Civil Detention and Other Oxymorons

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American immigration detention law is suffering from an existential crisis. The foundation for its "civil" classification was its original use as a non-punitive adjunct to the civil deportation process. In this article, the author first demonstrates that there is a growing disconnect between this constitutional justification and the reality of immigration detention. As the process has grown more similar to criminal detention it has become increasingly disconnected from deportation. The author begins by tracing the history of non-citizen detention and its constitutionalization as a helpmate to deportation. The article then maps the disintegration of that relationship, concluding that it is now inverted—detention drives deportation. This inversion is the result of a persistent misinterpretation of the detention authority the US Congress granted to enforcement officials. The article explains that Congress acted in the shadow of a long-standing presumption against detention, carving out confined arenas of detention power from this presumption of liberty. Adhering to the original statutory goals and adopting an appropriately restrictive stance toward detention authority would avoid a constitutional conundrum and bring detention authority into line with its statutory boundaries.

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Introduction

In June 2014, in response to an influx of Central Americans arriving at the United States border, the Department of Homeland Security (DHS) repurposed a high-security federal training center in the remote desert town of Artesia, New Mexico to serve as a temporary immigration detention facility.[1] The agency then confined approximately 550 mothers and their children in the secure facility.[2] The government sought to deny the Artesia detainees release on bond while awaiting their removal hearings by arguing that the detainees were risks to national security. The agency asserted that adopting a policy of detaining the families and refusing to release them would deter others from making the dangerous journey.[3] In other words, the primary reason for the detention was not to

1. See US, Department of Homeland Security, *Fact Sheet: Artesia Temporary Facility for Adults With Children in Expedited Removal* (20 June 2014) [*Artesia Temporary Facility*]. See also Julia Preston, "In Remote Detention Center, a Battle on Fast Deportations", *The New York Times* (5 September 2014), online: <www.nytimes.com>.

2. See Preston, *supra* note 1.

3. In public statements, the DHS has asserted that it detained the families both for

facilitate the deportation of the individual detainees, but rather to use the detention of the families in Artesia to influence the migration decisions of others.

In the United States, immigration detention stands alone in using physical confinement to enforce a civil regulatory regime. On any given day, the United States detains approximately 34,000 non-citizens.[4] In 2012, the DHS detained nearly 480,000 non-citizens, up from approximately 250,000 in 2006.[5] Unlike other forms of non-criminal detention such as civil commitment, which we justify as necessary to protect the public and the self from harm, or pretrial and material witness detention, which serve criminal justice ends, American law justifies immigration detention as a necessary adjunct to the deportation process.

The US Supreme Court has classified deportation proceedings (now called removal proceedings) as civil in nature—not criminal.[6] Reasoning that immigration detention is necessary to the civil deportation process,[7] the Court classified detention as civil in nature. It formulated detention as a creature of the administrative immigration law system. However, the Court also declared that the detention of non-citizens without trial is

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deterrence reasons and to facilitate deporting the non-citizens. See *Artesia Temporary Facility*, *supra* note 1; Julia Edwards, "In Shift, U.S. Officials Fight Release on Bond of Migrants: Lawyers", *Reuters* (19 September 2014), online: <www.reuters.com>. In litigation, however, the DHS has justified its policy of refusing release on bond or demanding high bonds by asserting that detention will deter other Central Americans. See Declaration of Philip T Miller, Assistant Director of ERO and ICE Field Operations (7 August 2014) in Department of Homeland Security Submission of Documentary Evidence, online: <www.aila.org> at paras 9, 12 (asserting that "[a]llowing detainees to bond out . . . further encourages mass migration" and concluding that a policy of declining to release detainees or imposing high bond amounts "would significantly reduce the unlawful mass migration" of Central American people).

4. See Nick Miroff, "Controversial Quota Drives Immigration Detention Boom", *The Washington Post* (13 October 2013), online: <www.washingtonpost.com>.

5. See US, Department of Homeland Security, "Immigration Enforcement Actions: 2012" by John F Simanski & Lesley M Sapp, Annual Report (December 2013); US, Department of Homeland Security, "Immigration Enforcement Actions: 2006" Annual Report (May 2008).

6. See *Harisiades v Shaughnessy*, 342 US 580 at 594–95 (1952).

7. See *Demore v Kim*, 538 US 510 (2003) (detention during deportation proceedings is "a constitutionally valid aspect of the deportation process" at 523); *Carlson v Landon*, 342 US 524 at 538 (1951) [Carlson]. "Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United

constitutional only if it is non-punitive and furthers the goal of orderly deportation.[8]

Civil detention is an oxymoron. The detention of non-citizens in the United States bears only a hazy resemblance to the resolution of civil disputes and has a much closer connection with criminal and national security law. Immigration detention is the mirror image of criminal detention. It is no coincidence that mass immigration detention grew up in the same time and space as mass incarceration, sharing the same facilities and actors to achieve a nearly identical restraint on liberty.[9] Both mass immigration detention and the rise in criminal incarceration emerge from

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States during the pendency of deportation proceedings." *Ibid.* See also, *Wong Wing v United States*, 163 US 228 (1896) [*Wong Wing*] (validating "detention, or temporary confinement, as part of the means necessary to give effect to the provisions for exclusion and expulsion of aliens", and reasoning that "[p]roceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation" at 235); *Padilla v Kentucky*, 559 US 356 at 364–65 (2010) (highlighting links between deportation and the criminal justice system). The underlying premise—that deportation is a necessary part of a functioning immigration policy—is in fact contested. See Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Politics 251 (challenging the idea that "[t]he power to admit or exclude aliens is inherent in sovereignty and essential for any political community," and arguing that instead, "borders should generally be open and . . . people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country" at 251); Kevin R Johnson, "Open Borders?" (2003) 51:1 UCLA L Rev 193 (arguing for open borders, and noting that "U.S. immigration law is founded on the idea that it is permissible, desirable, and necessary to restrict immigration into the United States and to treat the border as a barrier to entry rather than as a port of entry" at 196).

8. See *Wong Wing*, *supra* note 7 (approving of detention of non-citizens if used to "give effect to the provisions for the exclusion or expulsion of aliens" at 235). See also *Carlson*, *supra* note 7 (declaring, "[d]etention is necessarily a part of [the] deportation procedure" at 538).

9. See US, Department of Homeland Security, *Immigration Detention Overview and Recommendations*, by Dora Schriro (2009), online: <www.ice.gov/doclib/about/offices/odpp/ice-detention-rpt.pdf> at 4, 10 [*Immigration Detention Overview*]. The report states "[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pretrial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control." *Ibid.* About half of the detained population is held in dedicated facilities and most of the other half in county jails, where county prisoners and other inmates are also held. *Ibid.*

the protracted campaign to crack down on drugs.[10] Similarly, national security detention and immigration detention share roots that reach at least as far back as the Cold War.[11]

Immigration detention, however, relies upon a critical distinction to remain within the doctrinal borders of administrative law rather than criminal law. The central function of criminal law is to sort out who to punish and how. The central function of immigration law is to sort out who can enter and remain in the United States and for how long. Neither deportation nor immigration detention can constitutionally serve as punishment, and both must meet Due Process requirements.[12]

10. See César Cuauhtémoc García Hernández, "Immigration Detention as Punishment" (2014) 61:5 UCLA L Rev 1346 at 1361 (tracing the source of the modern detention regime to a set of statutes aimed at controlling drugs through increased criminal and immigration enforcement and sanctions).

11. See *Shaughnessy v Mezei*, 345 US 206 at 210, 214 (1953) (upholding on national security grounds the exclusion and indefinite detention without a hearing of a lawful permanent resident returning from "behind the Iron Curtain"). Another example is that before the September 11 national security detentions, Guantanamo Bay's military base served as an immigration detention center for Haitian migrants fleeing political unrest. See Margaret H Taylor, "Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine" (1995) 22:4 Hastings Const LQ 1087 at 1100–01 [Taylor, "Detained Aliens"] (describing the circumstances surrounding the detention of Haitians). See also Brandt Goldstein, *Storming the Court: How a Band of Law Students Fought the President and Won* (Toronto: Scribner, 2005) (relating the litigation challenging the Guantánamo detention of Haitian refugees). See also Margaret H Taylor, "Dangerous by Decree: Detention Without Bond in Immigration Proceedings" (2004) 50:1 Loy L Rev 149 at 164 [Taylor, "Dangerous by Decree"] (discussing Attorney General Ashcroft's directive to detain Haitians arrested in the United States who arrived by boat and confine them through the pendency of their asylum claims).

12. See *Zadvydas v Davis*, 533 US 678 (2001) (stating that government detention violates the Due Process Clause of the US Constitution "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections" or in certain narrow non-punitive circumstances "where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" at 690) [emphasis in original]. See Anil Kalhan, "Rethinking Immigration Detention" (2010) 110 Colum L Rev Sidebar 42 (noting that while detention to prevent flight or danger to public safety is constitutional as part of the civil removal process, "freedom from physical restraint 'lies at the heart of the liberty that [the Due Process] Clause protects,' and if the circumstances of detention become excessive in relation to these noncriminal purposes, then detention may be improperly punitive and therefore unconstitutional" at 44).

Scholars interested in the viability of the current detention scheme and how closely it hews to its ostensible purpose have tended to focus either on the overbreadth of mandatory detention,[13] the role of national security in expanding detention,[14] or the power of state and local law enforcement to detain non-citizens.[15] Scholarship examining detention more broadly has evaluated whether the immigration detention system is a quasi-criminal incarceration system ("immcarceration", as Anil Kalhan has aptly dubbed it),[16] and critiqued the judicial deference granted to immigration agencies in the detention context.[17] Scholars have advocated for the establishment of a "truly civil" detention system[18] and sketched its broad outlines.[19] By delving into the rationales undergirding the current system, this article

13. See Mark Noferi, "Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings" (2012) 18:1 Mich J Race & L 63 at 68 (arguing that constitutional due process doctrine requires appointment of counsel to mandatorily-detained lawful permanent residents challenging their detention); Geoffrey Heeren, "Pulling Teeth: The State of Mandatory Immigration Detention" (2010) 45:2 Harv CR-CLL Rev 601; Faiza W Sayed, "Challenging Detention: Why Immigrant Detainees Receive Less Process Than 'Enemy Combatants' and Why They Deserve More" (2011) 111:8 Colum L Rev 1833 at 1838–42 (describing categories of mandatory detention); Alina Das, "Unshackling Habeas Review: *Chevron* Deference and Statutory Interpretation in Immigration Detention Cases" 90:1 NYUL Rev [forthcoming in 2015], online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2467196>.

14. See Sameer M Ashar, "Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11" (2002) 34:4 Conn L Rev 1185 at 1192–99 (describing the expansion of race-based selective enforcement through detention after the terrorist events of September 11, 2001).

15. Christopher N Lasch, "Federal Immigration Detainers After *Arizona v. United States*" (2013) 46 Loy LA L Rev 629 at 696–98 (arguing that the Fourth Amendment to the US Constitution prohibits the use of federal detainers to authorize state and local law enforcement to prolong the arrest and detention of non-citizens).

16. See Kalhan, *supra* note 12 at 43; García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1348–49, 1389–90; Noferi, *supra* note 13 at 68–70.

17. Travis Silva, "Toward a Constitutionalized Theory of Immigration Detention" (2012) 31:1 Yale L & Pol'y Rev 227 at 262–66 (critiquing the institutional independence of US immigration agencies and concluding that Article III courts should make *de novo* determinations about release from detention).

18. See García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1405, citing Nina Bernstein, "U.S. to Reform Policy on Detention for Immigrants", *The New York Times* (6 August 2009), online: <www.nytimes.com>.

19. See García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1405–13.

will uncover why these proposals for rethinking immigration detention meet such daunting barriers.

This article makes two contributions to the growing body of work on immigrant detention. First, it questions the long-standing rationale for the constitutionality of immigration detention by highlighting the precarious distinction between immigration and criminal confinement, and by exploring the growing disconnect between deportation and detention. The article will trace the constitutionalization of detention as a non-punitive helpmate to deportation and map the disintegration of that relationship. Unmoored from its original justification as a minion of deportation, civil detention is cast adrift, seeking a rational anchor for the depth of its deprivation of liberty. The US government's insistence on confining Central American women with their children in the Artesia detention facility provides a modern example of this unmooring because the rationale for continuing to detain them relies on deterring others from migrating to the United States.[20]

Second, the article argues that the administrative agencies charged with implementing immigration law have overstepped by expansively interpreting their statutory immigrant detention authority beyond what those statutes intended. When placed in historical context, the legislation is properly understood to mete out to the administrative agencies specific, bounded detention powers. I will explain that Congress acted in the shadow of a long-standing presumption against detention and carved out confined arenas of detention power from this presumption of liberty. Congress was also acting in furtherance of goals that were collateral to immigration control. Adhering to the original statutory goals of addressing unlawful drugs and terrorism, and adopting an appropriately restrictive stance toward detention authority would avoid the constitutional conundrum that the current agency interpretation has created.

This article will proceed in four Parts. Part I lays out the history of immigration detention. It traces how the broad administrative interpretation of drug-oriented statutes built a massive and racialized detention system. In doing so, it demonstrates the historical basis for the disconnect between deportation and detention.

Part II identifies the portals through which non-citizens might enter the modern detention system. Building on this, it outlines how the

20. See Miller, *supra* note 3 and accompanying text.

immigration scheme discussed in Part I expanded through administrative interpretation. It concludes by discussing how this expanded detention scheme parallels the criminal detention system.

Part III outlines three consequences of this broadly interpreted and criminalized detention system: an increase in immigration detention, a more racialized immigration detention system and a breach of immigration detention's constitutional limits. It deconstructs the central justification for categorizing immigration detention as civil, concluding that the structure of modern detention law has frayed the bond between detention and deportation. It uses the evidence that detention functions as criminal punishment to illuminate this disconnect between detention and deportation.

Part IV argues that modern detention drives deportation rather than the other way around. It builds this argument by tracing the features of modern detention law—the way in which detention operates as a tool of crime control, the parallels between civil and criminal detention, and the establishment of mandatory and prolonged detention.

I. The Origins of Immigration Detention

The historical roots of immigration detention in the United States illuminate its classification as a ministerial sidekick to deportation. However, immigration detention departed from its subordinate role as detention became more closely intertwined with US criminal and national security law.

A. Early History: Of Ships and Islands

Historically, American law and practice closely tied detention to the entry or expulsion of non-citizens. The power to detain non-citizens arose in the first year of the nation's existence. One of Congress' earliest actions was to empower the President to declare that foreign nationals of enemy countries could be "apprehended, restrained, secured and removed as alien enemies".[21]

21. *An Act Respecting Alien Enemies*, c 66, § 1, 1 Stat 577 at 577 (1798) (codified as amended at 50 USC § 21 (2014)).

In the nineteenth century, it was ordinarily private transportation companies that played the largest role in detaining non-citizens. When an immigration inspector denied admission to non-citizens, the vessel that brought them bore the responsibility of returning them. Ships detained the rejected non-citizens on board to await the vessel's return trip. When it became impossible to conduct all immigration inspections aboard ship, Congress passed laws to permit the "temporary removal" of a non-citizen from a vessel for inspection.[22]

These statutes provided that the temporary removal would not constitute a "landing".[23] This set the groundwork for what is now called the "entry fiction", which maintains that a non-citizen's physical presence on US territory does not legally effect an admission into the country. The non-citizen is treated as if she were at the border.[24] The entry fiction was crucial to both island processing of arriving non-citizens within US territory and later to "paroling" a non-citizen onto the mainland.[25]

22. *An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States*, Pub L No 501, § 15, 39 Stat 874 at 885 (1917); *An Act to Regulate the Immigration of Aliens into the United States*, Pub L No 96, § 16, 34 Stat 898 at 903 (1907); *An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor*, c 551, § 8, 26 Stat 1084 at 1085–86 (1891). See also Charles D Weisselberg, "The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei" (1995) 143:4 U Pa L Rev 933 at 951.

23. See Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge, UK: Cambridge University Press, 2012) at 22, citing the *Case of the Unused Tag (In re Ah Kee)*, 21 F 701 (CCD Cal 1884).

24. See David Cole, "In Aid of Removal: Due Process Limits on Immigration Detention" (2002) 51:3 Emory L J 1003. Cole explains, "an alien granted temporary 'parole' into the United States at large is treated as if he were still at the border for purposes of assessing his ultimate admissibility. Thus, whether an alien is literally outside the country, detained in the country, or at large in the country has no legal effect on his admission if he has not 'entered'". *Ibid* at 1036. See also Weisselberg, *supra* note 22; David A Martin, "Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v Davis*" [2001] Sup Ct Rev 47. Martin explains that parole "permitted an excludable alien to be released at large into the United States, but—crucially—parole is not regarded as admission into the country. In the eyes of the law, a parolee remains at the border, with only whatever statutory or constitutional rights an excludable alien might hold, even though in reality a parolee may travel farther into the United States and for a longer period than a clandestine entrant." *Ibid* at 57.

25. See generally Laura Murray-Tjan, "Conditional Admission and Other Mysteries: Setting the Record Straight on the Admission Status of Refugees and Asylees" (2014) 17:31 NYUJ Legis & Pub Pol'y 37 (describing parole).

In 1892, the construction of an immigrant processing facility on Ellis Island in New York enabled the routine detention of non-citizens arriving from Europe considered too ill or poor to proceed to the mainland.[26] In 1910, the construction of a detention facility on Angel Island allowed the routine detention of Asian immigrant labourers.[27] Unlike Ellis Island, where detention was generally brief and a precursor to entry into the United States, detention on Angel Island tended to last longer and was ancillary to deportation.[28] In the late nineteenth century, immigration officials regularly detained Chinese immigrants while the Chinese-American community in the United States fought a legal war against a web of legislation that targeted Chinese labourers for exclusion and deportation.[29]

The writ of habeas corpus provided detained non-citizens a procedural opportunity to challenge the racialized immigration laws.[30] One lawsuit challenged the government's power to detain and punish for violation of the immigration laws. This led the US Supreme Court to strike down the imposition of hard labour as punishment without a criminal trial, but uphold the use of immigration detention as an adjunct to deportation.[31]

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26. See Wilsher, *supra* note 23 at 15–16.

27. Prior to the construction of the Angel Island detention facility, the shipping companies who had transported the Chinese newcomers were responsible for detaining them. The shipping companies resorted to using insanitary dockside sheds for this task. See *ibid* at 19.

28. See Roger Daniels, *Guarding the Golden Door: American Immigration Policy Since 1882* (New York: Hill & Wang, 2004) at 24; Wilsher, *supra* note 23 at 35.

29. See e.g. *The Chinese Exclusion Case*, 130 US 581 at 582 (1889). In *The Chinese Exclusion Case*, the Court rejected the constitutional challenge of a Chinese immigrant detained on board a steamship who was seeking to re-enter United States. *Ibid* at 609. See also *Fong Yue Ting v United States*, 149 US 698 at 703 (1893). In that case, the Court held that the plenary power of the US government over immigration law overrode the constitutional claims of detained Chinese non-citizens challenging their deportation orders. *Ibid* at 731–32. See also Wilsher, *supra* note 23 at 24; Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (New York: Oxford University Press, 2006) at 15–36 (narrating the story of the Chinese Exclusion laws and the organization of Chinese immigrant community members resisting laws singling them out for deportation and exclusion).

30. See Wilsher, *supra* note 23 at 19–20.

31. See *Wong Wing*, *supra* note 7 at 235; *Carlson*, *supra* note 7 at 538.

B. The Role of National Security

Throughout American history, national security concerns have been a formidable justification for civil detention. During World War I, Ellis Island transformed from an immigrant processing station to a holding center for enemy aliens.[32] The early establishment of the executive power to detain set the foundation for President Roosevelt's infamous World War II proclamation that all Japanese, German and Italian non-citizens were "alien enemies"[33] and the later military Exclusion Order mandating the mass internment of west coast residents of Japanese ancestry.[34]

While more than two thirds of those detained in the internment camps were United States citizens, the language of the military proclamation carrying out the Exclusion Order powerfully reconstituted the Japanese-American citizens as non-citizens, ordering internment of both aliens and "non-aliens"—US citizens—of Japanese ancestry.[35] The Court in *Korematsu v United States* upheld this arrangement. It affirmed the use of a racial category to justify detention and embraced the connection between detention and deportation. Justice Hugo Black, writing for the majority, stated that the "power to exclude includes the power to do it by force if necessary".[36] He continued, "And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected."[37]

National security remained a compelling reason for detention beyond World War II and into the Cold War, validating the indefinite detention of both arriving aliens and lawful permanent residents

32. See Wilsher, *supra* note 23 at 30.

33. 3 CFR § 117 (1942); 3 CFR § 121 (1942); 3 CFR § 122 (1942).

34. *Civilian Exclusion Order No 34*, 7 Fed Reg 3967 (1942) [*Civilian Exclusion Order No 34*]; *Korematsu v United States*, 323 US 214 at 216 (1944).

35. *Korematsu*, *supra* note 34 (dissent of Murphy J quoting *Civilian Exclusion Order No 34*, *supra* note 34 which "banish[ed] from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien'" at 234). See also Lt General JL DeWitt, *Civilian Exclusion Order No 20*, 7 Fed Reg 3964 (1942) (ordering the internment of "all persons of Japanese ancestry, alien and non-alien" from San Francisco).

36. *Korematsu*, *supra* note 34 at 223.

37. *Ibid.*

suspected of disloyalty.[38] As Cold War tensions abated, the preventive detention of Americans accused of being Communists engendered growing criticism, and the constitutionality of indefinite detention came into question.[39] Pressure to find alternatives to detention mounted.[40]

C. *The Establishment of Parole*

After World War II, officials began to "parole" non-citizens into the United States pending determination of their immigration status.[41] Parole was an administrative device that avoided physical confinement of non-citizens without granting lawful immigration status. Parole took advantage of the "entry fiction" because the government could permit non-citizens to be present within US territory while avoiding the implications of a legal admission. It permitted the non-citizen to be physically present within US borders without official recognition and acted as a less restrictive alternative to custody.[42]

Building on administrative parole, the *Immigration and Nationality Act* of 1952 codified immigration officials' discretion to detain pending a

38. See *Knauff v Shaughnessy*, 338 US 537 (1950) (upholding on national security grounds the exclusion of the fiancé of a US citizen detained on Ellis Island); *Shaughnessy v Mezei*, *supra* note 11 at 210 (upholding on national security grounds the exclusion and indefinite detention without a hearing of a returning lawful permanent resident); *Carlson*, *supra* note 7 (upholding a categorical denial of discretionary bail to alien detainees accused of being communists).

39. See Wilsher, *supra* note 23 at 64–65 (describing judicial and academic critique, centered on procedural grounds, of the breadth of the *Mezei* decisions). See also Farrin R Anello, "Due Process and Temporal Limitations on Mandatory Immigration Detention" (2013–2014) 65:2 Hastings LJ 363 (describing *Carlson* as an "outlier in the civil detention jurisprudence" at 380).

40. Wilsher, *supra* note 23 at 64–65.

41. Murray-Tjan, *supra* note 25 (noting the existence before the passage of the *Immigration and Nationality Act* in 1952 of "a non-statutory administrative practice of 'paroling' otherwise excludable non-citizens to avoid holding them in custody pending their deportation, or for specific purposes such as prosecution or testifying in criminal cases" at 46).

42. *Ibid.*

deportation decision.[43] In 1954 the government adopted an administrative presumption favouring parole for pending admission and deportation decisions.[44] When Attorney General Herbert Brownell announced this policy, he declared that detention would be reserved only for "those deemed likely to abscond or those whose freedom of movement could be adverse to the national security or the public safety", echoing the constitutional limitations on detention related to deportation.[45] All others would be "released on conditional parole, or bond or supervision, with reasonable restrictions to insure" their presence at immigration proceedings.[46]

In his next breath, the Attorney General announced the closing of Ellis Island and six other seaport detention facilities, which at that point held only a few hundred detainees.[47] His note that "[w]hen needed, other more modern facilities will be used" was an intriguing presage to what was to come.[48]

The presumptive use of parole in place of detention lasted over twenty-five years. It abruptly ended in 1981 when people fleeing political and economic crises in Haiti and Cuba arrived on US shores.[49] These events proved to be the historical impetus for modern detention law. Based

43. *Immigration and Nationality Act*, Pub L No 414, § 242(a), 66 Stat 163 at 208–09 (1952) (codified as amended in 8 USC § 1252 (2014)) (authorizing discretion in detention decisions by providing that an "alien may, upon warrant of the Attorney General, be arrested and taken into custody" pending a determination of deportability). See Murray-Tjan, *supra* note 25 at 46–47. Please note, this article refers to sections of the *Immigration and Nationality Act of 1952* in text; however, in subsequent footnotes it cites to the relevant sections of the United States Code, rather than to the Act.

44. See Murray-Tjan, *supra* note 25 at 64; *Leng May Ma v Barber*, 357 US 185 (1958) ("[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond" at 190), citing US, Department of Justice, *Annual Report of the Immigration and Naturalization Service, for the Fiscal Year Ended June 30, 1955* at 5–6 and US, Department of Justice, *Annual Report of the Immigration and Naturalization Service, for the Fiscal Year Ended June 30, 1956* at 5–6.

45. The Honorable Herbert Brownell, Jr, Address (Delivered at the Naturalization Ceremony in New York, NY, 11 November 1954) at 5, online: <www.justice.gov/ag/speeches-6>.

46. *Ibid.*

47. *Ibid* at 6–7.

48. *Ibid* at 7.

49. See Taylor, "Detained Aliens", *supra* note 11 at 1100–01 (setting out a brief history of the policy change).

on the perceived threat created by an influx of unauthorized entries, a multi-agency task force recommended that the government use detention as a primary response to the situation.[50] President Reagan's adoption of that policy in 1981 opened the door to the current era of mass detention of non-citizens.[51]

The early 1980s constituted a crossroads for immigration detention. After the influx of Cuban and Haitian migrants, immigration enforcement might have returned to conditional parole as the status quo. Had this been done, immigration would have been aligned with other forms of administrative regulation—almost all of which are not enforced through physical confinement. Alternatively, immigration enforcement policy could have remained *ad hoc*, employing detention only in emergent situations. It could even have evolved from the use of offshore camps and island facilities to a selective, noncarceral form of civil confinement. Instead, the history of immigration detention forms a trajectory from parole as the default to the current mass carceral era.

D. Detention and the "War on Drugs"

The Haitian and Cuban detention of the 1980s might have been merely an anomalous pinprick in detention law history but for the Administration's concurrent preoccupation with unlawful drugs. The "war on drugs" that began in the early 1980s, and intensified in the mid-1980s, led to the mass incarceration of African-Americans and Latinos.[52] César Cuauhtémoc García Hernández has traced the expansion of detention authority through the foundational war on drugs statutes

50. US, Report of the Select Commission on Immigration and Refugee Policy, 97th Cong, *Final Report on the Select Commission on Immigration and Refugee Policy* (Washington, DC: US Government Printing Office, 1981) at 326. See also Michele R Pistone, "Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers" (1999) 12 Harv Hum Rts J 197 at 226–27, citing *Louis v Nelson*, 544 F Supp 973 at 979–80 (SD Fla 1982), aff'd in part *Jean v Nelson*, 711 F (2d) 1455 (11th Cir 1984), aff'd in part 472 US 846 (1985).

51. Pistone, *supra* note 50 at 226–27.

52. See Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History" (2010) 97:3 J American History 703 at 706 (explaining that the rise of mass incarceration arose from the criminalization of poor urban African-Americans during and after the 1960s civil rights era).

that expanded the criminalization of drug-related conduct,[53] beginning with the *Anti-Drug Abuse Act of 1986*.[54]

However, while the initial drug war legislation expanded government detention authority, it was far from an unchecked authorization to detain. The legislation only incrementally increased the administrative authority to detain and had the larger purpose of addressing the social problem of drugs. The detention provisions in the drug statutes reflected the parole-based legal context that had existed at the time. They focused on controlled substances by singling out drug-related removal grounds and specific crimes rather than casting a wider net or delegating more expansive detention power to federal agents.

Throughout the next decade, Congress enacted a series of statutes that incrementally expanded agency authority to detain non-citizens in a way that drove a wedge between detention and deportation, and muddied the rationales underlying immigration detention.[55] Caught up in a fervour to crack down on illicit drug activity, Congress passed the *Immigration Reform and Control Act of 1986* (*IRCA*),[56] a statute oriented toward immigration reform, and infested it with strong anti-drug provisions. Tucked among the many provisions expanding drug crimes and enhancing drug law enforcement were provisions seeking to enlarge the federal capacity to detain non-citizens.

Between 1986 and 1996, Congress passed a series of statutes progressively restricting parole, incrementally expanding agency authority to detain and setting out particular categories of removal grounds that required

53. See García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1360–72.

54. Pub L No 99-570, 100 Stat 3207. See also García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1360–72.

55. See Stephanie J Silverman, "Immigration Detention in America: A History of Its Expansion and a Study of Its Significance" (2010) Centre on Migration, Policy and Society Working Paper No 80 at 18–21, online: <dx.doi.org/10.2139/ssrn.1867366> (critiquing US immigration detention legislation and policy as incoherent).

56. Pub L No 99-603, §§ 701–02, 100 Stat 3359 at 3445 (codified as amended at 8 USC § 1252 (2014)).

detention.[57] For example, the *Anti-Drug Abuse Act of 1986*[58] and *IRCA* mandated inter-agency cooperation in identifying non-citizens suspected of drug crimes and using immigration detention facilities to detain them.[59] The *Anti-Drug Abuse Act of 1986* required the Defense Department to share with the Attorney General a list of facilities that could be used as "detention facilities for felons . . . such as illegal alien felons and major narcotic traffickers".[60] Similarly, *IRCA* required that the Bureau of Prisons detain excludable and deportable non-citizens in federal prisons.[61] Separately, *IRCA* required the expeditious initiation of deportation proceedings against non-citizens convicted of deportable criminal offenses.[62] These statutes envisioned immigration detention in a new way—as a crime control mechanism separate and apart from deportation.

Immigration officials also turned to the private sector to expand the capacity to detain. In the early 1980s the immigration agency signed an agreement with a private prison company, the Corrections Corporation of America, to provide detention services, multiplying the government's capacity to detain.[63] By 1985, the United States was detaining approximately 2,200 non-citizens per day.[64]

57. See e.g. *Anti-Drug Abuse Act of 1988*, Pub L No 100-690, §§ 7341-50, 102 Stat 4181 at 4469-73 (codified as amended in scattered sections of 8 USC (2014)) (creating new deportation grounds for people convicted of an "aggravated felony" and subjecting them to mandatory custody without possibility of bond); *Antiterrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, §§ 440(c), 440(e), 110 Stat 1214 at 1277-78 (codified as amended at 8 USC §§ 1101, 1252 (2014)) (expanding the definition of "aggravated felony" and establishing other categories of immigrants); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub L No 104-208, §§ 303, 321, 110 Stat 3009-546 at 3009-585, 3009-627 to 3009-628 (codified as amended at 8 USC §§ 1101, 1226 (2014)) (further expanding definition of "aggravated felony" and mandatory detention). See García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1366.

58. Pub L No 99-570, § 1601, 100 Stat 3207 at 3207-47.

59. *Ibid.*

60. *Ibid.* See also García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1362.

61. *Immigration Reform and Control Act of 1986*, Pub L No 99-603, § 702, 100 Stat 3359 at 3445. See also García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1364.

62. 8 USC § 1252 (2014).

63. See Gretchen Gavett, "Map: The U.S. Immigration Detention Boom", *PBS Frontline* (18 October 2011), online: <www.pbs.org>.

64. See Margaret Taylor, "*Demore v Kim*: Judicial Deference to Congressional Folly"

Congress also introduced the immigration "detainer" in 1986. Detainers allowed state and local police to initiate immigration enforcement by requesting authorization to hold a non-citizen suspected of unlawful drug activity until immigration agents took custody.[65] This statutory language envisioned detention as a method of crime control, with deportation as only a secondary goal.

Over the next decade, all legislation expanding the criminal grounds for deportation included some form of expanded detention authority.[66] For instance, the *Anti-Drug Abuse Act of 1988* established conviction of an "aggravated felony" as a new deportation ground and mandated custody without possibility of bond.[67]

By 1996, a decade after the 1986 legislation that formally ended the official policy of parole, unwavering attention to controlling drug activity had carved specific exceptions out of the default rule of physical liberty that Attorney General Brownell had announced at the closing of Ellis Island. In place of the shuttered seaport immigration detention facilities used prior to 1952, the drug war legislation, along with rising public concern about terrorism, reframed immigration detention as within the bailiwicks of the Department of Defense and the Bureau of Prisons. It was now a matter of national security and crime control. Continuing this theme, two statutes—the *Antiterrorism and Effective Death Penalty Act*

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in David A Martin & Peter H Schuck, eds, *Immigration Stories* (New York: Foundation Press, 2005) 343 at 348.

65. See *Anti-Drug Abuse Act of 1986*, Pub L No 99-570, § 1751, 100 Stat 3207 at 3207-47 to 3207-48 (codified as amended in scattered sections of 8 USC). See also Christopher N Lasch, "Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers" (2008) 35:1 Wm Mitchell L Rev 164 at 182 [Lasch, "Enforcing the Executive's Limits"].

66. See e.g. *Anti-Drug Abuse Act of 1988*, Pub L No 100-690, § 7342, 102 Stat 4181 at 4469-70 (codified as amended in scattered sections of 8 USC (2014)) (establishing a new deportation ground for people convicted of an "aggravated felony" and mandating custody without possibility of bond); *Antiterrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, § 440, 110 Stat 1214 at 1276-77 (codified as amended at 28 USC § 1101 (2014)) (expanding the definition of "aggravated felony" and creating other categories of immigrants subject to mandatory detention); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub L No 104-208, §§ 303, 321, 110 Stat 3009-546 at 3009-585, 3009-627 (codified as amended at 8 USC §§ 1101, 1226 (2014)) (further expanding definition of "aggravated felony" and scope of mandatory detention).

67. See *Anti-Drug Abuse Act of 1988*, Pub L No 100-690, §§ 7341-7350, 102 Stat 4181 at 4469-73 (codified as amended in scattered sections of 8 USC (2014)).

of 1996 and the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*—expanded mandatory detention without possibility of bond by adding new crimes to the list of aggravated felonies and identified additional categories of non-citizens subject to mandatory detention.[68]

E. Detention Post-September 11, 2001

After the terrorist acts of September 11, 2001, the federal government channeled the drug war legislation to a new and broader purpose—combatting terrorism. In the immediate aftermath of the terrorist acts, the US government arrested and detained thousands of Muslim and Arab non-citizens on the basis of criminal and immigration violations under the DHS Absconder Apprehension Initiative.[69] Congress hastily passed the *USA PATRIOT Act of 2001*, legitimating the detention of non-citizens whom DHS had "reasonable grounds to believe" fell within the criminal or national security grounds for deportation.[70] The Act authorized DHS to detain individuals for up to seven days without charge, and for serial periods of six months until the agency determined that the non-citizen was not removable.[71]

The *USA PATRIOT Act* included another innovation in detention law. Prior statutes had required the immigration agency to "*take into* custody" non-citizens charged with certain criminal removal grounds. The national

68. *Antiterrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, § 440, 110 Stat 1214 at 1276-77 (codified as amended at 8 USC § 1101 (2014)); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub L 104-208, 110 Stat 3009 at 3009-585, 3009-627 being Division C of the *Omnibus Consolidated Appropriations Act of 1997*, Pub L 104-208, 110 Stat 3009 (codified as amended at 8 USC §§ 1101, 1226 (2014)).

69. See Larry D Thompson, Deputy Attorney General, "Guidance for Absconder Apprehension Initiative", Memorandum, (Washington, DC: Office of the Deputy Attorney General, 25 January 2002). The goal of this initiative was to locate, apprehend and deport non-citizens with outstanding removal orders. It prioritized non-citizens who "come from countries in which there has been Al Qaeda terrorist presence or activity". *Ibid* at 1.

70. *USA PATRIOT Act*, 8 USC § 1226a (2014).

71. *Ibid* (adding categories of terrorism-related offences and providing for detention). See also Susan M Akram & Maritza Karmely, "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?" (2005) 38:3 UC Davis L Rev 609 at 634-35 (analyzing provisions of the *USA PATRIOT Act* that single out Arab and Muslim citizens).

security provisions in the *USA PATRIOT Act*, however, upped the ante by specifying that the agency must "*maintain* custody" of non-citizens charged as terrorists until their removal from the United States.[72]

Despite this seemingly powerful new tool, immigration agents turned to the pre-existing immigration detention authority to authorize rapid and voluminous detentions.[73] They relied on the mandatory detention authority in immigration legislation,[74] revived a seldom-used regulation authorizing the detention of non-citizens for an indeterminate length of time "in the event of an emergency or other extraordinary circumstance",[75] and created other *ad hoc* policies to detain without charge or bond hearing.[76] Between 2,000 and 5,000 Arab and Muslim non-citizens were arrested, detained, interrogated and deported after September 11, 2001.[77]

F. The Significance of Immigration Detention History

The evolution of detention legislation in the United States is inconsistent with a limitless delegation of detention authority to executive agencies. Instead, it reveals Congress meting out circumscribed authority to detain for specific purposes, against a historical background that heavily disfavored detention. Congress legislated particular exceptions to the default policy favouring parole and tailored those exceptions to drugs and terrorism. Thus, after the parole presumption ended in 1981, statutory changes incrementally increased detention, creating certain crime categories and a subset of national security grounds that focused on terrorism but excluded other national security removal grounds such as communism, Nazism and serious foreign policy consequences.[78] The result was a set of detention provisions that were far from sweeping.

72. Compare 8 USC §1226(c)(1) (2014) with 8 USC §1226a(a)(2) (2014) [emphasis added].

73. See Taylor, "Dangerous by Decree", *supra* note 11 at 150 (delineating the statutes, regulations and *ad hoc* executive branch policies supporting detention without bond after September 11, 2001). See also Raquel Aldana, "The September 11 Immigration Detentions and Unconstitutional Executive Legislation" (2004) 29:1 S Ill ULJ 5 at 11 (describing how the September 11 immigrant detentions were employed as a law enforcement tool, with immigration enforcement as a secondary goal).

74. See 8 USC § 1226(c) (2014).

75. 8 CFR § 287.3(d) (2014).

76. See Taylor, "Dangerous by Decree", *supra* note 11 at 150.

77. See Akram & Karmely, *supra* note 71 at 620–21.

78. See 8 USC §§ 1226a, 1182(a)(3) (2014).

Instead they gave discretion to DHS to detain certain non-citizens, mandated that immigration agents detain others and required continued custody for certain national security reasons.

Outside of those categories, Congress provided no explicit authority to detain. Had Congress instead been focused on a broad expansion of detention authority, it could have written a more sweeping statute providing authority to detain based on any criminal violation that would result in deportation or on any national security removal ground. The enumerated provisions suggest that physical liberty remains and continues to be the default position, and custody the exception.

II. The Modern Face of Detention Law

The history of immigration detention, particularly the growth of detention facilities and the war on drugs, has shaped the contours of modern detention law. In this Part, I lay out the architecture of modern detention law, focusing on the three major decision points leading to entry into the system. I then demonstrate how administrative statutory interpretation of narrow or discretionary detention law has expanded the number of detainees and the length of their detention. In doing so, I demonstrate that deportation is no longer driving detention and can no longer be justified on that basis.

A. Entry Points to Detention

(i) The Structure of Modern Detention Law

There are three major decision points that determine entry into or release from the immigration detention system. Each incorporates elements of the criminal justice system or manifests strong parallels with it. First is the initial decision to detain after arrest by an immigration agent or police officer. Second is whether to continue detention or instead release the non-citizen either on her own recognizance or with conditions. The third decision point occurs after a removal hearing and prior to deportation.

The initial detention decision arises when a non-citizen is arrested. Two statutory provisions govern that initial decision of whether to

detain. The government's deportation and detention power is at its apex under section 235 of the *INA* after the arrest of an "arriving alien": an applicant seeking admission usually at the border or a port of entry.[79] If the examining officer determines that the non-citizen "is not clearly and beyond a doubt entitled to be admitted", the statute requires detention.[80] The families held in the Artesia facility fell under a related provision requiring detention of arriving aliens who demonstrate a credible fear of persecution.[81]

When the arrest occurs in the country's interior, the main detention provision, section 236 of the *INA*, largely governs initial detention.[82] The US Immigration and Customs Enforcement (ICE) agency is responsible for most interior immigration enforcement, such as when an ICE officer arrests a non-citizen during a workforce raid or at a highway checkpoint.[83] Entry to immigration detention can also occur after a state or local law enforcement officer arrests a non-citizen for probable criminal misconduct[84] or after a conviction.[85] State and local law enforcement may initiate handing a non-citizen over to ICE custody after inquiring about a non-citizen's immigration status.[86]

79. See *ibid*, § 1225(b)(1).

80. See *ibid*, § 1225(b)(2).

81. See *ibid*, § 1125(b) (governing detention of arriving non-citizens and asylum seekers).

82. See *ibid*, § 1226(a). Section 1225(b) authorizes expedited removal of arriving aliens found inside the border.

83. See generally *ibid*, § 1226. See also US Customs and Border Protection, Charles M Miller, ed, *Inspector's Field Manual* (2008) at 167, online: <www.checkpointusa.org/DHS/docs/CBPIFMFeb2008.pdf> (discussing border and internal highway checkpoints).

84. See generally 8 USC § 1226 (2014). See also Noferi, *supra* note 13 at 65.

85. See *ibid*, § 1226(a)–(c).

86. See US, Department of Justice Office of the Inspector General Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States* (2007), online: <www.usdoj.gov/oig/reports/OJP/a0707/final.pdf> (this has sometimes occurred in connection with the non-citizen's reporting of a crime). See Violeta R Chapin, "¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence" (2011) 17:1 Mich J Race & L 119 (collecting stories of incidents involving immigrants placed in ICE custody after calling state or local police to report a crime).

The second decision point is whether to detain a non-citizen pending removal proceedings, which is governed by section 236 of the *INA*.[87] Detention is permissive under section 236(a), meaning that the agency has discretion to detain or release the non-citizen. ICE may release the non-citizen upon the setting of a bond or conditional parole. Detention is mandatory under section 236(c) for non-citizens who are inadmissible or deportable for having committed certain crimes.[88]

Detention authority is fluid, however. Even if detention is initially mandatory for a non-citizen awaiting a removal hearing, a prolonged delay may trigger a shift to the discretionary detention authority under section 236(a). That section provides for a bond hearing with a chance at release.[89]

The third decision point is whether to detain non-citizens awaiting deportation after a final removal order. Congress has mandated detention from the time of the deportation decision until deportation and has given the agency a period of ninety days to effectuate removal, after which detention becomes discretionary.[90]

Under current practice, some situations always result in detention. For arriving aliens under section 235, initial detention is always mandatory, though the government may later decide to "parole" these non-citizens into the United States without actually admitting them.[91] For the second and third decision points (detention pending removal proceedings and detention after a final removal order), detention can be either discretionary or mandatory. Detention is discretionary when the immigration agency either chooses not to take a non-citizen into custody, or provides non-citizens the opportunity to demonstrate at a bond hearing that they

87. 8 USC § 1226(a) (2014) ("[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States"); *ibid*, § 1226(c) (mandating detention of non-citizens convicted of certain crimes).

88. *Ibid*, § 1226(c).

89. See e.g. *Rodriguez v Robbins*, 715 F (3d) 1127 (9th Cir 2013).

90. 8 USC § 1231(a)(2) (2014) ("[d]uring the removal period, the Attorney General shall detain the alien"). See also *ibid*, § 1231(a)(6) (providing for discretion to detain after the removal period).

91. "Parole" refers to DHS' discretionary authority to permit an inadmissible "arriving alien" to be present in the United States without granting an admission status. See *ibid*, § 1182(d)(5)(A); 8 CFR § 212.5 (2014).

will appear for the removal proceeding and do not pose a danger to the community while at liberty.[92] Immigration authorities have discretion to detain or release on bond most non-citizens arrested for civil immigration violations.[93] That discretion may be exercised by an immigration agent or by an immigration judge at a bond hearing.[94]

Other circumstances require immigration authorities to detain non-citizens: (1) when they are "not clearly and beyond a doubt" admissible upon arrival,[95] (2) when they show a credible fear of persecution, the first step in proving an asylum claim,[96] (3) pending a removal hearing, for specified categories of criminal offenses and a subset of national security removal grounds,[97] and (4) for up to ninety days after a final order of removal.[98]

As an example, immigration agents would be required to detain a lawful permanent resident with a ten-year-old theft conviction and a one-year suspended sentence because the theft would qualify as an "aggravated felony" under the deportation provisions of US immigration law.[99] An aggravated felony is a category of crime that qualifies as a deportation ground and requires officials take the non-citizen into custody regardless of the age of the conviction and without considering whether the non-citizen currently poses a flight risk or a detriment to the public.[100]

(ii) Agency Interpretation and the Expansion of Detention

As described above, the transition from a default policy of parole to a system that favours detention for certain criminal and terrorism grounds was largely statutory. But the subsequent transition into a system of mass detention was largely administrative. It was the accumulation of expansive

92. See 8 USC § 1226(c) (2014).

93. *Ibid.*

94. *Ibid.*

95. *Ibid*, § 1225(b)(2)(A).

96. See *ibid*, § 1225(b)(1)(B)(iii)(IV). "Mandatory Detention. Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Ibid.*

97. See *ibid*, § 1226(c)(1).

98. See *ibid*, § 1231(a)(1)(A).

99. See *ibid*, §§ 1226(c), 1101.

100. See *ibid*, § 1226(c); 8 CFR § 1003.19(h)(2)(ii) (2014). See e.g. *Matter of Joseph*, 22 I&N Dec 799 at 802 (BIA 1999).

interpretations of statutes accompanied by enhanced enforcement resources that has transformed detention practices to their current state, which has resulted in close to a half million detainees.

Three administrative statutory constructions that have broadened immigration detention illustrate this transition. The first example is ICE's interpretation of the statutory grant of detainer authority facilitating transfer of custody from state and local custody to federal immigration agents.

Systematic transfer from state criminal custody to federal immigration custody raises a set of practical and structural challenges. A major practical obstacle for the federal authorities is simply discovering whether a non-citizen is in state or local custody. The structural challenge is twofold: the non-citizen must be transferred from state to federal custody, and also from criminal to civil detention. These two steps are required because the state's custody authority arises from criminal law while the federal authority to detain is based in civil immigration law. If the state's criminal law process ends before the federal agency has taken custody, the state may lack authority to continue to detain.

Technology has begun to address the challenges of discovery and authority. The federal Secure Communities program authorizes ICE to tap into the nationwide databases that law enforcement agencies use when booking arrested suspects.[101] Access to the databases provides ICE agents with the ability to identify non-citizen arrestees in state or local custody.

That knowledge, however, is only part of the equation. A non-citizen who posts bail may exit state or local custody after demonstrating that they are not a flight risk, remaining physically free while they complete their engagement with the criminal justice process. The criminal justice system favours physical liberty until sentencing (at least as a formal matter). As a result, there is a mismatch between the two systems where federal immigration law would detain and the state or local criminal law would release on bail.

101. See 8 USC §1226(a)-(d) (2014); Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line" (2011) 58:6 UCLA L Rev 1819 at 1826 ("the enforcement discretion that matters in immigration law has been in deciding who will be arrested—not in deciding who, among those arrested, will be prosecuted" at 1833).

The agency's solution was an expansive interpretation of the detainer authority. Beginning in 1986 and until recently, ICE issued immigration "detainers" after identifying a non-citizen in state or local custody. The detainer instructed the state or local law enforcement agency to prolong the detention of a non-citizen until ICE could take custody.[102] On its face, the statutory detainer authority seems to apply only to drug-related arrests, specifying aliens arrested "for a violation of any law relating to controlled substances".[103] The statute also seems to require that the state or local police agency holding the non-citizen initiate the request for ICE to issue the detainer. Section 287(d) of the *INA* specifies that immigration agents may issue a detainer "[i]n the case of an alien who is arrested by a Federal, State, or local law enforcement official . . . if the official (or another official)" informs the immigration agency that she "believes that the alien may not have been lawfully admitted or otherwise not lawfully present", and also "requests the Service to determine promptly whether or not to issue a detainer to detain the alien".[104]

This language envisions that both the information and the request would come from the state or local law-enforcement agency with custody of the non-citizen, and that it would be limited to drug related charges. Instead, the immigration agency, in its regulations and practices, expanded the scope of the detainer beyond drug arrests to all arrests. It does this through the Secure Communities program's ability to check the fingerprints of anyone arrested or booked by police against federal

102. See 8 USC § 1357(d) (2014); 8 CFR § 287.7 (2014). This detainer practice suffered a severe blow after two court opinions indicated that honouring the detainers was unconstitutional. This set off a wave of law enforcement announcements of new policies refusing to accede to detainer requests. See *Miranda-Olivares v Clackamas County*, No 3:12 -cv-02317-ST (Or 11 Apr 2014) [*Miranda-Olivares*]; *Galarza v Szalczyk*, 745 F (3d) 634 (3d Cir 2014); Jennifer Medina, "Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time", *The New York Times* (5 July 2014), online: <www.nytimes.com>; Christopher N Lasch, "Preempting Immigration Detainer Enforcement Under *Arizona v. United States*" (2013) 3:2 Wake Forest JL & Pol'y 281 [Lasch, "Preempting Immigration Detainer Enforcement"] (anticipated the court's reasoning at 283–86); Lasch, "Enforcing the Executive's Limits", *supra* note 65 at 182–85 (analyzing and critiquing ICE's interpretation of its statutory authority to issue detainers).
103. 8 USC § 1357(d) (2014).
104. *Ibid.*

immigration and enforcement records.[105] ICE practice is also to initiate the detainer itself and to communicate to police that the detainer obligates them to continue to detain the non-citizen until ICE can take custody.[106] While there may be practical and political reasons to take this interpretive stance, it requires some convolution of the statutory language to reach it.

The policy choice to interpret the detainer statute in this way was extremely effective in increasing the detention of non-citizens. The detainers became the linchpin of the Secure Communities program, and between 2008 and the beginning of 2012, ICE issued nearly one million detainers.[107]

In addition to increasing the number of non-citizens in detention, detainers also increased the length of time they were in custody after arrest. In practice, the detainers functioned to override the criminal bail determination, keeping non-citizens in state or local custody until the end of the criminal proceeding and up to forty-eight hours afterwards.[108] The ICE detainer practice meant that the length of immigration detention in state or local custody largely depended on the length of the criminal justice proceeding as well as federal detainer law. The detainers created an authority vacuum: state and local law enforcement maintained custody outside of their criminal law authority at the request of federal agents who lacked control over the length of the criminal justice proceeding and therefore the non-citizen's time in custody.[109]

105. See US, Department of Homeland Security, "Secure Communities", online: <www.ice.gov/secure-communities>.

106. See *Aliens and Nationality*, 8 CFR § 287.7 (2014) (granting authority to issue detainers to a variety of entities, including immigration officers designated by ICE "who need the authority to issue detainers . . . to effectively accomplish their individual missions"). See the text accompanying note 81.

107. See Transactional Records Access Clearinghouse, "Who Are the Targets of ICE Detainers?" (20 February 2013), online: <trac.syr.edu/immigration/reports/310>; Lasch, "Preempting Immigration Detainer Enforcement", *supra* note 102 at 287–88, n 29. Secure Communities increased ten-fold the use of immigration detainers as an enforcement tool. See Christopher N Lasch, "Rendition Resistance" (2013) 92:1 NCL Rev 149 at 156.

108. See Kate M Manuel, Congressional Research Service, "Immigration Detainers: Legal Issues", R42690 (2014) at 18–19, nn 128–29, online: <fas.org/sgp/crs/homesec/R42690.pdf> (explaining that issuance of a detainer can result in denial of bail or a more restrictive custody or security designation).

109. *Ibid* (discussing, but not resolving, the question whether ICE, state or local law enforcement have custody over non-citizens for whom a detainer is issued). See also Lasch, "Preempting Immigration Detainer Enforcement", *supra* note 102 at 293–94.

The courts initially split over whether the detainers were constitutional, with a number of district courts initially upholding the detainer practice.[110] Two cases resolved this authority vacuum by deciding that local authorities acted unconstitutionality when holding non-citizens beyond their criminal law authority, exposing authorities to civil liability if they chose to comply with detainer requests.[111] These holdings created a ripple effect across the states as many sheriffs and police departments adopted policies that severely restricted acquiescence to immigration detainers.[112] These developments threaten the ability of the Secure Communities program to leverage state and local arrests for immigration enforcement purposes, and so this entry point into detention is narrower than it once was.[113]

A second statutory construction that has broadened detention authority is the meaning of "custody" in the federal regulation interpreting section 236(a), the main discretionary detention provision.[114] The immigration agency has interpreted "custody" restrictively. In *Matter of Aguilar-Aquino*, the Board of Immigration Appeals held that the term "custody" meant "actual physical restraint or confinement within a given space" and not any other form of custodial control.[115]

110. See *Davila v Northern Regional Joint Police Board*, 979 F Supp (2d) 612 at 635 (WD Pa 2013) (holding that the detainer regulation was a "directive" to state and local law enforcement); *Ramirez-Mendoza v Maury (County of)*, 2013 WL 298124 (MD Tenn) (holding that "the Defendant was not required to make an independent probable cause determination of Plaintiff's immigration status" at 8); *Moreno v Napolitano*, 2012 US Lexis 170751 (ND Ill) (characterizing the detainer regulation as asserting "mandatory language" at 14); *Rios-Quiroz v Williamson (County of)*, 2012 WL 3945354 (MD Tenn) (holding that the detainer imposed on state and local law enforcement agents "an obligation to maintain custody" at 4).

111. See *Galarza v Szalczyk*, *supra* note 102; *Miranda-Olivares*, *supra* note 102.

112. See Medina, *supra* note 102.

113. See Manuel, *supra* note 108 (noting that "ICE issued 270,988 detainers in FY 2009 and 201,778 detainers in the first eleven months of FY 2010" at 8); Lasch, "Preempting Immigration Detainer Enforcement", *supra* note 102 at 287 (offering a conservative estimate of 250,000 detainers per year on average).

114. 8 CFR § 1236.1(d)(1) (2014) (interpreting *INA* § 236(a) (2014)). See *Matter of Aguilar-Aquino*, 24 I&N Dec 747 at 751 (BIA 2009) (interpreting the term "custody" in the regulation and concluding that when Congress changed "custody" to "detain" in section 236(a), it did not intend to change the meaning).

115. See *Matter of Aguilar-Aquino*, *supra* note 114 at 752 (defining the term "custody" used in 8 CFR § 1236.1(d)(1) (2008)).

In defining "custody" to mean only physical confinement, the agency passed up less restrictive alternatives. If it had read the language of the statute in light of its origins as an exception from the parole policy, the agency could have adopted an interpretation that left room for alternatives to physical confinement while maintaining complete control over the non-citizen.[116] Instead, the agency opted for the narrowest interpretation. As a result, in any case in which bond was denied under section 236(a), the agency was obligated to physically confine the non-citizen within a facility.

Third, the agency interpreted the detention statutes to have no limit on how long a non-citizen could be detained. In the absence of an explicit statutory limitation, the agency concluded that it had the authority to detain indefinitely.[117] In *Zadvydas v Davis*, the Supreme Court rejected this interpretation for non-citizens subject to a final removal order and in discretionary detention after the ninety-day removal period. The Court held that because indefinite detention was constitutionally questionable, the statute must implicitly limit the length of detention.[118]

Like the post-removal period provision challenged in *Zadvydas*, the government has broadly interpreted the mandatory detention provisions. Six years after *Zadvydas*, in the wake of September 11, 2001, the categorical nature of mandatory detention prior to removal proceedings withstood

116. See *Reno v Koray*, 515 US 50 (1995) (the US Supreme Court determined that the term "custody" within the *Bail Reform Act of 1984* meant that the defendant was "completely subject to [the Bureau of Prisons'] control" at 62–63). For the relevant provision of the *Bail Reform Act of 1984*, see 18 USC § 3585 (2014). The Court contrasted the Bureau's comparative loss of control when the defendant was "released" under the Act. *Reno v Koray, supra* note 116. Significantly, the Court decided that in determining whether the defendant was released from "custody", he "could be subject to restraints which do not materially differ from those imposed on a 'detained' defendant committed to the custody of the Attorney General". *Ibid.* It was not the physical manifestation of control that mattered but rather whether the agency had complete control to summarily change the conditions of confinement. So long as the agency had complete control over the decision to change the conditions, the defendant was in "custody". *Ibid* at 63. A similar interpretation of the *INA*'s detention provisions would allow for a range of limitations on freedom so long as the agency had summary ability to change those conditions.

117. *Zadvydas v Davis*, *supra* note 12 (interpreting 8 USC § 1231(a)(6) and stating that "[t]he Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy v. United States ex rel. Mezei* . . . as support" at 692).

118. *Ibid* at 689.

constitutional challenge in the US Supreme Court.[119] The Court in *Demore v Kim* upheld the constitutionality of pre-removal hearing detention without a bond hearing, at least for "the brief period necessary" to conclude removal proceedings.[120]

Demore left open the question of whether detention that was not "brief" could be constitutional.[121] However, the government continued to abide by agency precedent that had taken an expansive approach to mandatory detention, despite the holdings in *Zadvydas* and *Demore*, and the constitutional shadow they cast. In a pair of cases, the Board of Immigration Appeals determined that immigration judges lacked jurisdiction over custody (*INA* § 236(c)) and bond determinations for non-citizens held under the mandatory detention provisions (*INA* § 235(b)).[122] By cutting off adjudication under both *INA* §§ 236(c) and 235(b), the Board precedents allowed the government to impose unlimited detention without an individualized bond hearing.

This decision to adopt a far-reaching interpretation of the detention statutes has encountered judicial resistance. A series of federal appellate court decisions culminating in a class action rejected the government's broad claim to authority to detain. In *Rodriguez v Robbins*, the Ninth Circuit used the canon of constitutional avoidance to read an implicit limitation of six months to categorical detention under *INA* §§ 235(b) and 236(c).[123] The court said that after six months, authority to detain shifted to the discretionary detention authority of *INA* § 236(a) which requires

119. *Demore v Kim*, *supra* note 7 (interpreting *INA* § 1226(c)).

120. *Ibid* at 513.

121. In his concurrence in *Demore v Kim*, Kennedy J warned that due process may require individualized hearings where the detention becomes "unreasonable" or "unjustified". *Ibid* at 532.

122. See *Matter of Joseph*, *supra* note 100 at 802 (interpreting *INA* § 236(c)); *Matter of Oseiwusu*, 22 I&N Dec 19 at 20 (BIA 1998) (interpreting § 235(b)). See Shalini Bhargava, "Detaining Due Process: The Need for Procedural Reform in *'Joseph'* Hearings After *Demore v. Kim*" (2006) 31:1 NYU Rev L & Soc Change 51 at 76–88 (arguing that the procedures set out in *Matter of Joseph* violate the Due Process Clause of the US Constitution).

123. 715 F (3d) 1127 at 1134 (9th Cir 2013) citing *Casas-Castrillon v Department of Homeland Security*, 535 F (3d) 942 (9th Cir 2008).

a bond hearing.[124] *Rodriguez* was the culmination of a series of appellate court decisions limiting prolonged detention.[125]

The government's expansive interpretations of the mandatory detention provisions of the *Immigration and Nationality Act* have inflated both the number of detainees and the length of their time in detention. The government's preference for interpreting detention statutes broadly aligns with concentrated increases in enforcement resources and private sector detention capacity. Though the mandatory provisions were originally created to address drugs and terrorism, these factors have expanded government detention authority at every entry point.

Following *Zadvydas*, avoiding the constitutional clash that these practices raise requires a more confined statutory interpretation of administrative authority to detain. In light of the history of Congress legislating against a backdrop of an established presumption against detention, these statutes should be understood to mete out limited detention authority, in contrast to the expansive approach taken to date. Adopting a limiting approach to detention authority would avoid the constitutional question that the current persistently broad interpretation has created.

B. Explaining Modern Detention Law: Crimmigration

There is broad overlap between the expansion of immigration enforcement and the criminal justice system.[126] Their convergence has become known as crimmigration law. The decision-making points in

124. *Rodriguez v Robbins*, *supra* note 123 at 1135, 1138, 1144. At least one court has taken a more direct approach, construing one of the mandatory detention provisions, *INA* § 236(c), to include a presumptive six-month limit after which a bond hearing is required. See *Reid v Donelan*, 2014 WL 2199780 at 3–4 (D Mass).

125. See *Ly v Hansen*, 351 F (3d) 263 (6th Cir 2003) (holding that *INA* § 236(c) authorized detention only "for a time reasonably required to complete removal proceedings in a timely manner", beyond which the non-citizen could "seek relief in habeas proceedings" at 268); *Nadarajah v Gonzales*, 443 F (3d) 1069 at 1071, 1078 (9th Cir 2006) (holding that *INA* § 235(b), governing categorical detention of arriving aliens, had an implicit, presumptively reasonable limitation of six months); *Diop v ICE/Homeland Sec*, 656 F (3d) 221 (3rd Cir 2011) (holding that Mr. Diop's 1,072 day detention under 236(c) was "unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause" at 226, 233).

126. See Juliet Stumpf, "Fitting Punishment" (2009) 66:4 Wash & Lee L Rev 1683 at 1685–86 (discussing deportation triggers). See also Geoffrey Heeren, "Pulling Teeth: The

modern detention law, discussed above, highlight the overlap between immigration enforcement and the criminal justice system. This relationship further underscores the need to reassess what is actually driving detention levels.

There is an especially broad overlap between immigration detention and criminal detention.[127] Detention features the same methods of entry as criminal law enforcement—warrants and arrests based either on a criminal or administrative violation.[128] The same or similar actors usher non-citizens and criminal defendants into the two systems: police officers and immigration agents, who often identify themselves as police.[129] Like pretrial detention and post-conviction incarceration, immigration officials detain non-citizens either in anticipation of an immigration proceeding, after the decision to deport, or both.[130] Immigrants are often detained in the same facilities as criminal pretrial detainees and post-conviction inmates. Alternatively, they are held in federal or privately operated facilities with structures that mimic criminal justice facilities, with walls, guards, and security-oriented restrictions on clothing, personal effects and liberty.

Immigration detention is one of the mainstays of crimmigration law.[131] It also represents one of crimmigration law's most extreme manifestations. Like pretrial detention and post-conviction incarceration of criminal

State of Mandatory Immigration Detention" (2010) 45:2 Harv CR-CLL Rev 601 at 613–15 (discussing conditions of immigration detention).

127. See Allegra M McLeod, "The U.S. Criminal-Immigration Convergence and Its Possible Undoing" (2012) 49:1 Am Crim L Rev 105 (describing the "reliance on detention in the immigration context within institutions that closely resemble (and often coexist alongside) sites of criminal incarceration" at 152–53).

128. See 8 USC §1226(c) (2014) (discussing apprehension and detention of certain non-citizens and "criminal aliens"); *ibid*, §1225(a)–(b) (discussing inspection of arriving non-citizens).

129. See Noferi, *supra* note 13 at 83 (discussing initiation of deportation proceedings through custody by ICE or police). See generally Lasch, "Enforcing the Executive's Limits", *supra* note 65 (discussing use of ICE detainers and collaboration between ICE and local police forces).

130. See 8 USC §1225–1226 (2014). See also Heeren, *supra* note 126 at 612–13; Noferi, *supra* note 13 at 83 (discussing procedures for determining and challenging mandatory detention).

131. See generally Jennifer M Chacón, "Managing Migration Through Crime" (2009) 109 Colum L Rev Sidebar 135; Ingrid V Eagly "Prosecuting Immigration" (2010) 104:4 Nw UL Rev 1281.

defendants, immigrant detention represents a complete restraint of the non-citizen's physical liberty.[132] In that respect, it surpasses the liberty constraints inherent in deportation. While deportation may have more lasting legal, personal and social effects when it separates individuals from an established life or family, detainees lack the very freedom to leave the institution in which they are held without an official order permitting their release.

As a result of the use of criminal incarceration facilities, the absence of criminal charges and detention's role in facilitating removal, immigration detention operates in the chasm between the criminal and civil legal systems.[133] It is a criminal-civil hybrid with elements of each system.[134] The result of this hybrid system is that immigration detention permits a lower threshold for justifying the restriction of liberty than the criminal justice system. For example, immigration officers have power to arrest based on probable cause that an administrative immigration violation has

132. See Whitney Chelgren, "Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections" (2011) 44:4 Loy LA L Rev 1477 at 1490–92 (concluding that the procedural protections for non-citizens detained pending removal hearings are comparatively weaker than the protections for pretrial detainees in the criminal justice system).

133. See Stumpf, "Fitting Punishment", *supra* note 126 at 1725–26; García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1348–51; Kalhan, *supra* note 12 ("[i]f convergence more generally has given rise to a system of *crimmigration* law, as observers maintain, then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*" at 43). See also Noferi, *supra* note 13. Noferi argues for appointed counsel for lawful permanent residents who are mandatorily detained and notes that "[p]rocedurally, immigration removal proceedings uniquely provide for preventive pretrial detention without counsel pursuant to underlying proceedings without counsel. Substantively, the underlying deportation proceedings result in harsh deprivation themselves." *Ibid* at 68–70.

134. See Mary Bosworth & Emma Kaufman, "Foreigners in a Carceral Age: Immigration and Imprisonment in the US" (2011) 22:2 Stan L & Pol'y Rev 429 at 437–42; Peter L Markowitz, "Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings" (2008) 43:2 Harv CR-CLL Rev 289 at 293–95. See also Ana Aliverti, "Making People Criminal: The Role of the Criminal Law in Immigration Enforcement" (2012) 16:4 Theor Crim 417 at 425.

occurred.[135] Once arrested, however, non-citizens often find themselves in a world that intersects with the criminal justice system. When the immigration detention system uses the same facilities, procedures and personnel as the criminal detention system, the detention experience becomes indistinguishable from that of criminal punishment.[136]

III. Disconnecting Detention from Deportation

A. Consequences of Modern Detention Law

The enlargement of detention authority and capacity, and its centrality in crimmigration law has three consequences: (1) greatly increased detention, (2) racialized detention and (3) most importantly, departure from detention's constitutional foundations.

First, with a constellation of statutory, regulatory and administrative rules fostering expanded detention authority, and with states, localities and the private prison industry gaining a stake in immigration enforcement,[137] the number of people being detained has risen dramatically. In 2006, a congressional subcommittee established a "bed mandate" conditioning ICE's funding on maintaining an average of 34,000 detention beds on a

135. *Powers of Immigration Officers and Employees*, 8 USC § 1357(a)(2) (2014) (immigration officers have the power "to arrest any alien in the United States, if [the officer] has reason to believe that the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest"). Case law has clarified that "reason to believe" should be construed as "probable cause". See e.g. *Au Yi Lau v United States Immigration and Naturalization Service*, 445 F(2d) 217 at 222 (DC Cir 1971). The statute requires that the arrested non-citizen "be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States". *Powers of Immigration Officers and Employees*, 8 USC § 1357(a)(2) (2014). While "unnecessary delay" is not defined in the statute, Department of Homeland Security regulations provide that a non-citizen may be held for up to forty-eight hours before a decision as to her release or continued custody is reached, "except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time". 8 CFR § 287.3(d) (2014).

136. See *Immigration Detention Overview*, *supra* note 9 at 4.

137. See Miroff, *supra* note 4 (describing the government contracts with private prison companies and noting that the contracts contained minimum occupancy guarantees).

daily basis.[138] ICE interpreted this as a requirement to detain that number of non-citizens per day. By 2010, the Administration was deporting close to 400,000 non-citizens annually.[139] In 2012, the United States hit a record of nearly 478,000 detainees.[140]

Second, the detention population has a disproportionate racial distribution.[141] Over 90% of detainees are Latino, and Latinos are the largest group prosecuted under the federal immigration criminal laws.[142] Yet at 81% of the unauthorized immigrant population, Latinos make up a comparatively smaller segment than their numbers in detention.[143] And, while black immigrants make up a much smaller share of the

138. *Ibid* (reporting that the House Homeland Security appropriations subcommittee has tied ICE funding to compliance with the mandate). The Washington Post also reported that defenders of the "bed mandate" justified the detention quota as necessary to encourage ICE to maintain adequate deportation levels. *Ibid.* This justification turns the role of detention on its head: Rather than detention acting as ancillary to deportation, deportation is to be driven by the detention quota.

139. Mark Hugo Lopez, Ana Gonzalez-Barrera & Seth Motel, "As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy", Pew Research Hispanic Trends Project (28 December 2011) at 1.

140. US, Department of Homeland Security "Immigration Enforcement Actions: 2012" by John Simanski & Lesley M Sapp, Annual Report (December 2013) online: <www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf>. This represented an 18% increase from 2010 in the number of non-citizens detained.

141. Legal scholarship is only now deeply exploring the role of race in modern immigration detention. See César Cuauhtémoc García Hernández, "The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness" (2011–2012) 1:3 Colum J Race & L 353 [García Hernández, "Perverse Logic of Immigration Detention"] (concluding that "it was inevitable for penal imprisonment trends to taint immigration law enforcement with raced and classed mass incarceration" at 354); Yolanda Vázquez, "Maintaining the Subordination of Latinos Through Crimmigration in a Post-Racial World" 76 Ohio St LJ [forthcoming]. See also Ashar, *supra* note 14 at 1186–99 (describing the arrest and detention of Arab and South Asian Muslim men after September 11, 2001 and linking the tactics deployed in the "war on terror" to those deployed against African American and Latino men in the "war on drugs").

142. See US, Immigrations and Customs Enforcement, *FY 2013 ICE Immigration Removals*, ERO Annual Report (2013) at 1, 4, online: <www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> (in the 2013 fiscal year 368,644 non-citizens were removed, over 90% of which came from Mexico, Guatemala, Honduras, El Salvador, Ecuador, Colombia and Nicaragua) [2013 ICE Removal Statistics].

143. Jeffrey S Passel & D'Vera Cohn, "Unauthorized Immigration Population: National and State Trends, 2010", Pew Research Center (1 February 2011), online: <www.pewhispanic.org/files/reports/133.pdf> (reporting that "Mexicans make up the majority

unauthorized immigrant population, they disproportionately experience longer detention stays.[144]

Professor Yolanda Vázquez attributes the outsized numbers of Latinos in confinement to three factors. The first factor is the rise of immigration-related criminal convictions, such as illegal entry or re-entry, as a percentage of all federal convictions.[145] The second factor is the use of Mexican appearance in deciding whether to stop or arrest a person, which has been sanctioned by the US Supreme Court.[146] And the third factor is the incremental implementation of the Secure Communities program based on the size of an area's Latino population.[147] Tamara Nopper points out that immigration enforcement practices have been shaped by fears about black immigrants and other racial-ethnic populations, such as the mass detention of Haitian and Cuban immigrants in the 1980s.[148] She notes that sentencing policies affect black immigrants more than other groups, especially when deportations have increased along with the reliance on criminal convictions.[149]

The third consequence of the modern expansion of detention law is the disconnection of immigration detention from its role as an adjunct to deportation. The Supreme Court recognized the constitutionally

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of the unauthorized immigrant population, 58%, or 6.5 million. Other nations in Latin America account for 23% of unauthorized immigrants, or 2.6 million. Asia accounts for 11%, or about 1.3 million, and Europe and Canada account for 4%, or 500,000. African countries and other nations represent about 3%, or 400,000" at 11).

144. See Tamara K Nopper, "Why Black Immigrants Matter: Refocusing the Discussion on Racism and Immigration Enforcement" in David C Brotherton & Philip Kretsedemas, eds, *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008) at 210 (noting that Mexican nationals make up only 24% of detention bed days despite composing 50% of the detainee population, compared with 12% from the four largely black Latin American countries of Brazil, the Dominican Republic, Haiti and Jamaica).

145. Mark Hugo Lopez & Michael T Light, "A Rising Share: Hispanics and Federal Crime", Pew Hispanic Center (18 Feb 2009) at 5, online: <www.pewhispanic.org/files/reports/104.pdf>.

146. *United States v Brignoni-Ponce*, 422 US 873 at 884–86 (1975); *United States v Martinez-Fuerte*, 428 US 543 at 563 (1976).

147. See Adam B Cox & Thomas J Miles, "Policing Immigration" (2013) 80:1 U Chicago L Rev 87 at 89–90.

148. See Nopper, *supra* note 144 at 228.

149. *Ibid.*

troubling nature of this disconnect in *Zadvydas v Davis*.[150] It observed that government detention violates the Due Process Clause "unless ordered in a criminal proceeding with adequate procedural protections" or in "certain special and 'narrow' non-punitive circumstances".[151] The Court declared that only a special justification like a harm-threatening mental illness could outweigh the individual's "constitutionally protected interest in avoiding physical restraint".[152] If these justifications evaporate, there is no constitutionally adequate basis for continued detention.

Today's detention practices have come unmoored from the justification that they are necessary as an adjunct to deportation. The fragility of that traditional justification is reflected in several facets of modern detention law: the use of detention as a tool of crime control, the evolution of the means of confinement towards carceral choices and the expansion of mandatory and prolonged detention.

(i) The Growth of Detention and Its Departure from Deportation

The history of immigration detention, discussed in Part I, is valuable to understanding how the traditional justifications came unhooked from the modern approach to detention.[153] Originally, the United States put the onus to detain and deport rejected non-citizens on the shipping companies that transported them, resulting in a brief detention that closely related to deportation. The shipping companies and immigration officials had little incentive to prolong the process. In fact, detention was a detriment to the shipping companies, and they pressured immigration officials to make speedy decisions to expedite deportation on departing vessels.[154] This system pressured a California federal court to imply a

150. *Supra* note 12 at 690, citing *Foucha v Louisiana*, 504 US 71 at 80 (1992); *United States v Salerno*, 481 US 739 at 746 (1987).

151. *Zadvydas v Davis*, *supra* note 12 at 690.

152. *Ibid.*

153. See generally Lenni B Benson, "As Old as the Hills: Detention and Immigration" (2010) 5 Intercultural Hum Rts L Rev 11 (laying out a history of immigration detention in the United States).

154. In 1889, a Congressional committee tasked with investigating the immigration inspection regime noted that "it was almost impossible to properly inspect the large number of persons who arrive daily during the immigrant season with the facilities afforded". See US, Select Committee of the House of Representatives, 50th Cong, *Select Committee to Inquire into the Importation of Contract Laborers, Convicts, Paupers, etc* (HR Rep No 3792)

"reasonable" limit—two months—on the President's authority to detain Chinese citizens after deciding to deport them.[155]

Then came infrastructure—Ellis Island and Angel Island—which gave the United States the facilities to detain non-citizens in order to hold more deliberate inspections and court proceedings. Consequently, the US began to distance itself from using brief detention as an adjunct to expedient deportation. Detention facilities play a key role in creating incentives for longer and more restrictive deprivations of liberty. The current state of mass detention has, in part, flourished because now both private parties and states and localities benefit from detention contracts.[156]

In the same way that building more highways supports a larger volume of traffic and longer trips, building more detention capacity similarly reduces pressures to release detainees. As a result, backlogs in immigration court impose costs only on those who are detained and the taxpayers who support detention, and benefit repeat players like the private prison companies.[157] Additionally, the growing connection between immigration, criminal law and national security policies fueled facility-based confinement: criminal incarceration, pretrial detention, internment camps and military detention facilities. The infrastructure itself enabled and encouraged the expansion of detention. At the same time it established detention as a creature separate and apart from deportation.[158]

(Washington, DC: US Government Printing Office, 1889) at 2. See also Wilsher, *supra* note 23 (describing "the practical problems of inspection of thousands of immigrants per day . . . without detention facilities. In any case of doubt the immigrant had to be either allowed entry or sent back to the ship and expelled" at 12–13). The problem of wrongful entry led to calls for an "immigrant depot" to be constructed in New York Harbor, leading to the construction of Ellis Island. See US, Select Committee on Immigration and Naturalization, *Immigration Investigation* (HR Rep No 3472) (Washington, DC: US Government Printing Office, 1891) (a concurrent resolution of the Senate and House of Representatives was passed on March 12, 1890). See also Wilsher, *supra* note 23 at 12, 45.

155. See *In re Chow Goo Pooi*, 25 F 77 at 80–81 (CD Cal 1884).

156. See Maunica Sthanki, "Deconstructing Detention: Structural Impunity and the Need for an Intervention" (2013) 65:2 Rutgers L Rev 447 (describing the division of ownership and management of immigration detention and observing that "DHS has almost exclusively privatized care of the detained population to private-prison companies and state and local jails" at 456–60).

157. See *ibid.*

158. See Wilsher, *supra* note 23 at 55–56.

(ii) The "War on Drugs" and New Purposes for Detention

Linking detention to the war on drugs introduced additional purposes for detention: incapacitation and deterrence of non-citizens who may be involved in drug trafficking.[159] Prior to the war on drugs legislation, parole had been the official policy of the government toward most forms of unauthorized migration.[160] The incremental expansion of detention through war on drugs statutes imposed a new frame on the detention of non-citizens, one that oriented detention towards criminal policy rather than purely deportation. With the war on drugs as a looming backdrop and the rise of crimmigration law, civil detention policy came to mirror criminal confinement.

The emphasis on the availability of military and criminal detention facilities suggests an explicable failure of imagination on the part of policy-makers. Between parole and incarceration lies a spectrum of policy choices about confinement, each of which implicates a greater or lesser restraint on physical liberty. Legislating immigration law through statutes that declared a war on drugs would necessarily colour the administrative lenses with national security and criminal law concerns. From that vantage point, it would be difficult to recognize alternatives along the spectrum between parole and incarceration—the place where non-carceral options for maintaining control over the non-citizen might reside.

The decision to largely confine detention to carceral facilities opened a wide gap between the detention framework and its traditional deportation justification. On its face, using detention as a crime control tool should not interfere with detention's original function as a stepping stone to deportation. Expanding the grounds for detention in conjunction with the war on drugs legislation is consistent with prioritizing the deportation of non-citizens involved in drug crimes. In fact, the legislative history of the drug legislation supports a strong connection between detention and deportation.[161] Through reviewing the legislative history of the detention provisions in these statutes, however, García Hernández's research revealed a more complicated purpose for detention: incapacitation of

159. See the text accompanying notes 46-63.

160. See the text accompanying notes 34-37.

161. See García Hernández, "Immigration Detention as Punishment", *supra* note 10.

non-citizens who may be involved in drug trafficking and deterrence of drug trafficking among others.[162]

(iii) Challenging the Justifications for Immigration Detention

In sum, American detention law is suffering an existential crisis. Having strayed from its constitutionally sanctioned justification for the substantial deprivation of liberty, immigration detention is in a precarious position. Contrary to the constitutional mandate, detention is no longer a supporting character in deportation's drama.

Yet the inadequacy of the deportation rationale to fully justify the architecture of modern detention law does not end the inquiry. Other justifications may supplement the deportation rationale for the civil, regulatory categorization of detention.[163] Alternative justifications for detention, however, must toe the criminal-civil line if they are to support the continued categorization of detention as an administrative stasis exempt from criminal procedural constraints.

Four potential alternative rationales for detention readily surface. First, immigration detention incapacitates non-citizens with criminal histories, thereby preventing further crimes. Second, it expresses social disapproval of the detainee and affirms the orderly nature of the immigration system. Third, through this sort of expression and example, detention is thought to deter non-citizens from committing similar violations. These three rationales—incapacitation, deterrence and social condemnation—support a fourth. Detention supplements criminal and deportation sanctions by

162. See generally *ibid.* See also the text accompanying notes 48–49 (describing the emergence of incapacitation and deterrence of drug crime as the impetus for expanding detention laws).

163. See Alina Das, "Immigration Detention: Information Gaps and Institutional Barriers to Reform" (2013) 80:1 U Chicago L Rev 137 at 139 (raising deterrence of unauthorized immigration and discouraging the pursuit of claims as alternative justifications for detention); Stephen H Legomsky, "The Detention of Aliens: Theories, Rules, and Discretion" (1999) 30:3 U Miami Inter-Am L Rev 531 at 540 (raising deterrence as an alternate justification).

imposing an additional cost on immigration and criminal law transgressors who lack full membership in American society.[164]

These justifications for detention, particularly the fourth, construct the current detention scheme as a form of punishment.[165] The intimacy with which the drug war laws intermesh with immigration detention has meant that detention often flows directly from the conviction of a deportable crime. It can also result from suspicion that a non-citizen with precarious immigration status is involved in criminal activity.[166]

Civil detention that functions like criminal punishment is constitutionally questionable, though a full analysis of that question is beyond the scope of this article.[167] In fact, whether the crime-control function of detention rises to the level of criminal punishment may not matter for purposes of evaluating whether detention is constitutional. The US Supreme Court has consistently declared that immigration detention must have a close connection to the deportation of the individual

164. Michael S Vastine, "Good Things Come to Those Who Wait?: Reconsidering Indeterminate and Indefinite Detention as Tools in US Immigration Policy" (2010) 5 Intercultural Hum Rts L Rev 125 (describing the preventive and symbolic rationales for detention, and pointing out that while detention "prevents additional criminal activity by the non-citizen . . . [i]n the criminal context, prisoners are released upon the completion of their jail sentences without such assurances" at 144–45).

165. See generally García Hernández, "Immigration Detention as Punishment", *supra* note 10; Kalhan, *supra* note 12 (suggesting that "excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*" at 43); Bosworth & Kaufman, *supra* note 134 (providing support for the conclusion that detainees experience their confinement as punishment for immigration violations). See also Stumpf, "Fitting Punishment", *supra* note 126 (noting that "expanded use of preventive detention and the increasing contact between immigrants and law enforcement personnel have imported elements of the criminal enforcement model into the immigration sanctions scheme" at 1725).

166. See Luin Goldring, Carolina Berinstein & Judith K Bernhard, "Institutionalizing Precarious Migratory Status in Canada" (2009) 13:3 Citizenship Studies 239 at 239–65 (defining precarious legal status as irregular or uncertain immigration status, and the shift from more secure temporary status to unlawful status).

167. See *Wong Wing*, *supra* note 7 at 236–37. See also *Padilla v Kentucky*, *supra* note 7 ("[w]e have long recognized that deportation is a particularly severe 'penalty' . . . but it is not, in a strict sense, a criminal sanction" at 365).

non-citizen.[168] If rationales beyond facilitating deportation support the breadth of detention law, detention may run headlong into the Due Process Clause of the American Constitution.

For example, when detention became an investigative tool for crime control and a consequence of drug-related criminal activity, the door opened for some detention decisions to rest on investigation or incapacitation rather than on facilitating deportation. When detention decisions depart from the deportation rationale, the justification for categorizing detention as civil weakens.

Both mandatory and prolonged detention also undermine traditional justifications for civil immigration detention. As *Demore* and *Zadvydas* make clear, prolonged detention profoundly tests the connection between detention and deportation, because as the time in detention lengthens without removal, the link between detention and removal similarly weakens.[169]

It is the breadth of mandatory detention that weakens the link between detention and deportation. Mandatory detention provisions compel immigration officials to detain non-citizens who are deportable on certain criminal grounds,[170] awaiting deportation after a final removal order,[171] or are not clearly admissible, including asylum seekers who show a credible fear of persecution.[172] This categorical approach divests immigration officers and judges of the discretion to release non-citizens,

168. *Demore v Kim*, *supra* note 7 (referring to "the Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings" at 526). See *Zadvydas v Davis*, *supra* note 12 (holding that detention did not serve its purported immigration purpose when removal was "no longer practically attainable" at 690).

169. See generally *Demore v Kim*, *supra* note 7; *Zadvydas v Davis*, *supra* note 12.

170. 8 USC § 1226 (2014) ("[t]he Attorney General shall take into custody any alien who- (A) is inadmissible by reason of having committed any offense covered in section 1182(a) (2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title").

171. *Ibid*, § 1231(a)(2) ("[d]uring the removal period, the Attorney General shall detain the alien").

172. *Ibid*, § 1225(b)(1)(B)(ii) (detention of asylum seekers); *ibid*, 1225(b)(2) (detention of non-citizens seeking admission).

precluding inquiry through a bond hearing into whether the non-citizen poses a flight risk or a danger to society.[173] As a result, some non-citizens will experience detention even when an immigration judge would have found detention unnecessary to prevent flight from deportation.

IV. When Detention Drives Deportation

The fragility of the link between detention and deportation becomes clear when detention seems to be driving deportation levels and outcomes instead of the other way around. There are two major components of this phenomenon. First, mass detention necessitates mass deportation. Second, over-detention, especially of those with the highest stake in physical freedom, increases the risk of erroneous deportation. By creating a detention scheme with a large capacity and a likelihood of introducing error in the removal determination, the system creates an upward pressure on deportation.

A. Mass Detention Fosters Mass Deportation

Greater numbers of detainees will result in greater numbers of deportations. Like any system with inputs and outputs, a non-citizen in detention puts pressure on the system to move that non-citizen through to the outcome of the removal decision. That pressure comes either from legal limitations on detention periods, from practical reasons such as limitations on detention space or simply because detention is upriver from deportation. Mass detention has, in addition, created certain efficiencies in removal proceedings (although it has also introduced other inefficiencies, discussed below). Locating courtrooms within detention facilities and instituting videotaped removal proceedings for detainees, for example, are innovations that are only possible and feasible when detention levels support those changes.

The bed mandate is the most visible manifestation of detention driving deportation.[174] The congressional subcommittee sponsors of the

173. See *ibid*, §§ 1226(c), 1231(a)(2).

174. See Miroff, *supra* note 4 and the text accompanying note 135.

requirement that ICE fill a detention bed quota were explicit that its purpose was to increase deportation levels.[175]

Beyond the bed mandate, there are numerous other detention practices that have put expansive pressure on deportation levels. These include the proliferation of detention facilities, the empowerment of police to initiate detention, the expansion of criminal and national security bases for detention, and the restrictions on agency discretion to release detainees. These practices have led to the current situation in which the sheer size of the detention population promotes the growth of deportation. The government's interpretation of the mandatory detention provisions has also maximized detention by detaining those who would otherwise be released on bond and by insisting on prolonged detention.

B. Over-Detention Creates Erroneous Deportation

The creation of conditions for erroneous removal is where detention truly drives deportation. Detention is intended to support deportation. However, removal proceedings in the current scheme are undermined by detention-induced procedural deficiencies and pressures to give up meritorious defenses to deportation.

Detention significantly increases the likelihood that meritorious cases never reach the courtroom.[176] Immigration detainees lack the certainty of a pre-determined end to their custody. Immigration detention ends when the government either removes the non-citizen or decides to release her either because of a favourable adjudication or through an exercise of discretion.[177] Often, defending a removal case or seeking an exercise of

175. *Ibid.*

176. See Transactional Records Access Clearinghouse, "Legal Noncitizens Receive Longest ICE Detention" (3 June 2013), online: <trac.syr.edu/immigration/reports/321> (analyzing data showing that "the longest average detention time—131 days—was spent for those individuals" whom ICE or a judge ultimately determined were legally entitled to be in the United States and that "those who were entitled to be in the U.S. . . . experienced the highest percentage of prolonged detention" with an average detention stay of 334 days).

177. See 8 USC §1226(a)(2) (2014) (authorizing discretionary release on bond). See also Kalhan, *supra* note 12 (suggesting that the Department of Homeland Security could "more actively exercise its parole authority or prosecutorial discretion to release returning permanent residents who have been detained upon arrival in the United States if they present neither a flight risk nor a danger to public safety" at 54).

prosecutorial discretion to refrain from removal will prolong detention beyond the time it would take to waive the right to contest removal and exit the detention system through deportation.[178] Detainees with meritorious claims to lawful status are left with a conundrum of whether to remain detained and make their claim or trade in their legal claim for sooner physical freedom elsewhere.

At the same time, immigration litigation tends to be more complex and lengthy than the criminal justice system's plea process. For detained non-citizens defending removal charges, removal proceedings can be lengthy due to litigation strategy, the need to collect information and the civil nature of the proceeding which has no parallel to the criminal right to a speedy trial.[179] In other words, immigration litigation itself plays a part in lengthening the detention of the non-citizen, putting further pressure on meritorious claims.

Conclusion

The historical events that shaped detention law have produced a scheme that is inconsistent with detention's underlying constitutional justification. The connection between detention and deportation law has proven weak, and the relationship between immigration and criminal law has become clouded. Of greatest concern, deportation now seems to be driving detention.

There are several implications of concluding that "facilitating deportation" no longer justifies civil detention. At a practical level, it becomes necessary to re-examine accepted constitutional and interpretive conclusions about detention practices and to consider how the new scheme figures into them. That may require questioning each case or category in which this justification is in play. At bottom, it calls for re-evaluating whether the structures and practices of modern detention law put the burden where *Zadvydas* requires—on freedom as the default rule and detention as the exception.

178. See García Hernández, "Immigration Detention as Punishment", *supra* note 10 at 1388.

179. US Const amend VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial").