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# U.S. Detention of Women and Children Asylum Seekers: A Violation of Human Rights

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## ARTICLE

# U.S. DETENTION OF WOMEN AND CHILDREN ASYLUM SEEKERS: A VIOLATION OF HUMAN RIGHTS

WENDY YOUNG\*

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## I. INTRODUCTION

Handcuffed, loaded into a van, and deprived of their personal belongings, the INS transferred six women asylum seekers from the Wackenhut Detention Center in New York to the York County Prison in Pennsylvania on June 8, 1998.<sup>1</sup> The INS failed to explain where they were going or why they were going there; one woman thought she was being deported. Frightened and confused, the women were strip-searched upon their arrival at York. A prison guard then placed the women in maximum-security prison, incorrectly assuming that they must have had criminal records in order to have been held in Wackenhut for so long.

Yudaya, a twenty-year-old Muslim woman from Uganda, broke down sobbing from the trauma and confusion of the day.

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1. These initial examples are based on interviews conducted by the Women's Commission.

She began to pound her head on the floor, crying, "I want to die, I want to die." The prison staff responded by sending in a "quick response team" including three men wearing riot gear and a dog. Their presence frightened Yudaya further, and she became more upset. The men stripped Yudaya of her clothing. She begged them not to remove her underclothing. The guards tried to dress Yudaya in a paper gown but she was too agitated. Instead of allowing her to dress herself, the guards placed her naked and spread-eagled in four-point restraints on a cot in the "Behavioral Adjustment Unit" (the term used for solitary confinement). Yudaya was then injected with a powerful sedative and left chained to the bed for three days. When the guards removed her restraints on the final day, she reported that she was dizzy, shaky, and confused. She remained in solitary confinement for one week and then was placed back in maximum security. After a visit from the Women's Commission for Refugee Women and Children (Women's Commission) and the British Broadcasting Corporation, Yudaya was suddenly transferred back to Wackenhut, where she remains incarcerated.

Yudaya's experience exemplifies the harsh treatment experienced by asylum seekers in detention. The Women's Commission has heard many such stories since 1996, when we launched a two-year assessment of the detention of women asylum seekers by the Immigration and Naturalization Service (INS). This assessment included visits to detention centers around the country and interviews with dozens of detained asylum seekers, as well as with the INS and local government officials charged with their care. In April 1997, we issued a comprehensive report on our findings, titled "Liberty Denied."<sup>2</sup> We have continued to monitor detention conditions for women and issued a follow-up report on one detention facility, the York County Prison in York, Pennsylvania.<sup>3</sup> We have also expanded our research to include facilities housing children asylum seekers. In total, we have witnessed conditions in approximately thirty detention facilities across the country, including INS Service Processing Centers, contract facilities, and local jails.

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2. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *LIBERTY DENIED: WOMEN SEEKING ASYLUM IMPRISONED IN THE UNITED STATES* (April 1997) [hereinafter *Liberty Denied*].

3. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *FORGOTTEN PRISONERS: A FOLLOW-UP REPORT ON REFUGEE WOMEN INCARCERATED IN YORK COUNTY, PENNSYLVANIA* (July 1998) [hereinafter *Forgotten Prisoners*].

Like Yudaya, who fled to the United States to seek political asylum, each woman and child we have met has a unique and compelling story. However, despite their individual circumstances, from detention facility to detention facility, women and children tell remarkably similar accounts of the abuse, isolation, and legal obstacles they face in detention. Collectively, their experiences make clear that violations of human rights in detention are not isolated incidents but instead reflect a disturbing failure on the part of the INS to protect the safety and dignity of detained asylum seekers. In general, we have found that asylum seekers who are in detention are treated more like criminals than individuals deserving protection and assistance, and that women and children are particularly at risk of neglect and abuse. Moreover, detention frequently undermines the ability of an asylum seeker to access legal counsel and effectively pursue her asylum claim.

## II. BACKGROUND

The use of detention, and its attendant problems, is growing rapidly. The INS is now detaining a daily average of 16,000 individuals, roughly a ninety percent increase from Fiscal Year (FY) 1995.<sup>4</sup> Growing numbers of detained juveniles are part of this increase, and between December 1995 and July 1998, the INS added 400 new detention bed spaces for children under age eighteen.<sup>5</sup> The agency plans to further expand its detention capacity; it estimates that it will need between 20,000 and 35,000 detention bed spaces in FY 1999 to detain everyone who might be subject to detention.<sup>6</sup> In fact, immigration detention has become the fastest growing federal prison program.<sup>7</sup>

Approximately 7% of detainees are women and 3.5% are minors under age eighteen.<sup>8</sup> Although the INS is not systematically tracking the number of detainees who are seeking asylum, it has estimated that five percent of detainees are

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4. See 75 INTERPRETER RELEASES 1407 (Oct. 9, 1998).

5. See *Senate Judiciary Subcommittee on Immigration* (July 29, 1998) (testimony of Commissioner Doris Meissner, Immigration and Naturalization Service).

6. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEPT OF JUSTICE, SECOND REPORT ON DETENTION AND RELEASE OF CRIMINAL AND OTHER ALIENS (1997).

7. See 75 INTERPRETER RELEASES 1407 (Oct. 9, 1998).

8. See *Forgotten Prisoners*, *supra* note 3, at 3.

asylum seekers.<sup>9</sup> Service providers actually believe that the percentage is much higher. This means that hundreds of asylum seekers who have no criminal record are in detention on any given day. Moreover, while the INS has projected that the average length of stay in detention for aliens in removal proceedings is thirty-two days for FY 1998, and twenty-nine days for FY 1999, individuals who have raised an asylum claim often remain in detention for far longer. Some asylum seekers with whom the Women's Commission met had been incarcerated for almost five years.

The cost that detention represents to U.S. taxpayers is extremely high. In its interviews with facility administrators, the Women's Commission found that the INS is paying anywhere from \$41 to \$156 per day per detainee. In the case of county and local prisons, the INS is typically paying the facility twice the rate that is paid for the incarceration of criminal inmates. This significant commitment of resources, combined with the human cost that detention often carries, makes it critical that the INS, the Department of Justice, and Congress ensure that asylum seekers are not unnecessarily detained, that alternatives to detention are pursued, and that conditions of detention for those who must be held are humane.

### III. CONDITIONS OF DETENTION

In its investigation, the Women's Commission found that women asylum seekers face physical and verbal abuse in detention centers and frequently endure prolonged imprisonment in conditions that fail to meet international principles of refugee protection and basic standards of decency and compassion. Many of these women have fled torture and gender-based persecution, including politically motivated rape, female genital mutilation, and forced marriages.

Detention effectively removes asylum seekers from the public eye. Locked in cells, hidden behind concertina fences, forced to wear prison uniforms, subjected to pat and strip searches, handcuffed and shackled when transported, and never informed about how long their imprisonment will last, asylum

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9. See Kerwin & Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 1433 (Oct. 19, 1998).

seekers often lose hope and abandon their asylum claims to risk return to their home countries.

Women asylum seekers are particularly at risk of neglect and abuse. The Women's Commission found that the physical, psychosocial, and legal needs of women are frequently ignored. In some cases, women are denied services provided to their male counterparts in the same facility, including in one case access to legal assistance,<sup>10</sup> and in several cases, access to translation services and English classes.<sup>11</sup> Moreover, women are more likely to be held in county prisons with which the INS contracts for detention space.<sup>12</sup> The INS uses their relatively small numbers to justify this harsh treatment of women, frequently claiming that it cannot afford to provide women the same level of services as it provides to male detainees.<sup>13</sup>

The Women's Commission investigated several facilities and made evaluations of the following conditions: 1) the physical settings used to detain asylum seekers; 2) the treatment women experience at the hands of facility staff and criminal inmates; 3) the availability of translation services; 4) the availability of health care; 5) the availability of recreation and access to the outdoors; 6) the availability of appropriate spiritual support; 7) the level of access attorneys and others have to detention centers; and 8) the implementation of the Asylum Pre-Screening Officer Program (APSO) and other release alternatives. We have also looked at the special issues facing children in the custody of the INS.<sup>14</sup>

#### A. *Physical Settings Used to Detain Asylum Seekers*

The INS utilizes three basic types of detention centers to house asylum seekers. Service Processing Centers, of which there are nine, are owned and operated by the INS itself. Private

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10. See *Liberty Denied*, *supra* note 2, at 35.

11. See *id.* at 17. See also WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, A CRY FOR HELP: CHINESE WOMEN IN INS DETENTION (Mar. 1995).

12. See *id.* at 29.

13. See *id.*

14. See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES (Dec. 1998).

correctional companies operate six INS "contract facilities" on behalf of the INS solely to house immigration detainees.<sup>15</sup> Finally, the INS relies on approximately 500 local jails and prisons to provide sixty percent of its bed space; dependence the agency projects will increase in the coming years.<sup>16</sup>

All of the facilities visited by the Women's Commission, regardless of type, were prisons or the equivalent. Many were maximum security. Locked doors, cells or institutional dormitories, hi-tech security systems, and concertina wire fences define the detainees' living space.

Moreover, many of the detention centers are in remote locations that create a psychological barrier between detainees and the outside world. Many are located far from urban areas and strong immigrant or immigrant advocacy communities.<sup>17</sup>

The prison and jail facilities with which the INS contracts for detention space present special problems. Such facilities are designed to punish criminal offenders and protect the surrounding community. These goals are in no way compatible with meeting the critical legal and social service needs of asylum seekers.

The INS contracts with local prisons through its thirty-three district offices. The INS districts, in turn, almost completely relinquish their detention authority to the facility in question. INS officials at all levels refer to themselves as "guests" of the prisons. The intergovernmental service agreements entered into with these facilities fail to specify that any special provision be made to accommodate immigration detainees generally, let alone asylum seekers. Moreover, the INS officials declare themselves unable to influence prison policies despite the fact that the INS

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15. See Matthew Purdy, *In Jail Business, Nashville Company Leads Crowded Field*, N.Y. TIMES, Jan. 19, 1996, at B4; John Sullivan, *Operator of Immigration Jails Has a History of Troubles*, N.Y. TIMES, June 20, 1995, at A1.

16. It should be noted that the INS also sometimes utilizes hotels when it lacks space to hold an individual elsewhere or occasionally to house a family unit together. Very little is known about the conditions in such hotels, although anecdotal evidence suggests that outdoor exercise and food are frequently inadequate.

17. For example, the Hancock County Justice Facility is located in a small community on the Gulf of Mexico, a 2.5 hour drive from New Orleans; the Port Isabel Service Processing Center is 1.5 hours outside the small community of Harlingen, Texas surrounded by the Texas desert. Also, the Wackenhut Detention Center is in the middle of a warehouse district behind John F. Kennedy Airport, inconveniently located away from the legal services available in Manhattan and with no sign to identify its function.



retains custody of the individual while in the contract facility and therefore should be held accountable for meeting certain standards. In most cases, the INS has failed even to communicate to the prison the reason for the asylum seeker's detention.<sup>18</sup> Therefore, the prison is unaware of the person's needs and lacks the necessary information to provide appropriate services.

The tragic results of this breakdown in accountability and oversight are borne by the asylum seekers. The hands-off approach of the INS means that detainees housed in prisons become indistinguishable from the criminal inmates. In many facilities, asylum seekers share living space and even cells, with inmates accused or convicted of violent crimes. The mixing of the criminal population with detainees is more common for women asylum seekers than for their male counterparts.<sup>19</sup> The INS and prison officials typically justify this practice with the rationale that there are too few women to justify separating the living quarters for female detainees from the general prison population.<sup>20</sup>

Women asylum seekers are frequently terrified of the "American inmates." Many detainees reported being harassed by the criminal inmates when they spoke their own languages.<sup>21</sup> In one facility, the criminal inmates who worked in the kitchen frequently drew obscene pictures on the food trays used to serve the INS detainees.<sup>22</sup>

Prison officials often assume that the asylum seeker would not be in prison if she had not committed some crime. Even after learning that an asylum seeker lacks a criminal record, prison officials often express a reluctance to differentiate among the people in their custody.

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18. See *Liberty Denied*, *supra* note 2, at 15 (noting that jail personnel admit to not knowing why the INS has asked them to house an asylum seeker, often assuming that the detainee has committed a crime).

19. See *id.* at 14.

20. See *id.*

21. See *id.*

22. See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, AN UNCERTAIN FUTURE, A CRUEL PRESENT: WOMEN IN INS DETENTION (Sept. 1995) [hereinafter *Uncertain Future*].

In 1998, the INS issued standards for detention.<sup>23</sup> These standards represent a significant acknowledgment by the INS that detention centers should meet certain minimum criteria. However, the standards have two fundamental flaws. First, they allow the INS districts to retain the responsibility for overseeing implementation of the standards and investigating any violations.<sup>24</sup> The practical effect of continuing to lodge this authority with the districts is that the very office violating the standards is the one charged with investigating the violation. Second, the INS does not require the prisons that hold detainees to meet these standards; they only apply to the Service Processing Centers and contract facilities. This means that over half of the detainees held by the INS are in facilities that are not required to comply with the standards.

### *B. Treatment of Detainees by INS and Prison Staff*

Detainees interviewed by the Women's Commission reported verbal and physical abuse, frequent strip searches, and excessive use of prolonged isolation for minor infractions of facility rules. The INS and prison staff who have direct contact with detainees exhibit mixed behavior, professionalism, and attitudes toward the women in their care.

Also disturbing are reports that denial of basic needs, such as feminine hygiene, are used as a means to humiliate women. A Chinese woman in the Kern County Lerdo Detention Center in Bakersfield, California, complained that she was punished for asking for a sanitary napkin.<sup>25</sup> The guard twice refused her request. The guard then shoved the young woman against a wall and placed her in solitary confinement for several days for reportedly using "too much toilet paper."<sup>26</sup>

Finally, there have been reports of sexual harassment and abuse of women asylum seekers. According to the Florida Immigrant Advocacy Center (FIAC), a pregnant Angolan woman

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23. The detention standards are actually a series of individual "standards" on many aspects of INS detention. They can be found in LUTHERAN IMMIGRATION AND REFUGEE SERVICE, DETENTION RESOURCE MANUAL (Mar. 23, 1998).

24. See INS Releases *Uniform Detention Guidelines*, 75 INTERPRETER RELEASES 199 (Feb. 9, 1998).

25. See *Liberty Denied*, *supra* note 2, at 16.

26. *Id.*

and her seven-year-old child were detained for one month in a hotel. Throughout her detention, the woman alleges that a guard would wake her up at night and pressure her for sex.<sup>27</sup> In a recent case that occurred in the Varick Street Detention Center, a Service Processing Center located in Manhattan, a doctor has pled guilty to sexually molesting a female detainee.

While the Women's Commission also met INS and prison officers who appeared to be genuinely concerned about the individuals in their care, the fact remains that most staff who have direct responsibility for asylum seekers are unaware of their special needs. The INS has implemented few measures to ensure that the detention facility staff is trained in recognizing the special needs of asylum seekers, including recognition of symptoms of trauma. This failure to educate front line staff is particularly true in the case of prison officers, who often respond to behavior symptomatic of trauma with force rather than a more appropriate response.

### *C. Translation Services*

The vast majority of detainees speak little or no English, and most detention facilities lack readily accessible translation services. Generally, the INS only provides interpretation during emergencies or medical examinations and that is frequently done by telephone. The inability to adequately communicate compounds many of the problems detainees face. First, it greatly exacerbates their fears about their detention and the status of their asylum cases. Second, it results in an inability to request medical assistance. Third, it leads to unnecessary disciplinary actions due to detainees' confusion about the facility rules. Fourth, it inhibits the ability of detainees to access the few services available, because they remain unaware of the existence of such services or are unsure about how to request them. Finally, detainees are effectively left with no recourse to raise complaints when abuses occur.

Moreover, while interpreters are not readily available to most detainees, in at least one facility, the Women's Commission found that women are disproportionately impacted. In the York County Prison, two Mandarin interpreters were posted in the

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27. See Mark Dow, *Our Daily Ordeal is Going Unnoticed*, (on file with author).

male wing to provide translation to the 118 Chinese men from the *Golden Venture*, the smuggling ship that ran aground on the coast of New York five years ago.<sup>28</sup> The six Chinese women in the same facility, however, had to formally request translation services whenever they needed them.<sup>29</sup> The male interpreters were then made available and were used to translate even sensitive medical information for the women.<sup>30</sup>

In most facilities, the INS relies on detainees to translate for each other. This raises two concerns. First, detainees are not professional interpreters and thus may fail to communicate critical information. Second, a detainee may wish to convey information or inquire about issues of a confidential nature, such as health problems or harassment by an officer or inmate. Forcing her to rely on a fellow detainee compromises her privacy.

The INS, however, frequently downplays the need for translation. One officer stated it to the Women's Commission quite blatantly when he said about a Guatemalan detainee, "She can speak the universal language—sign language—and I know the sign language for pee, poop, sex, and fist fight."<sup>31</sup> The District Director backed this approach, observing in a subsequent letter that "[i]t is felt that the use of fellow detainees to help translate for emergent reasons is not inappropriate, and has well served all concerned in the past."<sup>32</sup> Meanwhile, the woman in question told the Women's Commission that she had not been outside in four months, because no one had explained to her the rules dictating such access.<sup>33</sup> She spent her days lying in her cell, too afraid to venture out.

#### D. Health Care

The inability of detainees to communicate, combined with the slow or inappropriate response of some facilities to medical complaints, has led to disturbing instances of serious health problems being ignored or mismanaged by both INS and prison authorities. In other cases, the stress and trauma of prolonged

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28. See *Uncertain Future*, *supra* note 22, at 9.

29. See *Liberty Denied*, *supra* note 2, at 17.

30. See *id.*

31. *Id.*

32. *Id.* at 19.

33. See *id.* at 28.

detention have caused individuals to develop physical and mental health problems.

The Public Health Service (PHS) provides medical services in INS Service Processing Centers and contract facilities. In most of the prisons with which it contracts, the INS utilizes the health services provided to the criminal inmates. Often, these services are provided by outside medical service contractors. These services typically do not include medical staff trained to care for patients from different cultures. Moreover, there is frequently a lack of female medical staff. This can undermine the treatment of women detainees, many of whom come from cultures in which it is considered inappropriate to reveal sensitive medical information to male strangers.<sup>34</sup>

Most recently, FIAC has raised serious concerns about the living conditions in the Krome Service Processing Center in Miami and the medical care being provided by the Public Health Service in that facility.<sup>35</sup> This includes exposure to bodily fluids

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34. The following three examples typify the mishandling of women asylum seekers' medical needs. In the first case, a Haitian woman who spoke little English misunderstood a prison officer during her intake at the Wicomico County Prison in Maryland. See *Liberty Denied*, at 21. She mistakenly answered affirmatively when he asked her if she felt suicidal. She was then separated from her sister, who was also in detention, and placed on suicide watch in a single cell, with no bedding and only a paper gown to wear. She remained there for five days struggling to communicate that she was not going to kill herself. Pregnant at the time of her apprehension, she suffered a miscarriage. Despite the fact that she was in severe pain and bleeding profusely, she was handcuffed and shackled on the way to the hospital and into the operating room.

In the second case, a Chinese woman was suffering from severe complications from an IUD that had been forcibly inserted by the Chinese authorities under that country's coercive family planning policy. See *Liberty Denied*, at 20. Despite her repeated complaints and multiple requests by her attorney that she be paroled from detention so that she could join her family in New York and obtain appropriate medical care, the INS refused to release her. Finally, under a federal court order to either release her or provide appropriate medical care with a Whenzhou interpreter to assist her through the surgery and recovery, the INS brought in a New York-based interpreter for a fee of \$10,000. The detainee's lawyer reported, however, that the interpreter was unfamiliar with the medical terminology used and returned to New York as soon as the operation was completed. The Chinese woman was immediately returned to her cell, where she lay bleeding and vomiting.

In the third case, a twenty-year-old ethnic Albanian woman from Kosovo was held in the Wackenhut Detention Center for ten months. She suffered from a chronic respiratory infection which resulted in her immigration hearing being postponed several times. She was brought to the emergency room of a local hospital at least twice, but the INS refused to release her into the care of her family or admit her into the hospital. When the Women's Commission met her, she was gaunt and coughing uncontrollably. Her sister reported that she had coughed up blood and had fainted in the shower.

35. See FLORIDA IMMIGRANT ADVOCACY CENTER, INC., KROME'S INVISIBLE

from detainees with infectious diseases and a lack of basic medical supplies and medications.<sup>36</sup> FIAC also reported that a callous disrespect for detainees with serious conditions has been exhibited by some staff, including an incident in which a PHS doctor told a detainee suffering an epileptic seizure to "stop it," and that the detainee "should not be doing that in here."<sup>37</sup>

Prolonged detention itself is detrimental to women's physical and psychological health. Adelaide Abankwah from Uganda has spent almost two years in detention at the Wackenhut Detention Center in New York, and during this time her health has notably deteriorated. She has experienced significant weight loss and suffers from high blood pressure, high cholesterol, and depression. Despite a viable asylum claim based on her fear of female genital mutilation and the presence of a relative who is a U.S. citizen willing to care for her, the INS has indicated that there is no release in sight for Adelaide. The Women's Commission has spoken with other women who have experienced chronic problems, such as nausea, heartburn, and diarrhea, dizziness, high blood pressure, irregular menstrual cycles, and significant weight changes. In some cases, women have been prescribed drugs to address their conditions but are ignorant of the nature and properties of the drugs.

Asylum seekers who are fleeing violence and persecution in their homelands frequently are in poor health when they arrive in the United States. In addition, they may be suffering from Post Traumatic Stress Disorder and other mental health problems. It is therefore critical that they be provided prompt, adequate, and culturally appropriate medical care.

### *E. Recreation And Access To The Outdoors*

Detainees universally report boredom and listlessness as a result of the lack of recreational activities and outdoor access. Detainees frequently spend their days lying in bed or watching English language television. Reading materials are also often only in English.

Access to the outdoors is severely limited in most detention centers, as minimal as one hour per week. Many facilities offer only rooftop exercise areas or areas surrounded by high fences and covered by mesh fencing, through which little natural light filters. Many facilities also lack windows, adding to the detainees' physical malaise and disorientation. A Chinese woman in the Kern County Lerdo Detention Center in Bakersfield, California reported that despite wanting to see the sun, she could not bear to go outside because she had to endure a pat search whenever she returned inside.<sup>38</sup> In the Virginia Beach Jail, outdoor access is severely limited for much of the year because detainees are not allowed to go outside if the temperature is over ninety degrees or under forty-five degrees.<sup>39</sup>

Women are sometimes denied activities that are provided to men in the same facility. In the York County Prison, the Chinese men were supplied with craft materials and were actually selling their artwork to the outside world.<sup>40</sup> The Chinese women were not provided similar materials.<sup>41</sup> In the Kern County Lerdo Detention Center, the men were provided the opportunity to participate in English classes while the women were not.<sup>42</sup> The prison administrator justified this distinction by indicating that there were too few women in the prison to merit providing them English instruction.<sup>43</sup> Ironically, the INS New Orleans District staff used just the opposite rationale to discontinue English classes that the women detainees in the New Orleans Parish Prison initially received. The INS Deputy District Director said that there were too many women in detention for the prison to continue offering English classes.<sup>44</sup>

Experience has shown that activities and outdoor access can make detention more tolerable. Some facilities, such as the Elizabeth Detention Center in New Jersey, allow charitable organizations to offer English classes. Jesuit Refugee Services has reported that these classes have become a vital link to the

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38. *See Liberty Denied*, *supra* note 2, at 28.

39. *See* AMNESTY INTERNATIONAL, *LOST IN THE LABYRINTH: DETENTION OF ASYLUM SEEKERS* (Sept. 1999) at 56.

40. *See Liberty Denied*, *supra* note 2, at 29.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

outside world, helping detainees prepare for life in the United States if they are allowed to remain and giving them an activity to occupy their time.

### *F. The Availability Of Spiritual Support*

Religious services are generally made available through the chaplain's offices at detention centers. Services for certain denominations are therefore readily available, while services for religious sects not common in the United States are unavailable or have to be arranged.<sup>45</sup>

Also disturbing are reports of proselytizing directed at asylum seekers. The head chaplain in the York County Prison opposed the efforts of local advocates to achieve the release of Chinese detainees, arguing that these detainees should first convert to Christianity and then agree to deportation in order to carry Christianity back to China.<sup>46</sup>

### *G. Attorney Access*

Legal representation is critical for an asylum seeker to successfully pursue her case. The immigration bar typically considers asylum cases as among the most complex and time-consuming of the various types of immigration problems its members address. Despite the critical need for assistance, the Executive Office for Immigration Review has reported that less than eleven percent of detainees actually have been able to procure representation.<sup>47</sup>

Several problems endemic to detention hamper the ability of asylum seekers to obtain representation. First, the lists of *pro*

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45. The Assistant Chaplain in the York County Prison conceded that his office had been unable to arrange visits from representatives of most of the women's religious sects. See *Liberty Denied*, *supra* note 2, at 30. He was experiencing difficulty identifying an Islamic temple to assist Muslim detainees, and the Chinese women had not seen a Buddhist priest. In the Kern County Lerdo Detention Center, the prison chaplain had initially refused access to a Chinese-speaking minister but later allowed weekly services to be held in his presence. The Chinese minister was not allowed to offer individual counseling. When the Women's Commission requested an interview with the minister, he reported that the chaplain had forbidden him to talk to the delegation.

46. See *id.*

47. See Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASES 649 (May 11, 1998).



*bono* and low-cost legal service providers that the INS provides to an individual when she is first detained are frequently inaccurate or out of date.

Second, in many facilities, even if a detainee has identified a service provider to assist her, she can only contact him or her by placing collect calls, a tremendous financial burden that deters many agencies from representing detained asylum seekers. In many detention centers, moreover, a legal representative cannot leave a message for his or her client, forcing the service provider to visit the detention center if he or she needs to communicate critical information to the client.

In some Service Processing Centers and contract facilities, detainees are now able to use phone cards. This alternative has somewhat improved detainees' ability to communicate with the outside world, but many detainees complain about the high cost of the phone cards. In a few facilities, such as the Elizabeth Detention Center, detainees are now able to make toll-free calls to their legal representatives, which is obviously an important step forward in facilitating the ability of detainees to obtain counsel.

Third, the remoteness of many detention centers deters attorneys from accepting detainees as clients. Many centers are located far from the legal services that are generally available in urban centers with strong immigrant traditions. In addition, attorneys visiting detention centers report having to wait hours before being allowed to see their clients. The combination of long commutes and time wasted to talk to a client effectively means that attorneys may have to devote an entire day to interview one client.

Fourth, the INS frequently transfers detainees from detention center to detention center for fiscal and logistical reasons. Detainees therefore often end up in centers hundreds or thousands of miles from their attorneys. The INS typically does not provide prior notification of such transfers.

Finally, the *county* prisons pose special problems for attorney access. The Virginia Beach Jail refused access to an attorney because she could not display a bar card.<sup>48</sup> The attorney was

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48. The author participated in an Amnesty International delegation that investigated conditions at the Virginia Beach facility in April 1997. This information is

admitted to the New York Bar, which does not issue such cards. The prison was accustomed to interacting with attorneys practicing criminal law in Virginia, who typically have cards verifying their membership in the Virginia Bar.<sup>49</sup> Moreover, the prison warden in the facility was unfamiliar with the concept of a non-attorney practicing law, as is the case with representatives accredited by the Board of Immigration Appeals (BIA).<sup>50</sup> He indicated that he would normally refuse access to a BIA-accredited representative.<sup>51</sup>

Attorney access from a county prison also presents difficulties. While the telephones in the prison were programmed to provide toll-free access to criminal law *pro bono* programs, they had not been programmed to provide access to immigration law *pro bono* programs.<sup>52</sup>

Legal representation is perhaps the most vital link that a detainee can have to the outside world. In addition to the critical role that attorneys play in presentation of an asylum claim, they also can act as an intermediary between the detainee and the INS. They also offer hope to the detainee, a not insignificant function since many asylum seekers otherwise may abandon their claims and agree to deportation.

We are encouraged by the INS's more recent efforts to provide *pro bono* and low-cost legal service providers with regular access to Service Processing Centers and contract facilities. This cooperation is enabling service providers to offer group "Know Your Rights" presentations and to identify detainees who most need legal assistance.<sup>53</sup> However, such access is not available in county prisons.

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based on conversations with jail staff.

49. *See id.*

50. *See id.*

51. *See id.*

52. The warden, however, indicated that he would have willingly addressed these oversights if the INS had shared this information with him, thus underscoring the need for the INS to better communicate with the prisons with which it has contracted. *See id.*

53. For a discussion of one "know your rights" program, see Nugent, *Strengthening Access to Justice: Pre-hearing Rights Presentations for Detained Respondents*, 76 INTERPRETER RELEASES 1077 (July 19, 1999).

### H. Visitor Access

Detainees are also often cut off from relatives, friends, agencies, and individuals willing to help them. The factors which hinder access to legal services (remoteness of facilities, limits on phone calls, frequent transfers, and the slowness of some facilities to locate a detainee for a visitor) also hinder visitor access. Even limitations specific to non-attorney visitors, such as visitor restrictions and time limits, play a factor.<sup>54</sup> These limits can lead to an asylum seeker abandoning their asylum claim.<sup>55</sup>

Organizations such as the Women's Commission also have difficulty obtaining access to detention centers. The rules dictating access were different for every facility we investigated, particularly in the case of county prisons. The INS district office would frequently indicate a procedure different from that laid out by the prison officials. Even within the INS itself, each district has its own procedures for permitting outside agencies to monitor detention centers. Fortunately, the process for obtaining such access is now more clearly defined under the new INS detention standards, but, like all of the standards, these procedures only apply to SPCs and contract facilities.<sup>56</sup>

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54. For example, at the Wicomico County Detention Center, family members and friends are restricted to two twenty-minute visits per week on Tuesdays and Thursdays that must be held on different days. Minors under age 18 are not allowed to visit detainees at all, even if the detainee is their parent.

55. The Women's Commission interviewed a Guatemalan asylum seeker in a detention center in Maryland and also her husband, an affirmative asylum applicant living in the Washington metropolitan area. The husband stated that he had traveled three hours to deliver some toiletries and personal items to her but the facility refused to let her have them. See *Liberty Denied*, *supra* note 2, at 33. Being that the husband was trying to pay for his wife's asylum attorney, he stated that he could not afford to take time off from work to visit his wife very often and even had to tell her to stop phoning him because of the exorbitant rates charged for collect calls had cost him \$400 one month. See *id.* When his wife began to lose hope, he returned to the prison one more time but was denied entry told to "get lost" or else he would risk deportation himself. *Id.* Finally, after five months of incarceration, his wife abandoned her asylum claim and was deported to Guatemala. See *id.*

56. See LUTHERAN IMMIGRATION AND REFUGEE SERVICE, *supra* note 23.

#### IV. IMPLEMENTATION OF THE ASYLUM PRE-SCREENING OFFICER PROGRAM (APSO)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>57</sup> re-codified the parole authority of the INS so that it could continue to release people from detention "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."<sup>58</sup> Release from detention is allowed for certain categories of individuals, including those with serious medical conditions, pregnant women, minors, detainees who will be witnesses in certain proceedings, and those "whose continued detention is not in the public interest."<sup>59</sup>

In 1992, the INS Central Office issued non-binding guidelines to its districts on how their parole discretion should be exercised for asylum seekers.<sup>60</sup> This program, known as the Asylum Pre-screening Officer Program (APSO Program), allows for the release of asylum seekers from detention if they meet several criteria, including if their asylum claim is judged credible and if they are found not to pose a flight risk.<sup>61</sup> The APSO Program, at least implicitly, represents an acknowledgment by the INS that detention of asylum seekers is inappropriate and unnecessary in many cases.

Since enactment of IIRIRA, the INS has stated in memoranda at least three times that release continues to be an option for asylum seekers. In a memorandum dated March 31, 1997, the Office of the INS Deputy Commissioner stated, "Once an alien has established a credible fear of persecution [under expedited removal] . . . release of the alien may be considered under normal parole criteria."<sup>62</sup> This option was reemphasized in a memorandum dated December 30, 1997, from the INS Office of Field Operations that stated, "Parole is a viable option and

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57. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.).

58. 8 U.S.C. 1182(d)(5)(A) (1998).

59. 8 C.F.R. § 212.5(a) (1998).

60. INS Commissioner Gene McNary announced the APSO Program in a policy memorandum and cable to the field in April 1990. See *INS Pilot Project to Parole 200 Detained Asylum Applicants*, 67 INTERPRETER RELEASES 530 (May 7, 1990).

61. See *id.*

62. Memorandum from Chris Sale, INS Deputy Commissioner, *Implementation of Expedited Removal* (Mar. 31, 1997) (reprinted in 74 INTERPRETER RELEASES 646 (1997)).

should be considered for detainees who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct. . . ."<sup>63</sup> Most recently, a memorandum dated October 7, 1998, stated that "it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a flight risk or danger to the community."<sup>64</sup>

Despite these policy directives, parole remains inconsistent among districts. For example, the New York District maintains a virtual blanket detention policy, with a release rate of only 2.4%.<sup>65</sup> Right next door, the Newark District has maintained a relatively generous release policy until recently. Disturbingly, its release rate has dropped significantly in recent months. INS District Directors, who retain the authority to make release decisions, often cite the use of faulty documentation as a justification for continued detention of an asylum seeker. This logic defies the reality faced by the vast majority of asylum seekers. Individuals concerned about persecution are the ones least able to take the time and risk the exposure to government authorities to complete the requisite paperwork before fleeing their homelands.

While the Women's Commission did not focus on the merits of the asylum claims of the women with whom we spoke, it was obvious that many were strong candidates for release under the APSO Program. We interviewed women from many countries, including those experiencing conflict and human rights abuses. Many women stated that they had fled torture, threats to their lives, harassment for political activities, female genital mutilation, forced marriages, and coercive family planning. In fact, many of the women were later granted asylum.<sup>66</sup>

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63. Memorandum from Office of Field Operations, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997). See generally, Arthur C. Helton, *A Rational Release Policy for Refugees: Reinventing the APSO Program*, 75 INTERPRETER RELEASES 685 (May 18, 1998).

64. Memorandum from Michael Pearson, INS Executive Associate Commissioner for Field Operations, *Detention Guidelines Effective October 9, 1998* (Oct. 7, 1998) (reprinted in 75 INTERPRETER RELEASES 1508, 1523 (Nov. 2, 1998)).

65. See Helton, *supra* note 63, at 689.

66. A twenty-year-old ethnic Albanian woman, whom we first met when we visited the Wackenhut Detention Center and later saw again at the York County Prison after she was transferred, was granted asylum after enduring 16 months of incarceration.

The APSO Program will remain vulnerable to the caprice of INS District Directors until it carries the force of law. Meanwhile, prolonged detention frequently erodes the physical, emotional, and mental energy of an asylum seeker. Even setting aside these humanitarian concerns, in the vast majority of cases, detention of asylum seekers is an unnecessary waste of taxpayer dollars and limited detention space.

## V. CHILDREN IN DETENTION

Children held in detention face unique problems. Thanks largely to extensive advocacy by immigrant rights organizations as well as a national class action lawsuit,<sup>67</sup> the INS has slowly improved its practices with regard to children in detention. However, inconsistent treatment is still evidenced and several serious issues remain outstanding.

First, the INS is unprepared to house family units and sometimes splits parents and other adult caregivers from children into separate detention centers; often only allowing limited contact between the family members. As is easily imagined, this can cause extreme distress to both the child and the parent or caregiver.

Second, although the INS has opened several children's shelters around the country, which, to varying degrees, offer the legal and psycho-social services that children need, it also continues to allow its districts to make local arrangements with juvenile correctional facilities. The most striking example is the Liberty County Juvenile Correctional Center, 1.5 hours outside Houston. Liberty is a maximum security facility in which children wear prison uniforms, are frequently pat searched, and live in cells for twenty-three hours a day.<sup>68</sup> The outdoor exercise area is the size of a basketball court, with little grass and no trees.<sup>69</sup> The facility is surrounded by concertina wire.<sup>70</sup> The only activity provided to the children is three hours of classroom

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67. See *Reno v. Flores*, 507 U.S. 292 (1993). The parties in *Flores* settled the case after the Supreme Court's decision. See 75 INTERPRETER RELEASES 1020 (July 27, 1998).

68. See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 14 (Dec. 1998). [hereinafter *Protecting the Rights of Children*].

69. See *id.*

70. See *id.*

instruction on weekdays, but that is offered in English.<sup>71</sup> When the Women's Commission was in Liberty in June 1998, the INS had over eighty children incarcerated in the prison, commingled with juveniles with criminal records, even though the majority of INS-detained children had no criminal conviction or record of running away from a shelter facility.<sup>72</sup>

Third, children often remain in detention for prolonged periods of time. The Women's Commission visited an eleven-year-old Indian girl who had been abused by her parents and then sold to a smuggler for child labor.<sup>73</sup> She had been housed in a group shelter under contract with the INS for fifteen months until she was finally placed in a foster home after the INS appealed her grant of asylum.<sup>74</sup> Uncertainty about the future and the lack of a stable family environment can have a devastating impact on a child's well being and is clearly not in his or her best interests.

Fourth, in some districts children are subjected to handcuffing and shackling during transport. One INS officer stated, "This is for their protection. Otherwise, they might run out into traffic."<sup>75</sup> Such restraints are highly inappropriate for all asylum seekers, but are particularly harmful to the well being of children.

Finally, the Women's Commission has received multiple reports of teenagers being held in adult detention centers, after an unreliable dental radiograph has identified them as being eighteen years of age.<sup>76</sup> Between September and November 1998, ten cases were documented where minors were wrongly placed in an adult facility as a result of dental radiograph results. In order to prove that they are less than eighteen years old, the INS asked

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71. *See id.*

72. These are the two situations under the *Flores* settlement agreement in which children can be held in a secure setting.

73. *See Protecting the Rights of Children*, *supra* note 68, at 2.

74. *See id.*

75. *Id.*

76. Dental experts have offered their opinion that relying on such exams for definitive age determinations is inappropriate. For example, Dr. Herbert H. Frommer, D.D.S., Chair of Radiology at the New York University College of Dentistry, stated in a letter to the Women's Commission that "[I]t is impossible to make an exact judgment based on radiographs of whether an individual is above or below the age of 18 years." Letter from Herbert H. Frommer, DDS, New York University College of Dentistry to Women's Commission for Refugee Women and Children (Aug. 7, 1997) (on file with author).

the children to produce original birth certificates and in some cases required that the children have their certificates authenticated by the American embassy in their country of origin.<sup>77</sup>

On December 10, 1998, the INS released new Guidelines for Children's Asylum Claims.<sup>78</sup> The Women's Commission worked with the INS as they developed these guidelines and we are tremendously encouraged by the progress the Guidelines make towards ensuring that children are provided child-friendly asylum hearings. The Guidelines also establish more age-appropriate legal, procedural, and evidentiary standards. We hope that the INS will extend their collaboration with non-governmental organization to ensure that children are not unnecessarily detained and that the care they are provided reflects their best interests.

## VI. CONCLUSIONS AND RECOMMENDATIONS

The INS and members of Congress are currently devising plans for INS reorganization. These proposals are generally based on the idea of dividing the agency into service and enforcement sectors. Reorganization offers the opportunity to address many of our concerns about the detention of asylum seekers. However, reorganization also raises the possibility that the detention of asylum seekers could be placed under the jurisdiction of the enforcement sector of a reorganized agency. Such a plan would most likely exacerbate the problems of detention.

The degree of neglect and abuse that we have witnessed in INS Service Processing Centers, contract facilities, and local facilities, is inexcusable and must end. Congress should play an active role in the design, implementation, and monitoring of U.S. detention policy and move forward with legislation that brings accountability, consistency, and compassion to detention. The Women's Commission offers the following eight conclusions and recommendations concerning INS detention practices.

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77. After spending between 30 and 88 days co-mingled with adults, all ten children were eventually paroled or transferred to a juvenile facility.

78. See Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, *Guidelines for Children's Asylum Claims* (Dec. 10 1998) (reprinted in 76 INTERPRETER RELEASES 1, 5 (Jan. 4, 1999)).



### *A. Develop Alternatives to Detention*

For those few individuals who cannot be released, the INS should develop alternatives to detention. This includes supervised release. The INS should also collaborate with voluntary agencies with expertise in assistance to refugees to develop half-way houses or reception centers that provide housing, food, orientation to the United States, and ready access to legal and social services. Such centers would allow the INS to meet its goal of discouraging absconding while at the same time allow asylum seekers to begin the process of healing and possible integration into the United States.

Most individuals detained can probably be released, however. For instance, those individuals found to have a credible fear of persecution should be released promptly. Therefore, the INS should rejuvenate APSO Program so that the INS Central Office exercises strict oversight of the implementation of APSO and holds its districts accountable for low release rates. Congress should incorporate APSO into law to ensure its continued availability and consistent implementation.

It is inhumane to detain asylum seekers. They may very well suffer further trauma if incarcerated. The INS lacks the expertise to care for populations at risk, including women, children, and torture victims. The APSO Program represents a thoughtful attempt to ensure that asylum seekers are not unnecessarily detained and that limited INS detention space is not misused.

### *B. Cease the Practice of Using Contract Facilities*

Local prisons fall woefully short of addressing the needs of detainees. It is unrealistic to expect that such facilities can revise their mission and programs sufficiently to ensure that asylum seekers receive the services they need. They fail to provide any service that would merit the exorbitant rates paid by the INS. The INS, in turn, is failing to exercise any oversight of these facilities and the treatment to which they subject asylum seekers. Therefore, the INS should stop detaining asylum seekers in contract facilities.

*C. End Sexual Discrimination in Detention Facilities*

In some detention centers, services that are provided to men are not provided to women. In others, the basic needs of women are either ignored or, worse, denied in order to humiliate a woman. This discrimination is unacceptable.

The INS must adopt flexible release policies and provide appropriate facilities and staffing to meet the needs of women. Women should not be transferred to remote locations or more restrictive settings simply because a more appropriate facility is not staffed to meet their needs. The women should be released or staffing adjusted.

Additionally, services made available to male detainees must be equally provided to women, including translation services, English classes, separation from criminal inmates, and consultation with attorneys.

The INS should make all efforts to ensure that women are not separated from family members while in detention and that feminine hygiene products and appropriate medical care, including reproductive health care, are provided to women detainees. Under no circumstances should denial of basic needs be used as a means to humiliate women.

*D. Revise Detention Standards*

The INS' recent issuance of standards of detention represents a significant acknowledgment by the agency that detention centers should meet certain minimum conditions of detention. However, the standards are fundamentally flawed. The INS districts retain too much authority for their implementation and oversight. Moreover, the standards do not apply to the prisons that the INS uses, thus effectively denying their application to more than half of the population in INS custody.

Oversight of the implementation of detention standards should be lodged with the INS Central Office. Officers trained to assess the implementation of the standards should frequently inspect the detention centers. Such inspections should be unannounced. Authority to require changes in facilities that fail

to comply with the standards should also be retained by the Central Office.

INS officers charged with oversight of the implementation of standards should consult with national and local non-governmental organizations serving INS detainees to obtain their input.

Compliance with the standards should be contractually required by all facilities used by the INS, including prisons. New facilities should meet the requirements of the standards before they are allowed to open.

The INS should invite consultation and input from organizations with expertise in refugee protection and assistance when promulgating standards of detention.

#### *E. Solicit Input From Non-Governmental Organizations*

Outside monitors, including agencies with expertise in meeting the needs of refugees, face difficulty in obtaining access to detention centers. Such monitoring can serve as an important vehicle for assessing conditions of detention and identifying problems confronting detainees. The INS should include outside experts and agencies when monitoring conditions of detention.

The INS should also regularly consult with national and local non-governmental organizations that serve detainees to ensure that it is aware of and can quickly address any problems that may arise in detention centers. Last year, the INS agreed to hold quarterly consultations with such organizations to discuss detention concerns. This is a useful process that should continue.

Facilities with which the INS contracts, including prisons, should not retain the discretion to determine which organizations or individuals can visit a facility.

#### *F. Establish Means for Legal Representation*

The vast majority of detainees lack legal representation. Representation is critical to the ability of an asylum seeker to succeed with her claim. The INS should support the establishment of legal representation projects at all detention

facilities. Such programs should be allowed to conduct regularly scheduled "Know Your Rights" presentations.

Lists of accurate *pro bono* and low-cost legal service providers should be promptly provided to a detainee at every facility in which she is held. The INS should ensure that adequate and affordable telephone services are available in every facility, including toll-free legal service calls. The INS should avoid transferring detainees away from their attorneys. Under no circumstances should such transfers occur without prior notification of counsel. Additionally, consideration should be given to providing government-funded legal assistance, particularly to asylum seekers.

#### *G. Cease the Practice of Detaining Children in Prisons*

The INS continues to provide inconsistent care to children in its custody. Children are particularly vulnerable to the trauma that detention can cause. The INS should immediately discontinue the use of prisons to detain children. Under the auspices of its Central Office, it should continue to develop appropriate shelters and foster care placements for unaccompanied children in its custody. After appropriate home studies, family reunifications should be performed expeditiously.

In making an age determination, the INS should give a child the benefit of the doubt. The INS should also accept a variety of evidence to demonstrate age and allow a child to appeal a finding of adulthood.

In the even that children must be detained, the INS should neither commingle children with adult detainees nor handcuff nor shackle the children. Moreover, children should never be divided from their parent or adult caregiver. Families should be released. For those isolated instances in which release is not an option, the INS should establish shelters designed to house family units.

### *H. Centralize the Detention Program Through Legislative Reform*

The INS has failed to centralize its detention program. It is nonsensical from a management perspective and dangerous from a humanitarian perspective to allow thirty-three districts to implement thirty-three detention policies. Congress should move forward with detention reform legislation. Such legislation should include four main components: 1) codification of APSO and other release alternatives, including the development of comprehensive shelter and foster care alternatives for children; 2) development of comprehensive standards for detention that apply to all facilities used by the INS and a requirement that the INS report to Congress on their implementation on an annual basis; 3) creation of an oversight office within the Department of Justice but outside the INS structure with the authority to monitor conditions of detention and to take steps to ensure compliance; and 4) mandatory collection of comprehensive detention data by the INS, including but not limited to, the number of people in detention, the number of people seeking asylum in detention, the length of detention, the frequency of transfers, and a gender and age breakdown.

Any reorganization of the structure and functions of the INS must carefully address detention. Detention of asylum seekers should not be considered an enforcement function, but rather a service that ensures that refugees receive the care and assistance they deserve.

If the INS continues to fail to meet the needs of asylum seekers, the detention of asylum seekers should be moved to a federal agency better able to address those needs, such as the Department of Health and Human Services. Particular care should be taken to ensure that the needs of populations at risk, including women and children, are adequately addressed.