

Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers

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Soon after its discovery by Europeans more than 500 years ago, the “New World” of America began to be regarded by both its own populace and those around the world as a sanctuary for victims of government oppression. This remains America’s favorite image of itself. Yet, despite this favored image, the reality is that, as you read this Article, hundreds of people who fled their home countries to seek protection from government-sanctioned oppression are languishing in Immigration and Naturalization Service (INS) administrative detention. Under current practices, the INS detains asylum seekers, including those who have been found by government officials to have a significant possibility of establishing eligibility for asylum,¹ in prison-like environments from the time they arrive at a U.S. airport or border crossing until final adjudication of their claims.

Recent events have sharply reduced the need for detention. Yet the INS fails to recognize that its detention practices have been overcome by recent events and maintains its broad detention practices. Retention of the status quo with respect to detention practices for asylum seekers is a real mistake that must be rectified. The consequences of the INS’s detention practices are severe, both to individual asylum seekers and to the asylum adjudication process as a whole.

This Article examines how, when, and why the INS detains asylum seekers pending adjudication of their claims. It is based in part on my observations made during visits to several facilities where asylum seekers are detained, and in numerous interviews with detained asylum seekers and with

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1. Asylum protection is granted to individuals who establish that they suffered past persecution or have a well-founded fear of future persecution because of a fundamental aspect of who they are, i.e., their race, nationality, or membership in a social group, or because of what they believe, i.e., their religion or political opinion.

high-ranking INS officials charged with implementing the INS's detention practices. Part I briefly summarizes relevant asylum law and describes the INS's recent attempts to implement a parole system for asylum seekers. Part II describes the conditions under which asylum seekers are detained and the toll that detention takes on them. Part III examines the adverse impact that detention has on the asylum adjudication process, as being in custody severely impedes asylum seekers' ability to present thoroughly their asylum claims. The rationales that the INS has professed in support of its detention policies—to deter undocumented immigration, to prevent absconding, and to protect the public safety—are discussed in Part IV.

Part V then argues that the force of two of these three rationales, namely, the deterrence and absconding rationales, has been substantially reduced as a result of recent changes to immigration law enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² Part VI examines why the INS has failed to appreciate the reduced weight of the deterrence and absconding rationales post-IIRIRA and concludes that the failure is attributable to a combination of bureaucratic realities that make the status quo preferable in the eyes of the INS.

Finally, the Article concludes with a legislative proposal, based on the federal criminal pre-trial detention laws, to create a parole system for asylum seekers who have been found by government officials to have a credible fear of persecution.

2. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

I. The Asylum Adjudication and Parole Processes

A. *The Asylum Adjudication Process*

The INS is authorized to deport, or remove,³ those persons who are in the United States without permission. A grant of asylum is a form of relief from removal by the INS. In order to establish a claim for asylum, the applicant has the burden of proving to an immigration law judge or INS asylum officer that she is unable or unwilling to return to her country of nationality⁴ because of a well-founded fear⁵ of persecution⁶ on account of one of five grounds: "race, religion, nationality, membership in a particular social group, or political opinion."⁷

Asylum claims are decided in two different procedural contexts. Affirmative application procedures apply when the asylum applicant, after entering the United States, applies for asylum prior to the initiation of removal proceedings.⁸ In contrast, defensive application procedures apply when the application for asylum is made only after the INS has apprehended

3. Recent amendments to the immigration laws changed several of the terms used in immigration. For example, the terms "deportation" and "exclusion" proceedings have been replaced by the term "removal." See Immigration and Nationality Act § 240 (1997), 8 U.S.C. § 1251 (1998).

4. If the applicant does not have a country of nationality, then she must prove an unwillingness to return to her country of last habitual residence. See Immigration and Nationality Act § 101(a)(42) (1997), 8 U.S.C. § 1101(a)(42) (1998).

5. A "well-founded fear" can be established by: first, showing that the applicant "has a fear of persecution in his or her home country of nationality;" second, showing that there is "a reasonable possibility of suffering such persecution" if the applicant were to return home; and third, proving that the applicant would be "unable or unwilling to return to or avail himself or herself of the protection in that country because of such fear." 8 C.F.R. § 208.13(b)(2). The well-founded fear requirement has been found to have two components: subjective and objective fear. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987). The objective component requires credible, specific, direct evidence supporting a reasonable fear that the applicant would face persecution in her home country. See *Huaman-Corneloi v. Board of Immigration Appeals*, 979 F.2d 995, 999 (4th Cir. 1992); *M.A. v. INS*, 899 F.2d 304, 311 (4th Cir. 1990) (en banc). The "subjective component may be satisfied by an applicant's credible testimony that he genuinely fears persecution." *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993); see also *Figeroa v. INS*, 886 F.2d 76, 79 (4th Cir. 1989).

6. Persecution is broadly defined as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Kovac v. INS*, 407 F.2d 102, 197 (9th Cir. 1969). The "harm or suffering must be inflicted [upon the victim] in order to punish him for possessing a belief or characteristic [that the] persecutor seeks to overcome." *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985). Persecution can include "torture, prolonged detention without charging, inhumane treatment, constant surveillance, pressure to become an informant, and enforced social or civil inactivity." See ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, BASIC LAW MANUAL: ASYLUM SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 23-24 (Nov. 1994).

7. Immigration and Nationality Act § 101(a)(42) (1997), 8 U.S.C. § 1101(a)(42) (1998). Only very occasionally has Congress supplemented the broad statutory definition with a specific directive. For example, recently Congress has instructed that for purposes of seeking asylum and refugee protection, a person who has had a forced abortion or involuntary sterilization or is persecuted for refusing to undergo such procedures, will be deemed to have been persecuted on account of political opinion. *Id.* The use of this provision is limited to 1000 cases annually.

8. See Immigration and Nationality Act § 208(d)(5)(ii) (1997), 8 U.S.C. § 1158 (1998).

the applicant and begun proceedings to remove the individual from the United States.

Individuals who have entered into the United States and have not been apprehended by the INS, regardless of their immigration status, can affirmatively apply for asylum by submitting an application to the INS.⁹ If asylum is granted, the applicant is then authorized to apply for a work permit,¹⁰ and one year after receiving asylum, for permanent residency.¹¹ After the applicant is granted asylum, he or she can apply for asylum for a spouse and children.¹² If the asylum office does not grant asylum, the case is referred to the immigration court, where proceedings to remove the applicant from the United States, commonly referred to as "removal proceedings," begin immediately.

On the other hand, individuals who have been apprehended by the INS before affirmatively applying for asylum, including asylum seekers who arrive at the border without proper travel documents¹³, follow a different procedure. They are not entitled to an opportunity for an asylum officer to adjudicate their claim. Rather, they are usually put into removal proceedings before immigration judges where they can raise a claim for asylum as a defense.

INS detention policies generally apply to this later group of asylum applicants. Under current practices, people who are apprehended by the INS at an airport or border and are determined to be inadmissible comprise the largest group of detained asylum seekers.¹⁴ Generally, they are detained by the INS from the time they are apprehended until the conclusion of removal proceedings against them.¹⁵

9. The asylum application must be filed within one year of the individual's last arrival in the United States. Immigration and Nationality Act § 208(a) (1997), 8 U.S.C. § 1158(2)(b) (1998). Applications that are filed after the one-year deadline has elapsed will only be accepted for filing if the applicant can explain that changed or exceptional circumstances prevented her from filing earlier. For a discussion of the deadline, see Beth Lyon, *Fighting a Deadline on Fear: Asylum Practice Update as the One-Year Deadline Approaches*, 75 INTERPRETER RELEASES 285 (Mar. 2, 1998); Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997), reprinted in 2 BENDER'S IMMIGRATION BULLETIN 385 (1997) and as *Asylum Changes and Expedited Removal*, in UNDERSTANDING THE 1996 IMMIGRATION ACT (Federal Publications ed., 1997).

10. See Immigration and Nationality Act § 208(d)(2) (1997), 8 U.S.C. § 1158 (1998).

11. See Immigration and Nationality Act § 209 (1997), 8 U.S.C. § 1159 (1998).

12. See Immigration and Nationality Act § 208(b)(3) (1997), 8 U.S.C. § 1158 (1998).

13. Many of those who travel without documents likely hurriedly fled their countries in fear of further oppression and did not believe that they had enough time to secure a visa or other travel document. Others may have traveled under an alias because they were afraid that government officials were looking to persecute them. They may have feared that if they revealed their true identities, the government would catch them as they were leaving their home countries. See Michele Pistone, *New Asylum Laws: Undermining an American Ideal* in CATO Institute, Policy Analysis No. 299, 11 (1998), reprinted in 3 BENDER'S IMMIGRATION BULLETIN 496, 504 (1998).

14. Others, who enter the United States without inspection by the INS and are later apprehended, usually in worksite raids, may also be subject to INS detention.

15. Many juveniles who are seeking asylum protection in the United States are also in INS custody. See, e.g., HUMAN RIGHTS WATCH, *SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE* (1997). This Article does not address

Asylum seekers are temporarily permitted to remain in the United States if they indicate at the secondary interviews that they are afraid to return back to their home countries. They constitute a small fraction of arriving undocumented individuals—less than 200 individuals per month.¹⁶ These arriving asylum seekers are fortunate because they comprise the small minority of the group of arriving undocumented individuals who are not returned back to their home countries directly from the border. But their good fortune is not unadulterated. After the secondary interview, these “fortunate” few are sent to detention centers where they may remain in U.S. government custody for months until their asylum claims are adjudicated.¹⁷ Most will remain in custody even after a government official determines that they have a credible fear of being persecuted if they are returned back home.¹⁸

B. *The Parole Practices*

Beginning in the early 1990s, the INS attempted to implement an administrative program, known as the Asylum Pre-Screening Officer Program (APSO), to screen credible asylum seekers for parole from detention.¹⁹

The APSO program’s twin objectives were 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.”²⁰ As the INS Commissioner explained in a policy memorandum to INS officials describing the program when it was first initiated:

The [INS has] limited detention space. By adopting the Parole Project, the Service [would] be able to detain those persons most likely to abscond or to pose a threat to public safety rather than

the issue of minors in detention.

16. UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, FACT SHEET: UPDATE ON EXPEDITED REMOVALS (Mar. 24, 1998) [hereinafter MARCH 1998 FACT SHEET].

17. *The Immigrant Lockup*, N.Y. TIMES, Dec. 31, 1998, at A1; Ronald Smothers, *Immigrants in Federal Center Are Confined in Dormitories Over Hunger Strike*, N.Y. TIMES, Oct. 1, 1998, at A28 [hereinafter Smothers, *Immigrants in Federal Center*]; Patrick J. McDonnell, *Asylum-Seekers Held Long Periods Despite Clean Records*, L.A. TIMES, Sept. 9, 1998, at B1.

18. Immigration and Nationality Act § 235(b)(1)(B)(ii) (1997), 8 U.S.C. § 1225 (1998) provides that even if an asylum officer “determines at the time of the [credible fear] interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum.”

19. The APSO program was initiated by former INS Commissioner Gene McNary in 1992. He issued a memorandum addressed to INS district and regional counsel and directors and to officers in charge of detention facilities outlining the procedures and policy for parole of detained asylum seekers. Memorandum from Gene McNary, INS Commissioner, *Parole Project for Asylum Seekers at Ports of Entry and in INS Detention* (Apr. 20, 1992) [hereinafter 1992 APSO Memo].

20. See INS Memorandum from Offices of General Counsel, Programs and International Affairs, to Commissioner, *Subject: Asylum Pre-screening Evaluation 1* (June 13, 1996) [hereinafter 1996 APSO Evaluation] (on file with author); INS Memorandum from Office of General Counsel to Commissioner, *Subject: Asylum Pre-Screening, May 1993–Dec. 1993 1* (Feb. 10, 1994) [hereinafter 1994 APSO Evaluation] (on file with author).

base the detention decision solely or primarily on the availability of detention space.²¹

Under the APSO program, asylum pre-screening officers²² were charged with interviewing asylum seekers to determine whether release was warranted. Factors considered important to this determination included whether the applicant's asylum claim was credible and her identity established,²³ whether she had community ties,²⁴ and whether any statutory bars would preclude an ultimate grant of asylum protection.²⁵ APSO interviews were scheduled upon the "written request for parole or for a pre-screening interview from the applicant's attorney."²⁶ After the interview, the parole criteria findings, together with a recommendation on whether or not to parole the individual,²⁷ were sent to local district offices, where release decisions would be made.

Parole orders under APSO could be conditional: parolees could be required to present themselves to the INS when required, to notify the INS of any address changes, and to continue with their removal proceedings.²⁸ Furthermore, if the district director determined that the applicant satisfied some but not all of the parole criteria mentioned above, or "where other fac-

21. 1992 APSO Memo, *supra* note 19, at 1.

22. The program initially envisioned that the asylum pre-screening officers would come from the asylum officer and inspectors officer corps and would be specially trained in asylum law and interviewing skills. However, until recently, APSO interviews were actually conducted by INS trial attorneys. The trial attorneys conducted APSO interviews in addition to carrying full caseloads and were reluctant to commit the time that would have been necessary for the program to operate effectively. When effective, the success was often "the direct result of the personal efforts and initiatives of APSOs themselves." 1996 APSO Evaluation, *supra* note 20, at 6.

23. Identity had to be established "with a reasonable degree of certainty." 1992 APSO Memo, *supra* note 19, at 2. The basis for requiring that one's identity be established appears to be that it is difficult for an "accurately identified individual to abscond." *Id.* Identity can be established by the applicant's documentation. Presumably, one who has some documentation, such as a passport or visa, would have gone through a screening process before obtaining the documents, during which the applicant's identity and history would have been established. *See Bertrand v. Sava*, 684 F.2d 204, 214 (2d Cir. 1982). District directors have denied parole when the asylum seeker does not possess any identity documents.

24. This criteria could also be satisfied if the applicant had a legal representative. 1992 APSO Memo, *supra* note 19, at 2.

25. *See Immigration and Nationality Act* § 208(a)(2) (1997), 8 U.S.C. § 1158 (1998).

26. 1996 APSO Evaluation, *supra* note 20, at 7. Consequently, "unrepresented applicants often were not interviewed" for parole. *Id.* Identifying this as a flaw in the program, an internal INS review noted that some "districts [had] not conducted interviews unless the applicant [had] obtained legal representation and made a request for an interview. For applicants who speak little or no English, arrive alone, or have no ties to the community, this . . . often [meant] poor access to the program." *Id.* at 10. To address this flaw, the program was later amended to apply to all detained asylum seekers, whether or not they were represented by counsel, but the amendment appears not to have been systematically implemented.

27. As initially envisioned, the APSO interviewers were charged with "recommend[ing] to the district directors that the person be paroled." 1992 APSO Memo, *supra* note 19, at 3. This practice has changed. Now, asylum officers do not make recommendations about parole, but only collect the relevant information. INS Memorandum from Office of Field Operations to Regional Directors, District Directors and Asylum Office Directors, *Subject: Expedited Removal: Additional Policy Guidance 3* (Dec. 30, 1997) [hereinafter Dec. 1997 Policy Guidance].

28. *See* 1992 APSO Memo, *supra* note 19, at 3.

tors suggest a strong risk that the person [would] . . . not appear as required," the person could be required to post a bond.²⁹

The efforts to establish through APSO a nationwide release program and the concomitant attempts to systemize the program through policy and procedure directives from INS headquarters have fallen far short of expectations. A 1996 internal evaluation of the APSO program found that it operated "inefficient[ly], inconsistent[ly] from district to district"³⁰ and "unevenly around the country."³¹ In most cases, APSO interviews were not conducted absent a request by the detainee's attorney.³² While the parole function has recently been folded into new procedures to identify asylum seekers from among the larger group of arriving undocumented individuals,³³ the INS's record of inconsistent parole decision-making persists.³⁴ Parole decisions fluctuate within the same jurisdictions over time, and local districts often do not follow policy directives from headquarters.³⁵ As a result, in some districts, virtually all defensive asylum applicants are detained from the day they enter the United States until their asylum claims are finally adjudicated, a period that can span ninety days or more.³⁶

29. *Id.*

30. 1996 APSO Evaluation, *supra* note 20, at 2.

31. *Id.*

32. *Id.* at 7-8.

33. Asylum officers who conduct credible fear interviews are also charged with collecting data for assessing the parole criteria during the interviews. See Immigr. and Naturalization Service, Record of Determination/Credible Fear Work Sheet, INS Form I-870 (Apr. 1, 1997).

34. See Mirta Ojito, *Inconsistency at I.N.S. Complicates Refugees' Asylum Quest*, N.Y. TIMES, June 22, 1998, at B1 [hereinafter Ojito, *Inconsistency at INS*]; Anthony Lewis, *The Road to Asylum*, N.Y. TIMES, Dec. 8, 1997, at A25.

35. Authority to parole asylum seekers who have been determined to have credible claims from detention derives from sections 212 and 235 of the Immigration and Nationality Act (INA) and the regulations implementing those sections. Section 235(b)(2)(A) of the INA states that an applicant for admission who "is not clearly and beyond a doubt entitled to be admitted shall be detained for a [removal] proceeding under section 240." Immigration and Nationality Act § 235(b)(2)(A) (1997), 8 U.S.C. § 1225 (1998). The regulation implementing section 235(b)(2)(A) provides that: "[A]ny arriving alien, who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act, shall be detained . . . Parole of such alien shall only be considered in accordance with section 212(d)(5)(A)." 8 C.F.R. § 235.3(c) (1999).

Section 212(d)(5) provides, in pertinent part, that parole may be authorized "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Immigration and Nationality Act § 212(d)(5) (1997), 8 U.S.C. § 1182 (1998). The terms "urgent humanitarian reasons" and "significant public benefit" have been interpreted by regulation to include (1) people with serious medical conditions, (2) pregnant women, (3) certain juveniles, (4) witnesses in judicial, administrative, or legislative proceedings, and (5) people whose "continued detention is not in the public interest as determined by the district director . . ." provided that the person presents "neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(a) (1999).

Sections 235 and 212 of the INA have for years been read together in interpreting INS parole authority for applicants for admission. For an analysis of amendments to these provisions by IIRIRA, see Margaret Taylor, *Detention and Related Issues*, in UNDERSTANDING THE 1996 IMMIGRATION ACT 5-1, 5-2 (Federal Publications ed., 1997).

36. *The Immigrant Lockup*, *supra* note 17, at A18 (noting that asylum seekers found to be credible "are then often detained for months or even years as they wait for their asylum hearings"); McDonnell, *supra* note 17, at B1 (quoting INS spokesman as saying that the "INS only grants a temporary release to about 10% of asylum applicants").

II. COSTS OF DETAINING ASYLUM SEEKERS

The costs and burdens of detaining asylum seekers pending adjudication of their claims are high. There are monetary costs for each day an asylum seeker is detained. Scarce legal resources are spent on such matters as traveling to distant detention facilities. Further, detention imposes psychological and medical costs on asylum seekers and adversely impacts the physical and psychological well-being of detainees. Social relationships with friends and family are strained as those outside of detention expend tremendous amounts of time and resources trying to help the detainees both emotionally and legally. These costs and burdens make detention a harsh reality.

A. Conditions of Detention

The INS uses three types of facilities to detain asylum seekers: government-owned Service Processing Centers (SPC), which are operated by the detention and deportation branch of the INS; privately operated "contract facilities"; and state, local, and county jails, in which the INS rents bed space as needed.³⁷ Many of these facilities also house convicted criminals, who, in the case of local jails, are serving criminal sentences, or, in the case of SPC and contract facilities, have completed their sentences and are awaiting deportation.³⁸

While the different facilities vary in size, shape, and population, the physical facilities in which asylum seekers are housed are all emphatically prisons; they have multiple layers of locked doors (which open only after the door behind it is closed), surveillance systems that closely monitor and regulate movement throughout the facility, "lock-downs" to count inmates regularly, use solitary confinement to punish detainees, and are surrounded by walls and/or barbed-wire fences.

Where asylum seekers are detained in centers that also house criminal inmates, the asylum seekers are typically not treated differently from the general prison population.³⁹ Guards receive no special training about asylum seekers.⁴⁰ Indeed, prison staff in many detention centers do not know which

37. In 1996, "[a]pproximately 46 percent of the detention space used by the [INS was] with state and local facilities." 62 Fed. Reg. 10,312, 10,323 (1996). In 1998, up to 60% of INS detention beds were in these non-federal facilities. William Branigin, *'Criminal Aliens' Jam INS Detention Centers*, WASH. POST, Nov. 2, 1998, at A17.

38. For example, the Women's Commission on Refugee Women and Children reports that women asylum seekers share living space and sometimes cells with criminal inmates in at least the following detention facilities: York County Prison, Berks County Prison, Wicomico County Detention Center, Dorchester County Prison, and Metropolitan Detention Center. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, LIBERTY DENIED: WOMEN SEEKING ASYLUM IMPRISONED IN THE UNITED STATES 14 (1997) [hereinafter LIBERTY DENIED].

39. HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES (Sept. 1998) [hereinafter LOCKED AWAY]. See also Mirta Ojito, *Report Says Immigrants Are Jailed With Convicts*, N.Y. TIMES, Sept. 10, 1998, at A20 [hereinafter Ojito, *Report*].

40. Detention facility guards have been trained to work in prisons and to deal with criminal detain-

of the inmates under their guard are criminals and which are asylum seekers.⁴¹ With no way of distinguishing between the two subgroups of inmates, members of the two groups are often treated the same way—as criminals. They are subject to frequent strip searches, pat downs, and prolonged isolation in solitary confinement as punishment for minor infractions.

Other conditions under which asylum seekers live are also similar to conditions faced by criminal inmates.⁴² For example, detained asylum seekers are forbidden from wearing their personal clothing, and are required to wear the facility's prison-like uniforms. Likewise, they are forbidden from keeping their personal property with them in the facility.⁴³ Detention facility officials also strictly monitor and regulate inmates' access to visitors.⁴⁴ Asylum seekers also are not permitted to move around freely within the detention centers. They spend most of the day in their cells, which, depending upon the detention facility, are either small cells with as little as two in-

ees. They wear uniforms and carry weapons, and their training is in punishment and rehabilitation.

41. See, e.g., *LIBERTY DENIED*, *supra* note 38, at 15; *LOCKED AWAY*, *supra* note 39, at 39–46; *Ojito Report*, *supra* note 39. It is official policy not to disclose to INS or prison employees whether an individual has claimed asylum protection. Interview with Rubin Cortina, INS Director of Detention Operations, and Bill Buddenberg, INS Detention and Deportation Officer, in Washington, D.C. (July 23, 1998) (on file with author).

42. Noting the pervasiveness of abusive conditions of confinement, in October, 1998, a federal court authorized asylum seekers to sue the federal government for damages under the Alien Tort Claims Act. *Hawa Abdi Jama v. INS*, Civ. No. 97-3093, U.S. Dist. LEXIS 15454 (D.N.J. Oct. 1, 1998). For general reports on conditions of confinement see, for example, *LOCKED AWAY*, *supra* note 39; *LIBERTY DENIED*, *supra* note 38; Florida Immigrant Advocacy Center, *Krome's Invisible Prisoners: Cycles of Abuse and Neglect* (1996); and the American Civil Liberties Union, *Conditions at Varick Street Immigration Detention Center* (1993). See also Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 *HASTINGS CONST. L.Q.* 1087 (1995).

43. Asylum seekers have complained that their personal property has been lost by the INS or has not been transferred along with the detainee to another detention facility. All of the personal property of one of my clients was lost by the INS and never replaced.

44. Most, if not all, detention facilities regulate who can visit detainees, how long the visits can last, and how often the same individual can visit an individual detainee. For example, visits with family members and friends at Wicomico County Detention Center, located in a rural area close to the Maryland shore, 100 miles from Washington, D.C., and 75 miles from Baltimore, are limited to two 20-minute visits per week. *LIBERTY DENIED*, *supra* note 38, at 32–33. For some visitors, the time limits imposed on visits may not justify traveling the typically long distance to the detention center. See, e.g., Pamela Constable, *Video-Conferencing Violates Due Process Rights*, *WASH. POST*, Dec. 21, 1997, at B1 (noting that one detainee's wife was able to make the long trip to visit him only one time in eight months). Such visitation restrictions apply equally to family members of different genders who are detained in the same facility. *Health Services and Health-Related Living Conditions in an INS Detention Center: A Report from the Rio Grande Valley* (Health and Human Rights Student Group, Harvard School of Public Health, Cambridge, Mass.), June 1997, at 13 [hereinafter *Health and Human Rights Student Group*].

While visitation by friends and relatives is strictly regulated by detention centers, international treaties between the United States and several countries require that the consular or diplomatic offices of foreign nationals be notified when a national is detained by the INS. See 8 C.F.R. § 236.1(e) (1997). Such notification is mandated whether or not the detainee requests it. *Id.* This is particularly problematic for asylum applicants in detention who are typically fleeing oppression by their governments. Although the INS is required not to reveal that an asylum application has been filed, the mere fact alone that someone is in the United States may indicate that the person has fled his country and is likely here to seek protection. See Celia Dugger, *Doubts Cast on Identity of Nigerian Who Says He's a Political Refugee*, *N.Y. TIMES*, May 24, 1997, at 24.

mates or larger "pods" in which more than 100 detainees may live.⁴⁵ Reports of overcrowding persist.⁴⁶ Some complain that they are denied such things as soap, sanitary napkins, and toilet paper.⁴⁷ Detained asylum seekers' access to the outdoors is also regulated.⁴⁸ Recreational opportunities are generally limited to such things as communicating with fellow detainees, watching television, and playing board games and cards.⁴⁹ English as a Second Language classes are taught at some detention centers by outside volunteer organizations, but attendance is limited and not all who want to are able to attend.⁵⁰

This last fact is particularly problematic, as an inability to speak English can substantially contribute to the oppressiveness of asylum seekers' detention experiences. SPC and contract detention facilities are required to pro-

45. Some pods have television and public telephones within them, others do not; typically, there is minimal access to natural light. Asylum seekers in these facilities reported to the Women's Commission that "they generally spent their entire days lying in bed or watching English-language television, which many did not understand. Boredom and listlessness were universally reported." *LIBERTY DENIED*, *supra* note 38, at 28.

46. See, e.g., MICHAEL BROMWICH, INSPECTOR GEN., OFF. INSPECTOR GEN., ALLEGED DECEPTION OF CONGRESS: THE CONGRESSIONAL TASK FORCE ON IMMIGRATION REFORM'S FACT-FINDING VISIT TO THE MIAMI DISTRICT OF INS IN JUNE 1995 (1996) (reporting that a building at the Krome SPC, outside of Miami, Florida, was built to house 105 detainees, but its occupancy rate at times exceeded 200); Eric Schmitt, *Justice Department Report Details Ruse by Immigration Aides*, N.Y. TIMES, June 29, 1996, at A1 (explaining that a detention center designed to hold 226 immigrants was used to detain 407 individuals; "more than 50 women had to sleep on cots in the lobby of the center's medical clinic").

47. Many of the detainees in the Elizabeth, New Jersey detention center, which was formerly run by the Esmor Correctional Service Corporation, cited among the reasons for staging a riot, which resulted in the temporary closing of the facility and an internal investigation of the conditions at the facility, the fact that they had been detained in inhumane conditions for prolonged periods of time. The Esmor Interim Report documented that prison guards refused to issue sanitary napkins to women detainees. IMMIGR. AND NATURALIZATION SERVICE, THE ELIZABETH, NEW JERSEY CONTRACT DETENTION FACILITY OPERATED BY ESMOR INC.: INTERIM REPORT 6 (July 20, 1995) [hereinafter ESMOR INTERIM REPORT].

48. *LIBERTY DENIED*, *supra* note 38, at 28. While the rules concerning outdoor access vary among the detention facilities used by the INS, such access is typically restricted to once or twice a week for an hour at a time. At Kern County Lerdo Detention Center in Pennsylvania, the Chinese women detainees were only allowed to go outside for one hour a week until their lawyers intervened. After that, one woman reported being permitted to go outside three or four times a week, but generally during non-daylight hours. In the Elizabeth Detention Center in New Jersey, the "outdoor recreation space" is actually a courtyard surrounded by walls, with no grass, trees, or other vegetation. Interview by Michele Pistone & Pat Rengel, Legislative Counsel, Amnesty International, USA, with Amir Ali, asylum seeker from Pakistan, at Elizabeth Detention Center (July 21, 1997) (on file with author). Likewise, in the Kern County Detention Center, the outdoor recreation area is entirely paved, surrounded by cement walls that are too high to see over, topped by a fence, and covered by a roof "through which sunlight barely filters." *LIBERTY DENIED*, *supra* note 38, at 28. At the Virginia Beach Correctional Center detainees are "allowed one hour of exercise every two weeks." See Constable, *supra* note 44, at B1. After asylum seekers recreate outside they are patted down or strip searched by prison guards. One detainee reported to the Women's Commission that the searches intimidated her so much that she went out only once in the two years she was detained at the facility in Bakersfield, California. *LIBERTY DENIED*, *supra* note 38, at 28.

49. The INS appears to resist efforts to establish activities for the detainees. For example, on its own initiative, the operator of the contract facility in Elizabeth, New Jersey submitted a proposal to the INS to provide training sessions on working in eating establishments to detainees. Interview by Michele Pistone & Pat Rengel with Mary McClenahan, staff attorney, Catholic Legal Immigration Network, Inc., in Newark, New Jersey (July 22, 1997) (on file with author). The proposed training program would have taken place in the facility's kitchen. Detainees would have learned through assisting and observing the facilities' kitchen help and classes would have been free of charge. The INS rejected the proposal. *Id.*

50. *LIBERTY DENIED*, *supra* note 38, at 29-30.

vide each detainee with a copy of a "detainee handbook," which sets out the rules and practices of the detention center. Detained asylum seekers are expected to read the handbook and to abide by the rules it describes, but it is not translated into foreign languages.⁵¹ Thus, although asylum seekers may be unable to read and understand the handbook, they are nonetheless expected to live by the rules set out in it and are disciplined if they disobey them or fail to follow facility procedures.⁵²

B. Costs of Detention

1. Costs on Asylum Seekers' Psychological and Physical Health

The psychological and physical costs of detaining asylum seekers under prison-like conditions, measured in terms of the deterioration in detainees' physical and mental health, can be severe. For various reasons, when asylum seekers arrive at a detention facility, their physical and mental health may be weak. Many have recently been persecuted or tortured and may be suffering from severe physical injuries or mental ailments⁵³ that are directly attributable to their persecution. "Most refugees have been exposed to high levels of violence and other types of traumatic events in their country of origin and during their journey to their host country."⁵⁴ As a consequence, asylum seekers and torture victims often suffer from post-traumatic stress disorder (PTSD) as a result of the trauma suffered.⁵⁵ They may experience severe

51. Interview with Rubin Cortina, INS Director of Detention Operations and Bill Buddenberg, INS Detention and Deportation Officer, in Washington, D.C. (July 23, 1998) (on file with author).

52. Lack of adequate interpretation of these materials also inhibits the ability of detainees to access the limited facilities available to them, exacerbates detainees' feelings of fear, confusion, and feelings of helplessness, and inhibits detainees' ability to voice complaints.

53. "Many forms of torture, such as near suffocation by immersion in a pail of urine and feces, electric shocks, sleep deprivation or sexual assaults, may leave no physical scars. The psychological scars, however, are very real and can last indefinitely." Allen S. Keller, M.D., *Congress Should Drop Summary Exclusion From Immigration Bill*, SALT LAKE TRIB., June 16, 1996, at AA6.

54. Catherine J. Locke, Ph.D. et al., *The Psychological and Medical Sequelae of War in Central American Refugee Mothers and Children*, 150 ARCHIVE PEDIATRICS & ADOLESCENT MED. 822, 823 (1996).

55. See, e.g., *id.* (reporting that studies of refugees "consistently have found a high incidence of symptoms of [PTSD] and other psychiatric conditions"); Richard C. Cervantes, Ph.D. et al., *Posttraumatic Stress in Immigrants from Central America and Mexico*, 40 HOSP. & COMMUNITY PSYCH. 615 (1989) (recognizing that "refugees have experienced varying kinds and degrees of psychological trauma due to prolonged exposure to violence and war"); Richard F. Mollica et al., *The Psychological Impact of War Trauma and Torture on Southeast Asian Refugees*, 144:12 AM.J. PSYCH. 1567, 1569 (Dec. 1987) (study showing that 50% of patient population had PTSD and 16 of those without PTSD exhibited other trauma-related symptoms).

For purposes of diagnosing PTSD, a traumatic event is one "that involves actual or threatened death or serious injury, or a threat to the physical integrity of self or others." AM. PSYCHIATRIC ASS'N, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994). PTSD can be caused by traumatic events that are either experienced directly or witnessed. Traumatic events include events such as being subject to violent personal attacks, kidnapping, torture, or incarceration as a prisoner of war or in a concentration camp. *Id.* Witnessed events include such things as "observing the serious injury or unnatural death of another due to violent attack" or "unexpectedly witnessing a dead body or body parts." *Id.* These and similar traumatic events are commonly described by asylum seekers when discussing their

memory loss, depression, unresponsiveness, mistrust, flashbacks and related physiological symptoms that arise when recalling the traumatic events of their persecution.⁵⁶ Compounding these ailments is a general feeling of isolation and helplessness; most asylum seekers have been forced to flee their homes, jobs, friends, family and social networks to a country whose language they do not speak and whose customs they do not understand. Few have ever traveled outside their home countries.

Asylum seekers' delicate physical and mental health often deteriorates even further while they are detained. The deterioration in physical health can be attributed in part to the stress of being detained and in part to the inadequate medical health facilities at detention centers. Moreover, there is an increased risk of infectious disease when people live together in close quarters. As the Director of the Public Health Service at the Krome SPC explained, "overcrowding poses a health problem due to the lack of cleanliness and appropriate air circulation."⁵⁷ She explained that the health service in the Krome detention facility "noticed an increase in respiratory and skin conditions."⁵⁸ These conditions, if not urgently addressed, could result in epidemics. Illnesses such as tuberculosis and chicken pox tend to spread rapidly among detainees, particularly when new arrivals are commingled with the general population before they are medically tested.⁵⁹ Further, the food served in detention centers is often unfamiliar to recent immigrants and their bodies are not accustomed to the diet. As a result, detained asylum seekers often complain of "chronic stomach problems, such as nausea, heartburn, and diarrhea."⁶⁰ In addition, restriction in a confined prison environment may cause sensory deprivation, which can lead to dizziness and blurred vision.⁶¹ And even those correctly diagnosed with illnesses often face difficulty complying with their doctor's orders because of institutional inflexibility.⁶²

The mental health illnesses of victims of torture can also be exacerbated in detention because the conditions of their detention may reactivate the trauma they suffered.⁶³ Studies have shown a "significant association be-

persecution. Doctors who study PTSD in refugees report direct observation by their patients of such events as "having family members beaten or taken away, and seeing dead bodies on the streets." See, e.g., Locke, *supra* note 54, at 824 (describing reports of observation of traumatic events by children refugees).

56. AM. PSYCHIATRIC ASS'N, *supra* note 55, at 424-25.

57. Bromwich, *supra* note 46, at 32 (quoting PHS Director Dr. Ada Rivera).

58. *Id.*

59. See Health and Human Rights Student Group, *supra* note 44, at 19.

60. LIBERTY DENIED, *supra* note 38, at 20.

61. *Id.*

62. For example, detainees who are put on low-salt or low-cholesterol diets report that they are not served foods that comply with their dietary restrictions. Health and Human Rights Student Group, *supra* note 44, at 26; Interview by Michele Pistone & Miraan Sa, Researcher, Amnesty International, USA, with Iranian detainee, in El Centro, Cal. (Feb. 9, 1998) (on file with author).

63. See Rachel Yehuda, Ph.D. et al., *Impact of Cumulative Lifetime Trauma and Recent Stress on Current Posttraumatic Stress Disorder Symptoms in Holocaust Survivors*, 152 AM.J. PSYCHIATRY 1815 (1995); J. David Kinzie et al., *Posttraumatic Stress Disorder Among Survivors of Cambodian Concentration Camps*, 141 AM.J.

tween recent and cumulative lifetime stress.”⁶⁴ This relationship may be reflected in “heightened vulnerability of traumatized individuals to subsequent stressors, as a result of an increased sensitivity to stress from past [trauma] or depleted coping capability.”⁶⁵ Indeed, the “supplemental impact of events,” such as prolonged imprisonment, can explain the “onset, persistence, and severity of PTSD.”⁶⁶

In other cases, detainees’ mental health deteriorates because they are unable to make sense of their situation. They do not understand the connection between their actions—fleeing persecution or torture to the United States without proper travel documents—and their situation, i.e., being detained in a prison.⁶⁷ Many view prison as a place to detain people who have been convicted of a wrong to society. They view the United States as a nation that values democratic principles and is founded on the notion that fundamental human rights should be available to all people. Yet, they find themselves in jail and cannot understand why, particularly if they do not speak English. An unfortunate circle of mistrust can easily ensue, as the detainee’s feelings of confusion may exacerbate certain other symptoms of PTSD, such as distrust of authority figures.⁶⁸

In addition to the adverse physical and mental impact of detainees’ inability to rationalize their situation, detention facilities generally have only limited medical personnel on staff to treat health problems.⁶⁹ These medical personnel visit the facilities for limited periods during the week, and are not constantly on call.⁷⁰ Their time at the facility typically is apportioned primarily to conducting physical examinations of all new arrivals to the facility; treatment for emergency conditions is a second priority.⁷¹ As a result, de-

PSYCHIATRY 645 (1984).

64. Yehuda, *supra* note 63, at 1817; Kinzie, *supra* note 63, at 649. The subsequent stressors can be as minimal as “a delayed payment or expectations of future loss or financial support or even a request for minimal job performance.” *Id.* at 649.

65. Yehuda, *supra* note 63, at 1817.

66. *Id.*

67. Andrew Stolbunov, a Russian asylum seeker, wrote that the INS “put an innocent guy [in detention] without bond. That really got me down. I had to be on anti-depressants, which got me through the loneliness.” *Russian Student, Fleeing Imprisonment for his Beliefs in Russia, Locked Up in the U.S. for 11 Months*, DETENTION WATCH NETWORK NEWS (Lutheran Immigration and Refugee Service), June 1998, at 3, 4. Another detainee wrote in frustration and disbelief: “The INS told me being incarcerated does not mean that I am a criminal? Is that true?” He went on to say “I want to know precisely why I am incarcerated.” Letter from Dr. Ali Yassin Mohamed Karim, a detainee at San Pedro Detention Facility to Amnesty International (Feb. 5, 1998) (on file with author).

68. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 55, at 427–29.

69. The health facilities at SPCs are operated by the Immigration Health Service (IHS) through an interagency agreement between the INS and the Department of Health and Human Services. IHS is “part of the Bureau of Primary Care in the Health Resources and Services Administration,” which is within the U.S. Public Health Service. See Health and Human Rights Student Group, *supra* note 44, at 14.

70. For example, at some facilities no medical personnel are available at night or on weekends. See *id.* at 17. The Esmor Interim Report notes that a physician visited the facility with 300 detainees only 12 hours per week. ESMOR INTERIM REPORT, *supra* note 47, at 22.

71. For example, the goal of the health service providers at the Port Isabel SPC, a detention facility in Los Fresnos, Texas, “is not to provide complete restorative care to individuals, but instead to respond to

tainees often have to wait weeks after requesting medical attention to see a medical doctor. Treatment for mental health disorders in detention facilities is similarly sparse.⁷² Most INS detention facilities do not have mental health professionals on staff.⁷³ Yet, the long-term effects of PTSD remain “unless they are specifically addressed in treatment.”⁷⁴

Language barriers in detention further impede detainees’ access to medical and psychological assistance.⁷⁵ While medical staff may look for signs of depression during initial physical exams, as one psychologist has noted, “it is hard to know what is going on if someone doesn’t speak English.”⁷⁶ Detainees express similar complaints. A pregnant woman, who was detained in the Wicomico County Detention Center, explained that she did not understand much English when she first arrived at the facility.⁷⁷ Thus, when she was asked by an officer during intake whether she was suicidal she answered “yes,” thinking that she was telling the officer that she was “sad.” She was placed on suicide watch in a solitary confinement cell, with no bedding or clothing except for a paper gown. Over the next few days, she struggled to explain that she was not suicidal, but was unsuccessful without an interpreter. She was finally released from solitary confinement when a doctor consented to her transfer to a regular cell; she had been in solitary confinement for five days.⁷⁸

Language barriers also inhibit asylum seekers’ understanding of their medical diagnosis and treatment alternatives. For example, one detainee who suffered a miscarriage explained that she did not understand the interpreter who interpreted during her surgery and thus “expressed confusion about why she had needed an ‘abortion.’”⁷⁹

Detained asylum seekers’ handicap in communicating with their doctors, coupled with slow responses to requests for medical attention, often leads to mismanagement and misdiagnosis of health problems by the INS and prison authorities. One of the most flagrant cases involved a Sri Lankan man who

more acute needs that are presented and to focus on disease prevention and surveillance.” Health and Human Rights Student Group, *supra* note 44, at 15.

72. At some detention facilities, outside referrals are made when a detainee is suicidal or indicates a need for acute mental health counseling. Health and Human Rights Student Group, *id.* at 18. Otherwise, mental health counseling may be provided by religious organizations or social service employees. For example, a social service worker provides counseling on a weekly basis at the Port Isabel SPC, “however, it is unlikely that one individual can provide adequate counseling for [that facilities’] 731 detainees.” *Id.* Indeed, detainees in Port Isabel reported “that [counseling] had not been available in weeks.” *Id.*

73. Interview with Rubin Cortina, INS Director of Deportation Operations, & Bill Buddenberg, INS Detention and Deportation Officer, Washington, D.C. (July 23, 1998) (on file with author).

74. Andrea Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Based Persecution*, 11 GEO. IMMIGR. L.J. 167, 187 (1996).

75. Detainees who do not speak English often have to rely on fellow detainees or guards to learn about health care opportunities.

76. LIBERTY DENIED, *supra* note 38, at 22–23.

77. *Id.* at 18.

78. *Id.* Similar reports come from other detention facilities. See, e.g., Health and Human Rights Student Group, *supra* note 44, at 26 (describing conditions at the Port Isabel SPC in Texas).

79. LIBERTY DENIED, *supra* note 38, at 22.

had complained of heart problems.⁸⁰ His attorney had notified the INS that his client suffered from heart problems, and had requested that the client be released from detention to pursue proper medical treatment. The request was denied. The client subsequently died of a heart attack while in detention.⁸¹

Other egregious incidents also have been noted. For example, Yvenie Emmanuel, a Haitian woman who was more than two months pregnant when she was first detained in the Wicomico County Detention Center, was locked for five days in solitary confinement without fundamental hygienic supplies such as clothes, sheets, soap or a toothbrush.⁸² She later complained to a nurse that her stomach looked flatter than it had when she arrived at the facility, but was denied a doctor's visit. Later that evening, Ms. Emmanuel started suffering from severe pain in her stomach. When she went to the restroom, she noticed that she was bleeding. Recognizing the urgency of her situation, prison guards transported her to a hospital, with shackles strapped to her hands and feet. She remained shackled throughout her surgery. She miscarried the baby.⁸³

2. Adverse Impact of Detention on Ability to Secure Counsel

Unlike American citizens facing criminal charges, asylum seekers do not have a statutory right to counsel. Their ability to be represented by counsel is a "privilege," not a right.⁸⁴ While the privilege to consult with an attorney is theoretically available to asylum seekers in detention, for a number of reasons, detention often inhibits or encumbers detainees' ability to contact and retain counsel. As a result, many detained asylum seekers are forced to represent themselves pro se.

While in detention, asylum seekers are isolated from the outside world, where resources may be available to assist them and where it would be more likely that they would learn about and be able to take advantage of those resources.⁸⁵ They often have little or no command of the English

80. Letter from Nicholas J. Rizza, National Refugee Coordinator, Amnesty International, to J. Scott Blackman, District Director & Theodore Nordmark, Assistant District Director, Immigration and Naturalization Service 7 (June 19, 1996) (on file with author).

81. *Id.* Another detainee reported being denied medical attention for several days after she realized that she was pregnant. After she finally saw a doctor, her prescription dietary supplements and vitamins were confiscated by the prison staff as contraband; they were never replaced. She was denied further medical attention and was detained until her eighth month of pregnancy. LIBERTY DENIED, *supra* note 38, at 20.

82. *Id.* at 21.

83. *Id.*

84. The Immigration and Nationality Act mandates that the Attorney General advise asylum applicants of "the privilege of being represented by counsel . . . and provide the [asylum seekers] a list of persons (updated quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis." Immigration and Nationality Act § 208(d)(4) (1997), 8 U.S.C. § 1158 (1998).

85. For a thorough discussion of challenges to providing legal representation to INS detainees, see Margaret Taylor, *Promoting Legal Representation of Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997). See also Philip S. Anderson, *Torture in the County Jail*, WASH. POST, Dec. 23, 1998, at A23.

language,⁸⁶ and have limited financial resources to make telephone calls from the detention facility.⁸⁷ They often have medical or psychological ailments that undermine their ability to take the steps necessary to obtain counsel. Limited access to the outside world, in turn, frustrates asylum seekers' ability to contact representatives, friends, or relatives who can assist them through the asylum adjudication process.⁸⁸

Compounding these barriers to asylum seekers' access to legal service providers, jails are often located in remote towns where the legal bar is small. Consequently, since the asylum seekers are detained, and not at liberty to travel to cities with more legal resources, the limited supply of legal representation means that the cost of representation will increase and that, for reasons of cost or unavailability of counsel, some detainees will remain unrepresented.⁸⁹ Given that asylum seekers typically have few financial resources and are less familiar with U.S. legal practices than others in these facilities, they are often the ones who remain unrepresented.⁹⁰

Those asylum seekers who are housed in detention facilities located close to metropolitan areas are more fortunate; there is a possibility that even if they are unable to contact legal representation on their own, they may nonetheless be identified by lawyers who are willing to represent them for little or no fee. A few nongovernmental organizations have staff attorneys and legal assistants dedicated to representing detained asylum seekers.⁹¹ These

86. Some asylum seekers are also impeded from using the telephone to contact a lawyer because they have limited to no familiarity with U.S. telephone technology. For example, one of my clients reported to me that he was unable to contact a lawyer from the list of free legal service providers that was given to him by the immigration court because he did not understand how to make a collect telephone call.

87. The telephone facilities in detention centers do not facilitate communication with potential counsel. Many of the telephones that detainees have access to do not permit the user to make collect calls. Yet collect calls are often the only real means of outside communication for asylum seekers because it is unlikely that they would have sufficient resources to pay for telephone calls, particularly if the asylum seeker ends up in a remote detention center far away from sources of legal services. In January 1998 the INS implemented internal standards, which apply to SPCs and contract facilities, to address these concerns. See *Immigr. and Naturalization Service, Detention Standard—Detainee Telephone Access* (Jan 28, 1998). Early reports indicate that telephone access remains problematic in many facilities. See U.S. Committee for Refugees, *Out of Reach? NGO Monitoring and Services for Detainees*, Refugee Reports, June 1998, at 9.

88. This type of communication with friends and relatives is often crucial for asylum seekers to overcome the stress associated with their flight from persecution and their prolonged detention in a foreign country with foreign norms and a foreign language.

89. The INS Service Processing Center in El Centro, California, houses up to 700 detainees at any one time, yet there are only four law firms and charitable organizations listed as providers of free legal services in the town of El Centro. If these four legal service providers were to represent every detainee who needed representation, each would have to represent 175 detainees at any one time, in addition to their non-detained case load.

90. For example, most of the detainees held in the INS Service Processing Center in El Centro, California, are criminal aliens who have lived for extended periods of time in the United States, have a network of family and friends in the United States, and are familiar with U.S. legal practices. They are much better equipped to hire the limited available legal service providers with offices in El Centro than are recently arrived asylum seekers.

91. However, while very welcome, the resources of these organizations are often quite limited. For example, the Catholic Legal Immigration Network has one lawyer assigned to representing detained asylum seekers in each of New Jersey, Los Angeles, and San Francisco.

organizations have developed presentations that can be given to a large number of detainees at once, in an effort to increase the economy and efficiency of providing legal counseling.⁹² During the presentations, a lawyer or legal assistant addresses the fundamentals of U.S. immigration law and procedures, including the asylum adjudication process and alternative relief that may be available to the detainees. These presentations are designed to provide asylum seekers with information about the process, and they may also include a discussion of non-asylum options, such as voluntary departure⁹³ and other means of removal, which would shorten time spent in detention.⁹⁴

Where such "know-your-rights" presentations are conducted, they have been successful. One such presentation, given by the Florence Immigration and Refugee Rights Project in Florence, Arizona, has been embraced by the INS as a model to be duplicated around the country.⁹⁵ However, the concept of rights presentations has not been so eagerly embraced at all detention facilities. In some jurisdictions, nongovernmental organizations that provide free legal assistance to detained asylum seekers report being denied access to the detained asylum seeker community.⁹⁶ Despite these and similar efforts to identify detained asylum seekers and connect them to lawyers, there is not enough pro bono representation to adequately represent all of the detained asylum seekers who warrant their assistance.

92. See Immigr. and Naturalization Service, Detention Standard—Group Legal Rights Presentations (Jan. 28, 1998).

93. See Immigration and Nationality Act § 240B (1997), 8 U.S.C. §1229(c) (1998). Those who are determined not to have a prima facie asylum claim may elect to depart from the United States voluntarily and not face the prospect of being ordered removed. This option is known as "voluntary departure." The new regulations establish two different time periods for voluntary departure depending upon whether it is granted before or after the conclusion of removal proceedings. If voluntary departure is granted prior to the completion of the removal proceeding, the individual must depart the United States within 120 days. If, on the other hand, voluntary departure is granted after completion of the removal proceeding, the individual must depart within 60 days. See 8 C.F.R. § 240.26(h) (1999).

94. If time permits after the presentations, the NGO may also meet with detainees who have decided to proceed with their claims for individual counseling. See Immigr. and Naturalization Service, Detention Standard—Group Legal Rights Presentations 7–8 (Jan. 28, 1998).

95. Learning from the Florence Project, CLINIC set up a similar project at the San Pedro SPC with funding from the Executive Office of Immigration Review. A CLINIC staff attorney makes daily legal rights presentations in English and Spanish. U.S. Committee for Refugees, *supra* note 87, at 4. Another regular presentation is run by a group of advocacy organizations that corroborate to provide legal education and representation to detainees in New York and New Jersey detention facilities. *Id.* at 3.

96. Where legal service providers are willing to provide free consultation services (most major cities have free legal service providers available for asylum seekers) the INS has often been unwilling to allow them into the detention center to meet with all the detainees. Rather, a consultant must know the name of the detainee with whom he wants to meet upon his arrival at the facility. The INS cites detainee confidentiality as its reason for refusing to provide the names of detained asylum seekers to potential free legal service providers. While asylum seeker confidentiality is certainly a real concern, such confidentiality can be waived by the asylum seekers in the interest of receiving legal advice. To appease its concerns, the INS could invite all recent arrivals to a rights presentation by a local NGO, thereby giving them the ability to choose whether or not to attend the presentation. Absent such a blanket invitation, the NGO is required to identify the asylum seekers with whom it would like to meet, which increases the likelihood that true asylum seekers are not identified for legal representation.

Those asylum seekers who are fortunate enough to contact legal representatives face additional hurdles in convincing the lawyers to represent them while they are detained. The opportunity cost of representing a detainee is significant. Consultation with detained asylum seekers is much more burdensome for lawyers than consultation with asylum seekers who are not in detention.⁹⁷ The most significant cost is of the lawyer's time. Because detention facilities are often located in rural or suburban areas that are far from cities where most pro bono legal services are located, lawyers need to spend considerable time simply traveling to and from the detention centers.⁹⁸ If the same lawyer spent that travel time in her office, she could consult with many more asylum applicants. This investment of time and resources in representing a detained asylum seeker is multiplied when the lawyer needs either the assistance of an interpreter to communicate with her client, or a medical expert, such as a medical doctor or psychologist, to corroborate the client's story through a medical or psychological examination.⁹⁹

Added to the investment of travel, once the lawyer arrives, there is no guarantee that a private interview room will be available in which to interview her client. Counsel often have to wait, sometimes for hours, to meet with their detained clients.¹⁰⁰ The possibility that meeting rooms will not be available must be factored into any commitment that lawyers who represent detained asylum seekers must make.

97. See U.S. Committee for Refugees, *supra* note 87, at 4 ("[r]epresenting one detainee is like taking two non-detained clients . . ."). For a general discussion of the range of hurdles lawyers face in representing clients in INS detention, see generally, Florida Immigrant Advocacy Center, *supra* note 42, at 18-27.

98. For example, the Bakersfield facility in California, where close to a quarter of the 200 INS detainees are asylum seekers, is a four and one half hour drive from San Francisco. See AMNESTY INT'L, HUMAN RIGHTS HAVE NO BORDERS, INFORMATION AND ACTION ON THE USE OF COUNTY JAILS AND OTHER PRISONS TO DETAIN ASYLUM SEEKERS 1 (June 1997) (on file with author). The El Centro, California, SPC, which houses as many as 700 detainees at any one time, including asylum seekers, is located in the desert just north of the Mexican border. It is a four-hour drive from Los Angeles and a two-and-one-half-hour drive from San Diego. Traveling to such remote locations is burdensome and costly not only for pro bono lawyers, who are typically employed by not-for-profit and religious organizations with limited resources, but for private lawyers who expect to be reimbursed for their expenses and paid for their travel time by their clients. Given the limited financial resources of many asylum seekers, these costs in many cases are prohibitive.

99. Physicians for Human Rights is an "organization of health professionals, scientists, and concerned citizens that uses the knowledge and skills of the medical and forensic sciences to investigate and prevent violations of international human rights and humanitarian law." PHYSICIANS FOR HUM. RTS., DEPENDING THE RIGHT TO ASYLUM: OPPOSITION TO THE 30-DAY LIMIT FOR ASYLUM SEEKERS IN THE UNITED STATES, STATEMENT OF PURPOSE attachment 1 (Jan. 1996). Its members are often able to corroborate a torture victim's explanation of the methods of torture used by his persecutors by testifying that the victim's scars are consistent with the type of torture they allege to have suffered. But it is not easy for a lawyer to find a medical expert who is willing to travel to a remote detention facility to conduct a medical examination.

100. For example, in the Elizabeth, New Jersey detention center, attorneys are typically forced to wait for over an hour before being allowed to meet with their clients. Interview with Mary McClenahan, attorney with Catholic Legal Immigration Network, Inc., in Newark, N.J. (July 22, 1997) (on file with author). In the Krome SPC outside of Miami, Florida, attorneys "regularly have to wait two hours" before meeting with a client. U.S. Committee for Refugees, *supra* note 87, at 9.

In addition, asylum seekers are sometimes transferred from one detention center to another.¹⁰¹ The transfers are often accomplished without any prior notice to the detainee, her friends or relatives, or even her legal representative. Attorneys often learn of the transfer only upon arriving at the detention center to meet with a client.¹⁰² Many of the detention facilities to which these detainees are transferred are in “desolate, remote areas, wholly lacking in counsel and/or . . . translators.”¹⁰³

III. THE ADVERSE IMPACT OF DETENTION ON THE ASYLUM ADJUDICATION PROCESS

Together, the above-mentioned costs of detention 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. Detention adversely impacts an asylum seeker’s ability to find and hire counsel, to prepare and present an asylum claim, and to provide credible and detailed testimony. 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. This state of affairs is particularly lamentable given that the stakes are so high. Indeed, only in cases involving capital offenses are the stakes so often as high, and there, tellingly, special rules have been established to ensure against inaccurate negative determinations.

A. Poor Mental Health Impedes Ability to Discuss Claim

A failure to adequately treat the physical and mental health-related problems related to imprisonment, torture, or persecution inhibits an asylum seekers’ ability to protect their best interests and seek out legal representation. Indeed, the side effects of PTSD can become so overwhelming for an

101. Transfers are motivated by space availability, as asylum seekers may be transferred to facilities that have available beds. Oftentimes, asylum seekers who have appeals pending before the Board of Immigration Appeals are transferred to more remote detention facilities, which typically are less expensive.

102. As a member of a mission on behalf of Amnesty International, USA, to the SPC in San Pedro, California, outside of Los Angeles, I requested to interview several clients who were being represented by a local lawyer. When Ms. Bonales, detention officer supervisor at the facility, called the lawyer to obtain the lawyer’s consent for the interviews, the lawyer learned for the first time that one of her clients had been transferred a number of days earlier to a county jail.

103. See, e.g., *Louis v. Meissner*, 530 F.Supp. 924, 926–27 (S.D. Fla. 1981). In *Louis*, the INS transferred Haitian detainees from Miami, Florida, a city with a substantial immigration bar, many Creole translators, and community support groups, to facilities in remote areas, such as Morgantown, West Virginia, a coal mining town with an approximate population of 30,000, and Big Springs, Texas, a “semi-desert city of approximately twenty-five thousand people, described as being about two hundred sixty miles west of Fort Worth, 350 miles east of El Paso, and ‘really not near anything.’” *Id.* Neither of these towns had substantial immigration bars, Creole translators or support groups. *Id.*

asylum seeker that they can prevent the individual from articulating the basis for his or her claim.¹⁰⁴ For example, female refugees who have been victims of rape and other forms of sexual violence are often unable to speak about their persecution; they often mistrust others, experience recurring nightmares, suffer from depression and experience feelings of extreme isolation.¹⁰⁵ These women typically have to undergo months of therapy before they are able even to explain their fears.¹⁰⁶ Others may become so depressed that their ability to present their asylum claims is severely impaired.¹⁰⁷

Refugees with PTSD reveal their "histories reluctantly and incompletely."¹⁰⁸ Common symptoms of PTSD include avoiding "thoughts, behaviors, and any activities that would remind them of the past."¹⁰⁹ On direct questioning, most do not elaborate "in any more detail or initially describe any personal reactions to the situation."¹¹⁰ Studies show that refugees with PTSD usually have to be "encouraged to give more detail of what they experienced" but can do so only after "trusting relationships" have been established.¹¹¹

B. Detention Impedes Ability to Satisfy Burdens of Proof and Persuasion

Asylum cases are difficult to prove. The INS grants asylum to only roughly twenty percent of affirmative asylum applicants,¹¹² and an even smaller percentage of litigated claims are granted by immigration courts.¹¹³ The low approval rates are attributable in part to the fact that most asylum seekers are unrepresented, and consequently may wrongfully be denied protection because they are unable to prepare their claim adequately. Indeed, the approval rates of represented asylum seekers far exceed those of unrepresented

104. Individuals who suffer from PTSD persistently avoid stimuli associated with their trauma: "[t]he person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event." AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 55, at 424-25; *see also* Physicians For Human Rights, *supra* note 99, at 3, attachment 10.

105. *See generally* Stark, *supra* note 74.

106. *See id.* at 186-87 ("Recovery can take weeks, months, or even years depending on the individual's ability to come to terms with the attack(s), the support systems available to the victim, and the therapy provided to the victim."); *See also* Physicians for Human Rights, *supra* note 99, at 3, attachment 10.

107. *See* Fenting v. Chasse, Docket No. 92-2371-CIV-DAVIS (S.D. Fla.) (ordering the parole of a female asylum seeker because her prolonged detention had caused her to become so despondent that she was unable to present her asylum claim in court).

108. *See* Kinzie, *supra* note 63, at 646.

109. *Id.* at 649.

110. *Id.* at 646.

111. *See, e.g., id.* at 649.

112. 1996 STAT. Y.B. IMMIGR. & NATURALIZATION SERVICE 87 (U.S. Dept. Just., 1997 ed.) [hereinafter 1996 STAT. Y.B.].

113. Less than 12% of the asylum cases adjudicated by immigration judges during the first three quarters of fiscal year 1998 were granted. PUB. AFF. OFF., EXECUTIVE OFF. OF IMMIG. REV., ASYLUM STATISTICS FOR PERIOD 10/1/97-6/1/98.

sented individuals.¹¹⁴ The low approval rates are also attributable, in part, to the fact that the burdens of proof and persuasion rest on the asylum seeker, who, particularly when detained, face substantial hurdles in meeting them.¹¹⁵ Given these impediments, we cannot be confident of the veracity of decision making in the cases of unrepresented asylum seekers.

Determinations as to whether or not an individual has met her burdens, and thus warrants asylum protection, are fact-intensive inquiries made on a case-by-case basis. These findings are made after a hearing in which the applicant may be represented by counsel (provided that it is at no expense to the Government); the evidence against her (other than national security information) is examined;¹¹⁶ the applicant may present evidence on her own behalf, and may cross-examine any witnesses presented against her.¹¹⁷ The hearings typically focus on an account of particular events that cause the applicant to fear returning to her home country, so that the adjudicator can determine whether the fear is well-founded, and an analysis of whether the persecution is on account of one of the five statutory grounds—race, religion, nationality, political opinion, or membership in a particular social group.

114. For example, at the Center for Applied Legal Studies, a live-client clinic at Georgetown University Law Center that represents asylum seekers in removal proceedings, the approval rate is approximately 80%. Similarly, the approval rate for asylum cases represented through the Lawyers Committee for Human Rights, which works with law firms in New York and Washington, D.C., to provide legal representation to asylum seekers, exceeds 80%.

115. See 8 C.F.R. § 208.13(a) (1998); *In re S-M-J*, Int. Dec. No. 3303, 4 (BIA 1997). “Real victims of persecution very often have little available to them in the way of supporting evidence, testimonial or documentary, to support their claims.” *Id.* at 20 (Rosenberg, L., concurring). This is particularly true of detainees. *Id.* at 20–21 (Rosenberg, L., concurring).

116. See Immigration and Nationality Act § 240(b)(4)(B) (1997), 8 U.S.C. § 1229(a) (1998). The INS can use secret evidence, which the applicant cannot obtain through any form of discovery, to deny immigration benefits such as asylum, permanent residence, naturalization or release from detention. See William Branigin, *Secret U.S. Evidence Entangles Immigrants*, WASH. POST, Oct. 19, 1997, at A3 (explaining how the INS used secret evidence to hold Mazen Najjar, a Palestinian national who has lived in the United States for more than 16 years, in detention for more than six months without bringing charges against him). Mohammed Jose Qaisar, an Iraqi, was detained by the INS for fifteen months before he was granted asylum by an immigration judge. He was among several Iraqis, many of whom were members of two CIA-backed resistance groups, who were “airlifted to the United States after a failed uprising against Saddam Hussein in 1996.” David Rosenzweig, *Iraqi Refugee Incarcerated by INS Wins Political Asylum*, L.A. TIMES, Jan. 30, 1998, at 4. He and about 20 other men were detained by the INS, which alleged that they “posed a danger to the security of the United States.” *Id.* He and the others were “accused of being double agents for Saddam Hussein by feuding members of the splintered Iraqi opposition movement.” But under the law that permits the use of secret evidence in immigration cases, he was not given the opportunity to confront or cross-examine his accusers. He was ultimately granted asylum, after having spent 15 months in detention. At least six of his Iraqi countrymen remain in detention. James Woolsey, *Iraqi Dissidents Railroaded—by U.S.*, WALL ST. J., June 10, 1998, at 18. See also Ronald Smothers, *Secret Data and Hidden Accusers Used Against Some Immigrants*, N.Y. TIMES, Aug. 15, 1998, at A1.

117. See Immigration and Nationality Act § 240(b)(4) (1997), 8 U.S.C. § 1229(a) (1998). A full record of the proceeding, including all testimony and evidence, must be kept. See *id.*

1. Detention Impedes Ability to Prepare Cases

Detention hinders asylum seekers' ability to present thorough asylum claims. Meetings between asylum seekers and their lawyers are less convenient and less private when the applicants are detained. Many detention centers do not have satisfactory facilities for attorney-client meetings; either the facility is not equipped with rooms in which attorneys and clients can talk face to face or the facility does not have a sufficient number of rooms to accommodate all lawyers during business hours.¹¹⁸ Due to the lack of such facilities, communication between attorney and client is limited and thus, it is difficult for lawyers to uncover fully facts that are "sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear."¹¹⁹

Moreover, being in detention frustrates asylum seekers' ability to work efficiently with their representatives. Detained asylum seekers are not able to locate witnesses, gather evidence, or otherwise assist their attorneys in case preparation.¹²⁰ Commentators have attributed similar costs to criminal pre-trial detention in the United States:

[The detained defendant] cannot help locate witnesses or evidence which may be more accessible to him than to an outsider. His contacts with counsel may be impeded by having to plan a [case] from cramped jail facilities within the limited hours set aside for visitors. The pretrial prison experience may adversely affect his demeanor and attitude in the courtroom or on the witness stand.¹²¹

These costs apply to an even greater extent to asylum seekers, who, unlike criminal defendants, do not have the benefit of court-appointed counsel and often represent themselves *pro se*.¹²²

In cases where personal background information is unavailable, the applicant's testimony is measured against background information about the

118. In my visits to detention facilities used by the INS to detain asylum seekers, I noticed that the space in which lawyers and their clients meet in some detention centers is separated by a piece of plexi-glass. Clear communication between attorney and client is inhibited by the plexi-glass, making it very difficult to accomplish the lawyer's goals.

119. *Matter of Mogharabi*, 19 I. & N. Dec. 439, 443 (BIA 1987).

120. *See Barker v. Wingo*, 407 U.S. 514, 533 (1972); *In re S-M-J*, Int. Dec. No. 3303, 21 (BIA 1997) (Rosenberg, L., concurring).

121. Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 *FORDHAM L. REV.* 423, 425 (1980) (quoting D. Freed & P. Wald, *Bail in the United States: 1964*, at 46 (footnotes omitted)) (working paper for National Bail Conference). *See also* Albert Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 *MICH. L. REV.* 510, 517-18 (1986); Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 *U. CIN. L. REV.* 153, 198 (1986); Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 *HARV. J.L. & PUB. POL'Y* 173, 176-77 (1986).

122. *See In re S-M-J*, Int. Dec. No. 3303, 20 (BIA 1997) (Rosenberg, L., concurring) (stating that individuals may have difficulty presenting corroborating evidence that satisfies the BIA's standards without expert and effective legal representation). *Cf. Castro-O'Ryan v. United States*, 847 F.2d 1307, 1313-14 (9th Cir. 1988) (recognizing that asylum case was seriously prejudiced by lack of counsel).

conditions in the applicant's home country. Courts expect that "general background information about a country, where available, will be included in the record as a foundation for the applicant's claim."¹²³ The burden falls on asylum applicants to produce such "supporting evidence, both of general country conditions and of specific facts sought to be relied on by the applicant."¹²⁴ Failure to provide such supporting evidence is seen as a failure to establish the burden of proof: "[e]ven if an alien is found to be credible, if there is no context within which to evaluate her claim, she has failed to meet her burden of proof because she has not provided sufficient evidence of the foundation of her claim."¹²⁵

In *In re S-M-J-*, for example, the Board of Immigration Appeals¹²⁶ found that even though the asylum seeker's testimony was credible, she failed to meet her burden of proof because she did not provide sufficient general information about country conditions in her home country.¹²⁷ For example, the BIA pointed out that the respondent did not provide any information to prove that her tribe exists or that other groups would seek to harm members of it.¹²⁸ "Consequently, there [was] no background information against which to judge her claim."¹²⁹ The court explained that when available, information about the history or political climate of a country should be provided through "corroborative background evidence such as country reports provided by a credible source or an expert witness."¹³⁰

Detained asylum seekers usually do not have access to relevant legal or background resource materials. Indeed, until recently, the INS did not have any standards concerning the content of legal libraries at detention facilities.¹³¹ Even though these standards are in place, they do not apply to non-

123. *In re S-M-J-*, Int. Dec. No. 3303, 6 (BIA 1997). There, the Board of Immigration Appeals ruled that when such background information is unavailable, the applicant has the burden of explaining why, and the court must include the explanation in the record. *Id.*

124. *In re S-M-J-*, Int. Dec. No. 3303, 6 (BIA 1997). When the applicant's asylum claim "becomes less focused on specific events involving the respondent personally and instead is more directed to broad allegations regarding general conditions in the respondent's country of origin, corroborative background evidence that establishes a plausible context for the persecution claim . . . may well be essential." *Matter of Dass*, 20 I. & N. Dec. 120, 125 (BIA 1989) (emphasis added).

125. *In re S-M-J-*, Int. Dec. No. 3303, 12 (BIA 1997).

126. The Board of Immigration Appeals (BIA) is part of the Department of Justice's Executive Office of Immigration Review, and hears appeals from immigration courts. *See* 8 C.F.R. §§ 3.9-3.42.

127. *See In re S-M-J-*, Int. Dec. No. 3303, 11 (BIA 1997).

128. *Id.*

129. *Id.*

130. *Id.* at 11-12; *see also* *Matter of Y-B-*, Int. Dec. No. 3337 (BIA 1998); *Matter of M-D-*, Int. Dec. No. 3339 (BIA 1998). *See generally* Larry Katzman, *Increased Corroboration Requirements in Asylum Claims*, 3 BENDER'S IMMIGRATION BULLETIN 837 (1998).

131. In early 1998, the INS released standards for access to legal materials by detainees. *See* *Immigr. and Naturalization Service, Detention Standards: Access to Legal Materials* (Jan. 28, 1998). The standards apply to INS SPCs and contract detention facilities, but not to local or county jails, where many asylum seekers are detained. The standards require each SPC and contract facility to maintain a law library for detainee use that must be available for inmate use at least five hours per week. *Id.* at 3. While the standards note that the size of the library "shall depend on the size of the detainee population and frequency of detainee use," they afford much leeway to the individual detention facilities with respect to

INS facilities such as local, county, and city jails where many asylum seekers are detained;¹³² therefore, the contents fall far short of alleviating concerns about the availability of sufficient corroborative materials. The standards do not require libraries to maintain up-to-date information about country conditions. Rather, in INS service processing centers and contract detention facilities, required reference materials are limited to the State Department's annual Country Reports on Human Rights Practices, printed each February for the preceding year, and Human Rights Watch—World Report, which is printed annually and covers only selected countries.¹³³ No current newspapers, country conditions updates, or reports from other "credible sources"¹³⁴ are required to be kept in the libraries. Even with all the relevant legal and country condition resource materials necessary to present a claim for asylum, only the minority of asylum seekers fluent in English are able to use them.

2. Detention Adversely Impacts Ability to Testify Credibly

As to the presentation of evidence of a fear of persecution, most, if not all asylum cases focus on the direct testimony of applicants regarding events that took place in foreign countries, involved foreign governments, and are characterized in terms of foreign norms and cultures. Given the nature of this testimony, judgments as to whether or not an applicant has satisfied her burdens of proof and persuasion typically hinge on the applicant's credibility,¹³⁵ with particular attention given to the level of detail in the account,¹³⁶

the size and capacity of the library. *Id.* at 2. Law libraries are required, however, to contain certain legal resource materials, including the immigration statute (United States Code Title 8), immigration regulations (Code of Federal Regulations Title 8), Administrative Decisions under Immigration and Naturalization Laws (BIA decisions) and certain immigration law treaties and law manuals. *See* Immigr. and Naturalization Service, Detention Standards: Access to Legal Materials, at 2, attachment A (Jan. 28, 1998). The facility is also required to replace these materials promptly if damaged or stolen. The libraries should also contain typewriters, paper and writing implements and be inspected at least one time per week for broken or missing materials. *Id.* at 2-3.

132. *See* Memorandum from the American Bar Association Immigration Pro Bono Development Project, *re: Final Release of INS Detention Standards* (Jan. 28, 1998) (on file with author). The ABA consulted with the Department of Justice for over one year to develop the standards.

133. *See* Immigr. and Naturalization Service, Detention Standard—Access to Legal Materials, attachment A (Jan. 28, 1998).

134. *In re* S-M-J, Int. Dec. No. 3303, 11-12 (BIA 1997).

135. INS regulations recognize that "the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13(a). *See In re* Mogharrabi, I. & N. Dec. 439, 443 (BIA June 12, 1987) (explaining that "the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible . . ."). *See generally* Hon. Rose Collantes Peters, *Applying for Asylum*, 9 AM.U.J. INT'L L. & POL'Y 245 (1994).

136. *See In re* Y-B-, Int. Dec. 3337 (BIA 1998) (denying asylum where testimony was credible but not sufficiently detailed); *Matter of* E-P-, Int. Dec. 3311 (BIA 1997) (although credible, the BIA found the respondent's testimony "vague and lacking in specific detail"); *Matter of* Dass, 20 I. & N. Dec. 120 (BIA 1989) (denying asylum because there were, among other things, "major gaps" in the testimony).

the applicant's demeanor,¹³⁷ and whether or not the account is internally consistent.¹³⁸

Various factors influence whether or not an applicant satisfies these evaluation criteria. For example, "[i]ndividuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of torture and trauma . . ." ¹³⁹ They typically "avoid thoughts, feelings, or conversations associated with the trauma," "avoid activities, places, or people that arouse recollections of the trauma," and are often unable "to recall an important aspect of the trauma."¹⁴⁰ Without an appropriate diagnosis or treatment, however, such inability to remember details of one's persecution may be interpreted by the court as indicia of deception. Moreover, the side effects of PTSD may adversely impact a detained asylum seeker's ability to discuss enough details of her persecution to establish eligibility. The side effects may also cause the asylum seeker to have poor concentration and a confused memory. If not diagnosed and treated before the hearing, these symptoms of PTSD can lead to an adverse assessment of the asylum seeker's credibility on the witness stand.

The practice of conducting removal hearings via video conference—a practice that is limited to hearings for detainees—can also be confusing to asylum seekers.¹⁴¹ During video conference hearings, asylum seekers remain detained and are connected to the courtroom via video, while the judge, INS counsel, detainee's counsel, and an interpreter, if necessary, are all physically present in the courtroom.¹⁴² The detainees view the courtroom proceedings

137. See *In re A-S-*, Int. Dec. 3336 (BIA 1998) (according a high degree of deference to a credibility finding supported by a reasonable inference drawn from an alien's demeanor). See also *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818–21 (9th Cir. 1994) (awarding "special deference" to credibility findings based on demeanor); *Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994) (same); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that an immigration judge can observe the tone and demeanor to determine whether the testimony "ring[s] of truth").

138. See, e.g., *Mejia-Paiz v. INS*, 111 F.3d 720 (9th Cir. 1997) (noting that the lower court's adverse credibility finding was supported by inconsistencies in the record); *Saballo-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1984) (upholding denial because of notable inconsistencies between the applicant's written application and his oral testimony); *In re A-S-*, Int. Dec. 3336 (BIA 1998) (upholding asylum denial because of discrepancies and omissions in the record).

139. AM. PSYCHIATRIC ASS'N, *supra* note 55, at 426. See also *Mollica*, *supra* note 55, at 1571 (study revealing that "highly traumatized and tortured patients may have difficulty articulating their trauma-related symptoms").

140. AM. PSYCHIATRIC ASS'N, *supra* note 55, at 426.

141. The Immigration and Nationality Act authorizes removal hearings to be conducted in person or via video conferencing, or, with the consent of the applicant, via telephone conference. See Immigration and Nationality Act §§ 240(b)(2)(A), (B) (1997), 8 U.S.C. § 1229(a) (1998). For example, removal hearings for asylum seekers who are detained in a county jail in Virginia Beach, Virginia, are currently being conducted via video conference. And the use of video conferencing with detainees is the "wave of the future." Immigration Judge Christopher Grant, Remarks at the American Immigration Lawyers Association, D.C. Chapter, Liaison Meeting with the Baltimore and Arlington Immigration Courts (Oct. 29, 1997). The "intention of the chief judge's office is to video link all immigration judge offices . . . in all kinds of permutations." *Id.*

142. See Pamela Constable, *Deportation Case Also Puts an INS Experiment on Trial*, WASH. POST, Dec. 21, 1997, at B1.

on a television screen from the detention facility.¹⁴³ They provide direct testimony and are cross-examined via video. This system hurts detainees in at least two ways. First, asylum seekers are not able to consult privately with their attorneys during the hearing. Second, it is more difficult for an asylum seeker to establish his or her credibility when testifying via video.¹⁴⁴

3. Detention Adversely Affects Ability to Demonstrate Legal Standards are Met

Finally, detention also impedes an asylum applicant's ability to satisfy the difficult legal standard of an asylum proceeding. The issue of what constitutes each of the five grounds of persecution, like other legal standards, has been subject to considerable legal wrangling and is continually evolving in response to "changing notions of human rights violations" abroad.¹⁴⁵ For example, in light of the clan-based persecution in Somalia's tribal conflict, since early 1990 many Somalis have sought asylum in the United States because they fear persecution based on their membership in a particular Somali clan. These asylum applicants have argued that membership in a Somali clan constituted membership in a particular social group within the meaning of section 208(a) of the INA. In 1996, the BIA agreed, and held that because Somali clan members share ties of kinship and linguistic commonalities, members of a clan could be characterized as a particular social group for purposes of adjudications of asylum claims.¹⁴⁶ Indeed, the term "persecution" is not defined by statute and "various attempts to formulate such a definition have met with little success."¹⁴⁷ Due to these evolving notions of protection, asylum cases often challenge the boundaries of the law and thus often pose insurmountable difficulties to the majority of detained asylum seekers, who are pro se applicants.

In addition to the problems unrepresented asylum seekers face in proving that what they suffered constitutes persecution, asylum seekers also often do

143. Cf. *Maryland v. Craig*, 497 U.S. 836 (1990).

144. Immigration Judge Wayne Iskra compared the experience of conducting a removal hearing via video conference to watching a sports event on television as opposed to being in the stands. Immigration Judge Wayne Iskra, Remarks at American Immigration Lawyers Association, D.C. Chapter Liaison Meeting with the Baltimore and Arlington Immigration Courts (Oct. 29, 1997). He acknowledged that "he would rather be at the game than to watch it on TV because it is different and it is different for me to try a case by video rather than in person." *Id.* He hoped that he could "make a case for no video conferences" explaining that "he is not convinced that he can make credibility findings over video." *Id.*

145. Scholars have noted that the term "persecution" was intentionally left undefined so that it would evolve in response to changing notions of human rights. See T. Alexander Aleinikoff, *The Meaning of 'Persecution' in U.S. Asylum Law*, 3 INT. J. REF. L. 5, 11 (1991).

146. See *Matter of H*, Int. Dec. 3276 (BIA 1996). See also *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (noting that Iranian women who refuse to conform to the gender-specific social norms and laws promulgated by the Iranian government may constitute a particular social group); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (finding that a nuclear family constitutes a social group); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (upholding immigration judge's finding that an applicant for withholding of deportation feared persecution because of his membership in a social group—homosexuals).

147. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS § 51 (1992).

not understand the necessity of proving a connection between their persecution and one of the five statutory grounds for asylum.¹⁴⁸ For example, a woman may testify at her hearing that she fears returning to her home country because her family will kill her, but may not explain why they plan to kill her. The adjudicator may find the applicant credible and actually believe that she will be killed if sent back. But if a nexus is not established between the fear and one of the five grounds—fear of reprisals by one's family alone is not sufficient for a grant of asylum under the INA—the adjudicator would be compelled to deny asylum. If this same applicant had a basic understanding of the law or were represented by someone who did, she would understand that she needs to establish that, for example, her family was motivated to harm her because she supports an opposition political party, while the family is an ardent supporter of a current dictator. Similarly, a man may explain to the immigration judge simply that he fled his home country because he deserted the army and as an army deserter he would be subject to persecution. The mere fact that he deserted his home country's army may not warrant asylum protection.¹⁴⁹ However, if the reason he deserted the army is that it is against his religion, and the laws are selectively enforced against people who follow his religion, an adjudicator might find the applicant met the asylum standard, presuming, of course, that the applicant knew enough about the law to mention these crucial facts.¹⁵⁰

Additionally, asylum claims often suffer from a failure to trace the chain of causation far enough. For example, an applicant's testimony may suggest that she is fleeing discrimination and economic hard times, which is not a ground for asylum protection, and as a result the applicant may be denied asylum. Yet, analysis of the conditions in the applicant's home country may reveal that the government systematically discriminates against the applicant's particular religious or other group, depriving the group of fundamental rights such as education, employment, and housing. If pervasive and persistent, such discrimination could rise to the level of persecution within the meaning of the INA.¹⁵¹ Similarly, persecution does not generally include prosecution.¹⁵² But asylum has been granted even though the persecution took the form of prosecution for a crime, when it has been proven that the statute was enacted as a means to justify persecution.¹⁵³ Without the assis-

148. See *Matter of E-P-*, Int. Dec. 3311, 6 (1997) (denying asylum because, among other things, the applicant's testimony "did not provide a sufficient nexus between the applicant's fear of harm and one of the five enumerated grounds").

149. See *INS v. Elias-Zacarias*, 112 U.S. 812 (1992) (a person threatened with conscription into the army, without more, is not persecuted on account of political opinion).

150. See *Fischer v. INS*, 37 F.3d 1371 (9th Cir. 1994).

151. See generally *KAREN MUSALO ET AL.*, REFUGEE LAW AND POLICY: CASES AND MATERIALS 254-70 (1997).

152. See, e.g., *Castaneda v. INS*, 23 F.3d 1576, 1577-78 (10th Cir. 1994) *reh. en banc denied*, 33 F.3d 44 (1994) (persecution does not encompass fear of mistaken prosecution); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (persecution does not encompass criminal charges for fraud).

153. See generally *MUSALO*, *supra* note 151, at 270-82.

tance of attorneys, asylum seekers face problems in organizing and presenting such facts to the adjudicator in a coherent fashion that explains why they meet the statutory requirements.

C. Detention Motivates Abandonment of Valid Claims

Prolonged detention pending an asylum hearing also acts, in some cases, to induce genuine asylum seekers to abandon their claims in the hope of facilitating an earlier release from detention, in spite of the fact that they may suffer further persecution if returned to their home country. For example, Mr. S.S., a torture victim from Iran, whose sibling was living in the United States and who had a wife and two American-citizen children living in Mexico, abandoned his asylum claim after living in jail for several months. He explained to me that the prospect of spending considerably more time in jail, where his diabetic condition remained untreated, and from where he could not adequately provide care for his wife and children¹⁵⁴ bothered him and impeded his ability and willingness to proceed with his claim.¹⁵⁵

IV. THE RATIONALES ADVANCED IN SUPPORT OF DETENTION PROVIDE INADEQUATE SUPPORT FOR THE CURRENT DETENTION SYSTEM

Given the substantial costs of the prehearing detention of asylum seekers and the adverse impact of detention on the accuracy of the asylum adjudication process, it seems clear that only compelling countervailing reasons could justify detention of credible asylum applicants. The rationales that the INS has advanced to support its asylum detention policy are: (1) to prevent applicants for admission from absconding; (2) to protect the public safety; and (3) to deter future applicants from attempting to enter the country illegally.

With respect to absconding, the concern is that immigrants who are released into the general population may not appear at their immigration court hearings or for removal or may abandon their claims and disappear into the underground economy, thereby placing upon the government the burden of locating them before their removal can be effected.

A "better safe than sorry" premise underlies the concern for public safety rationale, which is based on the unknown potential of immigrants for criminal activity. Detention is viewed as a means of protecting the public from the possibility that arriving immigrants may pose a threat.

154. See *United States v. Barber*, 140 U.S. 164, 167 (1891) (pre-trial detention deprives detainee's family of support and assistance).

155. Interview with Iranian detainee, El Centro, Cal. (Feb. 9, 1998) (on file with author).

Finally, it is thought that a policy of detaining those who arrive at the border without sufficient travel documents will discourage immigrants from attempting to enter the country without proper documentation. The theory is that, sooner or later, potential immigrants will learn that they will be detained upon arrival if they come to the United States without proper documentation. Once this is learned, it is thought that the prospect of spending considerable time in jail will deter such intending immigrants from coming to the United States.¹⁵⁶

A fundamental difference exists between these rationales, which has not yet been fully appreciated by the INS or commentators and has important implications for detention policy. Specifically, deterrence is a rationale of a different kind than the safety or absconding rationales. While the safety and absconding rationales are capable of being directly applied to individual cases, leading to varying detention decisions on a reasoned basis, deterrence may not be so capable. Indeed, the idea of detaining any single individual on the ground of deterrence, while simultaneously paroling others, is irrational. Rather, the role of deterrence is more general; it acts as a sort of prism that can affect one's view of the other concerns. The "felt necessity" for deterrence, in other words, informs the assessment of the other concerns. Thus, when the need for deterrence is keenly felt, other rationales are more broadly applied to detain more people. Conversely, when the need for deterrence appears less compelling, other rationales may more often be interpreted to allow parole rather than detention of an asylum applicant.

The last two decades have offered compelling proof for this view. The historical record is clear that the deterrence rationale actually prompted the INS to adopt a more strict, standard detention policy in the early 1980s. That this policy has prevailed ever since and still prevails today becomes clear after closely scrutinizing the INS's pronouncements and practices concerning detention and parole.

A. Historic Change to More Restrictive Detention Practices was Brought about by Heightened Perceptions about the Need for Deterrence

Before deterrence became a leading concern, detention was almost never used. Indeed, since 1954, when the Attorney General announced that "[o]nly those deemed likely to abscond or those whose freedom of movement could be adverse to the national security of the public [would] be detained,"¹⁵⁷ detention of undocumented individuals arriving in the United States was "the exception, not the rule."¹⁵⁸ That changed in the

156. Professor Margaret Taylor refers to the INS's use of detention to deter undocumented entry as "symbolic detention." For an analysis of problems concerning the use of symbolic detention, see Margaret Taylor, *Symbolic Detention*, in XX IN DEFENSE OF THE ALIEN 153 (1997).

157. *All But a Few*, N.Y. TIMES, Nov. 12, 1954, at 14.

158. *Lang May Ma v. Barber*, 78 U.S. 1072 (1958).

early 1980s when the U.S. government was faced with mass influxes of refugees from the Caribbean. In particular, in the spring of 1980, a boatlift from the Cuban port of Mariel brought 125,000 refugees to the United States within a span of a few months.¹⁵⁹ At approximately the same time, significant numbers of refugees from Haiti were continuing to seek U.S. protection.¹⁶⁰

Critics attributed the unprecedented sudden influx of immigrants from Cuba and Haiti to the fact that U.S. laws provided inappropriately substantial incentives for people to enter the United States without documents. In particular, it was argued that arriving immigrants were too readily paroled into the United States, rather than detained, and too readily given work authorization pending adjudication of their immigration proceedings, which often took months or even years to complete. Thus, the argument went, an immigrant who came to the United States without proper travel documents simply had to assert that she wanted political asylum and she would be at liberty to live and work in the United States for months or even years pending the adjudication of her claim, regardless of the claim's merits. The courts confirmed this sentiment, reasoning that the combination of being granted work authorization and being paroled from detention "provided the greatest inducement to the ultimate swollen tide of undocumented aliens."¹⁶¹

In response to this perception, a special governmental task force was established to examine, among other things, alternative means of deterring future mass influxes of immigrants.¹⁶² With respect to deterrence, the task force recommended that the government "detain as a matter of course all arriving immigrants who could not establish a prima facie claim for admission to this country."¹⁶³ The deterrent was directed at "those who might see

159. In the spring of 1980, approximately 10,800 Cuban nationals claiming to be political refugees sought a safe haven in the Peruvian Embassy in Havana, Cuba. *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). Responding to this news, President Carter announced that 3,500 Cuban refugees could apply for asylum in the United States, pursuant to the newly enacted Refugee Act of 1980. An airlift was started to transport the refugees to the United States, but Fidel Castro stopped the flights a few days later and announced that anyone who wanted to leave the country could do so through the Mariel harbor. The Mariel boatlift or "Freedom Florilla" had begun. Approximately 114,000 Cuban refugees crossed 90 miles of ocean on nearly 1800 boats to seek a safe haven in the United States. *Id.* at 1389.

160. *See, e.g., Louis v. Nelson*, 544 E.Supp. 973 (S.D. Fla. 1982); *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980); Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993).

161. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029, n.11 (11th Cir. 1982).

162. The Select Commission on Immigration and Refugee Policy proposed two sets of changes to immigration policy. *See Louis v. Nelson*, 544 E.Supp. 973, 979 (S.D. Fla. 1982). The first set, responding to concerns about the illegal immigrants who were already in the United States, proposed that an amnesty program be established to legalize the status of the illegal immigrant population already in the United States. The second set of recommendations, which is discussed in the text, focused on dealing with individuals unlawfully coming to the United States.

163. *Louis v. Nelson*, 544 E.Supp. 973, 979-80 (S.D. Fla. 1982). The task force examined three options. Option 1, entitled "Status Quo" was not recommended by any of the advisors. Option 2, entitled "Limited Interdiction Plus Status-Quo Non-detention," was recommended by two advisors. The third

an asylum claim as a means of circumventing U.S. immigration laws."¹⁶⁴ By detaining them, the new arrivals would not be able to obtain a work permit.¹⁶⁵ The Reagan Administration adopted this recommendation,¹⁶⁶ marking the first time in U.S. history that detention was used generally as a means to deter immigration.¹⁶⁷ The general hope was that prospective immigrants would learn that they would be put into detention if they came to the United States, and would therefore decide not to make the trip.¹⁶⁸ Thus, the historical record is clear that the more strict detention policy adopted in

option, recommended by the majority of advisors and ultimately adopted by the Reagan Administration, was entitled "Interdiction and Detention." *Id.* at 980, n.19.

164. Paul Wickham Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 330 (1987), citing Select Comm'n. on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest (1981).

165. *Id.*

166. The administration reasoned that the new detention policy would "more effectively deter illegal immigration to the United States—whether across our expansive borders or by sea" and thereby help facilitate efforts to regain control of the borders. See *Administration's Proposals on Immigration and Refugee Policy: Joint Hearing before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. On the Judiciary and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong. 6 (1981) (statement of William French Smith, Attorney General of the United States) [hereinafter Smith Statement].

167. Regulations embodying this shift in policy were adopted in 1982. See 47 Fed. Reg. 30,044 (July 9, 1982), amended by 47 Fed. Reg. 46,493 (Oct. 19, 1982). The new regulations implemented procedures for the detention of all immigrants who arrived at the border with fraudulent travel or identity documents or without any travel documents. The regulations specifically provided that "[a]ny alien who appears to the inspecting officer to be inadmissible, and who arrives without documents or who arrives with documentation which appears to be false, altered, or otherwise invalid . . . shall be detained." 8 C.F.R. § 235.3(b) (1982). Detention was not mandatory for immigrants who arrived with facially valid travel documents but who appeared to be excludable for other reasons. Rather, the regulations provided that such individuals "may be detained, paroled, or paroled for deferred inspection" depending upon whether the immigrant was likely to abscond or posed a security risk. 8 C.F.R. § 243.3(c) (1982).

The 1982 regulations also set out three situations in which district directors could parole detainees: (1) for emergent reasons, (2) for reasons defined to be "strictly in the public interest," or (3) for purposes of participating in prosecution. 8 C.F.R. § 212.5 (1982). The term "emergent reasons" was defined to exist when the immigrant had a serious medical condition and continued detention would not be appropriate. 8 C.F.R. § 212.5(a)(1) (1982). Parole was considered "strictly in the public interest" if the individuals subject to release did not present a risk to public security or of absconding, and the individual was a pregnant woman; a juvenile; an immigrant with close family relatives who had filed a visa petition for the immigrant; or an immigrant who was proposed to be a witness in administrative, judicial or legislative proceedings. 8 C.F.R. § 212.5(a)(2) (1982). See also *Jean v. Nelson*, 472 U.S. 846, 862, n.3 (1985). The regulations also included a catch-all category authorizing parole of "aliens whose continued detention is not in the public interest."

168. Both administration and agency pronouncements on the new detention policies reiterated that deterrence was a goal. See 47 Fed. Reg. 30,044 (1982). When the INS issued interim regulations with a request for comment on its new detention and parole policies it noted that the "Administration has determined that a large number of Haitians and others are likely to attempt to enter the United States illegally unless there is in place a detention and parole regulation." It further explained that "[s]uch a large influx would clearly be contrary to the public interest." 47 Fed. Reg. 30,044. Attorney General William French Smith reiterated the notion that detention was necessary to deter illegal immigration when he presented the Administration's proposals to Congress. See Smith Statement, *supra* note 166, at 15, 20. See also *Louis v. Nelson*, 544 F.Supp. 973, 980 (S.D. Fla. 1982) (recognizing the INS's reliance on detention as a deterrent to illegal immigration); *Singh v. Nelson*, 623 F.Supp. 545, 556 (D.C.N.Y. 1985) (same); U.S. GEN. ACCT. OFF., PUB. NO. GGD-92-85, REPORT REVIEWING INS DETENTION PRACTICES 35 (1992) (noting the INS's contention that "detention is a deterrent to uncontrolled illegal immigration").

the early 1980s coincided with a heightened belief that a stronger deterrent was needed, and is in fact attributable to that belief.

B. Present Detention Practices Show that the Deterrence Rationale Continues to Control Decision-Making Concerning Detention of Asylum Seekers

Deterrence has continued to dominate asylum seeker parole decision-making. The fact that deterrence guides the application of the safety and absconding rationales to parole decision-making is evinced, as explained in Part IV.B.1 *infra*, through several anomalies surrounding parole decision-making. In addition, the predominance of the deterrence rationale in current parole decision-making practices is further demonstrated by comparing the current system to the notion of how a system designed predominately to deter would look. As explained in Part IV.B.2 *infra*, the current system closely resembles a deterrence-focused system.

1. The INS Makes Little Effort to Ensure the Safety and Absconding Rationales are Effectively and Uniformly Applied

Although the INS at times professes reliance on the rationales of prevention of absconding and protection of public safety in its parole decision-making, this assertion of reliance is unconvincing in light of several anomalies that suggest that these two rationales are treated more as an incantation than as an explanation. Consider the following: (1) criminals are released on bond while asylum seekers with no record of criminality languish in detention, in apparent disregard of the safety rationale;¹⁶⁹ (2) the INS's parole decisionmakers have not shown an interest in collecting proof about appearance rates for asylum seekers and discount evidence that asylum seekers in fact are not absconding when paroled, while simultaneously alleging that the potential for absconding is what inhibits them from making positive parole decisions;¹⁷⁰ and (3) personnel at

169. The INS also reports that due to an overall lack of detention space for all of its detainees, including criminals subject to orders of deportation, it expedited the release of 1,300 criminals detainees from its detention facilities. *Immigr. and Naturalization Service, Second Report on Detention and Release of Criminals and Other Aliens 6* [hereinafter *Second Detention Report*]. During that same six-month period, the INS failed to detain approximately 13,000 individuals who otherwise would qualify for detention in the six-month period ending July 31, 1997. *Id.* at 2. See also William Branigin, *INS Weighs Plan to Free Criminals: Space Lacking*, WASH. POST, Feb. 4, 1999, at A2.

170. Indeed, the INS has no statistics to support the notion that asylum seekers who have been determined to have a credible fear fail to appear at hearings if they are released from detention. Further, anecdotal evidence suggests that absconding by credible asylum seekers constitutes an illusory concern. Lawyers who work with asylum seekers who arrive at the New York and New Jersey ports of entry indicate that less than 10% of paroled asylum seekers have failed to appear at their hearings. Telephone Interview with Mary McClenahan, attorney with Catholic Legal Immigration Network, Inc. (Aug. 11, 1998) (on file with author); Telephone Interview with Amy Gottlieb, staff attorney, American Friends Service Committee, Immigrants Rights Project (Aug. 11, 1998) (on file with author); e-mail communication with Frank Lipiner & Aaron Gershowitz, attorneys, HIAS (Aug. 12, 1998).

INS headquarters tolerate vast discrepancies in release rates among local districts, proving that districts do not uniformly apply the rationales,¹⁷¹ and overlook local offices' failure to follow procedures¹⁷² designed to ensure consideration of the professed rationales.¹⁷³

171. As INS spokesperson, Russ Bergeson explains, what satisfies the parole standards "for one district director may not be so for another." Ojito, *Inconsistency at INS*, *supra* note 34. See also Lewis, *supra* note 34, at A25. The INS has acknowledged that, "in certain districts the program is viewed as unnecessary and that little or no correlation exists between recommendations and parole decisions." 1996 APSO Evaluation, *supra* note 20, at 5. Notwithstanding a Service recognition of discrepancies, they often go unexplained by the district directors to central headquarters. An overall lack of accountability by local districts to headquarters accounts, in part, for this practice.

172. Explicit policies on how parole decisions should be made are commonly ignored by local offices. The procedure for exchanging findings about the release criteria between the asylum officer factfinders and the district office decisionmakers, a critical step in the process, without which no affirmative parole decision can be made, is just one example of the recurring disconnect between policy and practice. A policy directive from INS headquarters requires the asylum office to inform district directors "of the outcome of credible fear cases by faxing" the completed record of the interview and accompanying notes to the district director "as soon as the decision has been served on the applicant." See Dec. 1997 Policy Guidance, *supra* note 27, at 2. The supervisory asylum officer is charged with faxing the complete Form I-870, Record of Determination/Credible Fear Worksheet and interview notes to the district director. The district director is then directed to review the information, to make a parole decision, and, as soon as the decision is made, to fax it back to the asylum office. *Id.* at 3. The requirement that communications be faxed illustrates both an intent by the policy's drafters to expedite the release process so that asylum seekers are not needlessly detained and a desire to ensure that the files of all credible asylum seekers, whether they are represented by counsel or not, are reviewed for possible release. Telephone Interview with Kelly Ryan, INS Assistant General Counsel, Washington, D.C. (July 24, 1998) (on file with author).

But officials in the INS General Counsel's office question whether this is actually being done. According to one INS official, the policy concerning faxing the file to the district office is not universally followed: how the credible fear interview file actually travels "to the deciding officer, varies district by district." *Id.*

Whether a file gets the attention of the district office often depends upon the diligence of the asylum seeker's lawyer. Proactive steps by an attorney to bring the case to the attention of the local district officer before parole is considered appears to be necessary in all of the largest ports of entry and they vary from district to district. For example, an attorney in El Paso, Texas, explained that delivery of the asylum seeker's file to the person in the district office who makes parole determinations "is supposed to be automatic." But, she complained that the officer typically "does not consider parole unless an attorney bugs him, and even then it could take as long as five weeks." In the Los Angeles district, parole determinations are not made absent a letter requesting parole from the applicant or his attorney. Interview by Michele Pistone & Miraan Sa with George Shioura, INS Asylum Officer, San Pedro, Cal. (Feb. 6, 1998) (on file with author). The San Diego, California district does not make a decision unless they have reviewed the applicant's entire immigration file, not just the credible fear determination and accompanying notes. Interview by Michele Pistone and Miraan Sa with Steven Clauser, Supervisory Asylum Officer, Los Angeles INS Asylum Office, El Centro, Cal. (Feb. 9, 1998) (on file with author). If the asylum seeker is detained, her file is maintained at the detention facility. Therefore, the file has to be sent from the detention facility to the district office, which often takes days, before a review of the file can begin. In the Miami district, lawyers report having to send a "form letter to the district office informing the office that the asylum applicant was found to have a credible fear [of persecution] and has ties to the community." Telephone Interview with Stacy Taeuber, attorney with Catholic Legal Information Network, Inc., Miami, Fla. (July 24, 1998) (on file with author). The local New Jersey district requires that an affidavit by a friend or relative who is willing to house the asylum seeker and assist her in attending court hearings (for which it has not published or otherwise provided a form) be submitted with a request for parole. After the affidavit and parole request is filed with the local district office, the asylum seeker's lawyer has to follow up with the local office until a response is given. Telephone Interview with Mary McClenahan, attorney with Catholic Legal Immigration Network, Inc. (Aug. 11, 1998) (on file with author).

173. There is no indication that local district directors contact the asylum officers who have collected

When considered together, these anomalies suggest that something other than the professed rationales of preventing absconding and protecting public safety most influences individual parole decisions. And, as explained below, that something plainly is deterrence.

2. Detention Bed Space Availability, as a Surrogate Means for Achieving Optimal Deterrence, Controls Parole Decision-Making

Finally, to determine whether deterrence stands as the dominant motive behind the current system, it might prove instructive to imagine what a deterrence-focused system would look like. A detention system focused predominately on deterrence would essentially seek to detain as many individuals as it had the capacity to detain. The only practical limitation would be the availability of detention bed space. In an effort to continue to increase its deterrence capacity, it would continuously try to increase its detention bed capacity.

Tellingly, this is essentially the system that the INS operates. Detention bed space more often than not is what guides parole decisions. Indeed, the established practice by many local INS district offices¹⁷⁴ is to decide whether or not to release an asylum seeker from detention based upon the availability of detention beds. Many districts have essentially adopted a *de facto* policy of not granting parole if they have an available detention bed.¹⁷⁵

The ubiquitousness of this *de facto* policy has been confirmed by many INS officials of various ranks.¹⁷⁶ Indeed, INS policy personnel at headquar-

the release criteria data at interviews with the asylum seekers before they make parole decisions or that they systematically reverse parole denials when evidence suggesting that the applicant will not abscond, such as community support, is provided. Interview with Mary McClenahan, staff attorney, Catholic Legal Immigration Network, Inc., Newark, N.J. (July 22, 1997) (on file with author).

174. Local INS districts have jurisdiction over parole decisions in their districts. District directors' jurisdiction over parole decisions is not statutory, but derives from the INS's regulations delegating authority from the Service to various directors and Associate Commissioners within the INS. Those regulations provide that "[d]istrict directors are delegated the authority to grant or deny any application or petition submitted to the Service . . . to initiate any authorized proceeding in their respective districts." 8 C.F.R. § 103.1(g)(2)(ii)(B) (1996). Parole decisions were interpreted to fall within the scope of "any application or petition" and prior regulations concerning parole specifically recognized the authority of district directors over these decisions: [i]n determining whether or not aliens who have been or are detained . . . will be paroled out of detention, *the district director should consider* [certain delineated factors]." See 8 C.F.R. § 212.5(a) (1996) (emphasis added).

But the INS's revised regulations implementing IIRIRA delete these operative words about the district director considerations with respect to parole decisions. The only reference to the district director is with respect to release under the catch-all provision for those whose "continued detention is not in the public interest *as determined by the district director.*" See 8 C.F.R. § 212.5(a)(5) (1997) (emphasis added).

175. John O'Malley, INS deputy assistant commissioner for detention and deportation, explained that historically parole was often resorted to only when there was no space to detain individuals. Interview with John O'Malley, INS Associate Commissioner for Detention and Deportation, Washington, D.C. (Jan. 22, 1998) (on file with author); see also Ojito, *Inconsistency at INS*, *supra* note 34; John Sullivan, *More Illegal Immigrants Released Since Melee Shut New Jersey Jail*, N.Y. TIMES, Oct. 16, 1995, at A1.

176. Non-INS observers also have noted the importance of bed space. For example, Professor Peter Schuck explained in a white paper he prepared for the National Institute for Justice after interviewing numerous INS personnel and visiting several detention facilities that "it is not too much to say (and INS

ters explain discrepancies in release rates between various local districts not by reference to different applications of the safety and absconding rationales by local district directors, but by reference to detention beds available to them. For example, the INS General Counsel recently explained that "detention bed availability is the determinative factor in deciding whether to release."¹⁷⁷ Phyllis Coven, former INS Director of International Affairs, echoed the fact that the availability of detention beds often dictates whether one is detained or not by explaining that "beds go a long way" in justifying parole decisions.¹⁷⁸ As a result, she stated, "release of asylum seekers [post IIRIRA] has been negligible in certain districts" where beds are readily available.¹⁷⁹ Numerous local INS officials also have confirmed that the availability of bed space continues to dictate their release decisions.¹⁸⁰

Moreover, the INS continues to press for substantial increases in detention capacity, even though current capacity is more than twice that of only six years ago.¹⁸¹ And, despite regular increases in detention bed capacity over

field personnel often do say) that the availability of detention (bed) space is what drives and shapes INS enforcement at every point." Peter H. Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667, 673 (1997).

177. Interview with Paul Virtue, INS General Counsel, in Washington, D.C. (July 21, 1998) (on file with author).

178. Phyllis Coven, INS Director of International Affairs, Remarks at the Round Table Discussion on the Implementation of Expedited Removal, hosted by Carnegie Endowment for International Peace, Apr. 30, 1998.

179. *Id.*

180. A local district director explained that "if we have the space, we'll hold [an applicant until asylum is granted.]" Tim Doran, *Jailed Woman Awaits Decision: Iraqi Native Seeks Asylum to Join Family*, DET. FREE PRESS, July 9, 1998, at 1B (statement by Carol Jenifer, Detroit district director). Noting that "Newark was becoming a sieve" in the eyes of asylum seekers who considered their parole policies to be especially liberal, the INS district director for the New Jersey district sought to deter future asylum seekers from viewing her district that way by implementing a harsh detention policy. Ronald Smothers, *Asylum-Seekers Are Confined to Dormitories After Protest*, N.Y. TIMES, Oct. 1, 1998, at B6.

A detention officer-in-charge of a detention facility similarly explained that if the facility has bed space, "we will keep people in detention." Telephone interview with Stacy Taeuber, attorney with Catholic Legal Immigration Network, Inc., Miami, Fla. (July 24, 1998) (relaying statement of Caryl Thompson, INS Officer-in-Charge of Krome Detention Facility) (on file with author). And an INS spokesperson, Russ Bergeron, conceded "illegal immigrants may be released only in parts of the country with less detention space." Doran, *supra* note 180. This practice was explained by a former INS official, who requested that she not be identified, who worked performing INS enforcement and detention functions: The availability of beds plays a "tremendous" role in whether someone is detained or not. "If there is no bed space, no one gets detained; it is as simple as that;" and if there is bed space, then the INS will detain an individual "even if they are asylum seekers and not deserving of detention" the former INS official continued. Telephone Interview with former INS official, anonymous (July 17, 1998).

181. In 1992, the INS had fewer than 6300 detention beds. U.S. GEN. ACCT. OFF., GAO/GGD-92-85, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 12 (June 25, 1992). By 1996, the number of INS detention beds had increased to 9000. T. Alexander Aleinikoff, former INS Executive Associate Commissioner for Programs, Remarks at U.S. Commission on Immigration Reform, Consultation on Detention (Apr. 11, 1996). Scholars report that spending by the INS's detention and deportation division increased approximately 250% between 1992 and 1997. *See* Schuck, *supra* note 176, at 674, n.7. The following year, the "INS was allocated funding for . . . additional . . . beds, bringing [its] total [detention] capacity to 12,050" beds. *The Judiciary and Related Agencies, Fiscal Year 1999 Appropriations, Before the Subcomm. on Commerce, Justice, and State, of the Senate Comm. on Appropriations*, 105th Cong., 2d Sess. (Mar. 3, 1998) (testimony of Doris Meissner, INS Commissioner). The number of individuals in INS detention again increased, to 13,491, by the beginning of fiscal year 1998.

the last several years, the INS continues to assert that it needs additional detention bed capacity. In sum, if deterrence were officially made the *only* objective behind detention policy, current policy would not need to change much, if at all. However, this very fact also suggests that if the need for deterrence is shown to be exaggerated in a particular context, then a substantial change in detention policy may very well be warranted.

V. FORCE OF RATIONALES IN LIGHT OF IIRIRA

Although the INS appears not to recognize it, the force of these rationales, as applied to asylum seekers after apprehension at an airport or border, has declined appreciably since IIRIRA was adopted.¹⁸² Indeed, even assuming the general validity of all three rationales as applied to asylum applicants from the early 1980s until recently, in light of the changes brought about by IIRIRA, only one of the professed rationales can currently be considered more than an anachronistic concern.

A. *Use of Detention as a Deterrent Is an Outdated Remedy for a Resolved Problem*

While in the 1980s and early 1990s detention may have substantially contributed to the intended goal of deterring undocumented individuals from coming to the United States and filing unmeritorious asylum claims, the potency of detention to serve this rationale has decreased dramatically in recent years. The sharp reduction in the usefulness of detention as a deterrent can be attributed in large part to changes in asylum laws enacted as part of IIRIRA. These statutory changes are themselves designed to deter the same group of people that the Reagan Administration's detention policies were designed to deter.¹⁸³ As a result, IIRIRA's amendments reduced the usefulness of and, concomitantly, the need for, detention as a deterrent in at least two significant respects.

See id.

The upward trend in the number of INS detention beds dates back a few decades. In 1968, the INS had 858 detention beds. *See* AMERICAN CIVIL LIBERTIES UNION ET AL., DETENTION OF UNDOCUMENTED ALIENS 33 (1990). By 1982, capacity in INS detention facilities more than doubled to approximately 1800 beds. *Id.* By the end of 1985, capacity again increased, to 2265 beds. *Id.*

182. Pub. L. No. 104-208. For a detailed discussion of the impact that the new asylum laws have on potential asylum seekers, see Pistone, *supra* note 13. *See also* Schrag & Pistone, *supra* note 9.

183. *See* H.R. Conf. Rep. No. 104-828, at 1 (1996); 8 U.S.C. § 1225(b)(1)(A) (1996); U.S. GEN. ACCT. OFF., PUB. NO. GAO/GGD-98-81, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES 16 (Apr. 1998) [hereinafter APR. 1998 GAO REP.].

1. The Group of Individuals Sent to Detention Is a Narrowly Selected Subset of the Pre-IIRIRA Group

Most importantly, IIRIRA changed dramatically the class of individuals being sent to detention centers. Under the previous laws enacted in the early 1980s, any potential immigrant who arrived at the U.S. border or airport without documentation or whose documentation was suspected of being fraudulent had an opportunity for a formal hearing before an immigration judge.¹⁸⁴ The majority of these individuals elected to have hearings before the immigration court.¹⁸⁵ The hearings often did not take place for months or years after their arrival in the United States. Under the detention policy in place in 1996, when IIRIRA took effect, most undocumented individuals were sent to detention centers to await their hearings.

Under IIRIRA's expedited removal provisions, however, two separate procedural screenings operate to reduce the universe of people entitled to formal immigration court hearings. The first screening takes place at airports and border crossings immediately after a person arrives at the border with false travel documents, documents suspected of being procured by fraud,¹⁸⁶ or no travel documents at all.¹⁸⁷ During these screenings, immigration inspectors at the airports and border crossings interview all undocumented individuals to determine whether they are entitled to stay in the United States. Only those who have lawful immigration status or who indicate to a government inspector that they have an intent to apply for asylum or a fear of persecution are not subject to immediate removal.¹⁸⁸ But the vast majority of undocumented immigrants make no such claim and are removed within two days.¹⁸⁹ Thus, under current U.S. procedures, approximately 4000

184. At the hearing, the judge determined the validity of the officer's original finding about the individual's eligibility for admission. Asylum seekers requested asylum protection at these hearings.

185. APR. 1998 GAO REP., *supra* note 183. Others withdrew their applications for admission, were granted waivers, were paroled into the United States, were detained, or were turned over to another enforcement agency. *Id.*

186. See Immigration and Nationality Act § 212(a)(6)(C) (1997), 8 U.S.C. § 1182 (1998). Section 212(a)(6)(C) subjects to this screening "any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or had sought to procure or has procured) a visa, other documentation or admission into the United States or other benefit provided under the Act . . ." An individual who has a valid nonimmigrant visa who the inspector suspects procured the visa through fraud, because for example he suspects that the immigrant actually intends to remain in the United States permanently, would also be subject to expedited removal under section 212(a)(6)(C). See, e.g., Anthony Lewis, *It Can Happen Here*, N.Y. TIMES, Sept. 8, 1997, at A23 (Chinese businesswoman, traveling on a valid visa, was subject to expedited removal because inspector mistakenly believed her visa was procured by fraud).

187. See Immigration and Nationality Act § 212(a)(7) (1997), 8 U.S.C. § 1182 (1998). Section 212(a)(7) covers immigrants who do not have valid travel documents (including expired or incorrect visas or passports) and anyone who is not "in possession of a valid unexpired immigrant visa."

188. All noncitizens are inspected by a primary inspector at the airport or border. The removal orders are made during the course of inspections at these ports of entry. If a primary immigration officer suspects that an individual procured his documents by fraud or does not possess travel documents, the officer is required to refer the arriving individual to a second inspector for screening. Individuals who explain that they fear persecution, fear returning to their home country, or want to apply for asylum at the secondary inspections interview are not ordered removed. 8 C.F.R. § 235.3(b)(4) (1999).

189. APR. 1998 GAO REP., *supra* note 183, at 40, 44.

individuals per month are ordered removed from airports or borders and are immediately sent back to their country of nationality by an immigration inspector.¹⁹⁰ Only an average of 200 people per month indicate a fear of persecution in their country of nationality at these initial screening interviews.¹⁹¹

Those individuals who express a fear of being returned or who request asylum protection are then taken to INS detention facilities.¹⁹² At the detention centers they are subject to a second screening, commonly known as a "credible fear interview." There, an asylum officer¹⁹³ interviews them to determine whether their asylum claims are credible.¹⁹⁴ Only those who establish that they have a credible fear of persecution¹⁹⁵ at these interviews are eligible for a hearing before an immigration judge.¹⁹⁶ Approximately twenty percent of those sent to credible fear interviews are determined not to have a credible fear of persecution and are screened out of the process.¹⁹⁷

190. See Immigration and Nationality Act § 235(b)(1)(A)(I) (1997), 8 U.S.C. § 1225 (1998). Removal orders are not subject to appeal or judicial review and carry a five year bar from reentering the country. More than 35,000 individuals were summarily removed from the United States in the first three quarters of 1998. See Inspections Processing Activities Report, INS Form G-22.1, column F (1998) (on file with author).

191. APR. 1998 GAO REP., *supra* note 183.

192. Section 235 of the Immigration and Nationality Act provides that: "[a]ny alien subject to [a credible fear interview] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." Immigration and Nationality Act § 235(b)(1)(B)(iii)(IV) (1997), 8 U.S.C. § 1225 (1998).

193. The interviews are conducted by asylum officers who have had special training in "country conditions, asylum law, and interview techniques" and are supervised by an officer with the same training and who has had "substantial experience adjudicating asylum applications." Immigration and Nationality Act § 235(b)(1)(E) (1997), 8 U.S.C. § 1225 (1998).

194. The INS has installed offices for asylum officers in several detention centers and they regularly conduct most credible fear interviews at detention facilities. See Immigration and Naturalization Service, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997) (stating an intention for most credible fear interviews to be conducted at detention centers). Asylum officers who conduct credible fear interviews have offices in INS service processing centers and contract facilities, including for example, in San Pedro, California, Queens, New York, and Elizabeth, New Jersey.

If the "port of arrival is not near [an INS] detention facility and it is impractical to transport the alien to [an INS] facility, the alien may be detained in other [INS-approved] detention sites, such as local or county jails." *Id.* In such cases the credible fear interviews are conducted in the detention center or, if the INS maintains a local asylum office, at that office. For example, credible fear interviews are conducted in the Arlington, Virginia, asylum office for people who arrive at the Dulles International Airport. The INS transports the asylum seeker from the local county or city jail where she is detained to the asylum office for the interview. In other jurisdictions that are not located close to an INS asylum office, the asylum officer will travel to the detention facility to conduct the credible fear interview. *Id.* at 10319-10320. For example, asylum officers from Los Angeles travel to El Centro, California, and to Arizona to conduct credible fear interviews. Interview by Michele Pistone of George Shioura, INS Asylum Officer (Feb. 6, 1998) (on file with author).

195. The term "credible fear of persecution" is defined by statute to mean "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." Immigration and Nationality Act § 235(b)(1)(B)(v) (1997), 8 U.S.C. § 1225 (1998).

196. See Immigration and Nationality Act § 235(b)(1)(B) (1997), 8 U.S.C. § 1225 (1998).

197. INS FACT SHEET, UPDATE ON EXPEDITED REMOVAL 2 (July 9, 1997) [hereinafter JULY 1997 FACT SHEET]. The negative credible fear finding is reviewable by an immigration judge at the request of

As a consequence of the new expedited removal laws, the class of arriving immigrants that is sent to detention centers to apply for asylum protection before immigration judges is a narrowly selected subset of the undifferentiated and substantially larger group that detention was originally designed to deter.¹⁹⁸ Most of the other thousands of arriving undocumented individuals have been screened out through the expedited removal process and swiftly removed from the United States back to their home countries, many without ever reaching a detention center.¹⁹⁹

Moreover, under current laws, these detained asylum applicants have already passed two separate screenings by government official—an INS secondary inspector and an INS asylum officer—and have been found to have credible claims for asylum. Nonetheless, under current practices, the vast majority of asylum seekers whose claims are deemed credible at these two screenings are detained by the INS from the time they enter the country until the conclusion of their removal hearing before immigration judges.²⁰⁰ Any review of the judges' decisions typically spans a period of at least several months.

2. IIRIRA Reduced the Potential for Abuse of the Asylum Process

In addition to the fact that the class of people subject to detention today is significantly different and substantially smaller than the group that the detention policies were originally designed to deter, IIRIRA also sharply reduced, or eliminated completely, the inducements that many thought promoted gaming of the asylum system in the past.²⁰¹ When the detention policy was first adopted as a means of deterring undocumented immigration, the asylum adjudication process that was in place varied greatly from the process that exists today. At that time, people were paroled into the country while they awaited their immigration court hearings. Because of significant backlogs in the adjudication of asylum claims, which were primarily due to a lack of sufficient resources, applications often remained on file for months or even years before they were addressed.²⁰² Asylum applicants could work

the applicant within seven days. Immigration and Nationality Act § 235(b)(1)(B)(iii)(III) (1997). Immigration judges confirm asylum officers' negative credible fear findings in about 83% of the cases appealed to them. APR. 1998 GAO REP., *supra* note 183, at 51.

198. As a result, only approximately 160 individuals are detained per month, as opposed to the hundreds of thousands originally feared by the U.S. policymakers who implemented the stricter detention policies of the 1980s.

199. See Immigration and Nationality Act § 235(b)(1)(A) (1997), 8 U.S.C. § 1225 (1998).

200. *The Immigrant Lockup*, *supra* note 17; Smothers, *Immigrants in Federal Center*, *supra* note 17; McDonnell, *supra* note 17.

201. See *Restructuring of the U.S. Immigration and Naturalization Service Before Immigration and Claims Subcomm. of the House Judiciary Comm.*, 104th Cong., 2d Sess. (May 21, 1998) (statement of Diana Aviv, Associate Executive Vice President for Public Policy, Council of Jewish Federations).

202. In 1981, for example, 61,568 new asylum applications were filed with the INS, but only 4521 cases were completed. 1996 STAT. Y.B., *supra* note 112, at 87. With respect to filings made in that one year alone, 57,000 cases were backlogged. Those backlogs multiplied in subsequent years. By 1991, the system was backlogged by 150,000 applications. U.S. GEN. ACCT. OFF., PUB. NO. GAO/GGD-94-101,

legally in the United States throughout this period; an individual could receive a work permit upon submitting an asylum application to the INS, regardless of the merit of the asylum claim. Moreover, the previous system did not impose any sanctions on frivolous asylum applicants. The combination of these factors was perceived by many to promote the filing of frivolous asylum claims.

However, since 1995, the Executive Office of Immigration Review (EOIR) and the INS have taken several significant steps, many of which were later codified in IIRIRA, to address the perceived problems in the asylum adjudication process.²⁰³ In particular, under the new laws, asylum seekers are no longer eligible for a work permit upon filing an application for asylum.²⁰⁴ Therefore, the filing of a frivolous asylum application no longer benefits people who merely want to obtain work authorization. In addition, because the INS and EOIR increased their staffs of asylum adjudicators after 1995, claims are now being decided at record speed.²⁰⁵ Indeed, current laws require adjudication of asylum claims within 180 days.²⁰⁶ Thus, the prospect of legally working for months or years pending adjudication of one's case has been eliminated. IIRIRA also imposes sanctions for filing frivolous asylum claims, including disqualifying all frivolous applicants from receiving any benefits under the INA.²⁰⁷ Together, these changes to the asylum adjudication process, coupled with other restrictive immigration policies,²⁰⁸ have

INS USER FEE: INS WORKING TO IMPROVE MANAGEMENT OF USER FEE ACCOUNTS 23 Figure 5 (1996) [hereinafter 1996 GAO REPORT]. Two years later, approximately 300,000 asylum applications were in the backlog. *Id.* In 1994, an INS official explained to the GAO that "without any staff increases, INS expected to process about one-third of the total applications received in fiscal year 1993." *Id.* at 23. The GAO reported that "[a]t the fiscal year 1993 staffing level and completion rate of about 40,000 applications per year, INS would take over seven years just to eliminate the existing backlog and not process any new applications." *Id.*

203. While these changes were conceived by the INS as a means of discouraging the filing of frivolous asylum applications by people already in the United States, I believe that they also served to deter unmeritorious applicants from coming to the United States. That is, by eliminating the work permit and other incentives that favored taking the risk of trying to enter the United States without proper travel documents, these regulatory and statutory changes deterred undocumented immigrants from unlawfully attempting to enter the United States.

204. See 8 C.E.R. § 208.7(a)(1) (1997). Now an asylum applicant is not eligible for a work permit "prior to 180 days after the filing of the application for asylum." Immigration and Nationality Act § 208(d)(2) (1997), 8 U.S.C. § 1158 (d)(2) (1997). The INS has 30 days from the date of filing of the work authorization application to grant or deny the work permit, but "no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application." *Id.* If asylum is denied within 150 days of the asylum application's receipt by INS, then the applicant is ineligible for a work permit.

205. Since these reforms took effect in January 1995, asylum officers increased more than fivefold the number of claims they adjudicate in a year. For example, during 1992, approximately 10,500 asylum cases were adjudicated by asylum officers. In contrast, in 1996, soon after the reforms took effect, more than 62,000 cases were adjudicated by the asylum office. See 1996 STAT. Y.B., *supra* note 112, at 87.

206. See Immigration and Nationality Act § 208(d)(5) (1997), 8 U.S.C. § 1158 (d)(5) (1998).

207. See Immigration and Nationality Act § 208(d)(6) (1997), 8 U.S.C. § 1158 (d)(6) (1998).

208. For example, IIRIRA imposes bars on reentry for individuals who attempt to enter the country unlawfully and on individuals who are ordered deported. See Immigration and Nationality Act § 212(a)(9)(A) (1997), 8 U.S.C. § 1182 (a)(9)(A) (1998).

sharply reduced the possibility that the asylum system is an avenue for overcoming otherwise strict U.S. immigration laws in an effort to gain work authorization and later permanent residence in the United States. As a result, unmeritorious asylum applications are further deterred.²⁰⁹

In sum, before the INS began using detention to deter arriving undocumented individuals in the early 1980s, if it was faced with an influx of thousands of undocumented individuals, some of whom were asylum seekers and some of whom were not, its only option would be to release all such individuals into the community, grant them work authorization, and hope that they would appear for their immigration court hearings, which would not take place until months or years later. In contrast, under the post-IIRIRA system, expedited removal procedures screen arriving individuals once they arrive at the border. Those who are not entitled to remain in the United States are subject to immediate removal. They are not entitled to hearings before immigration judges or to work permits. Only those who establish to U.S. government officials at secondary inspections and again during credible fear reviews that they are entitled to remain are eligible for hearings before immigration judges.

These changes, however, have not caused the INS to reconceptualize the need for detention post-IIRIRA. Rather, it continued on as before, without recognizing that the class of individuals subject to detention post-IIRIRA only includes those found to have credible fears of persecution and that the incentives for filing frivolous claims have been largely eliminated. As a result, the INS detains credible asylum seekers pursuant to a system designed to deter an entirely different group of people.

Deterrence, of course, must be understood to mean no more than discouraging *unmeritorious* asylum claimants from abusing the asylum adjudication process to gain undeserved protection in the United States; otherwise, it would be inconsistent with domestic laws and international treaty obligations that offer protection from return to genuine asylum seekers.²¹⁰ Since deterrence, properly defined, has already been achieved through IIRIRA's statutory changes, the use of detention for deterrence purposes has become an outdated remedy for a problem that no longer exists. Those who are cur-

209. In 1996, the year after the reforms took effect, the number of affirmative asylum applications filed with the INS fell by approximately 16%. See 1996 STAT. Y.B., *supra* note 112, at 87. Pre-IIRIRA, approximately 8,000 individuals who arrived at the U.S. borders without proper documentation applied for asylum each year. Since the expedited removal provisions of IIRIRA went into effect, that number has declined to only approximately 2,600 individuals per year. MARCH 1998 FACT SHEET, *supra* note 16.

210. The United States asylum laws were adopted from the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1968) [hereinafter *Protocol*]. The United States acceded to the Protocol in 1968. The Protocol provides that by ratifying it, all signatory nations are also bound by Articles 2-34 of the Refugee Convention. Protocol, art. 1(1). The right to seek asylum protection was incorporated into United States law in the Refugee Act of 1980. Immigration and Nationality Act § 101(a)(42).

rently being subject to detention are not people who the United States should want to discourage from pursuing their claims; rather, they are U.S. government-certified "credible" asylum seekers.

B. Likelihood of Absconding is Reduced by IIRIRA

Given that the deterrence rationale as applied to undocumented arriving asylum seekers has been undermined by IIRIRA, the weight given to the absconding rationale in parole decisions must be examined through a "prism" in which the need for deterrence is not substantial. As mentioned in Part IV.A *supra*, historically, in such circumstances, the absconding rationale was not thought sufficient to justify widespread detention of undocumented individuals.

The absconding rationale should also be reevaluated post-IIRIRA strictly on its own merits because, as explained below, just as IIRIRA eliminated the utility of detention to deter frivolous asylum claims, it also decreased in several ways the probability that asylum seekers who are released from detention will abscond pending the adjudication of their claims on the merits.

First, given that under IIRIRA, claims of the vast majority of asylum seekers in detention have already been found by government officials to be credible, they are more likely to want to pursue their claims in immigration court.²¹¹ This is particularly true since there are many benefits to receiving asylum protection. For example, once an applicant is granted asylum, she can immediately apply for work authorization and begin to earn money to support herself.²¹² She can also apply for a refugee travel document, which would authorize her to travel outside of the United States.²¹³ In addition, one year after receiving asylum, the applicant can apply to the INS to adjust her immigration status to permanent residency and to apply for legal status for her spouse and children. All of these incentives favor the individual's appearance at her immigration hearings.²¹⁴ Consequently, the potency of the absconding rationale is minimal in a post-IIRIRA world.²¹⁵ Indeed, Senator Spencer Abraham, Chairman of the Senate Subcommittee on Immigration, recently recognized that "asylum seekers have strong incentives to show up for their asylum hearings, particularly after they have made the threshold showing that they have a so-called 'credible fear' of persecution in their home countries."²¹⁶ He explained that "Congress recognized this when it

211. See *Bertrand v. Sava*, 684 F.2d 204, 217, n.16 (2d Cir. 1982) (noting that "the more likely it is that an alien's application will succeed, the less likely it is that he will abscond while on parole"). See discussion of Vera Institute for Justice, Appearance Assistance Program, *infra* at Part VII. D. 2.

212. See 8 C.F.R. § 208.7 (1998).

213. See 8 C.F.R. § 208.8, 8 C.F.R. § 223.2 (1998).

214. If detention is necessary at all, the need would arise only in the cases of individuals who were denied asylum protection at their hearings.

215. See *supra* note 170.

216. *INS Oversight and Reform: Detention: Hearing Before the Subcomm. on Immigration of the Senate Comm.*

mandated the detention of asylum seekers during the brief period before they have demonstrated credible fear, but did not require detention after credible fear has been shown.”²¹⁷ Findings by the Commission on Immigration Reform lend further support. In its 1997 Report to Congress, it found that post-IIRIRA the risk of absconding by those deemed by asylum officers to have credible claims was minimal enough not to warrant the use of “scarce detention resources” to detain them.²¹⁸

C. *The Safety Rationale*

Finally, the safety rationale also has been used to justify detention by the INS. Although there is a paucity of evidence that quantifies the risk of criminal activity by asylum applicants in general, the safety rationale certainly retains some visceral appeal. However, as with absconding, post-IIRIRA the safety rationale as applied to asylum claimants also must be evaluated in light of the substantially reduced need for deterrence. Moreover, in light of the fact that the rationales of deterrence and absconding have been undercut by IIRIRA’s changes, serious questions exist as to whether the safety rationale in isolation can be deemed sufficient to justify detention. Obviously, the use of public safety concerns, by themselves, to deny parole absent a demonstrated showing of prior criminal activity in a particular case is particularly troubling when, as here, there are no statistics quantifying the rate of asylum seeker criminal activity in general.

VI. BUREAUCRATIC BIASES FAVOR DETENTION OVER RELEASE

In light of the costs of detention, why has the INS not taken into account in asylum seeker parole decision-making that the events that initially prompted its reliance on detention, i.e., to deter influxes of groups of undifferentiated, undocumented individuals, have been substantially addressed by IIRIRA, thus calling into question the utility and need of detention post-IIRIRA of credible asylum seekers?

The answer derives from a combination of bureaucratic realities that, in the eyes of the INS bureaucracy, make a deterrence-inspired, “bed-centric” policy preferable to one focused on the ostensible detention rationales of preventing absconding and protecting the public safety. In particular, the bed-centric policy is: (1) more consistent with the dominant enforcement

on the Judiciary, 105th Cong., 2d Sess. (1998) (statement of Senator Spencer Abraham, Chairman of the Subcommittee on Immigration).

217. *Id.*

218. U.S. Commission on Immigration Reform, U.S. Refugee Policy: Taking Leadership, A Report To Congress 29–30 (1997). Similarly, Professor Peter Schuck found that the most obvious group of detainees for prehearing release, because their “risk of flight is low,” are those who have demonstrated a credible fear of persecution to government officials. Schuck, *supra* note 176, at 675, n.8.

mission, (2) easier to apply, (3) more appealing to the bureaucratic instinct for self-preservation, and (4) less depletive of the appropriated budget.

A. Bureaucratic Performance Concerns Favor Detention over Parole

The INS is charged with what are often considered competing missions. First, the INS is charged with enforcing the immigration laws that prohibit entry without proper documents and promote the removal of unauthorized individuals from the United States. In addition, the INS has a service function involving adjudicating applications for immigration and naturalization benefits available under the INA.²¹⁹ Critics argue that the INS's enforcement functions frequently overshadow and even undercut its service mission.²²⁰ The INS's interpretation and application of IIRIRA provide ample evidence in support of the critics' charges. For example, the INS has been quick to use IIRIRA to maximize its expanded enforcement mission, yet slow to grasp the implications of IIRIRA for its service function. As a result, the INS has engaged in, *inter alia*, efforts to deport legal permanent residents because of minor offenses committed years before, to deny entry and imprison business travelers with valid visas issued by the State Department, to deport vacation travelers with validly issued visas, and to restart deportation proceedings after fifteen years of inaction.²²¹ All of these actions test the bounds of the INS's expanded enforcement authority. Some of these actions were later retracted under pressure when the INS conceded that it had more discretion under the statute than it first asserted. Nevertheless, the enforcement culture of the INS prevails, particularly among local INS dis-

219. See generally T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION PROCESS AND POLICY* 101-04 (3d ed. 1995); Daniel Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 *GEO. IMMIGR. L.J.* 109 (1996).

220. See generally Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 *INTERPRETER RELEASES* 937, 941 (1998) (explaining historical context of enforcement priority); Demetrios Papademetriou et al., *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 *INTERPRETER RELEASES* 501, 504 (1998) (noting that the "combination of enforcement and service functions . . . has been criticized on the ground that enforcement goals always seem to take precedence over service goals"). Several proposals are currently pending before Congress and the administration to restructure the INS in an effort to separate the service and enforcement missions. See, e.g., H.R. Rep. No. 105-4264 (1998); H.R. Rep. No. 105-3904 (1998); *Meissner Announces INS Restructuring, Splitting Enforcement and Service Roles*, 75 *INTERPRETER RELEASES* 466 (1998); but see Gene McNary, *No Authority, No Accountability: Don't Abolish the INS, Make it an Independent Agency*, 74 *INTERPRETER RELEASES* 1282 (1997).

221. See, e.g., Anthony Lewis, *Bullies at the Border*, *N.Y. TIMES*, June 15, 1998, at A23; Anthony Lewis, *Punishing the Past*, *N.Y. TIMES*, Mar. 30, 1998, at A17; Anthony Lewis, *When it is Unjust*, *N.Y. TIMES*, Dec. 26, 1997, at A39; Anthony Lewis, *That's the Way It Is*, *N.Y. TIMES*, Dec. 19, 1997, at A39; Anthony Lewis, *Now We Are Ashamed*, *N.Y. TIMES*, Dec. 12, 1997, at A35; Anthony Lewis, *Accent the Positive*, *N.Y. TIMES*, Oct. 10, 1997, at A23; Anthony Lewis, *Human, Not Animals*, *N.Y. TIMES*, Sept. 19, 1997, at A31; Anthony Lewis, *It Can Happen Here*, *N.Y. TIMES*, Sept. 8, 1997, at A19; Anthony Lewis, *End of a Dream*, *N.Y. TIMES*, Aug. 29, 1997, at A23; Anthony Lewis, *Is This America?*, *N.Y. TIMES*, Aug. 18, 1997, at A19. These are a few accounts of excessive enforcement vigor by INS officials; numerous others probably go unreported to the press or INS headquarters.

trict offices.²²² Indeed, "specializing in enforcement has been the way to the top at the INS."²²³

Local districts, which have sole authority over parole decisions, resist paroling asylum seekers because they see it as antithetical to their enforcement priorities.²²⁴ There is always a possibility that individuals who are released from detention on parole could fail to appear at their court hearings and consequently complicate efforts by the INS to locate them when they are ordered to be removed. District offices are evaluated in large part based upon the number of individuals removed from their districts each year and not upon the number of asylum seekers released on parole.²²⁵ Paroling asylum seekers is viewed by local districts as undermining the INS's enforcement function since the ability to enforce and effectuate a removal order is directly linked to the ability of the INS to locate the individual who has been ordered to be removed.²²⁶

The possibility, no matter how slight, that asylum seekers will fail to appear at hearings or for removal, thus, weighs heavily against parole. Indeed, critics of the INS's enforcement bias assert that the culture of the INS "has bred an 'enforcement mentality' that 'infects' INS personnel undertaking other tasks. As a result, many adjudicators are thought to begin their tasks with a predisposition to doubt applicants and to deny applications."²²⁷ With the possibility of absconding weighing against parole, and the absence of performance incentives favoring parole of asylum seekers from detention, the tendency of decision makers, whose performance will be based in part on actions of parolees, is to deny parole unless there are not sufficient detention beds.

222. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 371 (1989) ("An agency with a strong mission will give perfunctory attention, if any at all, to tasks that are not central to that mission"). District directors have been trained in enforcement and as a result view it as the agency's primary mission. See Scully, *supra* note 220, at 941 (1998) (recognizing that enforcement personnel "have stood a better chance of reaching senior positions—such as District Directors, for example—than those who work as adjudicators"); Mirra Ojito, *Change in Laws Sets off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1 (quoting statement by former INS prosecutor that "the Agency has become completely enforcement-minded").

223. See Scully, *supra* note 220, at 941 (referring to statement by INS Commissioner Meissner).

224. See Celia Dugger, *In Pursuit of Freedom, Only to Find Prison Bars*, N.Y. TIMES, July 8, 1996, at B1. The fact that local offices favor the INS's enforcement function has been a concern with respect to their ability to serve the needs of asylum seekers since 1990. See 55 Fed. Reg. 30674 (1990) (removing the asylum adjudication function out of the jurisdiction of district directors, "since the [local INS office] is also responsible for enforcement functions").

225. Interview with Paul Virtue, INS General Counsel, in Washington, D.C. (July 21, 1998) (on file with author).

226. As Commissioner Meissner acknowledged, "the INS's ability to detain aliens is directly linked to our ability to remove them from the United States." *The President's Fiscal Year 1999 Budget Request: Before the Subcomm. on Commerce, Justice, State and the Judiciary of the Senate Comm. on Appropriations*, (Mar. 3, 1998) (testimony of Doris Meissner, INS Commissioner).

227. Papademetriou et al., *supra* note 220, at 504 (1998) (citing critics of the INS's enforcement mentality).

B. Bureaucratic Ease Favors Detention over Parole

Local district offices make parole decisions based on bed availability in part because it is easier to find out whether there is an empty bed in a detention facility than it is to apply the rationales to the particular facts of each individual case. It is simply human nature to favor methods that are least taxing of one's time and energy, and bureaucrats are not immune from this natural impulse.²²⁸ Businesses in a capitalist society have numerous substantial incentives—both positive and negative—to struggle against this tendency, e.g., the lure of financial reward on the one hand, and the specter of bankruptcy on the other. With government bureaucracies, however, the incentives that most affect behavior in a private business are non-existent, or at least much less readily apparent. In such an environment, the bureaucratic analogue to Newton's first law—bodies at rest tend to remain that way—is especially likely to find itself supported by considerable empirical proof, unless something comes along to disturb the rest. In a government bureaucracy, that something must be a heightened sense of mission or a managerial insistence upon adherence to new standards, with severe consequences for failing to comply.

There is no heightened sense of mission within the Service about the parole program for asylum seekers because the program "has not been a core commitment of the agency" for years.²²⁹ Indeed, as explained above, the sense of mission throughout the INS is antithetical to parole; it is focused predominately on the Service's enforcement function.²³⁰ And, it is well recognized, an "agency with a strong mission will give perfunctory attention, if any at all, to tasks that are not central to that mission,"²³¹ much less to tasks that are antithetical to the primary mission.

As far as compelling adherence to administrative parole policies by the imposition of negative sanctions, commentators and former high-ranking INS officials have noted that there is no sense of accountability by local districts to INS headquarters.²³² According to some commentators, as a general

228. WILSON, *supra* note 222, at 231.

229. Dugger, *supra* note 224 (quoting then-Executive Associate Commissioner T. Alexander Aleinikoff).

230. See footnotes 219–227 and accompanying text.

231. WILSON, *supra* note 222, at 371 (1989).

232. The lack of accountability by INS field offices to headquarters is one of the concerns that served as an impetus for recent proposals to reform the INS. See, e.g., Meissner *Announces INS Restructuring*, *supra* note 220, at 466; Papademetriou et al., *supra* note 220, at 501.

With respect to paroling asylum seekers, the Service recognizes that district directors often ignore findings that asylum seekers have credible claims and community support for release. See 1996 APPO Memo, *supra* note 20, at 5 (recognizing that in some districts "little or no correlation exists between recommendations [for parole by APPO officers] and parole decisions"). Such discrepancies often go unexplained by the district directors to central headquarters.

Efforts by the central office to make district directors accountable for discrepancies between release records and positive parole criteria have seen little success. For example, in their 1996 Evaluation of the APPO program several INS offices recommended that "steps be taken to ensure conformity with the program throughout the districts." In their opinion, the most desirable of the options was to call for

rule, “[p]olicies and practices vary from district to district, headquarters-to-field communication is notoriously poor, and managers are rarely—if ever—held accountable for neglecting the service side of the agency’s work or for tolerating enforcement practices that are at variance with agency policies.”²³³

C. *Detention Is Appealing to the Self-Preservation Instinct*

In addition to the fact that a detention policy based on available bed space is easy to apply and facilitates local offices’ enforcement mission, the policy appeals to the instinct of district directors to preserve their professional status. It is natural for district directors to prefer to make the mechanical decision of whether or not to parole an individual asylum seeker based on available bed space rather than to apply the various detention considerations in a discretionary manner because of the greater potential for blame to be assessed individually when a discretionary decision goes awry. For example, there is always a possibility that someone who is released from detention could pose a danger to the community. If a parolee does in fact cause harm to another person, the district director under whose watch that individual was released could be deemed responsible for not recognizing and protecting against the potential for violence. If, on the other hand, the district director resists paroling individuals from detention unless lack of detention space forces her hand, the blame could be deflected from the district director to the fact that the system lacks sufficient beds. Thus, by making decisions based on the amount of available detention space, the district director shields herself from responsibility for the actions of parolees.

The current detention system also appeals to directors’ self-preservation instinct for a second reason. In the past, the INS has faced findings of systematic bias by its adjudicators against specific groups of non-citizens.²³⁴ Mechanical application of detention and parole policy based on bed availability offers protection against the possibility that truly individual reviews could be attacked as exhibiting a policy of systematic bias or discrimination

review from outside the district in the event that a particular district director’s parole decisions varied from the APSO recommendation by a given percentage. Efforts were made to systemize review in the event of a 20% variance between APSO findings that the parole standards had been met and a district director’s decisions not to parole or to parole on a bond that the asylum seeker was unable to meet. See DRAFT INS APSO PROCEDURES MANUAL 21 (Aug. 28, 1996) (on file with author). In the event of a 20% variance, the district would be required to submit a written explanation to headquarters. However, these procedures were never formalized.

233. Papademetriou et al., *supra* note 220, at 505 (1998).

234. See, e.g., *Orantes-Hernandez v. Thornburg*, 919 F.2d 549 (9th Cir. 1990) (Salvadoran nationals challenged practices that prevented the class from pursuing asylum claims); *American Baptist Church v. Thornburg*, 760 F.Supp. 796 (N.D. Cal. 1991) (Salvadoran and Guatemalan nationals alleged a pattern of discrimination by immigration officials who adjudicated their asylum claims); *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980) (challenging actions that single out Haitians for discriminatory treatment); see also MUSALO, *supra* note 151, at 86–97.

in the decision-making process, an allegation that could easily threaten further career advancement.

D. *The User Fee, a Budgetary Anomaly, Favors Detention*

An additional consideration favoring the current system arises from a budgetary anomaly that facilitates detention of asylum seekers. Section 286 of the INA authorizes the Attorney General to charge and collect an "inspections user fee,"²³⁵ in the amount of six dollars per individual, which is added to the purchase price of international airline tickets and collected by the airlines.²³⁶ In fiscal year 1997, more than \$360 million was deposited into the inspections user fee fund.²³⁷ The use of these funds is circumscribed by statute: the INA sets aside these dedicated funds for financing immigration inspections, detention and removal of inadmissible individuals, and immigration support.²³⁸

Detention is funded out of this account for "inadmissible aliens arriving on commercial aircraft and vessels" or individuals who "attempted illegal

235. General authority for government agencies to assess user fees derives from statute. See 31 U.S.C. § 9701 (1994) (authorizing agencies to define special services they provide to segments of the population and to charge fees for those services). The inspections user fee was first established in 1986, when it was set at five dollars per international airline passenger. See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341, 3341-53 (1986). The 1994 Department of Justice Appropriations Act increased the fee to six dollars. Pub. L. No. 103-121, 107 Stat. 1153, 1161 (1993).

Before Immigration and Nationality Act section 286 was enacted, airline carriers were responsible for detaining asylum seekers who arrived in the United States on their airplanes and were undocumented pending adjudication of their asylum claims. See Immigration and Nationality Act § 233 (1997), 8 U.S.C. § 1223 (1985). The enactment of section 286 shifted that responsibility in most cases from airline carriers to the INS. See *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1260 (3d Cir. 1994); *Linea Air Nacional de Chile v. Sale*, 865 F.Supp. 971, 978 (E.D.N.Y. 1994) *aff'd*, *Linea Air Nacional de Chile v. Meissner*, 65 F.3d 1034 (2d Cir. 1995); see generally Constance O'Keefe, *Immigration Issues and Airlines*, 59 J.A.L. & COM. 357 (1993). For a general discussion of several court challenges in the early 1990s by airlines of the INS's position that airlines pay for the detention of certain asylum seekers see Kathleen T. Beesing, Note, *Who Pays Detention Costs When Aliens Seek Asylum at the Borders of the U.S.? Relief May Be In Sight for the Transportation Industry*, 22 TRANSP. L.J. 495 (1995).

236. The fee does not apply to travel between the United States and Canada, Mexico, or certain adjacent islands. Immigration and Nationality Act § 286(e)(1) (1997), 8 U.S.C. § 1356 (E)(1) (1988). Airlines and other carriers who collect the user fees remit them to the INS. Immigration and Nationality Act § 286(f)(3) (1997), 8 U.S.C. § 1356(f)(3) (1988). The fees are statutorily earmarked for the "immigration inspection of each passenger arriving at a port of entry in the United States." Immigration and Nationality Act § 286(d) (1997), 8 U.S.C. § 1356(d) (1988).

237. Immigration User Fee Account by Program, Inspections User Fee Advisory Committee Meeting, Agenda and Reference Material (May 6, 1998) [hereinafter May 1998 User Fee Advisory Committee Meeting Agenda] (on file with author).

238. The majority of the money is used to fund inspections, detention and removal, and immigration support: of the \$360 million collected in fiscal year 1997, \$218 million (60%) was used for inspections and \$63 million (17%) was allocated to detention and removal. *Id.* at 5. The INA also authorizes user fee funds to be used for "providing overtime immigration inspections services for commercial aircraft or vessels," administrating "debt recovery, including the establishment and operation of a national collections office," expanding and operating information systems for "nonimmigrant control and debt collection," and detecting "fraudulent documents used by passengers traveling to the United States." Immigration and Nationality Act § 286(h)(2)(A) (1997), 8 U.S.C. § 1356(h)(2)(A) (1988).

entry into the United States through avoidance of immigration inspections at air or sea ports-of-entry.²³⁹ Included in these categories are asylum seekers who were found inadmissible at airports and were sent to detention facilities pursuant to the expedited removal procedures.²⁴⁰ Indeed, asylum seekers account for the most person-days-in-detention²⁴¹ within the group of inadmissible individuals who are detained under the provision.²⁴² Most other inadmissible individuals are subject to expedited removal and are usually deported within two days of their arrival.²⁴³

Thus, most asylum seekers do not compete with other detainees for the INS's limited detention resources. Resources to fund most asylum seekers in detention are separately appropriated through the user fee.²⁴⁴ In 1997, approximately 1500 detention beds were funded by the inspections user fee, the majority of which were located within close proximity to the largest airports of entry.²⁴⁵ By statute, these "user fee beds" cannot be used to detain anyone other than "inadmissible aliens arriving on commercial aircraft."²⁴⁶ In other words, they may not be used to detain, for example, criminal detainees.

An able and well-financed advisory committee, comprised primarily of representatives of airline carriers, monitors the inspections user fee account to ensure that it is not used outside of the statutory parameters.²⁴⁷ Since air-

239. Immigration and Nationality Act § 286(h)(2)(A)(v) (1997), 8 U.S.C. § 1356(h)(2)(A)(v) (1988).

240. Not all asylum seekers are eligible to be detained through user fee funding. Asylum seekers who do not enter the United States by air and individuals who request asylum after having entered the United States without inspection are not detained in user fee detention beds.

241. The number of person-days-in-detention is calculated by adding together the total number of days each individual detainee is held in detention.

242. Interview with Paul Virtue, INS General Counsel, Washington, D.C. (July 21, 1998) (on file with author). Undocumented arriving individuals who are ordered removed at the airport or border spend, on average, only two days in detention. *See* APR. 1998 GAO REP., *supra* note 183, at 44. In contrast, asylum seekers spend an average of 92 days in detention in Queens, New York, 74 days in Los Angeles, California, 44.25 days in San Francisco, California, 62.5 days in Miami, Florida, and 88 days in Newark, New Jersey. Karen Musalo & Deborah Anker, *Report on the First Year of Implementation of Expedited Removal* (Expedited Removal Study, Int'l Hum. Rts. & Migration Project, Markkula Center for Applied Ethics, Santa Clara Univ.), 1998, at 55, table 7.

243. *See* Immigration and Nationality Act § 235 (1997), 8 U.S.C. § 1225 (1988). The Government Accounting Office estimates that at least 95% of the aliens who received expedited removal orders were removed either that day or the day after. *See* APR. 1998 GAO REP., *supra* note 183, at 44.

244. INS Immigration User Fee Review, Bi-Yearly Notice of User Fee Account Status, 62 Fed. Reg. 26570 (May 14, 1997).

245. The user fee detention beds were allocated in 1998 as follows: 200 beds in the Queens, New York contract facility; 170 beds in the Elizabeth, New Jersey contract facility; 225 beds in the Philadelphia district (close to Washington, D.C., New York and New Jersey); 260 beds in the San Pedro SPC outside of Los Angeles; and 100 beds in the Krome SPC in Miami. Interview with Rubin Cortina, INS Director of Detention Operations & Bill Buddenberg, INS Detention and Deportation Officer, Washington, D.C. (July 23, 1998) (on file with author). In addition, 100 detention beds are funded by the inspections user fee in the INS's western region, and smaller amounts are funded in areas close to other major ports of entry. For example, 16 detention beds are funded by the user fee in the Washington, D.C. area. *Id.*

246. Immigration and Nationality Act § 286(h)(2)(A)(v) (1997), 8 U.S.C. § 1356(h)(2)(A)(v) (1988).

247. The advisory committee is authorized by statute. *See* Immigration and Nationality Act § 286(k) (1997), 8 U.S.C. § 1356(k) (1988). The inspections user fee advisory committee meets at the INS twice

line passengers pay the user fees, which are reflected in higher airline ticket prices, the airlines have a considerable interest in ensuring that the funds are used for immigration operations associated with travel by air, and not for unrelated operations. And, indeed, the airline industry places considerable pressure on the INS to use the funds according to the statutory constraints. As Janet Thomas, the Director of Facilitation for the Air Transport Association of America and a member of the immigration user fee advisory committee has explained, the "airlines keep a careful eye on the use of beds by the INS, [since] we don't want the INS to use user-fee beds for non-user-fee individuals."²⁴⁸

Funds to finance the detention of most detainees other than inadmissible individuals arriving by airplane, on the other hand, are specifically and separately appropriated by Congress. For years, the INS has complained that Congress has not appropriated enough funds for it to detain all of the people who could legally be detained. Indeed, as mentioned above, the INS estimates that in fiscal years 1998 and 1999 it would need between 20,000 to 32,000 beds and 20,000 to 35,000 beds, respectively, if it were able to locate and process all individuals "subject to detention" pursuant to IIRIRA's mandatory detention provisions.²⁴⁹ And, due to insufficient detention space, the INS reported that, in the six-month period ending July 31, 1997, it was unable to detain approximately 13,000 individuals who otherwise would have qualified for detention.²⁵⁰

Since funds allocated through the user fee account cannot be used to fund the local district's general detention or other needs,²⁵¹ there is no opportunity cost to detaining asylum seekers who arrive by air when user fee beds are available. If the beds remain "vacant," there will only be a surplus in the user fee account. But such a surplus could not be captured by the local districts and reallocated to their other needs. "The inability of public managers to capture surplus revenues for their own use alters the patterns of incentives at work in government agencies."²⁵² In this case, the pattern of incentives created by the user fee favors the use of its revenues to detain asylum seekers.²⁵³

yearly.

248. Telephone Interview with Janet Thomas, Director of Facilitation, Air Transport Association of America (July 17, 1998) (on file with author). Thomas added that there is concern by airlines that "the INS not use the user fee money as a slush fund. There is certainly pressure [on the INS] to spend user fee money for other purposes, and we are always watchful" of that.

249. Second Detention Report, *supra* note 169, at 2.

250. *Id.*

251. See *Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Committee on the Judiciary*, 102d Cong. (Sept. 5, 1996) (testimony of David A. Martin, former INS General Counsel); Interview with Paul Virtue, INS General Counsel, Washington, D.C. (July 21, 1998) (on file with author).

252. Wilson, *supra* note 222, at 120.

253. Moreover, in making a case before Congress for additional appropriated resources, the INS has "to show that it is already using its current resources effectively." See Schuck, *supra* note 176, at 674. Local INS districts cannot show that their detention space is used effectively if their "beds" remain un-

This incentive structure is particularly evident in the parole decision-making of the New York and the New Jersey districts. John O'Malley, Associate Commissioner for Detention and Deportation, noted that with the opening of detention facilities dedicated to detaining user fee individuals in New York and New Jersey,²⁵⁴ "it is less likely that asylum seekers will be released."²⁵⁵ Indeed, statistics show that the average asylum seeker who has established a credible fear of persecution is detained eighty-eight days in the Elizabeth detention facility in Newark, New Jersey, which has 170 beds funded by the user fee account.²⁵⁶ Similarly, the average asylum seeker detained at the 200-bed detention facility in Queens, New York spends ninety-two days in detention.²⁵⁷

In sum, local district directors have multiple incentives to use detention beds to detain asylum seekers and few, if any, constraints on such use. Predictably, their actions are consistent with this pattern of incentives. As a result, asylum seekers who have been determined to have credible fears of persecution and who have substantial incentives to appear at all hearings are detained pending adjudication of their asylum claims, even though all of the evidence indicates that such a practice "is not a good use of scarce detention resources."²⁵⁸

VII. CRIMINAL PRE-TRIAL DETENTION SYSTEM AS A MODEL FOR REFORM

Because of the substantial strength and apparently intractable nature of the institutional biases favoring detention, it would seem to put hope before experience to think that future agency-inspired efforts to improve detention decision-making for credible asylum seekers will succeed when all others have failed. The parole practices of local district offices are unlikely to change significantly as long as bureaucratic incentives and budgetary concerns still favor detention over parole, and, thus, long term results in accord with the prevailing incentive structure can be expected. Accordingly, any

used. But that is exactly what would happen in some of the larger user fee jurisdictions if asylum seekers were not detained. If detention beds funded by the inspections user fee are not used to detain asylum seekers or other inadmissibles who arrive by air, they must essentially "remain vacant." In other words, since the INS is statutorily restricted from using user fee money to pay to detain individuals who do not fall within the scope of the user fee statute, the money will remain unused.

254. The "contract facilities located in Queens, New York and Elizabeth, New Jersey, are for Immigration User Fee detainees." Immigration and Naturalization Service, Immigration User Fee Budget for 1998 and 1999, 63 Fed. Reg. 11,956-02 (1998), at 11 (on file with author).

255. Interview with John O'Malley, INS Deputy Assistant Commissioner for Detention and Deportation, Washington, D.C. (Jan. 22, 1998) (on file with author).

256. Musalo & Anker, *supra* note 242, at 55, table 7.

257. *Id.* Most asylum seekers in New York who are found to have a credible fear of persecution are detained during the preparatory stage of their asylum claims and until their claims are adjudicated by a judge and they are granted asylum.

258. U.S. COMMISSION ON IMMIGR. REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP, A REPORT TO CONGRESS 29 (1997).

efforts to ensure that a release policy for credible asylum seekers becomes viable on a permanent and system-wide basis needs to come as a clear statement from Congress, as, in Newton's terms, an outside force is needed to move a body at rest.

This section proposes legislation that would overcome the narrow institutional biases of the INS while taking into account all legitimate government interests, including the interest in accurate decision-making on the merits of asylum claims. The proposal is based on the system established for pre-trial release decision-making in the federal criminal context. In that context, release before trial is the norm. There are constitutional limits, most notably the Eighth Amendment's proscription against "excessive bail," and statutory limits that usually require the government to release suspected criminals before trial on the merits. The most notable statutory restrictions are found in the Bail Reform Act of 1984 (BRA),²⁵⁹ which limits the use of detention in an effort to protect the arrestee's liberty interest. Collectively, these safeguards provide significant substantive and procedural protections to criminal arrestees.

The BRA is an appropriate model for reform of the asylum parole system because, like asylum prehearing detention, protecting the public safety and limiting the risk of flight have traditionally been goals of the criminal justice system's pre-trial detention programs.²⁶⁰ The BRA's system addresses these two sets of concerns, yet includes substantive protections to facilitate just decision-making. In addition, in both the criminal pre-trial release and the credible asylum seeker parole contexts, deterrence cannot legitimately be considered a leading rationale. Thus, the BRA provides a model that affords ample consideration of the government's legitimate interests in determining whether an asylum seeker who has been determined to have a credible fear of persecution should be released from detention on parole.

A. *Impetus for the Bail Reform Act of 1984*

The policies underlying the Bail Reform Act of 1984 contrasted sharply with previous criminal detention and release policies.²⁶¹ For example, in a significant change from prior law, the BRA authorized courts to incorporate potential danger to the community into their decision-making.²⁶² Before

259. 18 U.S.C. §§ 3141–3156 (1988) [hereinafter BRA].

260. *See, e.g.*, Bail Reform Act of 1984 (codified at 18 U.S.C. §§ 3141–3156 (1984)); District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, Title 1 (1970); Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

261. *See* S. REP. NO. 98-225, at 3185–86 (1983) (explaining that the adoption of the BRA's changes to bail reform laws "marks a significant departure from the basic philosophy of the [1966 statute]"); *see also* Billie Farthing, *An Analysis of the Bail Reform Act of 1984*, 53 TENN. L. REV. 145, 145–46 (1985).

262. Several legal scholars criticized this expansion. *See, e.g., supra* note 121, criticizing the BRA because it "disregards concepts of individual freedom and responsibility . . ."; Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 974 (1985) (arguing that there is no convincing evidence

enactment of the BRA, federal courts were not permitted to detain individuals pending trial based on their potential dangerousness to the community.²⁶³ Thus, when courts were confronted with the decision of whether to release a person thought to be potentially dangerous to society, the common practice was to use "an indirect method of achieving detention through the imposition of financial conditions beyond [the defendant's] reach."²⁶⁴ In describing pre-BRA detention practices, Senator Kennedy wrote: "it appears to be an established practice for judges to set high bail or to jail a suspect because the court is convinced the accused is dangerous and will commit another crime if released."²⁶⁵

The BRA was enacted in response to a growing concern that the then-existing federal bail laws failed in two respects. First, they did not adequately "address the alarming problem of crimes committed by persons on release."²⁶⁶ Second, because of the practice of many judges to use "*sub rosa* preventive detention through the arbitrary imposition of high money bail,"²⁶⁷ the existing bail laws were criticized as arbitrary and unfair. The BRA addressed both concerns. With respect to the problem of crimes committed by people who were released on bail, the BRA gave "the courts ade-

that pre-trial detention will result in less frequent harassment of victims); Lawrence Tribe, *An Ounce of Detention: Preventive Detention in the World of John Mitchell*, 56 VA. L. REV. 371 (1970) (pre-trial detention would relieve public pressure from the "less dramatic and more expensive types of reform that alone might restore peace to urban life.").

263. Rather, the primary purpose of the Bail Reform Act of 1966 [hereinafter 1966 BRA], which was amended by the BRA, was to "de-emphasize the use of money bonds in the federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pre-trial incarceration of poor defendants." S. REP. NO. 98-225, at 3187-88, citing Final Report of the Attorney General's Task Force on Violent Crime, Aug. 17, 1981, at 50-51. The 1966 BRA therefore focused on creating a system to assure the appearance of the defendant at judicial proceedings. At the time, danger to the community and protection of public safety were not permissible factors to be considered in making release decisions. S. REP. NO. 98-225, at 3188. Consequently, many argued that "while the imposition of conditions had apparently been for the purpose of assuring the defendant's appearance at trial, the underlying concern has been the need to detain a particularly dangerous defendant." S. REP. NO. 98-225, at 3193.

264. S. REP. NO. 98-225, at 3194.

265. Kennedy, *supra* note 121, at 428. Senator Kennedy found support for his perception in both legal opinions and scholarship. For example, he cited Judge Marvin Frankel's opinion in *United States v. Melville*, 306 F.Supp. 124 (S.D.N.Y. 1969), in which Judge Frankel wrote:

While "danger to any other person or to the community" is not in itself a proper consideration for pretrial bail in a noncapital case, we doubt that a defendant's powerful disposition to incur further criminal liabilities could be ignored utterly in judging what will "reasonably assure" his appearance for trial . . . [I]t is apparent that in this instance, as in many others familiar to all of us, the statement of the astronomical [amount set for bail] is not meant to be literally significant. It is a mildly cynical but wholly undeceptive fiction, meaning to everyone "no bail." There is, on the evidence adduced, no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set.

Id. at 126-27 (footnotes omitted). Legal scholars found similar practices common. See, e.g., P. WICE, FREEDOM FOR SALE 73-77 (1974); Richard Cohen, *Wealth, Bail and the Equal Protection of the Laws*, 23 VILL. L. REV. 977 (1978); see also Tribe, *supra* note 262. A former director of the Department of Justice's Bureau of Justice Statistics also found this. See Stephen R. Schlesinger, *supra* note 121, at 173 (1986) (noting that bail was used to "fulfill a second, unexpressed, purpose of keeping those defendants who are deemed dangerous in jail in order to prevent them from committing additional crimes").

266. S. REP. NO. 98-225, at 3185.

267. Schlesinger, *supra* note 121, at 188.

quate authority to make release decisions that gave appropriate recognition to the danger a person may pose to others if released."²⁶⁸ By permitting courts to consider the defendant's potential criminality, lawmakers encouraged courts to address detention issues "honestly and effectively."²⁶⁹ Under the BRA, the "defendant would be fully informed of the issue before the court, the government would be required to come forward with information about dangerousness, and the defendant would be given an opportunity to respond directly." In Congress' view, the new bail procedures "promote[d] candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well."²⁷⁰

While the BRA differs sharply from previous law by expressly authorizing courts to detain defendants before trial based on their potential dangerousness to the community, it plainly favors release on personal recognizance.²⁷¹ The BRA permits judicial officers to order pre-trial detention only upon a finding that release on personal recognizance will not reasonably assure the individual's appearance or will endanger community safety.²⁷² As described in detail below, unlike asylum parole decisions, detention determinations under the BRA are not made by partial adjudicators in an ad hoc process; rather, they are made in an open process before judicial officers whose actions and decisions are circumscribed by statute and regulations—a process that ultimately protects defendants' procedural rights.

B. Procedural Protections Afforded in Federal Criminal Pre-Trial Detention

The BRA provides arrestees with a number of procedural rights before pre-trial detention can be ordered. Most importantly, a decision to detain someone pre-trial can be made only after a hearing before a judicial officer.²⁷³ The hearing must be held "immediately upon the person's first appearance

268. S. REP. NO. 98-225, at 3185.

269. S. REP. NO. 98-225, at 3192.

270. S. REP. NO. 98-225, at 3194.

271. See *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985) (noting that "the right to bail should be denied only for the strongest of reasons"). Release on personal recognizance is typically conditioned only on agreeing not to commit additional crimes. 18 U.S.C. § 3142(c)(1)(A). Release may also be conditioned upon "execution of an unsecured appearance bond in an amount specified by the court." 18 U.S.C. § 3142(b).

272. The statutory language provides that before the court decides not to order release on either personal recognizance or an appearance bond, it must determine that "such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." *Id.* If release is ordered, it must be conditioned on the person not committing "a Federal, State, or local crime during the period of release." 18 U.S.C. § 3142(c)(1)(A).

273. Authority to order pre-trial detention is granted by statute to a "judicial officer authorized to order the arrest of a person" pursuant to 18 U.S.C. § 3041. 18 U.S.C. § 3141(a). Section 3041 defines the term "judicial officer" to include any judge or justice of the United States, U.S. magistrate, and those state judicial officers who are authorized to arrest and commit offenders. 18 U.S.C. § 3041. For purposes of this Article, I use the term "court" to refer to these decision-makers.

before the judicial officer," which is usually within forty-eight hours.²⁷⁴ Pre-trial detention issues are typically addressed during the arrestee's first appearance before a judicial officer, thereby diminishing the likelihood that the individual could remain in detention for substantial periods of time without appropriate relief.²⁷⁵ Special rules apply in the case of a defendant who is not a United States citizen or lawful permanent resident, and who is found to pose a risk to the community or a risk of absconding.²⁷⁶ In such cases, the judicial officer must order detention of up to ten days, in order to give the government enough time to contact the INS, before release is determined.²⁷⁷ Although "the deprivation of liberty of up to ten days, [was recognized as] a serious matter,"²⁷⁸ it is balanced against the need for full notification and information.

At pre-trial detention hearings, arrestees are granted an array of additional protections. They are entitled to be represented by counsel,²⁷⁹ to testify on their own behalf, to introduce evidence,²⁸⁰ to present witnesses,²⁸¹ and to cross-examine witnesses against them.²⁸² In addition to procedural protections, the BRA also discourages the inconsistent application of pre-trial detention among arrestees. The BRA enumerates specific and detailed substantive factors that must be considered in each case before ordering pre-trial detention or release.²⁸³ They include such matters as: (1) the nature and cir-

274. 18 U.S.C. § 3142(f). The hearing will only be postponed if one party asks for a continuance. A continuance requested by the defendant may not exceed five days; if requested by the government, it may not exceed three days. *Id.* Arrestees are detained pending the judicial officer's decision on whether to release or detain the individual pending trial.

275. 18 U.S.C. § 3142(f).

276. 18 U.S.C. § 3142(d)(1). These special rules also apply to any person who, at the time of committing the offense, was released pending trial for a felony, was released pending imposition or execution of a sentence, appeal, or completion of a sentence, or was on probation or parole for any offense. *Id.*

277. S. REP. NO. 98-225, at 3200. This provision is adapted from a similar five day period in the District of Columbia bail laws. S. REP. NO. 98-225, at 3200. The Senate Judiciary Committee considered and rejected a five day time limit because it was "too short a period of time in which to expect proper notification and appropriate action by the original releasing body." *Id.*

278. S. REP. NO. 98-225, at 3200.

279. Counsel will be appointed by the government if the arrestee is financially unable to secure otherwise adequate representation. 18 U.S.C. § 3142(f).

280. The presentation of evidence in BRA bail hearings need not conform with the federal rules of evidence. S. REP. NO. 98-225, at 3205. Indeed, hearsay evidence is admissible at BRA detention hearings. *See United States v. Cardenas*, 784 F.2d 937, 938 (per curiam), *vacated as moot*, 792 F.2d 906 (9th Cir. 1986). But courts have warned that in relying on hearsay evidence, the trier of fact should assess its reliability and seek corroboration when necessary. *See United States v. Accerturo*, 783 F.2d 382, 389 (3d Cir. 1986).

281. Indeed, judicial officers often permit arrestees to make a proffer of testimony in lieu of presenting live witnesses. *See, e.g., United States v. Smith*, 79 F.3d 1208, 1209-10 (D.C. Cir. 1996); *United States v. Accerturo*, 623 F.Supp. 746, 754-55 (D.C.N.J. 1985), *remanded* 783 F.2d 382 (3d Cir. 1986); *United States v. Jimenez*, 628 F.Supp. 808, 809 (N.D. Ill. 1986).

282. 18 U.S.C. § 3142(f).

283. These factors are intended to encourage courts to weigh "not only a general consideration of the nature and seriousness of the danger posed by the person's release but also the more specific factors of whether the offense charged is a crime of violence or involves a narcotic drug, whether the defendant has a history of drug or alcohol abuse, and whether he was on pretrial release, probation, parole, or another form of conditional release at the time of the instant offense." S. REP. NO. 98-225, at 3206.

cumstances of the offense charged;²⁸⁴ (2) the weight of the evidence;²⁸⁵ (3) the history and characteristics of the defendant, including the defendant's character, physical and mental condition, family ties, employment, financial resources, and community ties; (4) the defendant's previous record of court appearances;²⁸⁶ and (5) the nature and seriousness of the danger to the community or to any person posed by the defendant's release.²⁸⁷

In assessing these factors, pre-trial detention can be resorted to only if the two underlying reasons for authorizing such detention—ensuring the defendant's appearance at trial and the safety of the public—cannot be satisfied in any other way. Thus, even in cases where there is a strong possibility that public safety could be endangered or that the defendant could abscond, pre-trial detention is appropriate only if less restrictive means of conditioning the defendant's release to ensure the public's safety and prevent the defendant's flight are unavailable.

Consistent with its bias in favor of release, the BRA encourages decision makers to consider several optional conditions that courts may adopt in conditioning release.²⁸⁸ These include, *inter alia*: (1) remaining in the custody of a designated person;²⁸⁹ (2) abiding by specific restrictions with respect to personal associations, place of abode or travel, such as house arrest or limitations on travel;²⁹⁰ (3) reporting on a regular basis to a designated law enforcement or similar agency;²⁹¹ (4) complying with a curfew;²⁹² (5) undergoing medical or psychiatric treatment;²⁹³ (6) executing an appearance or surety bond;²⁹⁴ and (7) satisfying "any other condition that is rea-

284. 18 U.S.C. § 3142(g)(1).

285. 18 U.S.C. § 3142(g)(2).

286. 18 U.S.C. § 3142(g)(3). A record of failing to appear is given substantial weight in determining whether parole is warranted. *See, e.g.,* United States v. Gonzales Claudio, 806 F.2d 334 (2d Cir. 1986), *and cert. denied, sub nom. Melendez Carrion v. United States*, 479 U.S. 978 (1986); United States v. Shakur, 817 F.2d 189 (2d Cir. 1987), *cert. denied*, 484 U.S. 840 (1987).

287. 18 U.S.C. § 3142(g)(4).

288. 18 U.S.C. § 3142(c)(1)(B). The 1966 version of this section set out five conditions for release, including a catch-all permitting judges to impose "any other condition deemed reasonably necessary to assure appearance as required." Bail Reform Act of 1966, 18 U.S.C. § 3146(a)(5) (1966). In enacting the BRA, Congress explicitly added nine more conditions. While recognizing that the new conditions could be imposed under the then-existing catch-all provision, Congress reasoned that "spelling it out in detail is intended to encourage courts to utilize them in appropriate circumstances." S. REP. NO. 225, at 3196.

289. 18 U.S.C. § 3142(c)(1)(B)(i). This provision does not extend liability to the custodian in the event that the defendant absconds or commits crimes while under the custodian's custody, "rather it is intended to alert the judicial officer to the necessity of inquiring into the ability of proposed custodians to supervise their charges and to impress on the custodians the duty they owe to the court and to the public to carry out the supervision to which they are agreeing and to report any violation to the court." S. REP. NO. 225, at 3197.

290. 18 U.S.C. § 3142(c)(1)(B)(iv); *see, e.g.,* United States v. Traitz, 807 F.2d 322, 324–25 (3d Cir. 1986) (conditioning release on, among other things, house arrest, ceasing communications with anyone but family members, and surrendering passport); United States v. Clark, 791 F.Supp. 259, 261–62 (E.D. Wash. 1992) (conditioning release on, among other things, house arrest).

291. 18 U.S.C. § 3142(c)(1)(B)(vi).

292. 18 U.S.C. § 3142(c)(1)(B)(vii).

293. 18 U.S.C. § 3142(c)(1)(B)(x).

294. Congress noted that there is a potential for abuse in conditioning release on providing bonds.

sonably necessary to assure the appearance” of the defendant and the safety of the community.²⁹⁵

Before concluding that detention is appropriate in a particular case, the court first must attempt to condition release on the least restrictive of these conditions.²⁹⁶ Congress recognized that “all conditions are not appropriate to every defendant and that [it] did not intend that any of these conditions be imposed on all defendants.”²⁹⁷ In determining whether the conditions can be appropriately imposed in a particular case, the entire host of optional conditions should be considered in relation to their relevance to the two goals of pre-trial detention—whether the defendant will fail to appear at required INS proceedings and whether she will pose a danger to the community.²⁹⁸ “Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing,”²⁹⁹ the BRA requires a written order by the court stating that none of these conditions alone or in combination would assure public safety. Orders mandating detention must be supported by clear and convincing evidence.³⁰⁰ All detention orders must be supported by “written findings of fact and a written statement of the reason for the detention.”³⁰¹ If detention is ordered, the order must expressly direct that, while he is being detained, the detainee must be afforded “reasonable oppor-

Recognizing that excessively high bonds were often used to achieve the detention of dangerous defendants, it expressly limited the use of bonds to the purpose of assuring the defendant’s appearance at trial. S. REP. NO. 98-225, at 3198–99.

295. 18 U.S.C. § 3142(c)(1)(B). Other ways to condition release include: (1) maintaining or seeking employment; (2) maintaining or commencing an educational program; (3) avoiding contact with the alleged victim and potential witnesses; (4) refraining from possessing a firearm or other dangerous weapon; (5) refraining from excessive use of alcohol or of any controlled substance; and (6) returning to custody for specified hours following release for employment, schooling or other limited purposes. The judicial officer who designs the order granting release may amend the release order to impose different or additional designated conditions at any time, 18 U.S.C. § 3142(c)(3), but is prohibited from imposing “a financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2).

296. 18 U.S.C. § 3142(c)(1)(B).

297. S. REP. NO. 98-225, at 3196–97.

298. All but one of these conditions can be imposed by courts either to protect public safety or to prevent absconding. The exception is financial conditions, which can be imposed only to assure appearance. S. REP. NO. 225, at 13. *See also* United States v. Cardenas, 784 F.2d 937, 939 (9th Cir. 1986), *vacated* 792 F.2d 906 (9th Cir. 1986) (noting that these factors should not be used to make a pre-trial determination of guilt; rather, they are relevant “only in terms of the likelihood that the person will fail to appear or will pose a danger to the community.”).

299. S. REP. NO. 98-225, at 3205.

300. 18 U.S.C. § 3142(f). The Senate Report “emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary.” S. REP. NO. 225, at 3205. For example, if “the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.” S. REP. NO. 225 at 3205. The statute is silent on the standard of proof required for detention on the ground of risk of flight. Courts have required proof by a preponderance of the evidence. *See, e.g.*, United States v. Motamedi, 767 F.2d 1403, 1407 (9th Cir. 1985); United States v. Logan, 613 F.Supp. 1227, 1228 (D. Mont. 1985).

301. 18 U.S.C. § 3142(i)(1).

tunity for private consultation" with counsel.³⁰² The statute also expressly authorizes the court to permit the subsequent release of the detainee "to the extent that the judicial officer determines such release to be necessary for preparation of the person's [court proceeding]."³⁰³ The detention order also must direct that the detainee not be placed in the detention facility with those who are serving criminal sentences.³⁰⁴

Orders authorizing release are similarly subject to statutory parameters. For example, the written order must expressly explain the conditions for release "in a manner sufficiently clear and specific to serve as a guide for the person's conduct."³⁰⁵ Such orders must also advise the defendant of the penalties for violating a release condition.³⁰⁶ Release orders are not static but may be amended by courts at any time "to impose additional or different conditions of release."³⁰⁷

C. Benefits of Procedural and Substantive Protections

The BRA's procedural and substantive protections promote the consistent application of pre-trial detention authority. Indeed, in adopting the BRA, lawmakers emphasized that

[p]roviding statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient *would allow the courts to address the issue of pretrial criminality honestly and effectively.*³⁰⁸

Consistency, honesty, and efficiency in pre-trial detention decision-making are further enhanced by the statutory requirement that decision-makers state their reasons for all detention decisions in writing.³⁰⁹ Requiring such a statement of reasons for detention facilitates consistency by making meaningful review possible not only in individual cases, but also by

302. 18 U.S.C. § 3142(i)(3).

303. 18 U.S.C. § 3142(i).

304. 18 U.S.C. § 3142(i)(2).

305. 18 U.S.C. § 3142(h)(1).

306. 18 U.S.C. § 3142(h)(2).

307. 18 U.S.C. § 3142(c)(3); S. REP. NO. 225, at 3199. "Either the defendant or the government may move for an amendment of conditions, or the court may do so on its own motion." S. REP. NO. 225, at 3199-3200. The authority to change a release decision is "based on the possibility that a changed situation or new information may warrant altered release conditions." S. REP. NO. 225, at 3199. Different or additional conditions may be imposed at "an ex parte hearing in situations where the court must act quickly in the interest of justice. In such a case, a subsequent hearing in the defendant's presence should be held promptly." *Id.*

308. S. REP. NO. 98-225, at 3194 (emphasis added).

309. See Schlesinger, *supra* note 121, at 188 (recognizing that the procedural protections in the BRA "added accountability to release decisions by requiring the judicial officers to state the reasons for detention").

creating a record from which it may be possible to uncover systematic abuse and bias.³¹⁰

The BRA also recognizes that detention hinders a defendant's ability to prepare thoroughly for court proceedings. Detainees cannot locate witnesses or evidence for their cases. Lawyer-client meetings may be hampered by having to meet for limited periods of time in cramped jail facilities. Moreover, the fact that they are imprisoned before trial may adversely impact detainees' demeanor and attitude in the courtroom or on the witness stand.³¹¹ Consequently, even in the event that someone is ordered detained before trial, the BRA authorizes judges to permit limited release for purposes of preparing for a court proceeding.³¹²

D. A Legislative Solution

The BRA should serve as a model for reform of the pre-hearing detention system for asylum seekers. The principal elements of the BRA's release provisions should be adapted to the context of parole of asylum seekers. The BRA's substantive standard is designed to ensure that people are treated equally, according to clear rules. The procedural rights are designed to achieve fair and correct results. The requirements of review and written reasons for detention provide for the consistent application of the articulated substantive standard and procedural rights. As explained above, all of these safeguards are absent in the current decision-making process for release of asylum seekers, leaving it a fertile ground for arbitrariness.³¹³

Given that the INS has tried but failed to formalize a uniform administrative process for releasing asylum seekers in the APSO program—and that deep-rooted bureaucratic imperatives make any similar agency initiative also likely to fail—legislation is needed.³¹⁴ This section adapts the BRA's release procedures in an effort to propose legislation that would apply to asylum seekers who have already been determined by the INS to have a credible fear of persecution. Under this proposal, the current ad hoc system would be

310. As the Third Circuit recognized, "when an order for release is contested, a statement of reasons is necessary so that we can intelligently perform our review function." *United States v. Coleman*, 777 F.2d 888, 892 (3d Cir. 1985). See also *United States v. Chimurenga*, 760 F.2d 400, 406 (2d Cir. 1985) (noting that the absence of detailed findings supporting release hampers court's ability to review decision).

311. Kennedy, *supra* note 121, at 425 (quoting D. Freed & P. Wald, *Bail in the United States: 1964*, at 46 (footnotes omitted)) (working paper for National Bail Conference). See also Alschuler, *supra* note 121, at 517–18; Overbeck, *supra* note 121, at 198; Schlesinger, *supra* note 121, at 176–77 (1986).

312. 18 U.S.C. § 3142(i).

313. See footnotes 19–34 and accompanying text.

314. The Chairman of the Senate's Subcommittee on Immigration reasoned that "it is hard to explain why the INS detains asylum seekers when others are not, particularly if they meet the threshold of credible fear." *INS Oversight and Reform: Detention: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 104th Cong. (1998) (statement of Senator Spencer Abraham, Chairman of the Subcommittee on Immigration). He later noted that the Senate Judiciary Committee would "continue to look at these issues." *Id.*

replaced by a legislative framework, modeled on the BRA, that has the following four elements: (1) impartial decision-makers utilizing (2) well-articulated substantive standards in a process with (3) increased procedural protections that contemplate (4) alternative conditional release.

1. How the Proposed System Would Work

Legislation that takes authority over parole decision-making out of the hands of local districts and puts it into the hands of neutral immigration judges³¹⁵ should be adopted.³¹⁶ In particular, within ten days of being found to have a credible fear of persecution pursuant to the expedited removal process,³¹⁷ all asylum seekers should be entitled to a parole hearing before an immigration judge. During the hearing, information would be solicited from the asylum seeker relating to the substantive standards for release. These standards would be designed to gauge whether the asylum seeker is likely to appear at subsequent hearings and for removal or whether she is likely to present a danger to the community. To gauge the likelihood of absconding, the judge would consider: (1) the strength of the asylum claim; (2) the asylum seeker's ties to, support from, or sponsorship by the community, including community-based organizations; (3) the asylum seeker's character; (4) the asylum seeker's history of appearances; and (5) any other factors relevant to the incentive to appear. The judge would assess the asylum seeker's physical and mental condition and history of dangerous behavior to determine whether her release would endanger the public safety. At the proceedings, asylum applicants could be represented by counsel and would be permitted to introduce evidence, present witnesses and cross-examine witnesses, if any, against them. A complete record of the hearing would be kept.

If the immigration judge determines, after weighing all of the evidence, that the asylum seeker is likely to appear at all subsequent immigration hearings and would not impair public safety, the asylum seeker would be granted parole from detention.³¹⁸ For example, if the immigration judge found that the applicant had no record of dangerous behavior, and had family members who would support her and pledge that they would accompany

315. Proposed legislative language is attached as an Appendix to this Article.

316. Authority currently exists for parole hearings before immigration judges in cases involving non-criminal detainees "arrested and detained pending a decision on whether the alien is to be removed from the U.S." Immigration and Nationality Act § 236(a) (1997), 8 U.S.C. §1226 (a) (1997); 8 C.F.R. 236.1(c)(2) (1998). For a discussion of the INS's detention policies pre- and post-IIRIRA, see Margaret Taylor, *Detention and Related Issues*, in UNDERSTANDING THE 1996 IMMIGRATION ACT 5-1 (Federal Publications ed., 1997). The INS is also considering alternatives to detention for other detained populations. For example, the INS is developing parole review boards for certain foreign nationals who are subject to indefinite detention because no country will accept them. See Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASES 649 (1998).

317. Or in the event of a mass influx of individuals, within a reasonable time of their arrival.

318. The parole of a person out of detention is not considered an admission into the United States. See *Lang May Ma v. Barber*, 78 U.S. 1072 (1958).

her to future immigration court proceedings, the judge should be inclined to order the applicant released from detention on her own recognizance.

The proposal contemplates the use of conditional release in cases where concerns about absconding or public safety weigh against release on one's own recognizance. In such cases, judges could condition release on the least restrictive combination of conditions that would reasonably ensure that the individual would appear as required and not pose a danger to the safety of the community. Permissible conditions would include requiring the asylum seeker to: (1) remain in the custody of a designated person or independent nongovernmental organization, or reside at a specified address or in a specified non-secure shelter care or group home supervised by a nongovernmental organization; (2) report either in person or by telephone on a regular basis to a designated INS office; (3) comply with a specified curfew; (4) attend English as a Second Language or other remedial classes on a regular basis; (5) undergo available medical, psychological, or psychiatric treatment; or (6) satisfy any other condition that is reasonably necessary to ensure the appearance of the person or the safety of the community.

In determining which condition or conditions should be imposed in a particular case, the judge should consider the applicability of the conditions in relation to the particular concern raised by the individual case. For example, if the judge is concerned that because the applicant does not speak English, he or she may not know how to get to court, then release may be conditioned on living in a shelter sponsored by a nongovernmental organization pending adjudication of the asylum case. If the judge finds that the applicant speaks English but has no family member to live with, release may be conditioned on both reporting to the local INS office by telephone once weekly and in person once monthly and living in a shelter sponsored by a nongovernmental organization. Bonds should be avoided as a condition for release unless the judge finds that no other combination of conditions would be sufficient to ensure that the individual will appear at court proceedings.

In cases of release on one's own recognizance and conditional release, the immigration judge would issue a release order clearly explaining the conditions of parole so that the asylum seeker would understand the conditions and would be able to guide her conduct accordingly. In all cases, parole would be conditioned on the asylum seeker informing the INS and the immigration court of any change of address or phone number within forty-eight hours of the change and on appearing at all immigration court proceedings, including those for removal, if ordered.

Alternatively, if after a hearing the immigration judge determines that appearance and safety cannot be achieved through any combination of conditions, then continued detention would be appropriate. Detention orders would be required to include findings of fact and a statement of the reasons for detention. The detention order also would inform the detention facility in which the asylum seeker is to be detained that the asylum seeker should

be afforded a reasonable opportunity for private consultation with counsel or consultant throughout the term of detention.

2. Benefits of Proposed System

The proposed parole system would result in the release of credible asylum seekers from detention pending adjudication of their claims, thereby facilitating their access to legal counsel and an ability to present thorough asylum claims. Moreover, the proposed parole system would accomplish the INS's twin goals of preventing absconding and protecting the public with significantly reduced costs to asylum seekers or adverse impact on the adjudicatory system. The interest in reducing absconding and protecting the public would be accomplished in a number of ways.

Most importantly, as explained in Part V.B, *supra*, asylum seekers released from detention on parole have incentives to appear at hearings. Since their cases have been found to be credible, they are motivated to pursue them and gain the benefits associated with asylum protection—the rights to adjust immigration status to permanent residency, to work, to be reunited with family, and to travel outside the United States. The potential availability of these incentives motivates credible asylum seekers to follow through with their claims.

Moreover, the substantive standards that the court must consider before authorizing parole are designed to solicit information that would identify whether the applicant is likely to abscond or be a risk to public safety. If the judge determines that these concerns are real and substantial in a particular case, she has the option to condition release in any combination of ways that would address the particular concerns.

The substantive standards coupled with the spectrum of conditional release alternatives allow the court to customize release conditions to the particular concerns raised in each individual case. Indeed, the experience of the Vera Institute for Justice, a private nonprofit organization that has been working with governments to study various forms of supervised release since 1961, bears this out. In February 1997, the Vera Institute began an "Appearance Assistance Program" (AAP) to test different methods and levels of supervised release of INS detainees. One of the goals of the program is to "learn how to increase rates of court appearance and compliance with adverse rulings" by immigration courts.³¹⁹ Since early 1997, the Vera Institute has been working with individuals with criminal convictions detained in New York detention facilities and with people who have been apprehended by the INS in worksite violations who are being detained in facilities in New Jersey to determine whether they are appropriate for release.³²⁰

319. VERA INSTITUTE OF JUSTICE, *THE APPEARANCE ASSISTANCE PROGRAM: ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION* 5 (1998) [hereinafter *VERA INSTITUTE*].

320. Telephone Interview with Megan Golden, Vera Institute Appearance Assistance Program, New

All parole decisions in these cases are subject to different levels of supervision, ranging from weekly reporting by telephone to living with a specified community group. The supervision condition imposed in an individual case is based on the particular facts of that case. For example, individuals who have a community sponsor and verified address may be released subject to the condition that they report regularly to the AAP office, "where staff stress the importance of compliance, inform them about the immigration court process, and provide referrals for legal counsel."³²¹ Others may be paroled based on the sponsorship of a "guarantor" community-based organization.³²² The guarantor organizations typically represent populations served by the AAP and are usually chosen to participate in the program because they offer either legal or social services to the parolees.³²³ They "keep in contact with the [parolees] and reinforce the AAP's reminder of their court dates."³²⁴ The program's initial results are very promising. Since the program's inception, "80% of the AAP's participants are showing up" for immigration court hearings.³²⁵

In addition, "people with legal representatives are more likely to appear in court."³²⁶ The high appearance rates of represented asylum seekers are attributable, in part, to the fact that many of the people who fail to appear at INS proceedings do so simply because they do not understand the process.³²⁷ Releasing someone from detention increases asylum seekers' chances of being able to find a lawyer who is able to represent them adequately and explain the process, including the importance of keeping all court dates, to them. According to current regulation, at removal hearings immigration courts are required to advise asylum seekers of their right to be represented by counsel and to provide them with a list of pro bono legal service providers who can assist them in presenting their claims.³²⁸ If immigration judges provided this information to asylum seekers upon ordering them released from detention, then the asylum seekers would be better equipped to find

York City Director (July 23, 1998) (on file with author).

321. VERA INSTITUTE, *supra* note 319, at 8. The Vera Institute also supervises people who the INS would otherwise release from detention. These individuals must "attend an orientation session, keep the AAP informed of their address and phone number, appear in court, and comply with the Judge's decision." *Id.*

322. VERA INSTITUTE, *supra* note 319, at 10.

323. *Id.*

324. *Id.*

325. *Id.* at 15-16. The Vera Institute's statistics show appearances at master calendar and individual hearings.

326. *Id.* at 13 (specifically supporting the belief that represented asylum seekers are more likely to appear at hearings by a study of the pilot APSO program, which showed high appearance rates in asylum seekers released from detention). See Arthur Helton, *A Rational Release Policy for Refugees: Reinvigorating the APSO Program*, 75 INTERPRETER RELEASES 685, 688 (May 18, 1998) (referencing a report by Lawyers Committee for Human Rights that found "high rates of compliance by represented asylum applicants [paroled by the INS] in terms of meeting monthly reporting requirements and appearing in the immigration court").

327. VERA INSTITUTE, *supra* note 319, at 11-12.

328. 8 C.F.R. § 240.10.

legal representation and hence more likely than otherwise to appear if released.

In addition to accomplishing the INS's twin goals of preventing absconding and protecting public safety, the proposed parole system would also address, with significantly reduced costs on asylum seekers and very little adverse impact to the adjudicatory system, the institutional biases that currently impede fair release decision-making. By removing release decision-making authority from the jurisdiction of local district directors and granting that authority to immigration judges, the proposal addresses the problem that has plagued the APSO program at its core—that biased local district directors have sole authority over release decisions. The proposal would eliminate the influence of those biases on parole decisions in two significant ways. First, it would remove one of the two competing and irreconcilable missions (i.e., enforcement and service) from the jurisdiction of local districts. Local districts would continue to focus on their enforcement mission, while the courts would, in appropriate circumstances, be authorized to grant parole, a humanitarian relief. As a consequence of eliminating the influence of the bureaucratic and enforcement biases, parole decisions would no longer be dictated by the availability of bed space. Rather, the proposal would facilitate the use by immigration judges of well-articulated substantive standards on which parole decisions can be based.

By applying articulated substantive standards to determine whether an individual is eligible for parole, the proposed system would promote more informed decision-making. A recorded immigration court parole hearing, during which both the asylum seeker and the INS can argue and present evidence in favor of their respective positions, would facilitate the consistent application of the articulated substantive standard. Under the proposal, people who meet the same qualifications would tend to be treated similarly and would no longer be jeopardized by long detention terms simply because they arrived in one airport as opposed to another.³²⁹ Moreover, requiring judges to conduct parole hearings for each individual who is found to have a credible fear of persecution would also eliminate the current need for lawyers to prod local districts to adjudicate parole requests.³³⁰ Therefore, the pro-

329. Under the proposal individuals would not be penalized by prolonged detention because they traveled to a city, such as New York, where parole is nearly impossible due to sufficient detention capacity, as opposed to Miami, Florida, which recently has been readily releasing asylum seekers upon written request. See Ojito, *Inconsistency at INS*, *supra* note 34.

330. Under current practices when an asylum seeker's file is brought to the attention of the local district office to decide whether to parole the individual, express policy requires the officer to review the information and make final decisions on whether or not a particular individual should be released from detention. Dec. 1997 Policy Guidance, *supra* note 27, at 3. But whether or not the file gets the attention of the district office often depends upon the diligence of the asylum seeker's lawyer. Proactive steps, which vary from district to district, appear to be necessary in all of the largest ports of entry.

For example, an attorney in El Paso, Texas, explained that delivery of the asylum seeker's file to the person in the district office who makes parole determinations "is supposed to be automatic." But she complained that the officer typically "does not consider parole unless an attorney bugs him, and even then it could take as long as five weeks." In the Los Angeles district, parole determinations are not made

posed system would address the long-standing complaint that the APSO program operated "inconsistent[ly] from district to district," and "unevenly around the country."³³¹ The often-ignored administrative policy directives that spell out the procedures to be followed in making release determinations would be replaced by a statutory hearing mechanism that would apply equally in all jurisdictions. These procedural safeguards would help to ensure that parole decisions are being made consistently across the country.

Finally, there is little reason to credit the potential argument that the process due under the proposal cannot be afforded because it is too expensive. This argument ignores the fact that the costs of detaining individuals from the time they have been found to have credible claims until their hearings on the merits of their case are significant. For example, it costs the INS \$160 a day to house and feed someone who is detained in the Queens SPC,³³² one of the larger user-fee funded detention facilities, in which the average asylum seeker is detained for ninety-two days.³³³ Thus, it costs an average of \$14,700 to house, feed, and medically treat an asylum seeker who is detained in Queens, New York.

The Queens detention center has 200 user-fee funded beds. Taking a conservative estimate that two-thirds of the beds (132 individuals) are used to detain asylum seekers, then it costs \$21,120 per day, \$633,600 per month, and \$7,708,800 per year to detain asylum seekers there.

This sum exceeds the costs of the proposal by a considerable margin. The proposal does not require the purchase of new equipment. Rather, it would impose additional burdens only on judges, to hear cases and makes parole decisions, and on INS district counsel, to represent the government's interest at the hearings. But "there is no reason to believe that a short parole hearing before an Immigration Judge would impose a significant burden on the INS."³³⁴ Bond hearings "typically last 10 to 15 minutes."³³⁵ If each of

absent a letter requesting parole from the applicant or his attorney. Interview by Michele Pistone and Miraan Sa with George Shioura, INS Asylum Officer, San Pedro, Cal. (Feb. 6, 1998) (on file with author). In the Miami district, lawyers report having to send a "form letter to the district office informing the office that the asylum applicant was found to have a credible fear [of persecution] and has ties to the community." Telephone Interview with Stacy Taeuber, attorney with Catholic Legal Information Network, Inc., Miami, Fla. (July 24, 1998) (on file with author). The local New Jersey district requires that an affidavit by a friend or relative who is willing to house the asylum seeker and assist her in attending court hearings (for which it has not published or otherwise provided a form) be submitted with a request for parole. After the affidavit and parole request is filed with the local district office, the asylum seeker's lawyer has to follow up with the local office until a response is given. Telephone Interview with Mary McClenahan, attorney with Catholic Legal Immigration Network, Inc. (Aug. 11, 1998) (on file with author).

331. 1996 APSO Evaluation, *supra* note 20, at 2.

332. Telephone Interview with Bill Buddenberg, INS Detention and Deportation Officer (July, 24, 1998) (on file with author).

333. Musalo & Anker, *supra* note 242, at 55, table 7.

334. Cruz-Taveras v. McElroy, 1996 WL 455012, at *7 (S.D.N.Y. 1996). See also Ekekhov v. Aljets, 979 F.Supp. 640, 644, n.8 (N.D. Ill. 1997); Thomas v. McElroy, 1996 WL 487953, at *4 (S.D.N.Y. 1996).

335. Cruz-Taveras v. McElroy, 1996 WL 455012, at *7 (S.D.N.Y. 1996). See also Ekekhov v. Aljets,

the 160 asylum seekers found each month to have a credible fear of persecution has a fifteen-minute hearing under the proposal, the hearings cumulatively would take a total of only forty hours per month in the entire country. Let us assume that it would take the equivalent of ten full-time government employees—earning an average of \$100,000 per year—to prepare for, argue, and judge these forty hours of hearings each month. Even with these generous salaries, the proposal would cost only an additional \$1 million per year if no additional detainees were released. If the forty hours of hearings were to result in the parole of only half of the detainees, the cost savings would finance the proposed system with a significant surplus; indeed, the savings in Queens alone would likely match the nationwide cost of the program.

VIII. CONCLUSION

As circumstances change, so must the law. Because the INS's current detention policy—born in conditions no longer extant, and maintained through a combination of bureaucratic inertia and aggrandizement—has not evolved to fit current circumstances, it no longer serves as a satisfactory means of achieving the legitimate ends of detention. The policy, therefore, must be changed.

Federal criminal pre-trial detention law provides an appropriate and workable model for an improved asylum detention policy. Because the INS is institutionally incapable of effectively making and implementing the necessary changes on its own, the impetus for change must come from Congress, in the form of express legislation. These changes must be made, and made soon. The costs of continued inaction are substantial, and include harm to the physical and mental health of detained asylum seekers, and impairment of the truth-seeking function in the asylum adjudication process.

Moreover, continued inaction threatens to undermine America's favorite image of itself as a sanctuary for victims of government oppression, an image embraced throughout the world and embodied most vividly by the Statue of Liberty's promise of liberty and safety to the world's "huddled masses yearning to breathe free." With each unnecessary detention of an asylum seeker, Lady Liberty's light is dimmed. The stakes of the present challenge are thus nothing less than the preservation of a core belief of the American idea, for if Liberty's torch is to shine for anyone, it should be for victims of government oppression, the historical descendants of America's founding immigrants.

APPENDIX

The following statutory language should be adopted:

“PAROLE OF ASYLUM SEEKERS FROM DETENTION

(a) Parole. Each asylum seeker who has been found to have a credible fear of persecution, pursuant to section 235(b)(1)(B) of this Act or otherwise, shall be entitled to a parole hearing pursuant to section (b).

(b) Detention Hearing. An immigration judge will as soon as practicable but in no event later than 10 days after the alien’s finding of credible fear, or, in the event of an extraordinary migration situation,³³⁶ within a reasonable time after the aliens’ arrival, conduct a hearing to determine whether the alien should be paroled from detention on his own recognizance or whether any condition or combination of conditions set forth in subsection (d) will reasonably assure the appearance of the person as required and the safety of the community, at which hearing the immigration judge will take into account the available information concerning:

- (1) the strength of the alien’s claim for asylum, including the fact that an INS officer determined that the alien had a credible fear of persecution;
- (2) the alien’s ties to, support from, or sponsorship by the community, including community-based organizations;
- (3) the alien’s character;
- (4) the alien’s history of appearances;
- (5) the alien’s physical and mental condition;
- (6) the alien’s history of dangerous behavior; and
- (7) any other factors that indicate that the asylum applicant has incentives to appear before the immigration court as required or that the alien would pose a risk to the community.

(c) Rights of Aliens at Hearings. At hearings conducted pursuant to subsection (a), the alien may be represented by counsel, at no expense to the government, and shall have a reasonable opportunity to examine the evidence against the alien, to present evidence

336. The definition applicable here is the one enunciated in the Leahy Amendment, which defines an “extraordinary migration situation” as “the arrival or imminent arrival in the United States or its territorial waters of aliens who by their numbers or circumstances substantially exceed the capacity of the inspection and examination of such aliens.” H.R. 2202, 104th Cong. § 141 (1996) (as approved by the Senate), 142 CONG. REC. S4739 (May 6, 1996).

against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the government.

(d) Parole on Conditions. If the immigration judge determines that the parole release on one's own recognizance will not reasonably assure the appearance of the person as required or endanger the safety of the community, such immigration judge shall order the parole of the person:

(1) subject to the condition that the alien inform a designated INS office and the immigration court of any changes of address or telephone number within 48 hours of the change;

(2) subject to the condition that the alien not leave the jurisdiction without prior notice to the INS and the immigration court;

(3) subject to the condition that the alien appear before the immigration court as required; and

(4) subject to the least restrictive further condition, or combination of conditions, that such immigration judge determines will reasonably assure the alien will appear as required and will not pose a danger to the safety of the community:

(A) remain in the custody of a designated person or independent, nongovernmental organizations, or reside at a specific address or in a specific non-secure shelter care or group homes supervised by NGOs;

(B) report either in person or by telephone on a regular basis to a designated INS office;

(C) comply with a specified curfew;

(D) attend English as a Second Language or other remedial classes on a regular basis;

(E) undergo available medical, psychological, or psychiatric treatment;

(F) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of the community.

(e) Detention. If the immigration judge determines that no condition or combination of conditions set out in subsection (d) will reasonably assure the appearance of the person as required and the safety of the community, parole may be denied.

(f) Parole orders. In a parole order issued under this section, the immigration judge will include a written statement that sets forth (1) all of the conditions to which the parole is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct and the penalties for violating the parole order; and (2) a current list of counsel prepared under section 240 of this Act.

(g) Detention orders. In a detention order issued under this section, the immigration judge will include a written statement that:

(1) sets forth the findings of fact and statement of reasons for the detention; and

(2) directs that the alien be afforded reasonable opportunity for private consultation with counsel or consultant.

The immigration judge may, by subsequent order, permit the temporary parole of the alien to the extent necessary for preparation of the alien's removal proceedings.

(h) Penalty for failure to appear. Whoever, having been released under this section, knowingly fails to appear before the immigration court as required by the conditions of parole or fails to surrender for removal if so ordered shall be ineligible for any benefits under the Immigration and Nationality Act."

