

Immigration Detention as Punishment

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ABSTRACT

Courts and commentators have long assumed, without significant analysis, that immigration detention is a form of civil confinement merely because the immigration proceedings of which it is part are deemed civil. This Article challenges that deeply held assumption. It harnesses the U.S. Supreme Court's instruction that detention's civil or penal character turns on legislative intent and, buttressed by theoretical understandings of punishment, contends that immigration detention—apart from the deportation that often results—itself constitutes penal incarceration. In particular, legislation enacted over roughly fifteen years in the 1980s and 1990s indicates a palpable desire to wield immigration detention as a tool in fighting the nation's burgeoning war on drugs by penalizing and stigmatizing criminal behavior. Indeed, the modern immigration detention system has accomplished the U.S. Congress's punitive goal: Immigration detention is a severely unpleasant experience and immigration detainees are viewed as dangerous. In order to remain true to the Court's guidance to draw formal boundaries between civil and penal confinement, the current immigration detention regime should be conceptualized as punishment. This Article contends that the constitutional limitations imposed by criminal procedure are ill-equipped to address immigration detention. Instead, policymakers should learn from the nation's failed experience with mass penal incarceration—and step back from immigration detention's punitive origins to create a truly civil immigration detention system.

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INTRODUCTION

In fiscal year 2011, for the first time in the nation's history, more than 400,000 people were confined while they waited to learn whether they would be allowed to remain in the United States.¹ This was another in a string of recent record-setting years for the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) agency, the governmental unit with custody of individuals facing removal. Clearly, incarceration is a major feature of immigration enforcement today, and immigration imprisonment represents a substantial portion of all modern detention in the United States.² Unlike their counterparts under the custody of state or federal correctional departments, individuals in ICE's custody are not there as punishment for having committed a crime.³ They are there because DHS has decided, for any number of reasons, that they might not have permission to remain in the country.⁴ Legally, they are treated as civil detainees, not criminals.

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1. See JOHN SIMANSKI & LESLEY M. SAPP, DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 ANNUAL REPORT 5 tbl.4 (2012) (reporting that 429,247 people were detained).
 2. Though immigrants are sometimes detained pending criminal proceedings, this Article focuses on individuals who are in immigration detention. Stephanie J. Silverman and Evelyne Massa distinguish immigration detention by noting that it bears three characteristics: "[F]irst, detention represents a deprivation of liberty; second, it takes place in a designated facility in the custody of an immigration official; and third, it is being carried out in the service of an immigration-related goal." Stephanie J. Silverman & Evelyne Massa, *Why Immigration Detention Is Unique*, 18 POPULATION, SPACE, AND PLACE 677, 679 (2012). While Immigration and Customs Enforcement (ICE) outsources a significant portion of its detention operations to police agencies and penal institutions that typically focus on criminal detention, as well as private prison operators, individuals in immigration confinement nonetheless remain within ICE's legal custody—that is, they are confined because ICE has the authority to keep them there.
Borrowing from the U.S. Supreme Court's statement regarding juvenile detention facilities that what matters is not the title of the facility but the experience it entails, this Article occasionally refers to the enclosures in which detainees are held pending immigration proceedings as "prisons." See *In re Gault*, 387 U.S. 1, 27 (1967). Use of this locution is buttressed by the fact that many of these facilities are in fact jails or prisons. See *infra* Part III.A.
 3. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392–95 (2006) (explaining the reasons for criminal and immigration confinement); see also Silverman & Massa, *supra* note 2, at 677 ("[Immigration] detention is thought to facilitate the realisation of immigration goals—such as . . . deportation . . ."). Pretrial criminal detention is not punitive and is mentioned here only to illustrate that people involved in criminal proceedings are typically held in penal detention institutions. See *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("[P]retrial detention . . . is regulatory, not penal . . .").
 4. See Immigration and Naturalization Act (INA) §§ 236(a), (c) (codified as 8 U.S.C. §§ 1226(a), (c) (2012)).

Whatever the actual reason for detention and despite immigration detention's legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement. "Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways," wrote Dora Schriro, a highly respected corrections professional who formerly served as director of the Office of Detention Policy and Planning.⁵ They are represented as a threat to public safety, locked behind barbed wire, often in remote facilities, and subjected to the detailed control emblematic of all secure environments. Often they are held alongside their criminal counterparts. People serving time as a sanction for engaging in criminal activity are housed in the same facilities as people waiting to receive an immigration court's decision about which country will become their next residence.⁶

These similarities, this Article demonstrates, are neither coincidental nor legally insignificant. Rather, they are the logical outcome of an immigration detention system launched in the 1980s and 1990s through legislation intended to curtail crime, especially illicit drug activity. During a key period of about fifteen years from the early 1980s to the mid-1990s, the U.S. Congress drastically expanded the executive branch's power—and at times obligation—to confine people pending immigration proceedings largely by tapping the nation's growing concern about drug activity. Congress in effect envisioned immigration detention as a central tool in the nation's burgeoning war on drugs.

By so intertwining immigration detention and penal incarceration, Congress created an immigration detention legal architecture that, in contrast with the prevailing legal characterization, is formally punitive. Uncovering immigration detention's legislative history and giving it the significance that the U.S. Supreme Court instructs leads, in Kathleen Sullivan's words, to a legal rule establishing a "brightline boundar[y]" between punitive and administrative confinement with immigration detention recognized as punishment.⁷ Framing detention in this way might tempt legal formalists to conclude that the government's power to impose immigration detention must bend to constitutional norms that have not been applied to this form of detention.⁸ At the very least, reframing detention as this Article suggests would bring our understanding

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5. DORA SCHIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009).
 6. See Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442 (2011).
 7. Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992).
 8. See *id.*; see also Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 536 (1999).

of this form of confinement more in line with how detainees, family members, and other observers perceive it.

To explain how immigration detention became punishment, this Article proceeds in four parts. Despite the consistent assumption by courts and commentators alike that immigration detention is a form of civil confinement, no one, Part I recounts, has ventured an explanation for this conclusion of profound constitutional significance. Beginning with the Supreme Court's admonition that legislative intent ought to be the primary consideration when categorizing detention as penal or civil,⁹ and contextualizing key expansions of the federal government's immigration detention authority in the political climate from which that authority arose, Part II reveals a robust history of entangling immigration detention with the antidrug initiatives of the 1980s and 1990s.¹⁰ This history discloses that the modern legislative framework authorizing immigration detention did not develop in 1996 or after the attacks of September 11, 2001, as other scholars have proposed; rather, the detention framework developed alongside the legislation that permitted the mass incarceration that came to define antidrug policies in the late twentieth century. Because immigration and criminal confinement were intended to stigmatize and penalize those who engage in drug activity, imposition of both ought to be considered punishment.¹¹ Part III demonstrates that immigration detention, born in the same legislative milieu and motivated by the same concern about drug activity, eventually came to resemble the unforgiving and expansive character of penal incarceration in the drug war era. Today, immigration detention stands apart from other types of detention deemed civil and instead looks to people outside and inside the hundreds of jails, prisons, and stand-alone detention facilities that have been used for this purpose as if those confined are being punished just the same as people serving time for a conviction. Viewed as punishment, two options arise to continue using detention as a method of enforcing immigration law: entrench it in criminal procedure, or

9. See *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

10. While the analysis this Article presents is guided by the Supreme Court's emphasis on legislative intent, it is not limited by the Court's mandates, including its contested dictates on the appropriate scope of statutory interpretation, because it does not offer an analysis tailored to litigation. Instead, this Article begins with the Court's concerns about legislative intent and adds to it a rich history of the political climate in which Congress and multiple presidential administrations expanded the scope of immigration detention. The Article's purpose, to borrow from David Garland, is to create "a genealogical account that aims to trace the forces that gave birth to our present-day practices and to identify the historical and social conditions upon which they still depend. The point is not to think historically about the past but to use that history to rethink the present." DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 60 (2001).

11. See *infra* Part II.C.

distance immigration detention from its punitive past. Part IV posits that the failures of the war on drugs suggest that the most reasonable choice is to move away from an emphasis on detention and toward an immigration law enforcement regime in which confinement is the exception, not the norm. In this vein, it presents not a strategy for constitutional litigation or judicial remedy, but a vision of immigration detention that lives up to its civil characterization.

I. CONFINEMENT'S LEGAL CHARACTER

Courts and commentators almost universally agree that the purpose and effect of the immigration imprisonment regime is civil, not criminal.¹² This unanimity, however, masks an oversight: Courts and commentators have simply not attempted to rationalize the putative truism that confinement as a means of enforcing immigration law is a form of civil detention. This Part sets forth a framework by which to explain immigration detention's formal legal character by turning to Supreme Court cases and philosophical theories of punishment that, combined, emphasize both the legislative intent authorizing a particular form of detention and its symbolic significance.

A. Treating Immigration Imprisonment as Civil Detention

On its website, ICE explains that it “manages and oversees the nation’s civil immigration detention system.”¹³ Before leaving ICE, Schriro issued an illuminating report that added, “immigration detention is not punishment.”¹⁴ Even critics accept this premise.¹⁵

Such consistency is to be expected. The Supreme Court has steadfastly described the entire immigration process as civil. Determinations of whether someone is to remain in the country, it has said, are conducted in civil proceedings, and the final outcome, deportation, is likewise civil.¹⁶ Beginning in 1893 and regularly repeated since then, the Court has been clear that “deportation is

12. See Legomsky, *supra* note 8, at 536.

13. *Detention Management*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., <http://www.ice.gov/detention-management> (last visited Dec. 14, 2012).

14. SCHRIRO, *supra* note 5, at 4 n.2.

15. See AM. BAR ASS'N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 1 (2012); DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES 125 (2012); Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1494–95 (2011); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1098 (1995).

16. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

not a punishment for a crime.”¹⁷ Instead, deportation is considered nothing more than a physical manifestation of the nation’s sovereign prerogative to dictate the terms by which it admits noncitizens and allows them to remain within its borders.¹⁸

Following this thread, the Court and commentators have suggested that immigration imprisonment—apart from deportation—is also civil, largely because it is connected to immigration proceedings that are civil and that potentially lead to the civil sanction of deportation. In *Zadvydas v. Davis*, the Court explicitly stated its assumption when it considered the constitutionality of a statutory authorization to detain individuals indefinitely after being ordered removed and the procedures through which the Immigration and Naturalization Service, ICE’s predecessor, decided whether to exercise that power.¹⁹ Without elaboration, the Court explained that “[t]he proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.”²⁰ Based on this assumption, it went on in the next sentence to describe the detention itself as “civil detention.”²¹ In an article published after leaving her position at ICE, Schriro reiterated this logic: “Immigration proceedings are conducted exclusively in civil courts, and immigration detention is not a form of punishment.”²² Immigration imprisonment has, in essence, taken on the same legal character as the immigration process and outcome that justify its existence: It is civil confinement because it is part of a civil proceeding to determine whether a civil sanction will be meted out.

For its part, ICE goes out of its way to encourage use of the civil label to describe its detention apparatus. The facilities it runs tend to avoid the terms “prison” or “jail.” Instead, they adopt the more sanguine “detention center,” “processing center,” or, as an ICE facility in Karnes County, Texas announces in

17. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

18. *See id.* at 730; *see also* *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889).

19. *Zadvydas v. Davis*, 533 U.S. 678, 688–89 (2001); *see* INA § 241(a)(6) (codified as 8 U.S.C. § 1231(a)(6) (2012)); 8 C.F.R. § 241.4(a) (2011).

20. *Zadvydas*, 533 U.S. at 690.

21. *See id.*; *see also* *Carlson v. Landon*, 342 U.S. 524, 537–38 (1952) (noting that “[d]eportation is not a criminal proceeding and has never been held to be punishment” and that “[d]etention is necessarily a part of this deportation procedure”).

22. Schriro, *supra* note 6, at 1442. Likewise, Jill Family explained that “[i]mmigration detention is almost indiscernible from criminal detention, but the immigration violation is a civil offense,” suggesting that, by extension, immigration detention is also civil. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 561 (2011); *see* Raha Jorjani, *Ignoring the Court’s Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 112–14 (2010) (“DHS has no legal authority to detain for punitive purposes, so its detention is labeled ‘preventive.’”).

large letters next to the main entrance, “civil detention center.”²³ As one newspaper article described ICE’s position concerning the Karnes County facility, “Just don’t call it a prison, they insist.”²⁴

B. An Assumption but No Explanation

Despite the consistent description of immigration confinement as civil, the Court has never explicitly rationalized this determination. According to Daniel Kanstroom, “The Supreme Court has rarely, if ever, seriously considered the basic analytical and normative questions raised by the civil/criminal dichotomy in the deportation context,” including immigration detention.²⁵ Its leading decisions on whether a particular type of detention is civil or penal have, at most, sometimes touched on immigration confinement without elaboration. In *United States v. Salerno*, for example, a case addressing pretrial detention, the Court explained that “detention of potentially dangerous resident aliens pending deportation proceedings” is constitutionally permissible, and it cited two immigration detention cases for support.²⁶ It did not explain, in *Salerno* or the two immigration detention cases cited, why that type of detention was civil. Rather, it used the immigration detention cases as examples of situations in which the “Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”²⁷ This inquiry arose only because it implicitly assumed that the immigration detention involved in the cases it cited was regulatory rather than punitive.²⁸

The Court’s concern about whether governmental action is punitive or regulatory reveals the fundamental difference between penal and civil confinement. The former is intended to punish individuals for transgressing social mores embedded in criminal law.²⁹ In contrast, civil detention is permissible to ensure that an accused appears for legal proceedings (whether they are judicial or,

23. See News Release, U.S. Immigr. & Customs Enforcement, U.S. Dep’t of Homeland Sec., ICE Opens Its First-Ever Designed-and-Built Civil Detention Center (Mar. 13, 2012), available at <http://www.ice.gov/news/releases/1203/120313karnescity.htm>.

24. Kirk Semple & Tim Eaton, *Detention for Immigrants That Looks Less Like Prison*, N.Y. TIMES, Mar. 14, 2012, at A17.

25. Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1464 (2011).

26. See *United States v. Salerno*, 481 U.S. 739, 748 (1987) (citing *Carlson*, 342 U.S. at 537–42; *Wong Wing v. United States*, 163 U.S. 228 (1896)).

27. *Salerno*, 481 U.S. at 748.

28. See *id.* at 747.

29. See David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006–07 (2002).

as in the immigration context, administrative) or to promote public safety; it is expressly not intended to punish.³⁰ The Court articulated this bifurcated framework in a pretrial detention case, *Bell v. Wolfish*, in which it “recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.”³¹ Relying on an earlier case, the Court explained that forfeiture of citizenship is punishment,³² while concluding that the conditions of pretrial detention at the heart of *Wolfish*’s claim, double-bunked cells, are not.³³

Despite the Court’s repeated reliance on immigration law and even immigration detention cases, none of these decisions actually explains how confinement pending immigration proceedings fits within the civil or criminal dichotomy and why the Court has routinely placed immigration detention on the regulatory side of the regulatory/punitive divide.³⁴ Even the Court’s immigration detention cases fail to address fully its civil or penal character. Two years after assuming that detention is civil in *Zadvydas*,³⁵ the Court took up another immigration detention challenge in *Demore v. Kim*.³⁶ There it did not even mention the civil or punitive distinction. Instead, it merely reiterated its historical allowance of “detention during deportation proceedings as a constitutionally valid aspect of the deportation process” and pointed to *Zadvydas* and the late nineteenth century’s *Wong Wing v. United States* for support.³⁷

Wong Wing, in turn, contemplated a section of the infamous Chinese Exclusion Act that required imprisonment for up to a year followed by deportation for Chinese people violating immigration laws.³⁸ Though the Court prohibited “imprisonment at hard labor” without judicial proceedings—an unmistakable conclusion that the Justices viewed that type of confinement as punishment—it added, “We think it clear that detention or temporary confinement, as part of the

30. See *id.*; see also *In re De La Cruz*, 20 I & N Dec. 346, 349 (B.I.A. 1991) (explaining that immigration detention is generally improper “except on a finding that he is a threat to the national security or is a poor bail risk” (citing *In re Patel*, 15 I & N Dec. 666 (B.I.A. 1976))).

31. See *Bell v. Wolfish*, 441 U.S. 520, 537–38 (1979).

32. See *id.* (discussing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

33. *Bell*, 441 U.S. at 538–40.

34. In contrast, some lower courts have addressed whether the immigration detention provisions enacted in 1996 are civil or criminal. See, e.g., *Welch v. Ashcroft*, 293 F.3d 213, 224, 228 (4th Cir. 2002) (concluding that prolonged detention pursuant to the mandatory detention provisions of INA § 236(c), enacted in 1996, is punishment, but suggesting that short-term detention is not punishment); *Hoang v. Comfort*, 282 F.3d 1247, 1258–59 (10th Cir. 2002) (concluding that the mandatory detention provisions of INA § 236(c) are nonpunitive).

35. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

36. 538 U.S. 510 (2003).

37. See *id.* at 523 (citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

38. *Wong Wing*, 163 U.S. at 235.

means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.”³⁹ It did not, unfortunately, elaborate on why this type of confinement is so clearly permissible without judicial involvement. Allowing one type of detention without judicial process while prohibiting another is, as Kanstroom explains, “not so clear in practice as it seems in theory.”⁴⁰

The truth of Kanstroom’s observation becomes obvious from reading the Court’s opinions with the benefit of historical context. A half-century after *Wong Wing*, for example, the Court observed in *Carlson v. Landon*,

Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail.⁴¹

To an observer of the modern immigration detention apparatus, the Court’s reference to discretion sounds quaint, because much of that discretion was eliminated in a series of policy practices and statutory enactments beginning in the early 1980s and culminating in 1996. Furthermore, the detention framework that existed in the early 1950s was not wrapped in legislative efforts to curtail and sanction criminal activity in the way that the modern framework is.⁴² More importantly, *Wong Wing* and its simple conclusion about the permissibility of detention pending immigration proceedings long preceded the Court’s modern jurisprudential demarcation between civil and punitive detention in which “the distinction between the two forms of incarceration may depend for the most part on the intention of the government.”⁴³

What emerges from the case law and commentary is a curious absence of sustained discussion about whether this type of imprisonment meets the Court’s framework for distinguishing punitive from regulatory confinement. At the same time, courts and commentators assume that confinement pending a decision on whether a person will be allowed to remain in the United States is civil because immigration proceedings and deportation are both civil.

39. *Id.*

40. Kanstroom, *supra* note 25, at 1506.

41. *Carlson v. Landon*, 342 U.S. 524, 538 (1952).

42. *See infra* Part II (discussing legislative history related to the war on drugs).

43. Kanstroom, *supra* note 25, at 1506.

C. Blurring the Criminal/Civil Divide

Recent scholarly and judicial developments cast doubt on the established wisdom that immigration law is uniformly civil. Immigration law's increased interconnectedness with criminal law, many scholars now argue, suggests that immigration law enforcement has taken on the character of criminal law enforcement. Thus, immigration law's adjudicative process and outcome—deportation—ought to be subjected to some of the limitations on governmental power that apply to criminal proceedings and imposition of criminal sanctions. Beth Caldwell, for example, proposes recategorizing deportation as punishment because it “is imposed as a societal imposition of blame; it is imposed to punish.”⁴⁴ Michael Wishnie, meanwhile, argues that “[a] removal order is sufficiently punitive to trigger constitutional proportionality review” pursuant to the Fifth Amendment's Due Process Clause and Eighth Amendment's Cruel and Unusual Punishment Clause.⁴⁵ This is especially true, he contends, when removal results from a criminal conviction because, in *Padilla v. Kentucky*, the Court explained that deportation is integrally linked to “the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁴⁶

Identifying a unique doctrinal path, Kanstroom posits that the formal recognition of deportation as civil and nonpunitive can be reconciled with its deep reliance on criminal justice processes and outcomes only by adopting features of Fifth and Sixth Amendment limitations on governmental power.⁴⁷ Considering *Padilla's* implications closely, Kanstroom is intrigued by “the way the Court straddles the civil/criminal and punitive/regulatory lines in its understanding of deportation” resulting from a long-term lawful permanent resident's conviction of a crime. He believes it portends “a new constitutional norm,”⁴⁸ one that features the “flexible due process guarantees of the Fifth Amendment” and the right-to-counsel protections of the Sixth Amendment.⁴⁹ Interpreting *Padilla* in this way, he suggests, could go a long way to mitigating some of the harshness of modern deportation law.⁵⁰

44. Beth Caldwell, *Banished for Life: Mandatory Deportation of Juveniles as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2277 (2013).

45. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012).

46. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010); Wishnie, *supra* note 45, at 424.

47. See Kanstroom, *supra* note 25, at 1467.

48. *Id.* at 1472.

49. *Id.* at 1475.

50. See *id.* at 1477–78.

Though different in important ways, these critiques all build on the increasing convergence of criminal law and immigration law to challenge how immigration law enforcement currently operates. None, however, addresses the fundamental character of immigration detention. This Article fills this gap by reconsidering how we think of the detention authority at the heart of the nation's "formidable immigration law enforcement machinery."⁵¹

D. Penal Versus Civil Incarceration

In a series of decisions, the Supreme Court has provided a framework by which to do this. In *Zadvydas*, the Court explained the nuances of its position on permissible confinement: "[G]overnment detention violates that [Fifth Amendment Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"⁵² This language encapsulates what Sullivan describes as a "standards" approach—that is, a legal directive that "allow[s] the decisionmaker to take into account all relevant factors or the totality of the circumstances."⁵³ In constitutional law, she adds, standards consist of balancing competing interests—precisely what *Zadvydas* seems to require.⁵⁴

Some observers have recently criticized the balance that the immigration detention regime strikes between immigrants' liberty interest and the circumstances of confinement. Alina Das, for example, questions whether ICE is properly equipped to collect the information necessary about specific individuals to assess whether a special justification in fact exists to confine them.⁵⁵ Schriro focuses her attention on the severity of confinement conditions, concluding that they are inappropriately penal for most detainees.⁵⁶ Mark Noferi argues that mandatory detention "uniquely provide[s] for preventive pretrial detention without counsel pursuant to underlying proceedings without counsel."⁵⁷ Meanwhile, Anil Kalhan argues that immigration detention's excessive scope and harshness

51. MEISSNER ET AL., *supra* note 15, at 12.

52. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (internal citations omitted).

53. Sullivan, *supra* note 7, at 59.

54. *See id.* at 60.

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

56. SCHRIRO, *supra* note 5, at 2–3.

57. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012).

has, for many detainees, converted it “into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”⁵⁸

While there is much merit to such functionalist critiques,⁵⁹ and *Zadvydas* suggests doctrinal support, this Article adopts a formalist, rules-based approach rooted in immigration detention’s legislative history.⁶⁰ Detention that occurs as part of the removal process does not satisfy the narrow exception for special “non-punitive” circumstances precisely because it is inherently punitive. The *Zadvydas* Court’s balancing, in effect, is subsumed by a categorical assessment that immigration detention is always punitive. This approach finds doctrinal support in the line of cases that currently guides determinations of whether confinement is penal or civil. After experimenting with a “functional, multi-part test to determine whether [a] law was civil or punitive in nature” that “consider[ed] the nature and effects of ‘civil’ or ‘remedial’ laws”⁶¹ developed in such cases as *Boyd v. United States*⁶² and *Kennedy v. Mendoza-Martinez*,⁶³ beginning in the 1980s the Court “moved more generally in the opposite direction” by “emphasiz[ing] the use of legislative intent for determining whether a penalty is civil or criminal.”⁶⁴ In *Salerno*, the Court explained, “To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.”⁶⁵ In a subsequent case, the Court added, “Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’”⁶⁶ According to Kanstroom, “[t]his development effectively sounded the death knell for the multi-functional type of analysis endorsed by the [*Kenne-*

58. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010).

59. Indeed, the depiction of immigration detention provided in Part III supports functionalist critiques.

60. Sullivan explains that a legal rule “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.” Sullivan, *supra* note 7, at 58. Though Sullivan uses the language of “rules” and “standards,” others have equated these labels with “formalism” and “pragmatism.” E.g., Ronald M. Levin, “*Vacation*” At Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 346 & nn. 248–49.

61. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1921 (2000).

62. 116 U.S. 616 (1886).

63. 372 U.S. 144 (1963).

64. Kanstroom, *supra* note 61, at 1923.

65. *United States v. Salerno*, 481 U.S. 739, 747 (1987) (internal citations omitted).

66. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)); see also *Kansas v. Hendricks*, 521 US 346, 361 (1997).

dy] Court. A legislative decision to label a sanction as a ‘civil penalty’ was now given deference.”⁶⁷

The Court’s test undoubtedly privileges legislative intent.⁶⁸ Detention is punitive if the legislature intended to punish. This circularity leaves much to be desired. What are the markers of a legislature intent on punishing? Legal philosopher H.L.A. Hart’s five-part definition of legal punishment offers the beginnings of a theoretical response. According to Hart, punishment involves an “unpleasant” consequence such as pain, “must be for an offence against legal rules,” must target an offender “for his offense,” “must be intentionally administered,” and “must be imposed and administered by an authority constituted by a legal system against which the offense is committed.”⁶⁹ While helpful, Hart’s definition is incomplete because punishment also involves symbolic reprobation.⁷⁰ That is, it publicly conveys disapproval and, in so doing, involves “stigmatizing symbolism.”⁷¹

Combining indicia of this “stigmatizing symbolism” evident in the political climate from which much immigration detention arose with a broad view of legislative intent establishes a binary that lends itself to a formalist assessment of immigration detention: If Congress developed the immigration detention statutory scheme within a political context infused with a desire to punish immigrants, as Part II posits it did, then to detain is necessarily to punish.⁷² This is so no matter the harshness of the detention conditions, the severity that detention represents for the individual whose liberty is at stake, or the value that the government reaps from detaining a particular person, as would be true following a standards approach.⁷³ Part II follows the Court’s command to consider legislative intent in light of theoretical understandings of punishment and the political context in which immigration detention expanded. It explores the legislative origins of the modern immigration detention apparatus stretching from the early 1980s to the mid-1990s, places it within the context of legal trends developing at the time, and concludes that the legislative environment in which early immigration detention practices arose exhibits key features of a desire to punish.

67. Kanstroom, *supra* note 61, at 1923.

68. Though this Article discerns legislative intent by analyzing a large body of statutes and the context in which they were enacted, it is also guided by the text of specific statutory provisions. In doing so the Article reflects purposive and textualist approaches to statutory interpretation without addressing the relative merits of each—a task that is beyond the Article’s scope.

69. H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROC. OF THE ARISTOTELIAN SOC’Y 1, 4 (1959).

70. Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397, 400 (1965).

71. *See id.* at 400, 418.

72. *See Sullivan, supra* note 7, at 59.

73. *See id.* at 59–60.

II. BUILDING THE WAR ON DRUGS

Immigration imprisonment cannot be characterized as nonpunitive. The legislative origins of today's immigration detention system show a desire to punish noncitizens thought to be dangerous to society. Specifically, the concerns that led Congress to prosecute the nascent "war on drugs" were intertwined with concerns that immigrants were bringing the scourge of drug use and drug trafficking into cities across the country. In response, Congress sought to punish drug activity and the noncitizens who legislators thought were, to a great extent, its purveyors. The legislative record of pivotal federal policies and statutes authorizing antidrug initiatives and immigration detention enacted from the early 1980s to the mid-1990s indicates that Congress did so by turning to incarceration.

A. Common Roots of Immigration and Penal Incarceration

The 1980s proved to be a crucial period in enacting the legislation that laid the groundwork for today's massive immigration incarceration. This was the period when Haitians boarded rickety rafts in large numbers hoping to make their way to the United States,⁷⁴ and Cubans left the port of Mariel looking to join South Florida's prospering émigré community.⁷⁵ It was also the time when drug use and drug trafficking entered the political consciousness with vengeance, framing people of color as undeserving of the United States' freedoms and social welfare programs.⁷⁶ These phenomena quickly became enmeshed with one another,⁷⁷ and the national political response to all three soon centered on the same tactic: detention. To deal with the approximately 125,000 Cuban

74. See Alex Stepick III, *The Refugees Nobody Wants: Haitians in Miami*, in *MIAMI NOW!: IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 57, 57 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

75. See B.E. Aguirre, Rogelio Sáenz & Brian Sinclair James, *Marielitos Ten Years Later: The Scarface Legacy*, 78 *SOC. SCI. Q.* 487, 488–89 (1997).

76. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 48–49 (2010).

77. See JOSEPH NEVINS, *OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* 96 (2d ed. 2010); TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* 155 (1996). The U.S. General Accounting Office reported that, "[a]ccording to INS [in the mid-1980s], aliens involved in crimes pose a growing threat to the nation's domestic and internal security." U.S. GEN. ACCOUNTING OFFICE, *GAO GGD-88-3, CRIMINAL ALIENS: INS' ENFORCEMENT ACTIVITIES* 8 (1987). As examples of this growing threat, the INS pointed to a cocaine processing laboratory near Albany, New York operated by noncitizens and "capable of supplying 5 percent of the total U.S. cocaine market," and to a study of crime in Southern California that estimated that "illegal aliens represent . . . 50 to 80 percent of those arrested for selling drugs." *Id.* at 8–9.

“marielitos” who came to the United States in 1979 and 1980, the INS moved rapidly to set up immigration detention camps as well as to find space in the federal penitentiary in Atlanta to house the new arrivals.⁷⁸ Not long after, in 1982, President Ronald Reagan ordered the mandatory detention of all arriving Haitians suspected of violating immigration laws.⁷⁹ Military bases, federal prisons, and “secure INS detention facilities run like prisons” were suddenly filled with Haitian asylum seekers.⁸⁰ According to Attorney General William French Smith, there was no other way to stop them from coming: “Detention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place.”⁸¹ That same year, “Reagan officially announced his administration’s War on Drugs.”⁸²

Drastic though they were, the responses to Cuban and Haitian asylum seekers were hasty measures implemented by Executive Branch officials who suddenly found themselves under intense political pressure. Within a few short years, however, Congress and the president escalated the war on drugs by involving a range of law enforcement agencies pushing more people into detention, including immigration detention.⁸³ Relying in large part on the growing desire to fight drugs, Congress enacted a series of laws between 1986 and 1994 that set the legislative groundwork for the expansive immigration detention apparatus that exists today: the Anti-Drug Abuse Act (ADAA) of 1986, the Immigration Reform and Control Act (IRCA) of 1986, the Refugee Assistance Extension Act of 1986, a 1986 joint congressional resolution, the ADAA of 1988, the Crime Control Act of 1990, the Immigration Act of 1990 (IMMACT 90), and the Violent Crime Control and Law Enforcement Act of 1994. As these titles suggest, Congress busied itself debating and supporting legislative amendments to federal criminal law generally (the Crime Control Act) and specifically (the ADAA of 1986 and 1988’s focus on drug crimes and the Violent Crime Control and Law Enforcement Act’s focus on violent crimes), immigration law generally (IMMACT 90, Refugee Assistance Extension Act, and IRCA) and immigration law enforcement specifically (IRCA). Importantly, all these laws expanded

78. See Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* 9 (Univ. of Oxford, Working Paper No. 80, 2010), available at <http://ssrn.com/abstract=1867366>.

79. See *id.* at 10.

80. Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 214, 225 (Marc Mauer & Meda Chesney-Lind eds., 2002).

81. MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 7 (2004).

82. ALEXANDER, *supra* note 76, at 49.

83. See *id.* at 73–77.

the government's immigration detention authority dramatically and were frequently wrapped in a legislative context tinged with drug war fervor. Furthermore, these legislative enactments occurred well before the twin public laws enacted in 1996 that are usually credited with expanding immigration detention: the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

A turning point in the legislative authorization of immigration imprisonment came in 1986. After a few years in which the INS, a division of the Department of Justice (DOJ), had effectively taken the lead regarding immigration detention policymaking, Congress was ready to get involved. And it did so with long-lasting effects, sending President Reagan four pieces of legislation with confinement provisions in October and November.

The first authorization, the ADAA of 1986, is best known for its drug war emphasis. If its title is not sufficient indication of Congress's intention, then the preamble's repeated references to illicit drug use and trafficking, and Congress's desire that this public law would stem that activity, surely are.⁸⁴ The law imposed life imprisonment on a host of drug activities and mandatory minimum sentences for trafficking specified quantities, including the infamous crack-cocaine sentencing disparity that punished possession of 500 grams of powder cocaine identically to five grams of crack cocaine.⁸⁵ Within the very same title in which these penalties were included—the "Anti-Drug Enforcement" title—Congress inserted a section authorizing the DOJ to seize drug-related assets "for equipping for drug law enforcement functions any government-owned or leased vessels, vehicles, and aircraft available for official use by . . . the Immigration and Naturalization Service" and a separate requirement that the Defense Department provide the attorney general with a list of all its facilities that were or could be used as "detention facilities for felons, especially those who are a [f]ederal responsibility such as illegal alien and major narcotic traffickers."⁸⁶ The link between the war on drugs and immigration enforcement thus began.

84. See Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207-047, preamble (1986).

85. See generally *id.* § 1002 (explaining sentencing penalties for federal controlled substances offenses); U.S. SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY 180 (1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm. The sentencing disparity for possession of crack cocaine and powder cocaine was widely criticized by a generation of judges, attorneys, and scholars until Congress finally reduced the disparity to 18-to-1 in 2009. See Erik Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 29, 2010, at A16.

86. Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207-047, § 1152 (1986) (referencing forfeiture authority); *id.* § 1601 (referencing Defense Department facilities). In a separate section,

That link only grew stronger. In the ADAA of 1986, Congress, for the first time, introduced into the INA a practice that is now at the center of immigration law enforcement—immigration detainers.⁸⁷ Immediately following a subsection on using federal buildings “as detention facilities for felons, especially those who are a Federal responsibility such as illegal alien felons and major narcotics traffickers,”⁸⁸ the “Narcotics Traffickers Deportation Act,” as the subsection is labeled, authorized state and local law enforcement officials to request that the INS “issue a detainer to detain” people arrested for any violation of a controlled substances offense and believed to be in the United States without permission.⁸⁹ In turn, it required the INS to “promptly determine whether or not to issue a detainer” and, if issued, “effectively and expeditiously take custody of the alien.”⁹⁰ Though this statutory provision referenced only controlled substances offenses, the INS subsequently amended its regulations to include its new detainer authority and, in the process, interpreted the statute as authorizing it to detain individuals convicted of other offenses as well.⁹¹ Lastly, the ADAA of 1986 further entangled the criminal and immigration law systems by drastically expanding the types of drug offenses that can lead to deportation, replacing a reference to convictions involving an “addiction-sustaining opiate” with much broader language encompassing any conviction involving a state, federal, or foreign country’s controlled substance.⁹²

A week-and-a-half later, President Reagan signed another bill with important immigration law implications: the IRCA. The IRCA is most widely recognized as containing the last major amnesty program and secondarily known for including the employer verification requirement that remains with us today. It also contained, however, provisions promoting the use of detention as part of the INS’s investigative process, with a special emphasis on individuals convicted of a felony. The DOJ was required to reimburse states for the cost of imprisoning Cubans (going so far as to statutorily define who constitutes a

the act required the Defense Department to inform the INS and other agencies which of its physical and intelligence assets may be of assistance in targeting drug activity. *Id.* § 3057.

87. See KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 5 (Aug. 31, 2012); Christopher Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 182 (2008) [hereinafter Lasch, *Enforcing the Limits*]; Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 690–91 (2013), available at <http://ssrn.com/abstract=2178524>.

88. Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207, § 1601 (1986).

89. *Id.* § 1751 (amending INA § 287, 8 U.S.C. § 1357).

90. *Id.*

91. Lasch, *Enforcing the Limits*, *supra* note 87, at 183–84; see MANUEL, *supra* note 87, at 5–6.

92. Anti-Drug Abuse Act § 1751 (amending INA § 212(a)(23)).

“marielito Cuban”) or other noncitizens convicted of a felony who entered the United States without permission.⁹³ In a separate section, IRCA blurred the boundary between civil detention and penal detention by encouraging the confinement of excludable and deportable individuals in federal prisons operated by the Bureau of Prisons (BOP).⁹⁴ These individuals were to be held under the BOP’s control rather than the INS’s, suggesting that Congress viewed people who were suspected of violating civil immigration law as no different from people convicted of violating federal criminal law.⁹⁵ More strikingly, the public law required the president to order the Defense Department, with the attorney general’s assistance, to identify which of its facilities could help the BOP meet its new obligation.⁹⁶ Yet another provision required the attorney general to “expeditiously” initiate deportation proceedings involving “an alien who is convicted of an offense which makes the alien subject to deportation.”⁹⁷ The INS interpreted this mandate, along with the detainer authority regarding controlled substances offenses enacted in the ADAA of 1986 days before, as providing the authority to adopt a detainer practice that far exceeded drug offenses.⁹⁸ Though it had been using detainers before 1986, these IRCA and ADAA provisions gave the INS a basis from which it could adopt regulations facilitating what Christopher Lasch describes as its “generally unbound detainer practice.”⁹⁹ Instead of issuing detainers against people potentially excludable on the basis of a drug conviction as the ADAA of 1986 provides,¹⁰⁰ the INS combined that authorization with IRCA’s expeditious deportation provision to conclude that it could detain “any alien amenable to proceedings under any provision of the law.”¹⁰¹ That detainer practice has only increased in the quarter-century since.

93. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 501, 100 Stat. 3359, 3443.

94. See *id.* § 702.

95. See *id.*

96. See *id.*

97. See *id.* § 701 (amending INA § 242). This provision was also the basis on which INS created the Alien Criminal Apprehension Program (ACAP). American Immigration Council, *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, IMMIGRATIONPOLICY.ORG (Aug. 1, 2013), <http://www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails>. Though the ACAP was part of the INS’s then-new strategy for identifying, apprehending, and deporting noncitizens convicted of any crime, it had a particular focus on drug offenses. U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS’ ENFORCEMENT ACTIVITIES 13 (1987).

98. See Lasch, *Enforcing the Limits*, *supra* note 87, at 183.

99. *Id.* at 184.

100. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207–47, 3207–48, (amending INA § 287, 8 U.S.C. § 1357 (1988)).

101. Lasch, *Enforcing the Limits*, *supra* note 87, at 184 (quoting 8 C.F.R. § 242.2(a)(2) (1987)).

The same day that he signed the ADAA of 1986, President Reagan signed the Refugee Assistance Extension Act.¹⁰² Apparently discontented with the ten-day old ADAA's requirement that the Justice Department reimburse states for the cost of imprisoning only those Cubans convicted of a felony,¹⁰³ Congress mandated through the Refugee Act that the DOJ pay states and counties for confining any Cuban paroled into the United States in 1980 and convicted of any crime.¹⁰⁴ Lastly, Congress passed and the president signed an appropriations bill that tucked immigration law enforcement funding between money for the Drug Enforcement Administration and federal prisons, and specifically included support for INS purchases of police vehicles and aircrafts.¹⁰⁵

Two winters later, in November 1988, Congress, now paired with President George H.W. Bush, returned to its dual-pronged legislating on drugs and immigration in the ADAA of 1988. This act boosted the federal government's fledgling drug war in multiple ways.¹⁰⁶ To combat police officials' hesitation to join the federal government's antidrug efforts, the federal government had launched forfeiture programs in 1970 that allowed it to seize assets related to drug activity and, as of 1984, keep part of the proceeds of drug investigations.¹⁰⁷ This converted police from uninterested in pursuing drug activity to having "a pecuniary interest not only in the forfeited property, but in the profitability of the drug market itself."¹⁰⁸ The ADAA of 1988 expanded the forfeiture program to include having proceeds pay for an array of drug enforcement activities and tools, including INS vehicles and aircraft, and federal prisons.¹⁰⁹ It separately guaranteed \$200 million in funding for federal prison construction in FY 1989 alone to meet the drug war's growing demand for prison space.¹¹⁰

As with the ADAA of 1986, the 1988 iteration not only increased the criminal sanctions and enforcement of the war on drugs but also targeted immigration

102. See Refugee Assistance Extension Act of 1986, Pub. L. No. 99-605, 100 Stat. 3449.

103. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 501, 100 Stat. 3359.

104. Refugee Assistance Extension Act of 1986 § 13.

105. See Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341, 3341-049.

106. See DUNN, *supra* note 77, at 53.

107. See ALEXANDER, *supra* note 76, at 77. Katherine Beckett explains that as a result of the Comprehensive Crime Control Act of 1984, "local law enforcement agencies were entitled to deposit up to 95% of the value of the profits and proceeds seized in their own discretionary funds." KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 94 (1997).

108. ALEXANDER, *supra* note 76, at 77; see also Eric L. Jensen & Jurg Gerber, *The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections*, 42 CRIM. & DELINQ. 421, 425 (1996).

109. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §6072, 102 Stat. 4181, 4320-23 (amending 28 U.S.C. § 524(c) (1988)).

110. *Id.* § 6157.

law enforcement challenges, with a special focus on drug activity. Three provisions located within the act's subsection on "state and local narcotics control and justice assistance improvements," for example, promoted interagency cooperative investigations of noncitizen involvement in drug activity. The act funded INS agents' involvement in the Organized Crime Drug Enforcement Task Force "exclusively to assist [f]ederal and local law enforcement agencies in combating illegal alien involvement in drug trafficking and crimes of violence."¹¹¹ It also granted the task force's director the power to dispense immigration benefits, including waivers of deportation or inadmissibility, to individuals "whose presence in the United States is essential to the investigation and prosecution of criminal aliens involved in drug trafficking and crimes of violence."¹¹² Another section created and funded a pilot project within the INS's Investigative Division to coordinate communications between the INS and state and local law enforcement agencies "concerning aliens who have been arrested or convicted for, or are the subject of criminal investigation relating to, a violation of any law relating to controlled substances."¹¹³ Lastly, a provision contained under a separate subtitle required the INS to work with the State Department and Customs Service to create a machine-readable travel document linked to shared data about "narcotics traffickers, terrorists, convicted criminals, fugitives, and others" tracked by the three agencies.¹¹⁴

No part of the ADAA's many sections, however, more significantly affected the course immigration law, including detention, would take in the late twentieth century as did its aggravated felonies provisions. Though it has now come to emblemize modern immigration law's severity, the "aggravated felony" concept did not exist in immigration law before the ADAA of 1988. That initial definition included three offenses: murder, illicit trafficking in firearms, and drug trafficking.¹¹⁵ Congress, it seemed, viewed these crimes as, if not analogous, at least worthy of mention in the same breath. To encourage cooperation focused on this newly conceptualized group, Congress required that the attorney general assign INS officers around-the-clock to help federal, state, and local authorities identify whether individuals arrested for aggravated felonies are noncitizens; train INS officers throughout the country to assist local law enforcement agents, prison officials, and courts with identifying noncitizens

111. *Id.* § 6151.

112. *Id.*

113. *Id.*; *see also id.* § 7350 (establishing a similar pilot program that targets only nonaggravated felony controlled substances offenses).

114. *Id.* § 4604. Another provision authorized funding for the creation and maintenance of an INS Drug Education Officers Program, "an effort to feature the work of INS drug detection units to the public." *Id.* § 6162.

115. *Id.* § 7342 (amending INA § 101(a), 8 U.S.C. § 1101(a) (1988)).

charged with an aggravated felony; and devise a computerized tracking system of deported individuals convicted of an aggravated felony.¹¹⁶ At the same time, it decreed that unauthorized entry into the United States by a person deported after having been convicted of an aggravated felony is criminally punishable by up to fifteen years imprisonment,¹¹⁷ authorized criminal imprisonment for anyone caught helping someone convicted of an aggravated felony to enter the United States without the government's permission,¹¹⁸ and ordered that the Justice Department set up deportation proceedings at federal, state, and local correctional facilities especially for individuals convicted of an aggravated felony.¹¹⁹ Most relevantly, it required that the INS take custody of any noncitizen convicted of an aggravated felony immediately upon completion of the criminal sentence, thereby mandating an entirely new class of immigration detention.¹²⁰ This last provision marked the beginning of the mandatory detention authorization that remains a central feature of immigration law.

Combined, these provisions streamlined the link between the criminal and immigration law enforcement systems. Entry into the criminal justice apparatus for a variety of conduct but especially drug activity, the INA now instructed, ought to result in entry into an immigration law regime now equipped with detainers and detention. As if intending to announce this relationship with the burgeoning campaign against drug activity, Congress placed all but one of these provisions in the same section within the ADAA as an expansion of the death penalty for drug-related offenses and increased authorization and funding for the FBI, Coast Guard, and correctional agencies engaged in the drug war.¹²¹ Its title, "Death Penalty and Other Criminal and Law Enforcement Matters," suggests its content—a series of provisions related largely, if not exclusively, to penal affairs. Indeed, some members of Congress voiced similar concerns during floor debates leading to the ADAA of 1988's passage. New York's Senator Alfonse D'Amato, for example, described aggravated felons as "a particularly dangerous class" and credited prosecutors with helping craft these provisions "to put aggravated alien felons in *detention* immediately after they serve their criminal sentence."¹²² Im-

116. *Id.* § 7343 (amending INA § 242(a)).

117. *Id.* § 7345 (amending INA § 276).

118. *Id.* § 7346 (amending INA § 277).

119. *Id.* § 7347 (amended to add INA § 242A, recodified at INA § 238).

120. *Id.* § 7343 (amending INA § 242(a)).

121. *See id.* § 7000. The one provision discussed that is not included in this section—that related to machine-readable travel documents—falls within "Title IV—International Narcotics Control." *See id.* §§ 4001, 4604.

122. 134 CONG. REC. S17, 301-01, (daily ed. Oct. 21, 1988) (statement of Sen. Alfonse D'Amato) (emphasis added), 1998 WL 178508, at *38.

migration imprisonment became an integral part of the punitive consequences of the targeted drug activity.

Evidently not content with the growing nexus between immigration and criminal policing, as well as the growing use of imprisonment in enforcing immigration law, in 1990 Congress amplified the INS's power to investigate criminal activity and detain suspects. First, a minor public law, the Crime Control Act of 1990, funneled an additional \$25 million to the INS for "criminal investigations and the expeditious deportation of criminal aliens from detention."¹²³ Then, the same day, President George H.W. Bush signed a much more impactful bill into law, the IMMACT 90. This act, the president explained, "meets several objectives of my Administration's war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country."¹²⁴ Such people, he added, "jeopardize the safety and well-being of every American resident."¹²⁵ And, he went on, the act improves the federal government's "ability to secure the U.S. border—the front lines of the war on drugs"¹²⁶ As with the earlier public laws, the 1990 act targeted drugs and immigration through confinement. For one, it smoothed the government's ability to move a person from penal custody into immigration custody by requiring that the states provide the INS with court records of noncitizens convicted of drug offenses.¹²⁷ At the same time, it added to the list of crimes that constitute an aggravated felony (and therefore are subject to mandatory immigration detention) a broader reference to drug-related crimes than previously existed, as well as other offenses.¹²⁸ The act treated immigration officers like more traditional law enforcement officers by expanding their immigration warrantless arrest powers and clearly authorizing them to carry firearms.¹²⁹ Soon

123. Crime Control Act of 1990, Pub. L. No. 101-647, §701(7)(B), 104 Stat. 4789, 4825.

124. George H. W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1OsUYZ1gw>.

125. *Id.*

126. *Id.*

127. Immigration Act of 1990, Pub. L. No. 101-649, § 507, 104 Stat. 4978, 5050–51.

128. *Id.* § 501. Whereas the aggravated felony definition enacted in 1988 referenced "any drug trafficking crime as defined in section 924(c)(2) of title 18," Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70, the 1990 amendments broadened the reference by leaving the 1988 definition intact and adding a reference to "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)." Immigration Act of 1990 § 501. This is the definition that remains a part of immigration law. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a) (1988).

129. Immigration Act of 1990 § 503.

thereafter, the White House, then under President Bush's command, designated the Border Patrol as one of the country's primary drug interdiction agencies.¹³⁰

After more than a decade of intermingling criminal and immigration law enforcement through a drug-activity emphasis, by the mid-1990s Congress was ready to branch far beyond that concern. In the Violent Crime Control and Law Enforcement Act of 1994, for example, Congress expanded the use of immigration imprisonment but, unlike in earlier statutory enactments, did not explicitly link imprisonment to drug activity. Rather it took a broader approach aimed at the "undocumented criminal alien," defined as a person convicted of a felony and sentenced to a term of imprisonment and lacking authorization to be in the United States.¹³¹ The act authorized the construction of two INS detention centers specifically "to detain criminal aliens."¹³² It also authorized federal reimbursement of state and local expenses incurred incarcerating so-called undocumented criminal aliens.¹³³ The program authorized by this provision, known as the State Criminal Alien Assistance Program, distributed approximately \$4.1 billion between 1997 and 2005¹³⁴ and now costs the federal government between \$300 and \$400 million per year.¹³⁵ In the alternative, it authorized the attorney general to take custody of the individual "and incarcerate the alien."¹³⁶

Together, the various public laws enacted between 1986 and 1994 conditioned policymakers, INS officials, and the public to the use of detention as a tool of immigration law enforcement. By the mid-1990s prisons had become a fact of life and a go-to tactic for legislators engaged in drug war legislating, and immigrants were not exempted. Detention of immigrants had become commonplace in the penal and immigration contexts.

It was simply a matter of time before the vast increase in the penal prison population experienced in the 1980s came to immigration. Fifteen years after the INS subjected Haitians to mandatory detention¹³⁷ and ten years after the ADAA of 1986 began entangling immigration detention and the drug war, the well-

130. U.S. GEN. ACCOUNTING OFFICE, BORDER PATROL: SOUTHWEST BORDER ENFORCEMENT AFFECTED BY MISSION EXPANSION AND BUDGET 1 (1991).

131. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1796, 1823.

132. *Id.* § 130007.

133. *Id.* § 20301.

134. KARMA ESTER, CONG. RES. SERV., IMMIGRATION: FREQUENTLY ASKED QUESTIONS ON THE STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (SCAAP) CRS-3 (Jan. 25, 2007).

135. U.S. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 36 (2011) (providing data for fiscal years 2005–2009).

136. Violent Crime Control and Law Enforcement Act § 20301.

137. See Silverman, *supra* note 78, at 10.

known duo of 1996 laws, AEDPA and IIRIRA, changed the face of immigration law. Enacted just five months apart, they marked a “seismic change” in immigration detention¹³⁸—one from which the federal government has not turned. For its part, AEDPA vastly expanded the use of mandatory detention. No longer would the INS be required to hold only individuals convicted of an aggravated felony as required by the ADAA of 1988;¹³⁹ now noncitizens convicted of any controlled substances offense, those who used drugs after entering the United States, and others would also be subject to detention without review by an immigration judge.¹⁴⁰ Meanwhile, the act authorized state and local law enforcement officers to detain individuals thought to be in the country without authorization and who had previously been convicted of a felony.¹⁴¹ Most vividly, AEDPA dramatically expanded the aggravated felony definition to include a host of crimes, all of which now suddenly fell within the INA’s mandatory detention provision—everything from gambling offenses to altering a passport.¹⁴²

A few months later, IIRIRA “accomplished the improbable feat of expanding the scope of criminal detention mandates even beyond the AEDPA requirements.”¹⁴³ Two provisions created or facilitated programs that are now at the center of immigration law enforcement, both of which have important incidental effects on detention: the 287(g) and Secure Communities programs. IIRIRA’s § 133 added § 287(g) to the INA authorizing the INS to essentially deputize local law enforcement officers “in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers).”¹⁴⁴ Used infrequently for the first decade after enactment, agreements pursuant to § 287(g) became commonplace under the Obama Administration, significantly affecting the detention population.¹⁴⁵ In fiscal year 2009, for example, 12 percent (44,692 individuals) of people de-

138. Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209, 209 (1997).

139. Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (1988) (amending INA § 242(a)).

140. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §440(a), 110 Stat. 1214, 1276-77 (1996) (amending INA § 242(a)(2)). Others subject to mandatory detention as a result of this amendment included noncitizens convicted of a firearms offense, espionage, sabotage, treason and sedition but only if “a term of imprisonment of five or more years may be imposed,” the selective service registration requirement, and some crimes involving moral turpitude. *Id.*

141. *Id.* § 439(a).

142. *Id.* § 440(e).

143. Taylor, *supra* note 138, at 216.

144. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-563 (1996).

145. See MEISSNER ET AL., *supra* note 15, at 104, 106 fig.21.

tained by ICE were identified through 287(g) programs.¹⁴⁶ Building off earlier enactments, IIRIRA expanded the INS's computerized database, known as the Automated Biometric Identification System (IDENT), specifically "to apply to illegal or criminal aliens apprehended nationwide."¹⁴⁷ Today, the IDENT database contains more than 148 million fingerprint records¹⁴⁸ and, along with an FBI database, is one of two core repositories that ICE's Secure Communities program taps to identify potentially removable individuals.¹⁴⁹ Using records in the IDENT database, in fiscal year 2009 alone 20,824 people were taken into ICE custody through Secure Communities.¹⁵⁰

At the same time, IIRIRA contained another two provisions that radically altered the evolution of immigration detention and provided the statutory basis for two characteristics of today's immigration detention regime: privatization and scale. Through IIRIRA, Congress required the INS—now DHS—to consider leasing or purchasing "existing prison, jail, detention center, or other comparable facilit[ies] suitable for such use."¹⁵¹ Aside from strongly suggesting that prisons, jails, and so-called civil detention centers were equally "suitable" for holding immigration detainees, this provision facilitated the growing reliance on private prison corporations to meet the bed space needs of the INS and, later, DHS. More significantly, however, IIRIRA rendered innumerable more people subject to detention. The public law added § 236(c) to the INA requiring the arrest and detention of individuals believed to have violated a broad range of immigration law provisions, including most of the crime-based grounds of removal.¹⁵² The mandatory detention provision has undeniably become the central reason for today's enormous immigration detention population. Indeed, Margaret Taylor's premonition that AEDPA and IIRIRA would "exacerbate the very serious problems that currently plague immigration deten-

146. SCHRIRO, *supra* note 5, at 12.

147. IIRIRA § 112.

148. MEISSNER ET AL., *supra* note 15, at 67.

149. Model Memorandum of Agreement Between U.S. Dep't of Homeland Sec. Immigration & Customs Enforcement and Local Law Enforcement Agencies 1–2.

150. U.S. Immigr. and Customs Enforcement, U.S. Dep't of Homeland Sec., *Secure Communities: IDENT/LAFIS Interoperability Monthly Statistics Through October 31, 2009*, (Dec. 4, 2009), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2009.pdf.

Meanwhile, the Department of Homeland Security (DHS) flagged approximately 1.1 million potentially removable individuals between fiscal year 2009 and the first nine months of fiscal year 2012; of these 1.1 million people, 220,322 were subsequently removed. MARC R. ROSENBLUM ET AL., INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 26 (2012).

151. IIRIRA § 305 (codified at INA § 241(g)(2)).

152. *Id.*

tion [and] choke off the development of alternatives to confinement” captures very well what has happened since then.¹⁵³

These policy shifts and statutory enactments explain how detention became a core feature of immigration law enforcement. They do not, however, explain why this occurred so powerfully from the early 1980s to the mid-1990s. To understand why, the next Subpart posits, requires placing immigration detention in the context of norms that first swept criminal law before appearing in immigration law.

B. Penal Norms Become Immigration Norms

Detention has long been part of the immigration law enforcement arsenal, but before the 1980s it was never a central feature of immigration policing.¹⁵⁴ Instead, it was always the exception.¹⁵⁵ Indeed, from 1954 until the early 1980s the INS tended to release individuals suspected of violating immigration laws.¹⁵⁶ Before the 1980s the government had never detained every member of a particular group thought to be present in the United States in contravention of civil immigration law, as it did with Haitians. Nor had it ever before used its civil detention and penal detention authority in such an intertwined fashion to target the same perceived social ill—in this case, drugs.

This Subpart explains why that minimal reliance on detention changed so suddenly and drastically in the 1980s and 1990s. This Subpart contends that immigration detention was an outgrowth of the increasingly harsh penal norms gaining popularity during that period. In particular, mandatory minimum sentences and “truth in sentencing” requirements swept the nation’s criminal codes, increasing penalties, restricting judicial discretion regarding sentencing decisions, and ensuring the public that the sentence served would align with the sentence meted out.¹⁵⁷ Before the 1980s every state relied on indeterminate sentences that

153. Taylor, *supra* note 138, at 223.

154. See Miller, *supra* note 80, at 214; see also ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, 75–76 (2003) (discussing the Angel Island facility that mostly detained prospective Chinese immigrants); Silverman, *supra* note 78, at 4 (describing detention centers on Ellis Island and Angel Island in the San Francisco Bay).

155. See Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 640 (2003).

156. See DOW, *supra* note 81, at 7; DUNN, *supra* note 77, at 46.

157. See Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621, 1653 n.235 (2003) (describing the call for truth in sentencing as characteristic of sentencing reform during the 1970s and 1980s); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1090–91 (2002) [hereinafter Demleitner, *Immigration Threats*] (describing limits on judicial discretion and mandatory minimums).

left much discretionary authority in parole boards or other agencies.¹⁵⁸ Beginning in the 1970s, however, states commonly adopted mandatory minimum sentences and more severe penalties.¹⁵⁹ This was especially true for drugs and weapons offenses.¹⁶⁰ Before this, punishments for drug-related activity, even minor crimes such as simple possession, were historically unprecedented,¹⁶¹ in the words of William Stuntz, they became “draconian” in the 1970s, 1980s, and 1990s.¹⁶² The ADAA of 1986 and 1988, as well as other federal crime legislation of the period, included mandatory minimum sentences for drug crimes. States responded with their own harsh measures.¹⁶³

Meanwhile, there developed a perception that judges’ sentences were not sufficiently harsh and were inexplicably divergent.¹⁶⁴ Some commentators blamed them for their “rudderless” sentencing and others blamed the sentencing regime, while legislators began to portray judges as “betrayers of the common good.”¹⁶⁵ Congress responded to the perceived reluctance of judges to impose suitable criminal punishments by establishing the U.S. Sentencing Commission in 1984 and tasking it with developing sentencing guidelines.¹⁶⁶ The idea was that guidelines would promote sentence uniformity—that is, the notion that conviction for a particular crime would result in a specified punishment.¹⁶⁷ Together, mandatory minimums and sentencing guidelines “were passed with an eye toward limiting judicial discretion.”¹⁶⁸ Lastly, beginning with Washington in 1984, states began enacting truth-in-sentencing statutes.¹⁶⁹ Though these statutes took different forms, they were frequently intended to ensure “close correspondence

158. See 24 C.J.S. Criminal Law § 2006 (2013); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 60 (2001).

159. See GARLAND, *supra* note 158, at 61; Demleitner, *Immigration Threats*, *supra* note 157, at 1090–91.

160. See Demleitner, *Immigration Threats*, *supra* note 157, at 1090–91.

161. See ALEXANDER, *supra* note 76, at 53.

162. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 272 (2011).

163. See ALEXANDER, *supra* note 76, at 86.

164. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 7 (2007); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1687–89 (1992).

165. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 113 (2007); Freed, *supra* note 164, at 1689.

166. DAVIS, *supra* note 164, at 103.

167. See *id.*; Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment With Targeted Nonprison Sentences and Collateral Sanctions*, 58 *STAN. L. REV.* 339, 353 (2005); see also Freed, *supra* note 164, at 1689 (“The theory was that, if judges adhered to rational guidelines for formulating permissible sentences and other participants in the process did their jobs properly, unwarranted disparity would surely decrease.”).

168. DAVIS, *supra* note 164, at 56.

169. See PAULA M. DITTON & DORIS JAMES WILSON, *BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS* 2–3 (1999).

between the pronounced sentence and time served¹⁷⁰ and, relatedly, limit the possibility of early release from prison.¹⁷¹ Truth-in-sentencing schemes became slightly more widespread in the decade after Washington's enactment and then expanded significantly in 1994 when Congress enacted financial incentives in the form of grants for prison construction for states that required individuals convicted of certain violent crimes or serious drug offenses to serve at least 85 percent of their sentences.¹⁷² Combined, these trends did much to increase the size of the criminal prison population.¹⁷³

Just as importantly as their impact on prison populations, the limits on judicial discretion and augmented penalties increased prosecutorial power.¹⁷⁴ Clearly prosecutors have "broad discretion" about when to initiate a criminal action and for what charges.¹⁷⁵ Balanced by discretionary authority granted to other criminal justice system actors, prosecutorial discretion is a necessary ingredient of just proceedings.¹⁷⁶ The government's preoccupation with crime in the 1980s and 1990s, however, converted the prosecutor into "a dominant force" in legal proceedings.¹⁷⁷ Rather than judges or juries possessing discretionary authority about punishment, prosecutors were handed the reins as they "gained power as the [actor] capable of holding both criminals and judges in check."¹⁷⁸ According to Stuntz, severe punishment possibilities gave prosecutors enormous leverage over defendants, resulting in "more easily induced guilty pleas and harsher sentences," including mandatory sentences, both of which were "crucial to the massive increase in America's prison population."¹⁷⁹ At the same time, jury trial rates

170. Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 685 (1993). Knapp explains that other common usages of the phrase "truth in sentencing" "refer[] to judicial control of sentencing as opposed to back-end control . . . adherence to articulated standards . . . predictability of time served." *Id.*; see also DITTON & WILSON, *supra* note 169, at 1.

171. DITTON & WILSON, *supra* note 169, at 2.

172. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20101(b), 20102(a), 108 Stat. 1796, 1815-16 (1994); see DITTON & WILSON, *supra* note 169, at 3.

173. See WILLIAM J. SABOL ET AL., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 9-10 (2002).

174. See DAVIS, *supra* note 164, at 99 (noting that 1980s penal trends associated with the war on drugs "resulted in a tremendous expansion of the power and discretion of federal prosecutors").

175. *Wayte v. United States*, 470 U.S. 598, 607 (1985); see SIMON, *supra* note 165, at 39.

176. See DAVIS, *supra* note 164, at 6, 12.

177. SIMON, *supra* note 165, at 41; see *id.* at 36-37, 41-42, 71; see DAVIS, *supra* note 164, at 5.

178. SIMON, *supra* note 165, at 130; see STUNTZ, *supra* note 162, at 286.

179. STUNTZ, *supra* note 162, at 259, 263; see also DAVIS, *supra* note 164, at 57 ("In cases involving mandatory minimum offenses, the stakes are often too high for a defendant to exercise his constitutional right to trial, regardless of the weakness of the prosecutor's plea offer."). Prosecutors frequently attempt to induce guilty pleas by inflating the number or severity of charges. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54

plummeted, meaning juries affected outcomes much less frequently, and substantive criminal law became more rigid, leaving jurors with less discretion in those few instances in which they continue to be involved.¹⁸⁰ The result, suggested Stuntz, is “excessive prosecutorial power” that “is unchecked by law and, given its invisibility, barely checked by politics.”¹⁸¹

Soon these trends appeared, slightly refracted, in immigration law. Detention became mandatory for an ever-growing number of individuals. At the same time, discretion long held by immigration judges and federal courts to avoid removal and, incidentally, detention, dwindled, all in the name of assuring the public that the government could and would quash the threat posed by immigrant criminality.¹⁸² Nora Demleitner writes that the 1996 immigration law amendments contained in AEDPA and IIRIRA “replicate[d]” the transition that began taking hold in criminal law in the late 1970s “by requiring deportation following a specific conviction, independent of the offender’s background.”¹⁸³

Though the 1996 enactments certainly accelerated this process, the legislative record illustrates that this copying began much sooner. The myriad immigration law enactments that dot the 1980s through the middle of the 1990s began the process of “[r]educing an individual merely to his criminal record.”¹⁸⁴ The 1981 adoption of detention as the federal government’s official policy for dealing with unauthorized Haitian and Cuban entrants launched the era of mandatory immigration detention.¹⁸⁵ It was no coincidence that immigration imprisonment gained popularity at roughly the same time that penal incarceration was growing exponentially. Haitians and Cubans, the two groups against whom mandatory detention was initiated, were linked in the public imagination to

AM. J. COMP. L. 717, 728 (2006); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1965 (1992).

180. See STUNTZ, *supra* note 162, at 32.

181. *Id.* at 295.

182. See Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 306 (2003); cf. Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migration*, 61 S.M.U. L. REV. 171, 173 (2008) (“[T]he new detention-and-removal-centered approach to the dispensation of non-U.S. citizens with past criminal convictions (so-called ‘criminal aliens’) directly reflected a transformation within the criminal justice system known as ‘penal severity,’ resulting in a convergence of immigration control and crime control policies.”).

183. Demleitner, *Immigration Threats*, *supra* note 157, at 1091.

184. *Id.*; see Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 604 (2010).

185. See *Louis v. Nelson*, 544 F. Supp. 973, 980 n.19 (S.D. Fla. 1982) (describing the “interdiction and detention” policy adopted by the Reagan Administration in 1981 in response to the “Cuban/Haitian Problem”).

crime and illegality.¹⁸⁶ No more vivid example of this popular association exists than the 1983 Hollywood blockbuster “Scarface” starring Al Pacino as a Cuban “marielito” who becomes a top drug trafficker with an affinity for violence.¹⁸⁷ This perception turned into a concern “that immigrant criminal involvement was rampant and posed a significant threat to the public’s well-being,” a threat represented especially poignantly by drug activity.¹⁸⁸

Within a few years, Congress responded by codifying mandatory detention authorization in the INA, and the INS responded by firmly embedding it into its law enforcement practice. No longer would immigration judges have the power to release certain individuals on a case-by-case basis while immigration proceedings were pending. Instead, they would be required to make categorical assessments: If the individual met criteria specified by Congress, she was to be sent to a detention center without further inquiry into the person’s life history. The ADAA of 1988’s requirement that the INS detain anyone allegedly convicted of an aggravated felony, which at that time included only drug trafficking and two other offenses, tied together immigration detention and criminal convictions to an extent that has not been unraveled since.¹⁸⁹ Congress’s subsequent decisions to expand the definition of “aggravated felony” to include more than two dozen types of crimes—along with its decision to impose mandatory detention of people convicted of offenses that are not aggravated felonies as well as some individu-

186. See Miller, *supra* note 80, at 232 (describing the perception that Haitians were associated with African Americans and their allegedly rampant drug activity); Silverman, *supra* note 78, at 9 (explaining that the Cuban Mariel exodus “ignited a panic among the American public that the migrants were criminals, ideologically left, racially different and diseased”).

187. See STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 28–29 (2003); see also Ediberto Román, *Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER, RACE & JUST. 37, 42–43 (2000) (describing the movie’s violent representation of Cuban immigrants). See generally Ramiro Martinez, Jr. et al., *Revisiting the Scarface Legacy: The Victim/Offender Relationship and Mariel Homicides in Miami*, in RACE, CRIME, AND JUSTICE: A READER 263 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (describing the public perception of criminality among Mariel refugees as a “myth”).

188. Jeff Yates et al., *A War on Drugs or a War on Immigrants?: Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 876 (2005).

189. See Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470–71 (1988) (requiring the attorney general to take custody of “any alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction”). Both the INS and the DHS have broad discretion to hold someone pursuant to the mandatory detention provision. Once the agencies do so, detainees interested in challenging detention “face an impossibly high threshold to do so: they must prove that DHS is ‘substantially unlikely’ to prevail, a standard that compounds what is already an overly complex inquiry in a removal case.” Heeren, *supra* note 184, at 630.

als who have been accused of merely committing a crime—served only to drastically increase the number of people affected.¹⁹⁰

While the scope of mandatory detention was expanding, Congress was also busy limiting the possibilities for leniency available to individuals convicted of crime. Unlike in the criminal context, where harsher sentences could mean more time in prison, in the immigration context harshness was measured more starkly—by increasing the likelihood that deportation would result and, indirectly, that detention would be used while deportation proceedings were pending. The Immigration Act of 1990, for example, repealed a long-standing power to prevent deportation, the Judicial Recommendation Against Deportation (JRAD).¹⁹¹ Despite its use of the word “recommendation,” the JRAD effectively operated as a mandate that a sentencing judge could issue to bar the INS from deporting the defendant on the basis of that conviction.¹⁹² This powerful device was deeply entrenched in immigration law. As the *Padilla* Court recounted, the JRAD was a “critically important procedural protection to minimize the risk of unjust deportation” that was part of immigration law from 1917 to 1990.¹⁹³ Indeed, failure to query whether JRAD protection might be available could subject a defense attorney to a Sixth Amendment ineffective assistance claim.¹⁹⁴ Because of JRAD’s availability, the *Padilla* Court explained, “from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, [sentencing] judges retained discretion to ameliorate unjust results on a case-by-case basis.”¹⁹⁵ After the 1990 Act, however, judges no longer had that power. Instead, they were granted the power to order deportation rather than prevent it.

In addition to limiting the power of sentencing judges to bar deportation, Congress also began a piecemeal process of stripping immigration judges of their authority to waive deportation in compelling circumstances. Though that authority took slightly different forms over the years, INA § 212(c) and its predecessor statute gave immigration judges broad power to consider a person’s life

190. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3009–45, (adding INA § 236(c)). Section 236(c), as currently written, subjects people convicted of all manner of crimes to mandatory detention. By referencing INA § 212, it also requires detention of certain individuals thought to have committed a crime involving moral turpitude or a controlled substances offense.

191. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978 (1990).

192. See *Padilla v. Kentucky*, 559 U.S. 356, 361–62 (2010).

193. *Id.*

194. See *Janvier v. United States*, 793 F.2d 449, 455 (2d Cir. 1986); see also César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 879–82 (2013) (collecting cases).

195. *Padilla*, 559 U.S. at 362.

history as a basis to favorably exercise the attorney general's discretionary authority to not order deportation or exclusion even though the individual had been found to have committed a crime that rendered her in violation of immigration law.¹⁹⁶ Indeed, in 1983 the Eleventh Circuit suggested that § 212(c) provided an immigration judge some ability to override the INS's charging decision.¹⁹⁷ In *Marti-Xiques v. INS*, the court held that an individual was eligible for § 212(c) relief even though the INS charged him with a ground of deportation that precluded eligibility.¹⁹⁸

Some form of this extensive discretionary authority existed since 1917, the same year JRADs were introduced into immigration law.¹⁹⁹ Though an accurate count of how many people benefited from § 212(c) relief does not exist, the Court noted that more than 10,000 individuals were granted § 212(c) relief applications between 1989 and 1995 alone, suggesting that hundreds of thousands of people may have benefited during its life.²⁰⁰ That history began to change in 1990.²⁰¹ Eligibility was further restricted in 1991.²⁰² Five years later Congress restricted § 212(c) eligibility even more, then repealed it altogether a few months later.²⁰³

Limiting judicial and administrative discretion through repeal of JRADs and § 212(c) relief indirectly but significantly affected detention. The existence of both discretionary tools meant that many individuals convicted of a crime

196. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES § 10:25 (1984); Lory D. Rosenberg & Denyse Sabagh, *A Practitioner's Guide to INA § 212(c)*, 93-04 Immigr. Briefings 1, 1 (1993).

197. See Rosenberg & Sabagh, *supra* note 196, at 1 ("In failing to charge Mr. Hernandez-Casillas with a ground of deportability that has a comparable or analogous exclusion ground, the INS sought to exercise an unauthorized form of 'discretion' amounting to a form of selective prosecution. It is for an IJ or the BIA, not the INS, to determine whether an alien's conduct merits forgiveness under INA §212(c).").

198. 713 F.2d 1511, 1515-16 (11th Cir. 1983), *vacated on grant of reh'g*, 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984). According to the court, the important detail was that the INS used a less serious crime as the basis for deportation proceedings while ignoring a more serious crime that would have allowed Marti-Xiques to request § 212(c) relief. *Id.* Since, in the court's view, this conflicted with Congress's intent in enacting § 212(c), it held that an immigration judge had the power to waive deportation. *Id.*

199. See *INS v. St. Cyr*, 533 U.S. 289, 294 (2001).

200. *Id.* at 296.

201. The 1990 act prohibited immigration judges from granting § 212(c) relief to individuals who had been convicted of an aggravated felony and served a term of five years imprisonment or more. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (1990); see *St. Cyr*, 533 U.S. at 294-98 (explaining the historical evolution of § 212(c) relief).

202. See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 307(b), 105 Stat. 1733, 1754 (1991).

203. See *St. Cyr*, 533 U.S. at 297 (discussing the limitations imposed by AEDPA § 440 and repeal by IIRIRA § 304(b)).

could avoid deportation or exclusion. Their repeal, therefore, made it more likely these individuals would face removal from the country. Meanwhile, throughout the 1980s and 1990s the INS's detention authorization was increasingly tied to deportability based on criminal activity. In statute after statute enacted during this period, Congress amplified immigration officials' power to detain people facing deportation as a result of a growing list of convictions. In effect, Congress made deportation for an ever-expanding list of crimes more likely by limiting judicial and administration discretion while simultaneously making detention more likely by linking it to removability for having been convicted of any of a growing list of crimes.

Combined, the increased reliance on detention and decreased availability of discretionary tools that sentencing judges and immigration judges had to prevent removal altered the state of immigration law. The *Padilla* Court surmised as much when considering the impact of Congress removing JRAD and § 212(c) relief. "These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction," the Court explained.²⁰⁴ Though the Court did not have occasion to contemplate the increased reliance on detention in enforcing immigration law, surely it would agree that the heightened possibility of spending time in an immigration detention center increases the stakes as well.

C. Punishing Immigrants

If the Supreme Court is to follow its own admonition that we consider the legislative intent of a statutory provision authorizing confinement when distinguishing regulatory from punitive detention, then surely immigration detention, rooted as it is in the same fears and norms that spurred the war on drugs, is more properly characterized as punitive. The federal government's fifteen-year history of intermingling immigration detention and crime-fighting legislation strongly implies that Congress and, at times, the president viewed this as a criminal law enforcement tool.

In light of the Court's admonition to consider the legislature's "express[] or implied[] preference for one label or the other," Congress's decision to place the ADAA of 1988's expansion of the aggravated felony category (which leads to immigration detention) under the banner of death penalty and "other" criminal law enforcement matters strongly implies that Congress viewed the "aggravated felony" provision of immigration law as a criminal law enforcement

204. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

tool.²⁰⁵ Similarly, its decision to expand the INS's detention authority through one statute whose name explicitly targets drug activity, the ADAA of 1986, and another statute whose name targets terrorism and lists the death penalty—the most severe of criminal law punishments—in its title, the Anti-Terrorism and Effective Death Penalty Act, exhibits a remarkably clear labeling choice.²⁰⁶ So too does Congress's decision to increase the INS's detention capacity through a statute whose name shows nothing if not a desire to quash crime, the Violent Crime Control and Law Enforcement Act of 1994.²⁰⁷ The titles of these provisions alone strongly suggest a legislative intent to make immigration detention punitive in nature. Moreover, President Bush's description of the Immigration Act of 1990 as a core component of his administration's "war on drugs and violent crime" suggests that he too was comfortable discussing immigration legislation as a tool of criminal law enforcement.²⁰⁸

Relying on the definition of punishment provided by Hart and other legal philosophers further supports the conclusion that immigration detention is punishment. Three of Hart's requirements—that to be punishment, a consequence must be "intentionally administered" by people acting pursuant to "an authority constituted by a legal system" "for an offense against legal rules"—are obviously met by the imposition of immigration detention.²⁰⁹ It is, after all, a deliberate deprivation of liberty carried out by immigration officials operating under the authority of federal statutes that allow or require confinement upon violation of any of a number of immigration law provisions. Another of Hart's requirements—that punishment "involve pain or other consequences normally considered unpleasant"—is plainly present in immigration detention.²¹⁰ The Court's repeated description of imprisonment as "infamous"—far worse, in one instance, than losing the ability to pursue one's chosen occupation—surely signifies its unpleasant

205. See *Hudson v. United States*, 522 U.S. 93, 99 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)); Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7000, 102 Stat. 4181, 4387-95 (1988); see also *United States v. Reveles*, 660 F.3d 1138, 1140-41 (9th Cir. 2011) (relying on a statute's title, among other sources, to glean legislative intent); *Johnson v. Bredesen*, 624 F.3d 742, 752 (6th Cir. 2010); *Estate of Reiserer v. United States*, 229 F.R.D. 172, 178 (W.D. Wash. 2005).

206. See *supra* notes 87-91 (discussing immigration detainer provisions in the ADAA of 1986); *supra* notes 139-42 (discussing AEDPA provisions that amplified immigration detention authorization).

207. See *supra* notes 131-36 (discussing the Violent Crime Control and Law Enforcement Act of 1994's provision of additional detention centers).

208. See George H. W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1OsUYZ1gw>.

209. Hart, *supra* note 69, at 4.

210. *Id.*

quality.²¹¹ Former Attorney General William French Smith's statement that detention was necessary to discourage Haitians from coming to the United States implies the unsavory nature of detention.²¹² And, as Part III describes, immigration detention features many of penal incarceration's most unpleasant qualities, including the use of solitary confinement.²¹³ Lastly, many of the immigration detention statutes enacted during the early 1980s to the mid-1990s meet Hart's fifth requirement—that the consequence must be imposed on the offender “for his offence.”²¹⁴ In particular, the ADAA of 1986 launched an unabated trend to impose detention for conviction of a large number of crimes. That statute, for example, facilitated confinement of immigrants convicted of a felony,²¹⁵ while subsequent statutes required confinement of anyone convicted of an aggravated felony²¹⁶ or any controlled substances offense.²¹⁷

As a whole, the immigration detention statutes also show the expressive function of punishment that Hart overlooks. Imprisonment, writes the legal philosopher Joel Feinberg, not only expresses community disapproval of the conduct that resulted in detention—in this instance, violating some immigration law provision by committing an offense—but it also “bears the aspect of legitimized vengeance.”²¹⁸ Indeed, Justice Brandeis, writing for the Court in *United States v. Moreland*, explained that, “imprisonment in a penitentiary . . . now renders a crime infamous,” making it the chosen means by which to inflict “public disgrace.”²¹⁹ Throughout the 1980s and 1990s, Congress showed a repeated willingness to use federal prisons and other secure facilities to house people suspected of having violated immigration law.²²⁰ On occasion legislators explicitly vilified these individuals in public statements.²²¹ To casual observers, therefore, the people confined awaiting a decision on their ability to stay in the

211. See, e.g., *Hudson v. United States*, 522 U.S. 93, 104 (1997) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

212. See MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 7 (2004).

213. See *infra* notes 245–47 and accompanying text (describing the use of solitary confinement in immigration detention).

214. Hart, *supra* note 69, at 4.

215. Anti-Drug Abuse Act, Pub. L. No. 99-570, § 1601, 100 Stat. 3207, 3247 (1986).

216. Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (1988) (amending INA § 242(a)).

217. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (1996) (amending INA § 242(a)(2)).

218. Feinberg, *supra* note 70, at 403.

219. 258 U.S. 433, 447–48 (1922).

220. See *supra* notes 185–90.

221. 134 CONG. REC. S17301-01, (daily ed. Oct. 21, 1988) (statement of S. D'Amato).

United States were no different from those serving a sentence meted out upon conviction for a crime.²²²

III. IMMIGRATION IMPRISONMENT TODAY

The entangled legislative history of incarceration as a method of sanctioning criminal conduct and immigration law violations would eventually lead to two detention regimes that are worlds apart legally but which otherwise share much. Both are of gargantuan proportions that tower over similar policies by other nations, adopt a securitization regime, and occupy a central role in the panoply of policing tools. Perhaps of greatest significance to the individuals whose liberty is at stake, however, and despite the civil labeling of immigration detention, both create an unmistakable penal reality for the people confined. As far as immigration detainees are concerned, it would seem, Congress succeeded at using immigration detention as a method of punishing noncitizens.²²³

A. Conditions of Confinement

Today, immigration detention represents the single most common confinement that occurs in the United States. In fiscal year 2012, the Department of Homeland Security detained 477,523 individuals while removal proceedings were pending or as they waited for actual removal from the country.²²⁴ Though this is the single highest number of immigration detainees ever, recent years have seen similarly large numbers confined: 429,247 in FY 2011, 363,064 in FY 2010, and 383,524 in FY 2009.²²⁵ In 2008 ICE claimed a “record total of 378,582, representing a 22 percent increase from 2007.”²²⁶ That year, in turn, it reported detaining 311,169, a 21 percent rise from the previous year and itself a record at the time.²²⁷ These numbers mean that “ICE operates the largest detention and supervised release program in the country,” according to Schriro.²²⁸ To accomplish

222. See SCHRIRO, *supra* note 5, at 4; Schriro, *supra* note 6, at 1442.

223. Stephen Lee presents an interesting related phenomenon by which state criminal proceedings have assumed significant power to affect immigration law outcomes. See Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 555 (2013).

224. JOHN SIMANSKI & LESLEY M. SAPP, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 ANNUAL REPORT 5 (2013).

225. JOHN SIMANSKI & LESLEY M. SAPP, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 ANNUAL REPORT 5 table 4 (2012).

226. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008 ANNUAL REPORT 3 (2009).

227. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2007 ANNUAL REPORT 3 (2008).

228. SCHRIRO, *supra* note 5, at 2.

this, DHS relies on a network of 254 facilities, some of which house fewer than ten individuals on DHS's behalf while others report upward of 2,000 detainees.²²⁹

This "carceral archipelago of detention centers," as William Walters describes it,²³⁰ stands apart from the rest of the world's use of detention as a tool of immigration law enforcement. Many other countries detain noncitizens while deciding whether to allow them to enter or remain in the country. Italy, for example, operates a much-discussed detention center on the Mediterranean island of Lampedusa that has become the focal point of immigration detention operations in Europe, especially since North African nations began to experience increased political turbulence. For its part, Australia attempted to outsource its immigration detention to nearby nations in the hope of deterring potential migrants, a decision that some observers criticized and others applauded. Taking an approach that more readily resembles the United States' practice, the United Kingdom operates a series of facilities that detain only individuals awaiting a decision on their immigration status but also uses prisons that house penal detainees. Though these and other countries use detention as part of their immigration law enforcement operations, none does so on a scale that even approaches that of immigration imprisonment in the United States. Italy holds approximately 7,735 immigration detainees,²³¹ while Australia and the UK count approximately 5,485 and 25,940, respectively, according to the most recently available estimates for each of these countries.²³²

In addition to detaining many more people under immigration law authority, the United States relies heavily on detention facilities that resemble the nation's penal institutions.²³³ Both are secure environments in which guards monitor each resident's movements. Meals, personal and legal visits, access to

229. HUMAN RIGHTS FIRST, *JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW* iv (2011); see *May 2011 ADP by Detention Facility*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGR. & CUSTOMS ENFORCEMENT, (June 6, 2011), <http://www.ice.gov/doclib/foia/dfs/average-daily-pop-by-facility-may2011.pdf> (listing average daily population statistics for a handful of detention facilities). The United States' detention system comes at substantial financial expense: DHS spends roughly \$2 billion on prison beds alone each year. U.S. DEP'T OF HOMELAND SEC., CONGRESSIONAL BUDGET JUSTIFICATION: FY 2012, at 33 (2011).

230. William Walters, *Deportation, Expulsion, and the International Police of Aliens*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 69, 92 (Nicholas de Genova & Nathalie Peutz eds., 2010).

231. GLOBAL DETENTION PROJECT, *ITALY DETENTION PROFILE* 9 (Nov. 2012).

232. GLOBAL DETENTION PROJECT, *AUSTRALIA DETENTION PROFILE* 17 (July 2008); GLOBAL DETENTION PROJECT, *UNITED KINGDOM DETENTION PROFILE* 10 (June 2011).

233. For a detailed description of one individual's experience in detention as retold by his former attorney, see Heeren, *supra* note 184, at 613–18.

medical providers, and every other aspect of social life are regulated. According to Schriro's 2009 review of immigration detention,

With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely on the principles of command and control. Likewise, ICE adopted standards that are based on corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.²³⁴

Immigration detention centers, in effect, are built and managed on the premise that immigration detainees are just as dangerous as penal detainees.

Meanwhile, the most invasive features of penal imprisonment resonate through the immigration detention estate. Some individuals have been subjected to strip searches upon being taken into immigration custody pursuant to institutional policies requiring strip searches of all inmates.²³⁵ Most are required to wear uniforms color-coded to their security classification.²³⁶ Movements around the grounds are tightly limited and observed by guards; many detainees must spend "all or most of the day in their housing units," with as little as one hour of recreation time.²³⁷ Visits from family and friends are limited to thirty minutes a few days a week and contact is prohibited (detainees and visitors speak through telephones while separated by Plexiglas dividers).²³⁸ One facility prohibits contact visits even with attorneys.²³⁹

Others are reportedly placed in solitary confinement where they are locked in cells for twenty-three hours a day without contact with other detainees.²⁴⁰ A recent review of government data reported that several dozen were held in soli-

234. SCHRIRO, *supra* note 5, at 4.

235. *See* Kwai Fun Wong v. Beebe, 381 F. App'x 715, 715 (9th Cir. 2010), *reh'g granted on other grounds*, 704 F.3d 816 (2013) (en banc).

236. HUMAN RIGHTS FIRST, *supra* note 229, at 7.

237. *Id.* at 8.

238. *Id.* at 9.

239. *Id.*

240. *See* NAT'L IMMIGRANT JUSTICE CTR, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 3 (2012); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 111 (2003) [hereinafter SEPTEMBER 11 DETAINEES] (explaining that the individuals detained at the BOP's Metropolitan Detention Center were placed in solitary confinement); Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1 (reporting that approximately 300 people are held in solitary confinement each day in the nation's fifty largest immigration detention centers, but adding that this is likely an undercount).

tary confinement for more than seventy-five days, well above the fifteen days that a United Nations representative found to be the point at which “some of the harmful psychological effects of isolation can become irreversible.”²⁴¹ In one particularly striking example, in the immediate aftermath of the September 11, 2001 attacks on the Pentagon and World Trade Center, some individuals arrested on civil immigration charges were placed in high-security federal prisons such as the BOP’s Metropolitan Detention Center (MDC) in Brooklyn.²⁴² Within the MDC they were placed in the Special Housing Units, a segregated part of the prison designed for individuals “who have committed disciplinary infractions or who require administrative separation from the rest of the facility’s population.”²⁴³ Even subject to these conditions, they were not afforded the routine individualized review required by BOP regulations of its criminal detainees because they were civil immigration detainees.²⁴⁴ Solitary confinement is meted out for a range of transgressions. Internal documents obtained by advocacy groups indicate that in one facility solitary confinement may sometimes result from nothing more than “[f]ailure to speak English when able, [or] watching [the] Spanish channel on the TV.”²⁴⁵

The Karnes County facility that DHS unveiled as a model of a “less penal” institution was meant to limit some of these features.²⁴⁶ Yet the fundamental features remain: tightly regulated access to the outside world, constant surveillance,²⁴⁷ and a stark division between the inmates and guards (dubbed resident advisers and reportedly attired in blue polo shirts and khaki trousers rather than more standard correctional uniforms),²⁴⁸ plus barbed wire fencing, a commissary that distributes

241. See Urbina & Rentz, *supra* note 240, at A1; Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 26, U.N. Doc. A/66/268 (Aug. 5, 2011) (prepared by Juan Méndez) (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124 (2003)).

242. SEPTEMBER 11 DETAINEES, *supra* note 240, at 111.

243. See *id.* at 118. Though immigration detainees are sometimes segregated from the general jail or prison population out of concern for the detainees’ safety—this sometimes occurs, for example, with lesbian, gay, bisexual, transgendered, or intersex detainees—there is nothing in the Inspector General’s report suggesting that this occurred here. See Christina Fialho, *A Model Immigration Detention Facility for LGBTI?*, 42 FORCED MIGRATION REV. 50, 50 (2013).

244. See *id.*

245. NAT’L IMMIGRANT JUSTICE CTR, *supra* note 240, at 18.

246. See Semple & Eaton, *supra* note 24.

247. *Karnes County to Get Low Risk Detainee 600-Bed Immigration Civil Detention Center*, TEXASBUSINESS.COM (Dec. 12, 2010, 12:02 AM), <http://www.texasbusiness.com/karnes-county-to-get-low-risk-detainee-600-bed-immigration-civil-detention-center-cms-3167>.

248. Semple & Eaton, *supra* note 24.

wares through a sliding metal box,²⁴⁹ and more. More importantly, Karnes houses 600 individuals²⁵⁰—a fraction of the number that DHS is responsible for in a given year.²⁵¹

Many immigration prisoners experience confinement that shares much more with penal incarceration than similar size and conditions. These prisoners are housed in institutions that serve both penal detention and immigration detention purposes. Though the standalone facilities that hold the largest number of immigration detainees were constructed with DHS or its predecessor, the INS, in mind, about half of the approximately 250 facilities that DHS uses are standard county jails.²⁵² For most county governments, the jail is the principal detention center. County jails house individuals arrested, charged, or convicted of the range of criminal offenses that occur every day in communities throughout the country. They also house immigration detainees on DHS's behalf. County jails and other secure facilities that resemble jails house the overwhelming majority of immigration detainees.²⁵³ It is no surprise that county jails in which people who are awaiting removal proceedings are housed have the feel of penal institutions.

Even those facilities exclusively used to house immigration prisoners, however, closely resemble penal institutions in part because they rely on the same correctional standards that regulate county jails and state prisons.²⁵⁴ In 2009, ICE acknowledged that using penal standards to govern the conditions of confinement in immigration detention facilitates is problematic, and that it “needs to develop Immigration Detention standards consistent with the needs of its population.”²⁵⁵ Despite this call for action, it has yet to issue new standards. Rather, the agency's 2011 Performance-Based National Detention Standards are littered with references to standards explicitly promulgated by correctional associ-

249. Guillermo Contreras, *Detainees to Be Confined With Greater Civility*, SAN ANTONIO EXPRESS-NEWS, March 14, 2012, at 01A, available at http://www.mysanantonio.com/news/local_news/article/A-new-kind-of-detention-center-for-immigrants-3404501.php#photo-2616345.

250. *Karnes County Civil Detention Center*, THE GEO GROUP, INC., <http://www.geogroup.com/Maps/LocationDetails/23> (last visited Dec. 31, 2013).

251. In a report produced before Karnes opened, Human Rights First calculated that the three “less penal” institutions then in operation held “between 3 and 4 percent of ICE’s total detained population.” HUMAN RIGHTS FIRST, *supra* note 229, at 10.

252. *Id.* at iii (“In July 2009, approximately 50 percent of ICE’s population was held in actual correctional facilities that also housed criminal detainees. . . . The remaining 50 percent of ICE immigration detainees—those who are not held in actual jails or prisons—are still held in jail-like facilities.”).

253. See MEISSNER ET AL., *supra* note 15, at 136.

254. See *id.*; see SCHRIRO, *supra* note 5, at 4, 16.

255. SCHRIRO, *supra* note 5, at 16.

ations for penal institutions.²⁵⁶ Meanwhile, GEO Group, the private contractor that operates the Karnes facility, plans to seek accreditation from the American Correctional Association Accreditation and the National Commission on Correctional Health Care, two organizations that regulate conditions in penal institutions.²⁵⁷

From the perspective of individuals confined in immigration detention centers, the civil or criminal distinction is easily lost.²⁵⁸ Detainees regularly envision themselves as confined. Focusing on the dissonance between its legal denomination as civil and the lived experience of confinement, former immigration prisoner Malik Ndaula wrote, “They call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds.”²⁵⁹ Detainees’ visitors see a similar experience. As one former immigration detainee’s relative explained, “The inmates are compelled to enter and stay. They sleep in dorms arranged body to body. They ask permission to go to the bathroom. Their hands, feet, and waists are shackled when they are moved from place to place. In other words, they are prisoners.”²⁶⁰ Justice Fortas, writing for the Court in a 1967 decision concerning juvenile detention facilities, expressed a similar sentiment:

The fact of the matter is that, however euphemistic the title, a receiving home or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a building with whitewashed walls, regimented routine and institutional hours. . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by

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256. See generally U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2011), available at <http://www.ice.gov/detention-standards/2011>. As Mark Noferi explained, the 2011 standards “still cit[e] model jail standards in nearly every section.” Mark Noferi, *New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?*, CRIMMIGRATION.COM (Aug. 28, 2012, 4:00 AM), <http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx>.
257. *Karnes County Civil Detention Center*, THE GEO GROUP, INC., <http://www.geogroup.com/Maps/LocationDetails/23> (last visited Dec. 31, 2013); see *Standards & Accreditation*, AMERICAN CORRECTIONAL ASSOCIATION, https://www.aca.org/standards/faq.asp#overview_what (last visited Dec. 31, 2013); *About Us*, NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, <http://www.ncchc.org/about/index.html> (last visited Dec. 15, 2013).
258. See Jorjani, *supra* note 22, at 91 (“To an individual who is behind bars, the difference between ‘prison’ and ‘detention’ is purely academic.”).
259. Malik Ndaula & Debbie Satyal, *Rafiu’s Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008).
260. Subhash Kateel & Aarti Shahani, *Families for Freedom: Against Deportation and Delegalization*, in Brotherton & Kretsedemas, *supra* note 259, at 258, 263.

guards, custodians, state employees, and delinquents confined with him for anything from waywardness to rape and homicide.²⁶¹

Fortas may have been discussing juvenile confinement, but his functionalist approach to legal characterization suggests that it may be possible to bridge the divide between immigration detention's legal characterization and its lived reality.

These harsh conditions, which any rational person would seek to avoid, mean that imprisonment, in the immigration context as in the criminal context, has become a tool of the government's prosecutorial arsenal. The threat of jail time or of a longer term of imprisonment frequently affects the plea bargaining process.²⁶² Indeed, the modern criminal justice system could not function without vast numbers of defendants forgoing their right to contest the government's allegations. Stuntz argued that sentences became increasingly severe in the last quarter of the twentieth century in large part to increase the likelihood that defendants would agree to enter pleas.²⁶³ And with more pleas came more prisoners.²⁶⁴ To criminal defendants, additional confinement is undeniably a cost to be avoided. Individuals charged with civil violations of immigration law have also come to see imprisonment as a cost of contesting the government's claims of removability. Detainees regularly report that they are loath to spend more time in immigration detention facilities. Instead, they accept the government's proposition.²⁶⁵ But because the outcome of immigration proceedings is limited to the stark binary of removal or not—there is no spectrum of outcomes as in the criminal context—accepting the government's outcome means accepting removal. For many immigration detainees, then, the cost of contesting the government's allegation of removal is too high when it involves further confinement. In their eyes, they are imprisoned and willing to accept the government's charge as the price of obtaining their liberty.

261. *In re Gault*, 387 U.S. 1, 27 (1967) (citations omitted) (internal quotation marks omitted).

262. See STUNTZ, *supra* note 162, at 259.

263. See *id.* at 82.

264. See *id.* at 303.

265. According to former immigration judge Paul Grussendorf, "When I was an immigration judge in San Francisco from 1997 to 2004, I presided over the detention calendar. I saw scores of immigration detainees who had the potential to win their immigration hearing. But they threw up their hands and accepted deportation, after months-long and often arbitrary detention, because they had no prospects of ever finding counsel to assist them." Paul Grussendorf, *Next Step for Immigration Reform: Give Detained Migrants Legal Counsel*, CHRISTIAN SCIENCE MONITOR (Mar. 22, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0322/Next-step-for-immigration-reform-Give-detained-migrants-legal-counsel>.

B. No Ordinary Form of Civil Confinement

Perhaps because intent is so difficult to discern in any other way, the Court has frequently turned to the conditions of confinement to glean the legislative purpose of a particular type of detention. The Court has uniformly concluded that confinement is permissible when it is done for nonpunitive purposes, such as in the commitment of sexually violent individuals or the mentally ill. The conditions that characterize the modern immigration detention system suggest that immigration detention is readily distinguishable from these forms of confinement. Instead, it resembles more closely the sanctions that the Court has deemed punitive.

In *Kansas v. Hendricks*, the Court held that confinement of individuals deemed “sexually violent predators” was civil and not punitive, because “commitment under the [Kansas] Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.”²⁶⁶ The state legislature could not have intended for the Kansas statute to act as a deterrent for two reasons: The people subjected to this type of confinement

are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State’s part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution.²⁶⁷

The first factor—mental “abnormality”—is irrelevant to the immigration detention context. Though mentally ill individuals are routinely housed in immigration detention facilities, they are not there for that reason. The second factor, meanwhile, militates against a similar conclusion. Unlike individuals confined pursuant to the Kansas statute, immigration detainees are frequently “subjected to punitive conditions” in county jails and, sometimes, federal prisons. Moreover, they are always subjected to confinement pursuant to correctional norms.

In a similar vein, the Court in *Reno v. Flores* upheld INS custody of juvenile noncitizens against a constitutional challenge in part because it concluded that such confinement was not punitive.²⁶⁸ Its holding is informative precisely be-

266. *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997).

267. *Id.* at 362–63.

268. *See Reno v. Flores*, 507 U.S. 292 (1993).

cause the custodial setting was vastly different from the adult detention experience.²⁶⁹ According to the Court:

these are not correctional institutions but facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children, and are operated in an open type of setting without a need for extraordinary security measures. The facilities must provide, in accordance with applicable state child welfare statutes and generally accepted child welfare standards, practices, principles and procedures, an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance.²⁷⁰

Facilities that resemble this description are few and far between in the immigration detention estate.²⁷¹ Approximately half of all facilities are primarily county jails—the very picture of correctional institutions. Most others are highly secure environments: Detainees are watched closely, social visits are limited, lawyers are screened and often prohibited from entering with many of the tools of their trade such as laptop computers and cell phones, medical care is notoriously lacking, and the perimeter is adorned with fencing, barbed wire, or both.

While the Court's cases categorizing certain types of detention as civil examine underlying facts that depart in significant ways from immigration detention, the Court's cases categorizing other types of detention as criminal involve facts that share important similarities with immigration detention. *In re Gault*, the Court's landmark decision extending the right to counsel to juvenile delinquency determinations, announced that juvenile delinquency proceedings must be considered "criminal" in part because "in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.'"²⁷² Any other conclusion, the Court added, "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."²⁷³

Much the same could be said of immigration detention, in which thousands of people are housed in jails. For several years, children were sometimes housed alongside adults in facilities designated for family units, until the practice ended

269. *Id.* at 303.

270. *Id.* (citations omitted) (internal quotation marks omitted).

271. See HUMAN RIGHTS FIRST, *supra* note 229, at v.

272. *In re Gault*, 387 U.S. 1, 50 (1967).

273. *Id.*

because of public criticism.²⁷⁴ The largest and most criticized of these facilities, the T. Don Hutto Residential Center east of Austin, Texas, had been used to house inmates under the custody of the U.S. Marshals Service, the State of Texas, and DHS before it was used to house families.²⁷⁵ Though that facility has since been converted to a detention center for female adults, thousands of children who enter the United States on their own without authorization continue to be detained in other facilities.²⁷⁶

The Court has addressed the regulatory or punitive distinction with regard to deprivations other than detention; those cases too prove informative. In *Kennedy*, the case that the Court subsequently explained provides factors that guide analyses of whether governmental action is punitive,²⁷⁷ the Court concluded that the congressional intent clearly showed a desire to punish people who remained outside the United States to avoid the military draft.²⁷⁸ Not content to criminalize “draft dodging,” Congress sought to take away the citizenship of those who left the country to avoid the draft. Congress, the Court explained, enacted the denationalization provision primarily “to serve as an additional penalty for a special category of draft evader.”²⁷⁹ The idea motivating Congress, said the Court, was “that citizens who had left the country in order to escape military service should be dealt with, and that loss of citizenship was a proper way to deal with

274. See WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN & LUTHERAN IMMIGRATION AND REFUGEE SERV., LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 1–2 (2007). The ICE currently maintains standards specifically applicable to detention of children in “residential family facilities.” See, e.g., Immigr. & Customs Enforcement, *Family Residential Standards*, U.S. DEP’T OF HOMELAND SEC., § 5.2 <http://www.ice.gov/detention-standards/family-residential> (last visited Dec. 30, 2013) (providing the ICE’s educational policy applicable to children held in residential family facilities).

275. See WOMEN’S COMMISSION FOR REFUGEE WOMEN & CHILDREN & LUTHERAN IMMIGRATION & REFUGEE SERV., LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 1–2 (2007).

276. See 8 C.F.R. § 236.3; Pamela M. Prah, *Number of Undocumented Children Who Cross U.S. Border Alone Has Tripled*, STATELINE, May 9, 2013, <http://www.pewstates.org/projects/stateline/headlines/number-of-undocumented-children-who-cross-us-border-alone-has-tripled-85899474787>; *Texas Air Force Base Housing Detained Illegal Immigrant Children*, ASSOCIATED PRESS, Apr. 17, 2012, <http://houston.cbslocal.com/2012/04/17/texas-air-force-base-housing-detained-illegal-immigrant-children>. See generally *Reno v. Flores*, 507 U.S. 292 (1993) (upholding the constitutionality of juvenile detention regulation). Minors who enter the United States unaccompanied by adult family members are handed over to the U.S. Health and Human Service agency’s Office of Refugee Resettlement, which maintains facilities exclusively for children throughout the country, including a former Air Force base near San Antonio. See Prah, *supra*; ASSOCIATED PRESS, *supra*.

277. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

278. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

279. *Id.* at 169–70, 184.

them.”²⁸⁰ It did not matter that this statutory provision was eventually folded into the INA,²⁸¹ instead, what matters is its purpose and effect. Accordingly, the statute authorizing divestment of citizenship was deemed “fundamentally retributive in nature,” one of the traditional goals of punishment.²⁸²

In contrast, in *Hudson v. United States*, the Court considered the character of monetary penalties and occupational debarment imposed for violation of federal banking statutes.²⁸³ The Court thought it significant that “the authority to issue debarment orders is conferred upon” administrative agencies.²⁸⁴ Unlike the debarment power considered in *Hudson*, immigration imprisonment orders are frequently issued by legislative command rather than exercise of administrative discretion. Mandatory detention policies inaugurated in the early 1980s regarding Haitian and Cuban entrants were codified and expanded in the fifteen years that followed, while the federal banking statute that the Court cited, 12 U.S.C. § 1818(e)(1)-(3), provides that the agency “may” remove an offender from her position within the banking organization if certain conditions are met. While it remains true that immigration imprisonment is actually carried out by an administrative agency, ICE, it would be inaccurate to claim that the agency exercises much meaningful discretion when it issues detention orders for the many tens of thousands of people subject to mandatory detention under § 236(c) or its predecessor provisions.²⁸⁵

IV. TREATING IMMIGRATION IMPRISONMENT AS PUNISHMENT

Viewing immigration imprisonment as punishment is certainly no minor adjustment. Just as Congress has “dramatically raised the stakes” by bundling criminal convictions to immigration outcomes,²⁸⁶ however, the reality of immigration detention must dramatically alter how immigration adjudications are

280. *Id.* at 181–82.

281. INA § 349(a)(10) (1952) (current version at 8 U.S.C. § 1481 (2012)); *see Kennedy*, 372 U.S. at 183–84.

282. *See Kennedy*, 372 U.S. at 169, 183.

283. *See Hudson v. United States*, 522 U.S. 93, 95 (1997).

284. *See id.* at 103.

285. To be sure, ICE maintains discretion in how it detains. Importantly, it also maintains discretion over who it targets for the initial apprehension that then leads to detention. *See Hiroshi Motomura, The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1833 (2011). Discretion regarding detention conditions and investigatory or prosecutorial priorities, however, are available to all law enforcement agencies with detention, investigatory, or prosecutorial authority. To claim that this type of discretion means that the confinement is civil, therefore, would require the same conclusion for all types of confinement—even that which is indisputably penal.

286. *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

processed. If we did no more than recognize immigration detention as punishment, it would necessarily require changing how immigration law is enforced. Immigration detention would, in the end, be slower and costlier to impose than it is currently. The procedures used to impose immigration detention would, in essence, become more similar to procedures used to punish in the traditional criminal context. Such would be the price of depriving people of their liberty by sanctioning them for antisocial conduct.

This is not, however, the right course of action. The war on drugs has led to no shortage of prisoners, even with greater procedural protections than are afforded immigration detainees. And yet the panoply of policies and practices that make up the war on drugs has not proven effective at stemming drug activity. In the war on drugs, the drugs won.²⁸⁷ Reconceptualizing immigration detention, therefore, requires more than making the process by which immigration detention is imposed look more like the process by which criminal incarceration is imposed for drug activity. Rather, it requires a wholesale reexamination of the efficacy of confinement as a tool of social control.

A. Bringing Criminal Procedure Into Immigration Detention

Imprisonment is unquestionably an awesome power that the government is authorized to wield in limited circumstances.²⁸⁸ To reduce the incidence of abuse by government officials, the U.S. Constitution imposes significant procedural obstacles to imprisonment. If immigration detention is to be reconceptualized as punishment, then it becomes necessary to consider the logical legal outcome: Imposition of punishment would be subject to the constitutional constraints on governmental action that apply to all criminal prosecutions.

First, penal imprisonment requires individualized findings, whereas immigration law provisions have for decades authorized detention based on categorical assessments of dangerousness or flight risk. For criminal imprisonment, confinement before conviction is permissible pending proceedings only if the person has been deemed likely to abscond or further endanger the community. After conviction, penal confinement is permitted as a sanction for having been found by a jury or, at the defendant's election in nonpetty cases, a judge to have actually

287. Nicholas D. Kristof, *Drugs Won the War*, N.Y. TIMES, June 14, 2009, <http://www.nytimes.com/2009/06/14/opinion/14kristof.html>; see GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY 10 (June 2011) [hereinafter GLOBAL COMMISSION REPORT] (“[T]he war on drugs has not, and cannot, be won.”).

288. See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1597 (2006).

engaged in wrongful conduct.²⁸⁹ In the immigration context, in contrast, the threat posed by the specific individual whose liberty is at stake is irrelevant, and the individual has no right to advance arguments about the merit of detention given her unique circumstances.²⁹⁰

Second, punitive imprisonment is subject to a rough sense of proportionality that does not apply to civil detention.²⁹¹ It does not matter what the noncitizen did to violate immigration law. The imprisonment consequence is the same for a person who becomes removable as a result of being convicted of turnstile jumping as someone who rapes a child: detention pending removal proceedings.²⁹²

Third, immigration detention's civil characterization means it is not subject to the Double Jeopardy Clause's prohibition against multiple punishments for the same offense.²⁹³ A person, therefore, may be imprisoned after criminal proceedings that result in a conviction, then imprisoned again during the course of immigration proceedings and while actual removal awaits based on the very same conduct as formed the basis for the criminal conviction. So too may a person be imprisoned twice while awaiting the outcome of successive deportation proceedings based on conviction for the same crime. The U.S. Court of Appeals for the Ninth Circuit, for example, explained that a noncitizen who was subjected to two deportation proceedings based on two grounds of deportation—the basis of the

289. The jury-trial right's application is likely limited by the fact that the Court has construed it as inapplicable to prosecutions involving a possible prison term of six months or less. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989). Likewise, the *Zadvydas* Court held that immigration detention is presumptively reasonable for up to six months after issuance of a final order of removal, and ICE data indicate that approximately 97 percent of people detained by ICE in November and December 2012 were released within six months of being apprehended. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); Transactional Records Access Clearinghouse, *Legal Noncitizens Receive Longest ICE Detention* (June 3, 2013) [hereinafter *Noncitizen Detention*], <http://trac.syr.edu/immigration/reports/321>. Confinement for less than six months is surely neither trivial nor petty; the consequences of confinement—job loss, social stigma, family disarray—may very well be the same regardless of its duration. See *Baldwin v. New York*, 399 U.S. 66, 73 (1970). This concern resonates especially saliently given that 20 percent of individuals (169 people) released from ICE custody in November and December 2012 because proceedings were terminated—meaning they avoided removal—averaged 334 days of detention. *Noncitizen Detention*, *supra*. Despite this impact on a small number of detainees, for the rest the burden of confinement for a short period “may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.” *Blanton*, 489 U.S. at 543 (quoting *Baldwin*, 399 U.S. at 73) (internal quotation marks omitted). Following this approach, short-term immigration detention likely may be imposed without a jury trial.

290. Cf. *Demore v. Kim*, 538 U.S. 510, 523–24 (2003) (discussing *Carlson v. Landon*, 342 U.S. 524 (1952)).

291. See *Wishnie*, *supra* note 45, at 419, 424.

292. See *Stumpf*, *supra* note 3, at 391.

293. See *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (explaining that the Double Jeopardy Clause “protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense”); *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994).

second proceeding did not exist at the time of the first proceeding—could be detained while both proceedings made their way through the immigration and judicial court systems. “Because deportation proceedings are civil and not criminal in nature,” the court explained, “they cannot form the basis for a double jeopardy claim.”²⁹⁴ Reconceptualizing immigration detention as punishment would mean that the Double Jeopardy Clause would apply to multiple detentions triggered by the same criminal conduct.²⁹⁵

Lastly, a host of criminal procedure norms that emblemize modern criminal proceedings are inapplicable to immigration proceedings. The Fourth Amendment’s exclusionary rule, for example, cannot serve as a bulwark against constitutional violations by police officials except in egregious circumstances.²⁹⁶ Without this sanction, illegally obtained evidence is more readily admissible to prove that a particular individual is removable and, because detention often turns on whether and why a person is removable, illegally obtained evidence can indirectly result in detention. Having been brought to the attention of immigration officials by local police officers, it is almost certain that detention awaits while an immigration judge decides the noncitizen’s fate. Likewise, the Sixth Amendment right to counsel—including one of its critical features, the right to appointed counsel—provides no comfort to the individual charged as removable. Nor does the Fifth Amendment’s Due Process Clause, which was once thought to

294. *Yacoubian*, 24 F.3d at 10.

295. To posit that the Double Jeopardy Clause will apply is not, of course, to say that a double jeopardy claim will often preclude detention. Double jeopardy claims are difficult to raise successfully, and there are nuances peculiar to immigration detention that would make such claims particularly difficult. First, the Double Jeopardy Clause would not prohibit punishment by a government other than the one that inflicted the initial punishment. See *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985). Second, the Double Jeopardy Clause would not impede immigration confinement, because this type of confinement is not being imposed for the same legal violation as punishment imposed for the underlying crime. See MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 158 (4th ed. 2009). To determine if an individual is facing punishment for the same offense, courts have long queried “whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see *United States v. Ramos*, 666 F.2d 469, 476 (5th Cir. 1982). Without question, coming within the purview of the INA’s principal detention provisions, § 236(a) or (c), requires proof of at least one fact that is not an element of most state or federal crimes: alienage. Moreover, the BIA has long required that the government show proof of dangerousness or flight risk to justify discretionary detention. See *In re Ellis*, 20 I & N Dec. 641, 642 (B.I.A. 1993) (citing *In re Patel*, 15 I & N Dec. 666 (B.I.A. 1976)). In addition, the BIA requires proof that a person violated one of the conditions listed in § 236(c)—whether commission of a specified offense or temporal limitation—before concluding that a person is “properly included” in a mandatory detention category. 8 C.F.R. § 1003.19(h)(2)(ii); see *In re Joseph*, 22 I & N Dec. 799, 806 (B.I.A. 1999).

296. See *Puc-Ruiz v. Holder*, 629 F.3d 771, 777, 778 (8th Cir. 2010); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984).

perhaps provide appointed counsel in immigration proceedings,²⁹⁷ though no reported judicial decision has ever evidenced a court willing to do so. Consequently, approximately 44 percent of individuals navigate removal proceedings without the benefit of counsel, making it that much more difficult to avoid detention, and 84 percent of detained individuals make their way through removal proceedings without counsel.²⁹⁸

If immigration detention were treated as a form of punishment for commission of a crime, then these provisions would ensure that detainees are treated as suspected criminals before and after the decision to detain is made. At a minimum this would bring the law of immigration detention, currently based on civil administrative procedures, in line with the reality that immigration detention subjects people to correctional conditions.

Doing this would alter the immigration detention decisionmaking and adjudication process, but less radically than first appears. State courts already play a major role in determining which immigrants get to remain in the United States, because so much of modern immigration law turns on convictions, and most convictions occur in state courts.²⁹⁹ So long as immigration law remains a “conviction-based removal system,” prosecutors, because they dictate charging criminal decisions, will have an outsized influence on immigration law’s “gate-keeping power.”³⁰⁰ Adding standard criminal procedure protections to this process would simply curtail some of the “selective, asymmetric” incorporation of features of criminal law that now characterizes immigration law enforcement.³⁰¹ No longer would the decision to imprison be delegated to an ICE officer with the option of appealing to an immigration judge. Instead, only an Article III court could mete out imprisonment that serves to punish. There it would be necessary to determine whether the noncitizen committed the antisocial conduct that Congress intended to punish—namely, one of the innumerable immigration law violations triggered by criminal behavior. In effect, reconceptualizing immigration detention as punishment would require a criminal adjudication before a criminal court that underlying criminal conduct actually subjects a person to statutorily permissible detention pending removal proceedings. Importantly, as with other punitive sanctions, detention could be ordered only upon a guilty or nolo contendere plea or, at the defendant’s elec-

297. See *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

298. U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICAL YEARBOOK, G1 fig.9; HUMAN RIGHTS FIRST, *supra* note 229, at 30.

299. See Lee, *supra* note 223, at 557–58.

300. *Id.*

301. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007).

tion, a jury or bench trial with a finding of guilt beyond a reasonable doubt. In effect, an Article III court would have to decide whether a particular noncitizen committed an offense that is listed in the INA's mandatory or discretionary detention provisions.

Needless to say, the prospects for such a drastic alteration are infinitesimally small. The procedural burdens are more than policymakers are likely to bear. Nor should they. Using detention to police immigration law, the following two Subparts explain, cannot be justified by the lessons of drug war penal incarceration or traditional justifications for imposing punishment.

B. Learning From the Drug War's Failures

A commission led by five former heads of state plus numerous other former high-ranking officials, business leaders, and intellectuals began their detailed report on forty years of governmental responses to drug activity with simple, unambiguous language: "The global war on drugs has failed, with devastating consequences for individuals and societies around the world."³⁰²

Aside from the untold number of deaths associated with drug use and trafficking, the war on drug's most vivid feature in the United States has been the enormous prison population it has helped create.³⁰³ The United States counted almost 1.6 million people in a state or federal prison in 2011.³⁰⁴ Almost half of those—48 percent—were confined because of drug offenses.³⁰⁵ Confining so many people does not come without significant direct costs. In 2003, when 1.46 million people were confined,³⁰⁶ local, state, and federal governments spent ap-

302. GLOBAL COMMISSION REPORT, *supra* note 287, at 2.

303. See Bryan Stevenson, Drug Policy, Criminal Justice and Mass Imprisonment 2 (Jan. 24–25, 2011), available at http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Bryan_Stevenson.pdf ("Drug Policy and the incarceration of low-level drug offenders is the primary cause of mass incarceration in the United States."); see also *id.* at 3 ("Criminalization of possession and illegal use of drugs compounded by mandatory sentencing and lengthy prison sanctions for low-level drug use has become the primary cause of mass incarceration.")

304. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 1 (Dec. 2012) (indicating 1,598,780 people were under the jurisdiction of state or federal correctional authorities). Another 735,601 were confined in city and county jails from June 2010 to June 2011. TODD MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES 1 (Apr. 2012).

305. CARSON & SABOL, *supra* note 304, at 1.

306. *Id.* at 2 tbl.1.

proximately \$60 billion on corrections alone and over \$185 billion when police and court expenditures are included.³⁰⁷

The indirect costs are, of course, much more difficult to quantify but undoubtedly much more devastating. Drug users have been shunned as criminals rather than provided treatment as patients;³⁰⁸ racially marginalized communities, especially African Americans, have become accustomed to seeing friends and relatives hauled off to prison,³⁰⁹ and antidrug initiatives have destabilized entire countries.³¹⁰ Meanwhile, drug offense convictions entail a host of consequences, including immigration detention and removal, that continue to stigmatize and penalize convicted individuals long after they have completed their penal sentence.³¹¹

The use of conviction and confinement on a large-scale replicates and expands social marginalization.³¹² As Michelle Alexander put it in her impressive study of the devastating impact that the war on drugs and its regime of mass incarceration have had on social stratification in the United States, “Mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a

307. KRISTEN A. HUGHES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, 2, 9 app. tbl. (2006).

308. See GLOBAL COMMISSION REPORT, *supra* note 287, at 2.

309. MARC MAUER, RACE TO INCARCERATE: THE SENTENCING PROJECT 143 (1999); see Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 27, 34–35 (Christopher Mele & Teresa A. Miller eds., 2005). While drug offenses affect noncitizens from all parts of the world who find themselves placed in immigration proceedings, this appears especially true for black noncitizens. Tamara K. Nopper, *Why Black Immigrants Matter: Refocusing the Discussion on Racism and Immigration Enforcement*, in Brotherton & Kretsedemas, *supra* note 259, at 204, 208, 222.

310. Fred E. Foldvary, *The Foreign Economic Effects of the U.S. War on Drugs*, 91 OR. L. REV. 1129, 1132 (2013); see MARIO A. MURILLO, COLOMBIA AND THE UNITED STATES: WAR, UNREST, AND DESTABILIZATION 123 (2004) (noting that in Colombia, anti-drug policies, in large part funded by the United States, “ha[ve] led to a further escalation in the internal military conflict, an increasingly deteriorating human rights crisis, and a general failure to put a dent in the international drug trade”); DAVID BOAZ, CATO HANDBOOK FOR POLICYMAKERS 599 (7th ed. 2009) (recommending that policymakers “stop pressuring the government of Mexico to escalate the war on drugs, since that policy is leading to a dangerous upsurge in violence that threatens to destabilize the country”); Solimar Santos, Comment, *Unintended Consequences of United States’ Foreign Drug Policy in Bolivia*, 33 U. MIAMI INTER-AM. L. REV. 127, 128 (2002) (claiming anti-drug policies “have left Bolivia, the poorest country in South America, in the grips of economic devastation and in the wake of social upheaval”).

311. See Chin, *supra* note 309, at 32–33; see also ALEXANDER, *supra* note 76, at 14 (“So long as large numbers of African Americans continue to be arrested and labeled drug criminals, they will continue to be relegated to a permanent second-class status upon their release, no matter how much (or how little) time they spend behind bars.”).

312. See Chin, *supra* note 309, at 39.

group defined largely by race.”³¹³ In part because of the drug war’s expansive and discriminatory reach that Alexander chronicled, criminal law scholar Stuntz concluded that the criminal justice system is “unraveling” before our eyes.³¹⁴ The rule of law collapsed, discrimination worsened, and the justice system became “the harshest in the history of democratic government,” he wrote in his final exploration—an indictment of sorts—of modern criminal law and procedure.³¹⁵

Meanwhile, drug use continues apace. Worldwide consumption of opiates, cocaine, and marijuana all increased between 1998 and 2008.³¹⁶ In the United States, drug use overall has remained fairly consistent, but there have been notable increases in marijuana use among youth.³¹⁷ At the same time, the government has been unable to significantly reduce the availability of illicit drugs, and prices have remained stable.³¹⁸ The government’s antidrug initiative, famously encapsulated in Nancy Reagan’s “just say no” campaign, it seems, has been nothing short of a spectacular failure.³¹⁹

Given the war on drug’s failure to reduce drug use or make communities safer even while vastly expanding prison populations, policymakers might ask what value there is to continuing to rely on detention as a tool of immigration law enforcement. Rather than embrace immigration imprisonment as penal incarceration subject to more procedural protections, we should rethink the use of immigration imprisonment as it stands today in light of the fact that its companion—war on drugs incarceration—so mightily failed its stated purpose.

313. ALEXANDER, *supra* note 76, at 13.

314. STUNTZ, *supra* note 162, at 1.

315. *See id.* at 2–3.

316. GLOBAL COMMISSION REPORT, *supra* note 287, at 4.

317. NATIONAL INSTITUTES OF HEALTH, NATIONAL INSTITUTE ON DRUG ABUSE, DRUG FACTS: NATIONWIDE TRENDS (last updated Dec. 2012), *available at* www.drugabuse.gov/publications/drugfacts/nationwide-trends; Press Release, National Institutes of Health, National Institute on Drug Abuse, *Regular Marijuana Use by Teens Continues to Be a Concern* (Dec. 19, 2012), *available at* <http://www.drugabuse.gov/news-events/news-releases/2012/12/regular-marijuana-use-by-teens-continues-to-be-concern>.

318. *See* WILLIAM RHODES ET AL., ILLICIT DRUGS: PRICE ELASTICITY OF DEMAND AND SUPPLY 91 (2001) (“Given experiences since the beginning of the war on drugs, which initiated major expansions in expenditures on supply-based programs, it seems more reasonable to conclude that the Nation will not be able to have any large future influence on decreasing the availability and increasing the price of illicit drugs.”); *id.* at 89 (noting that drug prices are raised by anti-drug initiatives but the government’s ability to raise prices is limited).

319. ERIC A. POSNER, LAW AND SOCIAL NORMS 32 (2000); *see also* KATHLEEN J. FRYDL, THE DRUG WARS IN AMERICA, 1940–1973, 418 (2013) (“Whether the drug war was notional, deployed mainly as a rhetorical device, or fully realized, featuring military assaults and, in the case of Manuel Noriega in Panama, toppling a regime, it is a war that has been lost.”).

C. Unjustifiable Detention

In addition to learning from the war-on-drugs experience to question whether immigration imprisonment serves legitimate social goals, a careful look at justifications for penal incarceration reveals that few of the traditional justifications for criminal punishment are served well by detaining people waiting to learn their immigration fate. Deterrence, one of the traditional justifications, asks whether punishment would disincline people from violating immigration law.³²⁰ This is unlikely for multiple reasons. First, many individuals who are detained have family members residing in the United States.³²¹ As such, the moral weight of violating immigration law to remain or return to loved ones is strong, while the moral benefit of complying with immigration law's dictate to stay away from family is low. As one magistrate judge who presides over prosecutions of immigration-related federal crimes said, "The thought [that] prosecution will be effective when their entire family is in the U.S. is questionable."³²² When compliance with a law viewed as amoral requires leaving behind family, it should come as no surprise that people would do so once and, if necessary, time and again.³²³ Indeed, it is quite common for people who are removed to make their way back to the United States.³²⁴ Many do so despite the familiar tales of lives lost during the trek. And they do so without any apparent concern for whether they were detained before deportation. Indeed, in an empirical analysis of Mexican males' attitudes toward unauthorized migration to the United States, Emily Ryo found

320. Legomsky, *supra* note 8, at 536.

321. Though the specific number of detained individuals with relatives in the United States is unknown, DHS did report that at least 108,434 individual parents of United States citizen children were removed from fiscal years 1998 to 2007, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HOMELAND SECURITY, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 6 fig.2 (2009), suggesting that the overall number of detained individuals with relatives is also quite high. DHS added that 37.1 percent of these individuals had previously been removed, though the report did not explain whether the earlier removal occurred before or after family members were in the United States. *Id.* at 5.

322. HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 72 (2013).

323. One individual told Human Rights Watch researchers that he "had tried to return to the United States four times—and been detained or prosecuted each time, up to four months the last time." *Id.* at 71.

324. An imperfect measure of return is the number of people who were sent to federal prison within three years of having been convicted of a federal immigration crime. According to Justice Department statistics, 13.8 percent of immigration offenders were returned to federal prison during the three years following release. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010 37 tbl.14 (2012).

that “neither perceived risks of apprehension nor severity of sanctions were significantly related to people’s intent to migrate illegally.”³²⁵

Second, ICE’s own success at detaining upward of 400,000 people annually might reduce detention’s deterrent capability. Criminologist Daniel Nagin argued that criminal deterrence research suggests that a sanction has the power to deter only insofar as it stigmatizes the actor, but “such fear would seem to depend on the actual meting out of the punishment being a relatively rare event.”³²⁶ The modern immigration detention regime is anything but rare. Furthermore, deterrence is particularly unsuited as a justification for keeping noncitizens from committing crime. As Stephen Legomsky, currently chief counsel for the U.S. Citizenship and Immigration Services agency, wrote, “It is hard to imagine that a person who is willing to risk removal from the United States would shy away from deportable behavior merely to avoid being detained from the time of the final removal order to the time of actual removal,” especially given that the criminal penalty meted out for committing the crime was not a sufficient deterrent.³²⁷

Similarly, rehabilitation, another traditional justification, is inapposite because it requires remorse. Immigration law violations are not the inherently immoral acts that appear throughout penal codes or the common law crimes. Rather, they are mainly *malum prohibitum* offenses; they are “deemed wrong only because of a statutory proscription.”³²⁸ Even when commission of an underlying immoral act triggers the immigration law violation—for example, burglary—it is the underlying immoral act for which remorse may adhere; the immigration violation is nothing more than a secondary threshold of illegality. That is, it is immoral to commit burglary; it is not inherently immoral to violate the terms of one’s permission to stay in the United States, even if done by engaging in burglary. Indeed, prospective migrants tend to view violations of immigration law as justifiable.³²⁹ Yet immigration detention is imposed only when committing the underlying offense violates immigration law. It may arise because of a legislative desire to target prohibited criminal activity, but it is imposed only because that criminal activity also violates the conditions of a noncitizen’s presence in the United States.

A third traditional justification, incapacitation, is only mildly served. Certainly incarcerated individuals cannot violate immigration law. Most de-

325. Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 593 (2013).

326. Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 4 (1998).

327. Legomsky, *supra* note 8, at 540.

328. *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011).

329. Ryo, *supra* note 325, at 592.

tainees, however, are released within two months of being confined.³³⁰ The incapacitative value of detention, therefore, is quite limited temporally. Moreover, once release occurs, detention ceases to prevent formerly detained individuals from violating immigration laws. Indeed, the rigid state of immigration law today may increase the likelihood of violating immigration law again upon release, because many removed individuals have little or no avenue by which to return to the United States with the requisite authorization.³³¹ Some evidence for this is found in the fact that the number of people unlawfully present in the United States rose significantly after Congress restricted the number of people who could enter the country from countries with strong ties to the United States. Rather than risk the possibility that they might not be able to return, they refused to leave.

The traditional justification that immigration detention most promotes is retribution—that is, the goal of “reprimand[ing] the wrongdoer” to ensure that “the punishment should fit the crime.”³³² Invoking the oft-repeated biblical proclamation that an “eye for eye” is the most appropriate punishment,³³³ retributive sanctions symbolize society’s collective determination of the proper stigmatizing response to conduct that flouts the group’s mores. Applied to immigration detention, confinement signals to detainees that they have committed a social wrong, criminal activity that violates immigration law, and must now suffer the consequence meted out—a deprivation of liberty. This, of course, is precisely the goal of the panoply of antidrug penal laws that have sanc-

330. See *Noncitizen Detention*, *supra* note 289 (reporting that an analysis of ICE data revealed that, of individuals deported or released in November and December 2012, 70 percent were released within thirty days and another 16 percent released during the following month). It is difficult to justify immigration detention on the basis that these individuals will not commit traditional crimes while detained, because most data indicate that noncitizens commit crime at low rates, lower than even native-born individuals. Charis E. Kubrin et al., *Introduction*, in *PUNISHING IMMIGRANTS: POLICY, POLITICS, AND INJUSTICE* 1, 1 (Charis E. Kubrin, Marjorie S. Zatz & Ramiro Martinez, Jr. eds., 2012); see also Ramiro Martinez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in *IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE* 1, 10, 12 (Ramiro Martinez Jr. & Abel Valenzuela Jr. eds., 2006).

331. Cf. Seth Freed Wessler & Julianne Hing, *Torn Apart: Struggling to Stay Together After Deportation*, in *BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS* 152, 158 (Jenna M. Loyd, Matt Mitchelson & Andrew Burrige eds., 2012) (suggesting that the limited possibility of relief from removal led one noncitizen to stop appearing for immigration court hearings).

332. *E.g.*, *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (describing one purpose of punishment as the desire “to reprimand the wrongdoer”); ARNOLD H. LOEWY, *CRIMINAL LAW IN A NUTSHELL* 6 (5th ed. 2009) (“Cliches such as . . . ‘make the punishment fit the crime’ are essentially retributive in nature.”).

333. *Leviticus* 24:20 (King James); see also Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 844 (1969) (“One of the laws given to Moses by the God of the Jewish nation, Yahweh, was the *lex talionis*—an eye for an eye, a tooth for a tooth. It is generally considered a law of retribution—the product of a vengeful deity.”).

tioned a generation of people involved in the drug trade without significantly stemming the flow of drugs.

That immigration detention weakly promotes the traditional justifications for criminal punishment does not mean that it is applied for nonpunitive purposes. Criminal incarceration's tendency to promote these goals, after all, is often dubious as well.

But because immigration detention is assumed to be civil, courts do not rely on the traditional justifications as explanations of immigration detention's permissibility. Instead, the Supreme Court has endorsed two criteria that are similar to the justifications offered for pretrial criminal detention: the risk that an individual will fail to appear for removal proceedings or removal, and the risk that an individual will harm the public. Like the traditional justifications for punishment, these justifications also do not support the mass immigration incarceration we observe today. Moreover, they cannot transform what is penal in nature, as described above, into a civil detention system.

In *Demore*, the Court explained that Congress, while debating detention provisions from the late 1980s to 1996, "had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully."³³⁴ The Court added that Congress adopted INA § 236(c), the current mandatory detention provision, "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."³³⁵ In light of these legislative goals, the Court went on to uphold short-term mandatory detention pending removal proceedings pursuant to § 236(c).³³⁶ Likewise, in *Salerno*, a challenge to the pretrial detention provisions of the Bail Reform Act of 1984, the Court concluded that "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling," and, importantly, overrides the arrested person's liberty interest.³³⁷

Neither of these factors justifies the massive use of imprisonment in immigration today. Though it is undeniably easier to ensure that individuals in removal proceedings appear for hearings if they are locked up than if they are entirely free to live their lives as they wish, ICE has plenty of tools at its disposal that can ensure attendance while avoiding incarceration. According to the ICE, individuals are eligible for an Alternative to Detention (ATD) program only if they "pre-

334. *Demore v. Kim*, 538 U.S. 510, 528 (2003).

335. *Id.* at 518.

336. *Id.* at 531.

337. *United States v. Salerno*, 481 U.S. 739, 749–51 (1987).

sent a low risk of flight, and . . . pose no danger to the community.”³³⁸ Strikingly, individuals enrolled in an ATD program appeared for hearings 93.8 percent of the time.³³⁹ Moreover, they did so at the cost of \$0.30 to \$14 per day per person.³⁴⁰ Perhaps reflecting its own comfort with ATD programs, ICE unexpectedly released 2,228 detainees in late February 2013, just days before it expected to suffer severe budget cuts, and took pains to explain that these individuals pose little threat to the public.³⁴¹

Moreover, the particular features of the Bail Reform Act that the *Salerno* Court viewed as promoting public safety are either not present or significantly diminished in the immigration detention context. The *Salerno* Court noted that the pretrial detention provisions at issue “operate[] only on individuals who have been arrested for a specific category of extremely serious offenses.”³⁴² These include crimes of violence, offenses involving a sentence of life imprisonment or death, serious drug offenses, and certain recidivist offenders.³⁴³ Though there is some overlap between these categories and those that subject a person to immigration detention, the INA’s detention provisions sweep much more broadly. A person must be automatically detained if charged as removable for having bounced a check or shoplifted within five years of admission, been caught possessing a small quantity of marijuana, or filed fraudulent income tax returns, all of which are a far cry from the type of crime that the *Salerno* Court determined the government has a heightened interest in preventing.³⁴⁴ Indeed, according to the ICE, only 11 percent of detainees had been convicted of a violent crime, and only 19 percent were considered to pose a high security risk.³⁴⁵ Furthermore, even if an arrestee falls within one of the Bail Reform Act’s categories of serious offenses,

338. Fact Sheet, U.S. Immigr. & Customs Enforcement, Alternatives to Detention for ICE Detainees (Oct. 23, 2009) (on file with author).

339. RUTGERS SCH. OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC & AM. FRIENDS SERV. COMM., FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 10 (2012).

340. *Id.* at 3.

341. See Suzy Khimm, *Austerity = 2,228 Immigrants Released From Detention*, WONKBLOG, WASH. POST (Mar. 15, 2013, 11:06 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/15/austerity-2228-immigrants-released-from-detention>; Martin Michaels, *DHS to Release Detainees Amid Budget Cuts, Reducing Immigrant Population Behind Bars*, MINT PRESS NEWS (Feb. 27, 2013), <http://www.mintpress.net/dhs-to-release-detainees-amid-budget-cuts-reducing-immigrant-population-behind-bars>; Kirk Semple, *Mass Release of Immigrants is Tied to Cuts*, N.Y. TIMES, Feb. 27, 2013, at A1.

342. *Salerno*, 481 U.S. at 750.

343. *Id.* at 747.

344. These offenses fall within one of the categories of crimes referenced by the mandatory detention provision, INA § 236(c).

345. HUMAN RIGHTS FIRST, *supra* note 229, at 2.

the government must persuade a judge “that no conditions of relief can reasonably assure the safety of the community or any person.”³⁴⁶ Such individualized determination stands in stark contrast to the INA’s mandatory detention provision—or the INS’s mandatory detention policy toward Haitians and Cubans that preceded it—based on categorical assessments.³⁴⁷

Deciding whether to remain committed to detention as a core feature of immigration policing requires balancing its costs against its value as a method of announcing social opprobrium toward people who engage in specified conduct. It is not particularly useful as a method of deterring immigration law violations or of incapacitating or rehabilitating its violators. Nor is it especially helpful as a method of promoting public safety. And while detention can certainly increase the likelihood that a detainee will appear for a hearing, releasing many detainees without restriction or placing them in the ATD programs already in ICE’s law enforcement toolkit can have much the same effect—and at a significantly reduced cost. Contemplating what to do about the people currently placed in immigration detention, therefore, requires reconsidering what this form of detention ought to accomplish.

D. Creating a Different Type of Detention

Rather than shift immigration detention decisions into the criminal courts, reconceptualizing immigration detention as punishment should push Congress to recreate immigration detention in such a way that it can be described only as civil confinement. Doing this would mesh well with ICE’s stated objective of creating a “truly civil detention system.”³⁴⁸ Two broad options exist to accomplish this: The first involves extensive statutory reform while the second involves tailored administrative reform.

346. *Salerno*, 481 U.S. at 750.

347. *See Demore v. Kim*, 538 U.S. 510, 524–25 (2003) (dismissing the dissenting opinion’s view that individualized determinations of dangerousness were required before imposing immigration detention).

348. Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants: A ‘Truly Civil’ System*, N.Y. TIMES, Aug. 6, 2009, at A1. Some observers have noted that deportation shares important features of punishment, such that people facing the possibility of deportation should receive some set of procedural protections normally provided in criminal proceedings. *E.g.*, Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013). Because this Article focuses on immigration detention, and not deportation, it takes no position on the most appropriate characterization of deportation or the procedural protections that ought to accompany it.

According to the Court's *Salerno* line of cases, legislative intent is key to determining whether detention is punitive or regulatory.³⁴⁹ To shift from a punitive to a regulatory detention regime, therefore, Congress's intent must change. After a quarter century of heavily relying on the criminal justice system as a method of selecting whom to detain, Congress would need to disentangle the criminal and immigration confinement processes. It would need to undo the war-on-drugs era legislation that blurred the boundary between decisions to detain because of a suspected criminal law violation and decisions to detain because of a suspected immigration law violation. The statutory enactments that created a well-trodden path from jails and prisons to immigration detention centers would have to be repealed. Only then could it be said that the legislative decisions of the 1980s to mid-1990s to use immigration detention as a tool in waging the war on drugs had been unraveled.

Alternatively, ICE could reconstruct its immigration detention apparatus to eliminate its reliance on detention in correctional institutions or facilities that have adopted correctional norms. This would require beginning with a reassessment of the method used to detain. ICE recently began assessing risk based on involvement in broadly defined criminal activity³⁵⁰ and the INA requires categor-

349. *Salerno*, 481 U.S. at 747 (citations omitted) (internal quotations marks omitted).

350. *Detention Reform Accomplishments*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/detention-reform/detention-reform.htm> (last visited Dec. 31, 2013) (explaining that the ICE announced that it began using a "Risk Classification Assessment" in July 2012). According to the ICE, "The Risk Classification Assessment incorporates factors that reflect the agency's civil enforcement priorities." *Id.* Those priorities, in turn, specify that "aliens convicted of crimes" are among the agency's highest priority. Memorandum from John Morton, Director, U.S. Immigr. & Customs Enforcement, to All ICE Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>. ICE uses the same prioritization scale to determine who to pursue for removal through the Secure Communities program, an initiative intended "to target dangerous criminals and persons who pose a threat to the community." Michele Waslin, *The Impact of Immigration Enforcement Outsourcing on Ice Priorities*, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 127, 129 (Maria João Guia, Maartje van der Woude & Joanna van der Leun eds., 2013) [hereinafter Waslin, SOCIAL CONTROL AND JUSTICE]. In fiscal year 2011, 26 percent of people identified through Secure Communities had been convicted of the most serious type of offenses under ICE's prioritization scale—aggravated felonies, or two or more felonies. *Id.* at 133, 131. Another 26 percent had no criminal convictions. *Id.* at 133.

In an op-ed Robert Koulisch and Mark Noferi explained that with ICE's "risk assessment technology . . . Congress can now effectively decriminalize immigration detention without increasing risk to the American public." Robert Koulisch & Mark Noferi, *Unlocking Immigrant Detention Reform*, BALT. SUN, Feb. 20, 2013, <http://www.baltimoresun.com/news/opinion/oped/bs-ed-immigrant-detention-20130220,0,5653483.story>. Separately, Koulisch took a more critical view of the risk assessment process, explaining that it provides "a freedom without much liberty." Robert Koulisch, *Entering the Risk Society: A Contested Terrain for Immigration Enforcement*, in SOCIAL CONTROL AND JUSTICE *supra*, at 61, 83.

ical assessments that leave no room for individualized discretion.³⁵¹ Instead, ICE officers or an immigration judge should consider whether an individual noncitizen “presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision,” as the American Bar Association recently proposed.³⁵² Doing this would more closely relate immigration detention to the regulatory goal of having individuals appear for hearings and keep the public safe—the two factors historically used by the BIA and immigration judges in determining whether to release someone on bond³⁵³—by focusing on the unique characteristics of each person in removal proceedings.

If detention is deemed necessary, the conditions of confinement should be tailored to the individual’s personal circumstances. The ABA advises that ICE consider a person’s “criminal history and demonstrated propensity for institutional violence, risk of flight, and security needs,” among other factors unrelated to criminal activity.³⁵⁴ Currently there is no good measure of the violent proclivities or flight risk of the aggregate immigration detention population because many receive no individualized review. Given that only a small number of people in immigration detention can be said to have committed a violent offense,³⁵⁵ however, it is reasonable to infer that the bulk of detainees are not violent. Consequently, ICE would need to turn to noncarceral environments to detain people.³⁵⁶

With a view toward determining confinement conditions based on security and flight risk, ICE would need to make use of a range of detention methods. Michael Flynn proposes a typology of facilities to which immigrant detainees could be assigned depending on risk. At the most lax end of Flynn’s proposed spectrum are nonsecure environments from which a resident is not physically restrained from leaving but may face adverse consequences for not returning.³⁵⁷

351. INA § 236(c).

352. AM. BAR ASS’N, *supra* note 15, § II.G.

353. *In re Saelee*, 22 I & N Dec. 1258, 1261 (B.I.A. 2000); *see* *United States v. Salerno*, 481 U.S. 739, 747 (1987) (citations omitted) (internal quotation marks omitted) (explaining that one factor in determining whether detention is punitive or regulatory is whether the detention “appears excessive in relation to the alternative purpose assigned”).

354. AM. BAR ASS’N, *supra* note 15, § III.B.1.b.

355. SCHRIRO, *supra* note 5, at 6 (reporting that only 11 percent of people in immigration detention have committed a violent offense).

356. *See* AM. BAR ASS’N, *supra* note 15, at 1 (recommending that DHS “transition to a comprehensive civil detention system that does not primarily make use of jails and jail-like facilities to house the persons in its custody”).

357. Michael Flynn, *Immigration Detention and Proportionality* 23 (Global Det. Project, Working Paper No. 4, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344188.

This type of institution, Flynn adds, “is by definition not a detention facility”; considering it as one end of the detention spectrum, however, elucidates the range of options available, especially given that such facilities are commonly used in Europe to house suspected immigration law violators.³⁵⁸ At the other end of Flynn’s spectrum are highly secured environments such as the local jails used in the United States and some immigration detention facilities.³⁵⁹ In between are semisecure environments that “only partially restrict the freedom of movement of migrants” by, for example, allowing detainees to leave the facility during certain hours.³⁶⁰

Though there is a palpable difference between being locked inside a county jail or inside a facility from which detainees are free to leave during the day, “so long as secured walls exist, the deprivation of liberty and concomitant effects remain the same.”³⁶¹ Whether locked up for eight or twenty-four hours a day, the detained individual has been denied “the fundamental nexus of membership [in society]: liberty to participate in society without surveillance or suspicion.”³⁶² “The more meaningful reform,” argues Mark Noferi, “would be to enact a system of civil *custody* and *supervision*, rather than only *detention*, that incorporates risk assessment into the initial decision to detain, rather than the level of security of the detention.”³⁶³

Replacing the current detention-based regime with one focused on supervised custody is feasible. Even absent statutory reform, the federal government could reevaluate its reluctance to increase ICE’s use of ATD programs. The agency has long operated small-scale ATD programs.³⁶⁴ These programs impose varying degrees of supervision on individuals, but all require that enrolled noncitizens maintain close contact with designated ICE or contract personnel.³⁶⁵ In the agency’s eyes, however, none of these satisfy the INA’s detention provisions. Currently, the BIA takes the position that supervised

358. *Id.*

359. *Id.* at 22.

360. *Id.*

361. Mark Noferi, *New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?*, CRIMMIGRATION.COM (Aug. 28, 2012, 4:00 AM), <http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx>.

362. Doris Marie Provine, *Disappearing Rights: How States are Eroding Membership in American Society*, in SOCIAL CONTROL AND JUSTICE, *supra* note 350, at 115, 116.

363. Mark Noferi, *Making Civil Immigration Detention “Civil”: Defining the Emerging U.S. Civil Detention Paradigm*, 27.3 J. CIV. RTS. & ECON. DEV. (forthcoming 2014).

364. The former INS launched the first ATD program in 2004. RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC & AMERICAN FRIENDS SERV. COMM., *supra* note 339, at 5.

365. *See* SCHRIRO, *supra* note 5, at 20.

release involving electronic monitoring through an ankle bracelet is not a form of “custody” for purposes of the INA’s principal detention provision, INA § 236(a), which authorizes detention “pending a decision on whether the alien is to be removed.”³⁶⁶ In *Matter of Aguilar-Aquino*, the Board rejected the immigration judge’s conclusion that electronic monitoring is “custody” because, for purposes of federal habeas corpus relief, “custody” requires a deprivation of liberty but does not require actual physical restraint or confinement—in effect, that custody includes but is not limited to detention.³⁶⁷ Instead, the Board reviewed Congress’s 1996 amendments to the detention provision and concluded that Congress “used the terms ‘custody’ and ‘detain’ interchangeably.”³⁶⁸ When Congress said “custody,” in other words, it meant “detention.” Had the Board not interpreted Congress’s intent in this manner, it could not have addressed the limits of “custody” since the section at issue, § 236(a), refers to detention, not custody.³⁶⁹

Importantly, the Board came to this conclusion by relying on the 1996 amendment’s legislative history.³⁷⁰ Taken in the context of the version of the statutory provision that existed prior to 1996, however, the legislative history to which the BIA turned is quite muddled. Earlier versions of the detention provision stretching to 1952 explicitly permitted habeas review of a decision “concerning detention, release on bond, or parole pending final decision of deportability”³⁷¹ Habeas review, of course, is available only to individuals in custody.³⁷² Congress, it seems, considered detention, bond, and parole to be forms of custody subject to habeas review. In 1996 it not only replaced “custody” with “detention” in the new discretionary detention provision³⁷³ but it also limited habeas review of decisions to detain or not.³⁷⁴ This suggests that Congress was fully aware that detention is but one form of custody. Indeed, this conclusion is supported by the fact that the provision typically described as the “mandatory detention” provision, also added in 1996, actually requires that the attorney general “shall take into custody” anyone

366. See *In re Aguilar-Aquino*, 24 I & N Dec. 747, 751–53 (B.I.A. 2009) (citing INA § 236(a)).

367. *Id.* at 752.

368. *Id.* at 751.

369. See INA § 236(a).

370. *In re Aguilar-Aquino*, 24 I & N Dec. at 751.

371. See Immigration and Nationality Act, Pub. L. 88-414, § 242(a), 66 Stat. 208–209 (1952); see also 8 U.S.C. § 1252(a) (1982); 8 U.S.C. 1252(a) (1976).

372. 28 U.S.C. § 2241.

373. See *In re Aguilar-Aquino*, 24 I & N Dec. at 751 (“Congress substituted the term ‘detain’ where the term ‘custody’ had previously been employed.”).

374. See H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.) (“The current authority in section 242(a) for a court in habeas corpus proceedings to review the conditions of detention or release pending the determination of the alien’s inadmissibility or deportability is not retained.”).

who meets the specified criteria.³⁷⁵ It would be odd for Congress to require detention of individuals whom it permits an immigration judge to release while allowing immigration judges to impose nondetention forms of custody on individuals whom they cannot let out of government custody. Consequently, whether “custody” is synonymous with “detain” is not as obvious from the legislative history as the board concluded. Just as the BIA concluded that the two terms are interchangeable, the board or attorney general could reconsider in light of other language that existed before 1996, as well as the language of other statutory amendments.³⁷⁶ Doing this would allow ICE to meet the INA’s demand that large classes of people with criminal history be “taken into custody”³⁷⁷ without physically confining them in secure environments.

Turning to ATD programs is not without complications. ICE could easily be tempted to use ATD programs for individuals who pose such little risk of flight or danger to the community that they do not merit detention. This could quickly become “a large-scale regime of ‘alternatives to release,’ rather than true ‘alternatives to detention.’”³⁷⁸ Indeed, in the penal context, research suggests that noncustodial supervision alternatives to incarceration expanded the scope of governmental surveillance to people who would otherwise not merit much supervision.³⁷⁹ Rather than move people from incarceration into community settings, “sociologists argued that expanding ‘alternative’ sanctions like probation induced court actors to shift cases on the margin between sanctions with no supervisory component . . . up to probation supervision—thus ‘widening the net’ of carceral control.”³⁸⁰ A form of this occurred in a noncustodial supervision pilot project

375. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 303, 110 Stat. 3009-585 (1996) (amending INA § 236(c)).

376. In response to a request from the American Immigration Lawyers Association that electronic monitoring and supervision be considered “custody,” ICE “promise[d] to continue to look at this issue” but suggested that its options were restrained by “statutes and regulations.” AILA-ICE Liaison Minutes—October 30, 2009, AILA InfoNet Doc. No. 10032266 (posted Mar. 22, 2010). In a follow-up case to *Aguilar-Aquino*, the board held that an immigration judge may ameliorate the conditions of release from detention, including forced participation in Intensive Supervision Appearance Program, which required an ankle bracelet and reporting requirements, if the noncitizen requests amelioration within seven days of release. *In re Garcia-Garcia*, 25 I & N Dec. 93, 94-95 (B.I.A. 2009).

377. INA § 236(c).

378. Kalhan, *supra* note 58, at 56.

379. See, e.g., Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51, 52 (2013).

380. *Id.* at 56.

that the Vera Institute operated on the INS's behalf in which people who would not have been detained were required to submit to supervision.³⁸¹

Furthermore, alternatives to detention that impose restrictive conditions may actually increase incarceration by increasing the likelihood of violating the terms of release.³⁸² Beginning in the 1980s, “[p]arole and probation as sources of prison admissions . . . bec[a]me almost as important as the court system itself.”³⁸³ Reflecting this paradoxical relationship between detention and what is supposed to be an alternative to detention, the number of people on probation and incarceration rose and fell together since the mid-1980s, and since 1980, “the national evidence suggests that in only one period (in the early 1980s) was there any evidence of probation being used as an alternative to prison.”³⁸⁴ Instead of “operat[ing] as alternatives to, or exits from, the prison system, both [probation and parole became] alternative routes to prison.”³⁸⁵

To avoid converting ATD programs into little more than inexpensive control that merely postpones incarceration, ATD programs must be designed cognizant of the challenges that people placed in ATD face when they return to life at home. This means that supervision and reporting requirements should support (or at least not disrupt) daily life.³⁸⁶ Moreover, ICE should move into ATD only “individuals who otherwise would have been detained, rather than released on recognizance or bond.”³⁸⁷ Doing this would allow ICE to adopt the least restrictive means necessary to prevent flight or danger, as the ABA and other commentators counsel.³⁸⁸

In a truly civil detention system, detention is the exception. According to the *Salerno* Court, it is permissible only “in special circumstances.”³⁸⁹ In *Salerno*, those circumstances concerned the dangerousness of a particular individual de-

381. VERA INSTITUTE OF JUSTICE, THE APPEARANCE ASSISTANCE PROGRAM: ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION 7 (1998).

382. See Phelps, *supra* note 379, at 59; see also Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 105 (1999) (“[T]he defendant on parole or probation can be sent to prison more quickly and easily than the defendant with no criminal justice status.”).

383. Caplow & Simon, *supra* note 382, at 102.

384. Phelps, *supra* note 379, at 64 & fig.1.

385. Caplow & Simon, *supra* note 382, at 102.

386. See Phelps, *supra* note 379, at 59.

387. Kalhan, *supra* note 58, at 55. In this vein, the ABA suggests that ATD programs should be a middle ground between release and detention. AM. BAR ASS'N, *supra* note 15, § III.A.1.

388. *Id.* § III.A.2; see also Kalhan, *supra* note 58, at 55 (explaining that immigration custody “should not involve restraints more restrictive than necessary to accomplish the permissible purposes of custody”).

389. *United States v. Salerno*, 481 U.S. 739, 749 (1987).

terminated after reviewing his unique circumstances.³⁹⁰ To this Article's discussion of immigration detention we might add the likelihood that a particular noncitizen will abscond. Such individualized determinations of dangerousness or flight risk are a far cry from the categorical assessments routinely used in immigration detention. To become a civil detention regime, however, the presumption must be that people placed in removal proceedings are neither dangerous nor prone to flee.³⁹¹ Only individualized, articulable evidence to the contrary ought to rebut that presumption.³⁹² Beginning with a presumption that people will remain free, adopting a custodial approach that imposes only the least restrictive measures, requiring a specific finding of dangerousness or flight risk to detain, and then only detaining in the least restrictive conditions merited by the risk the particular individual presents would go a long way to converting immigration detention into the civil regime that ICE claims to aspire to run.

All of this is likely to lead to less detention than we experience today. "[T]he logical extension of tailoring a detention system to its civil aims is less detention," posits Noferi.³⁹³ An immigration detention system that properly presumes that detention is an extraordinary measure that should be taken only in exceptional circumstances would hone in on those individuals who show a substantial risk of endangering public safety or absconding if not confined.³⁹⁴ Though it is not possible to know with certitude exactly the size of a truly civil immigration detention system, ICE's existing risk classification regime provides an imperfect glimpse into this untrodden territory—one that suggests that the detention population might shrink by roughly 80 percent. To begin, the 41 percent of detainees whom ICE classifies as low risk are unlikely candidates for civil detention because they have no criminal history or minor criminal activity that did not involve physical violence.³⁹⁵ Similarly, many of the 40 percent of detain-

390. *Id.*

391. AM. BAR ASS'N, *supra* note 15, § III.B.4.

392. *Id.* ("Noncitizens should not be presumed to be dangerous or prone to flight in the absence of credible information establishing objective risk factors.")

393. Noferi, *supra* note 363.

394. The Appearance Assistance Program that the Vera Institute operated from 1997 to 2000 considered various factors relevant to public dangerousness and flight risk. *See* OREN ROOT, THE APPEARANCE ASSISTANCE PROGRAM: AN ALTERNATIVE TO DETENTION FOR NONCITIZENS IN U.S. IMMIGRATION REMOVAL PROCEEDINGS 3 (2000), *available at* <http://www.vera.org/pubs/appearance-assistance-program-alternative-detention-noncitizens-us-immigration-removal>.

395. *See* HUMAN RIGHTS FIRST, *supra* note 229, at 2; U.S. Immigr. & Customs Enforcement, U.S. Dep't of Homeland Sec., 2011 Operations Manual, ICE Performance-Based National Detention Standards § 2.2(V)(F)(1), *available at* http://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf. The Detention Standards reference low, medium, and high custody classifications, but ICE officials, advocates, and analysts frequently describe these classifications as

ees who are classified as medium risk are unlikely to pose a danger or flight risk; these are individuals who lack a history of violent assaults or a history of assaults while in any type of custody, and who have not been convicted of an offense that ICE considers among the most severe.³⁹⁶ The remaining 19 percent of detainees—people who are classified as high risk—present a more likely option for civil detention.³⁹⁷ These individuals, after all, are more likely to have evidenced a history of violence, though not necessarily so—only 11 percent of detainees had in fact committed violent crimes.³⁹⁸ Because high-risk classification does not necessarily indicate a past involvement in violent crime, even these individuals should receive individualized assessments of dangerousness or flight risk to limit the possibility of detaining people who pose neither. Moreover, individuals charged with having been convicted of an aggravated felony have lived in the United States for an average of fifteen years suggesting that they have developed deep ties in this country.³⁹⁹ Though imprecise, these risk classification data suggest that approximately 80 percent of the existing immigration detention population presents little risk of endangering the public or fleeing if left to continue on with their ordinary lives while removal proceedings are pending. If this were true, instead of 477,523 in immigration detention during fiscal year 2012, there would have been 95,505 confined.⁴⁰⁰ This is still a large detention population, but it is a far cry from what has become the outsized norm.

CONCLUSION

The immigration detention system has become a leviathan. It consists of a wide network of prisons, jails, and other secure environments that stretch across approximately half the states. It affects the lives of more than 400,000 people directly and unknown numbers of friends, relatives, coworkers, and other acquaintances in communities throughout the country. It is reinforced by a powerful

“level 1” for low-risk detainees, “level 2” for medium-risk detainees, and “level 3” for high-risk detainees. See HUMAN RIGHTS FIRST, *supra* note 229, at 2 n.11.

Though ICE policy requires that all noncriminals be classified as low-risk detainees, data analyzed by Human Rights First indicates that some noncriminal detainees are not classified as low-risk. *Id.*

396. See *id.* at 2; U.S. Dep’t of Homeland Sec., *supra* note 395, § 2.2(V)(F)(2). Medium-risk detainees cannot have been convicted of an offense that ICE classifies of the “highest” severity: aiding escape, aggravated battery with a deadly weapon, armed robbery, burglary with assault, escape, inciting riot, kidnapping, first or second degree murder, and sexual battery. *Id.* § 2.2, app. 2.2.C.

397. See HUMAN RIGHTS FIRST, *supra* note 229, at 2.

398. See *id.*; U.S. Dep’t of Homeland Sec., *supra* note 395, § 2.2(V)(F)(3).

399. See Transactional Records Access Clearinghouse, *How Often is the Aggravated Felony Statute Used?*, <http://trac.syr.edu/immigration/reports/158> (last visited Oct. 20, 2013).

400. SIMANSKI & SAPP, *supra* note 224, at 5.

network of intergovernmental operations designed to identify and apprehend suspected immigration law violators. And it is palpably just as punitive as the criminal incarceration that has defined law enforcement in the United States for a generation.

As this Article has shown, the legal divide between criminal law and immigration law is contradicted by the lived experience of hundreds of thousands of people who every year occupy immigration detention centers. The intensity of isolation from friends and family, closely watched movements, locked quarters, and threat of barbed-wire perimeters reveal law's formal insistence that immigration detention is civil as nothing more than a quaint myth. The myth is backed by the full power of the state.

If the law of immigration detention is to catch up to the legislative intent, then the myth that immigration detention is civil must meet its demise. The modern immigration detention estate was born of the same antidrug hysteria that swept the nation in the 1980s and 1990s, giving life to the same war on drugs that created penal mass incarceration. Congress wanted to quash drug activity by condemning its purveyors, and it chose the awesome power of imprisonment as its preferred tool. The decades since then attest that it did so with impressive success, creating two systems of mass incarceration—the penal detention system that is often discussed, and the immigration detention system that is this Article's concern. It may have taken another decade and the attacks of September 11, 2001 to push the immigration detention population to explosive proportions, but it was the imprisonment architecture that developed from the early 1980s to the mid-1990s that this Article details that made immigration mass incarceration politically feasible and legally possible. This Article, then, sets forth a framework by which to understand how the current immigration detention system came to be, and begins to envision a different version.

As the nation grapples with what to do about the rate of penal incarceration,⁴⁰¹ the time is ripe to revisit immigration detention. It must either become more penal by being enveloped by the criminal procedure doctrines that characterize imposition of detention in the penal context, or it must become truly civil. The war on drug's failure counsels moving toward a civil detention system. To do that it must move away from its punitive past and into a future where detention is the exception and liberty is the norm.

401. See Eric Holder, Attorney General, Remarks to the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.