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Immigration Detention: No Turning Back?

The growth in the number of noncitizens in immigration detention in the United States over the past two decades is striking. In 1994 the Immigration and Naturalization Service (INS) detained approximately 6,000 noncitizens a day in immigration detention, and annual detention capacity was just over 100,000. In less than two decades, that annual detention capacity has quadrupled. In fiscal year 2011, approximately 429,000 people were confined in an immigration detention facility. The number of noncitizens detained on any given day now tops 30,000 and has for several years. The length of stay for an immigrant in detention varies widely, but one snapshot taken on January 25, 2009, revealed that the average stay for detainees present on that date was eighty-one days (Kerwin and Lin 2009). Some immigrants are detained much longer.

The growth in immigration detention is intertwined with, but not fully explained by, national security concerns. The US government certainly used immigration detention as a way to address widespread concern over national security in the wake of the September 11, 2001, attack on the United States by al-Qaeda. Thousands of Arabs and Muslims were placed in immigration detention for technical violations of their immigrant and nonimmigrant visas, notwithstanding the lack of evidence that these detainees posed any actual risk to national security. The events of September 11 also prompted the implementation of long-contemplated changes to the federal bureaucracies responsible for immigration enforcement and detention. Congressional legislation created the Department of Homeland Security (DHS), and the INS was broken up into three separate agencies that operate, along with other agencies like the Federal Emergency Management Agency and the Coast Guard,

under the umbrella of the DHS. Since that reorganization, Immigration and Customs Enforcement (ICE) has overseen immigration detention.

The frenzy of detentions after September 11 was striking in its unabashed reliance on racial and religious profiling, but it does not explain either the current size of the United States' detained immigrant population or the longevity of the detention boom. Detention figures actually began to swell after 1996, in response to changes in the law that vastly expanded the number of noncitizens subject to mandatory detention during removal proceedings. As Margaret Taylor (2005: 345) notes, "The detention mandate that ultimately became [Immigration and Nationality Act] § 236(c) was inserted without study into omnibus legislation that Congress was in a hurry to pass. And the statute was widely considered by experts inside and outside the government to be unduly harsh, unrealistic and unwise." The legal changes enacted by Congress in 1996 drove a doubling of the detained immigrant population from 1996 to 2000.

The next significant spike in detention figures occurred in 2007. In late 2005 President George W. Bush declared that his administration was working to end "catch and release" policies at the border. He announced that migrants coming into the United States without authorization would be detained and formally removed rather than simply turned back. Congress also provided substantial resources in this period to increase immigration enforcement and detention capacity. In 2007, for the first time, the number of people in immigration detention topped thirty thousand a day (Kerwin and Lin 2009: 6). The numbers have not dipped below thirty thousand since that time. The majority of immigration detainees in the United States are from Mexico and Central America. A January 25, 2009, snapshot showed 37 percent of detainees were from Mexico, 28 percent from Central America, 7 percent from the Caribbean, and 6 percent from South America (12).

Immigration detention in the United States is "civil" detention. As a legal matter, this means that an individual placed in immigration detention is not entitled to the same protections that would apply if he or she were being incarcerated for a crime. Individuals charged with crimes, whether citizens or not, have constitutional protections against lengthy pretrial detentions. They also have a right to counsel at the government's expense to assist in their defense. In contrast, immigration detention is not subject to the same set of procedural protections. The Supreme Court clearly articulated this distinction in the 1896 case of *Wong Wing v. United States*, in which the Court distinguished between "detention or temporary confinement, as part of the means necessary to give effect to the provisions

for the exclusion or expulsion of aliens,” and a sentence of a year at hard labor. The Court concluded that the former was “not imprisonment in a legal sense,” whereas the latter was and therefore was subject to the procedural protections of the Fourth and Fifth Amendments (*Wong Wing v. United States*, 163 U.S. 228 (1896)). In this legal construction, immigration detention is simply a holding mechanism used to allow the government to effectuate its civil immigration enforcement goals. It is not punitive in nature. Thus immigrant detainees are accorded minimal due process protections by courts, and courts largely look to congressional legislation to determine what process is due.

The legal conclusion that immigration detention is not punitive is essential to its operation in its current form. Because immigration detention is not treated under the law as a criminal punishment, immigrants are frequently detained pending removal proceedings in the absence of any individualized showing that the immigrant poses a danger to the community or is a flight risk. Indeed, this is precisely what the 1996 amendments to the Immigration and Nationality Act’s detention provisions were designed to achieve. Categorical pretrial detention of this nature would be unconstitutional in the criminal setting. It is permitted for immigrant detainees.

The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction. Detention is punitive, and it is experienced as such by immigrants. Immigrants in detention feel the punitive force of separation from families, inadequate conditions of detention, demeaning treatment, and lack of easy access to medical services. For some, the results are deadly; over one hundred inmates died in immigration detention between 2003 and 2009 (Bernstein 2010). Moreover, immigrant detainees are frequently housed in the same facilities as criminal offenders, and under the same conditions. A 2009 report by Dora Schriro, who at the time was a senior official at the Department of Homeland Security, concluded that the vast majority of immigration detainees were detained under punitive conditions inappropriate for civil detainees. Although ICE subsequently committed to expanding bed space available in more “civil” detention spaces, the vast majority of immigrant detainees continue to spend their time in jails and jail-like facilities (Human Rights First 2011). Moreover, despite efforts to elaborate civil standards for detention, ICE and DHS standards for detention, including those that articulate standards for populations with special needs, continue to be modeled on standards created for prisons and jails. These standards therefore require more restrictions than would be necessary for truly civil detention (Human Rights First 2011).

The legal conclusion that immigration detention is not punitive helps explain why courts do not evaluate immigration detention in the same way that they evaluate criminal punishment, but it does not explain why, as a policy matter, immigration detention came to be such a prominent feature of the US penal landscape. It is worth asking how this happened.

Perhaps it is no surprise that a society that relies so heavily on incarceration to address problems of crime and general social disorder would turn to the same model to handle concerns about migration. The United States does, after all, lead the free world in its prison population rate. High levels of incarceration in the United States—including the widespread incarceration of low-level offenders and nonviolent drug offenders—have been the subject of intense study and debate for decades. Scholars have proposed several explanations for the phenomenal growth of incarceration and the underlying “tough on crime” policies that generated both mass incarceration and expansions of other forms of social control. Explanations include concern generated by rising crime rates (real and perceived), the federalization of criminal law, racism, cultural anxieties, and the economic interests of security firms, prison guards, unions, and the like. Many of these explanations also seem useful in assessing the rise of immigration detention.

Certainly many of the same actors that benefited economically from the nation’s commitment to criminal incarceration continue to benefit from the expansion of immigration detention. Indeed, since the recession of 2008, numerous states and localities have opted to cut back on the use of expensive incarceration options in the criminal justice sphere. The detention industry has been under pressure to keep bed spaces filled in other ways. Noncitizens in immigration detention, whose bed space in both federally funded facilities and local jails is paid for by federal dollars, neatly fill some of the voids created by the use of more cost-effective and less incarceration-focused alternatives in the criminal justice sphere.

Notwithstanding the economic motivations of some special interest groups, one would not assume that policy makers and the voting public would automatically buy into the notion that immigration violators should be warehoused in jails throughout the country. Unsurprisingly, the ballooning of immigration detention in the United States went hand in hand with the rise of toxic rhetoric on migrant criminality and dangerousness. To take just one example, Representative Orrin Hatch (R-UT), when arguing in support of restrictionist amendments to the immigration laws in 1996, proclaimed that “we can no longer afford to allow our borders to be just overrun by illegal aliens. . . . Frankly, a lot of our criminality in this

country today happens to be coming from criminal, illegal aliens who are ripping our country apart” (142 Cong. Rec. S11, 505 (1996)). Representative Hatch was far from alone, and was certainly not the worst offender, in using this sort of language to characterize the threat that migrants posed to the nation. Those kinds of statements—accusatory, inflammatory, and unsubstantiated—came to dominate political discourse and media representations of migrants in the decade that followed.

Such rhetoric rendered the use of criminal-style detention for migrants an obvious solution to a phenomenon that was presented as a pressing social problem. Over time, it also inexorably led to more aggressive reliance on actual criminal prosecution for migration-related offenses. Immigration-related prosecutions now make up the single largest category of federal prosecutions each year—over 40 percent of the federal criminal docket (US Department of Justice 2012). Nor are such prosecutions limited to the federal criminal justice system. Notwithstanding formal legal doctrine that denies state and local governments a role in immigration enforcement (*Arizona v. United States*, 567 U.S. ____ 132 S. Ct. 2492 (2012)), some states and localities rely on criminal regulations such as document fraud provisions to prosecute and incarcerate noncitizens working without authorization. Human trafficking restrictions have also come to operate as a way to criminalize migrants at the state level—a somewhat ironic development given the purportedly humanitarian purposes of antitrafficking laws.

In other words, the growth and normalization of immigration detention is just one feature of a much broader integration of civil immigration enforcement and the criminal justice system. Both the civil and the criminal justice systems have been affected adversely by this integration. On the civil side, increasingly punitive measures are imposed without the constitutional protections afforded to criminal defendants. And on the criminal side, procedural protections that generally apply to all defendants—such as pretrial release on bond and a right to individual adjudication—have been stripped away in some cases involving noncitizens. Noncitizens in the criminal justice system are thereby at times denied standard procedural protections, while noncitizens outside the criminal justice system are sometimes subjected to punishment by another name and without the procedural rights that punishment entails.

In recent years, the wave of panic over migrant criminality has subsided to a certain degree in the United States. In this slightly more tolerant cultural climate, President Barack Obama’s administration has taken some specific steps to reform immigration detention. But these ongoing reforms

have been insufficient to address the deep, systemic problems of immigration detention, let alone broader immigration enforcement problems. First, as Anil Kalhan (2010) notes, reforms to date still have done nothing to address some of the most pressing problems of immigration detention, including prolonged detention, detention of populations that do not need to be detained, and insufficient reductions in the severity of detention conditions. Second, efforts to improve conditions of detention through the enactment of new policy guidelines raise the bar for governmental performance in immigration detention, but do very little to increase the accountability of the government to its immigrant detainees. No administration to date has enacted binding and enforceable detention standards, and no viable immigration reform proposal contains such a requirement. Immigration detention guidelines ultimately rely for their enforcement on the government's own goodwill and the possibility of pressure from a distractible public.

Finally, and perhaps most importantly, immigration detention reform efforts to date have not been tethered to appropriate efforts to decriminalize and rationalize immigration enforcement. Kalhan (2010) argues that "the excessive, quasi-punitive nature of detention today arises from more than the inadequate conditions of confinement that these [reform] initiatives principally target. . . . Absent more fundamental reconsideration of immigration control policies premised upon convergence with criminal enforcement, fully realizing 'fairness and humanity' will remain an aspiration in tension with 'toughness' that has dominated immigration policy in recent years." More generally, as long as the United States remains committed to its current course of deporting as many of its eleven million unauthorized noncitizens as is possible in any given year, rates of detention will remain high, and resources that might be used to improve conditions of detention are more likely to be used to expand the scope of detention.

Broader immigration reform proposals such as S. 744, the comprehensive immigration reform bill passed by the Senate in 2013, seek to address this problem by creating legalization mechanisms that will reduce the pool of noncitizens eligible for deportation while incorporating specific measures intended to remediate directly some of the harsh effects of immigration detention. These proposals have the potential to shrink the size of the detained immigrant population and to improve the conditions of detention for migrants who are detained. Indeed, the companies that profit from US immigration detention have noted the potentially deleterious effects that immigration reform would have on their profits (GEO's SEC Form S-4, quoted in García Hernández 2013). However, these reform

proposals also suggest the extent to which the tide of fear over immigration has not fully subsided in the United States. These fears are illustrated not only by the “border security” provisions, which would require the outlay of some \$46 billion in border security–related expenditures, but also by the more benign elements of the reform proposal.

The legalization program, with its lengthy waiting period, would greatly increase the number of noncitizens in a vulnerable, liminal status. The road to citizenship would be quite long under the Senate’s bill. It would take at least thirteen years for most eligible immigrants to acquire that status, and eligible noncitizens would need to remain employed and out of trouble with the law to obtain that status. Their eventual ability to acquire citizenship therefore will depend on the goodwill of their employers and on the nature of their interactions with local law enforcement, whose variable practices in the policing of immigrant neighborhoods will undoubtedly affect naturalization outcomes. All of this will mean that the need for immigration detention will not go away. Detention awaits as a possible destination for many of the individuals living under surveillance on the long road to citizenship.

The Senate did acknowledge the need to mitigate the harsher effects of detention in its reform bill. The bill therefore creates some new requirements for representation in detention as well as alternatives to detention. For example, the bill mandates access to counsel for special-needs populations such as juveniles and the mentally disabled—welcome and necessary changes to current immigration laws. Proposed reforms would also help individuals outside these special-needs populations. Individuals deemed by the DHS to pose a lesser risk of flight or danger will be allowed to take advantage of detention alternatives like electronic monitoring. Such reforms promise significant benefits, not least of which would be a possible reduction in the overdetection of low-risk immigrants in removal proceedings. On the other hand, as Mark Noferi and Robert Koulisch (2013) have argued, the DHS’s risk assessment tools still may be weighted toward overdetection, and alternatives to detention will likely be used not on individuals who would otherwise be detained but instead on individuals who would otherwise be outside the net of immigration detention altogether. Alternatives to detention may well widen the net of social control over immigrants in the United States.

In the end, notwithstanding the apparent trend in favor of immigration reform, fear of uncontrolled migrant bodies remains sufficiently strong that all viable reform proposals continue to assume the need for punitive detention for migrants as part of a criminalized immigration enforcement

model. Ongoing and proposed reforms to immigration detention in particular, and to immigration law in general, reveal just how far the United States is from immigration reform that is truly comprehensive.

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