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To the Senate Judiciary Committee:

The New York City Bar Association (the "City Bar") and its Committee on Immigration and Nationality Law (the "Committee") applaud the April 16 introduction of the Senate draft immigration reform bill entitled "Border Security, Economic Opportunity, and Immigration Modernization Act" (S. 744). The City Bar and its Committee have a longstanding commitment to support fair and humane immigration policies and to advancing human rights in the United States and abroad. In particular, the City Bar advocated for reforms to immigration detention, including the right to representation for detained immigrants, in a 2009 report.[1]

Recently, in an April 24, 2013 submission to the Senate Judiciary Committee, the City Bar supported the Senate's efforts to increase access to and representation by counsel, and urged Congress to expand the legislation to include universal representation of indigent non-citizens facing detention or deportation proceedings.

This letter builds upon that submission. Here, the Committee supports the steps that S. 744 takes to reduce Department of Homeland Security ("DHS)" over-detention of non-citizens. Specifically, we support that S. 744:

- Revises mandatory detention into mandatory "detention or custody";
- Encourages alternatives to detention, such as tracking bracelets and community-based supervision;
- Provides important due process protections, such as timely bond hearings; and
- Requires more oversight and transparency over DHS detention facilities.

These are important steps to reduce unnecessary restrictions on liberty and safeguard human rights while reducing costs to taxpayers. However, the Committee urges Congress to take further steps to reduce detention and ensure due process, including:

- Repealing mandatory "detention or custody" entirely, and requiring individualized judge review of each custody decision, with specific, transparent criteria and no artificial minimum bond amount;
- Repealing the "bed quota," which requires 34,000 detainees regardless of flight or public safety risk;
- Providing appointed counsel to all immigrant detainees and requiring lawyers to review DHS custody decisions; and
- Giving American Bar Association ("ABA") Civil Immigration Detention Standards the full force of law.

"Civil" Immigration Detention Should Employ Less Detention With Fewer Criminal Conditions

The U.S. immigration detention system has exploded into America's largest system of incarceration, detaining a record 429,247 individuals in 2011—more than any federal or state prison system.[2] This increased detention of immigrants[3] has been driven in part by 1996 laws requiring mandatory detention pending adjudication of those with prior criminal convictions (even minor or from long ago),[4] the post-9/11 buildup of immigration enforcement,[5] and the recent expansion of enforcement to state and local police[6] through initiatives like Secure Communities. Whereas in 1995, the U.S. detained 7,500 people on any one day, the U.S. now detains 34,000 in over 250 facilities across America.[7] This occurs at great cost to American taxpayers. The U.S. government spends $2 billion a year on immigration detention—$164 per detainee per day—when lesser restrictive alternatives to detention cost $14 per day or less.[8]

Further, this huge detention apparatus, requiring manpower to arrest, process, guard, transport, and house large numbers of people, means that essential personnel are diverted from other enforcement priorities. Certainly, due process has suffered. Immigration courts, unable to keep pace with the expansion, now conduct over 40% of removal hearings by video due to the cost of transporting detainees from remote locations. This raises serious issues for study, which the bipartisan Administrative Conference of the United States has begun to undertake after making recommendations to improve efficiency in immigration removal proceedings.[9]

Moreover, even though immigration violations are legally classified as "civil" proceedings, immigration detention facilities are more akin to criminal confinement.[10] Many immigrants are held in actual jails.[11] Worse, immigration facilities have been repeatedly denounced for substandard conditions, such as the use of excessive force, shackles, solitary confinement, poor food and exercise, fifteen minutes of phone access a day, visitation through Plexiglass, and inadequate law libraries containing English-only books.[12] As Dora Schriro, author of DHS' 2009 report on immigration detention, stated, "in general, criminal inmates fare better than do civil [immigration] detainees."[13] All this occurs without appointed counsel, which renders it nearly impossible for detainees to litigate their deportation cases.[14] Moreover, detainees are routinely transferred to rural facilities far from counsel or family who might assist.[15] And it is estimated that one percent of immigration detainees are U.S. citizens, for whom no justification to detain exists.[16]

DHS and its sub-agency Immigration and Customs Enforcement ("ICE") have engaged in meaningful efforts to make immigration detention "truly civil," as ICE Director John Morton stated.[17] We applaud this bill's extension of those steps. However, if the term "civil" detention means anything, it is that ICE should detain not just better, but less.[18] Our recommendations further that goal.

The City Bar Supports this Bill Because It Takes Steps to Reduce Over-Detention of Immigrants While Facilitating Increased Government Efficiency

First, we applaud the bill's steps to scale back mandatory immigration detention without bail. S. 744 revises mandatory detention into mandatory "detention or custody"—now including electronic tracking ankle bracelets—based on an individualized DHS determination.[19] This may, if DHS allows it, let thousands avoid unnecessary incarceration and remain with families pending their deportation hearing, for which they may more meaningfully prepare and participate.

We urge the Senate to go further and wholly repeal mandatory "detention or custody" so that DHS only detains those who pose a flight or public safety risk. There is no reason why immigration judges cannot determine flight or public safety risk as judges do every day in criminal courts. Yet the bill still excepts mandatory detention or custody from immigration court review.[20] Moreover, the bill *expands* the categories of criminal offenses that may subject one to immigration mandatory detention or custody (already including minor offenses like drug possession or subway turnstile jumping).[21] In addition, the bill retains the unfairness of retroactively subjecting immigrants to detention and custody for criminal offenses that had no immigration consequences when committed. The bill also retains the extremely high burden on those challenging mandatory "detention or custody"—i.e. that the Government only needs any non-frivolous legal rationale to detain.[22] Repealing mandatory "detention or custody" would eliminate these concerns.

Second, we applaud the bill's steps to reduce over-detention by making detention the exception, not the rule, and encouraging alternatives to detention ("ATD"). Importantly, except for mandatory detainees, DHS must now demonstrate to an immigration judge that "no conditions, including... alternatives to detention" will "reasonably assure" appearance at hearings and public safety.[23] The bill further requires DHS to establish alternatives to detention that provide a "continuum of supervision . . . including community support,"[24] and incorporate case management services."[25] DHS is also required to review the level of supervision on a monthly basis.[26] And, positively, the bill may reduce over-restriction as well as over-detention. The bill requires alternatives to detention **not** to be used when bail or simple release would suffice to ensure appearance and public safety,[27] more like criminal court practices.[28]

We also support the bill's requirement that DHS establish "community-based supervision programs" that screen detainees and provide appearance assistance and community-based supervision.[29] These programs have been shown to ensure appearance at hearings without risk to public safety, at a fraction of the cost. While detention costs taxpayers $166/day, alternatives to detention cost $14/day or less.[30] Meanwhile, DHS's pilot programs for alternatives to detention achieved an appearance rate of 94%, far beyond its target rate and that of most criminal release programs.[31]

That said, Congress should repeal the "bed quota," which requires DHS to detain 34,000 immigrants at any one time, regardless of risk. [32] Otherwise, the bill's other reforms encouraging

alternatives to detention will be frustrated, and DHS will continue to unnecessarily detain immigrants who pose little risk at great taxpayer cost.

Also, Congress should repeal the $1,500 minimum amount for individual immigration bond settings, which subjects immigrants to far greater bond settings than criminal pretrial detainees even though immigrants pose less risk.[33] Indeed, 80% of New York criminal arrestees receive bond settings of $1,000 or less.[34] Moreover, Congress should provide clear criteria regarding risk of flight or risk to public safety to DHS officers and immigration court judges, such as the eight delineated factors a New York criminal judge considers when setting bail.[35]

Additionally, Congress should make transparent ICE's new risk assessment tool which will play a key role in individual detention determinations.[36] Risk assessment has promise to reduce over-detention, and provide empirical evidence that detainees pose little risk, thus further supporting reform of detention laws.[37] As of now, however, ICE appears to be making computerized determinations regarding immigrants' liberty based on a secret algorithm with no opportunity for immigrants to change or review information. Human rights advocates previously criticized the tool for being weighted toward over-detention.[38] If this continues, legal reforms to reduce detention may be for naught. Congress should require immediate disclosure of ICE's risk assessment criteria, and require that the risk assessment summary, currently placed in DHS' file on an immigrant (the "A-File"), be reviewed in immigration court.

The City Bar Supports this Bill Because It Takes Steps to Improve Due Process for Immigrant Detainees

Additionally, we applaud the bill's steps to improve due process for immigrant detainees, in line with American values and widespread public support. The bill requires DHS to "immediately" determine whether an immigrant is detained or released, inform the immigrant of his rights to a bond hearing, and serve a copy of the detention decision, with reasons, on the immigrant within 72 hours.[39] The bill then provides for a bond hearing before an immigration judge within 72 hours of service of the custody determination, and no later than one week from arrest.[40] Nine in ten Americans, of party affiliation, agree there should be a "time limit on how long someone can be held in jail for immigration violations before they see a judge."[41]

Although these basic due process protections are welcome and long-overdue, Congress should go further and provide counsel to all immigrant detainees.[42] As we set forth in our companion letter, under fundamental American fairness and due process values, this country provides representation for indigents when liberty and livelihood are at stake.[43] Both are at stake in deportation proceedings involving detention. Immigration judge Paul Grussendorf testified, "It is un-American to detain someone, send them to a remote facility where they have no contact with family, place them in legal proceedings where they are often unable to comprehend, and not to provide counsel for them."[44] Appointed counsel will also increase court efficiency and in turn, reduce unnecessary detention.[45]

Also, Congress should require DHS lawyers, rather than DHS officer non-lawyers, to review and render detention decisions and charging decisions.[46] Non-lawyers should not have the authority to jail immigrants for months or years based on incredibly complex legal determinations.[47]

The City Bar Supports this Bill Because It Takes Steps to Improve Detention Conditions and Oversight

We applaud the bill's steps to provide long-needed oversight and transparency to immigration detention. The bill requires DHS to make all of its contracts with detention facilities contingent on compliance with ICE's detention standards, and requires the imposition of financial penalties on any facility that violates those standards.[48] Also, the bill requires DHS to report to Congress yearly on facility oversight, requires DHS to make all detention contracts, evaluations, and reviews public, and further makes those contracts, evaluations, and reviews subject to Freedom of Information Act requests, even regarding private prison corporations.[49]

That said, Congress should examine detention standards more closely and give them binding force. Congress should thoroughly examine the American Bar Association model Civil Immigration Detention Standards, and consider adopting them into law, rather than the ICE standards which remain modeled after criminal jail standards.[50] Moreover, whichever detention standards Congress adopts should be made binding with full force of law, as are Bureau of Prisons regulations, so as to provide legal relief to immigrant detainees who are mistreated.[51]

Lastly, Congress should require DHS to develop visitation policies for detained clients that are consistent, well-publicized, and less restrictive of access to counsel. Detention facilities have conflicting visitation standards, which make it difficult for representatives to access their clients. Some prohibit visitation unless lawyers submit to a criminal background check days in advance.[52] Congress should direct DHS to standardize its provisions for representatives to visit clients in detention facilities, and ICE should create online registries of representatives, as immigration courts are doing, to ease access.[53] ICE should also publicize policies regarding access to facilities, as immigration courts have done with *pro bono* information in each district.[54]

We thank the Senate Judiciary Committee for its consideration of these comments and recommendations.

Respectfully submitted,

Lenni Benson

Prof. Lenni Benson
Chair

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[1] *See* Association of the Bar of the City of New York, Committee on Immigration & Nationality Law, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009) [hereinafter "City Bar, *Right to Counsel*"], *available at* http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf.

[2] John Simanski and Lesley M. Sapp, Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2011* 4 (September 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf; *see also* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees* ("Improving Conditions"), 47 Am. Crim. L. Rev. 1441, 1446 (2010).

[3] *See generally* Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42, 44-46 (2010).

[4] *See* 8 U.S.C. § 1226(c).

[5] Ted Hesson, *Five Ways Immigration System Changed After 9/11*, ABC News/Univision (Sept. 11, 2012), *available at* http://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590#.UXngGLWR9d0.

[6] *See generally* Lenni B. Benson, *As Old as the Hills: Detention and Immigration* ("As Old as the Hills"), 5 Intercultural Hum. Rts. L. Rev. 11, 11-13 (2010).

[7] *The release of criminal detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?, Hearing Before the H. Comm. On the Judiciary*, 113th Cong. (2013) (Statement of John Morton) (2013) ("Morton, *Written Testimony*"), *available at* http://www.dhs.gov/news/2013/03/19/written-testimony-us-immigration-and-customs-enforcement-director-john-morton-house; *see also* Dora Schriro, U.S. Dep't of Homeland Security, *Immigration Detention Overview and Recommendations* 6 (2009) ("Schriro, *Immigration Detention Overview and Recommendations"), available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

[8] National Immigration Forum, *The Math of Immigration Detention* 1 (August 2011), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf; *Building an Immigration System Worthy of American Values, Hearing Before the S. Comm. On the Judiciary*, 113th Cong. 19 (2013) (Statement of Ahilan T. Arulanantham, ACLU) , *available at* http://www.judiciary.senate.gov/pdf/3-20-13ArulananthamTestimony.pdf.

[9] Two of the recommendations adopted at the Administrative Conference of the United States involved video teleconferencing. *See* Administrative Conference of the United States, *Administrative Conference Recommendations 2012-13* 16-17 (June 2012), *available at* http://www.acus.gov/sites/default/files/documents/2012-3.pdf.

[10] Schriro, *Immigration Detention Overview and Recommendations* at 2, 4.

[11] *Id.*

[12] Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 117 (2010), *available at* http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf; Amnesty International USA, *Jailed Without Justice-Immigration Detention in the USA* (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf; *see also* Nat'l Immigration Law Ctr., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), *available at* www.nilc.org/document.html?id=9; Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[13] Schriro, *Improving Conditions* at 1445.

[14] City Bar, *Right to Counsel* at 7.

[15] City Bar, *Right to Counsel* at 7; New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 Cardozo L. Rev. 357, 363 (2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

[16] William Finnegan, *The Deportation Machine*, THE NEW YORKER 24 (Apr. 29, 2013); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 622 (2011).

[17] Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html.

[18] *See* Benson, *As Old as the Hills* at 13-17 (2010); Mark Noferi, *New ABA Civil Immigration Detention Standards: Does "Civil" Mean Better Detention Or Less Detention?*, CRIMMIGRATION.COM (Aug. 28, 2012), *available at* http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx.

[19] Sec. 3715(c), (d), sec. 3717 (a) (creating new INA section 236(f)(5)); *see* Rutgers School of Law-Newark Immigrant Rights Clinic, *Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention* 24-25 (July 2012) (arguing that INA § 236(c) should be interpreted to allow electronic monitoring), *available at* http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf. The new bill excepts suspected terrorists certified by the Attorney General under INA § 236A (8 U.S.C. § 1226A).

[20] Sec. 3717(a) (creating new INA section 236 (f)(5) ("Except for aliens that the immigration judge has determined are deportable as described in section 236A and 236(c), the immigration judge shall review the custody determination de novo.... For aliens detained under 236(c), the immigration judge ***may*** review the custody determination ***if*** the Secretary agrees...")(emphases ours).

[21] *See Crimmigration Provisions of New Immigration Bill*, CRIMMIGRATION.COM (Apr. 18, 2013), http://crimmigration.com/2013/04/18/crimmigration-provisions-of-immigration-bill.aspx.

[22] *See, e.g. Gayle v. Napolitano*, Civ. A. No. 12-2806 (D.N.J. filed May 1, 2012), *available at* http://www.aclu.org/immigrants-rights/gayle-v-napolitano.

[23] Sec. 3717(a), creating new INA section 236 (f)(5).

[24] Sec. 3715(b).

[25] Sec. 3715(a).

[26] Sec. 3715(c); *see also* Rutgers School of Law-Newark, *Freed but Not Free* at 12-14 (inconsistent and conflicting guidance for review of alternatives to detention leads to arbitrary and inconsistent restrictions).

[27] Sec. 3715(c).

[28] NYU School of Law Immigrant Rights Clinic et al., *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City*, 8-11 (July 23, 2012) (in New York, while 80% of ICE detainees were denied bail, 68% of pretrial criminal defendant were released on recognizance with no bail at all), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.

[29] Sec. 3715(b); *see also Demore v. Kim*, 538 U.S. 510, 565 (2003) (Souter, J., dissenting).

[30] National Immigration Forum, *The Math of Immigration Detention* 1 (Aug. 2011), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

[31] Arulanantham at 26-27; Ophelia Field and Alice Edwards, UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees* POLAS/2006/03 24 (April 2006), *available at* http://www.refworld.org/docid/4472e8b84.html ("In the criminal justice field, compliance figures for felony defendants who are released under non-custodial measures before trial usually range from 40-70%. This study, therefore, assumes that any alternative measure applied to asylum seekers to ensure their appearance that achieves a success rate over 80% can be considered 'effective'.")

[32] Arulanantham at 19.

[33] 8 U.S.C. § 1226(a)(2)(A) ("the Attorney General... may release the alien on... bond of at least $1,500...").

[34] *See* NYU, *Insecure Communities* at 11 (for New York ICE arrestees, 75% of bond settings are $5,000 or more, and 35% are $10,000 or more. 55% of ICE arrestees were unable to pay, and one in five of those have children. Conversely, for New York criminal pretrial detainees, 80% of bond settings are $1,000 and below.).

[35] *See* N.Y. Crim. Proc. Law § 510.30. When making a bond determination, a criminal court "must, on the basis of available information, consider and take into account: (i) The principal's character, reputation, habits and mental condition; (ii) His employment and financial resources; and (iii) His family ties and the length of his residence if any in the community; and (iv) His criminal record if any; and (v) His record of previous adjudication as a juvenile delinquent[]; and (vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and (vii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and (viii) If he is a defendant, the sentence which may be or has been imposed upon conviction." *See generally* NYU, *Insecure Communities* at 8-9.

[36] On March 19, 2013, ICE Director John Morton confirmed to Congress that ICE had deployed nationwide its new automated "Risk Classification Assessment" tool. Morton, *Written Testimony* (Mar. 19, 2013), *supra* note 7.

[37] *See* Robert Koulish and Mark Noferi, *Unlocking immigrant detention reform*, BALTIMORE SUN, Feb. 20, 2013, *available at* http://www.baltimoresun.com/news/opinion/oped/bs-ed-immigrant-detention-20130220,0,5653483.story.

[38] Lutheran Immigrant Refugee Service, *Unlocking Liberty* 11, 21 (2011), *available at* http://www.lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf, *citing* Alice Edwards, UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* 81 (2011) ("the US risk assessment tool... appears heavily weighted in favour of detention"), *available at* http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4dc935fd2.

[39] Sec. 3717(a), creating new INA sections 236(f)(2), (7).

[40] Sec. 3717(a), creating new INA sections 236 (f)(3), (4). A bond hearing was not previously required. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 83 & n.103 (2012), *citing* 8 C.F.R.

§236.1(g)(1) (immigration official "may" issue an I-286 Notice of Custody determination "at any time… up to the time removal proceedings are completed").

[41] Belden Russonello Strategists LLC, *American attitudes on immigration reform, worker protections, due process, and border enforcement* 3 (April 2013), *available at* http://cambio-us.org/cirpoll2013/.

[42] City Bar, *Right to Counsel*, *supra* note 1; The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* 8 (2009), *available at* http://www.constitutionproject.org/pdf/359.pdf.

[43] Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. at 71 & n.30, 101-05.

[44] *Building an Immigration System Worthy of American Values, Hearing Before the S. Comm. On the Judiciary*, 113th Cong. 8 (2013) (Statement of Paul Grussendorf), *available at* http://www.judiciary.senate.gov/pdf/3-20-13GrussendorfTestimony.pdf.

[45] Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* 59, 66-67, 80-82 (2012), *available at* http://www.acus.gov/sites/default/files/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf; City Bar, *Right to Counsel* at 7-8.

[46] Currently, non-lawyers are allowed to make such determinations. *See* Benson and Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* at 37; Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. at 84; American Bar Association Commission On Immigration, *Reforming The Immigration System, Proposals To Promote Independence, Fairness, Efficiency, And Professionalism In The Adjudication Of Removal Cases* 1-49 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

[47] These determinations, such as whether a prior conviction is an "aggravated felony" or "crime involving moral turpitude," are based on interlocking state criminal and federal immigration laws. Analysis may involve determining whether the correct statutory test is a "strict" or "modified categorical approach," depending on whether a criminal statute is "divisible" and whether the immigration statute is "generic" or "specific." *See* Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. at 89-95.

[48] *See generally* sec. 3716.

[49] Sec. 3716 (c)(3), (d)(1)(D), (e).

[50] ABA Civil Immigration Detention Standards (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf; *compare* U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011* (Feb. 2012), *available at* http://www.ice.gov/detention-standards/2011/.

[51] Schriro, *Improving Conditions*, 47 Am. Crim. L. Rev. at 1446, 1451 ("The ultimate form of enforcement is regulation that also affords opportunity for relief . . . . Failure to comply with regulation is a basis for relief. Failure to comply with elective standards is not.").

[52] We base this information on interviews by our committee members of detention facility staff in the New York and New Jersey area.

[53] *See* Daniel Kowalski, *EOIR Final Rule: Registry for Attorneys and Representatives* (Apr. 1, 2013), *available at* http://www.lexisnexis.com/community/immigration-law/blogs/inside/archive/2013/04/01/eoir-final-rule-registry-for-attorneys-and-representatives.aspx; 78 Fed. Reg. 19400-01 (Apr. 1, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-04-01/pdf/2013-07526.pdf.

[54] *See* Department of Justice, *Free Legal Services Providers*, *available at* http://www.justice.gov/eoir/probono/states.htm.