

MANDATORY IMMIGRATION DETENTION FOR U.S. CRIMES:
THE NONCITIZEN PRESUMPTION OF DANGEROUSNESS

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ABSTRACT

Today in the United States, mandatory immigration detention imposes extraordinary deprivations of liberty following ordinary crimes—if the person convicted is not a U.S. citizen. Here, I explore that disparate treatment, in the first detailed examination of mandatory detention during deportation proceedings for U.S. crimes. I argue that mandatory immigration detention functionally operates on a “noncitizen presumption” of dangerousness. Mandatory detention incarcerates noncitizens despite technological advances that nearly negate the risk of flight, with that risk increasingly seen as little different regarding noncitizens, at least those treated with dignity. Moreover, this “noncitizen presumption” of danger contravenes empirical evidence, and diverges from parallel criminal pretrial detention reforms. Rather, it rests on stereotypes of dangerous, recidivist “criminal aliens”—even more salient to preventive detention determinations, given a noncitizen’s inherently speculative past. I preliminarily offer two theories for the “noncitizen presumption,” both reflecting expressive characteristics of immigration detention—government overcompensation for public “blaming the gatekeeper,” and complementarily, a social construct of noncitizens as invitees, derived from property law.

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1 INTRODUCTION

Today in the United States, if a noncitizen resident commits a crime, and later comes to immigration authorities’ attention, (s)he will likely never freely set foot on American soil again. (S)he will likely be “mandatorily detained.” In other words, (s)he will be incarcerated for months or years, without even an individualized bail hearing, until deportation (unless (s)he defeats those proceedings while incarcerated without an appointed lawyer).

Mandatory detention applies, even for minor offenses committed long ago, no matter how long the noncitizen has lived in America; or whether the noncitizen has lawful status (a.k.a. a “green card”), family, property, or a job; or indeed, whether any evidence of actual dangerousness exists. Mandatory detention applied, for example, to Melida Ruiz, a 52-year-old New Jersey grandmother who had lived in America for thirty years, supported her mother with Alzheimer’s and her U.S. citizen children and grandchildren, and had one nine-year-old misdemeanor drug possession offense for which she never served jail time. (Noferi and Koulis 2013) It applied to Bertha Mejia, a 53-year old California grandmother who stole groceries. (Mass 2013) It applied to Garfield Gayle, a 53-year old Brooklyn carpenter and grandfather who was convicted of possessing marijuana in 1995, seventeen years before U.S. Immigration and Customs

Enforcement (“ICE”) authorities came to his house. (Tan 2012) All were jailed for months or years during their deportation proceedings.

In short, mandatory detention potentially imposes extraordinary deprivations of liberty on persons following ordinary crimes—if the person convicted is not a U.S. citizen. The U.S. imposed 38,000 mandatory detentions in fiscal year 2011, estimates show. (Noferi 2012, p. 67 & n. 13) This article examines this disparate treatment.

Here, I present the first detailed analysis of U.S. mandatory immigration detention on criminal grounds, and its rationales and practices. My findings build on other scholars’ questionings of immigration law’s disproportionality, while more specifically examining detention practices (and comparing them to pretrial criminal detention, which employs similar rationales of preventing flight risk or danger).²

Here too, I isolate this particular context of pre-hearing mandatory immigration detention (i.e. pending deportation proceedings), for post-entry criminal activity (i.e. a U.S. crime). Doing so allows fuller examination of several heretofore-unexplored topics.³ For one, I focus on detention for *criminal* grounds, rather than other forms of pre-hearing detention,⁴ or mandatory detention.⁵ Additionally, I explore the categorical nature of immigration mandatory

² For example, Mary Fan argued that “criminal punishment and its costs should not turn just on the status of being an alien,” but in the context of criticizing U.S. laws that criminalize unlawful entry, rather than detention pending immigration proceedings. (Fan 2013, p. 45) Jennifer Chacon, in analyzing deportation, noted “questions about why the criminal law is deemed to provide sufficient punishment for citizens, but not for non-citizens,” but did not isolate detention. (Chacon 2007, p. 1887)

³ Geoffrey Heeren analyzed U.S. mandatory immigration detention generally, whereas here I isolate pre-hearing, post-entry mandatory detention on criminal grounds. (Heeren 2010)

⁴ DHS also discretionarily detains noncitizens in deportation proceedings. (8 U.S.C. § 1226(a)) For example, Anil Kalhan primarily surveyed immigration detention conditions (calling them “quasi-punitive”), without focusing on particular detention laws or mandatory detention. (Kalhan 2010)

⁵ Mandatory detention also exists post-deportation order, and for “arriving aliens” at the border. (Heeren 2010, pp. 609-13; Noferi 2012, p. 83 & n. 108) Post-deportation order detention seeks the same goals as pre-removal order, but after adjudication of deportation, before execution of removal. (Legomsky 1999, p. 534) An individual is mandatorily detained for ninety days after the removal order and, if not removed during those ninety days, may be released under supervision. (INA § 241(a)(1)-(3), 8 USC. § 1231(a)(1)-(3)) Additionally, “arriving aliens”—noncitizens arriving to the United States, including returning LPRs and asylum seekers—are mandatorily detained if deemed inadmissible, without any immigration judge review. (8 USC. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A)) They may be paroled into the United States, however. (8 USC. § 1182(d)(5)) (authorizing humanitarian parole). Also, such “arriving aliens” from Mexico or Canada may be mandatory detained during “expedited removal,” a fast-track procedure that allows immigration officers to issue removal orders with no hearing or review. (8 USC. §§ 1225(b)(2)(c), 1229a)

detention, which does not consider noncitizens as individuals.⁶ And notably, I explore constructions of migrants who enter and then commit a crime, distinct from scholars' prior constructions of the unlawfully entering (the stereotypical "illegal aliens"). (Fan 2013, p. 7; Schuck 1984, p. 6) Mandatory detention on criminal grounds applies to *all* noncitizens—lawful or not—which distinguishes the "noncitizen presumption" I describe here from prior scholars' work.

First, I argue that pre-hearing mandatory detention on criminal grounds today functionally operates on a "noncitizen presumption" of dangerousness, as noted. The U.S. effectively proceeds as if a noncitizen whom has committed a crime remains especially dangerous beyond the period of conviction, even if supervised, compared to a U.S. citizen. Mandatory detention does not quite categorically incarcerate *all* noncitizens with criminal convictions during their deportation proceedings. But I argue that a "noncitizen presumption" of dangerousness exists, based on the breadth of criminal activity encompassed, the absence of narrowing mechanisms for relief, and the empirical evidence I collect below.

I contrast this as well with U.S. criminal pretrial detention practices. Here, I argue that even though the U.S. criminal justice system over-detains relative to actual danger (despite recent reforms), mandatory immigration detention over-detains even more so, because it categorically ensnares the less dangerous—the older, those with only one criminal charge, and those charged with fraud and public order criminal offenses. (Baradaran & McIntyre, 2012)

I arrive at the "noncitizen presumption" by examining the two rationales for pre-hearing detention—flight risk and danger—and ruling out the first as legitimate for mandatory detention. Little justification remains today for mandatory incarceration to prevent flight. Technological advances in alternatives to detention, such as tracking bracelets and GPS, prevent flight nearly as well as detention. U.S. immigration and criminal authorities more routinely cooperate to identify and track noncitizens. More fundamentally, research preliminarily indicates that greater access to justice and less detention may encourage high compliance with proceedings—even, I argue, regarding noncitizens in immigration proceedings, traditionally presumed with higher incentives to "flee into the interior." (Noferi 2014; Tyler 2006; Sunshine & Tyler, 2003)

Given this, the remaining rationale is danger. U.S. immigration officials proffer this rationale, instead of flight risk, in their public statements and policies describing the danger to public safety from "recidivist criminal aliens." (Morton 2013) Essentially, the U.S. does not trust noncitizens with convictions to remain at large, even if supervised and attending proceedings. This presumption flies in the face of empirical evidence, showing that noncitizens are less likely to engage

⁶ César Cuauhtémoc García Hernández argues that immigration detention constitutes punishment in light of its legislative history, without isolating mandatory detention provisions. (Hernández 2013)

in criminal activity, and less likely to recidivate even if they do. Thus, I argue, the “noncitizen presumption” stems rather from well-familiar stereotypes of the dangerous “criminal alien” than empirical evidence. Moreover, in a preventive detention context like pre-hearing immigration detention, the inherently speculative nature of noncitizens’ lives *before* entering the U.S. accentuates the government’s tendency to err towards detention.

Finally, although I mainly seek here to establish the “noncitizen presumption,” I also preliminarily explore its animating rationales.⁷ I posit that the animating rationales are primarily expressive, not empirical—designed to send messages to the U.S. populace of active, competent Government protection from dangerous criminal aliens. I explore two potentially complementary theories here.

One I call “blaming the gatekeeper.” I argue the public assigns blame to the Government for failing its gatekeeping function and proximately causing a noncitizen’s later crime, with the Government then overcompensating to show protection via mandatory detention laws. Second, I argue that the U.S. socially constructs noncitizens as “invitees,” per a property law analogy, which helps explain the zero tolerance for noncitizen criminality inherent to mandatory immigration detention. Both these theories help explain troubling disconnects between disproportionate immigration detention practices and individualized, rights-based norms. I also largely reject two potential *sub rosa* rationales borrowed from criminal law, namely deterrence and punishment.

Most likely, given the expressive characteristics of mandatory detention laws, a change to mandatory detention will require a change to discourse regarding noncitizens with convictions. I explore this possibility last.

2 OVERVIEW: MANDATORY PRE-HEARING IMMIGRATION DETENTION OF NONCITIZENS FOR U.S. CRIMES

I examine here post-entry, pre-hearing mandatory detention —*i.e.* detention of someone apprehended inside the U.S., pending a determination on their deportation.⁸ In this section, I first, set out its facial rationales; second, provide an overview of the U.S. mandatory detention system; third, set out its historical development through law; and finally, provide a parallel overview of reforms to criminal pretrial detention, since passage of mandatory immigration detention laws.

⁷ I seek to explore these arguments more fully in future research.

⁸ Immigration and Nationality Act (“INA”) § 236(c); 8 USC § 1226(c). My categorization of “post-entry” detention follows Daniel Kanstroom’s categorization of “post-entry social control” immigration laws, distinct from “extended border control” laws. (Kanstroom 2000, pp. 1899-1914; Cox 2008, p. 350)

2.1 Rationales

On its face, pre-hearing immigration detention is designed to prevent the putative deportee from committing either of two social ills during deportation proceedings. The first is flight from proceedings (a.k.a. abscondment). The second is crime. (*Demore v. Kim* 2003, pp. 517-21; Legomsky 2009, p. 536) Mandatory detention seeks those same two goals via a categorical, rather than individualized, determination. (Legomsky 1999, p. 535) Here, the categorization is based on prior commission of a crime.⁹

Importantly, immigration detention, since it is legally civil, not criminal, is entirely preventive and should not be punishment. (*Zadvydas v. Davis* 2001, p. 682) That said, immigration detention and *pretrial* criminal detention, before conviction, are both legally civil. (Legomsky 1999, p. 536 & n. 28) Indeed, both have the same two goals of preventing flight and crime.

Additionally, civil detention and criminal incarceration, whether pretrial or post-conviction, both legitimately share the common mechanism of incapacitation, *i.e.* separation from society.¹⁰ Because of this overlap, with incapacitation in turn effecting complete deprivation of liberty, scholars have noted the functional resemblance between civil immigration detention and criminal incarceration. (Stumpf 2006, p. 391 & n. 130; Kanstroom 2000, p. 1895)¹¹

2.2 Current U.S. Pre-Hearing Mandatory Detention Laws

Since 1996, 8 USC § 1226(c) has governed U.S. mandatory detention of noncitizens in deportation proceedings pending their hearing. Under that statute, the U.S. government “shall take into custody” any noncitizen with prior criminal offense(s) that fit into certain immigration law categories, all of which would also make him or her deportable or inadmissible.¹² (Seipp and Feal, 2010, pp. 5-6) If DHS determines a crime fits such a category, it detains the noncitizen without bail during immigration proceedings, without any individualized hearing to assess flight risk or danger.

⁹ The U.S. also can mandatorily detain an individual that the U.S. Attorney General certifies as a national security threat. INA § 236A; 8 USC. § 1226A. The U.S. has never exercised this capability. (Cooper Blum 2012, p. 691)

¹⁰ “[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.” (*Kansas v. Hendricks* 1997, Kennedy, J., concurring; Demleitner 2003, p. 1637)

¹¹ *But see* Hernández 2014 (arguing that immigration detention is punishment because legislative intent was punitive).

¹² Federal immigration law primarily uses categories of crimes to trigger detention and deportation, rather than cross-referencing specific state or local criminal statutes. (Das 2011, p. 1672)

These immigration law categories encompass a broad range of criminal activity, much of it minor. One is mandatorily detained if one has been convicted of (a) an “aggravated felony,” (b) two “crimes involving moral turpitude” (“CIMTs”) at any time after U.S. admission, (c) one crime involving moral turpitude with a term of imprisonment of more than one year, (d) a controlled substance offense, or (e) a firearm offense.¹³ Attempted possession of drugs, simple assault, subway turnstile jumping, petty theft or shoplifting, or disorderly persons offenses have been held to qualify for mandatory immigration detention. (Noferi 2012, pp. 89-94) Offenses may qualify even if no or little criminal jail time was served. Offenses may also qualify even if the criminal system absolved one of liability, via a dismissal, deferred adjudication, revoked sentence, expungement, nullification, pardon, or juvenile adjudication. (Noferi 2012, pp. 94-95)

Offenses qualify as well even if committed long ago. There is no statute of limitations on detention and deportation for old convictions. Indeed, U.S. immigration law changes were retroactive, turning pre-1996 convictions into grounds for detention and deportation where none previously existed. (Stumpf 2011, p. 1797) Detention and deportation for old convictions appears fairly common. For example, a 2013 study found that regarding detainer requests ICE issues to local governments for a noncitizen with a conviction, about half involve convictions over five years old, with almost a quarter involving convictions over 10 years old, and four percent (about 4,000 over 16 months) involving convictions over 20 years old.¹⁴ (TRAC 2013b)

Regarding mandatory detainees specifically, along these lines, a significant portion are long-time U.S. residents, at least those who challenge deportation. For example, a 2013 expert report studied a sample of mandatory pre-hearing detainees who were detained six months or longer, and found that 75 percent had lived in the U.S. five years or longer, 55 percent 10 years or longer, and 26 percent 20 years or longer. (Tan, 2013, p. 7-8)

Mandatory detention applies to all noncitizens, and does not distinguish between those with lawful immigration status (such as a U.S. green card) and those without it. (Grussendorf, 2013, p.6) About 20 percent of those generally in

¹³ (8 USC. § 1226(c)(1)(A)-(D); Noferi 2013, p. 90)

Once DHS makes a mandatory detention determination, the noncitizen has a high burden to challenge it—essentially, to show the government has no non-frivolous argument supporting the mandatory detention categorization. *Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999) (noncitizen must show the government is “substantially unlikely” to establish the mandatory detention charge(s) at the removal hearing). The analysis of whether a crime fits the mandatory detention categories is incredibly complicated, and can include different modes of statutory analysis (“categorical” or “modified categorical” analysis), in different judicial circuits, as well as facts from the initial crime. (Noferi 2012, pp. 89-96) Indeed, mandatory detention analysis spurred U.S. Supreme Court Justice Samuel Alito to say that “nothing is ever simple with immigration law.” (*Padilla v. Kentucky* 2010, p. 1490)

¹⁴ The study reported that some convictions were over 40 years old. (TRAC 2013b)

immigration deportation proceedings appear to be lawful permanent residents,¹⁵ whom more likely have jobs and families, such as the poignant anecdotes in the Introduction.

Given all this, mandatory detention does not quite categorically encompass *all* noncitizens with criminal convictions pending their deportation proceedings. Some criminal convictions do not qualify one for mandatory detention. Data does not exist on the relative percentage of convictions that do qualify, among noncitizens.¹⁶ But given the breadth of criminal activity covered, and the absence of avenues for relief, I argue mandatory detention accurately creates a “noncitizen presumption” of pre-hearing incarceration in deportation proceedings, where none exists in pretrial criminal proceedings.¹⁷

Existing data implies that mandatory detainees are a significant minority of the noncitizens placed into immigration proceedings every year. From 2005 to 2010, 9 percent of New York ICE arrestees were mandatorily detained pre-hearing for crimes, which extrapolated nationwide would be over 38,000 mandatory detentions in fiscal year 2011 (of 429,000 the U.S. detained).¹⁸ (NYU 2012, p. 10; Noferi 2012, p. 67 & n. 13) Or, from 2001 to 2011, 15.2 percent of the nearly 2.3 million noncitizens placed into proceedings—over 346,000—were charged as deportable on criminal grounds (with some percentage of those mandatorily detained). (TRAC, 2011)¹⁹

Mandatory detainees also comprise a disproportionately high percentage of the long-term detention population. A 2009 government report stated that two-thirds of detainees then were “mandatory,” although it is unclear what percentage were detained pre-hearing for U.S. crimes. (Schriro 2009, p. 6; Kalhan 2010, p. 46) This high percentage may be explained by the length of mandatory detention,

¹⁵ Human Rights Watch found that approximately 20 percent of those deported on criminal grounds between 1997 and 2007 were lawful permanent residents. (Human Rights Watch 2009, p. 4) Similarly, a NYU study of ICE arrestees in New York from 2005 to 2010 found that 21.2 percent of ICE arrestees in New York were lawful permanent residents. (NYU 2012, p. 7)

¹⁶ Human Rights Watch found that 72 percent of those deported between 1997 and 2007 on criminal grounds were deported for nonviolent offenses, with the number rising to 78 percent when considering lawful permanent residents. (Human Rights Watch 2009, p. 4) It is unclear how many of these individuals were mandatorily detained.

¹⁷ For these reasons, several U.S. states and localities now refuse to hand over noncitizens with minor criminal records to federal immigration authorities. These jurisdictions include California, New York City, Chicago, Los Angeles, Newark, New Orleans, and Washington D.C. (N.Y. Times 2013)

¹⁸ If 9 percent does not seem high, consider that New York City criminal courts in 2010 denied bail to only 1 percent of defendants in cases continuing past arraignment. (Section 2.4)

¹⁹ Recent data since 2011 is similar. For example, TRAC Immigration, a Syracuse University research project studying public immigration data, found that in fiscal year 2013 to date, approximately 14.3 percent of those placed in proceedings were charged as deportable on criminal grounds, with slightly over 4 percent charged with an “aggravated felony” (which would automatically make one mandatorily detainable). (TRAC 2013)

for those who challenge deportation. A 2013 expert report found that of mandatory pre-hearing detainees who were detained six months or longer, the length of detention was about 14 months. (Long 2013, p. B-1)²⁰

More generally, mandatory detention has undeniably contributed to the U.S. immigration detention explosion, although its exact contribution is unclear. In 1995, before the 1996 laws passed, the U.S. detained 7,500 on any one day. (Schriro 2009, p. 2) Now, the U.S. Department of Homeland Security (DHS) detains 34,000 on any one day and 429,000 throughout the year, at a cost of \$2 billion per year. (U.S. DHS 2012, p. 4-5; Nat'l Immigration Forum 2013, p.1)

2.3 Historical Development of U.S. Mandatory Detention Laws

U.S. mandatory detention laws developed in three legislative enactments between 1988 and 1996. Initially, legislators focused on the danger posed by noncitizens with convictions, and then shifted their focus to encompass flight risk as well. I briefly summarize this history here.

Historically, mandatory detention was not the norm prior to 1988. Although the U.S. possessed broad discretionary power to detain noncitizens pending their deportation on criminal or national security grounds, noncitizens (including “criminal aliens”) could be afforded “liberal relief” from detention based on individual circumstances. (Miller 2003, p. 622)²¹ Detention appears to generally have been for short periods, and not on the large scale implemented today. (Kreimer 2012, p. 1486) In 1979 and 1980, however, the U.S. detained tens of thousands of Cubans arriving to the U.S.. In 1982, U.S. President Ronald Reagan then by executive order mandatorily detained thousands of Haitians arriving by boat. (Hernandez 2013, p. 15; Silverman 2010, p. 9)

The U.S. then, in 1988, first codified in statute pre-hearing mandatory immigration detention. Congress mandated detention pending deportation of noncitizens whom had committed murder, illicit firearms trafficking, and drug trafficking, in the Anti-Drug Abuse Act, part of the U.S. then-“war on drugs.”²² (Hernandez 2013, p. 22) Congress did so by creating an immigration law category of crimes—i.e. “aggravated felonies” (which included those three)—and

²⁰ The expert report was filed in California federal litigation challenging the failure of mandatory pre-hearing detention to provide individual bond hearings. One-third of these detainees (33 percent) won their cases, showing that challenging deportation was not a lost cause. Another 11 percent had cases still pending at the time of the study. (*Ibid.*, p. B-4)

²¹ Allowable considerations included age, health, elapsed time of detention, and likelihood of resuming or engaging in deportable behavior.

²² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (codified as amended at 8 USC. § 1252(a)(2) (2006)).

mandating the then-INS to take custody of any noncitizen convicted of these crimes after the criminal sentence.²³

At this time, legislators' stated rationale for mandatory detention was the dangerousness of those particular noncitizens. For example, New York Senator Alfonse D'Amato described aggravated felons as "a particularly dangerous class" and commended provisions that "put aggravated alien felons in detention." (Hernandez 2013, p. 22)

Subsequently, in 1990, the U.S. Congress expanded the "aggravated felony" category to include more drug crimes, thus expanding mandatory detention.²⁴ The rationale remained danger. For example, in 1989, Congress heard evidence that criminal aliens committed more crimes before being deported.²⁵ Or, then-President George H.W. Bush stated after the 1990 Act that these noncitizens "jeopardize[d] the safety and well-being of every American resident." (Bush 1990)

Then, between 1990 and 1996, legislators developed evidence focusing on criminal aliens' flight from proceedings, and recommending detention to prevent abscondment (and thus, future crimes). For example, a 1995 U.S. Senate report stated, "[c]riminal aliens are a serious and growing threat to public safety," and "[p]roblems of undetained criminal aliens who fail to appear or who abscond... would be lessened if the INS detained more criminal aliens." (U.S. Senate 1995, p.1) The report found that over 20% of deportable "criminal aliens" failed to appear for removal hearings, and called this a "high rate of no-shows." (*Ibid.*, p. 32) This followed a 1994 Department of Justice report, which similarly found that 21% of noncitizens failed to show for proceedings in 1992. (Department of Justice 1994, p. 5)

The 1995 Senate report did not estimate the numbers of crimes committed by noncitizens relative to citizens. Rather, it explicitly (if not empirically) connected unlawful immigration status to criminality. "[T]heir illegal situation conveys an 'outlaw' status, often leading them into the shadowy realms of criminal lifestyles." (*Ibid.*, p. 5) Subsequently, Senator Orrin Hatch stated (without statistics), "Frankly, a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart." (Chacon 2007, p. 1843)

The 1995 report also evinced a zero-tolerance attitude for criminality by noncitizens, whether lawful or unlawful. "[A] consensus seems to exist... there is

²³ Anti-Drug Abuse Act § 7342 (amending INA § 101(a)), § 7343 (amending INA § 242(a)).

²⁴ Immigration Act of 1990, P.L. 101-649, Nov. 29, 1990, 104 Stat. 4978; Hernández 2013, p. 22.

²⁵ House Committee on the Judiciary 1989, p. 52 (after criminal aliens were identified as deportable, 77% were arrested at least once more and 45% were arrested multiple times before deportation proceedings began).

just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more.” (*Ibid.*, p. 6)

In 1996, Congress then drastically expanded the categories of crimes qualifying for mandatory detention, whether by lawful or unlawful noncitizens, beyond crimes connected to the “war on drugs.”²⁶ (Miller 2003, p. 622) These categories are described above, and this law remains current today.

A note, however. Congress’ language required mandatory “custody,” not mandatory “detention” (i.e. incarceration). (8 U.S.C. § 1226(c)) Subsequently though, U.S. immigration enforcement agencies administratively adopted the position that mandatory “custody” under INA § 236(c) requires incarceration, rather than supervision.²⁷ (AILA 2010) The U.S. government has declined to change this position without explanation, despite immigrant advocates’ requests.²⁸ (HRF 2012, p. 8 & n. 16)

2.4 Parallel Development of U.S. Pretrial Criminal Justice Reforms

The lack of change to mandatory immigration pre-hearing detention policies since 1996 contrasts with recent U.S. criminal pretrial detention practices. Criminal authorities detain far less than U.S. immigration authorities, even though criminal pretrial detention shares the aims of preventing flight or danger. Moreover, U.S. criminal justice authorities are increasingly employing alternatives to incarceration, along with empirical tools to inform pretrial detention decisions, which reduce detention and still show great success at preventing flight and crime.

In practice, U.S. criminal authorities more readily employ a spectrum of supervision practices—from check-ins, community supervision and bond, to GPS tracking devices or house arrest, to jail on the most restrictive end.²⁹ (Wiseman 2013, p. 22) For example, while New York criminal judges denied bail to one percent of defendants in cases that continued past arraignment, DHS mandatorily detained by law, without bail, nine percent of New York immigration arrestees.

²⁶ Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 USC.); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 USC.).

²⁷ In the U.S. criminal system, courts have reached the opposite conclusion. (*Reno v. Koray* (1995) (defining “custody” to include those under control of the prison system).)

²⁸ Recently-passed U.S. Senate legislation would change this, and explicitly define “custody” under INA § 236(c) to include electronic ankle devices. (“Border Security, Economic Opportunity, and Immigration Modernization Act,” § 3715(d))

²⁹ Indeed, U.S. criminal laws rarely categorically impose detention without bail. The U.S. federal criminal code provides a rebuttable presumption that a defendant shall be denied bail on public safety grounds, if charged with certain serious crimes or crimes of violence; but the defendant is still provided a lawyer and a hearing to challenge that presumption. (18 USC § 3142) U.S. mandatory immigration detention provides no similar hearing, nor appointed lawyer.

(NYU 2012, p. 10) (And immigration authorities' tendency to detain more continues throughout their discretionary decisions).³⁰

Notwithstanding criminal authorities' tendency to detain less, criminal authorities have increasingly incorporated alternatives to detention into pretrial justice practices. Nine states, multiple localities, and the federal system now use risk assessments, conducting an actuarial assessment of the likelihood of re-offense or flight that informs their detention decisions. (Pretrial Justice Institute 2012a, p. 3; Pretrial Justice Institute 2012b, p. 14) Risk assessments can accurately differentiate risk of flight or danger with a fairly high accuracy rate, according to criminal studies. (Pretrial Justice Institute, 2012a, p. 4) For example, Kentucky's statewide risk assessment protocol has resulted in a 90 percent appearance rate and only 8 percent re-arrest rate. (COSCA 2013, 6)

U.S. immigration authorities also recently introduced a risk assessment tool in March 2013. (Sampson and Mitchell 2013, p. 103) That said, for mandatory pre-hearing detainees, risk assessment offers no help. U.S. immigration authorities have not allowed alternatives to mandatory pre-hearing detention.³¹ (Koulish and Noferi 2013a)

Although the U.S. pretrial criminal system still over-detains, the immigration system over-detains even more. For example, a recent criminal empirical study found that up to 25 percent of criminal pretrial detainees could be released without concomitantly increasing crime, generally in three categories—older defendants, defendants with previously clean records (i.e. only one criminal charge at issue), and defendants charged with fraud and public-order offenses. (Baradaran and McIntyre 2012, p. 554)

Yet the immigration system over-detains these individuals even more, and categorically so. Mandatory immigration detention plausibly ensnares individuals in all three non-dangerous categories. Immigration detainees are generally older, as the immigration system detains any time after a crime (unlike the criminal system, which detains immediately after a charge—crimes being more commonly committed by younger people).³² (Schriro, 2012; Stumpf, 2011;

³⁰ Another 71 percent of New York ICE arrestees were denied bail discretionarily by DHS. DHS set bail for 20 percent of immigration arrestees, at markedly higher rates, while releasing less than 1 percent on recognizance. Comparatively, New York criminal judges set bail for 20 percent defendants, and released 68 percent on recognizance. (NYU 2012, p. 10) I plan to address these vast discrepancies in future research.

³¹ Other concerns exist regarding immigration risk assessments. The current lack of transparency, and concurrent possibility of over-weighting towards detention, is one. More broadly, without transparency or process checks, risk assessment may facilitate a transition from mass incarceration to mass supervision, with its own attendant set of concerns. (Koulish and Noferi, 2013b) Robert Koulish and I plan to examine risk assessments in future research, based on ICE immigration risk assessments received through FOIA.

³² As Dr. Dora Schriro points out, the immigration detention population thus has more stable individuals with families and jobs, who are less dangerous. (Schriro 2012) Even regarding

Hirschi and Gottfredson, 1983) Mandatory detention also holds individuals with only one criminal charge—for example, an “aggravated felony,” which encompasses minor crimes like sharing a marijuana cigarette. (*Moncrieffe v. Holder*, 2013) And mandatory detention holds individuals charged with fraud or public order offenses. Indeed, a “crime involving moral turpitude” is typically one involving fraud, larceny, or intent to harm persons or property—for example, jumping a subway turnstile (as involving theft of services), or a disorderly persons offense (as involving intent to harm property).³³ (Noferi 2012, p. 93)

In sum, while the U.S. criminal pretrial system begins to reform over-detention, mandatory immigration detention categorically inculcates over-detention into law. A noncitizen charged with a minor crime today will likely be released pretrial in the criminal system, but if convicted, quite likely mandatorily detained during deportation proceedings.

3 MANDATORY DETENTION: THE “NONCITIZEN PRESUMPTION” OF DANGER IN PRACTICE

Given this overview, I argue that U.S. mandatory immigration detention today functionally operates on a noncitizen presumption of dangerousness. More specifically, the presumption is that noncitizens who commit crimes are more dangerous than citizens, and remain so beyond the time period of punishment for their conviction, thus categorically warranting complete incapacitation through incarceration for their remaining time in the U.S..³⁴

I reach this conclusion by examining the implementation of U.S. mandatory detention, in light of its two potential legitimate rationales—flight risk and danger—and ruling out flight risk as an explanation. Technological advances in alternatives to detention, such as tracking bracelets and GPS, prevent flight nearly as well as detention. U.S. immigration and criminal authorities more routinely cooperate to identify and track noncitizens. More fundamentally, research preliminarily indicates that greater access to justice and less detention may encourage high compliance with proceedings—even, I argue, regarding noncitizens in immigration proceedings, traditionally presumed with higher incentives to “flee into the interior.” Yet the U.S. refuses to employ alternatives for the mandatorily detained.

immigration detainees with criminal histories, only 11 percent had committed violent crimes (as of 2009). (Schiro 2009, p. 2).

³³ A separate 2009 study of immigration detention found that of the 42% of detainees with a criminal record, 8 percent were convicted of fraud, public order offenses, or forgery or counterfeiting. 30 percent were convicted of drug crimes. (Kerwin and Li 2009, pp. 20-21)

³⁴ Jennifer Chacon argued that U.S. deportation policy generally incorporates a “misguided belief that non-citizens require extra incapacitation in the form of criminal removal.” (Chacon 2007, p. 1887) Here, I argue that mandatory detention extends this “extra incapacitation” to the time period in removal proceedings, awaiting a determination.

This suggests that danger remains the primary concern. The discourse of immigration detention supports this, evidenced by U.S. immigration enforcement officials' statements that nearly exclusively focus on danger, and policies that prioritize mandatory detainees as dangerous above all others. Essentially, the U.S. does not trust noncitizens with convictions to remain at large, even supervised by mechanisms that prevent flight like tracking bracelets or GPS.

I argue that this danger rationale—which I call the “noncitizen presumption”—is grounded in stereotype and bias towards immigrants, particularly “criminal aliens,” rather than empirical evidence. This disconnect between immigrant criminality in discourse and fact is well-established in law and social science literature, which I briefly reference below.

3.1 Flight Risk

Since 1996, when U.S. legislators last revisited mandatory immigration detention, lesser restrictive alternatives have emerged, such as electronic tracking, supervision, and case management, that prevent flight nearly as well as complete incarceration at far less cost. (Sampson and Mitchell 2013; Kreimer 2012, p. 1511; Legomsky 1999, p. 541) Advances have already been demonstrated in immigration proceedings. A 2000 study showed that 92 percent of “criminal aliens” released under supervisory conditions attended all of their hearings. (Vera Institute 2000, p. 33, 36)³⁵ Or, Australia’s individualized case management program achieved a compliance rate of 94 percent between 2006 and 2009. (NIJC 2010, p. 6)

Some of these advances are technological. Electronic tracking bracelets, particularly, were not widely used in 1996, either in immigration or criminal proceedings. (Kreimer 2012, p. 1511; Wiseman 2013, p. 23) Today, U.S. immigration authorities do employ electronic monitoring, albeit not as widely as detention. (Rutgers 2012; Koulisch 2012) DHS’ “Intensive Supervision Appearance Program,” as of 2011, supervised 17,454 individuals (albeit no pre-hearing mandatory detainees, and compared to 429,000 whom DHS detained). (LIRS 2011, p. 31) This parallels the increasing use of electronic tracking in pretrial criminal justice. (Wiseman 2013, p. 24) Technological alternatives to detention also save significant money, costing \$17/day or less versus \$159/day for detention. (Nat’l Immigration Forum 2013, p. 1)

Additionally, risk assessment tools exist today that allow officials to base detention decisions on empirical assessments of danger or flight. (Koulisch and Noferi, 2013a) In 1996, immigration flight rates were high in part because DHS made release decisions arbitrarily, by bed space, without identifying those more

³⁵ As the study found, “mandatory detention of virtually all criminal aliens is not necessary.” Even 82% of criminal aliens released on recognizance without supervision appeared, as did 77% of those released on bond. The study did involve a selected group of detainees. On the other hand, the study also employed lesser restrictive alternatives such as supervision, in addition to electronic tracking bracelets.

likely to flee. (*Demore v. Kim* 2003, pp. 563-64) Nor did DHS identify lawful permanent residents with families and jobs, with more incentive to stay in the U.S., as DHS can today. (*Demore v. Kim* 2003, p. 563)

More generally, although some immigrants unquestionably fled proceedings then (and probably more than would today), more robust comparisons today to criminal pretrial practices illuminate the disproportionality of mandatory detention to remedy abscondment. Particularly, comparisons of rates of appearance between immigration pre-hearing and criminal pretrial populations establish a baseline not present in the 1996 debate.³⁶ For example, 1990s U.S. immigration studies found that over 20 percent of deportable “criminal aliens” failed to appear for hearings, which a U.S. Senate Committee called a “high rate.” (U.S. Senate 1995, p.1) Yet this rate was not much different than comparable criminal abscondment rates. Compliance figures for felony criminal defendants released under non-custodial measures before trial have commonly ranged from 40 to 70 percent.³⁷ (Field and Edwards 2006, ¶ 88)

Put another way, immigration abscondment was never that high. Rather, the public tolerance for noncitizen crime following abscondment appears low (as Section 4 explores).

Secondly, greater coordination today between federal immigration and local criminal authorities has remedied prior failures to identify deportable noncitizens (as a precursor to preventing abscondment once identified). (Kreimer 2012, p. 1518) In the 1990s, the then-INS was widely criticized for not identifying removable individuals after conviction. (*Demore v. Kim*, p. 518) Today, though, Secure Communities, which mandates local criminal authorities to share information with federal immigration authorities, makes it more possible to identify removable noncitizens.³⁸

Third, and most fundamentally, recent empirical immigration research may rebut the historical immigration law presumption that noncitizens are particularly likely to abscond immigration proceedings, and with it, rebut a primary rationale for detention. Rather, recent research preliminarily indicates that providing dignity, via access to justice and less detention, fosters trust and subjective feelings of fairness, which Tyler and others have connected to compliance in other fields. (Tyler 2006) I briefly describe potential implications here regarding mandatory immigration detainees.

³⁶ A 2003 U.S. Supreme Court decision upholding mandatory immigration detention discussed rates of immigration flight without comparing them to criminal rates. (*Demore v. Kim* 2003)

³⁷ Thus, this 2006 United Nations study assumed an immigration compliance rate over 80% was effective.

³⁸ Although ICE requires localities to share information, some states and cities now refuse to hand ICE noncitizen residents with criminal convictions. (New York Times, 2013b) This reflects public disagreement with ICE’s policies, however, rather than technological capability.

Noncitizens have been presumed more likely to abscond immigration proceedings, since they seek additional time in the country, and lose little by absconding (except eventual removal). (Legomsky 1999, p. 537; Schuck 1996, pp. 671-72) Along these lines, those with the least chance of success at a hearing have been thought least likely to attend it. (Schuck 1996, p. 680) “Criminal aliens” have in many cases no chance since 1996, since deportation is often mandatory. Thus, so the argument goes, mandatory detention prevents flight by those most likely to flee. (Heeren 2010, p. 631)

Yet recent research shows that treating noncitizens with dignity and fairness significantly correlates with a predisposition to compliance—i.e. providing a proper and prompt hearing, by a consistent decision maker, and most importantly with access to early, reliable assistance and legal advice.³⁹ (Costello and Kaytaz 2013; Sampson and Mitchell 2013, p. 110) For example, refugees acknowledged the necessity of a process to determine legitimate claims. But as Costello and Kaytaz found, refugees “expected not automatic protection, but a fair hearing.” (*Ibid.*, p. 15)

For example, a 2013 UNHCR study studied Toronto asylum seekers released into shelters (not incarceration) pending immigration proceedings, with minimal reporting requirements but increased access to representation. As one asylum seeker said, “I do have trust in the system because I understand it.” Toronto asylum seekers generally viewed the process as fair, and remained cooperative with authorities. (*Ibid.*, p. 18) This predisposition to comply extended to adverse orders. (*Ibid.*, p. 24) Conversely, asylum seekers in Geneva, detained in worse conditions, with delayed hearings, and without ready access to legal advice, viewed the process as deeply unfair, evidencing a predisposition not to comply with orders. (*Ibid.*)

Tyler identified these subjective views of fairness, produced by procedural justice, as correlative with perceived legitimacy and thus compliance. (Tyler 2006) This research has potential significance for immigration proceedings, although more research should be done—particularly, regarding compliance by noncitizens with varying membership claims and little relief.⁴⁰ Notably, however, alternatives to detention are proving successful even for “criminal aliens” without relief. Canada’s Toronto Bail Program, for example, supervises many criminal aliens with 90 percent compliance rates (although it screens clients for amenability to supervision). (Field and Edwards 2006, pp. 85-89) And through caseworker management, Sweden showed high rates of voluntary compliance with adverse removal orders, with 82 percent of refused migrants arranging their own return. (Phelps 2013, p. 46)

³⁹ A 2011 survey of European detention similarly stressed early access to reliable assistance and legal advice. (Amaral 2013)

⁴⁰ For example, Tyler’s conception of legitimacy presumes membership and shared purposes, while noncitizens have varying membership claims. (Tyler and Jackson 2014, p. 3 (studying U.S. citizens); *compare* Walzer 1996)

Still, the U.S. refuses to employ alternatives for those subject to mandatory detention. Even assuming theoretically that criminal aliens in removal proceedings pose greater flight risk—an assumption research increasingly rebuts—no evidence supports that flight risk is so much greater than ordinary criminal pretrial risk to categorically warrant total incarceration. Indeed, U.S. government officials do not argue this, but rather defend mandatory detention on danger grounds. I examine these arguments next.

3.2 Public Danger

U.S. immigration enforcement officials since 1996 have essentially presumed mandatory detainees too dangerous to release, even supervised. As such, pre-hearing mandatory detention has become a particularly excessive, blunt, and empirically unsound tool for “domestic crime control.” (Kreimer 2012, p. 1514; Heeren 2010, p. 633) Here, I contrast public statements and policies with empirical evidence.

Generally, U.S. executive branch and immigration enforcement officials have continually characterized their enforcement efforts as promoting “security” and ensuring “public safety” by deporting “criminal aliens.”⁴¹ (McLeod 2012, p. 164) Indeed, the Obama Administration dubbed its information-sharing requirements for local police “Secure Communities.” More specifically, in 2011 ICE Director John Morton issued a “prosecutorial discretion” memorandum setting ICE’s priorities as “serious felons, repeat offenders, or individuals with a lengthy criminal record.” (Morton 2011a) Notably, immigration officials cast criminal aliens as natural recidivists. For example, in 2011 Morton stated Secure Communities was “removing those aliens whose criminal history demonstrates a willingness to violate our laws....” (Morton 2011b)

Detention, concomitantly, is promoted as protecting the public from future crimes. For example, ICE characterizes its detention efforts as ensuring “security,” by focusing resources on “the most serious criminal offenders...in a way that maximizes public safety.” (U.S. ICE 2012; McLeod 2012, p. 127) Or, a 2009 government report characterized ICE detention as focusing on “dangerous and repetitive” criminal aliens. (Schriro 2009, p. 11; Kreimer 2012, p. 1513)

Perhaps most specifically, in 2013, Morton characterized detention as protecting “local communities [from] risks from suspected and convicted sex offenders, weapons violators, drunk drivers, and other violent criminals.” (Morton 2013) He continued, “These are not hypothetical risks.... additional crimes being committed by these recidivist criminal aliens... include the possession of a controlled substance, money laundering, burglary, spousal battery, aggravated driving under the influence, and even attempted murder.” (*Ibid.*)

⁴¹ See U.S. Immigration and Customs Enforcement, *Secure Communities*, available at http://www.ice.gov/secure_communities/ (“The highest priority of any law enforcement agency is to protect the communities it serves,” and thus “ICE prioritizes the removal of criminal aliens.”)

Mandatory detention, in turn, is characterized as protecting public safety—perhaps unsurprising, since mandatory detention by law detains noncitizens who have committed at least one crime. Yet ICE’s prioritization of mandatory detainees is surprisingly high, even higher than those it individually identifies as dangers. For example, a 2004 ICE policy memo, still in effect, places mandatory detainees first among detention priorities, above “national security interest aliens,” “aliens who exhibit specific, articulable intelligence-based risk factors for terrorism,” “aliens who present an articulable danger to the community,” or “suspected alien and narcotics smugglers.” (Hutchinson 2004, p. 2) The memo provides no distinction between the various classes of mandatory detainees—e.g., terrorism grounds, criminal grounds, or asylum seekers at the border. Moreover, “[i]n the case of mandatory detention,” guidelines must be heeded “strictly,” with ICE managers given no discretion to deviate (unlike other categories). (*Ibid.*)

ICE’s 2011 “prosecutorial discretion” memo does not change these detention priorities. Indeed, it reaffirms allocation of detention resources either to support its public safety priorities, or for “aliens subject to mandatory detention by law.” (Morton 2011a, p. 3) Moreover, it excepts mandatory detainees from its proviso to relax detention for certain categories, such as “primary caretakers,” the seriously physically or mentally ill, or the disabled, elderly, pregnant, or nursing. (Morton 2011a, p. 3) ICE could have allowed tracking bracelets for mandatory detainees, as alternative forms of “custody,” but has not.

In essence, ICE sets its mandatory detention policy by relying on Congress’ legislative, categorical determination of danger, over its own agents’ identifications of individualized danger. One might counter-argue that Congress’ legislative determination left ICE with little choice, except ICE has declined one choice it has.⁴² One explanation may be the Congressional criticism ICE has faced for releasing detainees. For example, when ICE recently released immigration detainees due to budget cuts, several elected officials assailed the releases as “needlessly endangering American lives” (Washington Post 2013), an “abrogation of [ICE’s] mission to ensure the safety and security of Americans” (Grassley 2013), and a “federally sponsored jailbreak.”⁴³ (Perry 2013)

Notably, these immigration officials’ statements and policies regarding mandatory detainees do not cite flight risk. Indeed, ICE can now more readily find noncitizens with convictions and supervise them at modest cost. Rather, the apparent rationale is that noncitizens with convictions would commit more crimes if on the streets during proceedings, even supervised—enough to categorically,

⁴² Contrastingly, the Obama Administration chose to implement a “deferred action” policy for undocumented youth, despite Congress’ failure to pass legislation.

⁴³ Not all elected officials posed this criticism. For example, Rep. Spencer Bachus (R-AL) asked, “Are you overusing detention? Are some of these mandatory detainees where we [Congress] could recommend they not be?” (Koulish and Noferi, 2013b)

drastically reverse the normal presumptions towards release in the criminal system. (Legomsky 1999, p. 541)

As a corollary, noncitizens are presumed vastly more likely to reoffend (and violently) than citizens who committed similar crimes. This appears empirically untrue. A 2012 Congressional Research Service study found that recidivism by those arrested by ICE was significantly lower than recidivism by the general prison population.⁴⁴ (CRS 2012) If anything, mandatory immigration detention results in greater over-detention relative to actual danger of recidivism than in the criminal system, as noted above. Yet mandatory detention persists.

3.3 Stereotype and Bias Supporting the Noncitizen Presumption

Given this, I argue that U.S. mandatory immigration detention today operates on a “noncitizen presumption” of dangerousness, which relies primarily on historical stereotypes of foreigners as “dangerous others,” rather than any empirical evidence of greater noncitizen criminality. Moreover, this stereotype particularly infects detention, because the inherently speculative nature of noncitizens’ lives before entering the U.S. amplifies the inherently speculative nature of preventive detention decisionmaking.

There is no evidence that noncitizens are more disposed towards criminality than citizens. Indeed, empirically, immigrants are generally more law-abiding than natural-born citizens. (Chavez and Provine 2009, p. 83; Alba et. al. 2005, pp. 901-19; Reid et. al. 2005, pp. 757-80) Migration, if anything, contributes to a decrease in violent crime rates. (Guia 2012, pp. 27-29; Rumbaut & Ewing 2007) Nor is a criminal conviction necessarily a “reliable indicator” of dangerousness.” (McLeod 2012, p. 149) This is particularly true regarding minor convictions, many of which qualify one for mandatory detention.⁴⁵ Moreover, there is no evidence that a noncitizen poses a greater danger after a criminal sentence. (Legomsky 1999, p. 539) If anything, noncitizen recidivism rates appear lower than the general population, as noted.

Yet the public perception of immigrants as “dangerous others” persists. (Guia 2012, pp. 27-29; Chacón 2007, p. 1887; Demleitner 1997; Garland 1996) Immigrants, lawful or not, are regularly conflated with criminals. As McLeod argues, a “stock crime-narrative framework” dominates immigration discourse, and thus criminal aliens are seen to “threaten the security and well-being of U.S. society.” (McLeod 2012, p. 164) Indeed, the use of detention—similar to

⁴⁴ 16 percent of ICE arrestees were rearrested for criminal activity within three years, compared to 43% of U.S. criminal prisoners released in 2004 that were convicted and returned to prison within three years. (Bennett 2012; Waslin 2012)

⁴⁵ Nor is a conviction a reliable indicator of undesirability. (Cox and Posner 2007, p. 846) As Allegra McLeod points out, a noncitizen may have “possessed narcotics, trespassed, shoved someone during a verbal altercation or pulled their hair, jaywalked, jumped a subway turnstile,” and on and “still be a valued contributor” to the U.S., let alone not dangerous. (McLeod 2012, p. 149)

criminal jail—reinforces the conflation of immigration with crime. (*Ibid.* p. 154) Or, immigrants are conflated with other “dangerous others”—i.e. terrorists, particularly after 9/11 in the U.S. (Baili 2006, 54) The very language of immigrants as “aliens” contributes to immigrants being viewed as an invading flood. (Cunningham-Parmeter 2011, p. 1559) Racial or ethnic prejudice is historically part of the equation as well. (Chavez and Provine 2012, p. 80) Thus, U.S. mandatory detention law functionally assumes that detention is necessary for an individual’s remaining time in the U.S..

Additionally, the “dangerous other” trope particularly infects detention policy because immigration detention is inherently predictive—informed by past acts, but ultimately preventive and speculative. As David Cole argued, “no one can predict the future,” and thus detention “decision makers all too often fall back on stereotypes and prejudices as proxies for dangerousness.” (Cole 2009, p. 696; Noferi 2012, p. 120; Robinson 2001, p. 1432) Moreover, the dangerous immigrant stereotype is less refutable because a noncitizen’s life before entering the U.S. is inherently speculative, and unknowable to immigration officials. (Koulisch 2012, pp. 63-64, 71) As Peter Schuck argued, “aliens who appear to be first-time offenders may well have been convicted of other crimes in their home countries... of which the INS simply has no record.” (Schuck 1997, p. 677) Or, as U.S. Supreme Court Justice Anthony Kennedy stated, a “significant risk may still exist” from “aliens who have completed prison terms,” since “[u]nderworld and terrorist links are subtle and may be overseas,” and not reflected in U.S. criminal records. (*Zadvydas v. United States* 2001, p. 714)

With immigration detention, I argue, this speculation regarding an unknowable past amplifies the already-speculative nature of preventive detention, in a way not possible regarding a criminal conviction based on tested evidence. (Robinson 2001) Thus, it accentuates a government’s tendency to err on the side of preventive detention. (Cole 2009, p. 696) Errors of detention are unknowable, but errors of release are criticized.⁴⁶ Thus, when any noncitizen could be a recidivist criminal, the safer course is to detain, even after lengthy U.S. residency without criminal activity. I return to these arguments in Section 4.2.1.

4 EXAMINING MANDATORY DETENTION’S ANIMATING RATIONALES

Here, I offer preliminary analysis of the animating rationales behind the “noncitizen presumption” of danger, and mandatory detention generally. First, I largely reject *sub rosa* criminal law rationales, and second, I explore expressive rationales.

⁴⁶ “How can one prove what someone would or would not have done had he been free?” (Cole 2009, p. 696)

4.1 Rejecting *Sub Rosa* Criminal Rationales

Deterrence or punishment, rationales customary to criminal law, likely do not play an improper *sub rosa* role in pre-hearing mandatory immigration detention for U.S. crimes. Deterrence plays little if any role in the detention of residents committing crimes after entry. As to punishment, I argue mandatory detention more likely (but not mutually exclusively) is animated by preventing future crimes, not punishing past crimes. Moreover, to the extent mandatory detention sends a message, it primarily expresses protection of the populace rather than the individual condemnation emblematic of criminal punishment, which I explore further in Section 4.⁴⁷

4.1.1 Deterrence

First, deterrence plays little if any animating role in pre-hearing, post-entry mandatory detention of noncitizens.

Deterrence certainly animated policies to deter arriving noncitizens, particularly asylum seekers. For example, when the U.S. mandatorily detained arriving Haitians by executive order in the 1980s, the deterrence rationale was explicit. (Taylor 1997, pp. 154-55; Pistone 1999, pp. 225-228) As then-Attorney General William French Smith stated, “[d]etention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail.”⁴⁸ (Silverman 2010, pp. 18-20)

That said, the deterrence rationale has much less salience to post-entry detention of residents already here. Theoretically, mandatory immigration detention on criminal grounds could serve a deterrent effect on criminal activity by residing noncitizens. But I agree with Stephen Legomsky that detention pending a deportation proceeding likely serves no meaningful deterrent effect, over and above the applicable criminal punishment and deportation.⁴⁹ (Legomsky 1999, p. 541; Hernandez 2013, p. 55) Moreover, recent U.S. government statements regarding detention emphasize its incapacitative nature—i.e. protecting the public from dangerous criminals—rather than its deterrent

⁴⁷ Briefly, I note too that the rehabilitation rationale, present in criminal incarceration, likely plays little role in pre-hearing immigration detention. For one, immigration detention’s baseline assumption has historically been deportation of detainees, rather than their return, and as a corollary rehabilitation has been presumed unnecessary from society’s standpoint. (Stumpf 2011, p. 1709). (That said, as more detainees receive procedural rights like appointed counsel and win deportation cases, this might change.) (Noferi 2012, pp. 127-28) For another, rehabilitation presumes remorse by the individual, which is less likely present (nor legally required) regarding civil immigration law violations. (Hernandez 2013, p. 56)

⁴⁸ Similarly, Australia passed its mandatory detention law to discourage so-called “boat people” from arriving. (NIJC 2010, p. 2)

⁴⁹ In any case, when the U.S. retroactively passed these mandatory detention laws, many individuals had *already* committed crimes which could not possibly be deterred.

impact—i.e. sending a particular message to noncitizens that immigration detention will be imposed for crime.

4.1.2 Punishment

Secondly, I acknowledge that detention may plausibly be conceived as extra punishment for noncitizens committing crimes, beyond the criminal sentence.⁵⁰ But I argue that detention more likely (but not mutually exclusively) reflects a perceived need for prevention, based on noncitizen dangerousness.⁵¹

César Cuauhtémoc García Hernández argues persuasively that immigration detention is legally punitive under U.S. Constitutional law, as Constitutional tests define “punishment” by focusing on legislative intent. (Hernández 2013) Hernández calls attention to legislators’ inclusion of immigration detention laws (including mandatory detention laws) with anti-crime legislation to fight the “war on drugs,” and argues that immigration detention was intended to sanction and stigmatize criminal behavior. (Hernández 2013, p. 4) In support, he notes some statements above, such as Senator D’Amato’s calling aggravated felons “a particularly dangerous class,” or President Bush’s terming of criminal aliens as jeopardizing “the safety and well-being of every American resident.” (*Ibid.*, p. 22).

Although legally, Hernández’ argument has merit, expressively, I argue that the particular mandatory detention provisions evince a prevention rationale more than punishment. These statements, and subsequent executive branch statements, focus more on immigration detention as protecting the American public from danger, rather than a tool for moral condemnation of noncitizen crimes.⁵²

Even assuming a punishment or quasi-punishment rationale exists in immigration detention, mandatory detention appears more designed to expressively send a message to society at large, rather than the individual detainee. (Kahan 1996) Indeed, mandatory detention law is by nature categorical, without reference to individual characteristics, and thus lacks one

⁵⁰ Such punishment would of course be illegitimate, as immigration detention is legally civil and preventive, not punitive. As Legomsky notes, no scholar has “sought to justify [pre-hearing immigration] detention on punishment grounds.” (Legomsky 1999, p. 540; Schuck 1996, p. 670)

⁵¹ Here, I consider whether mandatory immigration detention is extra punishment for the crime, not the immigration violation, because the crime triggers the immigration detention, not immigration status. Indeed, lawful permanent residents may have no immigration violation save the impact of the criminal conviction.

⁵² That said, the criminal provisions regarding those drug crimes, which increased criminal sentences and imposed mandatory minimums, certainly conveyed a sense of moral condemnation to the individuals involved. (Hernández 2013, p. 27)

aspect of the expressive condemnation associated with criminal punishment.⁵³ Even statements like the 1995 Senate Report's, which state that "America has enough criminals without importing more," appear to reflect society's tolerance level for noncitizen criminality and conception of desirable migration, rather than direct individual condemnation.

It is possible that immigration detention is designed both to punish for past crimes and prevent future crimes; indeed, criminal incarceration can serve both those functions. Yet any expressive condemnation appears eclipsed in practice by Government expressions of robust enforcement and protection. I further consider these expressions next.

4.2 Expressive Characteristics of Mandatory Detention

Finally, I offer preliminary thoughts regarding the expressive characteristics of U.S. immigration detention, and explore two theories for the animating rationales behind pre-hearing mandatory detention for U.S. crimes.⁵⁴ In my view, these expressive characteristics explain much of the above-described disconnect between the noncitizen presumption of danger and empirical reality.

Law has expressive, symbolic value, as many have set out. (Stuntz 2001, p. 533; Anderson & Pildes 2000; Sunstein 1996; Lessig 1995; Edelman 1964) Yet immigration law is uniquely, especially expressive, since it embodies decisions by the polity through their Government to pick new members and exclude others. (Stumpf 2006, p. 377; Walzer 1992, pp. 82-95) The spatial and physical structures created by immigration law also possess expressive content. For example, several scholars have explored the border and the physical fence along it. (Bosniak 2007, p. 276; Fan 2008, p. 711; Gulasekaram 2012, p. 161-62, 169-70)

Here, I preliminarily explore the expressive dimensions of immigration detention, the physical embodiment of enforcement inside the border. By increasing the public severity of immigration enforcement, I argue mandatory detention for U.S. crimes amplifies the expressive messages already inherent to citizenship and membership delineations.⁵⁵ (Stumpf 2006, p. 396; Demleitner 1999, p. 158; Bosniak 1994, p. 1055)

I proffer that mandatory detention is primarily motivated by expressive qualities—to "send a message" to the U.S. populace, in common parlance. The message is twofold—of active, competent protection of the populace from the dangerous "criminal alien," and of zero tolerance for criminality by noncitizens.

⁵³ Dan Markel has distinguished the two forms of communication of the social meaning of criminal punishment—communication to society and communication to the individual offender. (Markel 2001, pp. 2206-07)

⁵⁴ I plan to further explore these ideas in future research.

⁵⁵ I build upon Margaret Taylor's helpful analysis of detention's deterrent messages towards potential arrivals from outside the country. (Taylor 1997)

Nothing expresses protection of the public in a preventive detention regime, or revocation of a noncitizen's presumptive ability to remain, like total incarceration without possibility of release for the remaining time in the U.S..

Here, I analogize to Dan Kahan's articulations of expressive functions of criminal incarceration, but distinguish arguments for the immigration context. Kahan and other criminal theorists' posit that nothing expresses condemnation in our modern liberal society like incarceration's complete deprivation of liberty. (Kahan 1997, p. 384; Kahan 1996; Markel 2001) With immigration detention, designed to effect incapacitation, not condemnation, I posit that the physical structures and categorical severity of mandatory detention effectively send an analogous message of protection. Moreover, the larger the scale of detention, the more visible the message to the public. (Taylor 1997, p. 157) And as ICE's director once said, ICE detains on a "grand scale." (Kalhan 2010, p. 44)

Viewing pre-hearing, post-entry mandatory detention as expressive helps explain several disconnects that have troubled immigration law scholars. For one, it helps explain the "noncitizen presumption's" vitality in the face of parallel, empirically based advances in criminal law. More broadly, expressive analysis helps explain the disconnect between severe, incapacitative detention practices and individualized, rights-based norms that recognize U.S. lives, family, and employment ties. (McLeod 2012, 132-42) Importantly, the expressed message is categorical and designed for society at large, rather than individualized to any case and designed for that immigrant. Mandatory detention does not speak as to individual immigrants' circumstances, because it is not speaking to them. (Miller 2003, pp. 653-54; Pistone 1999, p. 225)⁵⁶

I theorize two, potentially complementary, theories for the animating rationales behind these messages. The first I term "blaming the gatekeeper," by which the public assigns blame to the Government for its failure to exclude or deport a noncitizen who later commits a crime, and the Government responds by overcompensating to show protection via mandatory detention laws. The second is a property law-derived theory of noncitizens as "invitees," with mandatory detention revoking the invitation upon commission of a crime, and returning the noncitizen to the fiction of *status quo ante* when seeking admission at the border (or at least, as close as physically possible inside it).

In setting out these theories, I aim to integrate institutional design analysis of immigration law, by Adam Cox and others, with the social and political analysis more traditional to immigration scholarship. (Cox and Posner 2008; Cox 2007) I offer a short preview here of these arguments, with future research to follow.

⁵⁶ As Teresa Miller stated, "A discourse that focuses on categories and sub-populations rather than individuals... serves different objectives than one based on moral or clinical judgments about individuals." (Miller 2003, pp. 653-54) While "safety and absconding rationales are capable of being directly applied to individual cases," symbolic detention is not. (Pistone 1999, p. 225)

4.2.1 *Blaming the Gatekeeper*

The title “blaming the gatekeeper” stems from an essential function of government under immigration law to admit desired types and exclude others.⁵⁷ (Cox & Posner 2007, p. 846; McLeod 2012, p. 164; Eagly 2010, p. 1296) It also stems from the U.S. Government’s own self-conception, expressed in 1990s initiatives like “Operation Gatekeeper” that allocated additional funding, fencing, and agents to the U.S.-Mexico border. (Hing 2001)

Because of this gatekeeping function, I argue, the public uniquely assigns blame to the Government for noncitizens who commit crimes. The Government’s perceived failure is generally insufficient *ex ante* exclusion—either insufficient enforcement, for those who unlawfully enter, or erroneous prediction, for those who lawfully enter but later commit a crime.⁵⁸ (Cox and Posner 2007) For those who enter and commit one crime, the failure to prevent a second crime becomes one of perceived insufficient *ex post* enforcement (with the first crime putting the Government on notice that removal is possible).

In each case, the government’s gatekeeping role creates the perception that it proximately causes any subsequent noncitizen crime, to employ a tort law analogy—that the crime “never would have happened” absent Government failure. (Prosser and Keeton 1984, p. 284) Put simply, the public holds the Government more accountable for noncitizen crime than citizen crime. While a citizen is “here,” for a noncitizen, the possibility always exists to be somewhere else besides “here.” Immigration officials thus face uniquely targeted criticism for crimes by those who “shouldn’t be here.”

This societal construction of Government proximate cause repeats throughout discourse on noncitizen crime. For example, consider the case of Carlos Martinelly-Montano, a Bolivian unauthorized immigrant (and then-potential DREAMer) who in 2010, killed one nun and injured two others while driving drunk in Virginia. (Boorstein 2010) Martinelly-Montano had two prior convictions for drunk driving, neither of which ICE determined triggered mandatory detention. Upon the second conviction, ICE released Martinelly-Montano with a GPS tracking device, and Martinelly-Montano complied with supervision conditions. (Vedantam 2011) Local police subsequently stopped Martinelly-Montano for two other driving violations, but he was not convicted. After multiple immigration court continuances, Martinelly-Montano crashed into the nuns 18 days before his rescheduled deportation hearing, while still under ICE supervision. (*Ibid.*)

⁵⁷ For example, Ayelet Shachar termed the “crucial realm of responsibility” of immigration regulators to “determine who to permit to enter, who to remove, and who to keep at bay.” (Shachar 2009, p. 811)

⁵⁸ To give an extreme example, some U.S. legislators criticized DHS for admitting the Boston Marathon bombers as asylees when children. (Weigel 2013)

The incident sparked criticism that cast ICE as proximately causing the crime because it failed to expeditiously detain and deport Martinelly-Montano. For example, U.S. Rep. Harold Rogers criticized ICE's prioritizing of those with only "serious" criminal records, and said "A life could have been saved had ICE just simply done their job to begin with." (Boorstein 2010) Similarly, the local county supervisor blamed federal immigration authorities, stating, "This crime *need not have happened...* if federal authorities, who now have blood on their hands, had done their job in the first place and had this sleazebag deported." (*Ibid.*)

Or, when a New York unauthorized immigrant killed a mother and daughter in a drunk driving accident, a group representing families of 9/11 victims criticized both Congress' and the executive branch's immigration policies.⁵⁹ "While crime is crime and the victims suffer equally whether the perpetrator is a citizen or illegal alien, what makes illegal alien crime so different is that the crime *would have never happened* if our government was doing its constitutionally mandated duty and enforcing immigration laws..." (Rae 2009)

The fear of subsequent crime is inherent to preventive detention determinations, such as criminal bail. Indeed, as David Cole noted, false positives are unknowable while false negatives are "emblazoned across the front pages." (Cole 2009, p. 696) But this perception of proximate cause for noncitizen crime amplifies that fear, and helps explain why, as Legomsky put it, "false negatives [are] tolerated in the criminal context but not in the [immigration deportation] context." (Legomsky 1999, p. 546)

Yet although the spectre of proximate cause might explain why DHS or an individual immigration judge might choose detention—and indeed, DHS invariably does in individual cases⁶⁰—it does not quite explain categorical detention even for minor crimes. Here, I preliminarily argue that mandatory detention represents an overcompensation by Congress and ICE to public "blaming the gatekeeper," to send a message to the U.S. populace of active, competent protection from dangerous "criminal aliens."⁶¹ Because individualized decisions lack the symbolic value of law, individualized detention by judges would not send a message so effectively. (Stuntz 2001, p. 533)

Mandatory detention law, implemented through the physicality of detention facilities, provides a sense of symbolic order, analogous to the border fence's symbolic sense of order for those who seek "the omniscient power of the government and the law to fix things." (Fan 2008 p. 704; Taylor 1997 p. 154; Motomura 2007) Indeed, mandatory detention establishes a kind of border within

⁵⁹ The 9/11 hijackers overstayed their immigration visas.

⁶⁰ As noted, DHS denied bail to 71 percent of ICE arrestees on discretionary, not mandatory grounds. (NYU 2012, p. 10)

⁶¹ Here, Congress has passed the law, and ICE subsequently interpreted it as strictly as possible by requiring detention rather than "custody."

borders, in placing a wall (or literally, four walls) between noncitizens who have committed crimes and the U.S. public. (Shachar 2009, p. 811)

4.2.2 A Property Law Analogy: Detention of Noncitizens as Invitees

Although “blaming the gatekeeper” may explain the symbolic value of mandatory detention legislation, it does not quite explain its severity towards lawful noncitizen residents. Indeed, minor noncitizen crimes should theoretically create minor blame, and resultant minor Government response—not the drastic remedy of detention without bail until deportation.⁶²

Thus, I explore here a complementary theory—that noncitizens who commit crimes are viewed as “invitees,” per property law analogies, whom upon committing a crime presumably violate the scope of permission granted by the landowner (i.e. the U.S. public). This better explains the categorical, nearly zero-tolerance attitude towards *ex post* crime expressed by mandatory detention law.

As Pratheepan Gulasekaram argues, property law analogies gain societal acceptance because they transplant “innately recognizable neighborly norms into the complicated arena of immigration law.”⁶³ (Gulasekaram 2012, p. 176) Several scholars, notably Peter Schuck, have explored the analogy of unlawful immigrants as “trespassers.”⁶⁴ (Schuck 1984, p. 7; McLeod 2012, pp. 128-33; Fan 2009, p. 727; Boland 2006) For example, Schuck argued that “Americans believe that illegal aliens... are like trespassers; they have no right to enter or remain. Control of illegal migration, then, is not merely a pragmatic policy goal; it assumes the character of a legal duty and a moral crusade... [and] Americans' conceptions of citizenship reflect these imperatives.” (Schuck 1997, p. 7-8)

I posit here that mandatory detention laws reflect an “invitee” construction, more applicable to post-entry conduct and not necessarily dependent on unlawful entry. Under this theory, although the landowner (here, the U.S.) owes duties to invitees, violating the terms of the granted permission forfeits the right to be present. (Restat 2d of Torts, § 332) Mandatory detention law thus expresses Government withdrawal of permission to be present, as much (or more than) the actual dangerousness implied by a noncitizen’s crime.⁶⁵ (Chacon 2007, p. 189) As the 1995 Senate report stated, “there is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals

⁶² For example, one could envision legislation imposing mandatory immigration detention for drunk driving that results in death, rather than subway turnstile jumping.

⁶³ Gulasekaram argued that U.S. border fence initiatives reflect and reinforce the societal trespass analogy. (Gulasekaram 2012, p. 176)

⁶⁴ Villazor also explores the connections between property law and immigration. (Villazor 2010, p. 981)

⁶⁵ As Chacon surmised, “[t]he crime is not the underlying offense so much as it is the act of committing any transgression, whether great or small, while being present in the United States as a non-citizen.” (Chacon 2007, p. 189) I depart from Chacon in analyzing detention specifically pursuant to removal, and raising a different analogy than to the criminal law.

without importing more.” (U.S. Senate Committee on Governmental Affairs 1995, p.6)

In doing so, mandatory detention approximates the fiction of the liminal “arriving alien” state, outside society pending the Government’s decision to admit—or as close as practically possible, by presuming detention unless deportation is defeated.⁶⁶ (Chavez & Provine, p. 80; Menjivar 2006) This is true even for lawful permanent residents, for whom the governing presumption is changed from “citizenship-in-training” to “liminal legality.” (Valverde 2010, pp. 224-29) The expressive presumption is banishment, and detention serves as a physical way station on that conceptual path, unless and until someone defeats deportation in immigration proceedings.⁶⁷ (Sweeney 2010, p. 84)

An “invitee” construct may help resolve several troubling disconnects. For one, “invitee” theory may help explain why mandatory detention applies equally to lawful entrants (or residents) as to unlawful, and thus the disconnect between the categorical harshness of detention and rights-based norms for long-term residents with jobs and families. Trespass theory cannot account for those lawfully admitted, since there is no “entry without invitation.” (McLeod 2012, p. 131) But under “invitee” theory, no trespass need exist for the “criminal alien” to violate social norms. Indeed, criminal activity would violate U.S. terms of permission under any status short of citizenship.

Moreover, an “invitee” construct may help explain the nearly zero-tolerance presumption for noncitizen crime that mandatory detention effects.⁶⁸ Under an “invitee” theory, the expressed message is not only protection from the dangerous, but *post hoc exclusion* of noncitizens committing crimes, even minimally dangerous crimes. This may explain the departure from criminal pretrial practices, which do not categorically impose a 100% incapacitation rate upon categories of prior offenders (although some released pretrial invariably reoffend). That said, this social “invitee” construct is imperfect, and I plan to further explore it in future research.⁶⁹

5 CONCLUSION

As a conclusion, I offer final thoughts as to the realistic chance that U.S. mandatory detention will change.

⁶⁶ Valverde noted that “practices of detention” play a role in creating “liminal citizenship” status. (Valverde 2010, pp. 224-29)

⁶⁷ Indeed, pre-hearing mandatory detainees are treated worse than actual “arriving aliens” in one respect—that pre-hearing mandatory detainees are ineligible for parole.

⁶⁸ Schuck, for example, justified pre-hearing detention of criminal aliens on grounds it might prevent “twelve crimes a year.” (Schuck 1996, p. 668)

⁶⁹ Indeed, although the rules set the norms, property law rules admit of exceptions—“attractive nuisance,” for example (Schuck 1984, p. 7), or “adverse possession” for the long-term unauthorized. (Gomez 2007)

If mandatory detention is primarily expressive and designed to send a message, then changes to mandatory detention are unlikely absent change in the underlying discourse characterizing immigrants as dangerous “criminal aliens.”⁷⁰ (Harvard 2012, pp. 1482-84, 1486; Dolovich 2011, pp. 266-67) There is potential for that change in discourse, however.

For one, the sheer numbers in the deportation system, as the U.S. has ramped up enforcement, causes greater recognition of the humanity of even “criminal aliens.” President Obama alone has deported nearly two million from the U.S. (Gonzalez 2013), which means two million sets of families, friends, and colleagues affected by deportation.

Concurrently, immigrants’ rights advocates have increasingly challenged the dichotomous discourse of good and bad immigrants (with “criminal aliens” of course “bad”). (NIJC 2013) Indeed, a current rallying cry against deportation is “not one more”—which omits a good/bad dichotomy.

Moreover, as more noncitizens are placed in proceedings, more are defeating deportation, and thus rebutting the presumption that one in immigration detention will not return to his or her American life. This trend may increase as immigrants in proceedings are provided greater access to procedural rights such as appointed counsel.⁷¹ These developments may cause greater public recognition of the disproportionality of mandatory detention, and the deprivations that follow from long-term residency.

⁷⁰ As Sharon Dolovich noted, “a political strategy emphasizing the financial costs of incarceration is bound to fail unless it also generates an ideological reorientation towards recognizing the people the state incarcerates as fellow human beings and fellow citizens.” (Dolovich 2011, pp. 266-67)

⁷¹ For example, a New York study found that 74 percent of those not detained but having a lawyer won their immigration removal proceedings, while even 18 percent of those detained with lawyers won. (New York Immigrant Representation Study 2011, pp. 363-64) New York City subsequently funded a pilot project to provide lawyers to the detained in immigration proceedings, and other cities are exploring similar efforts. (Noferi 2013)

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