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# TOWARDS BALANCING A NEW IMMIGRATION AND NATIONALITY ACT: ENHANCED IMMIGRATION ENFORCEMENT AND FAIR, HUMANE AND COST-EFFECTIVE TREATMENT OF ALIENS

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## I. INTRODUCTION

This article explores the contours of comprehensive immigration reform, including the enforcement trade-offs contemplated in proposed legislation and the interplay between enforcement and annual appropriations bills. From this analysis, two ideas emerge. First, a general mainstream consensus has emerged across partisan lines that to fix a broken immigration system, the United States must first liberalize access to valid immigration status for willing workers, including the pool of undocumented non-citizens already here, which is estimated to comprise approximately eleven million people.<sup>1</sup> Second, concomitant with the fashioning of new and realistic immigration rules for immigration status, it is incumbent on the United States to increase enforcement and adopt “smart” immigration enforcement measures.<sup>2</sup>

Most importantly, the United States must make enforcement not only smart but fair, humane, cost-effective and consistent with the legal, historical and moral traditions and aspirations of this nation of immigrants and refugees. This improved enforcement can be achieved through measures such as affording due process protections to non-

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1. See, e.g., JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, PEW HISPANIC CENTER (2005), <http://pewhispanic.org/files/reports/44.pdf> (estimating the undocumented resident population at 10.3 million).

2. See, e.g., *Immigration Overhaul: Hearing Before S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Tamar Jacoby, Senior Fellow, Manhattan Inst.), 2005 WL 1786197; Jeff Bell et al., *A Conservative Manifesto for Solving Border Woes*, ARIZ. REPUBLIC, (Aug. 15, 2004), [http://www.manhattan-institute.org/html/\\_arizrep-conservative\\_manifest.htm](http://www.manhattan-institute.org/html/_arizrep-conservative_manifest.htm) (including as signatories Tamar Jacoby, Newt Gingrich, Jack Kemp, and Grover Norquist among others); David Brooks, *Two Steps Towards a Sensible Immigration Policy*, N.Y. TIMES, Aug. 14, 2005, at 12.

citizens and offering a safe haven for the oppressed and persecuted.<sup>3</sup> However, given the parameters of today's immigration debate, it will be difficult for comprehensive immigration reform to generate fair and humane enforcement policies and practices.

To begin, the current discourse over comprehensive immigration reform is vaguely reminiscent of the national and congressional debate concerning the Immigration Reform and Control Act of 1986 (IRCA), which resulted in the legalization of several million undocumented non-citizens.<sup>4</sup> Under IRCA, the *quid pro quo* of liberalizing access to immigration status was the crafting of severe civil and criminal sanctions against employers for employing aliens unauthorized to work in the United States.<sup>5</sup> However, these sanctions have been largely unenforced, culminating in the current situation of millions of unauthorized non-citizen workers.<sup>6</sup> For any future large-scale immigration bill that provides undocumented immigrants with rights and benefits such as valid immigration status, must the *quid pro*

3. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (invalidating the indefinite detention of aliens by immigration authorities where the aliens cannot be removed to their country of citizenship or nationality in the reasonably foreseeable future despite a final order of removal, based on a statutory analysis of the Immigration and Nationality Act and a consideration of the serious constitutional issue of whether indefinite detention violates an alien's rights to substantive and procedural due process under the Fifth Amendment of the United States Constitution). In *Zadvydas*, however, the Supreme Court squarely reaffirmed its precedent that "the Due Process Clause applies to 'all persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." *Id.* at 693 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98, and n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). However, in this line of jurisprudence, recognizing rights for non-citizens contrasts sharply with other Supreme Court precedent affording deference to Congress under the plenary power doctrine for its control over immigration legislation and deference to the executive branch for its immigration enforcement actions respectively. For example, in *Jama v. Immigration and Customs Enforcement*, the Supreme Court upheld the removal of a Somalian alien to a country without the advance consent of that country's government in part due to the absence of contrary Congressional intent underlying the statutory provision and deference to the President in foreign affairs. 543 U.S. 335 (2005). Notably, during the Cold War, former President Dwight D. Eisenhower issued the statement that "Constitutional due process wisely confers upon any alien, whatever the charge, the right to challenge in the courts the Government's finding of deportability." *Special Message to the Congress on Immigration Matters* (President Dwight D. Eisenhower) (Feb. 8, 1956), reprinted in AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES, A.B.A. AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND 73 (2004), [http://www.abanet.org/publicserv/immigration/Due\\_Process.html](http://www.abanet.org/publicserv/immigration/Due_Process.html).

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

5. Immigration and Nationality Act, 8 U.S.C. § 1324a(f) (2000).

6. See *Worksite Enforcement and Employer Sanctions: Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigration, Border Security, and Claims*, 109th Cong. (June 21, 2005) (testimony of Richard Stana, Dir., Homeland Security & Justice Issues of the U.S. Gen. Accounting Office), 2005 WL 1464349.

*quo* be increased enforcement? Under the Clinton Administration, discrete benefits-bearing bills for particular classes of non-citizens were enacted *sans* such enforcement measures.<sup>7</sup> However, in this current era, particularly post-September 11, 2001, enforcement appears to be the overriding national and congressional priority for immigration reform.<sup>8</sup> Given the fundamental need for enforcement as a *quid pro quo* to liberalizing status, it is difficult to envision how comprehensive immigration reform could, in fact, yield fair and humane enforcement policies and practices.

Furthermore, comprehensive immigration reform will not make the Immigration and Nationality Act (INA) readily transparent and accessible to the many non-citizens who unknowingly run afoul of its provisions and consequently are subject to arrest, detention and removal by immigration authorities. Many experts and even federal judges have described the INA as being as complex and Byzantine as the Internal Revenue Service tax code.<sup>9</sup> Additionally, there will always be non-citizens who are excluded from coverage under new

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7. See, e.g., The Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997) (as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)) (providing opportunities for lawful permanent residence for Nicaraguans, Cubans, Salvadorans, Guatemalans and citizens of Eastern Europe in the United States with differing requirements regarding their date of entry, continuous presence in the United States and prior filing of an application for asylum). See also The Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538 (1998) (providing opportunities for lawful permanent residence for certain classes of Haitians in the United States); Syrian Adjustment Act, Pub. L. No. 106-378, 114 Stat. 1442 (2000) (providing opportunities for lawful permanent residence for certain classes of Syrians in the United States); Indochinese Parolees, Pub. L. No. 106-429, 114 Stat. 1900A-57 (2000) (providing opportunities for lawful permanent residence for certain classes of Vietnamese and Laotians in the United States). These discrete, nationality-specific pieces of legislation, however, were enacted after the uniformly sweeping 1996 immigration reform laws which ultimately expanded the grounds of removal and mandatory detention, and severely restricted due process protections for aliens in removal proceedings. See *infra* note 12.

8. According to several recent polls, American public opinion favors enhanced enforcement with access to earned legalization for undocumented non-citizens in the United States over enforcement-only measures such as mass detention and deportation. For example, in an October 2005 poll of 800 registered “likely” Republican voters conducted by the Tarrance Group for the Manhattan Institute, thirty-three percent to fifty-eight percent preferred a plan for undocumented non-citizens’ registration and earned legalization to a plan calling for deportation and enforcement-only measures. See Press Release, The Manhattan Institute, Earned Legalization and Increased Border Security is Key to Immigration Reform According to Republican Voters: New Poll (Oct. 17, 2005), [http://www.manhattan-institute.org/html/immigration\\_pol\\_pr.htm](http://www.manhattan-institute.org/html/immigration_pol_pr.htm).

9. See, e.g., Memorandum from Stephen R. Vina, Cong. Research Serv., to House Comm. on the Judiciary, Enforcing Immigration Law: Issues of Complexity (July 28, 2005), available at <http://ilw.com/immigdaily/news/2005,0824-crs.pdf> (citing a plethora of case law and experts referring to the complexity of immigration law, including testimony by Eduardo Aguirre, former Director of the United States Citizenship and Immigration Services).

laws and will thus remain without access to valid immigration status. Again, these non-citizens will be subject to arrest, detention and removal by immigration authorities.<sup>10</sup>

Experts further contend that a “culture of no” has emerged within the Department of Homeland Security (DHS), which may be viewed as a residual reflex to national security after September 11, coupled with the related concern over setting precedent favorable to non-citizens.<sup>11</sup> In this post-September 11 era, immigration enforcement sounds rational and reasonable. To date, however, enforcement has not always been smart or reasonable, but typically has been a categorical, one-size-fits-all approach, with excessively narrow discretion under the harsh 1996 immigration reform laws.<sup>12</sup> Therefore,

10. United States immigration law, like any other area of law, is categorical in nature. It has been construed by some observers as a *noblesse oblige* exercise of sovereignty whereby the American people, through their elected officials and the executive branch, grant and administer the unique privilege of admission and residence in the United States to aliens with identifiable sympathetic and deserving characteristics codified as criteria in law and regulations. On the other hand, the United States will deny such privileges to aliens deemed deficient in the normative deserving characteristics and resulting legal criteria. This binary “good alien/bad alien” approach historically has led to categorical exclusions of groups such as: homosexuals, the mentally disabled, people with HIV/AIDS and other classes of non-citizens deemed by the polity as undeserving of, if not life-threatening to, the values and mores of American society and, in the case of indigent or infirm non-citizens, to the state and federal coffers. See Jonathan Rauch, *To Fight AIDS, Lift the Ban on Non-Citizens with HIV*, REASONONLINE, Jan. 12, 2004, <http://www.reason.com/rauch/011204.shtml> (detrimentally impacting the current HIV immigration ban in HIV prevention efforts). Such a binary approach could undermine the discourse, substance and individual and collective capacity and empowerment of non-citizens as rights-bearing agents. The binary approach could be viewed as reinforcing the subordination of *all* non-citizens, regardless of their immigration status and as fragmenting the immigrant communities by pitting “good” non-citizens against “bad” non-citizens. In this regard, some community-based organizations have encountered difficulties in effectively organizing immigrant families and communities to challenge the detention of their loved ones and community members when convicted of criminal offenses given the severe societal stigma surrounding “criminal aliens.” See Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in our Midst Post-9/11: Legislating Outsiderness within the Borders, 38 U.C. DAVIS L. REV. 1683, 1691 (2005) (recommending, through an alternative, more holistic approach, that the law should not arbitrarily “legalize the outsidership of noncitizens, but, once noncitizens co-exist within our borders, treat them for what they are—human beings”).

11. See, e.g., T. Alexander Aleinikoff, IMMIGRATION IN THE DEPARTMENT OF HOMELAND SECURITY’S FIRST YEAR: A REPORT CARD 82 (Donald F. Kettl ed., 2004), available at <http://www.tcf.org/Publications/HomelandSecurity/3.immigration.pdf> (referring to attorneys’ moniker of the “culture of no” to explain the DHS’s actions as exemplified by the dramatic increase of DHS denials and requests for additional information for visa applications). See also Press Release, Am. Immigration Lawyers Ass’n, A Year in Review: The Department of Homeland Security (Feb. 27, 2004), <http://www.immigrationlinks.com/news/news1895.htm>.

12. 1996 immigration reform is shorthand for three laws enacted in 1996 under the Clinton Administration: The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110

policy-makers considering enforcement approaches must determine how to devise a reasonable calibration that accounts for individuals' particular facts and circumstances, possible inequities warranting exceptions from detention and removal and allowances for them to remain lawfully in the United States.

## II. CASE STUDIES

The following case studies illustrate the harshness of current immigration law and enforcement policies in individuals' lives, especially with regards to the doctrine in immigration law known as "prosecutorial discretion." These cases provide a comparative, real-world context for considering prospective legislation that will affect millions of non-citizens. Under prosecutorial discretion, DHS does not have to pursue the removal of an alien who has compelling circumstances or sympathetic equities.<sup>13</sup> However, according to the American Immigration Lawyers Association, there are no extant, published or binding DHS policies and procedures pertaining to or regarding the application of prosecutorial discretion to the vast majority of aliens facing removal.<sup>14</sup> The policy on prosecutorial

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Stat. 3009-546 (1996) (as amended by Pub. L. No. 104-302, 110 Stat. 3657 (1996)). For an excellent review on the harsh impact of these laws, see AMERICAN JUSTICE THROUGH NON-CITIZENS' EYES, *supra* note 3.

13. The doctrine of prosecutorial discretion in immigration law is expansive and includes: whether DHS should initiate charges of removal against an alien, which removal charges to bring, and whether to drop removal charges; or whether to settle a removal case by plea bargain. It also includes deferred action which is a discretionary act by the DHS not to prosecute or deport a particular alien. See Memorandum from Bo Cooper, General Counsel, I.N.S., to Regional Counsel, District Counsel, Appellate Counsel, I.N.S. (Dec. 7, 1999), available at <http://www.immigrationlinks.com/news/news152.htm>. For purposes of deferred action, according to DHS operating procedures, DHS considers the likelihood of ultimately removing the alien, the presence of sympathetic factors, the likelihood that because of sympathetic factors a large amount of adverse publicity will be generated, and whether the individual is a member of a class of removable aliens given high enforcement priority (e.g. terrorists, drug traffickers). See Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal cited in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999) (noting that although the Standard Operating Procedures were rescinded in 1997, the DHS continues to utilize these guidelines). DHS's use of prosecutorial discretion, including deferred action, is considered a discretionary action not subject to judicial review. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

14. See Audio tape: William Howard et al., General Counsel Open Forum at American Immigration Lawyers Ass'n 2005 Annual Conference on Immigration Law (June 23, 2005) (on file with U. MD. L.J. RACE, RELIGION, GENDER & CLASS). It is notable that on October 6, 2005, DHS issued a new policy geared to reallocate limited Immigration and Customs Enforcement (hereinafter USICE) resources which provides for DHS's use of prosecutorial

discretion issued by former Immigration and Naturalization Service Commissioner Doris Meissner reportedly has been rescinded, with no substitute policy announced to date.<sup>15</sup>

The case of Sheila Kapoor and her husband Gokal Kapoor, who are sixty-nine and seventy-one years old respectively, shows the reluctance of DHS to utilize its prosecutorial discretion.<sup>16</sup> The Kapoors are Hindus from Afghanistan who came to the United States in 1997, fearing persecution because of their religious beliefs. Hindus in Afghanistan are a small minority. Because of the rise of fundamentalist Islam in Afghanistan, they were greatly threatened. The Kapoors applied for asylum after their arrival in the United States. On July 8, 2005, the Kapoors were arrested at their home by DHS officers. An immigration judge decided that the Kapoors no longer merited asylum, given the changed political conditions in Afghanistan after the United States' intervention. Though they were law-abiding members of society who were gainfully employed and had a teenaged son attending school, they were placed in detention in separate accommodations in Pamunkey Regional Jail. Despite the Kapoors' age and poor health, DHS strove to execute the removal order that the immigration judge had entered against them. They were detained with four-hundred other inmates, some of whom were awaiting trial for serious crimes. DHS immigration authorities initially refused to utilize prosecutorial discretion and release this elderly couple from detention. It was only after an outpouring of media coverage, public concern and political intervention that DHS chose to reverse course and release the Kapoors back to freedom in the United States.<sup>17</sup>

The plight of Andrea Mortlock further demonstrates DHS's reluctance to apply prosecutorial discretion.<sup>18</sup> Ms. Mortlock is an

discretion in the limited instance of dismissing adjustment of status cases pending before the Executive Office for Immigration Review so that these cases can be adjudicated by its companion bureau within DHS, the United States Citizenship and Immigration Services (hereinafter USCIS). See Memorandum from William J. Howard, U.S. Immigration and Customs Enforcement, to Chief Counsels, U.S. Immigration and Customs Enforcement (Oct. 6, 2005) (on file with U. MD. L.J. RACE, RELIGION, GENDER & CLASS).

15. See Memorandum from Doris Meissner, Comm'r, I.N.S., to Regional Dirs., District Dirs., Chief Patrol Agents, and Regional and District Council, Exercising Prosecutorial Discretion (Nov. 17, 2000), available at <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>.

16. See Sally Kalson, *Afghan Couple Fall Victim to Homeland Security*, PITTSBURGH POST-GAZETTE, July 6, 2005, at A2, available at <http://www.post-gazette.com/pg/05187/533380.stm>.

17. *Id.*

18. See, e.g., Nina Bernstein, *Rights Agency Urges U.S. Not to Deport AIDS Patient*, N.Y. TIMES, Aug. 27, 2005, at B1 (hereinafter *Right Agency Urges U.S.*); Nina Bernstein, *Ill*

HIV-positive citizen of Jamaica who immigrated to the United States in 1979 when she was only fifteen years old. All of her family lives in the United States and she no longer has any contacts in Jamaica. She was addicted to drugs and spent some time in jail on drug-related offenses, but she is now rehabilitated. In 2000, DHS detained Ms. Mortlock under the harsh 1996 immigration laws. However, due to her HIV-positive status, Ms. Mortlock's health was in a very fragile condition and her removal would deprive her of the medication that keeps her alive. In 2003, Ms. Mortlock was released from immigration detention under federal court order because her HIV treatment was not being provided while she was in custody. Despite this information, DHS suddenly decided to detain Ms. Mortlock again on August 11, 2005, in order to execute the removal order. Through *pro bono* representation,<sup>19</sup> the Inter-American Human Rights Commission of the Organization of American States interceded on Ms. Mortlock's behalf and issued precautionary measures to bar DHS from removing Ms. Mortlock during the pendency of her petition before the Commission. In addition, constituents and grassroots organizations, including Immigration Equality and HIV service and advocacy organizations, mounted a public campaign to protest Ms. Mortlock's detention. DHS released her recently, but only because the authorities determined that she could no longer stay in detention due to her fragile health.<sup>20</sup>

The case of Marie Gonzalez also demonstrates DHS's need for a realistic prosecutorial discretion policy.<sup>21</sup> Ms. Gonzalez and her family came to the United States illegally from Costa Rica in 1991. Ms. Gonzalez was only five years old at the time. The family resided in Jefferson City, Missouri, where they owned a Chinese restaurant and a home. Ms. Gonzalez was an honors student, had recently graduated from high school and planned on attending college when DHS issued a deportation order for her and her family. After public

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*Woman Released from Detention*, N.Y. TIMES, Sept. 15, 2005, at B4 (hereinafter *Ill Woman Released*).

19. Ms. Mortlock was represented by Olivia Cassin of the Legal Aid Society of New York and Sarah L. Cave of Hughes Hubbard & Reed. See *Rights Agency Urges U.S.*, *supra* note 18.

20. See *Ill Woman Released*, *supra* note 18.

21. See, e.g., Harold Meyerson, *A Deportation Tragedy*, WASH. POST, June 29, 2005, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/28/AR2005062801250.html>; Megan Rolland, *Deportation Decision Splits Family*, MISSOURIAN NEWS, July 3, 2005, available at <http://digmo.org/news/story.php?ID=14661>; Rebecca Beyer, *Deportations Show Broken System*, NAT'L CATH. REP., July 15, 2005, available at [http://www.findarticles.com/p/articles/mi\\_m1141/is\\_34\\_41/ai\\_n15340926](http://www.findarticles.com/p/articles/mi_m1141/is_34_41/ai_n15340926).

outcry and political pressure, Ms. Gonzalez was issued a deferral of removal for one year. Her parents, however, were forced to comply with the removal order and to return to Costa Rica without Ms. Gonzalez. Her parents were deported to Costa Rica on July 5, 2005, only a day after celebrating the Independence Day of a country they had called home for fourteen years. Now, Ms. Gonzalez is forced to live in the only home she has ever known without the love, care and support of her parents.<sup>22</sup>

Finally, the plight of Mi-Choong O'Brien, a fifty-year-old native citizen of Korea, who has been legally living in the United States since 1985, further exemplifies why prosecutorial discretion should be applied in immigration removal proceedings.<sup>23</sup> Ms. O'Brien is married to an American citizen and has three children, who are also citizens. Convicted for embezzling money from a restaurant where she worked, she served a month in jail and also paid \$3,000 in restitution. Although Ms. O'Brien served her sentence, she was still subject to mandatory detention and removal pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>24</sup> Ms. O'Brien was detained in jail for almost six months. She was released by DHS several days after her husband, Joe O'Brien, went on a hunger strike. The hunger strike, compounded with media coverage, political pressure and activism from the Korean-American community helped secure her release.<sup>25</sup>

### III. EXPEDITED REMOVAL, PROSECUTORIAL DISCRETION AND RELIANCE ON DETENTION

These four case studies, in which prosecutorial discretion was ultimately favorably exercised, are precious rarities because the vast majority of non-citizens facing removal are dealt with out of sight and out of mind: far from private or *pro bono* lawyers, advocacy organizations, the media, the halls of Congress and the court of public opinion.<sup>26</sup> The comprehensive immigration reform now under

22. *Id.*

23. See, e.g., Chris L. Jenkins, *Fairfax Woman Won't Be Deported*, WASH. POST, June 19, 2004, at B2; Jong-Keuk Lee, *Deportation-Threatened Mi-Choong Suddenly Released*, KOREA TIMES, June 19, 2004.

24. See *supra* note 12.

25. See Lee, *supra* note 23.

26. Some readers may wish to conclude that these case studies exemplify that the system in fact worked since the non-citizens were all spared removal when immigration

consideration would not eliminate such tragic scenarios. Rather, expanded detention and removal and a policy of zero tolerance for non-citizens who violate the new immigration laws could easily exacerbate the problems that currently exist.

As of press time of this article, the House of Representatives is debating a bill that is predicted to expand expedited removal of non-citizens into the interior of the United States, require mandatory detention of apprehended aliens and increase detention beds.<sup>27</sup> Unfortunately, the current legislative debate fails to account for non-citizens' due process rights under the United States Constitution. Under United States Supreme Court precedent, illegal aliens who have entered the United States are entitled to due process protections under the Fifth Amendment to the United States Constitution.<sup>28</sup> Expedited removal, on the other hand, limits those protections because it allows a Customs and Border Protection agent to detain and remove an undocumented immigrant to his or her country of origin without a hearing before an immigration judge.<sup>29</sup> Thus, expedited removal and

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authorities were provided with tangible evidence concerning their particular individual circumstances and equities. However, the reality is that many non-citizens are removed irrespective of their compelling circumstances and inequities because they typically proceed *pro se* in their immigration cases due to indigence and because they lack the necessary knowledge, skills and resources to marshal their claims for prosecutorial discretion.

27. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). This bill was passed by the House of Representatives on December 16, 2005 by a vote of 239 to 182 and referred to the Senate. See Jim Abrams, *House OKs Bill to Tighten Immigration Laws*, ASSOCIATED PRESS, Dec. 17, 2005, <http://www.newsmax.com/archives/articles/2005/12/16/235327.shtml>. See COMM. ON THE JUDICIARY, BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005: DISSENTING VIEWS, H.R. REP. NO. 109-345, at pt. 1 (2005), available at [http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109Be55C&refer=&r\\_n=hr345p1.109&item=&sel=TOC\\_708928&](http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109Be55C&refer=&r_n=hr345p1.109&item=&sel=TOC_708928&) (analysis of this bill and its history).

28. See *supra* note 3.

29. See Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1) (2000) (codifying expedited removal for aliens rendered inadmissible for lacking immigrant or non-immigrant visas or making a material misrepresentation to immigration authorities). There are several limited codified exceptions to expedited removal for asylum-seekers, natives or citizens of Cuba, people with claimed immigration status such as permanent residence, refugee or asylee and minors. Concerning the obstacles for asylum-seekers in expedited removal, see U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REP. ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/index.html](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html); Rachel L. Swarns, *UN Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11; Bill Frellick, *US Detention of Asylum Seekers and Human Rights*, AMNESTY INT'L USA, Mar. 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=296>; HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY (2004), [http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf).

mandatory detention, particularly of non-criminal undocumented non-citizens, arguably raises constitutional concerns.<sup>30</sup>

The expanded use of mandatory detention in comprehensive immigration reform, of course, would necessitate additional detention capacity, which Congress is currently contemplating. For example, a proposal by a Democratic member of the House of Representatives calls for 100,000 additional detention beds.<sup>31</sup> Another bill introduced by Republican members of the House of Representatives and in the Senate by Democratic and Republican Senators would provide for 200,000 new detention beds through the creation of twenty detention centers, including the use of military bases recently approved for closure or realignment, with at least 10,000 new beds each.<sup>32</sup> Another Senate bill provides for an additional 10,000 new detention beds each year.<sup>33</sup>

Clearly, the focus of policy-makers is on detention as an integral part of the solution. Immigration officials and some advocates for enhanced immigration enforcement claim that detention is a deterrent for people who would otherwise attempt to enter unlawfully or to overstay their visas in the United States.<sup>34</sup> Likewise, detention

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30. While the Supreme Court ruled in *Demore v. Kim*, that mandatory detention of permanent residents with criminal offenses did not violate due process, the author is unaware of any specific challenge to the constitutionality of expedited removal and mandatory detention of undocumented non-citizens without criminal offenses and, in particular, vulnerable asylum-seekers. 538 U.S. 510 (2003). The Court of Appeals for the District of Columbia upheld the expedited removal regulations in the 1996 immigration reform laws on prudential grounds, regarding the lack of third party standing for the plaintiff. See *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1356-57 (D.C. Cir. 2000). See CARRIE E. DAVENPORT, A "BRUTAL NEED": HOW THE APPLICATION OF EXPEDITED REMOVAL TO POTENTIAL REFUGEES VIOLATES THE FIFTH AMENDMENT, AMERICAN IMMIGRATION LAW FOUNDATION 2005 DUBROFF LEGAL WRITING COMPETITION WINNING ENTRY (2005), available at [http://www.aifl.org/awards/dubroff\\_2005.pdf](http://www.aifl.org/awards/dubroff_2005.pdf) (considering due process concerns in expedited removal); David A. Martin, *Too Many Behind Bars: The INS Doesn't Need to Lock Up Everyone Facing a Deportation Hearing and the Supreme Court Should Say So*, LEGAL TIMES, Jan. 27, 2003, at 51 (critiquing mandatory detention of non-citizens with convictions post-*Demore v. Kim*).

31. See Rapid Response Border Protection Act of 2005, H.R. 4044, 109th Cong. § 201 (2005) (introduced by Rep. Sheila Jackson-Lee (D-TX)).

32. See True Enforcement and Border Security Act of 2005, H.R. 4313, 109th Cong. § 221 (2005) (introduced in the House of Representatives by Reps. Duncan Hunter (R-CA) and Virgil Goode (R-VA) and in the Senate by Senators Ben Nelson (D-NE), Jeff Sessions (R-AL) and Tom Coburn (R-OK)).

33. See Strengthening America's Security Act of 2005, S. 1916, 109th Cong. § 11 (2005) (introduced by Senators John Cornyn and (R-TX) and Jon Kyl (R-AZ)).

34. See *Solving the OTM Undocumented Alien Problem: Expedited Removal for Apprehensions along the U.S. Border: Hearing Before the House Comm. on Homeland Security, Subcomm. on Economic Security, Infrastructure Protection, and Cybersecurity*, 109th Cong. (2005) (statement of David Aguilar, Chief, Office of Border Patrol, Dept. of

arguably serves a national security interest because officials are able to confirm the identity and criminal background, if any, of individuals in their custody.<sup>35</sup> Detention also is touted as preventing the “catch and release” policy under which DHS apprehends undocumented immigrants and releases them on bond, only to have the immigrants later fail to appear at their immigration hearings.<sup>36</sup> Therefore, if immigration authorities are able to detain non-citizens until their removal is executed, they arguably restore compliance with and the integrity of existing immigration laws.

Moreover, even before the current debate on comprehensive immigration reform, the phenomenon of immigration detention has been expanding over the last decade. For Fiscal Year 2006, DHS has been appropriated a record one billion dollars for immigration detention, including ninety million dollars for new detention beds.<sup>37</sup> This reportedly will result in approximately 4,200 new detention beds when taking into account the beds provided in the emergency supplemental bill.<sup>38</sup> DHS uses over two-hundred facilities around the

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Homeland Security), 2005 WL 2428143 (stating that “DHS expects that [expedited removal], and the associated general rule of detention pending removal, will become a significant tool to deter future illegal migration between the ports of entry, particularly for non-Mexican illegal alien nationals who transit through Mexico.”).

35. *Id.*

36. See *U.S. Ending 'Catch and Release' at Mexico Border: Tens of Thousands of Illegal Non-citizens Slipped in Under Legal Loophole*, REUTERS, Nov. 23, 2005, available at <http://msnbc.msn.com/id/10173883/>. However, DHS statistics on the numbers, percentages and reasons why undocumented immigrants who were released from custody fail to appear at their hearings have been criticized by experts as inaccurate and unsubstantiated. See Frelick, *supra* note 29; and *Electronic Anklets Track Asylum Seekers in U.S.* (Nat'l Pub. Radio radio broadcast Mar. 2, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4519090>.

37. See DHS Appropriations Bill, H.R. 2360 enacted as Pub. L. No. 109-90 (2005), which requires that DHS report in thirty days from enactment of the bill on the number of new detention beds it plans to fund in FY 2006. Congress also has also directed DHS to develop and to report to Congress on a comprehensive immigration enforcement strategy that will reduce the number of undocumented immigrants in the United States by ten percent per year. Additionally, Congress mandated that DHS develop a national detention management plan for undocumented immigrants, which will include attention to regional detention contracts and alternatives to detention such as the use of ankle bracelets. Congress has withheld five million dollars until this plan is submitted to the Committees on Appropriations.

38. See Press Release, Congressman Solomon P. Ortiz (D-TX), House Passes Final Homeland Security Spending Bill; Adds Agents, Detention Beds (Oct. 7, 2005), available at [http://www.house.gov/ortiz/releases/pr\\_100705.html](http://www.house.gov/ortiz/releases/pr_100705.html) (noting that the appropriations bill will only provide 2,300 new beds, which when coupled with the 1,940 beds provided in Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, Pub. L. No. 109-13, will result in 4,250 new beds and still remains short 3,750 detention beds as authorized by The National Intelligence Reform Act of 2004, Pub. L. No. 108-458).

country for detention.<sup>39</sup> In addition, even though detained immigrants await civil administrative removal proceedings, aliens are not detained in civil detention facilities.<sup>40</sup> Instead, the facilities are typically private prisons or state and local jails where detainees are commingled with pretrial criminal detainees or criminal convicts serving their sentences.<sup>41</sup> DHS detains over 20,000 people on a daily basis, which results in over 200,000 per year.<sup>42</sup> Without the right to government-appointed counsel under the INA, almost ninety percent of detainees are unrepresented in the immigration removal proceedings.<sup>43</sup> Tellingly, immigration detainees are the fastest growing segment of the incarcerated population.<sup>44</sup>

There are significant federal, state and local dynamics at play, underscoring the growth of immigration detention. For example, because federal and state crime rates are down, there is significant excess jail space and arguably, a “need” for immigration detainees.<sup>45</sup> Additionally, DHS often enters into contracts paying a *per diem* rate, higher than the actual raw costs that state and local jails or private prisons expend on detaining an individual.<sup>46</sup> The difference in *per*

39. This number is a reasonable estimate of facilities based on recent DHS detention practices since DHS reportedly no longer releases to non-governmental organizations rosters of the actual facilities used and head-counts of detainees held in these facilities. The American Bar Association has reported that over 200 facilities are currently in use. See A.B.A., Comm’n on Immigration Pol’y, Practice & Pro Bono, INS Detention Standards Implementation Initiative, <http://www.abanet.org/immigprobono/detentionstandardsini.html>; Shawn Zeller, *Yearning to Breathe Free*, GOVEXEC.COM, Oct. 14, 2004, <http://govexec.com/features/1004-15/1004-15newsanalysis1.htm> (reviewing MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004)). See also ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS (1st ed. 2004); MICHAEL WELSH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX (2002).

40. See Zeller, *supra* note 39.

41. *Id.*

42. *Id.*

43. Section 292 of the Immigration and Nationality Act provides the right to representation in removal proceedings at no expense to the government. As a consequence, over eighty percent of detainees currently are unrepresented by counsel in removal proceedings. See A.B.A., Comm’n on Immigration, Pro Bono Assistance Needed for Immigrants, Refugees and Newcomers in Immigration Detention, <http://www.abanet.org/immigration/probono/adultprobono.html>; Nate Schweber, *Detainees in, out of County Jail*, HERALD NEWS (PASSAIC COUNTY, NJ), Feb. 16, 2004, available at <http://www.bergen.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFIZUVFeXkyJmZnYmVsN2Y3dnFIZUVFeXk2NDg4ODY4>.

44. See, e.g., Elizabeth Llorente, *Reform Plan Will Escalate Detention of Immigrants*, REC. (BERGEN COUNTY, N.J.), Jan. 18, 2005, at A1; and Lornet Tumbel, *New Tacoma Facility to House People Targeted for Deportation, Need Grows for Such Centers as U.S. Cracks Down*, SEATTLE TIMES, Feb. 26, 2004, at B1.

45. See DOW, ELSNER AND WELSH, *supra* note 39.

46. See, e.g., Dary Cracy, *Private Prisons Experience Business Surge*, ASSOCIATED PRESS, July 31, 2005, available at <http://abcnews.go.com/US/wireStory?id=993879&CMP=>

*diem* and actual costs may result in a profit stream destined to county coffers, which can help offset budgets and fund many other municipal functions, including public education.<sup>47</sup> Some Congressional offices, in fact, receive requests from officials in their districts to help secure contracts with DHS to house immigration detainees in their facilities, given the lucrative nature of this enterprise.<sup>48</sup>

Other dynamics underlying the growth of immigration detention occur during the appropriations process. DHS is an executive branch agency, ultimately accountable to Congress. DHS initially submits its budget through the Office of Management and Budget (OMB). After OMB releases the President's budget for the agency, members of Congress may alter the specific funding requests and insert language into the appropriations bills, such as directives to the agency regarding its policies and programs. In some instances, such funding and language can impact policy more significantly than substantive pieces of legislation because executive agencies may be more responsive to appropriations bills than to legislation enacted without funding or an unfunded mandate.

For example, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act migrated from being a stand-alone bill in the House of Representatives to being inserted in modified form into the appropriations process this year.<sup>49</sup> Consistent with the CLEAR Act's objective to authorize and encourage state and local law enforcement

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OTC-RSSFeeds0312; Keith O'Brien, *Six Weeks After Cuban Refugees Were Ordered Released, Many Remain Locked Up. For Some Wardens That's Good, Because Housing Them Means Big Bucks*, TIMES PICAYUNE (NEW ORLEANS), Mar. 3, 2005, National, at 1; Paul Kaplan, *Crime Pays for Roswell: The City Gets a Fee from the Feds to House Inmates, Whom It Turns Over to a Private Facility, Taking a Cut and Turning a Tidy Profit of Prisoners*, ATLANTA J. & CONST., Feb. 27, 2005 at 1ZH; Ken Serrano, *Middlesex County May Lose Aid for Jailed Illegal Aliens*, HOMES NEW TRIB., Feb. 13, 2005, at 1; Charles Keeshan, *County to Tap Rainy Day Funds for Jail Expansion*, DAILY HERALD (ARLINGTON HEIGHTS, IL), Jan. 12, 2005, at 1; *For Passaic Sheriff*, N.J. REC., Oct. 25, 2004, Opinion, at L6; Sasha Abramsky, *Incarceration, Inc: Private Prisons Thrive on Cheap Labor and the Hunger of Job-Starved Towns*, NATION, July 19, 2004, at 22; Getahn Ward, *Family Firm Finds Niche Behind Bars*, TENNESSEAN, Feb. 9, 2004, at E1; Brent Lancaster, *Mecklenburg County, N.C., Profits from Prisoners*, TIMES-NEWS (BURLINGTON, NC), Jan. 18, 2004; Michael Hallett, *Commerce with Criminals: The New Colonialism in Criminal Justice*, REV. POL'Y RESEARCH, Jan. 1, 2004, at 49; Joe Nawroski, *Federal Prison is Proposed Near Historic Turners Station: Privately Run Facility Seen as Threat to Revitalization*, BALTIMORE SUN, Nov. 19, 2003, Telegraph, at 1A; Alisa Solomon, *The Gate Keeper: Watch on the INS; Detainees Equal Dollars*, VILLAGE VOICE, Aug. 20, 2002, Features, at 46; Lori Montgomery, *Rural Jails Profiting from INS Detainees*, WASH. POST, Nov. 24, 2000, at A1.

47. *Id.*

48. *Id.*

49. The Clear Law Enforcement for Criminal Alien Removal Act of 2005, H.R. 3137, 109th Cong. (2005).

of federal immigration laws, Congress appropriated *sua sponte* five million dollars to DHS to train state and local officials on enforcing immigration laws.<sup>50</sup> This provision, however, had not been requested in the President's budget for DHS.<sup>51</sup> This five million dollar provision itself then migrated in modified form into a new stand-alone bill that proposed an eight-hundred and fifty million dollar reimbursement for state and local law enforcement for the detention and transportation of unlawful aliens to federal custody.<sup>52</sup> This new bill would still require state and local law enforcement to document and report to federal authorities regarding arrested aliens who are in their custody.<sup>53</sup> However, the incentive of reimbursement would lead to identification, detention and transportation of aliens to federal custody even without added funding for training by DHS. The transformation of the CLEAR Act illustrates that such provisions tend to migrate between the appropriations process and substantive legislation.

Another example of migration between substantive stand-alone bills and the appropriations process lies in the asylum reform provisions of the Real ID Act of 2005 (Real ID).<sup>54</sup> Several provisions of the Real ID originated in the Fairness in Immigration Litigation Act in the spring of 2004.<sup>55</sup> After the asylum provisions of Real ID were rejected by the Senate in the Intelligence Reform and Terrorism Prevention Act in December 2004, it nonetheless was attached to and enacted through the military supplemental bill of 2005, which was the first must-pass bill in the 109th Congress.<sup>56</sup>

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50. DHS Appropriations Bill, H.R. 2360 enacted as Pub. L. No. 109-90 (2005), *supra* note 37.

51. See U.S. DEPT. OF HOMELAND SECURITY, BUDGET-IN-BRIEF, FISCAL YEAR 2006, available at [http://www.dhs.gov/interweb/assetlibrary/Budget\\_BIB-FY2006.pdf](http://www.dhs.gov/interweb/assetlibrary/Budget_BIB-FY2006.pdf).

52. DHS Appropriations Bill, H.R. 2360 enacted as Pub. L. No. 109-90 (2005), *supra* note 37.

53. See TRUE Enforcement and Border Security Act of 2005, *supra* note 32.

54. Pursuant to H. Res. 151, the text of H.R. 418, as passed by the House of Representatives, was appended as Division B to the end of H.R. 1268. Division B was further modified in conference. H.R. 1268 became Pub. L. No. 109-13 on May 11, 2005.

55. The Fairness in Immigration Litigation Act, S. 2443, H.R. 440, 109th Cong. (2005). See HEBREW IMMIGRANT AID SOC'Y, FAITHFUL BUT FORSAKEN: REAL ID HARMS VICTIMS OF RELIGIOUS PERSECUTION (2005), [http://www.hias.org/News/Docs/FaithfulButForsaken\\_4-12-05.pdf](http://www.hias.org/News/Docs/FaithfulButForsaken_4-12-05.pdf) (critiquing how Real ID will prejudice asylum-seekers).

56. The National Intelligence Reform Act of 2004, Pub. L. No. 108-458 and the Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, Pub. L. No: 109-13, *supra* note 38.

## IV. PROPOSALS FOR REFORM

There are four key measures that could make immigration enforcement fair, humane and cost-effective. First, there are programs that exist called alternatives to detention.<sup>57</sup> In Fiscal Year 2006, Congress appropriated twenty-eight and a half million dollars to DHS for alternatives to detention programs, including the Intensive Supervision Appearance Program (ISAP) for non-citizens.<sup>58</sup> ISAP utilizes the best practices from the criminal justice system, including ankle bracelets through the first thirty days of an alien's participation in the program, coupled with referrals to legal and social service agencies.<sup>59</sup> Such alternatives to detention ensure increased appearances at immigration hearings and could result in a cost savings to taxpayers over the use of immigration detention.

Second, expanding access to the Legal Orientation Program (LOP) could improve immigration enforcement. Through LOP, the Executive Office for Immigration Review (EOIR) provides funding for nongovernmental organizations to orient detainees regarding their rights and remedies in immigration removal proceedings.<sup>60</sup> Studies show that detainees who received such orientation and realized that they lack any viable form of immigration relief will accept removal faster, thereby resulting in a savings of several million dollars in taxpayer expense on detention and immigration court costs.<sup>61</sup> In fact, EOIR received two million dollars in the DHS budget for Fiscal Year 2006 to implement LOP.<sup>62</sup> System-wide expansion of LOP, as recommended by the United States Commission on International

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57. See U.S. Immigration and Customs Enforcement, Fact Sheet, Detention and Removal Operations: Alternatives to Detention, July 14, 2004, <http://www.ice.gov/graphics/news/factsheets/061704detFS2.htm>. The precursor to DHS's current alternatives to detention programs was the Appearance Assistance Program implemented by the Vera Institute of Justice. See EILEEN SULLIVAN ET. AL., TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM (2000), available at [http://www.vera.org/publication\\_pdf/aapfinal.pdf](http://www.vera.org/publication_pdf/aapfinal.pdf).

58. See H.R. 109-241, at 47 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr241.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr241.109.pdf).

59. See Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils New Alternative to Detention: Pilot project to be introduced in eight cities (June 17, 2004), available at <http://www.ice.gov/graphics/news/newsreleases/articles/061704det.htm>.

60. See Andrew I. Schoenholtz, *Increasing The Efficiency And Fairness Of Immigration Removal Proceedings: Why Congress Should Expand The Legal Orientation Program*, IMMIGRATION LAW DAILY, Mar. 21, 2005, <http://www.ilw.com/articles/2005,0321-Schoenholtz.shtm>.

61. *Id.*

62. *Supra* note 52.

Religious Freedom, could be a practical means to making detention and removal proceedings more fair, humane and cost-effective.<sup>63</sup>

Additionally, the treatment of families in detention is cause for concern. Congress has begun to address DHS's separation of nuclear family members during detention.<sup>64</sup> DHS reportedly sends the wife to one facility, the husband to another and the children to the Department of Health and Human Services Office of Refugee Resettlement as an "unaccompanied alien child."<sup>65</sup> Keeping detained family members together as a unit in family-friendly shelters or through alternatives to detention programs would be fair, humane and cost-effective.

Finally, advocates should consider how to restore immigration judicial discretion and due process in removal proceedings, in order to secure comprehensive immigration reform. Without correcting the 1996 immigration reforms, immigration judges will continue to lack discretion and be forced to remove aliens who have compelling inequities to remain in the United States, but are ineligible for relief from removal under current immigration law.<sup>66</sup> Such reform could yield cost savings to both society and the economy if, for example, it prevented the removal of breadwinners from their families when their loss would cause family members to rely on public assistance at taxpayer expense. Also, by preventing removal, employees would not be separated from their employers, which would otherwise cause

63. See U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REP. ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), available at [http://www.uscirf.gov/countries/global/ asylum\\_refugees/2005/february/index.html](http://www.uscirf.gov/countries/global/ asylum_refugees/2005/february/index.html); *supra* note 30.

64. See, for example, the exchange between Congresswoman Lucille Roybal-Allard (D-CA) and HHS Assistant Secretary Wade Horn on this issue. *House Appropriations Comm. Hearing of the Labor/HHS, Education and Related Agencies Subcomm.*, 109th Cong. (2005), 2005 WL 546701.

65. In the House DHS Appropriations Conference Report No. 109-079, the House of Representatives directed DHS to cease its practice of separating children from their parents during detention through misclassifying the children as "unaccompanied" alien children, thus obligating the Department of Health and Human Services (HHS) to care for them at HHS expense. See DEP'T OF HOMELAND SECURITY APPROPRIATIONS BILL, 2006, H.R. REP. NO. 109-079, at 38 (2005), available at [http://thomas.loc.gov/cgi-bin/cpquery/R?cp109:FLD010:@1 \(hr079\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp109:FLD010:@1 (hr079)). Rather, the House directed DHS to use appropriate detention space to house families together, release them, or use alternatives to detention such as the Intensive Supervision Appearance Program. The joint explanatory statement of managers of the House and the Senate stated that such directives arising from the underlying House and Senate reports "should be complied with unless specifically addressed to the contrary in the final conference report and statement of managers." *Id.*

66. In this regard, The Keeping Families Together Act of 2005, introduced by Representative Filner (D-CA) would restore discretion to immigration judges by "restor[ing] certain provisions relating to the definition of aggravated felony and other provisions as they were before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." The Keeping Families Together Act of 2005, H.R. 2865, 109th Cong. (2005).

diminished productivity and a lost investment to the employer who provided the employees with job training.

A comprehensive prospective model for fair, humane and cost-effective reform of immigration enforcement is the Enhanced Information-Sharing, Coordination and Oversight Over Immigration Detention Policies, Practices and Operations Within the Department of Homeland Security (Meek's Amendment), which was introduced as an amendment by Representative Kendrick Meek (D-FL) to the Border Security and Terrorism Prevention Act of 2005.<sup>67</sup> Meek's Amendment reportedly was inspired by Reverend Joseph Dantica, an eighty-one-year-old asylum-seeker from Haiti, who died in immigration custody, and Ernsö Joseph, a Haitian orphan who had languished in immigration detention.<sup>68</sup> The purpose of Meek's Amendment was to:

- Establish a narrow category of particular populations in immigration detention, who require special care and placement by virtue of their vulnerable characteristics, including experiences or risk of abuse, mistreatment, or other serious harms threatening their health or safety.
- Ensure transparency in all policies and procedures among all entities within DHS that develop or implement policy on the treatment of immigrants, asylum-seekers, refugees and vulnerable populations.
- Promulgate written policies and regulations on immigrants, asylum-seekers, refugees and vulnerable populations that promote a balance between law enforcement and individual and humanitarian considerations.
- Ensure uniform, safe, and secure conditions of custody of non-criminal aliens, including vulnerable

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67. The Border Security and Terrorism Prevention Act of 2005 introduced by Rep. King (R-NY) was voted out of the Homeland Security Committee of the House of Representatives for referral to the Judiciary Committee. The Border Security and Terrorism Prevention Act of 2005, H.R. 4312, 109th Cong. (2005).

68. See *Republicans Say No to Improved Detention Standards*, HEARTBEAT NEWS, Nov. 18, 2005, available at <http://www.kendrickmeek.us/ShowPage.asp?page=Hardbeatnews11182005.asp>. See, e.g., Cheryl Little, *Investigate Pastor's Death*, MIAMI HERALD, Dec. 15, 2004, Opinion, and Edwidge Danticat, *Justice for Asylum Seekers*, PROGRESSIVE MEDIA PROJECT, Oct. 31 2005, [http://www.progressive.org/media\\_mpdanticat103105](http://www.progressive.org/media_mpdanticat103105) (concerning Reverend Dantica's death).

populations and family units, and to ensure their appearance before immigration court.

- Ensure standards for custody of children appropriate to their special needs.<sup>69</sup>

On November 16, 2005, during committee mark-up of the bill, Meek's Amendment was rejected by a vote of eighteen Republicans to all fifteen Democrats present who unanimously supported it.<sup>70</sup>

## V. CONCLUSION

As the debate over comprehensive immigration reform continues into 2006, there will be further opportunities for members of Congress and senators to propose and adopt fair and humane policies of immigration enforcement, which advocacy organizations, the media and the public can support. Fair and humane reform of immigration enforcement would honor this nation's history as a global beacon for human rights and give real effect to Emma Lazarus' timeless promise for America: "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed, to me: I lift my lamp beside the golden door."<sup>71</sup>

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69. Representative Meek's Amendment is on file with U. MD. L.J. RACE, RELIGION, GENDER & CLASS. See also Press Release, Women's Comm'n for Refugee Women & Children, U.S. Must End Harsh Treatment of Vulnerable Immigrants: Meek Amendment to House Homeland Security Bill a Creative Solution (Nov. 22, 2005), available at [http://www.womenscommission.org/archive/05/press\\_releases/112205.shtml](http://www.womenscommission.org/archive/05/press_releases/112205.shtml). The importance of Representative Meek's Amendment in "providing simple protections for immigration detainees" was explicitly recognized by the Democrats of the House Judiciary Committee in the Minority Views on H.R. 4437, 109th Cong. (2005). See *supra* note 27, at 483, note 35.

70. Other noteworthy proactive amendments to H.R. 4312 included several amendments by Representative Zoe Lofgren (D-CA) to exempt vulnerable populations from mandatory detention, to provide for individual custody determinations for aliens arrested by DHS; and amendments by Representative Sheila Jackson Lee (D-TX) to exempt asylum-seekers and victims of severe forms of trafficking from mandatory detention. Like Meek's Amendment, these amendments were rejected during committee mark-up.

71. EMMA LAZARUS, THE NEW COLOSSUS (1883) (appearing on a plaque at the base of the Statue of Liberty).