Journal of Law and Policy

Volume 31
Issue 1 *12/01/2022*

Article 1

12-1-2022

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Sabrina Balgamwalla

ICE TRANSFERS AND THE DETENTION ARCHIPELAGO

Sabrina Balgamwalla[*]

> Scattered from the Bering Strait almost to the Bosporus are thousands of islands of the spellbound Archipelago. They are invisible, but they exist. And the invisible slaves of the Archipelago, who have substance, weight, and volume, have to be transported from island to island just as invisibly and uninterruptedly.[1]

This article examines transfers as an understudied but critical dimension of the immigration detention system. Transfers regularly take detainees in immigration custody from public to private facilities, across state lines, and beyond the jurisdiction of individual courts. Immigration and Customs Enforcement ("ICE") has virtually unlimited authority to use transfers strategically to further agency goals of immigration enforcement. For individual detainees, transfers shape outcomes in their immigration cases. Noncitizens are regularly funneled into detention centers in legal jurisdictions generally hostile to claims for relief. Transfers also

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[*] Assistant Professor, Director of Asylum & Immigration Law Clinic, Wayne State Law School. The author wishes to thank the participants of the 2022 AALS Immigration Law Section New Voices Workshop and the 2022 Midwest Migration Scholars Conference—especially respective commenters Ingrid Eagly and Lauren Duquette-Rury—for their comments. This article also benefitted enormously from feedback from my Wayne State colleagues, especially Nancy Cantalupo, Christopher Lund, Jonathan Weinberg, and Steven Winter. This article was inspired by and is dedicated to the AILC clients whose lives have been marked by the fear, uncertainty, and isolation of being detained and transferred away from their communities. Finally, this article, like every other aspect of my work, would not be possible without the generous love and support of Lauren Harper.

[1] ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO: AN EXPERIMENT IN LITERARY INVESTIGATION (Thomas P. Whitney trans., 1974).

regularly send detainees to facilities in isolated, rural communities, where they are more likely to face psychological and logistical barriers to fighting their deportation. From the outset, ICE has resisted regulation and adherence to its own guidelines, resulting in harm to detainees without the protections and recourse afforded to those in criminal custody. The agency's unlimited authority to effectuate transfers can be traced to specific failures within each branch of government, including the lack of statutory or regulatory authority to rein in ICE practices and jurisdiction-stripping statutes that systematically prevent noncitizens from challenging immigration agency decisions. The intractable problems raised by transfers—including the limits of ICE detention infrastructure and the challenges of enforcing standards across public and private facilities—highlight the problems inherent in an enforcement strategy with detention at its center. This article concludes that transfer policies require not reform, but reimagination of immigration enforcement within a framework that offers safeguards for the rights of noncitizens in removal proceedings.

INTRODUCTION

On January 26, 2021, President Biden issued an executive order calling for the Department of Justice to end its reliance on private prisons.[2] Though this development suggests an intent to limit incarceration, the order notably omits closure of private facilities that detain immigrants in the custody of Immigration and Customs Enforcement ("ICE").[3] ICE detention infrastructure is extensive. The ICE agency website lists seventy-nine detention centers,[4] though current data from Freedom for Immigrants shows more than 200 active detention sites, including agency Service Processing Centers, privately-owned Contract Detention Facilities, and state and local government facilities that hold ICE detainees pursuant to

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[2] Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 21, 2021); *see also The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS: DEMOCRATS, https://joebiden.com/justice/ (last visited Nov. 18, 2022).

[3] Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 21, 2021).

[4] *Detention Facilities*, U.S. IMMIGR. AND CUSTOMS ENF'T., https://www.ice.gov/detention-facilities (last visited Oct. 21, 2022) (listing active detention facilities).

federal agency contracts.[5] A Freedom of Information Act ("FOIA") request by the National Immigrant Justice Center indicates that, as of November 2017, ICE held individuals at more than 1,000 facilities.[6] This detention infrastructure continues to expand, often to remote parts of the United States.[7] Throughout their time in immigration detention, many noncitizen detainees find themselves transferred from facilities hundreds of miles, or even across the country, from where they were initially arrested.[8] This dispersed network of immigration detention facilities—many of which are located in isolated, rural communities—is reminiscent of the islands of an archipelago.[9]

ICE's ability to transfer detainees to any facility in the country has shaped detention infrastructure, connecting facilities in remote

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[5] *See Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGR., https://www.freedomforimmigrants.org/map (last visited Oct. 21, 2022).

[6] *ICE Detention Facilities as of November 2017*, NAT. IMMIGRANT JUST. CTR., https://immigrantjustice.org/ice-detention-facilities-november-2017 (last visited Nov. 18, 2022).

[7] Edith Riegler, *More Prisons, Further Away: A Closer Look at the Expanding Global Prison Estate*, PENAL REFORM (July 6, 2022), https://www.penalreform.org/blog/more-prisons-further-away-a-closer-look/; *see* discussion *infra* Part I.B; *see also* Philip Marcelo & Gerald Herbert, *Immigration Detentions Soar Despite Biden's Campaign Promises*, THE GUARDIAN (Aug. 5, 2021, 11:00 AM), https://www.theguardian.com/us-news/2021/aug/05/migrant-detention-border-biden-politics.

[8] *See* discussion *infra* Part I.C.

[9] This analogy alludes to Aleksander Solzhenitsyn's GULAG ARCHIPELAGO: AN EXPERIMENT IN LITERARY INVESTIGATION (1974), the titular "archipelago" referring to the sprawling network of forced labor camps and prisons that comprised the Soviet Gulag. Michel Foucault adopted this reference in coining the term "carceral archipelago" in DISCIPLINE AND PUNISH (1975), referring to the disciplinary networks that carceral mechanisms and technologies. While this piece explores detention networks that are increasingly relocating ICE detainees to remote, rural areas of the United States, it is also worth noting that in many countries, immigration detention sites are literally located on islands. *See, e.g.*, Isabella Kwai, *Australia to Shift All Offshore Processing of Migrants to Island Nation of Nauru*, N.Y. TIMES (Oct. 6, 2021), https://www.nytimes.com/2021/10/06/world/australia/australia-migrants-nauru-papua-new-guinea.html; Lydia Emmanouilidou, *'This Island is a Prison': Migrants Say Plan for a Refugee Camp on Lesbos is Too Isolating*, THE WORLD (Apr. 6, 2021, 3:00PM), https://theworld.org/stories/2021-04-06/island-prison-migrants-say-plan-refugee-camp-lesbos-too-isolating.

parts of the United States in a shifting and rapidly expanding carceral network. Against this landscape, immigration courts and federal court jurisdictions take radically different approaches to the interpretation of immigration law, leading to inconsistent factfinding and legal interpretation. As Professors Andrew Schoenholtz, Jaya Ramji-Nogales, and Philip G. Schrag write in *Refugee Roulette*, the result is a system where asylum-seekers may stand virtually no chance of obtaining asylum based on the court that hears their cases and where one circuit is over 1,000% more likely to grant relief to an asylum-seeker compared to another.[10] What this means—in a system where ICE has unlimited transfer power—is that the agency that prosecutes these cases has the power to funnel respondents disproportionately into hostile jurisdictions, with little recourse for detainees.

This article examines ICE detention transfers practices, their legal consequences, and the origins of the agency's uniquely unchecked power. Part I of this article introduces the relevant law on jurisdiction and the key differences between transfer authority in the criminal, civil, and administrative law contexts, highlighting the lack of restrictions on ICE's ability to engage in forum shopping. Part II of this article examines the source of ICE's detention authority, the physical infrastructure of ICE detention, and how transfers work in practice. Part III explores how transfers systemically interfere with unbiased adjudication of claims, as noncitizens are disproportionately transferred to venues that overwhelmingly deny claims for asylum, release on bond or parole, and writs of habeas corpus. Part IV examines how transfers benefit a larger strategy of mass deportation, as they diminish a detainee's sense of fairness in immigration proceedings, inhibit access to counsel, create case delays, limit access to in-person hearings, and provide opportunity for agency coercion of detainees. Part V traces the factors that have contributed to the executive agency's broad and unchecked scope of authority, including specific areas of action and inaction by Congress, the executive agency's history of self-regulation, and judicial interpretations of jurisdiction-stripping statutes that inhibit detainees' ability to challenge transfer practices.

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[10] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301 (2008).

The article concludes that because the present state of ICE detention and transfer authority lies at the confluence of these issues, it will evade a simple unilateral fix through executive regulation. However, because transfers are what sustain the growth and maintenance of detention practices and infrastructure, addressing transfer practices will be critical to reforming and reimagining immigration enforcement.

I. TRANSFERS AND CHOICE OF LAW: FROM REFUGEE ROULETTE TO THE DETENTION ARCHIPELAGO

The seminal study *Refugee Roulette* exposed a truth that many practitioners knew anecdotally—that variations in rates of asylum grants and remands vary substantially between immigration courts and in federal court jurisdictions.[11] Despite the value traditionally placed on legal uniformity, variation in factfinding and jurisprudence has long been the reality.[12] Outcomes in local courts may differ substantially from one another;[13] such variations exist in

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[11] *Id.* at 296. This important study prompted other empirical analyses of federal court decisions. *See* Mary Hoopes, *Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals*, 39 BERKELEY J. INT'L L. 161, 163 (2021) ("Using data collected over seven years in five different Courts of Appeals, this Article finds that the variation between remand rates cannot be explained by a difference in the types of claims heard across the circuit courts; in other words, the data do not simply reflect the fact that circuits with very low remand rates are hearing fundamentally different types of cases than circuits with higher remand rates. Rather, these disparities reflect very different approaches across circuits in reviewing the immigration agency."); David Hausman, *The Failure of Immigration Appeals,* 164 U. PA. L. REV. 1177, 1187 (2016) (showing that the average standard deviation of judge relief rates within the nineteen largest immigration courts between 1998 and 2004 was approximately nine percentage points).

[12] *See, e.g.,* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448 (2019); *but see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (questioning the legitimacy of efforts to produce uniformity in federal jurisprudence and suggesting that concerns for multi-state actors, need for predictability, and forum shopping are overstated).

[13] Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1991).

the administrative law context as well.[14] Political science scholars Deborah Beim and Kelly Rader have observed that circuit splits "occur disproportionately in areas of the law that are actively developing or are ambiguous,"[15] immigration law being a prime example.

For immigration purposes, jurisdiction vests when ICE files a charging document—a notice to appear ("NTA")—in a particular immigration court, commencing removal proceedings before an immigration judge under the Executive Office for Immigration Review ("EOIR").[16] Choice of law is governed by the jurisdiction in which a detainee is held, irrespective of where proceedings were first commenced.[17] Immigration judges and, on appeal, the Board of Immigration Appeals ("BIA") "apply the law of the circuit in cases

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[14] Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja Vu of Decisional Disparities in Agency Adjudication*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 158 (2008) (comparing immigration court factfinding in asylum cases with administrative law judge decisions in disability cases).

[15] *See, e.g.,* Beim & Rader, *supra* note 12, at 450.

[16] 8 C.F.R. § 1003.14. EOIR is an agency body under the Department of Justice that includes immigration courts and the Board of Immigration Appeals. This agency was created on February 15, 1983, through an internal Department of Justice ("DOJ") reorganization, which also separated EOIR from the immigration enforcement functions of the Immigration and Naturalization Service ("INS"). Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038–39 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3, 100).

[17] *See* 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.23(b)(ii). *See also* Matter of R-C-R-, 28 I&N Dec. 74 (BIA 2020) (finding that the jurisdiction where the detainee is located controls choice of law, irrespective of where the presiding judge sits) (citing Luziga v. Att'y Gen. of U.S., 937 F.3d 244, 250 (3d Cir. 2019)); Medina-Rosales v. Holder, 778 F.3d 1140, 1143 (10th Cir. 2015). However, courts are not in agreement on choice of law issues. *Compare* Herrera-Alcala v. Garland, 39 F.4th 233 (4th Cir. 2022) (holding that the location of the immigration judge is what determines the court with which a petition for review should be filed, and, by extension, the law that should be applied), *with* Sarr v. Garland, 50 F.4th 326, 331 (2d Cir. 2022) (finding that that the statutory language could mean "the place where the case is docketed, the physical location of the IJ during the hearings, the location of the immigration court with administrative control of the case, or the location of the petitioner at a particular point in the proceedings, to name a few potential possibilities for venue" and holding that venue lies where the NTA was filed unless an immigration judge has granted a motion to change venue).

arising in that jurisdiction."[18] Given the marked disparities in immigration court decisions on immigration relief and the number of circuit splits in the interpretation of immigration law, ICE is therefore positioned to increase the likelihood of removal when transferring a detainee to a particular site. Once a case is decided by an immigration judge, the law precludes review of many aspects of the decision,[19] though some federal circuit courts of appeal are more inclined to reverse an unfavorable decision by the BIA or an immigration judge.[20]

This government control of venue in immigration cases is unique. In the civil context, litigants may have the option to choose between federal and state court or different territorial subdivisions.[21] The term "forum shopping" has sometimes been used disparagingly to refer to plaintiffs seeking the most favorable jurisdiction for their cases; other legal scholars regard it as one of many lawful strategies to be used by litigators.[22] In the context of immigration detention, ICE's unlimited authority to transfer detainees is tantamount to choosing not only the immigration court that will hear the case, but also what circuit court interpretations of immigration law will control the proceedings. While individuals in criminal custody might also be transferred by the government, those transfers are subject to constitutional limitations. The Venue Clause of Article III designates the proper venue as the state in which an offense is

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[18] Matter of U. Singh, 25 I&N Dec. 670, 672 (BIA 2012).

[19] AEDPA stripped courts of jurisdiction to review certain removal decisions, requiring federal courts of appeal to defer to agency discretion. *See* 8 U.S.C. § 1252(a)(2)(B) ("no court shall have jurisdiction to review" administrative denials of various discretionary remedies).

[20] *See* discussion *infra* Part III.A.

[21] *See, e.g.,* Pennoyer v. Neff (95 U.S. 714 (1878), *overruled by* Shaffer v. Heiter, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[22] *See, e.g.*, Note, *Forum Shopping Reconsidered,* 103 HARV. L. REV. 1677 (1990); *see also* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (arguing that forum shopping is an authorized and strategic legal choice and not "cheating" the legal system); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (using empirical measures to show how proposed anti-forum shopping measures are not necessary, and that implementing these measures would be unduly limiting on American and foreign citizens in an era of increasing transnational litigation).

committed[23] and the Vicinage Clause of the Sixth Amendment limits jury selection to the district in which the crime was committed.[24] Furthermore, federal prosecutors seeking to change venue are subject to Rule 18 of the Federal Rules of Criminal Procedure, which provides that

> the government must prosecute an offense in a district where the offense was committed . . . [requiring that] [t]he court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.[25]

Accordingly, transfer of an incarcerated person may occur after an individual is convicted and sentenced; at earlier stages of the process, transfers are relatively rare.[26]

By contrast, detainees in ICE custody can be transferred at any stage of their case, with the new location governing jurisdiction. The roulette analogy used by Professors Schoenholtz, Ramji-Nogales, and Schrag suggests that obtaining immigration relief is a matter of luck, depending on which court hears the case. However, for detainees, that venue is almost always selected by ICE. Accordingly, with a detainee's transfer, the agency is also selecting the choice of law on all matters, including whether a detainee should be released on bond, what law controls adjudication of a claim for immigration relief, and whether a detainee has recourse to challenge prolonged detention. While transfers do not necessarily personally target individuals to game the outcome of individual cases, maintaining a disproportionate number of detention beds in remote, hostile legal jurisdictions does benefit an immigration enforcement strategy of

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[23] U.S. CONST. art. III, § 2, cl. 3.

[24] U.S. CONST. amend. IV.

[25] FED. R. CRIM. P. 18.

[26] This is not to say that post-conviction transfers do not occur. Individuals do not have the right to be incarcerated in the state the state where they were convicted. Olim v. Wakinekona, 461 U.S. 238, 248 (1983); *see also* Emma Kauffman, *The Prisoner Trade*, 6 HARV. L. REV. 1815, 1843–45, 1873 (2020) (analyzing the practice and prevalence of state export of prisoners and its role in punishment).

deportation.[27] These outcomes are consistent with the government's historic use of detention as an administrative tool to exclude and expel noncitizens, particularly those considered undesirable.[28]

Because ICE detainee transfers are not governed by the venue statutes that offer protections in civil proceedings, and are not subject to limits of jurisdiction in service of process rules, ICE can file the NTA in any jurisdiction at whatever point in the case the agency desires.[29] Immigration attorneys have, in fact, reported that it is common for ICE to delay the filing of an NTA to transfer a person more expeditiously to a distant facility.[30] Venue for writs of habeas corpus is also determined by a detainee's physical location[31]—a rule deemed necessary by courts to prevent forum shopping by habeas petitioners.[32] Changes of venue are possible, but courts often defer to the government's interest in "administrative

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[27] Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 140 (2013).

[28] *Id.*

[29] Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1201 (2014).

[30] Org. of Am. States [OAS], *Report on Immigration in the United States: Detention and Due Process*, at 136, Doc. 78/10 (Dec. 30, 2010), https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf. ICE policy permits the detention of individuals with no NTA issues in the presence of "compelling law enforcement need." Memorandum from Asa Hutchinson, Undersecretary, Border & Transp. Sec., to Michael J. Garcia, Assistant Sec'y, U.S. Immigr. & Customs Enf't, & Robert Bonner, Comm'r, U.S. Customs & Border Prot., 3 (Mar. 30, 2004) (on file with author); *see also* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-13, IMMIGRATION AND CUSTOM ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 2 (2009), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-01_Dec06.pdf (in which the DHS Office of the Inspector General confirms ICE's discretion to issue NTAs without respect to timing).

[31] 28 U.S.C. § 2243; *see also Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004) (finding that the District Court retains jurisdiction over properly filed immigration habeas even if petitioner is moved out of the court's territorial jurisdiction).

[32] *See, e.g.,* Vasquez v. Reno, 233 F.3d 688, 694 (Vasquez asserts that "allowing alien habeas petitioners to name the Attorney General . . . as respondent will encourage rampant forum shopping among petitioners"); Yi v. Maugans, 24 F.3d 500 (3d Cir.1994). *But see* Henderson v. INS, 157 F.3d 106 (2d Cir.1998) (weighing the merits of a "flexible approach" that would allow the Attorney General to be named in some or all immigration habeas cases).

convenience,"[33] giving little opportunity to respondents to challenge the venue and choice of law.[34] Detainees are frequently dispatched to the outer reaches of the archipelago—isolated places where they will face lower chances of winning their claims, especially where they cannot access legal support.[35]

II. ICE DETENTION AND TRANSFERS

Although some detainees are held in state and local jails, it is now more common for people in ICE custody to be transferred to detention facilities outside of their communities.[36] To understand the instrumental role of transfers in ICE's broad interpretation of its detention authority, it is critical to understand both the relationship between the physical realities of the detention landscape, as well as the nature of transfers between facilities.

A. Source of Transfer Authority

Immigration enforcement has long been considered the prerogative of the legislative branch.[37] Congress first authorized

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[33] Markowitz & Nash, *supra* note 29, at 1203–04, 1204 n.246.

[34] The agency's mission is focused on enforcement. *See Mission,* U.S. IMMIGR. AND CUSTOMS ENF'T https://www.ice.gov/mission (last visited Jan. 2, 2023) ("Mission: Protect America through criminal investigations and enforcing immigration laws to preserve national security and public safety."); *see also* Das, *supra* note 27 (arguing that detention is central in the design of contemporary immigration enforcement, with deportation as a first-order policy goal).

[35] *See* discussion *infra* Part II.B.

[36] *Id.*

[37] This judicial deference in the area of immigration first appears in *Ping v. United States,* 130 U.S. 581 (1889) and has come to be known as the "plenary power doctrine." The doctrine has been thoroughly critiqued by immigration scholars over the years but remains a defining aspect of immigration law in the United States. *See, e.g.,* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S. CT. REV. 255 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L.J. 545 (1990); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L.R. 29 (2015); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77 (2017).

civil detention in 1891 as a means of removing noncitizens from ships and holding them for the purpose of inspection.[38] From its outset, this statutory framework created a limbo state for noncitizens—while these individuals have physically entered the country and are in fact in custody within its borders, they are not formally admitted and are held in an "extra-legal space."[39] Congress has not only authorized detention, but has also mandated it for a number of individuals.[40] The stated purpose of immigration detention, outside of mandated detention and the detention of those who pose a risk to public safety, is "to detain noncitizens to secure their presence for immigration proceedings or removal from the United States," or detain those who pose a flight risk.[41] Where detention determinations are made at the discretion of immigration officials, these decisions cannot be reviewed by courts.[42] Congressional action in 1996 further expanded grounds for mandatory detention.[43] After the 9/11 attacks and the passage of the Homeland Security Act in 2002, Congress created the Department of Homeland Security ("DHS") and allocated a broad range of power to that agency, including the functions of the former Immigration and Naturalization Service ("INS"), which it absorbed in 2003.[44]

ICE thus has the power to interpret its own detention authority very broadly. The Immigration and Nationality Act ("INA")

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[38] Immigration Act of 1891, Ch. 551, § 8, 26 Stat. 1084, 1085 (1891).

[39] DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 18 (2012).

[40] 8 U.S.C. § 1226(c).

[41] *Detention Management*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/detain/detention-management (last visited Jan. 2, 2023).

[42] 8 U.S.C. § 1226(e).

[43] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[44] Homeland Security Act of 2002, Pub. L. No. 107-296 (2002); Overview of INS History, USCIS HIST. OFF. AND LIBR., https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf (last visited Nov. 7, 2022).

contains no specific language on transfers.[45] Section 241 of the INA authorizes the Attorney General to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal," and to "acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention" when there are not facilities available to detain people awaiting the outcomes of their removal proceedings or for people being deported.[46] There are no statutory limits on ICE's transfer authority. ICE has opposed non-statutory limits on its power to transfer detainees from one facility to another, which, in the agency's view, "would curtail its ability to make the best and most cost-effective use of the detention beds it has access to across the country."[47] The agency has maintained that the sole "determining factor" for immigration detention transfers is "whether the transfer is required for operational needs."[48] ICE attributes its need for flexibility on transfers to the nature of its Intergovernmental Service Agreements ("ISGAs") with state and local jails, which are subject to their own procedures and guidance.[49] Like other aspects of detention determinations, ICE's discretion on the use of transfers is not subject to legal review.[50] Immigration scholar César Cuauhtémoc García Hernández has observed that the immigration system is positioned "not as part of the criminal justice system overseen by constitutional guarantees and the courts, but as a result of civil administrative proceedings that is largely outside the reach

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[45] Immigration and Nationality Act of 1952, Pub. L. No. 414 (1952) (codified at 8 U.S.C. §§ 1101–1105a, 1151–1504, 1521–24, 1531–37).

[46] 8 U.S.C. § 1231(g).

[47] *Locked Up Far Away,* HUM. RTS. WATCH 6, 20 (Dec. 2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf.

[48] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 52–53 (2010) (citation omitted).

[49] *Locked Up Far Away*, *supra* note 47, at 21.

[50] *See* 8 U.S.C. § 1226(e); s*ee also* Avramenkov v. INS, 99 F. Supp. 2d 210, 214 (D. Conn. 2000) (finding the court did not have "jurisdiction to review the Attorney General's decision to transfer an alien from one locale to another to commence removal proceedings . . . in the absence of proof of actual interference with an existing attorney-client relationship or a showing that an alien's constitutional rights have been interfered with").

of both."[51] In the general absence of review procedures for executive decisions on detention, he concludes, ICE's detention authority "operates in a legal black hole unknown even in the penal incarceration context," leaving detained noncitizens "largely invisible to the outside world."[52]

B. Detention Geography

As authority to detain has expanded, so has the carceral capacity to hold people in immigration detention. In 1979, immigrant detention centers held less than 2,500 people daily; by 2019, that number jumped to more than 49,000.[54] In the early 1980s, immigration detention emerged as a key tool in U.S. immigration enforcement, with immigration officials first systematically apprehending noncitizens from the Caribbean and later expanding to detaining people of all nationalities.[55] In 1986, Congress passed the Immigration Control and Reform Act,[56] establishing enforcement as a critical aspect of U.S. immigration policy.[57] In response to this demand, Congress also allocated funds to INS for to build the first privately-run immigration detention facility in the United States, as well as one of the world's first offshore

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[51] César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 871 (2014).

[52] *Id.* at 870.

[54] *Detained*, THE MARSHALL PROJECT (Sept. 24, 2019), https://www.themarshallproject.org/2019/09/24/detained. Although detention rates declined in 2020 due to the COVID-19 epidemic, they are rising again. *See, e.g.*, *Immigration Detention Numbers on Their Way Back Up After Pandemic Slump*?, TRAC IMMIGR. (June 10, 2022), https://trac.syr.edu/whatsnew/email.220610.html.

[55] Michael Flynn, *There and Back Again: On the Diffusion of Immigration Detention*, 2 J. ON MIGRATION AND HUM. SEC., 165, 170–71 (2014); MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING INS COMPLEX, 86 (2002).

[56] Immigration Control and Reform Act of 1986, Pub. L. No. 99–603, 100 Stat. 3445.

[57] *Immigration Facts: Immigration Enforcement Spending Since IRCA*, MIGRATION POLICY INSTITUTE 1 (Nov. 2005), https://www.migrationpolicy.org/sites/default/files/publications/FactSheet_Spending.pdf.

immigration detention facilities—the "Migrant Operations Center" in Guantanamo Bay, Cuba.[58] Present-day immigration detention facilities take multiple forms, including facilities designated for juveniles, holding/staging facilities, medical facilities, private facilities under ICE contracts, and a network of state and local facilities that hold detainees and are funded through ISGAs.[59] Although the law distinguishes between civil immigration detention and criminal detention in a jail or prison, individuals in immigration custody live alongside those in criminal custody.[60]

The number of total detention beds is significant, but so too is the location of detention facilities themselves. Around the world, migrants are often held in isolated locations, in a technique that geographer Alison Mountz describes as "dispersal."[61] In the United States, more than half of all ICE detainees are held in facilities in remote, rural areas.[62] Emily Ryo and Ian Peacock, two immigration

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[58] Flynn, *supra* note 54, at 165, 171–72.

[59] *About the Data*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/222 (last visited Jan. 2, 2023).

[60] Rachel L. Swarns, *2 Groups Compare Immigrant Detention Centers to Prisons*, N.Y. TIMES (Feb. 22, 2007), https://www.nytimes.com/2007/02/22/washington/22detention.html (describing children as young as six years old separated from their parents); *A Growing Detention Network*, N.Y. TIMES (Dec. 26, 2008), http://www.nytimes.com/interactive/2008/12/26/us/1227_DETAIN.html (interactive map of local, private and federal detention centers used to house immigration detainees); *see also* Dina Rasor, *"Breathing While Latino" Laws Boom for Private Prison Profits*, TRUTHOUT, https://truthout.org/articles/breathing-while-latino-laws-boom-for-private-prison-profits/ (last visited Jan. 2, 2023) (citing statistics from the Detention Watch Network, stating that DHS owns and operates its own detention centers and contracts for bed space from over 312 county and city prisons nationwide).

[61] Alison Mountz, *Mapping Remote Detention: Dis/location through Isolation*, *in* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 93 (2012).

[62] Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019 7:13 AM), https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks#:~:text=Twitter-,Unequal%20Outcomes%3A%20Most%20ICE%20Detainees%20Held%20In,Areas%20Where%20Deportation%20Risks%20Soar&text=Ikon%2FGetty%20Images-

scholars conducting empirical research on immigration detention practices, found that in fiscal year 2015, 64% of detainees spent some time in detention in a rural facility and 58% were held in facilities at least thirty miles away from the closest nonprofit organization with immigration attorneys.[63] The five family detention centers in use from 2001 to 2016—Berks Family Residential Center in Berks County, Pennsylvania; Karnes Residential Center in Karnes City, Texas; South Texas Family Residential Center in Dilley, Texas; T. Don Hutto Residential Center in Taylor, Texas; and Artesia Family Residential Center in Artesia, New Mexico—are all in rural cities with small populations, far outside major cities where more legal resources are available.[64]

The remote location of these detention centers mirrors a larger trend for carceral facilities generally. Rural prison siting goes back to the 1980s, when prison development was considered a potential catalyst for economic growth and a particular boon for rural communities where other redevelopment plans failed.[65] Economic development remains a persuasive promise for rural communities where ICE detention facilities are built.[66] Rural county jails that have depopulated as incarceration rates dropped are also being repurposed and subsidized as ICE detention facilities.[67] Whereas in

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,More%20than%20half%20of%20immigrants%20detained%20by%20the%20U.S.%20Immigration,NPR%20analysis%2C%20about%2052%25.

[63] Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 27–28 (2018).

[64] Ingrid Eagly et. al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 813 (2018).

[65] Ryan S. King et al., *Big Prisons, Small Towns: Prison Economics in Rural America*, THE SENT'G PROJECT 1 (Feb. 2003), https://www.prisonpolicy.org/scans/sp/inc_bigprisons.pdf; *see also* Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, VERA INST. OF JUST. 21 (June 2017), https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf.

[66] Nate Hegyi, *Can A Private ICE Detention Center Save A Rural Town's Economy?,* CPR (Mar. 9, 2020 8:21 PM), https://www.cpr.org/2020/03/09/can-a-private-ice-detention-center-save-a-rural-towns-economy/.

[67] *See, e.g.,* Andrew Hazzard, *ICE detainees on the rise at Grand Forks jail*, GRAND FORKS HERALD (Mar. 25, 2017 5:00 AM),

1978, most jails held only people arrested by local law enforcement or sentenced on local charges, by 2013, 84% of jails held some people for other authorities, including ICE.[68] Rural facilities as a whole saw exponential growth in the rates of holding for other authorities, increasing by 888% as opposed to 134% growth in urban areas.[69] As one ICE official explains, "it's very difficult to build a detention facility, in Manhattan or in Boston. One, because there's limited space; two, the cost can be exorbitant, especially to the taxpayer; and then three, in many instances there are local communities there, they don't want a prison built in their backyard."[70] By contrast, the Southern Poverty Law Center refers to the American South as the "bargain basement of immigration detention," citing the region's historic reliance on carceral infrastructure for income generation and facilities that currently offer the lowest costs per diem to detain noncitizens on behalf of ICE.[71]

C. Detainee Transfers in Practice

The isolated location of ICE detention facilities is particularly concerning given that most detainees are not from those rural communities—they were arrested elsewhere and transported to these remote locations, sometimes more than a thousand miles away.[72] While every state has a facility with dedicated space for ICE

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https://www.grandforksherald.com/newsmd/ice-detainees-on-the-rise-at-grand-forks-jail.

[68] Kang-Brown & Subramanian, *supra* note 64, at 13–14.

[69] *Id.* at 14.

[70] Interview by Jennifer Ludden with Allison Parker, Deputy Dir., Hum. Rts. Watch, *Immigration Transfers Add to Systems Problems,* NPR (Feb. 11, 2009, 4:00 PM), https://www.npr.org/2009/02/11/100597565/immigration-transfers-add-to-systems-problems.

[71] Eunice Hyunhye Cho et al., *Shadow Prisons: Immigrant Detention in the South*, S. POVERTY L. CTR. 5 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf.

[72] *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States,* HUM. RTS. WATCH 17 (2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf

detainees, the capacity to hold detainees arrested in California, the Mid-Atlantic, and the Northeast is relatively limited.[73] The majority of ICE beds are located in facilities within the jurisdiction of San Antonio, Phoenix, Atlanta, Houston, Miami, and New Orleans.[74] Hence the need for ICE to rely on transfers between facilities. Analysis by Human Rights Watch shows that there were 2.04 million transfers in ICE custody from 1998 to 2010.[75] During that time, an estimated 40% of all detainees experienced at least one transfer and over 46% of transferred detainees were transferred two or more times.[76] Over 3,400 detainees experienced ten or more transfers, with one individual transferred between facilities sixty-six times.[77]

Transfers are abrupt and often disorienting experiences. Detainees are only required to be notified about a transfer immediately before it occurs; the guidelines specify that, "[f]or security purposes, specific plans and time schedules shall never be discussed with the detainee involved."[78] A transfer can happen at any time of the day.[79] While the detainee is to be notified that they are being transferred rather than deported, there is no requirement to

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(showing that the detainees are transferred, on average, 369 miles, with one frequent transfer pattern crossing 1,642 miles).

[73] DORA SCHRIRO FOR U.S. IMMIGR. AND CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6–9 (Oct. 6, 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; Ian Peacock & Emily Ryo, *The Landscape of Immigration Detention in the United States*, AM. IMMIGR. COUNCIL 2 (Dec. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf.

[74] DORA SCHRIRO, *supra* note 72, at 6; Peacock & Ryo, *supra* note 72.

[75] *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, *supra* note 71, at 10.

[76] *Id.* at 17.

[77] *Id.*

[78] *National Detention Standards for Non-Dedicated Facilities Standard,* U.S. IMMIGR. AND CUSTOMS ENF'T 198 (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf (specifically stating that the limited notice is necessary).

[79] *See, e.g.*, *Locked Up Far Away*, *supra* note 47, at 2 ("[The detainees] are loaded onto a plane in the middle of the night. They have no idea where they are, no idea what [US] state they are in. I cannot overemphasize the psychological trauma to these people.").

tell a detainee where they are being sent or when they will arrive.[80] Following a notification, a detainee is not permitted to make or receive telephone calls or to communicate with others in immigration detention.[81] Detainees are shackled during the transfer process, which often takes several hours but can take more than a day.[82] Given the prevalence and frequency of transfers in ICE custody, the psychological effects of transfers are inseparable from the experience of detention.

III. EFFECT OF DETENTION TRANSFERS ON IMMIGRATION CASE OUTCOMES

By sending detainees to certain facilities, ICE shapes the likely outcome of a case and potentially gives its Office of Chief Counsel a distinct legal advantage. On the whole, the Fifth Circuit receives the most transfers, with Louisiana receiving the greatest number of detainees transferred from out of state and the second-highest number of detainees overall.[83] The Eleventh Circuit receives the second most interstate transfers.[84] Thus, practices in the immigration courts in Atlanta and El Paso, as well as interpretations of immigration law in the Fifth and Eleventh Circuits, tend to impact the largest number of detainees.

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[80] *Id.* at 25 n.52.

[81] *Id.* at 25.

[82] *See, e.g.,* Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 736 (2009) (citing the example of one detainee at the Eloy Detention Center who reported that her transfer took two days and involved transportation by bus and plane, as well stays in different rooms during the transfer process).

[83] *Locked Up Far Away*, *supra* note 47, at 22–23.

[84] *Id.* at 14; *Detention by the numbers,* FREEDOM FOR IMMIGRANTS (2018), https://www.freedomforimmigrants.org/detention-statistics. Regarding the challenges of obtaining more current data, *see* Elena Hodges, *Building Power: Charting Recent Victories in the Movement to End Immigration Detention in the United States*, NY DIGNITY NOT DETENTION 81 n.382 (2022), https://nydignitynotdetention.org/wp-content/uploads/2022/06/Building-Power_Charting-Recent-Victories-Report.pdf ("No providers, organizers, or community members have been able to compile aggregate national or regional data on these transfers.").

A. Asylum

It is long-established that an asylum-seeker's location plays a significant role in a case's outcome.[85] Analysis of nearly 180,000 cases in fiscal years 2014 to 2019 shows asylum grant rates as high as 97% in some immigration courts and as low as 0% in others.[86] In 2019, in nearly half of the twenty largest facilities constructed under the Trump administration, immigration courts denied the claims of 90% of asylum-seekers. In four of these facilities, every single asylum claim was denied. During the same period, the national average rate for asylum denials was 70% for all cases and 76% for detained cases.[87] Asylum-seekers at the Stewart Detention Center in Georgia and Oakdale Detention Center in Louisiana—common destinations for transferred detainees—receive grants of asylum at the exceptionally low rates of 5% and 6%, respectively.[88]

There are numerous layers to these findings. The lack of representation—particularly at remotely-located facilities—can impact chance of success.[89] Certain types of claims may also face challenges in jurisdictions where federal case law is hostile to asylum claims. Asylum claims based on particular social group, for example, will fare very differently depending on the jurisdiction in which they are heard.[90] Asylum-seekers may also be barred from relief based on jurisdictional differences as to whether they have a criminal conviction that constitutes an aggravated felony[91] or

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[85] Ramji-Nogales, *supra* note 10, at 325–49 (finding that "there are serious disparities among immigration courts" depending on where the asylum seeker is originally from and in which court the judge sits).

[86] *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019*, TRAC IMMIGR. (2019), https://trac.syr.edu/immigration/reports/judge2019/denialrates.html.

[87] Eunice Hyunhye Cho et al., *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, AM. CIV. LIBERTIES UNION 25 (2020), https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration

[88] Cho et. al., *supra* note 70, at 10, 27, 37.

[89] *See* discussion *infra* Part III.B.

[90] *See* Michael Kagan, Chevron*'s Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119 (2021).

[91] Jason Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 38-39 (2014) (citing Reply Brief for the

whether they engaged in the persecution of others.[92] Discretion also plays a central role in asylum claims; immigration scholars and data analysts have consistently noted the patterns of high denial rates by particular courts.[93] Geographic disparities are further reinforced in review by federal courts of appeal. The Seventh Circuit, for example, is known for granting a high rate of petitions for review as well as a high rate of reversal.[94] By contrast, other circuits—including the Fourth, Fifth, and Eleventh Circuits—all had remand rates under 5%.[95] One study of federal court decisions indicates that circuits take different approaches to key aspects of asylum cases, including findings of credibility[96] and the threshold of treatment required for a finding of persecution.[97] These various factors can all shape an outcome when a detainee is transferred to a particular jurisdiction.

Petitioner at 2-3, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)) ("collecting BIA cases involving immigrants convicted of the same New York marijuana crime and demonstrating that those transferred to detention facilities located in the Fifth Circuit were deemed to have committed an aggravated felony, while noncitizens detained in the Second and Third Circuits, prevailed on that issue").

[92] *See, e.g.,* Martine Forneret, Note, *Pulling The Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar"*, 113 COLUM. L. REV. 1007, 1008 (2013).

[93] *See, e.g.,* Ramji-Nogales, *supra* note 10; *Asylum Outcome Continues to Depend on the Judge Assigned*, TRAC IMMIGR., (Nov. 20, 2017), https://trac.syr.edu/immigration/reports/490/; *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges*, U.S. GOV'T ACCOUNTABILITY OFF. (Nov. 14, 2016), https://www.gao.gov/products/gao-17-72.

[94] *See* John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 SEVENTH CIR. REV. 216, 217–18 (2006).

[95] Ramji-Nogales, *supra* note 10, at 365.

[96] Hoopes, *supra* note 11, at 183–84.

[97] *Id.* at 191. Hoopes specifically notes that the Eleventh Circuit tends to require "require very violent, pervasive harassment and even injury" for a finding of persecution. *Id.* (citing Ruiz v. U.S. Att'y Gen., 367 Fed. App'x 51, 54 (11th Cir. 2010)).

B. Release on Bond or Parole

Transfers also affect the liberty interests of detainees, as a number of jurisdictional factors affect the likelihood of release. Not all detainees qualify for release as a matter of law.[98] For those who do, successfully obtaining release lessens the barriers associated with detention—obtaining representation, having the time to gather evidence and access witnesses, and staying connected to a support system to stay motivated to pursue relief.[99] Until a detainee is released, detention interferes with the ability to mount a case for release on bond. For example, in the absence of local witnesses and evidence, it is difficult to establish the presence of a support network, which is effectively required to ensure that an individual is not a flight risk.[100] The presence of community supporters can be helpful for securing release and other points of advocacy and is associated with better outcomes in requests for custody determination, favorable outcomes in bond proceedings, and the ability to post bond.[101] In addition, these networks are avenues through which detainees can connect with the outside world, including connecting them to counsel, interpreters, and resources that can help them articulate a theory of relief and source letters of support.[102] Other community resources may also determine the outcome in cases; for example, placement in a treatment or rehabilitation program may be a condition for release of an individual with substance abuse history.[103]

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[98] 8 U.S.C. § 1226(c) (generally mandating detention for noncitizens who are removable based on criminal activity or terrorism-related grounds); 8 U.S.C. § 1225(b) (providing for the detention of "arriving aliens" or certain other noncitizens who have not been admitted or paroled into the United States).

[99] *See* discussion *supra* Part IV.

[100] OAS, *supra* note 30, at 138–39.

[101] *See* Ruben Loyo & Carolyn Corrado, *Locked Up But Not Forgotten*, N.Y.U. IMMIGRANT RTS. CLINIC 13, 17 (2010), https://www.law.nyu.edu/sites/default/files/upload_documents/Locked%20Up%20but%20Not%20Forgotten.pdf.

[102] *Id.* at 1.

[103] Emily Ryo & Ian Peacock, *Beyond the Walls: The Importance of Community Contexts in Immigration Detention*, 63 AM. BEHAV. SCI. 1250, 14 (2019).

Like claims for immigration relief, bond grant rates and bond amounts also differ by jurisdiction.[104] To be eligible for bond, the detainee must establish that they do not pose a public danger or flight risk.[105] The rate of denial for bond in immigration custody across all courts was 50.2% in 2019.[106] However, bond grant rates in some courts are much lower, notably affecting detainees at large detention facilities such as at the Stewart Detention Center and the Irwin County Detention Center.[107] These regional disparities exist irrespective of nationality, with the most significant factor in bond being the immigration court that ruled on the motion.[108] The purpose of bond is to ensure that a detainee appears at a future hearing.[109] The amount is set at the discretion of the immigration judge,[110] with a minimum of $1,500.[111] Unlike in the criminal custody context, immigration judges are not required to consider a detainee's ability to pay when setting the amount.[112] Bond amounts vary by location;

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[104] Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & Soc'y Rev. 117, 123–24 (2016); *Three-fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGR. (July 2, 2018), https://trac.syr.edu/immigration/reports/519/; Freya Jamison, *When Liberty is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, COLUM. HUM. RTS. L. REV. ONLINE 147 (2021).

[105] 8 U.S.C. § 1226(a).

[106] *Three-fold Difference in Immigration Bond Amounts by Court Location*, *supra* note 103.

[107] Cho et al., *supra* note 70, at 11 (reporting a 5.2% bond release rate from Stewart Detention Center and a 7.7% release rate from Irwin County Detention Center in FY2015, compared to a 10.5% bond release rate nationally during the same period).

[108] *Three-fold Difference in Immigration Bond Amounts by Court Location*, *supra* note 103.

[109] Matter of Urena, 25 I&N Dec. 140, 141 (BIA 2009).

[110] 8 C.F.R. § 1236.1(d)(1).

[111] 8 U.S.C. § 1226 (a)(2).

[112] *See* 8 U.S.C. § 1226(a); 8 C.F.R. § 1003.19(h) (outlining discretionary factors to be considered in bond determinations, with no mention of financial resources); *see also* Matter of Castillo-Cajura, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009); Matter of Sandoval-Gomez, 2008 WL 5477710, at *1 (finding that financial capacity not to be a relevant factor in determining the amount of bond set by immigration judge). A notable exception is in the Ninth Circuit, governed by the ruling in *Hernandez v. Sessions*. Hernandez v. Sessions, 872 F.3d 976, 981 (9th Cir. 2017) (requiring that ICE officers and immigration judges

the median bond in 2019 was $8,000, but in some courts, it is much higher.[113] Recent reports from immigration attorneys indicate that bonds of $25,000 to $35,000 are "totally normal" in immigration courts in Louisiana and Texas, with one practitioner recently reporting bond set at $70,000 in a Louisiana court.[114] Although these determinations may be appealed, they are difficult to overturn because immigration judges have broad discretion and may give greater weight to any factors so long as the decision can be characterized as "reasonable."[115]

As an alternative to seeking bond before an immigration judge, a noncitizen may be administratively released on parole by DHS.[116] Each ICE Field Office Director makes these discretionary determinations for detainees in facilities within the office's area of responsibility.[117] As with immigration courts, grant rates vary depending on where in the country a detainee is located. A study of immigration detention facilities in the South found that virtually no one detained in any of the private detention facilities was granted parole, while grant rates at certain facilities in the South were zero or a fraction of a percent.[118] Based on the transfer patterns sending high numbers of detainees to these facilities, it is clear that many will be unable to obtain release on parole.[119]

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consider the person's (1) financial ability to post bond and (2) suitability for release on non-monetary alternative conditions of supervision, in order to ensure that "no person [is] imprisoned merely on account of his poverty.") This approach was squarely rejected by the Fourth Circuit in *Miranda v. Garland*. Miranda v. Garland, 34 F.4th 338 (2022).

[113] *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/bond/ (last visited Jan. 2, 2023).

[114] Email on file with author.

[115] Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006).

[116] 8 U.S.C. § 1226(a)(1)–(2).

[117] 8 U.S.C. § 1882(d)(5)(A); s*ee* U.S. IMMIGR. AND CUSTOMS ENF'T, DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE (2009) (A 2009 directive allows ICE the authority to grant parole to asylum-seekers with a credible fear of persecution provided they do not pose a threat to the community or a flight risk).

[118] Cho et al., *supra* note 70, at 11 (reporting a 0% parole grant rate at Stewart and Lasalle and a 0.2% parole grant rate at Irwin in FY2015).

[119] *See* discussion *supra* Part II.B.

C. Habeas Corpus

Habeas corpus is a critical option for relief for detained immigrants seeking to challenge prolonged detention. In *Rumsfeld v. Padilla,* the Supreme Court rejected an argument that Jose Padilla, a designated "enemy combatant" detained on a naval brig, could file a writ of habeas corpus with the secretary of defense.[120] The Court's conclusion was that a detainee's immediate custodian is the only proper respondent in a habeas action and that jurisdiction for core habeas petitions challenging present physical confinement lies only in the district of confinement.[121] After the Supreme Court's decision in *Padilla*, Law Professor Nancy Morawetz vocalized the concern associated with the power of the government to choose venue:

> [t]he practical question left open by the Padilla decision is whether the government's power to choose the site of detention, and hence the venue for a habeas action, will leave petitioners with adequate access to judicial review. Some may suspect that the government selected the South Carolina site for Padilla's detention precisely because it helped to compel litigation in a court that was sympathetic to the government to execute removal orders prior to any judicial scrutiny of those orders' legality . . . . This record demonstrates the grave dangers of extending the rule of Padilla beyond that case and into any situation in which the government has the power to choose the situs of detention.[122]

Professor Morawetz's observation is bitterly ironic given the authority ICE now has to transfer detainees to jurisdictions where it is impossible for them to obtain habeas relief. The Western District of Louisiana ("WLDA")—which has jurisdiction over twelve detention facilities with the capacity to hold a total of up to 9,000 detainees—is notable for its low rate of hearing and granting habeas

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[120] Rumsfeld v. Padilla, 124 U.S. 426, 436 (2004); *see also* 28 U.S.C. § 2242.

[121] Rumsfeld v. Padilla, 124 U.S. 426, 436, 438 (2004).

[122] Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 14–15 (2005) (citing Rumsfeld v. Padilla, 124 U.S. 426, 455 (2004)).

petitions.[123] After Texas, Louisiana is the second-largest destination for transferred detainees.[124] In her analysis of habeas cases in the WDLA, Morawetz concludes that "district courts should understand that when they transfer a case of an Oakdale detainee to the WDLA, they are basically allowing the government to deport that individual without the possibility of a stay and without the possibility of a judicial remedy requiring that person's return."[125] As a matter of practice, the district court vacates any stays previously entered by other courts.[126] The federal court also maintains the position that it does not have jurisdiction to stay an order of removal; hence, once a detainee is transferred to a facility within its jurisdiction, they will be unable to obtain a stay of their removal order.[127] Professor Morawetz notes that this is reflected in the dockets for cases out of the district, in which the last entries state that mail from the court is returned with a stamp that says "removed," indicating that those contesting their deportation have given up.[128] While a change of venue is technically available for good cause, in practice these motions are seldom granted, making it clear that detainees transferred to this jurisdiction will not have access to habeas as a recourse.[129]

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[123] *See* Nancy Morawetz, *Oakdale Justice: Routine Vacatur of Stays in the Western District of Louisiana*, 8 BENDER'S IMMIGR. BULL. 6, 6 (Jan. 1, 2004); *see* Morawetz, *supra* note 121, at 15–16.

[124] *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana*, TUL. U. L. SCH. IMMGR. RTS. CLINIC 3 (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf.

[125] Morawetz, *supra* note 121, at 31–32.

[126] *Id.* at 18.

[127] *Id.*

[128] *Id.* at 30.

[129] 8 C.F.R. § 1003.20(b) (2018); *see* Peter Markowitz & Lindsay Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153 n. 241–247 (2014) (illustrating where immigration judge's denial of change of venue motions were upheld on appeal).

IV. PSYCHOLOGICAL AND LOGISTICAL BARRIERS TO RELIEF FOLLOWING TRANSFERS

While the patterns of adjudication outlined above give important insight into the legal effects of transfers, transfers can also psychologically affect detainees in ways that increase the likelihood of deportation. A 2011 Human Rights Watch study found that 54% of detainees who were not transferred were deported, compared to the deportation rate of 74% for detainees who were transferred.[130] Transfers can contribute to detainees' cynicism about fairness in the immigration system, isolate them from their support networks, and inhibit their ability to engage with legal processes—all of which make deportation a much more likely outcome.

A. Psychological Consequences and Legal Cynicism

Moving people in detention quickly, randomly, and with minimal notice triggers uncertainty and fear. Scholars have noted the similar use of disorienting transfer and transport practices in other countries' systems as a means of establishing the carceral system's power over a person in its custody.[131] Immigration detention is intended to be civil, and therefore non-punitive, in nature.[132] Yet, the chaotic nature of transfers, which is largely embraced by ICE as a justification for resisting regulation, enhances the aspects of detention that give rise to "the projection of danger, instability, panic, and dramatic upheaval"—an agency assertion of

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[130] *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, *supra* note 71, at 28.

[131] *See* Dominque Moran, et al., *Disciplined Mobility and Carceral Geography: Prisoner Transport in Russia*, 37 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 3 (2012); *see also* NANCY HIEMSTRA, DETAIN AND DEPORT: THE CHAOTIC U.S. IMMIGRATION ENFORCEMENT REGIME 108 (Geographies of Justice and Soc. Transformation Ser. No. 43, 2019).

[132] Zadvydas v. Davis, 533 U.S. 678, 690 (2001); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 187 (D.C. 2015) ("The relevant question, accordingly, is whether the Government's justification for detention is sufficiently "special" to outweigh Plaintiffs' protected liberty interest.").

power that is both punitive and chilling.[133] The - ("IACHR") reported that there were numerous accounts from detainees about verbal abuse by security personnel, including the repeated refrain that they were being "treated like criminals" and that the abuse had a "negative psychological effect."[134] The IACHR indicated that among the threats made to detainees by security personnel were threats of transfer.[135]

The chaotic and unpredictable nature of transfers and the challenges of seeking immigration relief while detained can undermine a detainee's sense of control. This, in turn, can lead to despondency and legal cynicism—the perception that the legal system is punitive, legal rules are inscrutable, and legal outcomes are arbitrary.[136] Emily Ryo and Nancy Hiemstra's scholarship on legal cynicism among individuals in immigration custody is especially significant because it highlights how the experiences in detention and perceptions of the legal system shape case outcomes.[137] A sense of unfairness, stress, and despair caused by the removal process can discourage detainees from fighting their removal proceedings.[138]

Where the transfer is to a distant location, the isolation can create additional legal and psychological hardships.[139] Transfers can be particularly devastating for detainees who are separated from their families and support networks.[140] Separation from family, community, and other support networks can easily diminish a

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[133] Allison Mountz & Nancy Hiemstra, *Chaos and Crisis: Dissecting the Spatiotemporal Logics of Contemporary Migrations and State Practices*, 104 ANNALS OF THE ASSOC. OF AM. GEOGRAPHERS 382, 383 (2014).

[134] OAS, *supra* note 30, at 119; *see also* Rabin, *supra* note 81, at 737.

[135] OAS, *supra* note 30.

[136] NANCY HIEMSTRA, '*You don't even know where you are': Chaotic Geographies of US Migrant Detention and Deportation*, *in* CARCERAL SPACES: AGENCY AND MOBILITY IN IMPRISONMENT AND MIGRATION DETENTION 12–13 (Dominique Moran & Nick Gill eds., 2013); *see* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1001 (2017).

[137] HIEMSTRA, *supra* note 135, at 12–13; Ryo, *supra* note 135.

[138] HIEMSTRA, *supra* note 135, at 12–13.

[139] *Id.*

[140] *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, *supra* note 71, at 16; *Locked Up Far Away*, *supra* note 47, at 79–83; *see* Cho et al., *supra* note 70, at 61.

detainee's morale and willingness to remain in detention to pursue legal relief. When separated from their families, detainees may become despondent and hopeless.[141] Ryo and Peacock are among the scholars who have noted the connection between the location of facilities, the level of support available in the supporting community, and the outcomes of cases.[142] At some facilities, no in-person visits are allowed.[143] The IACHR observed that the transport of detainees to facilities far away from their friends and family creates a significant loss of "financial, logistical, and psychological support."[144]

B. Loss of Access to Legal Representation

Transferred detainees face significant barriers in accessing and retaining legal representation, which ultimately affects their chances of success in fighting deportation. In general, individuals in ICE detention face greater challenges in accessing legal representation. Only 14% of detained noncitizens fighting their removal cases are represented by counsel, compared to 66% of noncitizens released or never detained.[145] Current transfer practices may also make it difficult for local organizations to connect with those in need of representation. Because detainees can be held for over a month before being issued an NTA,[146] individuals might be in custody without being able to be found or contacted, whether through the detainee locator system or through a facility itself. If there is no NTA or an unknown A number—the identification number DHS assigns to noncitizens—it is impossible to find a detainee, contact them, or initiate a visit.[147] A detainee can attempt to seek legal help by calling a provider from the list of pro bono legal service providers that ICE

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[141] Rabin, *supra* note 81, at 737.

[142] Ryo & Peacock, *supra* note 102, at 1250, 1253.

[143] Cho et al., *supra* note 70, at 19.

[144] OAS, *supra* note 30, at 138.

[145] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

[146] OAS, *supra* note 30, at 136.

[147] *Online Detainee Locator System*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://locator.ice.gov/odls/#/index (last visited Jan. 2, 2023).

is required to provide when removal proceedings commence.[148] However, if an individual does not initiate the call, there is no way for local pro bono representatives to know that someone has been detained. Where individuals are unrepresented by counsel and unable to contact their family members and friends, the likelihood that the detainee will be deported expeditiously dramatically increases. The ICE detainee locator system regularly displays outdated or otherwise inaccurate information, making it difficult to ascertain a detainee's location.[149] In some cases, the system contains no information on a detainee at all.[150]

Transfers also interfere with existing attorney-client relationships. Some detention facilities have imposed additional requirements on a detainee's representatives following a transfer.[151] In 2021, a group of Chicago-based attorneys reported that after their clients were transferred ten hours away to the Kay County Detention Center in Oklahoma, ICE informed the attorneys that they needed signed notices of appearances to contact their clients. This violation of the requirements of the 2019 ICE Performance-Based Detention Standards further burdened and delayed the preparations for fast-approaching hearings.[152] There are other documented instances of detention facility officials restricting access for legal intakes, denying detainees the opportunity to make calls, and restricting access to confidential means of communication between attorneys

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[148] 8 C.F.R. § 1003.61(a)(2); *Detainee Telephone System (DTS) Pro Bono Platform Access Policy,* U.S. IMMIGR. AND CUSTOMS ENF'T 1 (Sept. 2021), https://www.ice.gov/doclib/detention/dtsProBonoPlatformAccessFAQ.pdf.

[149] *Detained and Disappeared: Enforced Disappearances Perpetrated in Immigration Detention by the United States*, FREEDOM FOR IMMIGRANTS 37 (2021), (reporting that, between April 2020 and August 2021, there were 216 cases documented by FFI staff in which an individual's name could not be found and resulted in a "CALL FIELD OFFICE" message via the ICE Locator for more than five days).

[150] *Id.* at 26 (finding that more than twenty immigration detention facilities—detaining at least 10% of individuals held in ICE custody—do not appear in the detainee locator database).

[151] *See, e.g.,* Letter from National Immigration Counsel, ACLU, et. al., to Hon. Alejandro Mayorkas, Sec'y of Homeland Sec., and Tae D. Johnson, Acting Director of the U.S. Immigr. and Customs Enf't (Oct. 29, 2021) (on file with author).

[152] *Id.*

and clients.[153] Transferred detainees can temporarily or even permanently lose access to their commissary funds and phone accounts, inhibiting their ability to communicate with legal counsel and people outside detention who can assist with mounting a defensive claim for immigration relief. There are also documented cases of facility staff refusing to arrange for phone calls and transfers of legal paperwork when attorneys could not meet with clients in person.[154]

Detainees transferred to remote locations face particularly limited options for legal representation. Professors Ryo and Peacock observe that detainees with proximity to legal representation and community support are more likely to be represented and face shorter periods of detention.[155] One study of New York City residents who were arrested there and later transferred to Louisiana, Pennsylvania, or Texas, found that 79% ultimately lacked representation in their removal proceedings.[156] By contrast, individuals detained in New York City have their cases at the Varick Street Immigration Court, where only 57% of respondents went unrepresented.[157] Additionally, pro bono representation is hard to come by, particularly in some of these locations where detainees are transferred.[158] Human Rights Watch interviewed a respondent

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[153] *Id.*; *see also* Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communications in Immigration Detention*, 95 N.Y.U. L. REV. 130, 141–42, 144–45 (2020) (outlining the challenges that attorneys face in communicating with clients, including phone access, methods for private communication, and initiating attorney-client relationships).

[154] *See* D. Conlon and N. Hiemstra, *Examining the Everyday Micro-Economies of Migrant Detention in the United States*, 69 GEOGRAPHICA HELVETICA 335, 339–341 (2014).

[155] Ryo & Peacock, *supra* note 102, at 1260–61.

[156] Peter L. Markowitz & Lindsay C. Nash, *Accessing Justice: The Available and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 372 (2011)

[157] *Id.* at 370.

[158] *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, NAT'L. IMMIGR. JUST. CTR. 3 (2010), https://immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf (finding that 80% of

detained in Chaparral, New Mexico, who reported challenges with his case:

> [i]n New York when I was detained, I was about to get an attorney through one of the churches, but that went away once they sent me here to New Mexico . . . . All my evidence and stuff that I need is right there in New York. I've been trying to get all my case information from New York . . . writing to ICE to get my records. But they won't give me my records; they haven't given me nothing. I'm just representing myself with no evidence to present.[159]

A 2020 American Civil Liberties Union ("ACLU") report found that access to counsel is particularly dire in facilities that opened after the start of the Trump administration in 2017, which tend to be located in much more remote areas of the United States.[160] Using data about immigration lawyer presence from the American Immigration Lawyers Association ("AILA"), the report found that the number of attorneys within a one hundred mile radius of the facilities opened prior to the Trump administration was four times the number of nearby attorneys for the facilities opened after 2017.[161] Of the five facilities in the country that are located in proximity to the fewest immigration attorneys, four of them began receiving detainees under the Trump administration.[162]

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detainees are held in facilities underserved by legal aid organizations); *see also Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County*, AM. CIV. LIBERTIES UNION 16 (2011), https://www.aclu-nm.org/sites/default/files/wysiwyg/ocpc_report.pdf (study of privatized detention in Otero County in 2009 that discusses the funding restrictions and capacity limitations that inhibited local nonprofits from providing removal defense representation to detainees at the Otero County Processing Center in Chaparral, New Mexico).

[159] Cho et al., *supra* note 86, at 20.

[160] *Id.*

[161] *Id.* at 20, 22.

[162] *Id.*

C. Case Delays

Transfers can be particularly detrimental to detainees when they cause delays and interfere with case deadlines. In November 2009, the DHS's Office of the Inspector General reported that transfers contributed to "errors, delays, and confusion for detainees, their families, and legal representatives" in their legal cases.[163] Later that year, immigration court judges and ICE detention officers confirmed that detainees were transferred to facilities outside the jurisdiction of the court where proceedings had already been scheduled; at one facility, it was estimated that this happened at least once a week.[164] Detainees were transferred without A-files or with pending criminal or bond cases.[165] Some detainees who were strong candidates for release were transferred before they could request bond.[166] Additionally, some attorneys were belatedly notified of their clients' transfers, or not notified at all.[167] The Inspector General found that these practices caused proceedings to be postponed, conducted via videoconference (rather than in person), or even held *in absentia*, withdrawn, and refiled in new jurisdictions.[168] Attorneys have described how transfers cause delays receiving paperwork and communicating with clients, leading to missing important deadlines, including the time period to contest a negative credible fear review determination for an asylum-seeker or to file a brief for a merits hearing.[169] ICE's power to effect transfers, in spite

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[163] Letter from Richard L. Skinner to John T. Morton, *Letter Report: Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* (OIG-10-13), *in* OFF. OF INSPECTOR GEN. DEP'T OF HOMELAND SEC.: IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS (2009), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-01_Dec06.pdf.at 1.

[164] *Id.*

[165] *Id.* at 3.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Letter from National Immigration Counsel, ACLU, et. al., to Hon. Alejandro Mayorkas, Sec'y of Homeland Sec., and Tae D. Johnson, Acting Director of the U.S. Immigr. and Customs Enf't (Oct. 29, 2021) (on file with author).

of the delays and derailment it causes to legal cases, reinforces detainees' feelings of powerlessness.

D. Loss of Access to In-Person Hearings

The location where a respondent is detained largely determines whether they have an in-person merits hearing in immigration court or whether they will appear remotely in the courtroom via video. Immigration courts began using videoconference technology ("VCT") in 1995 as an alternative to conducting in-person hearings.[170] The use of VCT increased exponentially as more detainees were transferred to facilities in remote rural areas, and the costs of transporting people to in-person hearings increased.[171] While only 35% of individual hearings took place via VCT in 2019, in some immigration courts, virtually all detainees had their hearings conducted through this technology rather than in person.[172]

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[170] *See* 8 C.F.R. § 3.25 (1995) (amending 8 CFR 3.25 to permit waiver of presence of parties).

[171] *See Use of Video in Place of In-Person Immigration Court Hearings*, TRAC IMMIGR. (Jan. 28, 2020), https://trac.syr.edu/immigration/reports/593/; *see also. e.g.*, Memorandum, Off. of the Chief Immigr. Judge, Dep't of Justice Exec. Off. for Immigr. Rev., Staffing and Video Technology Analysis 12–17 (June 26, 1997), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/vtc_eoir_1-30-13.pdf (observing that use of VCT equipment reduces the need for travel and will allow facilities to assist other courts); Memorandum from J. Thomas Davis, Memphis Immigr. Ct. Institute for Ct. Mgmt., Utilization of Videoconferencing in Court Proceedings: The Laredo Project 180–206 (May 1999), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/vtc_eoir_1-30-13.pdf (documenting the burdens of immigration judge travel to remote detention sites); Memorandum from Exec. Off. for Immigr. Rev., Video Equipment Usage Survey for 2006 125–29 (2006) https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/vtc_eoir_1-30-13.pdf (documenting additional sites using VCT).

[172] *Use of Video in Place of In-Person Immigration Court Hearings*, *supra* note 171. Among the immigration courts that relied almost entirely on VCT for detained individual hearings are Orlando (97%) and Detroit (94%). *Id.* Detainees in certain facilities were also more likely to have their merits hearings via VCT, including detainees as the Winn Correctional Center (86%) and the Northeast Ohio Correctional Center (86%). *Id.* During the last quarter of 2019, Houston

Access to in-person hearings has significance for case outcomes, so VCT raises a number of due process concerns. An AILA position statement from October 2021 cite concerns such as technical failures of audio and visual equipment, lower quality interaction with others in the courtroom and with the process itself, and limitations on presentation and examination of evidence.[173] In February 2019, a group of legal aid organizations in New York City filed suit to block implementation of the ICE New York Field Office's policy to allow detained immigrants only to attend their removal proceedings via VCT, arguing that the policy violated class members' First and Fifth Amendment rights.[174] The complaint alleged that detained respondents' ability to follow and participate in hearings via VCT is severely compromised due to the limited view of the courtroom, the dynamics of live interpretation, poor audio quality, and lack of ability to privately confer with counsel.[175] The complaint further alleged that credibility determinations—a critical aspect of factfinding with respect to a witness's testimony—are much harder to make via video, especially when detainees are disabled.[176] In her study of remote immigration adjudication, immigration law scholar Ingrid Eagly noted that detainees appearing via VCT "exhibited depressed engagement with the adversarial process," attributable to many factors affecting detainees.[177] She observed in her empirical study that rates for granted relief tend to be lower in VCT hearings

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Service Processing Center had the largest number of video hearings, with virtually all of its 818 hearings by video.

[173] *Id.* at 2; *see also* OAS, *supra* note 30, at 140–41 (stating that in IACHR observation of video proceedings, the "delegation noted how disconnected the detainee at the detention facility seemed from the judge and the proceedings in the court room," and that "video conferencing diminishes the quality of a detainee's legal representation, as an attorney must decide whether to be with the client at the detention facility to assist the client or in the courtroom with the immigration judge and DHS attorney").

[174] Jessica Zhang & Andrew Patterson, *New York Lawsuit Challenges Replacement of Immigration Court Hearings with Video Technology*, LAWFARE (Mar. 5, 2019, 9:00 AM) https://www.lawfareblog.com/new-york-lawsuit-challenges-replacement-immigration-court- hearings-video-technology.

[175] *Id.*

[176] *Id.*

[177] Ingrid Eagly, *Remote Adjudication in Immigration Detention*, 109 NW. U. L. REV. 933, 937–938 (2018).

than in non-VCT hearings.[178] She also observed that having a VCT hearing dramatically decreased the chance that a detainee would apply for relief; detained in-person respondents are 90% more likely to apply for relief than VCT respondents.[179]

E. Detainee Coercion

While transfer practices can be seen as depersonalized and logistical, the ability for ICE to transfer detainees with minimal justification also means that authority can easily be exploited to target and coerce individual detainees. Notably, detainees have been transferred in response to protests and to discourage detainee organizing.[180] Hunger strikes have long been a form of nonviolent political protest;[181] the ACLU has indicated its position that these strikes are protected speech under the First Amendment.[182] However, detainees who have engaged in hunger strikes have been subject to transfers intended to disrupt these strikes. For example, in December 2015, John P. Longshore, Field Office Director of Enforcement and Removal Operations, Denver, asked in an email,

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[178] *Id.* at 938.

[179] *Id.*

[180] Nina Bernstein, *Jail Protest by Immigrant Detainees Is Broken Up by Agents*, THE N.Y. TIMES (Jan. 20, 2010), https://www.nytimes.com/2010/01/21/nyregion/21jail.html; MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 29, 42, 76, 96, 100, 181, 204–07, 298 (2004).

[181] Felipe Hernandez, *ICE Hunger Strikes: Ending State Sanctioned Torture*, HARV. CIV. RTS. – CIV. LIBERTY L. REV. (Mar 5, 2019), https://harvardcrcl.org/ice-hunger-strikes-ending-state-sanctioned-torture/.

[182] *See, e.g., ACLU and PHR Renew Calls for ICE to End Force-Feeding Amid Release of Harrowing New Intercept Video*, ACLU (Nov. 15, 2022), https://www.aclu.org/press-releases/aclu-and-phr-renew-calls-ice-end-force-feeding-amid-release-harrowing-new-intercept; *see also* D. Sneed & H. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 HOWARD L.J. 549 (1989) (analyzing hunger strikes and forced-feeding in light of the First Amendment). *But see* Khaldun v. Daughtery, 2009 WL 5170039, at *1 (S.D. Ind. 2009) (holding "[prisoner's] act of going on a hunger strike was not protected activity under the First Amendment"); White v. Suneja, 2010 WL 4719663, at *1 (S.D. Ill. 2010) ("The Court is not aware of any specific guarantee under the First Amendment, or any other constitutional provision, that protects inmate hunger strikes.").

"[w]hat have we done to try to transfer the ones on the official hunger strike?"[183] In December 2013, supposedly based on medical advice, a Bolivian hunger-striker was scheduled to be transferred to Krome Service Processing Center in Florida to receive a higher level of healthcare.[184] The deportation officer responded, "I'll be visiting him this morning and would like to use the possibility of his transfer as a way to get him to eat today."[185]

Forum shopping has proved an issue in these hunger strike cases as well. The detention standards state that detainees on hunger strike have the right to refuse force-feeding and any other form of unwanted medical treatment.[186] However, courts do not agree about whether hunger strikers should be subject to force-feeding.[187] FOIA results obtained by the ACLU included an email from the Assistant Field Director for the Washington Field Office attempting to obtain an order for force-feeding by way of a transfer by way of the Miami Field Office:

> [h]ere in the Fourth Circuit, we do not yet have the infrastructure in place to obtain an order to involuntarily administer nutrition, and we are concerned that any delay could lead to his removal from the 2/14 charter flight. Would [the Miami Field Office] be willing to help us out in the short-term? We'd be requesting support to obtain a court order to

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[183] Eunice Hyunhe Cho & Joanna Naples-Mitchell, *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention*, AM. CIV. LIBERTIES UNION 45 (2021), https://www.aclu.org/sites/default/files/field_document/aclu_phr_behind_closed_doors_final_1.pdf.

[184] *Id.*

[185] *Id.*

[186] *National Detention Standards for Non-Dedicated Facilities Standard,* U.S. IMMIGR. AND CUSTOMS ENF'T 110–11 (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf

[187] *Compare* Dep't of Public Welfare, Farview State Hospital v. Kallinger, 580 A.2d 887, 893 (Pa. Commw. Ct. 1990) (upholding forcible feeding of hunger-striking prisoner, because state's interests in prison security and discipline, prevention of suicide, and integrity of medical profession, outweighed inmate's individual freedoms), *with* Zant v. Prevatte, 286 S.E.2d 715 (Ga. 1982) (holding that an inmate may refuse to allow nutrition intrusions on his person, even though calculated to preserve his life).

> administer nutrition and to ensure that he is medically cleared for travel.[188]

Beginning in March 2020, reports emerged that individuals who protested or attempted to organize around their risk of exposure to COVID-19 were threatened by officials.[189] In addition to being held in solitary confinement, detainee activists were also subject to transfer.[190] In another case, at the Yuba County Jail in California, one official instructed another to move a detainee to another facility, saying "he will likely beg to come back here and mind his manners until he is removed."[191] At the Berks Family Residential Center in Pennsylvania, a physician proposed separating a family through a transfer to interrupt a hunger strike, stating that "if it appears they really are on a hunger strike, we will need to separate the mother and children—send mom to an IHSC [ICE Health Service Corps] facility to address the hunger strike."[192] The same physician said earlier that day, "[i]f she gets closer to 120 lbs., we may consider telling her that IHSC will transfer her to a facility that could administer involuntary feeding if needed."[193] Detainees experienced these transfers as coercive at best, punitive at worst.[194]

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[188] Cho & Naples-Mitchell, *supra* note 183, at 45–46.

[189] Solitary Confinement Reporting Project, *Immigrant Detainees Went on Hunger Strike Against Intolerable Conditions and COVID Exposure. ICE Punished Them with Solitary Confinement.*, SOLIDARITY WATCH (Jan. 28, 2021), https://solitarywatch.org/2021/01/28/immigrant-detainees-went-on-hunger-strike-against-intolerable-conditions-and-covid-exposure-ice-punished-them-with-solitary-confinement

[190] *Id.*

[191] Cho & Naples-Mitchell, *supra* note 183, at 8.

[192] *Id.* at 8–9.

[193] *Id.* at 50.

[194] *See, e.g., id.* at 8, 12–13; SOLITARY CONFINEMENT REPORTING PROJECT, *Immigrant Detainees Went on Hunger Strike Against Intolerable Conditions and COVID Exposure. ICE Punished Them with Solitary Confinement.*, SOLIDARITY WATCH (Jan. 28, 2021), https://solitarywatch.org/2021/01/28/immigrant-detainees-went-on-hunger-strike-against-intolerable-conditions-and-covid-exposure-ice-punished-them-with-solitary-confinement; Noah Lanard, *7 Detainees Sued ICE. Then They Were Transferred to a Notorious Alabama Jail.*, MOTHER JONES (July 21, 2020), https://www.motherjones.com/politics/2020/07/seven-detainees-sued-ice-then-they-were-transferred-to-a-notorious-alabama-jail/.

V. EXCAVATING THE DETENTION ARCHIPELAGO: EXAMINING THE ORIGINS OF ICE'S UNLIMITED TRANSFER AUTHORITY

Courts have long recognized that Congress and the Executive have plenary power over immigration.[195] In the absence of legislative action regulating immigration detention, ICE has been left to implement the logistics of detention. The DHS has resisted calls to codify standards for detention—including those that govern transfer—arguing that doing so would eliminate "necessary flexibility to enforce standards that ensure proper conditions of confinement."[196] The result is that ICE wields broad detention authority—including the power of transfer—without limitations from other branches of government.

A. Congress

Congress's power over immigration historically comes from the legislative power to conduct foreign affairs.[197] Over the years, the legislature has repeatedly been informed of shortcomings in ICE's ability to regulate and monitor its own operations. Christopher Crane, then-Vice President of ICE Detention and Removal Operations, told Congress in 2009,

> [n]o checks and balances currently exist within [Immigration and Customs Enforcement,] ICE. ICE investigates itself. Because ICE investigates itself

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[195] *See also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1634 (1992) (analyzing plenary power in the context of the *Chinese Exclusion Case*).

[196] *Locked Up Far Away*, *supra* note 47, at 28 (citing letter from Jane Holl Lute, Deputy Sec. of the Dept. of Homeland Sec., to Michael Wishnie, Clinical Professor of L., Yale L. Sch., and Paromita Shah, Assoc. Director, Nat'l Immigr. Project of the Nat'l Law Guild (July 24, 2009) (available at https://deportationresearchclinic.org/DHS-Petition-Denial-7-09.pdf) (denying "Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees")).

[197] T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 181 (5th ed. 2003) ("The federal government's power to conduct foreign affairs . . . has led the courts to invalidate state statutes that attempt to regulate immigration.").

> there is no transparency and there is no reform or improvement . . . . Oversight must be removed from ICE, otherwise ICE managers and senior leadership will continue to have complete control over the investigative process and the outcome.[198]

A 2020 report by the U.S. House of Representatives Committee on Homeland Security reports that ICE's oversight programs are too broad and infrequent, that notice is given regularly prior to inspections, that ICE's contractor is not sufficiently equipped to conduct inspections, and that DHS does not have the mechanisms to enforce corrections.[199] Yet there has been no legislation to impose statutory limits and agency rules to limit ICE's detention authority or provide for other forms of oversight. Immigration scholars Anita Sinha and Phil Torrey attribute some of this lack of movement to the pivoting of the private prison industry following decarceration and the extensive lobbying by the industry combined with local pressure to bring jobs of any type to struggling communities.[200]

While Congress has not acted to rein in ICE's detention and transfer authority, legislative action has further entrenched the agency's authority and capacity to detain. One key aspect of this support is logistical: Congress has repeatedly enabled the dedication and funding of facility space for ICE detention. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act ("IRTPA") of 2004, which included a "bed mandate"—a number beds that ICE is required to maintain across all of its detention facilities.[201] This number was scheduled to increase by 8,000 beds

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[198] Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Mar., and Global Counterterrorism of the Comm. on Homeland Sec. H.R., 111th Cong. 15–16 (2009) (statement of Christopher L. Crane, Vice President, Det. and Removal Operations, Am. Fed'n of Gov't Emps. Nat'l ICE Council).

[199] U.S. HOUSE OF REPRESENTATIVES COMM. ON HOMELAND SEC., Majority Staff Report, ICE DETENTION FACILITIES: FAILING TO MEET BASIC STANDARDS OF CARE 2 (Sept. 21, 2020).

[200] Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 *DUKE J. CONST. L. & PUB. POL'Y* 77, 90–93 (2016); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879, 899 (2014-2015).

[201] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5204, 118 Stat. 3638, 3734 (2004).

each year for five years, contingent on funding.[202] In fact, while the number did not go up every year, it did not do so at the rate prescribed by the IRTPA.[203] In 2009, the following year's DHS appropriations bill was amended to include "a provision directing that a level of 33,400 detention beds shall be maintained throughout fiscal year 2010."[204] When questioned about the agency's budget proposal, among the list of questions for DHS Secretary Janet Napolitano included one about why, that week, only 28,027 beds were full:

> [t]hat means that 5,373 illegal aliens were not being detained when they could have been. In fact, the number of illegal aliens being detained has steadily dropped since the beginning of this administration (over the past year). Why are you not adhering to the law? Does ICE lack the funds to maintain these additional beds?[205]

ICE was only required to maintain the beds, not fill them. Yet there was clearly a different meaning attributed to "bed mandate"—one that Secretary Napolitano opted not to correct when she replied that "ICE is currently exploring options to increase detention efficiencies."[206] ICE officials have reinforced former Secretary Napolitano's interpretation. In 2013, ICE Director John Morton told the House Judiciary Committee that he intended to fill the beds established by congressional quota, saying "[o]bviously, if Congress appropriates us money, we need to make sure that we are spending it on what it was appropriated for."[207] President Biden's draft of the fiscal year 2023 budget requested that the bed quota be reduced from

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[202] *Id.*

[203] Phillip L. Torrey, *Immigration Detention's Unfounded Bed Mandate*, 15-04 IMMIGR. BRIEFINGS 1, 3 (2015).

[204] 155 Cong. Rec. H11175, H11197 (daily ed. Oct. 13, 2009), https://www.congress.gov/111/crec/2009/10/13/CREC-2009-10-13.pdf.

[205] *Department of Homeland Security Appropriations for Fiscal Year 2011*: *Hearings Before a Subcomm. Of the Comm. On Appropriations*, 111th Cong. 70 (2011).

[206] *Id.*

[207] *Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing before the Comm. on the Judiciary*, 113th Cong. 56 (2013).

the current number of 34,000 to 25,000 in the 2023 appropriations bill.[208] Even so, ICE remains the only law enforcement agency in the United States that maintains a commitment to hold a certain number of people in custody.[209] Having the mandate results in local lockup quotas[210] and correlates with higher rates of arrest.[211]

Congressional action also includes passage of jurisdiction-stripping statutes that have made it more challenging to pursue litigation against the federal government.[212] Notably, in 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, restricting judicial review of challenges to the removal process.[213] Courts' interpretation of the statute in detainee class action suits is further discussed in Part V.C below.

B. Executive

In the absence of legislation on immigration detention and agency regulations, ICE has opted to govern itself through nonregulatory, nonbinding, and unenforceable standards, based on

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[208] *See* Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*, N.Y. TIMES (Mar. 25, 2022), https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html?smid=url-share.

[209] *See* Sinha, *supra* note 201, at 85 (citing a statement by former New York District Attorney Robert Morgenthau).

[210] *Banking on Detention: Local Lockup Quotas and the Immigration Dragnet*, DETENTION WATCH NETWORK & CTR FOR CONST. RTS. 3 (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf.

[211] *Id.*; *If You Build It, ICE Will Fill It: The Link Between Detention Capacity and ICE Arrests*, IMMIGRANT LEGAL RES. CTR. ET AL. (2022), https://www.ilrc.org/sites/default/files/resources/if_they_build_it_ice_will_fill_it_report_2022.pdf.

[212] *See, e.g.,* Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 539, 556 (2003); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 781 (2016).

[213] Pub. L. No. 104–208, 110 Stat. 3009–546 (Sept. 30, 1996) (relevant provisions codified at 8 U.S.C. § 1252(e)(1)(B), 1252(f)(1)) (providing that a court may not "certify a class under Rule 23 of the Federal Rules of Civil Procedure" in any action for which the expedited removal statute permits judicial review and limiting injunctive relief).

those used by the American Correctional Association.[214] The standards on transfers, added in 2004 as an amendment to the 2000 INS detention standards, provide that ICE should take into consideration factors such as whether someone is represented by counsel, the proximity of the attorney of record to the detention facility, and what stage the detainee is at in the removal process.[215] Provisions require, for example, that the agency file should be transferred with the detainee, along with medical notices, health records, medications, and personal property.[216] The initial standards further stated that ICE was obligated to notify counsel of record about transfers, though for "security reasons," such notifications could not take place until after the detainee is en route.[217]

In the absence of enforceable regulations, facilities repeatedly failed to adhere to ICE standards, including those specific to detainee transfers. In 2006, an audit by the DHS Office of the

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[214] *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, HUM. RTS. FIRST 15 (2011), https://www.prisonpolicy.org/scans/hrf/jails_and_jumpsuits.pdf.

[215] *2000 National Detention Standards for Non-Dedicated Facilities*, U.S. IMMIGR. AND CUSTOMS ENF'T (Sept. 20, 2000), https://www.ice.gov/detain/detention-management/2000; *2000 National Detention Standards for Non-Dedicated Facilities; Detainee Transfers*, U.S. IMMIGR. AND CUSTOMS ENF'T 1 (June 16, 2004), https://www.ice.gov/doclib/dro/detention-standards/pdf/DetTransStdfinal.pdf. Notably, ICE's definition of a "transfer" does not include movement of detainees within an area of responsibility for the same field office. *Policy 11022.1: Detainee Transfers*, U.S. IMMIGR. AND CUSTOMS ENF'T 1 (Jan. 4, 2012), https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf. Each area is geographically large and can contain multiple facilities located considerable distance from one another. For example, the AOR for the ICE New Orleans Field Office includes the states of Alabama, Arkansas, Louisiana, Mississippi, Tennessee. *See ICE Field Offices: New Orleans - ERO*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/contact/field-offices (last visited Nov. 13, 2022). This AOR includes 23 ICE detention sites, as reported by Freedom for Immigrants. *See Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/map (last visited Nov. 13, 2022).

[216] *ICE Detention Standard*, U.S. IMMIGR. AND CUSTOMS ENF'T 6–9, https://www.ice.gov/doclib/dro/detention-standards/pdf/DetTransStdfinal.pdf.

[217] *Id.* at 1.

Inspector General flagged several areas of noncompliance.[218] Four of the five audited facilities failed to provide requisite initial medical screenings and physical exams. At three facilities, documentation—including removal case information and information on detainee health conditions—was reported missing for detainees who were transferred.[219] One facility did not even have a logbook to issue receipts for detainees' personal funds.[220] Some detainees faced challenges placing calls to attorneys and family members to notify them of their detention.[221] At another facility, following an audit that revealed a pattern of noncompliance, all ICE detainees housed at that facility were transferred to other detention sites.[222] In November 2009, the DHS's Office of the Inspector General reported that transfer practices at the audited facilities were "not conducted according to a consistent process," thus making it impossible to determine whether the standards are actually followed. [223]A 2011 report by the ACLU found that transfers at the Otero County Processing Center were still not compliant with ICE policy.[224] In 2012, ICE released a policy directive to restrict detainee transfers to only those deemed "necessary" to minimize detainee transfers

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[218] OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 1 (2006), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_07-01_Dec06.pdf (pertaining to inspections of the Berks County Prison in Leesport, Pennsylvania; a private detention facility operated by Corrections Corporation of America in San Diego, California; Hudson County Correction Center in Kearny, New Jersey; Krome Service Processing Center in Miami, Florida; and Passaic County Jail in Paterson, New Jersey).

[219] *Id.* at 4.

[220] *Id.* at 19.

[221] *Id.* at 24.

[222] *Id.* at 38.

[223] Letter from Richard L. Skinner to John T. Morton, *Letter Report: Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* (OIG-10-13), *in* OFF. OF INSPECTOR GEN. DEP'T OF HOMELAND SEC.: IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS (2009).

[224] *Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County*, AM. CIV. LIBERTIES UNION OF N.M. 16 (Jan. 2011), https://www.aclu-nm.org/sites/default/files/wysiwyg/ocpc_report.pdf.

outside an area of responsibility.[225] According to the new protocol, ICE should not transfer a detainee where there is documentation that establishes the presence of immediate family, an attorney of record, or a pending or ongoing removal proceeding in the area of responsibility, or if the detainee has been granted bond or is eligible for a bond hearing.[226] Yet, a 2014 report by the U.S. Government Accountability Office noted both incomplete data from ICE regarding tracking controls and the non-uniform application of federal detention standards, both without agency justification.[227]

In seeking uniform adherence to standards, ICE has actually moved towards relaxing its standards to avoid falling short of benchmarks, particularly as the agency grew to rely on ISGAs with state and local jails.[228] DHS issued performance-based standards in 2008 following criticism about the non-binding nature of the agency's standards.[229] While non-binding, these standards included a list of "expected practices" for facilities and "expected outcomes" that could be used as benchmarks to measure adherence to the standards.[230] These standards have grown less demanding with the development of the Performance-Based National Detention Standards ("PBNDS"), which eliminated key provisions that

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[225] *Policy 11022.1: Detainee Transfers*, *supra* note 216.

[226] *Id.*

[227] *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Standards*, U.S. GOV'T ACCOUNTABILITY OFF. 18, 33 (Oct. 2014), https://www.gao.gov/assets/gao-15-153.pdf.

[228] *Locked Up Far Away*, *supra* note 47, at 6, 21.

[229] *2008 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management/2008 (last visited Jan. 2, 2023). The PBNDS apply to dedicated ICE facilities, whereas contracted facilities not used solely for immigration detention. Congress has directed ICE to implement the 2011 PBNDS at all ICE facilities within a year, but in 2019 only 72% of detained immigrants were held in compliant facilities. *Fact Sheet: Immigration Detention in the United States*, NAT'L IMMIGR. F. (Jan. 27, 2021), https://immigrationforum.org/article/fact-sheet-immigration-detention-in-the-united-states/.

[230] *Id.* The standards were revised again in 2011, with select provisions revised in 2016. *Performance-Based National Detention Standards 2011*, U.S. IMMIGR. AND CUSTOMS ENF'T (2011), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.

safeguard detainee rights. For example, the 2011 PBNDS required ICE to notify detainees and their attorneys about transfers at the time they occur, with the caveat that the agency may delay notification of an attorney "if there are special security concerns."[231] The most recent standards, issued in 2019, remove the language on provision of notice to attorneys or families, as well as the language providing one free phone call to indigent detainees after a transfer.[232] The current standards also remove both the requirement to use forms for transfer[233] and the list of reasons for a transfer.[234]

In light of the challenges associated with implementing meaningful standards in a uniform manner, in October 2009, ICE announced an intent to move away from practices that contribute to the prevalence of transfers, subcontracting with state jails and prisons and locating facilities in regions where they are needed.[235] Yet the agency continues to rely on transfers between facilities as part of its immigration enforcement strategy. The impending closures produce additional transfers. For example, following President Joe Biden's announcement that Irwin County Detention Center in Oscilla, Georgia would be closed, the last 40 detainees there were transferred to the Stewart Detention Center. [236] Even as facilities are closed or converted, the facilities slated to open in their stead are in remote locations. Following the facility closure in Irwin County, ICE sought to expand the number of ICE beds at the Folkston County Jail, located more than one hundred miles away. If the Folkston facility raises its number of reserved ICE beds to the proposed 1,800, it will be the largest immigration detention facility in the country.[237] Similarly, following the announcement of the

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[231] *Performance-Based National Detention Standards 2011*, *supra* note 236, at 457.

[232] *Id.* at 198.

[233] *Id.* at 9.

[234] *Id.* at 9, 198.

[235] *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, *supra* note 71, at 4.

[236] Jeremy Redmon, *All ICE detainees moved out of South Georgia jail*, ATLANTA J.-CONST. (Sept. 4, 2021), https://www.ajc.com/news/all-ice-detainees-moved-out-of-south-georgia-jail/XJ6XIUTVBFCN3IALTUCUFUNBX4/.

[237] *Biden to Break More Promises by Making Georgia the Private Prison Capital of the U.S. with GEO Mega Immigrant Detention Center*, ASIAN AMS.

conversion of the Berks County Jail, ICE signed contracts to expand the conversion of Berks and to reopen the Moshannon Valley Correctional Center as an ICE detention facility.[238]

In addition to resisting regulation, ICE has resisted transparency efforts around detention and transfer practices. The Transactional Records Access Clearinghouse ("TRAC") at Syracuse University noted in a 2009 report that efforts to compile information were hampered by "reluctance and refusal to share even basic data regarding transfers."[239] Since 2016, ICE has claimed that its databases are not subject to FOIA requests; the most recent aggregate transfers data is from October 2014 to September 2015.[240] TRAC has filed three lawsuits against the agency challenging this interpretation of its FOIA obligations.[241] Court interpretation of FOIA requirements has limited access to records from private facilities.[242] The overall effect has been to discourage the reporting and sharing of information with the public as needed for oversight, entrenching the practices that allow agencies to elude accountability in these requests.[243] Even when documents are in the possession of a federal agency, courts have tended not to require disclosure.[244]

ADVANCING JUST. (Dec. 17, 2021), https://www.advancingjustice-atlanta.org/news/closefolkston.

[238] Letter from Detention Watch Network et. al. to Joe Biden, President of the U.S., and Alejandro Mayorkas, Sec't of Homeland Sec. (Oct. 28, 2021), https://www.detentionwatchnetwork.org/sites/default/files/Stop%20ICE%20Expansion%20Org%20Sign%20On_10.8.21.pdf.

[239] HIEMSTRA, *supra* note 135, at 70.

[240] Hodges, *supra* note 83, at 106 n.488.

[241] *Id.*

[242] *See* Wolfe v. Dep't of Health and Hum. Servs., 711 F.2d 1077, 1080 (D.C. Cir. 1983) (holding that documents created and maintained by private contractors are not "agency records" if the government agency has not obtained custody of the records); *see also What is the FOIA?*, FOIA.GOV, https://www.foia.gov/about.html (last visited Jan. 2, 2023) (FOIA requirements also prohibit record requests to private facilities).

[243] *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 218–19 (2011); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187 (2013).

[244] *See, e.g.,* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 716 (2002) (discussing *DOJ v. Reporters Comm. for Free Press*, where the Supreme Court found records held by law enforcement were deemed exempt from disclosure because the information

ICE's refusal to release information about transfer practices has made it difficult to confirm which facilities are being used for ICE detention and to understand what happens to detainees when a facility is shut down or ends a contract with ICE.[245] It also obfuscates ICE escalation in transfers, including in retaliation to hunger strikes, COVID-19 outbreaks, or to state or local-level policy decisions to cut contracts or close facilities.[246] This lack of transparency is further enabled by poor recordkeeping and the secretive nature of transfers. Professor Nancy Hiemstra reported that in the course of her research, facility officials would not disclose even basic information about transfers.[247] When she interviewed detainees about transfers, many did not know the locations or names of the facilities they passed through.[248] In the absence of agency transparency, public accountability measures rely on anecdotal data, which is more challenging to obtain once an individual has already been deported.

C. Judiciary

Without codification in the form of federal regulations, there are no limitations or carveouts on ICE's transfer authority that might serve as a basis to challenge this and many other detention practices. ICE's contention that transfers are neutral processes ignores their potential to undercut a detainee's attempt to fight deportation. This position is largely supported by courts, with repeated deference to Congress's intent to give the agency discretion over the question of where noncitizens are detained.[249] Courts have interpreted

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pertained to private citizens that just happened to be in the possession of a government agency).

[245] *See* Hodges, *supra* note 83, at 106–07.

[246] *Id.*

[247] HIEMSTRA, *supra* note 130, at 109.

[248] *Id.*

[249] *Locked Up Far Away*, *supra* note 47, at 19–20 (citing 8 U.S.C. § 1231(g); Aguilar v. United States Immigration and Customs Enforcement, 510 F.3d 1, 20 (1st Cir. 2007); Avramenkov v. INS, 99 F. Supp. 2d 210, 213 (D. Conn. 2000) ("Congress has squarely placed the responsibility of determining where aliens are to be detained within the sound discretion of the Attorney General"); Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999) ("a district court has no jurisdiction to

detainees' rights to due process conservatively, with the standard satisfied "if the alien has a full and fair hearing, with or without representation."[250]

However, following the passage of jurisdiction-stripping statutes by Congress, the ability for detainees to challenge agency action has been severely limited.[251] Namely, class actions have historically been important in the field of immigration, particularly in the detention context, where the population is vulnerable and only a small percentage have access to legal counsel.[252] Rule 23(a) requires class members to show that joinder of all members is impracticable due to the number of members, that there are common questions of law or fact across the class, that the claims or defenses of the representative parties are typical of those within the class, and that the represented parties will protect the interest of the class.[253] In *Jennings v. Rodriguez*, Alito's majority opinion, which signals that the Court will adopt a more stringent interpretation of the class

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restrain the Attorney General's power to transfer aliens to appropriate facilities by granting injunctive relief"); Sasso v. Milhollan, 735 F. Supp. 1045, 1046 (S.D. Fla. 1990) (holding that the attorney general has discretion over location of detention); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) ("We wish to make ourselves clear. We are not saying that the petitioner should not have been transported to Florida. That is within the province of the Attorney General to decide."); Earle v. Copes, 2005 WL 2999149, *1 (W.D. La., 2005) ("the transfer of a detained alien from one state to another does not raise any constitutional concerns even if representation of the alien may be less convenient"); Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1251, 1256 (4th Cir. 1995) ("there is nothing inherently irregular . . . about the [non-citizen's] transfer from Virginia to Louisiana"); Comm. of Cent. Am. Refugees v. INS, 682 F.Supp. 1055, 1060 (N.D. Cal. 1988) (regular transfers from San Francisco district to El Centro, California, or Florence, Arizona, did not rise to the level of due process violations)).

[250] Comm. of Cent. Am. Refugees v. INS, 682 F.Supp. 1055, 1065 (N.D. Cal. 1988) (citing Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); *see also* Rady v. Ashcroft, 193 F.Supp.2d 454 (D. Conn. 2002).

[251] *See* discussion *supra* Part V.A.

[252] *See* Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J. L. & POL'Y 71 (2008).

[253] FED. R. CIV. P. 23(a)(1)–(4).

uniformity requirement, limited the ability of detainees who have suffered a variety of harms to pursue relief as a single class.[254]

In addition, the statute places limits on class actions, stating that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under such [provisions] have been initiated."[255] In *Van Dinh v. Reno,* the Tenth Circuit held that the statute deprived the district court "jurisdiction to restrain the Attorney General's power to transfer aliens to appropriate facilities by granting injunctive relief in a *Bivens* class action suit."[256] In 2022, the Supreme Court held in *Garland v. Aleman Gonzalez* that 8 U.S.C. § 1252(f)(1) prohibits lower federal courts from granting class-wide injunctive relief.[257] Alito's majority opinion was premised on an interpretation of "operation" as the operation of immigration law "as properly interpreted."[258] Such a narrow interpretation limits § 1252(f)(1)'s prohibition to constitutional claims.[259] In her dissent in *Aleman Gonzales*, Justice Sotomayor cautioned that "the Court's blinkered analysis . . . will leave many vulnerable noncitizens unable to protect their rights."[260] She observed that the majority decision further disadvantages detainees, as it "place[s] upon each of them the added burden of contesting

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[254] Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (instructing the Court of Appeals to consider whether it can issue injunctive relief to the class in light of the restrictions under 8 U.S.C. §1252(f)(1)).

[255] 8 U.S.C. § 1252(f)(1).

[256] Van Dinh v. Reno, 197 F.3d 427, 434 (10th Cir. 1999). An action based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (403 U.S. 388 (1971)) allows individuals to access judicial damages as a remedy for tortious conduct by federal agents that violates the U.S. Constitution. A *Bivens* claim must establish a constitutionally protected right, a violation of that right by a federal officer, the lack of a statutory cause of action or available remedy, and a remedy that can be imposed. *Id.*

[257] Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2062–63 (2022).

[258] *Aleman Gonzalez*, 142 S. Ct. at 2066 (quoting Brief for Respondents at 49).

[259] *Id.* at 2067; *see also id.* at 2068, 2070–71 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (concluding that a statute's unlawful implementation cannot constitute its "operation").

[260] *Id.* at 2068.

systemic violations of their rights through discrete, collateral, federal-court proceeding," and requires them to do so with no accompanying right to counsel, often at a distance from community members and lawyers, and under the reality of regular transfers between facilities.[261] *Aleman Gonzales* thus significantly weakened the possibilities for future class actions, though it remains to be seen whether the Court will recognize other remedies, such as declaratory relief.[262] Even so, a district court finding in favor of a class of asylum seekers immediately following *Aleman Gonzales* lamented that declaratory relief was "no substitute for a permanent injunction."[263]

CONCLUSION: IMMIGRATION ENFORCEMENT BEYOND THE ARCHIPELAGO

Transfer practices are critical to maintaining not only immigration carceral infrastructure, but also an immigration enforcement system centered on detention. ICE's policy positions reinforce the presumption that detention is necessary for immigration enforcement, and that transfer power is a requisite part of this detention landscape. The agency's unfettered use of transfer authority gives ICE uniquely unchecked power to influence outcomes in detainees' cases. Additionally, regardless of the claimed motivation, the transfers have the same result as punishment or retaliation—detainee isolation, legal suppression, and the increased likelihood of swift removal.

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[261] *Id.* at 2077.

[262] *See* Transcript of Oral Argument at 16, Garland v. Aleman Gonzalez, No. 20-322 (Jan. 11, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-322_f2ag.pdf (in which the government argued that § 1252(f)(1) bars not only class wide injunctive relief but also other remedies "practically similar to an injunction.") For support, the government cited the Tax Injunction Act, which the Court previously had interpreted as extending to declaratory relief. *Id.* The majority acknowledged this position, but also noted that *Aleman Gonzales* did not present this particular issue. *Aleman Gonzalez*, 142 S. Ct. at 2065 n.2 (citing Grace Brethren Church, 457 U.S. 393, 408-09 (1982)).

[263] Al Otro Lado, Inc. v. Mayorkas, 2022 WL 3135914, at *2 (S.D. Cal. 2022).

ICE's largely unconstrained forum shopping abilities, as well as its practices of isolating detainees, have been enabled by all three branches of government. This political confluence makes the problem difficult to address, especially by any one branch. There is a temptation to suggest that, in the absence of movement by Congress to support immigration legal reform, executive regulations might create meaningful limitations on ICE's transfer authority. However, any regulations would be challenging to implement in the detention archipelago that now exists—a loose network of facilities throughout the country, all running according to their own procedures and protocols. It is also difficult to imagine how such regulations could be enforced in light of the limited paths left open for judicial relief, particularly among a population that does not have a right to counsel and faces imminent threat of deportation.

A number of immigration scholars have called for a more robust interpretation of the Fifth Amendment, one that gives rise to more specific protections as interpretations of the Sixth Amendment do in the criminal law context.[264] Prior to the passage of jurisdiction statutes, it was difficult, but not impossible, to raise successful Fifth Amendment issues; courts' consideration of Fifth Amendment claims occasionally noted the specific ways in which transfers harmed detainees and inhibited their ability to challenge their deportation. Some scholars are of the opinion that, in light of the need to offer meaningful noncitizen in removal proceedings, interpretations of Fifth and Sixth Amendment would benefit from disaggregation of the distinction between criminal and immigration law.[265] This would particularly strengthen access to counsel claims, especially for detainees detained in remote locations. However, it is hard to imagine that courts would recognize the rights of detainees to transfer away from hostile legal jurisdictions entirely, thus leaving the forum shopping problem in place.

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[264] *See, e.g.,* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1473 (2011); Anne R. Traum, *Institutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491 (2011).

[265] *See, e.g.*, Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. F. 59, 64 (2016); Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power,* 28 BERKELEY LA RAZA L.J. 118 (2018).

A rights-based challenge is also challenging to implement because it is difficult to parse "legitimate" transfers from "abusive" ones. Even ostensibly justifiable transfers can produce devastating losses of status and liberty for individual detainees. In such a legal landscape, individuals with social ties and legal counsel could potentially make the case for not being transferred away from their communities. But if ICE detention centers continue to proliferate in jurisdictions with low rates of granting relief, it will inevitably cause harm to others lacking these ties. A key affected population would be newly arrived asylum-seekers, many of whom seek refuge in the United States without established connections and are more likely to suffer from the isolation and legal cynicism associated with a transfer to a distant location. Immigration scholar Jill Family has observed that such selective interpretation of rights leaves vulnerable people behind: "those who have passed through the gates are protected, but those knocking on the door . . . are best entitled to the limited judicial responsibility that Justice Marshall called 'toothless'."[266]

Just as transfer policies and practices have played a critical role in shaping, expanding, and maintaining immigration the detention archipelago, a successful strategy to address transfers should address the narratives in which they play a critical part. If the stated intent of immigration detention is to ensure that noncitizens attend their removal hearings, ICE need not rely on detention as the means to achieve that end. Rather than pursuing practically unenforceable regulations or exclusive interpretations of rights, a meaningful change in transfer policy would address the very thing these practices are designed to enable—reliance on immigration detention as an enforcement tool. ICE is already experimenting with its so-called "alternatives to detention," though the use of tracking apps and ankle bracelets present their own problems.[267] The full range of

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[266] Family, *supra* note 258, at 99.

[267] *See, e.g.,* Fatma E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141 (2017); Mary Holper, *Immigrant E-Carceration: A Faustian Bargain,* 59 SAN DIEGO L. REV. 1 (2022); *see also ICE Needs to Better Oversee Its Multi-Billion Dollar Program for Monitoring Noncitizens in Immigration Court Proceedings*, U.S. GOV'T ACCOUNTABILITY OFF. (Dec. 13, 2022), https://www.gao.gov/blog/ice-needs-better-oversee-its-multi-billion-dollar-program-monitoring-noncitizens-immigration-court-proceedings.

alternatives are beyond the scope of this article, but there are a myriad of ways to reimagine an immigration system that does not center detention in its enforcement. Multiple studies indicate that most people attend their hearings without being detained or monitored.[268] Where respondents do not attend their hearings, it is usually indicative of larger systemic problems, including inadequate notice and information about hearings,[269] as well language barriers, obstacles related to physical and mental health, and other logistical challenges.[270] Where people have legal counsel, court attendance rates are nearly 100%.[271] Case management and other supportive services also increase the likelihood that respondents will attend their hearings.[272] Initiatives to provide these services—including state and local programs offering universal representation to people in removal proceedings,[273] the Family Case Management program that previously assisted families seeking asylum at the U.S.-Mexico

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[268] *See, e.g.,* Press Release, *11 Years of Government Data Reveal That Immigrants Do Show Up for* Court, AM. IMMIGR. COUNCIL (Jan. 28, 2021), https://www.americanimmigrationcouncil.org/news/11-years-government-data-reveal-immigrants-do-show-court; *Most Released Families Attend Immigration Hearings*, TRAC IMMIGR. (June 18, 2019), https://trac.syr.edu/immigration/reports/562/.

[269] *Immigration Court Appearance Rates*, HUM. RTS. FIRST (Feb. 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/Immigration_Court_Appearances_Feb_2018.pdf.

[270] *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*, ASYLUM SEEKER ADVOCACY PROJECT & CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (2019), https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court-2019-Update.pdf.

[271] *Immigration Court Appearance Rates*, *supra* note 275.

[272] *Id.*

[273] *See New York City Becomes First Jurisdiction in Nation to Provide Universal Representation to Detained Immigrants Facing Deportation*, VERA INST. JUST. (June 26, 2014), https://www.vera.org/newsroom/new-york-city-becomes-first-jurisdiction-in-nation-to-provide-universal-representation-to-detained-immigrants-facing-deportation; *New Legal Aid Alliance Aims to Build a Model for Universal Representation for Detained Immigrants Facing Deportation in the Chicago Immigration Court*, NAT'L IMMIGRANT JUST. CTR. (May 6, 2022), https://immigrantjustice.org/press-releases/new-legal-aid-alliance-aims-build-model-universal-representation-detained-immigrants.

border,[274] and legal orientation programs that contract with local nonprofit service providers to provide basic legal information[275]— not only accomplish the goal of ensuring that respondents attend their hearings, but speak to the rights gap created by the absence of Sixth Amendment protections in immigration law. Such alternatives are critical to both limiting ICE's power to shape legal outcomes through transfers and ending the agency's reliance on the detention archipelago.

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[274] *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, WOMEN'S REFUGEE COMM'N (June 13, 2019), https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration/.

[275] *See Legal Orientation Program: Overview*, VERA INST. JUST., https://www.vera.org/projects/legal-orientation-program (last visited Jan. 2, 2023).