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Daniel Wilsher

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## IMMIGRATION DETENTION LAW, HISTORY, POLITICS

The liberal legal ideal of protection of the individual against administrative detention without trial is embodied in the habeas corpus tradition. However, the use of detention to control immigration has gone from a wartime exception to normal practice, thus calling into question modern states' adherence to the rule of law.

Daniel Wilsher traces how modern states have come to use long-term detention of immigrants without judicial control. He examines the wider emerging international human rights challenge presented by detention based upon protecting 'national sovereignty' in an age of global migration. He explores the vulnerable political status of immigrants and shows how attempts to close liberal societies can create 'unwanted persons' who are denied fundamental rights. To conclude, he proposes a set of standards to ensure that efforts to control migration, including the use of detention, conform to principles of law and uphold basic rights regardless of immigration status.

DANIEL WILSHER is a senior lecturer in law at City Law School, London, and a part-time immigration judge in the Immigration and Asylum Chamber, First Tier Tribunal.

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# IMMIGRATION DETENTION LAW, HISTORY, POLITICS

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This book was written between 2006 and 2010, but began life much earlier prompted by my experiences as a lawyer visiting long-term immigration detainees in prisons and holding facilities. I was struck by the fact that often neither detainees nor the authorities clearly understood why they were being held. Often their release would follow from sending a simple fax setting out the reasons why continued detention made little sense. The absence of robust judicial oversight meant, however, that such releases were left to the vagaries of chance meetings with the right lawyers. This seemed to me a strange situation given the centrality of habeas corpus and personal liberty within liberal legal systems. Years later I wanted to bring together into one place a text which might better explain the historical development of the law in this area. This volume is an expanded and developed version of what became my Ph.D. thesis. I am very grateful to my supervisor, Professor Elspeth Guild. She has been a wonderful adviser, coach and friend throughout the process. With her on hand to inspire me, I was able to continue to believe in the value of this project even when my spirit sank a little or time ran short.

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INTRODUCTION AND OVERVIEW:  
FREE MOVEMENT OF PERSONS AND  
LIBERTY OF THE PERSON

The detention of foreigners under the auspices of immigration powers has grown enormously in both its scope and scale during the last thirty years. In a pattern repeated throughout developed nations, and increasingly copied by others, unauthorized or rejected foreigners are being held in prison-like facilities for extended periods without serious legal controls or accountability. The causes of this rise in immigration-related detention are many, but the results are clear; imprisonment of individuals without the normal due process safeguards commonly demanded in liberal democracies is now taking place on a vast scale. This process of ‘warehousing’ immigrants, outside the mainstream of the law, has entailed much that is arbitrary or inhumane. We can see this as part of a more general trend towards ‘politicizing’ the treatment of unauthorized migrants. This book is an attempt to explain the historical development of this phenomenon and to explore the underlying legal and political challenges that it exposes for societies ostensibly committed to a public policy based upon liberal reason and the rule of law.

**From free movement to border controls: the alien as liberal subject  
in the nineteenth century**

The ‘alien’ was not always so alien. The impetus towards free trade that prevailed during most of the nineteenth century encompassed labour migration. For a time, the development of liberal principles of economics and constitutionalism marched together to enhance the status of aliens. The increasing recognition of equality to act on the market, stripping away old restrictions based upon privileges and status, extended to aliens’ protection within the economic order of liberalized economies. This was mirrored in the liberal protection of the alien’s person. The habeas corpus tradition within Anglo-American law drew no clear distinction between

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citizen and alien. We see a growing juridical separation of the economic sphere (that of freedom and equality) from that of inter-state power relations (the sphere of war).<sup>1</sup> As a result, aliens were marked out mainly in relation to the state of war: alien enemies and alien friends became the key distinction. Absent the state of war, the alien was free to move within and across borders.

This era of classical free movement began to end when new forms of economic autarky emerged towards the end of the nineteenth century. After great waves of settlement and the emergence of nation-states with stable populations, the border began to emerge more clearly as a site of politics and regulation. This reflected a range of domestic concerns: the conflict between labour and capital, with workers seeking to protect wages from cheaper migrants; race- or religious-based exclusionary tendencies linked to claims about national identity, and sometimes moral panics about alien disease or criminal deviance. In the rhetoric of international relations, unwanted migration was said to be akin to invasion by foreign powers. The formal state of war, with its enemy/friendly alien divide, was superseded as the important legal and political category. This first era of globalization ended with aliens being seen both as bearing industry, skills and labour power but also as potentially disruptive of economic and social security, deviant or dangerous agents of foreign powers. Free movement became a threat as well as an opportunity.

### **The emergence and development of permanent immigration detention laws: from war powers to aliens powers**

Although the huge expansion in detention facilities and detainee numbers is relatively recent, restrictions on migrants' liberty first emerged during these earliest forms of migration control in the late nineteenth century. Such control initially took place at ports of entry in order to separate out aliens viewed as 'undesirable'. As noted, this was mainly on economic and racial grounds. Detention was viewed in largely bureaucratic terms, being seen as a necessary part of the process of selection and care of aliens arriving at the border. It was generally brief and did not attract jurisprudential

1 Schmitt speaks of '[t]he general movement to freedom, a termination of traditional orientations and, in this sense, a total mobility of the most intensive sort'. C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York: Telos Press, 2006, 236.

attention. Its use was later extended to serve as a means to deport aliens convicted of crimes or political activists pursuing troublesome causes. In these cases detention itself moved more centre-stage, becoming linked to national security policy and thus bearing analogy with war-time tools like preventive internment of enemy aliens. Indeed, during World War One we shall see that detention of aliens began to fall under both war powers and immigration powers.

The line between security measures and immigration measures has remained blurred ever since. Thus in recent years we have seen resort to detention under immigration powers to tackle terrorism. This is not surprising given that, in its infancy, the aliens' power was conceived of as a descendant of the war power. Gradually, however, it has mutated into a free-standing and open-ended tool used to justify wide-ranging government action against aliens.

### **The modern era: normalizing administrative detention of unauthorized or deportable foreigners**

The greatest growth in immigration detention in modern times has been that applied to a new category – those who are unauthorized. They are termed variously 'irregular', 'undocumented' or 'illegal' in different contexts, but usually share a lack of immigration authorization to enter or remain in a state. This hides the underlying diversity of such persons who are motivated by a wide range of social, economic and political factors. Throughout history migration has primarily been fuelled by such incentives. Demand for migrant labour has remained strong both from public and private sectors, but nations have placed limits on the lawful volume or types of labour migration. With lawful channels constrained amidst persisting push and pull factors, unauthorized entry has increased. 'Unauthorized' immigration has thus come into being in large part because of the proliferation of regimes which mandate the securing of prior permission to enter developed states.

Similarly, asylum seekers have been subject to restrictions on accessing Western nations. They have therefore been unable to obtain permission to enter before arrival. Arriving without prior permission or entering unlawfully they find themselves vulnerable to detention by reason of their immigration status. They can be held as 'illegal immigrants' pending permission to enter or remain. Detention of these unauthorized migrants

(whether seeking asylum or economic improvement) has thus become widespread and is no longer confined to Western nations where the practice began.<sup>2</sup> This process was driven by a complex mixture of ‘security’ concerns associated with loss of control over borders. Detention was part of a general ‘fight’ against unauthorized immigration, but one which was rarely based on the danger posed by individual criminal deportees or suspected terrorists.

### **Enemies or friends? The ambiguous contemporary moral and political status of foreigners**

We can thus see that detention has now become a technique of control used in a great many different situations to a wide variety of different categories of foreigners, a few alleged to be individually dangerous, most not. Both numbers of detainees and periods of detention have also risen substantially in recent years. These new legal categories not only bring persons under the panoply of detention powers, but also suggest that they occupy a lower political or moral status than citizens or lawful immigrants. They are deemed ‘illegal’, which has come to contain its own hostile implications. The legal categories thus both reflect and reinforce developing political and cultural norms about irregular migrants as deviants. This suggests a threat to be repelled and appears to legitimate (and even demand) more draconian detention policies. Such stereotypes do not accord with important aspects of liberal legal and moral theory, in particular the commitment to demonstrate respect for the equality and liberty of each person.

This contrasts sharply with the position of Western nations towards lawful migrants. Legal economic migration, although allowed selectively, has not been closed off. Skilled migrants’ status has been enhanced to the point where there is often a high degree of equality between them and citizens. This is most obvious for lawful resident migrants, who are given the same access to most economic and social rights as citizens. This has been driven by high levels of competition to attract particularly valuable migrants and pressure to admit them from industry and public service providers. This has been an important driver towards rising

2 Report of the UN Working Group on Arbitrary Detention (WGAD), 13th Session, A/HRC/13/30, 15 Jan. 2010, para. 54. This notes that since the 1997 extension of the WGAD’s mandate to cover administrative detention of asylum seekers and immigrants, all country mission reports contain a chapter on administrative immigration detention.

equality in the membership status of migrants. The same trend can be seen in more generous naturalization rules for long-term residents. Given that migration and migrants are not *per se* the subject of restrictive policies, it might appear paradoxical that the fight against ‘unauthorized’ migration, including the use of detention, has grown so fierce. In fact, the authorized/unauthorized line has, in important respects, replaced the citizen/alien divide.

### Constitutionalism and the problem of unauthorized persons

Whilst charting the development and expansion in the detention of immigrants, the study also seeks to critically examine this from the perspective of law and human rights. Migration policy, control over borders and the right to determine which categories of persons can be permitted to remain part of a community are intensely controversial issues. Historically their resolution has taken place through the democratic and bureaucratic processes, not the courts. Indeed, by the early twentieth century courts officially ceded most power over such questions to the other branches of government. Building, shaping and protecting nations through migration policy were political questions not within the courts’ jurisdiction or competence. International law was also reinterpreted to fit this model so that territorial sovereignty could be asserted to deny any obligation to admit even friendly aliens. This permitted governments to engage in, for example, deliberately racist migration controls without legal review. The political calculations of the democratic process trumped any constitutional or rule of law considerations.

Immigration detention, however, appears to be an exceptional case because it interferes with one of the most fundamental rights within democratic states, a right that the liberal legal order has staked much of its legitimacy upon defending. Despite this, we shall see that such detention is now governed largely by political and bureaucratic imperatives. Given political assertions of the nexus between ‘security’ and migration control, courts have been reluctant to question executive detention of aliens. More fundamentally, courts have been confronted with a deeper constitutional question: what residual rights, if any, do immigrants have if the government has declared that they are not unauthorized to be members of the community? To conclude that non-membership ousts the constitution permits an unbridled executive power, even an *imperium*, over such persons. The constitutional status in domestic law of unwanted

and unauthorized migrants is a crucial question in determining the ambit of detention powers.

### **The absence of a modern international law and politics of migration**

The doubtful status of aliens under domestic legal orders is mirrored in the absence of an international law framework regulating migration and migrants' rights. Whilst the mobility of persons across borders has remained vibrant, there has been a failure to regulate this process by sending and receiving nations. Whilst the modern era of globalization has mirrored that of the nineteenth century in witnessing massive trade liberalization protected by elaborate treaty mechanisms, this has been confined to goods, services and capital. Trade in labour, between developed and developing nations at least, is still largely controlled by national law. Since World War One, legal and political rhetoric has viewed the exercise of the aliens power as closer in nature to that of war powers than trade relations.<sup>3</sup> Given the lack of bargaining power between sending and receiving countries, there has been no pressure to agree mutual standards of treatment. As a result, maximal discretion over migration law has been retained by developed countries in their relations with developing countries' nationals. The status of the latter therefore remains heavily exposed to mercurial domestic political calculations in the receiving state and the ebb and flow of pro- and anti-immigrant lobbies.

The treaties relating to refugees and stateless persons that were signed after World War Two have not been followed or updated to manage modern migrations. These earlier treaties gave an international status to persons who had no state or whose state would not protect them. This helped safeguard international order by integrating them into new states upon specified terms. In the modern world, formal recognition of migrants as stateless or refugees is the exception. Most unauthorized migrants fall outside any formal treaty regime and as such present a destabilizing factor to international society.<sup>4</sup> They are often difficult to

3 Indeed, increasingly, one area where Western states have developed cooperation is over restrictions on migration. See G. Lahav, *Immigration Politics in the New Europe*, New York: Cambridge University Press, 2004, who argues that 'co-operation on migration has existed predominantly in the form of prevention'. He concludes that 'in so far as convergence is based on compatible interests to secure effective state control over migration, co-operation may bolster – not compromise – state sovereignty', 228.

4 E. Haddad, *The Refugee in International Society: Between Sovereigns*, Cambridge University Press, 2008, who argues that even refugee law is 'more a communitarian security issue than

actually expel due to practical or legal reasons, but have been declared to be ‘expelled’ under domestic law. Even states that wish to, do not find it easy to protect their migrant citizens who have chosen to leave. In such circumstances, unauthorized migrants assume the position of international outcasts. We see an international society that sometimes does not have any legal or geographical ‘space’ left for those who have been rejected by all states. They do not fit anywhere. Executive detention is one result of this exile.<sup>5</sup>

Increasing detention arising from gaps in the international migration regime has led to concern about the problem amongst many groups. International courts, tribunals, monitors and human rights institutions are beginning to recognize that the practice of detaining migrants under the banner of protecting ‘territorial sovereignty’ has led to practices which are arbitrary, inhumane, expensive and sometimes unnecessary. Apparently fundamental principles like that of the right of states to control their borders may look less fundamental in the light of the actual practices that they entail. Such experience has led one leading human rights body to go as far as to argue that whilst ‘fully aware of the sovereign right of States to regulate migration . . . immigration detention should gradually be abolished’.<sup>6</sup> In the absence of explicit treaty mechanisms designed to protect nationals who are overseas however, only the provisions of general human rights instruments may be invoked. The relationship between these general norms and border control is subject to ongoing legal and political debate.

### **A residual role for international human rights: the inalienable rights of unauthorized persons?**

We have identified two important ways in which unauthorized aliens are vulnerable to arbitrary state action. First, they can fall outside the scope of domestic constitutions that protect only citizens and, perhaps, authorized

a cosmopolitan humanitarian concern, it follows that refugees are perceived and controlled more as a matter of national and international security than a matter of human security’, 91.

5 For a detailed discussion of the position of the stateless, see *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London: Equal Rights Trust, 2010.

6 Report of the UN Working Group on Arbitrary Detention, 13th Session, A/HRC/13/30, 15 Jan. 2010, para. 58.

foreigners. Second, there is no clear set of international obligations giving a status to aliens in general. The specific group of refugees under the 1951 Refugee Convention is the main exception. Perhaps because of these two legal gaps, the modern period has seen increased recourse to the use of general human rights treaties by aliens. These are mainly drafted in terms which do not depend on immigration status or authorization. Nevertheless, 'border' control policies have increasingly turned inward as modern states have stripped away many 'fundamental' rights to liberty, work, healthcare, social security, and even marriage and family life, of unauthorized foreigners as part of their 'immigration control' strategies.

International tribunal case-law has thus far mainly decided that these treaties create important obligations on states to refrain from expelling even unwanted foreigners where this would lead to certain types of serious harm.<sup>7</sup> This does not amount to 'authorization' to be a 'member' of that society with a package of civil, economic and social rights. Such persons are merely unremovable. They do not thereby acquire 'membership' in any wider sense. Could they be detained for life and thereby, whilst not subject to expulsion, physically segregated from the wider society? The answer depends on how far international human rights law may go in recognizing a kind of regularization right.<sup>8</sup> This raises the general cosmopolitan question at its height: are there inalienable rights that all persons can assert against whichever state they are presently in, regardless of their formal membership status? Of course, to the extent that there are such rights, this may amount to a guarantee of 'membership' of the global human society. Human rights treaties guarantee all the rights contained therein to all *persons* unless they explicitly or impliedly permit derogation. Immigration status is usually irrelevant.<sup>9</sup> *Border control* is an important derogating interest, but it cannot support *unconstrained* measures against unauthorized foreigners. To do so puts membership of a nation (or at least immigration status) above personhood as the precondition for fundamental human rights.

7 For a strong example, see *Chahal v. United Kingdom* 23 EHRR 413, in which even national security interests could not prevail where a deportee faced a threat of torture in his home country.

8 For a right of membership derived from the prohibition on expulsion, see D. Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularise Illegal Stay?' (2008) *ICLQ* 57 87–112.

9 There are obviously fundamental political rights that are unique privileges of citizenship. Limitations on basic civil rights based upon immigration status appear to be less obviously justifiable. Most modern legislation seeks to focus its restrictions on unauthorized aliens' access to social and economic rights.



Nevertheless, despite the tendency towards ‘absolutist’ rhetoric within human rights talk, the real issue is one of *balance*. There is no doubt that foreigners can rightly be discriminated against in relation to some interests. That is the corollary of citizenship. Despite this inherent inferiority, foreigners need not be denied *respect* as individuals. In fact, I shall argue that the most important ‘right’ is the right of every foreigner subjected to state power to be governed by a system of law and practice that promotes migration policy whilst adequately taking into account those individuals it actually affects. This allows continued scope for criticism of measures that are arbitrary or harsh when set against this yardstick.

#### **Detained foreigners as enemies, criminals, emergency internees or outlaws**

Against the background of the issues set out above, this book examines the history and law relating to immigration detention against some basic themes. The most important is to ask how we should see the legal status, in either international or domestic law, of those detained. There are four possibilities that present themselves. First, analysis might reveal that the alien has been viewed as an enemy with whom the state is at war. This has its roots in the prevalent view that the entry and stay of foreigners engages the war, foreign affairs and national security powers of the state. In this case, action may be taken to deal with a threat posed by migrants that could not be contemplated in ‘peacetime’. As we shall see, whilst governments have used the language of conflict metaphorically, they have not made formal declarations of war against migrant-producing nations.

If the war analogy is inappropriate, detained aliens might be closer to criminal suspects in status. Although held without a formal criminal process, jurisprudence might have provided a shadow set of guarantees as regards timely expulsion processes, risk assessments and rights to bail. This approach would set up procedural processes that put the state seeking to detain to a burden of proof on key issues. Increasingly the most important of these issues is whether deportation is really likely to be achieved promptly and whether alternative, less invasive, measures might be adequate to ensure compliance with immigration rules.

Where detainees are treated neither as formal enemies nor criminal suspects, another description that seems appropriate for some periods in history is that of ‘emergency detainees’. This arises in situations falling short of war but where a crisis may have arisen in that, for example, the

border has been vulnerable to large volumes of unauthorized migrants. In modern times, however, although there has been a perception of permanent crisis in relation to migration, formal declarations to this effect have not been made. Instead, ‘normal’ immigration powers have been adapted and found adequate to meet particularly large migrations.

Finally we may consider detainees to be simply ‘unauthorized persons’. By this we mean simply that they have not established any clear legal status under domestic or international law. This presents a legal ‘non-status’ to the extent that no formal set of principles, international or national, regulates their treatment. We will consider how far this is a true representation of the methods used by states to detain aliens. If in fact they may truly be considered ‘outlaws’, this situation reveals perhaps most clearly the potential vulnerability of detainees to abuse. The idea of the ‘outlaw’ suggests both that the law does not provide proper safeguards against arbitrariness, but also that the law positively legitimates harsh measures.

### Detention centres as extra-legal spaces and virtual borders

The second theme relates to the legal and physical nature of immigration detention centres. The camp, particularly for refugees or displaced persons, has been a feature of migration throughout the past hundred years. Resettlement of such persons to new countries was often determined by negotiation and consent. The resettling state authorized migrants’ entry prior to them leaving the camps and travelling. Similarly, early migrants arriving spontaneously on ships were held on board until authorized to enter or expelled. Vessels were considered special zones beyond the reach of the law. Gradually remote control developed through visa restrictions and carrier sanctions. Crossing borders thereby became subject to extensive prior authorization procedures.<sup>10</sup>

In the modern era, those who do nevertheless arrive or enter without authorization are often held in immigration detention centres until they are authorized or expelled. How far do these places – transit zones, jails,

10 For a discussion of the importance of territory to the development of international law and society, see Schmitt, *The Nomos of the Earth*: ‘Thus, in some form, the constitutive process of a land-appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire. This is true as well for the beginning of every historical epoch. Not only logically, but also historically, land-appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law’, 48.

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holding centres and prisons – amount to special zones which are neither fully within nor without any existing state?<sup>11</sup> In such spaces, the jurisdiction of courts may be limited or extinguished altogether as detainees find themselves held in the name of a law which the government determines the limits of. Furthermore, many persons in detention have no country that will take them back and nowhere to go. This often stems from *de jure* or *de facto* statelessness. In these cases the detention centre may amount to a permanent ‘border within borders’, a hollowed out space for these unreturnables. We consider the extent to which this is an accurate picture of the law and practice of detention.

### Political and legal reasoning over membership within liberal societies: detention as the residue of arbitrary power

We also consider some questions of jurisprudence that flow from these first two questions. If we consider unauthorized foreigners in detention to be ‘outlaws’, is this based upon their non-member status and/or their ‘extra-territoriality’? If they are not strictly outlaws, then we must consider what principles of law have come to regulate their detention and whether these are defensible. One point that emerges clearly is a paradox. The classical idea that exercise of the ‘aliens power’ was beyond judicial reasoning has now been swept away. Courts now routinely subject government decisions over rights of entry and stay to close scrutiny using principles of due process, human rights and communitarian ideals of integration.<sup>12</sup> Those found to be without rights to stay after such scrutiny have thus been ruled to be outside even this extended, judicially protected ‘community’. Modern liberal states thus exhibit a highly developed political and legal process for determining membership and exclusion.<sup>13</sup>

11 G.L. Neuman, ‘Anomalous Zones’ (1995–6) 48 *Stan. L. Rev.* 1198.

12 P.H. Schuck, ‘The Transformation of Immigration Law’ (1984) 84 *Colum. L. Rev.* 1, which sets out the argument that the development of constitutional and judicial review of migration decisions moved the law decisively away from the traditional idea of a wide legislative plenary power over migration. Also see Joppke, who argues that in Europe strong constitutional courts have been able to protect migration rights from legislative restrictions: C. Joppke, ‘Why Liberal States Accept Unwanted Immigration’ in A. Messina and G. Lahav (eds), *The Migration Reader: Exploring Politics and Policies*, London: Lynne Rienner Publishers, 2006, 526.

13 Note that attempts by liberal governments to exclude judicial review of immigration decisions have been subject to fierce resistance by constitutional courts. See for example, D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge

‘Unauthorized’ migrants in liberal societies may therefore have been found to be non-members after (1) *political* debate on the general categories for membership within a democratic forum (in which migrants’ interest groups *may* have participated); (2) *executive* consideration of their case in terms of administrative rules; and (3) *judicial* analysis of their particular immigration claims and ties to the nation. Detention in such cases expresses the residue of truly arbitrary power after this expanded liberal political and forensic process has been exhausted (or has not been completed favourably yet). It is the physical and legal expression of their exclusion from the community. Detainees have fallen outside the limits of the internal legal order and yet they are not protected by an external legal order agreed upon by states. Such a person may be truly said to be an ‘outlaw’ as regards their capacity to lead an autonomous life governed by law. Their lives may be seen as essentially worthless to themselves and to the states of the international community. This might suggest that ‘[t]he exclusionary device of making people illegal is so complete that those so labelled scarcely even have human rights’.<sup>14</sup>

### Democracy, security, detention and authorization

There has indeed been an increasing tendency in contemporary Western states’ rhetoric towards politically and morally de-legitimizing all aliens not authorized by government to be present. These unauthorized persons are described as worthless at best or hostile at worst. Immigration authorization and border control have been made into a ‘security’ issue. The expansion and normalization of detention camps has only been possible through this political process. This widespread cultural and political phenomenon has, however, always been in tension with the actual fact that there are many millions of unauthorized persons, often engaged in complex and valuable relationships with their host societies. There have for political, practical and humanitarian reasons therefore always been methods of ‘reauthorizing’ such persons. There is a spectrum of such modes, from highly political amnesties for thousands to more ‘hard’ legalistic rules on long-term over-stayers or more flexible legal standards giving non-expulsion rights derived from international human rights law.

University Press, 2006, who examines the courts’ restriction of ouster clauses in Australia and the United States of America.

14 C. Dauvergne, *Making People Illegal: Migration Laws for Global Times*, Cambridge University Press, 2008, 28.

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## DEMOCRACY, SECURITY, DETENTION AND AUTHORIZATION    xxi

Whilst usually leading to permanent residence, this need not be the only type of reauthorization. For detainees, release on bail amounts to a more limited form of authorization; to be at large subject to reporting conditions. For many years, governments recognized the benefits of flexible bail powers. Indeed, where expulsion proved impossible legislation sometimes provided both for bail and more expansive ‘reauthorization’ rules allowing rights to work, for example. Modern politics and legislation has, however, moved away from temporary authorization and bail in favour of a binary choice between full authorization and expulsion. Given the assertion that migration control is a security issue, release from detention prior to full authorization has become politically illegitimate. Governments have thus normalized detention to an extent only previously seen in wartime.

Increasingly the ‘political’ branches of government have been driven towards hollowing out the legal status of unauthorized migrants. The broad notion of ‘security’ adopted has meant that such persons constitute an ‘enemy’ against whom strict measures are justified.<sup>15</sup> Again the spectre of the ‘outlaw’ beckons. Where are the appropriate limits upon such state action to be found? Even detainees must surely be ‘authorized’ to have access to basics such as toiletries, food and bedding, otherwise they could be starved or made ill. Yet much of the practice of modern immigration politics, particularly in liberal democracies, has tested the limits of law, morality, reason, utility and internationalism. Democracies, in which aliens cannot vote, appear to have developed a strong tendency towards ever-increasing levels of harshness in immigration enforcement measures. Legislatures have been reluctant to provide *legal* entitlements for persons who are unauthorized, preferring to remove rights or leave matters to executive discretion. In principle, judicial review has an important role in closely scrutinizing immigration enforcement policy which, lacking strong democratic safeguards, may inherently favour marginal benefits to citizens over serious harms to aliens.<sup>16</sup>

15 For the argument that the definition of ‘friend’ and ‘enemy’ is the ultimate ‘political’ decision which must be logically prior to the operation of any legal order, see C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2nd edn (trans. G. Schwab), Cambridge, MA: MIT Press, 1985.

16 Even strong republicans, who wish in general to limit judicial review in favour of democratic processes which they see as more likely to be protective of citizens, appear to accept that there may be a small number of groups who are particularly vulnerable to moral panics and hostility leading to harsh laws. See Bellamy, who seems to accept that in the case of asylum seekers, courts may have a role if ‘even their rights to a fair hearing and a humanitarian regards for their safety and well-being are ignored’. R. Bellamy, *Political*

### The rule of law and the limits of the aliens power: beyond authorization

Jurisprudence was nevertheless for many years quite passive in the face of the political claims of governments to hold monopoly control over migration policy. However, as noted above, the liberal constitution has increasingly begun to assert itself through judicial adjudication of membership claims. The political branches no longer have the final word on authorization. Can we move beyond a jurisprudence that simply seeks to provide extended judicial assessment of membership claims? Detention cases demand that even those not found to be worthy of membership at all (or whose membership is not yet established) are afforded protection under law. The nature of this protection raises some important questions about the central liberal doctrine of the rule of law.

In the end, a truly *liberal* state's assertion of a monopoly of force over all persons physically under its control during peacetime generates a tension within law. On the one hand, law sees the distinction between insiders and outsiders as fundamental to its purpose; the constitution must exist to protect the nation from outside threats. On the other hand, law must adequately regulate the state's use of force, even for the benefit of outsiders who are present. This tension asks, in essence, whether the rule of law is more constitutive of liberal democracies than regulation of membership and borders.<sup>17</sup>

We shall see that immigration detention has usually conformed to 'thin' versions of the rule of law. Governments have usually been able to point to a basic legal power to detain. However, as detention has become longer, more widespread and with increasingly harsh effects on detainees, it has conflicted with 'thicker' versions of the rule of law. Detention has increasingly become unstuck from its ostensible function of

*Constitutionalism*, Cambridge University Press, 2007, 256–8. He recalls here Stone J's opinion in *United States v. Carolene Products* 304 US 144 152–3, n4 (1938), which is often said to mark the germ of the idea with its reference to more searching judicial review where 'prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities'.

17 See Dyzenhaus discussing Hans Kelsen's idea that 'all state power, even at international level, is subject to the rule of law is a moral milestone, an expression of the liberal hope that, as Carl Schmidt understood it, the exception could be banished from the world'. D. Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2004–5) 68 *Law and Contemp. Probs.* 127, 162. Also see D. Dyzenhaus, 'Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen' (1994–5) 16 *Cardozo L. Rev.* 1–19.

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selecting who to admit or enforcing the speedy and efficient physical return of unwanted immigrants. It has mutated into a more general form of executive and political control over unauthorized aliens, capable of arbitrariness, oppression and disproportion.

Do such practices offend the ‘rule of law’? Here we can see a convergence between modern jurisprudence, which has argued for a richer notion of the rule of law, and emerging judicial practice, which has attached renewed importance to the rule of law in cases concerning aliens.<sup>18</sup> Liberal constitutions must closely regulate the deployment of state violence over all ‘persons’ subject to its power – even when they have not been authorized to be members of the community. To find otherwise ultimately pushes liberal states in the direction of slave societies in which the majority (or the government) can render non-members’ lives devoid of intrinsic worth, subject to the unbridled power of the state. This requires a reappraisal of the unruly and protean aliens power with its tendency to expand to meet political exigencies of the day. Whilst law may influence such a reappraisal, real progress depends, in the end, on a political recognition that the aliens power is deployed in time of peace not war. Most foreigners do not come bearing arms. Actions of doubtful necessity, even in war, should not be deployed against aliens in the less pressing circumstances of peace.

18 See T. Bingham, *The Rule of Law*, London: Allen and Lane, 2010 for a ‘thick’ version of the rule of law from a leading judge who sat in a number of important contemporary cases involving alien detention and restriction.