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Whitney Chelgren
Loyola Law School, Los Angeles

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PREVENTIVE DETENTION DISTORTED: WHY IT IS UNCONSTITUTIONAL TO DETAIN IMMIGRANTS WITHOUT PROCEDURAL PROTECTIONS

*Whitney Chelgren**

There are two main problems with the current immigration detention system: the conditions of confinement and the procedural mechanisms that are used to detain noncitizens. The current conditions of confinement cast serious doubt on the constitutionality of the detention system. Although it is purportedly civil, immigration detention is very much a punitive institution. Moreover, there is no binding regulation governing the operation of detention facilities or the conduct of detention staff. The problems that stem from this lack of regulatory oversight are compounded by the fact that many detention centers are run as for-profit businesses. More fundamentally, noncitizens are detained without the procedural protections that inhere in all other preventive detention contexts. Because there is no principled justification for this aberration, the constitutionality of the detention system is, at best, highly suspect. At a minimum, immigrants should receive pre-detention hearings to determine whether their detention is in the government's interest, and there should be time constraints imposed on pre-removal order detention.

* J.D. Candidate, May 2012, Loyola Law School Los Angeles; B.A., Philosophy, June 2009, Loyola Marymount University. My deepest gratitude to Kathleen Kim, Professor of Law at Loyola Law School Los Angeles, for lending her invaluable support and expertise to this article. I would also like to thank Roxana Mehrfar, Andrew Lichtenstein, Elena DeCoste Grieco, and Joshua Rich for all of their insightful comments and keen editing. A special thanks to my parents for their unconditional love and support and to my sister, Tia, whose incredible talent will forever inspire me to improve my writing. Lastly, many thanks to my boyfriend, Tim, for spending countless hours in coffee shops keeping me company and bringing me refills.

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> *[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.*[1]

I. INTRODUCTION

In 1984, Mr. Vinodbhai Bholidas Patel left India and started a life in the United States.[2] He lived and worked in St. Louis, Missouri, where he opened several businesses, including doughnut-shop franchises, bagel shops, and hotels.[3] In 1990, Mr. Patel became a lawful permanent resident,[4] and in 1996, the Immigration and Naturalization Service (INS) approved his application for naturalization.[5] Mr. Patel quickly became a well-respected member of his community.[6] All of Mr. Patel's immediate family—his wife, his four children, and his brother—legally resided in the United States as well.[7]

Despite the fact that the INS approved Mr. Patel's application for naturalization, the immigration authorities failed to schedule his oath of allegiance.[8] Mr. Patel, frustrated with the holdup, filed an action challenging the delay, and in 2000, a district court ordered the immigration authority to administer the oath.[9] Instead, the immigration authority revoked its approval of Mr. Patel's request for naturalization, initiated proceedings to have him removed from the country, and placed him in immigration detention.[10]

The year prior, Mr. Patel had been charged with harboring an undocumented alien, an offense that Mr. Patel pleaded guilty to after admitting to employing and housing the undocumented immigrant.[11] The conviction constituted an "aggravated felony" that authorized

1. Jackson v. Indiana, 406 U.S. 715, 738 (1972).
2. Brief for Petitioner-Appellant at 4, Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) (No. 01-2398), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003).
3. *Id.*
4. *Id.*
5. *Id.* at 4 n.1.
6. *Id.* at 4.
7. *Id.* at 4–5, 5 n.2.
8. *Id.* at 4 n.1.
9. *Id.*
10. *Id.* at 4 n.1, 5–6.
11. *Id.*

immigration authorities to mandatorily detain Mr. Patel, without a bond hearing, during the entire removal process.[12] Although Mr. Patel, a long-standing, law-abiding, legal permanent resident, was sentenced to only five months in prison for his offense, he was confined in detention for almost a year.[13]

Mr. Patel's story highlights some of the inequities that mar the United States' immigration detention system. Currently, immigration authorities can detain noncitizens without individualized hearings.[14] Without such hearings, however, the government cannot determine which noncitizens should be detained during the removal process and which noncitizens could be monitored through less invasive and expensive means. Moreover, as there are no time limits on pre-removal detention, confinement can drag on,[15] as illustrated by Mr. Patel's case where the length of his detention was six months longer than the time he served for the underlying offense.[16] The current immigration detention system is highly punitive in character, and yet it fails to provide individuals like Mr. Patel with even the basic procedural protections that exist in all other forms of civil detention.

Part II of this Article will provide a background of immigration detention. Because immigration detention is essentially preventive detention, Part II will also explain the basic contours of preventive detention and the procedural safeguards that generally inhere in preventive detention schemes.

Part III argues that the current conditions of confinement are constitutionally problematic for two reasons. First, although it is purportedly civil, the system has taken on a quasi-punitive character. Second, the system is unregulated. Part IV hones in on pre-removal order detention—the period of time before the court determines that a noncitizen is deportable and issues its removal order. Part IV demonstrates why the absence of two safeguards—individualized hearings and time limits—is constitutionally suspect. Part V

12. *Id.* at 5–6; *see* 8 U.S.C. § 1226 (2006).

13. Patel v. Zemski, 275 F.3d 299, 309 (3d. Cir. 2001), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003).

14. *See Demore*, 538 U.S. at 530–31.

15. *See id.* at 567–68 (Souter, J., dissenting).

16. *Patel*, 275 F.3d at 309, *abrogated by Demore*, 538 U.S. at 510.

entertains and ultimately rejects the common justifications for the absence of these protections in the context of immigration detention.

Part VI recommends an overhaul of the immigration detention system based on the limitations and protections that are present in other forms of civil detention. Part VI asserts that immigrants facing detention should receive individualized hearings to determine whether they pose threats to the public or risks of flight. Part VI also argues that there should be time limits on detention. Part VI then recommends that the government should reform the conditions of confinement to reflect the civil, regulatory purpose of immigrant detention and enforce those reforms through binding regulations. Finally, Part VI recommends that the government embrace alternative models of detention.

II. BACKGROUND

To comprehend the problems of our current immigration detention system, one must understand not only the procedures, statutes, and infrastructure involved but also the underlying policies and rationale. Immigration detention is theoretically preventive detention. However, the system is often at odds with its purported goals.

A. Background to Immigration Detention

Each year the United States detains more than 300,000 immigrants, and the figure is steadily climbing.[17] The government must spend $1.7 billion a year to accommodate the volume of immigrants passing through the system, and, as the numbers rise, the financial ramifications worsen.[18] The system's rapid expansion is largely attributable to two pieces of legislation passed in 1996—the Antiterrorism and Effective Death Penalty Act (AEDPA)[19] and the Illegal Immigration Reform and Immigrant Responsibility Act

17. THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS 1 (2009) [hereinafter CONSTITUTION PROJECT], *available at* http://www.constitutionproject.org/pdf/359.pdf.

18. Tom Barry, *Mass Incarceration of Immigrants*, BORDER LINES (May 24, 2009, 11:48 AM), http://borderlinesblog.blogspot.com/2009/05/mass-incarceration-of-immigrants.html.

19. Pub. L. No. 104-32, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., and 42 U.S.C.).

(IIRIRA).[20] These provisions concurrently expanded the categories of immigrants that are subject to mandatory detention.[21] Just two years after Congress passed AEDPA and IIRIRA, the number of immigrants in detention nearly doubled, increasing from 8,500 in 1996 to nearly 16,000 in 1998.[22]

The system's growth can also be traced to immigration enforcement agencies' increased reliance on home and workplace raids[23] as well as to the government's overall stricter enforcement of immigration laws in the wake of the September 11th terrorist attacks.[24] Because of these changes in policy and legislation, each year the detention system struggles to hold a greater number of immigrants; there is no end in sight to the mass influx.[25] In 2008, the United States detained a record-setting 378,582 immigrants,[26] surpassing the 2004 figure of 231,500 by more than 80,000.[27]

1. Statutory Framework

The United States detains a diverse range of immigrants pursuant to several statutory provisions.[28] Section 236(a) of the Immigration and Nationality Act (INA) gives the Department of

20. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

21. *See* DONALD KERWIN & SERIN YI-YING LIN, MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf; *Analysis of Immigration Detention Policies*, AM. CIVIL LIBERTIES UNION (Aug. 18, 1999), http://www.aclu.org/immigrants-rights/analysis-immigration-detention-policies; *see also* Nina Rabin, *Immigration Detention in Arizona: A Quietly Growing System Crying out for Reform*, 45 ARIZ. ATT'Y, July–Aug. 2009, at 31, 31 (2009) ("The skyrocketing rate of growth of detention over the past decade is a direct result of the Illegal Immigration Reform and Immigrant Responsibility Act . . . .").

22. AM. CIVIL LIBERTIES UNION, *supra* note 21.

23. KAREN TUMLIN ET AL., NAT'L IMMIGRATION LAW CTR., A BROKEN SYSTEM vi, 1 (2009), *available at* http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf.

24. CONSTITUTION PROJECT, *supra* note 17, at 13–14.

25. Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 147 (2008) ("[T]he rise in numbers is poised to continue well into the future.").

26. KERWIN & LIN, *supra* note 21, at 7; DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT: IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

27. Barry, *supra* note 18.

28. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 108.02 (2010).

Justice (DOJ) and the Department of Homeland Security (DHS) discretion to detain immigrants during removal proceedings.[29] If Immigration and Customs Enforcement (ICE), a division of DHS, takes an immigrant into custody, ICE *may*, during the pendency of removal hearings, continue to detain or release the immigrant on a bond.[30]

Next, under INA section 235(b)(1), the Secretary of Homeland Security *must* detain arriving aliens who are subject to expedited removal.[31] Expedited removal is a summary process for expelling noncitizens who have not officially entered the United States and who do not possess proper documentation.[32] Under current law, this category includes persons seeking political asylum.[33] Before the enactment of IIRIRA, asylum-seekers were automatically released on parole while their applications were adjudicated.[34] Now, their detention is mandatory until ICE determines whether they demonstrate a credible fear of persecution.[35] If they cannot establish that fear, they will be detained until they are removed.[36]

Pursuant to INA section 235(b)(2)(A),[37] arriving aliens who are inadmissible[38] but not subject to expedited removal—meaning that they are inadmissible for reasons other than improper documentation

29. *Id.* § 108.02(1).

30. *Id.* (stating that bond must be at least $1,500). To obtain release, the immigrant must demonstrate that he or she will not abscond or endanger his or her community. *Id.* § 108.05(2)(a). Should the immigrant be released on bond, ICE may rearrest and detain the immigrant at any time. *Id.* § 108.02(1).

31. *Id.* § 108.02(2)(a).

32. CONSTITUTION PROJECT, *supra* note 17, at 3.

33. *Id.* Asylum-seekers are immigrants who hope to gain refugee status in the United States based on a fear of prosecution in their home country. *Id.* The United States detains approximately 1,400 noncriminal asylum-seekers each day. SCHRIRO, *supra* note 26, at 11.

34. GORDON, *supra* note 28, § 108.02(2)(a).

35. *Id.*

36. *Id.*

37. 8 U.S.C. § 1225 (2006).

38. An alien can be found "inadmissible" if the alien has been convicted of or admits to having committed particular crimes, if the alien is determined to have certain communicable diseases or disorders, if the alien is suspected to be involved in espionage or terrorist activities, if the alien is present without being admitted or paroled, if the alien does not possess proper documentation, if the alien has been previously removed, if the alien is a practicing polygamist, or if the alien has committed fraud or misrepresentation in an attempt to procure documentation. *Id.* 8 U.S.C. § 1182(a)(1)–(10) (2006).

or misrepresentation—are, nevertheless, subject to mandatory detention.[39]

Additionally, under INA section 236(c),[40] immigrants who are convicted of certain criminal offenses *must* be detained.[41] This category of "criminal aliens" breaks down into three subgroups, depending in part on whether the immigrant has legally entered the country.[42] First, an immigrant who has not yet entered the country will be subject to mandatory detention if he or she has multiple prior criminal convictions[43] or has been convicted of any one of a number of specified crimes.[44] Next, an immigrant who has entered the country is deportable and subject to mandatory detention if he or she commits any one of a number of specified crimes within a designated number of years from the time that he or she was admitted to the country.[45] Finally, an immigrant is either inadmissible and subject to mandatory detention or deportable and subject to mandatory detention for engaging in terrorist activity.[46] Criminal aliens are only paroled when their release is necessary to further a government investigation.[47] Otherwise, they can only challenge their detention on

39. *Id.* § 1225. The alien is detained for a proceeding under *Id.* § 240. *Id.* § 1229.

40. *Id.* § 1226.

41. *Id.*

42. For the difference between *legal entrance* and *non-entrance*, see Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 298 (1983) ("Under the fiction by which 'admitted' and 'unadmitted' aliens are distinguished, aliens taken into custody upon arrival, and aliens who present themselves to the authorities without evading inspection, have not made an 'entry' and are not 'within' the United States . . . ." (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953))).

43. In order to fall within this category of inadmissible persons who are subject to mandatory detention, the criminal convictions must add up to at least a five-year aggregate sentence. 8 U.S.C. § 1182(a)(2).

44. *Id.*; GORDON, *supra* note 28, § 108.02(2)(b) (an arriving alien is inadmissible if he or she has been convicted of one of the following: a crime of moral turpitude, controlled substance violations, drug trafficking, prostitution and commercialized vice, or involvement in human trafficking).

45. 8 U.S.C. § 1227(a)(2)(A)(i)–(iii), (B), (C), (D); GORDON, *supra* note 28, § 108.02(2)(b) (a noncitizen is deportable and subject to mandatory detention if the noncitizen committed a crime of moral turpitude within five years of admission or within ten years for lawful permanent residents, provided: at least a one-year sentence was imposed; the noncitizen received multiple moral-turpitude convictions after entering the United States; the noncitizen received an aggravated-felony conviction after admission into the United States; the noncitizen received a controlled-substance conviction after admission into the United States; the noncitizen was charged with certain firearm offenses after admission into the United States; or the noncitizen committed a crime of sabotage, espionage, sedition, or treason).

46. 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B); GORDON, *supra* note 28, § 108.02(2)(b).

47. CONSTITUTION PROJECT, *supra* note 17, at 5.

grounds that the governing statute does not apply to their case.[48] In order to prevail on such a theory, the immigrant must carry a heavy burden and show that the government is "'substantially unlikely' to prove that an underlying conviction makes the non-citizen subject to mandatory detention."[49]

Finally, pursuant to INA section 241(a), the government *must* detain all immigrants who have received a final order of removal for a ninety-day "removal period."[50] If the government fails to remove the immigrant or the immigrant does not leave within that time frame, then the immigrant may be released, subject to an order of supervision, only if the immigrant can establish that he or she does not pose a danger to the community or a significant risk of flight.[51]

2. Facilities and Conditions of Detention

The immigration detention system consists of three main types of facilities: Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and Intergovernmental Service Agreement facilities (IGSAs).[52] Each of these types of facilities are owned or operated, to varying degrees, by private companies.[53] For instance, ICE frequently enters into contractual arrangements with private companies that in turn staff SPC facilities with guards and other personnel.[54] Similarly, CDFs are owned and operated by private, for-profit contractors.[55] ICE places the largest number of detainees in local prisons and jails—oftentimes alongside or even commingled with the criminal population[56]—pursuant to intergovernmental

48. *See* GORDON, *supra* note 28, § 108.05(3)(a)(i) ("Detained noncitizens may challenge their inclusion under the mandatory-detention provisions of the INA. . . . [A] noncitizen held pursuant to *INA § 236(c)* may seek a *Joseph* hearing in front of an [immigration judge] to determine whether the individual is 'properly included' within the mandatory-detention categories.").

49. CONSTITUTION PROJECT, *supra* note 17, at 6.

50. 8 U.S.C. § 1231(a); GORDON, *supra* note 28, § 108.02(2)(c).

51. 8 U.S.C. § 1231(a)(3); GORDON, *supra* note 28, § 108.02(2)(c).

52. TUMLIN, *supra* note 23, at 4.

53. *Id.*

54. ICE currently operates seven SPCs that hold about 13 percent of ICE immigrant detainees. *Id.*

55. *Id.* CDFs hold about 17 percent of immigrant detainees. *Id.*

56. CONSTITUTION PROJECT, *supra* note 17, at 15.

service agreements.[57] Many IGSA facilities are operated by private, for-profit prison companies.[58]

Immigrants in detention are held in strict, jail-like facilities under jail-like conditions.[59] They are often "transported in shackles, subjected to strip searches, [and] confined to 'lock down' for hours."[60] They are housed in secure facilities with hardened perimeters and held under management plans that are largely based on command and control.[61] In fact, ICE's detention standards are "based upon corrections law" and are thereby designed to control the operation of jails and prisons rather than of civil detention facilities.[62] In addition, detention facilities are frequently located in remote areas of the country where detainees cannot easily access legal resources and are often isolated from their families and loved ones.[63] DHS is at liberty to transfer detainees between the facilities scattered across the United States.[64]

Immigration detention facilities do not follow any form of binding regulation.[65] With the exception of IGSAs—ironically where the majority of immigrants are held[66]—immigration detention facilities are governed by nationwide detention standards, although these standards do not have the force of law and do not carry the same weight that codified regulation does.[67]

In January 2010, in the wake of myriad reports of detainee deaths[68] as well as egregious incidents of detention staff misconduct,[69] DHS replaced the National Detention Standards with

57. TUMLIN, *supra* note 23, at 4. Currently, there are more than 350 IGSA facilities holding approximately 67 percent of detainees. *Id.*

58. *Id.*

59. SCHRIRO, *supra* note 26, at 4.

60. Rabin, *supra* note 21, at 32.

61. SCHRIRO, *supra* note 26, at 4.

62. *Id.*

63. *Id.*

64. GORDON, *supra* note 28, § 108.04(1)(a).

65. *See* TUMLIN, *supra* note 23, at vi.

66. *Id.*

67. *Id.* ("[N]oncompliance carries no real penalty.").

68. *See* Darryl Fears, *3 Jailed Immigrants Die in a Month*, WASH. POST, Aug. 15, 2007, at A02.

69. *See* Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 67–68 n.71 (noting that immigration staff has reportedly used threats of violence and deportation to

the Performance Based National Detention Standards (PBNDS).[70] Like the old standards, the PBNDS delineate the acceptable living conditions for detainees, including access to legal materials, food service, recreation, telephone access, and medical care.[71] Although the new standards purportedly improve on the former standards by setting forth desired outcomes,[72] the two are strikingly similar and will still not apply to IGSAs, where most detainees are held.[73] Furthermore, despite the efforts of immigration reform advocates, DHS declines to give the new regulations the force of law.[74]

3. Length of Detention

Removal proceedings are not formally limited by time constraints,[75] and detention can last for months or even years.[76] Although records regarding the numbers of immigrants passing through the detention system are not entirely accurate,[77] a study conducted by the Migration Policy Institute (MPI) provides some

coerce detainees into performing sex acts); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47 (2010), *available at* http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf (noting that more than one hundred detainees have died in custody since 2003, and pointing to inadequate health care and neglect as contributing factors).

70. GORDON, *supra* note 28, § 108.04(1)(b).

71. *Id.* § 108.04(1)(b)–(c).

72. *Id.* § 108.04(1)(b).

73. TUMLIN, *supra* note 23, at 2–3.

74. *DHS Refuses Rulemaking on Detention Standards*, NAT'L IMMIGRATION FORUM (Aug. 13, 2009), http://www.immigrationforum.org/policy/agencies-display/dhs-refuses-rulemaking-on-detention-standards/ ("Advocates had sought rulemaking by the agency in 2007, and DHS neglected to respond at all until June 2009, when it received a court order to do so with a 30 day deadline. Twenty-nine days later, DHS denied the advocates' petition, asserting that the guidelines in place were sufficient.").

75. Demore v. Kim, 538 U.S. 510, 567 (2003) (Souter, J., dissenting).

76. *See* Welch v. Ashcroft, 293 F.3d 213, 227 (4th Cir. 2002) (lawful permanent resident mandatorily detained fourteen months before district court ordered bond hearing); *see also* Abimbola v. Ashcroft, No. 01CV5568(NG), 2002 WL 2003186, at *1 (E.D.N.Y. Aug. 28, 2002) (noncitizen mandatorily detained twenty months before BIA order).

77. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., No. OIG-07-08, REVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S DETAINEE TRACKING PROCESS 1 (2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-08_Nov06.pdf ("The detainee tracking system, for five of the eight ICE detention facilities tested, did not always contain timely information. . . . At six of eight ICE detention facilities tested, [the Deportable Alien Control System] and detention facility records did not always agree on the location of detainees, or contained information showing the detainee had been deported."); *see also* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 18 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (noting that the precise number of immigrants detained each year "is not known as the DHS does not publish this data").

insight into the statistics, on average, of time spent in detention.[78] MPI found that the average (mean) length of detention for detainees who were still awaiting a removal determination ("pre-removal order detainees") was eighty-one days.[79] With respect to those who had received a final removal order ("post-removal order detainees"), the average length of detention subsequent to receiving the removal order was seventy-two days up to that date.[80] For post-removal order detainees, the average amount of total time spent in detention up to that date, counting from the first day in detention until the day that MPI collected its data, was 114 days.[81] According to the study, 1,792 persons had already been detained for over six months.[82]

Most of the detainees who were counted in the study were not released the same day that the study was taken and remained in detention for days afterwards.[83] Thus, in order to get a true picture of detention duration, the averages would have to be increased to reflect how long the detainees remained in confinement after the study concluded.

B. Background to Preventive Detention

There are two main purposes behind immigration detention: to ensure that the government can successfully remove noncitizens by preventing immigrants from absconding before their removal hearings or after a final order of deportation, and to prevent deportable immigrants from committing crimes and endangering the public during the removal process.[84] Immigration detention, therefore, is essentially *preventive detention*—it is not meant to exact a punitive sentence but is an administrative measure designed to help

78. KERWIN & LIN, *supra* note 21, at 6. The MPI study was based on information obtained pursuant to the Freedom of Information Act, which required ICE to release data pertaining to the 32,000 detainees currently in its custody on January 25, 2009. MPI used this snapshot data to produce its findings. *Id.* at 4–5.

79. *Id.* at 16. Twenty-six percent (4,848 persons) had already been detained for ninety days or longer, and 3 percent (570 persons) had been detained for one year or longer. *Id.*

80. *Id.* at 17.

81. *Id.*

82. *Id.* (footnote omitted).

83. *Id.* at 19 n.40.

84. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.").

the government keep track of immigrants who might ultimately be ordered removed and to prevent removable immigrants from committing crimes in the interim.[85]

In 1987, the Supreme Court considered the constitutional limits of preventive detention in *United States v. Salerno*.[86] The Court held that preventive detention under the Bail Reform Act did not violate the Due Process Clause because the Act served a legitimate regulatory purpose and Congress carefully limited the circumstances in which pretrial detention could be sought.[87] The Bail Reform Act authorized pretrial detention of persons charged with particular felonies on the ground of future dangerousness, but only after the government demonstrated by clear and convincing evidence in an adversarial hearing that no conditions of release could reasonably assure that the arrestee would not pose a danger to the public.[88] The judicial officer was required to consider factors such as "the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release."[89] The Bail Reform Act entitled the arrestee to numerous procedural protections during the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses.[90] The Bail Reform Act also mandated that detainees be housed separately from convicts, and another piece of legislation, the Speedy Trial Act, strictly limited the maximum length of detention.[91]

85. In fact, immigration detention is *necessarily* preventive detention because DHS is not authorized to detain persons for punitive purposes since this authority is unique to the criminal justice system. *See* Wong Wing v. United States, 163 U.S. 228, 241 (1896) (holding that sentencing an immigrant to hard labor amounted to punitive punishment, which could only be inflicted on a person pursuant to the authority of the criminal justice system); *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006 n.14 (2002) ("The INS has no authority to detain aliens for any purposes other than prevention."). As for the minority of immigrants who are detained on the basis of criminal conduct, they have all served their criminal sentences by the time they enter detention. *See* KERWIN & LIN, *supra* note 21, at 1 (finding that only 42 percent of detainees had criminal records).

86. 481 U.S. 739 (1987).

87. *Id.* at 747–48.

88. *Id.* at 742.

89. *Id.* at 742–43.

90. *Id.* at 751–52.

91. *Id.* at 747.

In its decision, the Court considered the Act's legislative purpose: to prevent a limited class of felons from committing additional crimes while released on bail.[92] In light of the extensive procedural protections afforded to arrestees, the Court determined that pretrial detention was not excessive in relation to that purpose.[93]

In reaching its decision, the Court emphasized that pretrial detention could only be sought for the "most serious of crimes" and observed that there were "stringent time limitations."[94] The Court also mentioned that excessively prolonged pretrial detention would be punitive and therefore unconstitutional.[95] Finally, the Court stated that because the Bail Reform Act authorized pretrial detention only after the state carried a substantial burden, it was not a "scattershot attempt to incapacitate" all persons who were suspected of committing serious crimes.[96]

In upholding pretrial detention, the Court also pointed to the procedural rights afforded to the arrestee; namely, the Bail Reform Act required an adversarial hearing regarding the arrestee's dangerousness and placed strict time limits on pretrial detention.

In nonimmigration contexts, the Supreme Court continues to uphold the use of preventive detention when *Salerno*-type protections are present;[97] however, when these protections are absent, the Court holds that preventive detention is unconstitutional.[98]

92. *Id.*

93. *Id.* at 746–48.

94. *Id.* at 747.

95. *Id.* However, the Court declined to answer at what point detention would be considered excessively prolonged. *Id.* at 747 n.4.

96. *Id.* at 750.

97. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 362–64, 371 (1997) (upholding the preventive detention of sexual predators because the detention was preceded by an adversarial hearing that afforded the individual robust procedural protections, including the right to state-funded counsel, the right to present and cross-examine witnesses, and the right to an annual case review to determine if detention was still warranted).

98. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 81–82 (1992) (holding that the preventive detention of an insanity acquitee violated due process because the authorizing statute lacked the procedural protections central to the holding in *Salerno*, and stating "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited."); *see also* Kansas v. Crane, 534 U.S. 407, 415 (2002) (holding that a state law authorizing the civil commitment of sex offenders was unconstitutional because it did not require an adversarial hearing as to whether the offender lacked control over the dangerous behavior).

III. CONDITIONS OF CONFINEMENT: PUNISHMENT THAT FITS NO CRIME

Given the ubiquitous nature of *Salerno*-type protections in other preventive detention schemes, it is striking that virtually no protections attach to immigration detention. Immigrants are not entitled to pre-detention adversarial hearings concerning whether they pose a threat to their community or are likely to abscond.[99] If an immigrant seeks to challenge discretionary detention, he or she, rather than the government, carries the burden of proof.[100] Even if an immigration judge determines that the immigrant is eligible for parole, DHS can override this decision and require continued detention.[101] If an immigrant wants to challenge mandatory detention based on criminal offenses, the immigrant carries a heavy burden of proof and must show that the government is *substantially unlikely* to prevail.[102] Furthermore, there is no time limit imposed on pre-removal order detention.[103] Detention is not restricted to the "most serious" crimes, as an immigrant can be detained based on relatively minor traffic-related offenses[104] or simply for requesting political asylum.[105] ICE does not conduct individual assessments to determine whether conditions of release could serve state ends,[106] and immigrants are often detained among criminal populations[107] and in settings where the conditions of confinement do not reflect the

99. *See* Demore v. Kim, 538 U.S. 510, 531 (2003).

100. CONSTITUTION PROJECT, *supra* note 17, at 6.

101. Michael S. Vastine, *Good Things Come to Those Who Wait? Reconsidering Indeterminate and Indefinite Detention as Tools in U.S. Immigration Policy*, 5 INTERCULTURAL HUM. RTS. L. REV. 125, 147–48 (2010).

102. CONSTITUTION PROJECT, *supra* note 17, at 6.

103. *Id.*

104. KERWIN & LIN, *supra* note 21, at 2 ("The 'most serious' convictions for nearly 20 percent of criminal aliens in ICE custody were for traffic-related (13 percent) and immigration-related (6 percent) offenses.").

105. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2006).

106. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610–13 (2010) (discussing how immigration detention has shifted from a system that utilized parole to a system that now prohibits release on parole for mandatory holds).

107. AMNESTY INT'L, *supra* note 77, at 37.

regulatory purpose of detention. Finally, immigrants in detention have no right to government-funded counsel.[108]

The absence of *Salerno*-type procedural safeguards in immigration proceedings is troubling, especially in light of the current state of the immigration detention system. The system is so drastically and fundamentally broken that even if there were full-fledged procedural safeguards in place, it would still be constitutionally suspect for the government to place anyone in detention. Therefore, in an effort to reveal what is truly at stake for those who are detained without procedural protections, this part will provide an analysis of the problems that occur at the ground level of immigration detention.

The immigration detention system is broken for two reasons. First, the system is civil only in theory; in practice, it is very much a punitive institution.[109] Second, the system is not governed by binding regulation.[110] Together these defects generate a host of problems for detainees and cast serious doubt on the constitutionality of the entire system.

A. Although Purportedly Civil, the Detention System Is Highly Punitive

Within the current immigration detention model, it is impossible to draw any meaningful distinction between civil custody and penal incarceration.[111] Detainees are often handcuffed or shackled, subjected to invasive body searches, and forced to stand for hours during bed checks.[112] They face severe limitations on visitation, movement, and recreation as well as limited access to legal and medical services.[113] Many detainees are even housed in jails and are sometimes—in contravention of detention standards—commingled

108. CONSTITUTION PROJECT, *supra* note 17, at 8.

109. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) ("[I]mmigration law and the criminal justice system are merely nominally separate.").

110. *See* Tumlin, *supra* note 23, at 1.

111. *See* Stumpf, *supra* note 109, at 376.

112. *See* Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 707–08 (2009).

113. *Id.* at 708.

with the criminal population.[114] Given the prevalence of jail violence,[115] this commingling threatens the security and physical well-being of the detained immigrants. Moreover, guards at commingled facilities do not differentiate between the two populations and reportedly treat immigrant detainees in the same way that they treat criminal convicts.[116] In one instance, five Bureau of Prison officials admitted during an interview that they did not know immigration-specific detention standards even existed, so they trained their corrections officers to treat detainees in the same way that they treated inmates.[117] The deprivations and dangers that detainees face in immigration detention are thus virtually indistinguishable from those that criminal inmates face in jail.[118] This similitude raises constitutional concerns for a number of reasons.

1. The Current Immigration Detention System Is Excessive in Relation to Its Regulatory Goal

The immigration detention system should be narrowly tailored to serve its administrative function, as detention that is excessive in light of its stated purpose is unconstitutional.[119] The immigration detention system, however, has strayed significantly from its purported goals. It is designed to serve an administrative, civil purpose, yet it closely mirrors penal incarceration. As a result, immigration detention is both excessive and unconstitutional.

Although nominally civil, immigration detention is very much a punitive system. The correlation between immigration detention and prison is troubling because the two systems are based on divergent governmental objectives. Criminal incarceration is meant to punish

114. AMNESTY INT'L, *supra* note 77, at 37.

115. John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385, 399 (2006) ("There is disturbing evidence of individual assaults and patterns of violence in some U.S. prisons and jails . . . . Former prisoners recounted gang violence, rape, [and] beatings by officers . . . .").

116. GORDON, *supra* note 28, § 108.04(2)(a) (citation omitted).

117. Brané & Lundholm, *supra* note 25, at 161–62 (citing OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., No. OIG-07-01, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 31 (2006), *available at* http://trac.syr.edu/immigration/library/P1598.pdf).

118. *See, e.g.*, Raha Jorjani, *U.S. Immigration Detention: Policy and Procedure from a Human Rights Perspective*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 91 ("To an individual who is behind bars, the difference between 'prison' and 'detention' is purely academic.").

119. *See* United States v. Salerno, 481 U.S. 739, 746–47 (1987).

persons for past criminal conduct,[120] while immigration detention is merely an administrative tool designed to facilitate efforts to remove deportable immigrants.[121] Most immigrants in detention are not criminals at all,[122] so there is no legal or moral basis on which to subject them to punishment. Further, the state has no interest in incarcerating detainees who have already completed their criminal sentences by the time they enter the immigration detention system.[123] Therefore, the punitive aspects of detention are necessarily excessive in light of the system's nonpunitive purpose.

Many conditions of detention—including overcrowding, lack of adequate visitation hours, insufficient ventilation, poor food, inadequate water, unclean quarters, malfunctioning toilets, and both verbal and physical abuse inflicted by inmates and guards[124]—are utterly indefensible, as such conditions are egregious even in the penitentiary context.

2. Criminal Conditions Without Criminal Protections

The similarity between immigration detention and criminal incarceration is problematic because immigrant detainees are not entitled to the same constitutional protections that their criminal counterparts enjoy.[125] Most strikingly, immigrants in detention are not entitled to government-funded counsel.[126] As a result, most

120. *See* DANIEL E. HALL., CRIMINAL LAW AND PROCEDURE 29 (5th ed. 2009) ("[P]unishment through the criminal justice system is society's method of avenging a wrong. The idea that one who commits a wrong must be punished is an old one.").

121. *See* Mukhopadhyay, *supra* note 112, at 694; *see also* Raha Jorjani, *Ignoring the Court's Order: The Automobile Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 91 (2009) (noting that immigration detention is governed by civil, administrative laws).

122. KERWIN & LIN, *supra* note 21, at 1 (finding that 58 percent of detainees did not have criminal records).

123. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 558 n.14 (2003) (Souter, J., concurring in part and dissenting in part) (noting that the State of California has no interest in further detention after a detainee has completed his or her criminal sentence).

124. Kalhan, *supra* note 69, at 47 (citing AMNESTY INT'L, *supra* note 77, at 29–43).

125. *See* Brané & Lundholm, *supra* note 25, at 151 ("[A] person detained under immigration law is not protected by the same rights and safeguards as someone in the criminal process." (citing DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 34 (2003))); *see also* Cole, *supra* note 85, at 1014 ("The fact that the Constitution limits the imposition of custody in the bail and civil commitment settings does not necessarily mean that it constrains immigration detention to the same extent . . . immigration exceptionalism is well-documented . . . . "). As Part IV, *infra*, will explain, detainees awaiting deportation do not even receive the same procedural protections that detainees in other forms of *civil* detention do.

126. CONSTITUTION PROJECT, *supra* note 17, at 8.

immigrants represent themselves in deportation hearings,[127] despite the fact that the stakes are very high,[128] the law is very complex,[129] and language barriers tend to complicate the entire process.[130] Pro bono legal services are often unobtainable because detention facilities are located in remote areas of the country;[131] where such services are available, transfers frequently disrupt whatever attorney-client relationships that may have formed.[132] Because the conditions of immigration detention mirror those of penal incarceration, and because a rapidly growing number of immigrants are detained and subjected to these conditions each year, "legal representation during removal proceedings is more important than ever."[133]

3. Confinement as an Obstruction to Justice

The conditions of confinement are problematic because they keep many immigrants from pursuing meritorious claims to stay in the country.[134] Although DHS[135] and the Supreme Court[136] both insist that immigration detention is a short-term measure designed to facilitate removal hearings, "in reality, it becomes a long, unbearable process for most."[137] Many immigrants simply cannot endure the

127. *Id.*; Cole, *supra* note 85, at 35 ("Eighty percent of immigration detainees are unrepresented.").

128. Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families . . . .").

129. Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) ("[T]he immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985))).

130. Brané & Lundholm, *supra* note 25, at 160 ("Interpretation services in detention are frequently unavailable or insufficient.").

131. *See* Mukhopadhyay, *supra* note 112, at 705 ("Even if [asylum seekers] are able to find an attorney who is willing to assist them, it is difficult for the asylum seeker to meet and work with the attorney due to the isolated location of many detention facilities.").

132. *See* CONSTITUTION PROJECT, *supra* note 17, at 10 (recommending that before transfer decisions are made, agencies should take into consideration whether transferring a detainee will adversely affect an existing attorney-client relationship).

133. *Id.* at 8.

134. *See* Brané & Lundholm, *supra* note 25, at 160 ("The hardships of detention often force asylum seekers to abandon meritorious claims, simply in order to gain release.").

135. *See* Mukhopadhyay, *supra* note 112, at 694 (noting that DHS classifies detention as a nonpunitive, short-term administrative measure to ensure noncitizens appear at their immigration hearing).

136. *See* Demore v. Kim, 538 U.S. 510, 528 (2003) (distinguishing the case from precedent, where post-removal order detention was held to be potentially indefinite on the grounds that pre-removal order detention is "of a much shorter duration" than post-removal order detention).

137. Mukhopadhyay, *supra* note 112, at 704.

harsh, highly punitive conditions of confinement; consequently, they often voluntarily deport themselves through a process known as stipulated removal.[138] In 2004, the year when the government implemented the stipulated removal procedure, there were only 5,481 stipulated removal orders; the following year that number nearly tripled; and, by 2008, the number of stipulated removals was projected to reach 34,890.[139]

This phenomenon, where immigrants voluntarily abandon their claims in order to escape the suffering that they experience in detention, is perhaps most tragic with respect to asylum-seekers and torture survivors. These individuals come to the United States to escape state-sponsored abuse and torture, and they are undoubtedly astonished and disheartened to learn that they will be detained in jail-like facilities and treated like prisoners while their asylum applications are processed.[140] This detention, moreover, can stand in the way of just resolution of asylum petitions.[141] Without proper medical and mental health support, asylum-seekers have difficulty processing and articulating the abuse that they have endured; thus, they are less likely to win their cases,[142] especially if they are representing themselves without the support of counsel, which, as mentioned above, is often the reality.[143] What is more, asylum-seekers and torture survivors are especially vulnerable to the inhumane and prison-like conditions of detention and can actually be retraumatized by their experiences in confinement.[144] As a result,

138. Stipulated removal is a procedure, authorized by IIRIRA, that enables noncitizens to waive their rights to a hearing and any relief from removal without ever appearing before an immigration judge. *See* NAT'L IMMIGRATION LAW CTR., OVERVIEW OF KEY IMMIGRATION ISSUES FACING THE IMMIGRANTS' RIGHTS MOVEMENT 3 (2009), *available at* http://www.nilc.org/dc_conf/flashdrive09/Immigration-Law-and-Enforcement/imm1_imm-issues-overview-2009-11-05.pdf.

139. Jayashri Srikantiah & Karen Tumlin, *Backgrounder: Stipulated Removal*, IMMIGRANTS' RTS. CLINIC, 1, http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated_removal_backgrounder.pdf (last visited Mar. 31, 2011).

140. Mukhopadhyay, *supra* note 112, at 705.

141. *Id.* ("Inhumane and prison-like detention conditions can hinder an immigrant's ability to discuss his or her claim . . . . If the asylum seeker is unable to testify about the persecution she suffered, an asylum officer or immigration judge may inaccurately conclude that the asylum seeker is not credible and is therefore ineligible for asylum.").

142. *Id.*

143. CONSTITUTION PROJECT, *supra* note 17, at 8.

144. Mukhopadhyay, *supra* note 112, at 709 (explaining how the prison-like conditions and treatment in detention facilities compound asylum seekers' trauma).

these immigrants are more likely to forgo their claims and stipulate to their removal simply in order to get out of detention.[145]

Unfortunately, the immigrants who have suffered the most—such as victims of torture, rape, and prosecutions—are most vulnerable to harsh detention conditions. Unable to withstand the environment, they therefore are the first to give up their claims.[146]

B. The Detention System Is Dangerously Unregulated

The second major problem with the immigration detention system is the lack of binding regulation. Neither the former National Detention Standards nor the recently promulgated PBNDS carry the force of law.[147] Because there are no enforceable rules in place, there is no way to hold facilities accountable when they fail to maintain suitable detention standards. Indeed, part of the problem stems from the fact that detention officials have broad discretion when it comes to defining what is *suitable*.[148]

1. The Regulation Gap

The lack of regulation has allowed the detention system to deteriorate to the point where the conditions of confinement are not only punitive but also inhumane.[149] Reform advocates point to the absence of binding regulation as a cause of the high number of deaths, suicides, and human-rights abuses that have occurred in immigration detention facilities in recent years.[150] Moreover, the lack of enforceable regulation has created a significant gap between

145. *See* Marisa Silenzi Cianciarulo, *The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan for Victims of International Trafficking in the United States*, 38 N.M. L. REV. 373, 405 (2008) ("[Detention has] a severe negative psychological impact, resulting in many bona fide refugees giving up their asylum claims and accepting deportation rather than remaining incarcerated.").

146. *See id.* at 709–11.

147. TUMLIN, *supra* note 23, at 4–5. *See* U.S. DEP'T OF HOMELAND SEC., OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (2008), *available at* http://www.ice.gov/detention-standards/2008/, to review the PBNDS.

148. TUMLIN, *supra* note 23, at 8 ("Excessive reliance on reviewer discretion and 'good judgment' rendered ICE's self-reviews inherently unreliable, as review findings could neither be replicated by other reviewers nor meaningfully evaluated for accuracy.").

149. *See, e.g.*, Brané & Lundholm, *supra* note 25, at 160 ("[T]he conditions themselves may also infringe on human rights guarantees.").

150. Kalhan, *supra* note 69, at 47 ("These deprivations have been exacerbated by a range of detention related policies and practices . . . . Over 100 detainees have died in custody since 2003, often due to neglect of their health needs.").

detention standards—which, although nonbinding, are intended to govern the general affairs of detention facilities[151]—and everyday detention practices.[152] For instance, there have been reports of inadequate medical care,[153] failures to provide law libraries and access to updated legal materials,[154] breaches of visitation and phone-access policies,[155] violations of recreation standards,[156] overcrowding,[157] excessive use of force, abuse by detention guards,[158] and sexual misconduct on the part of the staff.[159] ICE has also been criticized for both failing to report and covering up[160] deaths of persons in detention. In addition, the staggering rate of detainee

151. GORDON, *supra* note 28, § 108.04(1)(b)–(c).

152. TUMLIN, *supra* note 23, at vi.

153. *Id.* at xi ("[O]ver 30 facilities failed to provide segregated detainees with required health care visits."); *id.* at 73 ("Facilities failed to provide adequate medical screening of newly arriving detainees.").

154. *Id.* at 33 ("29 detention facilities lacked an actual law library . . . . Law libraries at 59 facilities did not contain some or all of the required legal material . . . . 30 facilities failed to designate an employee to update legal material . . . . 27 facilities inappropriately limited detainees' access to their law libraries . . . . 15 facilities failed to equip their law libraries with any typewriters or computers . . . . 20 facilities had inadequate numbers of computers or typewriters . . . .").

155. *Id.* at 15 ("Over 60 facilities failed to post a list of pro bono legal services organizations . . . . 17 facilities failed to provide detainees the option of avoiding a strip search by choosing that a visit be 'noncontact.'"); *id.* ("More than a dozen facilities failed to allow detainees in disciplinary segregation access to legal visits."); *id.* at 27 (finding, based on American Bar Association (ABA) and the United Nations High Commissioner for Refugees (UNHCR) reports, that thirty facilities did not provide a reasonable degree of privacy for legal phone calls, thirty-two facilities failed to allow detainees to make special access calls, and nineteen facilities did not have a system in place for taking emergency phone messages).

156. *Id.* at 21–22 (according to ABA and UNHCR reports, forty-one facilities failed to provide detainees the minimum amount of recreation time; nineteen facilities had no outdoor programs; six facilities lacked an indoor recreation program; one facility provided neither outdoor nor indoor recreation programs; and eighteen facilities provided recreation areas that could not accommodate all detainees).

157. *Id.* at 46.

158. *Id.* at 49 (according to ICE, eleven facilities imposed one or more of the following sanctions against detention policies: corporal punishment; deprivation of food, exercise, clothing, or personal hygiene items; and withholding of correspondence privileges). According to independent reviewers, impermissible and retaliatory discipline was a common problem and violations included: deprivation of recreation and library time, deprivation of hygiene items, and use of corporal punishment, including shackling. *Id.*

159. GORDON, *supra* note 28, § 108.04(2)(b), (d), (e).

160. *See* Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1 (discussing numerous incidents where immigrants died or suffered horrendous abuse in detention and how officials covered up the details of such incidents).

depression[161] and the high number of documented suicides indicate that immigrants in detention do not receive the appropriate level of physical and psychological care that they require.[162]

The true extent of these problems and abuses is largely unknown. The government has maintained a "deliberate policy of opaqueness" with respect to the results of facility audits.[163] ICE has refused to release the results of its annual reviews, and the only two agencies that have been permitted to conduct their own audits, the American Bar Association (ABA) and the United Nations High Commissioner for Refugees (UNHCR), have gained access to the facilities on the condition that their findings remain confidential.[164]

2. The Privatization of Human Suffering

Additionally, the lack of regulatory oversight is even more dangerous due to the privatization of many detention centers. As indicated above, ICE relies heavily on private companies to provide staff, management, and supervision to immigration detention facilities. In fact, the majority of detainees (51 percent) are distributed between seventeen densely populated "mega-jail"[165] facilities, and more than 37 percent of all detainees are held in

161. *See* Lisa A. Cahan, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. OF HEALTH & BIOMEDICAL L. 343, 365 n.96 (noting that 86 percent of asylum-seekers in detention suffer from high levels of depression); *see also* Mukhopadhyay, *supra* note 112, at 709–10 (noting that conservative estimates from ICE estimate that at least 15 percent of the general detainee population suffer from depression and other mental illnesses).

162. Mukhopadhyay, *supra* note 112, at 709–10.

163. TUMLIN, *supra* note 23, at vi.

164. *Id.* at 1 (noting that ABA and UNHCR audit results are shared with ICE only). Pieces of the ABA and UNHCR audits have recently become available to the public pursuant to court-ordered discovery. *Id.* at 2 ("This information was released only as a result of court-ordered discovery in *Orantes-Hernandez v. Holder*."). However, the government withheld a substantial amount of the information that it was ordered to turn over. *Id.* ("[The government] withheld information on detention facilities' compliance with 20 of the 38 national detention standards . . . . The government also failed to produce *all* facility reviews conducted by ICE during 2004 and 2005, despite the court order to do so . . . . [I]t became clear that ICE had withheld facility reviews for *at least* 133 facilities that it reviewed in 2004 and 2005.").

165. HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 25 (2009), *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (noting that these detention centers have been described as "mega-jails").

facilities managed by private contractors.[166] Only two mega-jails are directly managed by localities.[167] Because private contractors play a significant role in the daily operation of detention facilities, the goals of the detention system have become intertwined with those of a for-profit business enterprise.[168] This confusion is exacerbated because the companies are not constrained by binding regulation but instead have great discretion over how they conduct their businesses.[169] Accordingly, under both the old detention standards and the new PBNDS, compliance is largely self-monitored by the companies running the facilities—companies that often have their eyes on turning a profit.[170] The ramifications of using an "honor system" to regulate the behavior of profit-driven companies are readily apparent.

A private detention company, like any other business, faces incentives to increase its profit margin.[171] When profit margins cause a detention company to cut corners and save costs, that leads to substandard care and serious infringements of detainees' rights.[172] In fact, independent agency reviews of detention facilities indicated "widespread and severe" violations of the national detention standards,[173] yet ICE consistently overlooked the reports and granted

166. KERWIN & LIN, *supra* note 21, at 14–15 (demonstrating that 12,159 of the 32,000 detainees held in mega-jail facilities—or 37.99 percent—are detained in facilities managed by private contractors).

167. *Id.*

168. *See* Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 489 (2007) ("[T]he privatization of immigration control also further diminishes chances for individual and social redress against an increasingly tyrannical system that is fueled by turning taxpayer revenue into corporate profits.").

169. *Id.* at 473 ("Consider a field of law in which officials may gather and use secret evidence, expedited removals, no review of final orders of removal, mandatory and indefinite detention, secretive changes of venue, exorbitant bonds, restricted access to counsel and restricted judicial review. Now consider the privatization of this process where employees . . . have nearly unchecked discretion to decide the fate of asylum applicants and immigrants at our borders.").

170. Private detention is a lucrative business. *See* Mukhopadhyay, *supra* note 112, at 702–03. The two largest corporations behind the detention business are GEO Group and Corrections Corporation of America, and they can charge the government anywhere from $30 million to $60 million a year to run a single facility. *Id.*

171. Donna Red Wing, *Every Prisoner a Profit Centre: Every Immigrant a Business Opportunity*, OPENDEMOCRACY (Sept. 29, 2010, 1:43 PM), http://www.opendemocracy.net/donna-red-wing/every-prisoner-profit-centre-every-immigrant-business-opportunity-1 ("As in any big business, the profit motive rules.").

172. Mukhopadhyay, *supra* note 112, at 703 ("[T]he high cost of detention results in high profits for private corporations who are able to cut corners in detainee treatment.").

173. TUMLIN, *supra* note 23, at viii.

the companies tremendous discretion to regulate themselves.[174] Through ICE's willingness to turn a blind eye to documented violations of its own standards, the government has sent a dangerous message to detention companies that "noncompliance carries no real penalty."[175]

One might expect these defects in the detention system to be counterbalanced by unassailably constitutional pre-detention procedures. But, as will be demonstrated below, this is far from the case.

IV. PREVENTIVE DETENTION CANNOT PERSIST WITHOUT PROCEDURAL SAFEGUARDS

As indicated above, immigration detention is preventive detention, and yet none of the usual preventive-detention safeguards apply. Although all of the procedural protections advanced in *Salerno* seem equally probative in the context of immigration detention, this part will focus on the importance of adversarial hearings and time constraints on the duration of detention. These two protections not only inhere in most, if not all, preventive detention schemes apart from immigration detention but they seem to be the hallmark of constitutionally sound civil detention.[176]

Preventive detention ceases to be *preventive* when there is nothing to prevent. Accordingly, there should be an individualized assessment to determine whether or not the government's interest is even implicated, before an immigrant is locked away. Furthermore, there should be limitations on the length of detention because, as the Supreme Court indicated in *Salerno*, when detention becomes prolonged and thus excessive in relation to the state interest, the nature of the detention changes from civil (and constitutional) to punitive (and unconstitutional).[177]

174. *Id.* at 12.

175. *Id.* at 1.

176. In addition, some of the other protections—for instance the notion that the conditions of confinement should reflect the state's regulatory purpose and the mandate that detainees should not be intermingled with the criminal population—are incorporated into Part III of this Article, *supra*, as part of a critique of the current conditions of confinement.

177. United States v. Salerno, 481 U.S. 739, 747 n.4 (1987).

As will be demonstrated in Part V, there is no principled justification for discarding these two protections when it comes to immigration detention. This is especially true given that the courts have recently bestowed greater due process rights on immigrants[178] and have pulled in the reins on the government's plenary power over immigration issues.[179]

A. Detaining Persons Without Individualized Hearings Is Unconstitutional

Currently, immigrants who are subject to mandatory detention are detained without any assessment as to whether they are dangerous or likely to abscond.[180] In other words, they are detained without an assessment as to whether their confinement furthers state interests. Instead, the system essentially presupposes that every immigrant who is subject to mandatory detention is either dangerous or a flight risk, or both.[181] However, some immigrants who are placed in removal proceedings are neither dangerous nor likely to abscond.[182] Detaining these individuals, when it is not in the government's interest to do so, arbitrarily deprives them of their fundamental right to liberty.

Individualized hearings are necessary because not all removable immigrants are dangerous.[183] Some immigrants who face mandatory detention have never been convicted of a crime, and thus the government has no reason to automatically presume that they pose a

178. *See* Zadvydas v. Davis, 533 U.S. 678, 690, 701 (2001) (indicating that a statute authorizing indefinite detention would violate noncitizens' constitutional rights, and holding that a statute authorizing post-removal order detention included an implicit reasonableness limitation of six months); *see also* Clark v. Martinez, 543 U.S. 371, 386–87 (2005) (extending the right to be free from indefinite post-removal order detention to inadmissible noncitizens); Tijani v. Willis, 430 F.3d 1241, 1249–50 (9th Cir. 2005) (extending the right to be free from indefinite detention to pre-removal order detainee).

179. *See Zadvydas*, 533 U.S. at 695 (indicating that the plenary power doctrine does not grant the government with the authority to indefinitely detain an immigrant who has been ordered removed but is not removable); *see also* Tran v. Mukasey, 515 F.3d 478, 485 (5th Cir. 2008) (indicating that even though a detainee had a violent criminal history and suffered from a mental condition that increased the likelihood of future dangerousness, the government's plenary powers do not authorize a continued detention on these grounds when removal is not foreseeable).

180. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 531 (2003).

181. *See id.* at 528–31.

182. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208–09 (1953); *supra* Part I.

183. *See supra* Part I.

danger to their communities.[184] Even when detention is based on past criminal conduct, the types of crimes that trigger mandatory detention do not always correlate with future danger.[185] A broad swath of criminal charges trigger mandatory detention,[186] and each charge is not necessarily probative of an immigrant's propensity for violence.[187] For example, the triggering offense might be a misdemeanor, a relatively minor traffic offense, or a nonviolent crime, such as money laundering.[188]

In contrast, in *Salerno*, the Bail Reform Act authorized detention only when a person committed a "crime of violence."[189] The fact that the Act only authorized preventive detention when the arrestee was charged with a "crime of violence" supplied an important link between the individual detainee and the state interest, because the Act only applied when what the person *did* increased the probability that the person would endanger his or her community.[190] Notwithstanding this correlation, the arrestee was still entitled to an adversarial hearing.[191]

In the immigration context, not only is the link between the act that triggers mandatory detention and the governmental purpose for the detention more tenuous but there are no additional procedural safeguards in place. Although removal of nonviolent criminal immigrants may serve legitimate policy objectives, the mere existence of a criminal conviction alone is not enough to justify detention. Thus, because there is no automatic correlation between the offenses that trigger mandatory detention and the government's

184. *See Shaughnessy*, 345 U.S. at 208–09.

185. *See* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 53 (2006) (noting that Congress, through the mandatory detention statutes, created an irrebuttable presumption of dangerousness and risk of flight, and arguing that this presumption is dubious in light of the crimes that trigger mandatory detention).

186. *Id.* at 58 (noting that a wide range of criminal offenses—money laundering, theft offenses, receiving a firearm through interstate commerce while being an unlawful user of controlled substances, trafficking in vehicles, offenses related to perjury, and passport mutilation—qualify as aggravated felonies for purposes of mandatory detention) (citing 8 U.S.C. § 1101(a)(43)(A), (D), (G), (P), (R), (S) (2000); *id.* § 1101(a)(43)(E)(ii) (2002)).

187. *See* Bhargava, *supra* note 185.

188. *Id.* at 58.

189. United States v. Salerno, 481 U.S. 739, 750–51, 755 (1987).

190. *Id.* at 739.

191. *Id.* at 755.

interest in protecting the public, individualized hearings must be utilized.

Similarly, without an assessment as to whether the immigrant poses a flight risk, there is no way to tell whether detention is necessary to ensure that an immigrant shows up to his or her removal hearings or whether a less invasive and less expensive alternative, such as release on parole, could accomplish the same goal. Certain groups of noncitizens are inherently less likely to abscond, and thus their detention, unless it is based on dangerousness, is unnecessary.[192] For instance, a lawful permanent resident with a job, a family, and strong ties to his community does not pose a significant risk of flight.[193] Asylum-seekers are also highly unlikely to abscond and skip their removal hearings because, by seeking asylum, they are voluntarily submitting themselves to the administrative process.

Vinodbhai Patel's story, discussed above, exemplifies the injustice in detaining nondangerous individuals who pose no real flight risk. The INS detained Mr. Patel for almost a year during removal proceedings, despite his having strong social and family ties that seemed to mitigate any danger of flight.[194] Nondangerous persons like Mr. Patel, who are unlikely to run away and subvert the administrative process because of their legitimate legal status and their strong community ties, should not be placed in detention.

In *Demore v. Kim*[195] the majority challenged this conclusion by pointing to a study that found that more than 20 percent of deportable criminal aliens released on bond failed to show up to removal hearings.[196] From this statistic, the Court drew the conclusion that it is constitutionally permissible to detain all immigrants as a prophylactic measure.[197] The statistic, however, was misleading.[198] As

192. *See, e.g.*, Renee Feltz, *Feds Push Detention Reforms Amid Record Number of Deportations*, NEED TO KNOW ON PBS (Oct. 19, 2010), http://www.pbs.org/wnet/need-to-know/security/feds-push-detention-reforms-amid-record-number-of-deportations/4341/ ("[D]etention remains the norm for immigrants brought into custody after living in the United States, even those who have children or family ties here that make them less of a flight risk.").

193. *See* Brief for Petitioner-Appellant at 4, Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) (No. 01-2398), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003).

194. *Id.* at 5–6.

195. 538 U.S. 510 (2003).

196. *Id.* at 519–20 (stating that detention is needed in order to avoid an "unacceptable rate of flight").

197. *Id.* at 531.

198. *See id.* at 563–64 (Souter, J., dissenting).

the dissent pointed out, the data were based on a test study in response to overcrowding.[199] This overcrowding forced ICE to haphazardly release a percentage of immigrants on bail.[200] ICE paid no attention to individual circumstances, such as whether the immigrant had strong ties to the community, a job, a family, or a history of absconding.[201] Thus, the persons who were released were not necessarily persons who posed low risks of flight. It is fair to presume that had ICE conducted assessments and released only those who were favorable candidates, far fewer noncitizens would have absconded.

In fact, the dissent pointed to a more recent study that found that 92 percent of criminal aliens who were released under supervisory conditions actually attended all of their hearings.[202] The institute that conducted the study applied various screening criteria, such as strength of family and community ties, before selecting candidates for release, thereby simulating the type of procedure that would likely be used if ICE were to implement individualized hearings.[203]

In any event, the fact that a portion of immigrants will abscond does not authorize the government to detain all immigrants without any assessment.[204] In 2001, the U.S. Court of Appeals for the Third Circuit made this point when it held that the government violated due process by mandatorily detaining a noncitizen without making an individualized determination of his risk of flight or danger to the community.[205] The court reasoned that even if 90 percent of released noncitizens would abscond during the removal process, it is nevertheless unjust to imprison the 10 percent who would dutifully report to their hearings.[206]

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 565.

203. *Id.* at 520 n.5 (majority opinion); *id.* at 565 n.21 (Souter, J., dissenting).

204. *See supra* notes 93–94 and accompanying text.

205. Patel v. Zemski, 275 F.3d 299, 314 (3d Cir. 2001), *abrogated by* Demore v. Kim, 538 U.S. 510 (2003).

206. *Id.* at 311–13.

The current immigration detention system is extremely clumsy.[207] All immigrants who are subject to expedited removal are lumped into one category: persons who are dangerous or likely to abscond.[208] But, without an individualized determination, it is impossible to know which immigrants *are* dangerous or likely to abscond. As one lower court pointed out, "The requirement of an individualized hearing would infuse the detention process with the accuracy and precision that it currently lacks."[209] As it stands now, the system deprives many individuals of their fundamental right to freedom without furthering any government goal.[210]

B. Without Parameters on the Length of Detention, Detention Can Become Excessively Prolonged and Unconstitutional

Time limits are important because immigration detention can last for months or even years.[211] The Supreme Court has consistently held that prolonged detention raises constitutional concerns because when detention becomes excessive in light of the state interest, it ceases to be constitutional.[212] Accordingly, the Court has struck down statutes for authorizing detention if the detention lacks an obvious termination point.[213] Yet, the Court has failed to recognize that immigration detention is also without an obvious termination point and, in many instances, is excessive in light of its administrative purpose.[214]

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207. *See Demore*, 538 U.S. at 550 (Souter, J., dissenting) ("We stressed [in *Salerno*] that the act was not a 'scattershot attempt to incapacitate those who are merely suspected of' serious offenses." (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))).

208. *See supra* Part II.A.1.

209. *Patel*, 275 F.3d at 312.

210. *Id.*; *see* Carlson v. Landon, 342 U.S. 524, 546–47 (1952); Singh v. Mule, No. 07-CV-6387-CJS-VEB, 2009 WL 204618, at *6–7 (W.D.N.Y. Jan. 27, 2009).

211. *See, e.g.*, Nadarajah v. Gonzales, 443 F.3d 1069, 1071 (9th Cir. 2006) (ordering the release of an asylum-seeker who had been detained for almost five years despite having prevailed at every level of review and having never been charged of any crime); *see also* CONSTITUTION PROJECT, *supra* note 17, at 13 (indicating that immigrants are often detained for months, sometimes even years).

212. *See, e.g.*, *Salerno*, 481 U.S. at 747 n.4.

213. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

214. *See* CONSTITUTION PROJECT, *supra* note 17, at 24 ("Although the Supreme Court has concluded that mandatory detention does not violate due process, that conclusion is based in part on the assumption that non-citizens in removal proceedings will be detained only for a 'limited period.' In reality, however, non-citizens are often detained for weeks or months, and some are even in detention for years." (citing Demore v. Kim, 538 U.S. 510, 531 (2003))).

The Court's misperception can be attributed to misleading statistics.[215] Government-reported statistics on detention lengths are not comprehensive due to systemic inadequacies of ICE's tracking system, which is the source of the raw numbers behind the statistics.[216] The current tracking system allows some immigrants to fall through the cracks.[217] These immigrants are never counted for purposes of data collection, yet their detentions drag on.[218] Furthermore, statistics about the average length of detention are often skewed because the data include stipulated removals.[219] Immigrants who waive their right to go before a judge in order to expedite the removal process are obviously detained for a much shorter duration; indeed, that is the incentive.[220] Stipulated removals, therefore, artificially draw down the average length of detention with respect to those who do decide to stay and challenge their removals.

In 2003, in *Demore v. Kim*, Justice Souter, writing for the dissent, criticized the majority for using similarly skewed statistical data to support its contention that detention is generally of a short duration.[221] Justice Souter believed that the statute authorizing mandatory detention of criminal aliens violated due process in part because removal proceedings have no deadline and may last more than a year.[222] The majority, however, found that the detention was

215. *See* Kimere Jane Kimball, Note, *A Right to Be Heard: Non-citizens' Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159, 161 (2009) (noting that the *Demore* decision has received criticism because the majority relied on statistics regarding detention length that included people who chose immediate deportation).

216. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 77 ("The detainee tracking system, for five of the eight ICE facilities tested, did not always contain timely information. . . . At six of eight ICE detention facilities tested, [the Deportable Alien Control System] and detention facility records did not always agree on the location of detainees, or contained information showing the detainee had been deported.").

217. Mukhopadhyay, *supra* note 112, at 704 (citing Amy Golstein & Dana Priest, *Careless Detention: Medical Care in Immigrant Prisons*, WASH. POST (SPECIAL SERIES), May 11–14, 2008) (noting that many detainees slip through the cracks due to lack of representation or family to whom they can stay connected while in detention; thus, it is highly likely that some detainees have been in detention considerably longer than those in any of the publicized cases).

218. *See id.*

219. Brief for T. Alexander Aleinikoff et al. as Amici Curiae Supporting Respondent, Demore v. Kim, 538 U.S. 510 (2003) (No. 011491), 2002 WL 31455523, at *3 ("[T]he median period of detention is misleading [sic] skewed as it is by the large number of detained aliens who concede deportability, do not apply for relief from removal and are promptly removed.").

220. *See supra* Part III.A.3.

221. *Demore*, 538 U.S. at 567–68 (Souter, J., dissenting).

222. *Id.* at 558.

not excessive because detentions, in most cases, lasted around forty-seven days.[223] The dissent pointed out that the majority relied on statistics that inaccurately portrayed the length of immigration detention.[224] The forty-seven-day average counted from the time an immigrant received charging documents to the time of decision.[225] It did not, therefore, capture the weeks or months that an immigrant can spend in detention before receiving charging documents.[226] Indeed, the MPI study discussed in Part II found that the average length of detention for pre-removal detainees was eighty-one days,[227] a conservative estimate given that the snapshot data were based on persons who remained in custody after the study concluded.

Moreover, several circuit courts, faced with the question of whether detention in nonimmigration contexts has become prolonged and thus unconstitutional, conduct a case-by-case analysis in which they consider the strength of the state's evidence indicating that the detainee poses a risk of flight or danger to the community.[228] However, if this balancing were applied to immigrants in detention, it seems that even a comparatively short time in detention would be considered prolonged. The state, having never conducted an individualized assessment, would have no evidence at all indicating that the immigrant poses a risk of flight or danger. Accordingly, because detention can become excessively prolonged in relation to its administrative purpose, immigration detention should be subject to stringent time limitations.

223. *Id.* at 529 (majority opinion).

224. *Id.* at 567–68 (Souter, J., dissenting).

225. *See id.*

226. *Id.*; *see also* Bridget Kessler, Comment, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 573–76 (2009) (describing story of young Peruvian mother who was seven months pregnant when she was detained, who waited in detention for almost two months before she received her charging documents).

227. KERWIN & LIN, *supra* note 21, at 16.

228. *See* United States v. Hare, 873 F.2d 796, 801 (5th Cir. 1989) ("Like other circuits, we find that the due-process limit on the duration of preventive detention requires assessment on a case-by-case basis . . . . [A] court must consider . . . the strength of the government's proof that the defendant poses a risk of flight or a danger to the community." (citations omitted)).

V. REBUTTING JUSTIFICATIONS FOR THE CURRENT IMMIGRATION DETENTION SYSTEM

Given the importance of the two protections discussed above and the fact that they are extended in other preventive detention contexts, it is puzzling that they do not apply to immigration detention. Some have defended the current detention system on the grounds that noncitizens are not entitled to due process,[229] or at least not the same level of due process that is afforded to citizens.[230] Others insist that immigration law is at the zenith of the government's plenary power.[231] Accordingly, Congress and the executive branch have virtually unbridled discretion to make immigration decisions.[232] The next section entertains each of these justifications and then shows why they fail. As a result, there is no principled justification for the absence of *Salerno*-type protections in the context of preventive detention as used in immigration removal proceedings.

A. Illegal Immigrants and Removable Noncitizens Are Entitled to Due Process

Some defend the current immigration detention system on grounds that illegal immigrants or removable noncitizens are not entitled to due process.[233] The Due Process Clause of the Fifth Amendment prohibits the government from unfairly depriving

229. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 692 ("The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention.").

230. *Id.*

231. *See, e.g.*, *id.* at 695 ("The Government also looks for support to cases holding that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decision making in that area.").

232. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J 545, 546–47 (1990) (describing a case involving an influx of Haitians seeking asylum in south Florida).

233. *See, e.g.*, Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1443 (5th Cir. 1993) (holding that continued detention of excludable aliens did not violate due process because the aliens had no liberty interest in being paroled); *see also* Maria V. Morris, *The Exit Fiction: Unconstitutional Indefinite Detention of Deportable Aliens*, 23 HOUS. J. INT'L L. 255, 278–80 (2001) (describing the theory that once an immigrant no longer has a right to remain in the United States, he or she can be expelled according to whatever process Congress mandates); *id.* at 275 (noting that under the entry fiction doctrine, immigration officials could parole a person into the United States without that person being considered to have entered the country for the purpose of constitutional due process protection).

persons of fundamental rights,[234] including the right to be free from imprisonment, detention, or other forms of physical restraint.[235] The Supreme Court has held that government detention violates due process unless it is ordered in a criminal proceeding with adequate procedural protections[236] or in special nonpunitive situations[237] where extenuating circumstances, such as a harm-threatening mental illness, outweigh the individual's constitutionally protected liberty interest.[238] As demonstrated above, immigration detention is not so narrowly tailored. Some have tried to justify this anomaly on grounds that due process guarantees simply do not extend to illegal immigrants.[239] The logic goes: if an immigrant is removable, and thus does not have a right to be in the country, then the immigrant is not entitled to the protections that the Constitution affords.[240] This position is in discord with both the language of the Due Process Clause and the decisions of the Supreme Court.

The Due Process Clause forbids the government from depriving *any person* of life or liberty without due process of law.[241] This language indicates that the protection applies to *all persons* inside the country, not only to *citizens*.[242] Indeed, this is how the courts have interpreted the Fifth Amendment. In 1976, in *Mathews v. Diaz*,[243] the Supreme Court stated that even unlawful aliens are entitled to Fifth and Fourteenth Amendment protections.[244] In 2001, in *Zadvydas v. Davis*,[245] a landmark case that will be revisited below, the Supreme Court reaffirmed this principle, stating, "Once an alien enters the

234. 16B AM. JUR. 2D *Constitutional Law* § 942 (2010) (discussing "constitutionally protected interests" as "fundamental rights").

235. *See* Foucha v. Louisiana, 504 U.S. 71, 86 (1992) ("Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.").

236. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

237. *See Foucha*, 504 U.S. at 80.

238. *See* Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997).

239. *See* Morris, *supra* note 233, at 279 (discussing the argument, advanced by some courts, that because excludable and deportable aliens have no right to be at large in the United States, they are not entitled to due process protection).

240. *Id.*

241. U.S. CONST. amend. V.

242. *Id.*

243. 426 U.S. 67 (1976).

244. *Id.* at 77–79; *see* Rosales-Garcia v. Holland, 322 F.3d 386, 409 (6th Cir. 2003).

245. 533 U.S. 678 (2001).

country, the legal circumstance changes, for the Due Process Clause applies to *all persons* within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."[246] Finally, in 2003, in *Demore v. Kim*,[247] the dissent once again echoed this point, insisting that "[i]t has been settled for over a century that all aliens within our territory are 'persons' entitled to the protection of the Due Process Clause."[248]

The courts have been more reluctant to recognize the due process rights of aliens who have not legally entered the country.[249] Such rights, when they come to fruition, tend to be limited.[250] For example, in 2005, the Supreme Court, in *Clark v. Martinez*,[251] extended its holding in *Zadvydas* to benefit aliens who have not entered the country, but it also suggested that the same constitutional concerns were not necessarily at play due to the immigrant's inadmissible status.[252] Although inadmissible aliens may be entitled to less process, this does not mean that they receive no due process protections at all.[253] A Sixth Circuit court pointed out, quite tellingly, that "[i]f excludable aliens were not protected by even the substantive component of constitutional due process . . . we do not see why the United States government could not torture or summarily execute them."[254]

246. *Id.* at 679 (emphasis added).

247. 538 U.S. 510 (2003).

248. *Id.* at 543 (Souter, J., dissenting).

249. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212–15 (1953); *see also Zadvydas*, 533 U.S. at 682 (pointing out that aliens who have not yet gained initial admission, in contrast with those who have been admitted and are subsequently ordered removed, "present a very different question").

250. Mathews v. Diaz, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification."); *see also Shaughnessy*, 345 U.S. at 212 (stating that "an alien on the threshold of initial entry stands on a different footing" than an alien who has "passed through our gates"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892))).

251. 543 U.S. 371 (2005).

252. *Id.* at 380.

253. Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) ("The fact that excludable aliens are entitled to less process . . . does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

254. *Id.*

Mandatory detention therefore cannot be justified on due process grounds. Even if *one* class of immigrants does not have full-fledged due process rights, the Court has held that *other* immigrants *do* have significant due process rights. Yet mandatory detention treats all of these immigrants the same.[255]

B. Plenary Power Doctrine Does Not Legitimize the Current Immigration Detention System

Others have defended the current immigration detention system by pointing to the plenary power doctrine.[256] Proponents of this justification assert that the plenary power doctrine gives Congress great latitude to define the categories of admission, exclusion, and deportation.[257] Under this view, "[i]f Congress believes that prior criminal convictions predict future dangerousness or flight risk" then Congress may, pursuant to its plenary power, "legislate that presumption."[258] There are two criticisms of this viewpoint.

1. Distinguishing Between the Power to Remove and the Power to Detain

First, there is a fundamental difference between the government's power to exclude and its power to detain.[259] Although the plenary power doctrine gives Congress broad discretion over decisions pertaining to issues of admission and exclusion, it does not provide the government carte blanche to detain.[260] Clearly, the authority to detain is a corollary of Congress's removal power.[261] When detention is incidental to effectuating removal, Congress does not, however, have unbridled discretion to detain simply by virtue of

255. *See supra* Part II.A.1.

256. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603–07 (1889) (holding that the federal government has plenary power to regulate admission and exclusion of noncitizens pursuant to its sovereignty); *see also* Bhargava, *supra* note 185, at 63 (citing *Chae Chan Ping*, 130 U.S. at 603–07) (noting how some defend the detention system on grounds that Congress has significant latitude pursuant to the plenary power doctrine).

257. Bhargava, *supra* note 185, at 63.

258. *Id.*

259. *Id.* ("[I]ssues of admission and exclusion are different from those of detention, and Congress's plenary power over the former does not—and should not—presuppose a similar power over the latter." (citing Cole, *supra* note 85, at 1038–39)).

260. *Id.*

261. *Id.*

its broad power to remove, for the two powers are not coextensive.[262] That is, the former—detention—is not always necessary to achieve the latter—removal.[263]

Moreover, conditions of detention, as indicated above, must comport with due process.[264] The power to detain, therefore, is subject to constitutional constraints that do not bind the government's power to remove. As such, detention falls within the government's plenary power only when special circumstances require it, namely, when a removable person poses a risk of flight or danger.[265]

2. Limits on Congress's Plenary Power over Immigration

Second, plenary power is not boundless.[266] The Supreme Court has placed important limitations on the doctrine.[267] For instance, in *Zadvydas v. Davis*, the Supreme Court used statutory interpretation to draw a very clear and important line, effectively placing an expiration date on the government's plenary power.[268] Zadvydas, a resident alien, was ordered deported based on his criminal record, but the government failed to remove him during the ninety-day removal period because no country was willing to accept him.[269] Zadvydas filed a habeas petition seeking release on grounds that the government could not detain him indefinitely.[270] In 2001, in a landmark decision, the Supreme Court held that the post-removal order detention statute did not authorize indefinite detention but contained an implicit reasonableness time limitation.[271] The Court set the permissible length of post-removal order detention at six months, at which point the immigrant must be released unless the government

262. *Id.* at 65–66.

263. *See supra* Part IV.A.

264. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (stating that Congress's plenary power is subject to constitutional limitations).

265. *See* Bhargava, *supra* note 185, at 65.

266. *See Zadvydas*, 533 U.S. at 700–01.

267. Bhargava, *supra* note 185, at 63–64; *see Zadvydas*, 533 U.S. at 700–01.

268. *Zadvydas*, 533 U.S. at 699 (interpreting "the statute to avoid a serious constitutional threat" and placing a six-month time limit on post-removal order detention).

269. *Id.* at 684–85.

270. *Id.*

271. *Id.* at 682 ("Based on our conclusion that indefinite detention . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation . . . .").

can show that there is a significant likelihood of removal in the reasonably foreseeable future.[272]

The *Zadvydas* decision is significant because it places parameters on the government's plenary power. The Court made it clear that the government's interest in securing removal—an interest that is at the core of its plenary power—at some point must yield to the alien's due process rights, even when the alien no longer has any claim to remain in the country.[273]

While the Court in *Zadvydas* did not find a constitutional violation, it construed the federal statute so as to save it from constitutional attack.[274] The Court reasoned, "A statute permitting indefinite detention of an alien would raise a serious constitutional problem," and so it chose to read a "reasonable time" limitation into the statute.[275] Although the Court formally based its holding on statutory interpretation, the decision had the effect of placing a constitutional check on the government's plenary power.

In fact, the Supreme Court has been placing limits on plenary power for years.[276] In 1952, the Court clearly stated that it would be unconstitutional to *assume* that every alien facing removal is dangerous.[277] In *Carlson v. Landon*,[278] four communist aliens were detained without bail pending a decision of their deportability.[279] The Court upheld their detention on grounds that the Attorney General had sufficient reason to believe that releasing the communist aliens during the removal process could endanger the welfare or safety of the country.[280] While it acknowledged that detention can be a necessary part of the removal process, the Court cautioned that "purpose to injure could not be imputed generally to all aliens subject to deportation."[281] Thus, the Court held that the statute, which gave the Attorney General discretion to detain, was constitutional

272. *Id.* at 701.

273. *Id.* at 689–90.

274. *Id.* (noting that, as a cardinal principle of statutory interpretation, the Court must first determine whether a fair construction of the statute can avoid the constitutional question).

275. *Id.* at 682, 690.

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

277. *Id.*

278. 342 U.S. 524 (1952).

279. *Id.* at 528–29.

280. *Id.* at 541–42.

281. *Id.* at 538.

precisely because it did not presume that all deportable aliens were dangerous.[282]

Although more than fifty years ago the Court recognized that it would be impermissible to sweep all immigrants into detention based on generalized presumptions, this is what the government does today. Given that due process rights do apply to immigrants, and given that the government does not have unlimited plenary power, the procedural protections identified in *Salerno* and its progeny should apply in the context of immigration detention. In fact, recent case law casts even greater doubt on the plenary power and no-due-process justifications for the current immigration detention system.[283] The Supreme Court and several lower courts have recently extended immigrants' due process rights[284] and have placed boundaries on the government's plenary power.[285]

C. Trend Toward More Due Process Rights and Greater Limits on Plenary Power

In the wake of *Zadvydas*, courts have imposed greater limitations on preventive detention as a tool in immigration removal proceedings.[286] This trend creates an even stronger argument for rejecting the proposed justifications for the current system. The move toward greater due process rights and restrictions on plenary power is illustrated by the manner in which lower courts have faithfully

282. *Id.* at 541–42.

283. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 371–72 (2005) ("[N]othing in *Zadvydas* indicates that *§ 1231(a)(6)* authorizes detention until it approaches constitutional limits. Nor does *§ 1182(d)(5)* independently authorize continued detention of these aliens."); Tuan Thai v. Ashcroft, 366 F.3d 790, 798 (9th Cir. 2004) ("We do not believe that *Zadvydas* can properly be read to prohibit the indefinite detention of dangerous resident aliens like Ma, while allowing the indefinite detention of dangerous resident aliens like Thai.").

284. *See, e.g.*, Prieto-Romero v. Clark, 534 F.3d 1053, 1065 (9th Cir. 2008) ("[D]ue process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" (quoting Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001))).

285. *See, e.g.*, Singh v. Mule, No. 07-CV-6387-CJS-VEB, 632009 WL 204618, at *5–7 (W.D.N.Y. Jan. 27, 2009) (holding that DHS/ICE could not detain the petitioner, an Indian national and an alien, since DHS/ICE failed to demonstrate that it was significantly likely that the petitioner would be removed in the reasonably foreseeable future).

286. *See, e.g.*, *Tuan Thai*, 366 F.3d at 792 (concluding that the Supreme Court's statutory interpretation of section 1231(a)(6) does not allow "for the indefinite detention of an alien under special circumstances, such as the existence of a mental illness which makes the alien a danger to the community").

followed *Zadvydas*[287] and by the way that subsequent rulings have extended it.[288]

1. Lower Courts Faithfully Apply *Zadvydas*

Several lower courts have followed *Zadvydas* and ordered the government to release detained immigrants, even in cases where detention is strongly in the government's interest.[289] For example, in *Tuan Thai v. Ashcroft*,[290] the Ninth Circuit held that the six-month limit on post-removal order detention controlled, even though the alien posed a significant danger to the community.[291] After entering the United States, Tuan Thai was convicted of assault, harassment, and third-degree rape.[292] Nevertheless, the court held that the authorizing statute, as it was interpreted in *Zadvydas*, did not contain an exception for particularly dangerous individuals.[293] The court pointed out that the state could use supervised parole or involuntary civil commitment as a way to abate the risk that Thai posed to the public.[294]

In 2008, in *Tran v. Mukasey*,[295] the Fifth Circuit also applied the *Zadvydas* six-month rule despite the government's contention that there should be an exception for violent, mentally-ill detainees.[296] Ha Tran, like Tuan Thai, had a well-documented history of violence and mental illness.[297] He spent two years in a mental hospital, followed by six months in a halfway house, and then murdered his wife the day after he was released.[298] Nevertheless, the court held that the government did not have the authority to detain Tran beyond the six-

287. *See id.*

288. *See, e.g.*, *Clark*, 543 U.S. at 378–79, 386 (applying a strict interpretation of the *Zadvydas* test).

289. *See, e.g.*, Tran v. Mukasey, 515 F.3d 478, 479 (5th Cir. 2008) (finding that continued detention of an alien beyond the ninety-day removal period was unacceptable despite the alien's mental illness); *Tuan Thai*, 366 F.3d at 792 (holding that an alien should not be detained even though he may possess ill mental health and a criminal history).

290. 366 F.3d 790 (9th Cir. 2004).

291. *Tuan Thai*, 366 F.3d at 792.

292. *Id.*

293. *Id.* at 797–98.

294. *Id.* at 799.

295. 515 F.3d 478 (5th Cir. 2008).

296. *Id.* 482–83.

297. *Id.* at 480.

298. *Id.*

month mark, given that removal was unlikely in the near future.[299] Agreeing with the Ninth Circuit, the court reasoned that it is of no consequence whether a detained immigrant poses a risk to the public, even a grave risk, because such a finding does not change the constitutional analysis.[300] The six-month rule from *Zadvydas* does not include an exception for dangerousness.[301]

These cases illustrate the decisive boundary that the Supreme Court drew in *Zadvydas*. The government has an obvious interest in protecting the public from repeat violent offenders, rapists, and murderers, especially when offenders have documented mental illnesses that increase the risk of future dangerousness. However, even when the government has a compelling reason to keep an immigrant detained, detention must still be reasonable.[302] That is to say, if removal is not reasonably foreseeable at the six-month mark, then the immigrant's interest in liberty trumps the government's interest in continuing to detain the immigrant, regardless of how compelling this interest may be.[303]

Courts have also interpreted and applied *Zadvydas* in a way that has created an onerous burden for the state.[304] Lower courts, for instance, have required the state to show the likelihood of effectuating removal *as to the specific immigrant*.[305] In *Singh v. Mule*,[306] a citizen of India conceded his removal, but the government could not remove him because the Indian Consulate failed to respond to requests for travel documents.[307] The court rejected the government's contention that it was still making a "good faith effort" to remove Singh, and it also dismissed the government's statistics-based argument that DHS had repatriated many hundreds of aliens to India in recent years.[308] According to the court, what mattered was

299. *Id.* at 484–85.

300. *Id.*

301. *Id.* at 485.

302. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (stating that Congress must implement its power to detain in a constitutionally permissible manner).

303. *See* Singh v. Mule, No. 07-CV-6387-CJS-VEB, 2009 WL 204618, at *5 (W.D.N.Y. Jan. 27, 2009).

304. *See, e.g.*, *id.*

305. *Id.* at *4–5.

306. *Id.*

307. *Id.* at *2–4.

308. *Id.* at *4–5.

not a showing of a good faith effort or evidence that the government *could hypothetically* remove immigrants to India.[309] Instead, the government needed to show that it was reasonably likely to remove Singh, himself, in the near future.[310] Given the Indian Consulate's protracted silence, the court held that Singh was entitled to release.[311]

Singh is significant because it narrows the scope of cases in which detention beyond the six-month mark will be authorized by increasing the government's burden of proof.[312] In order to justify ongoing detention, the government cannot simply point to a repatriation agreement with the immigrant's native country or suggest the accessibility of travel documents.[313] Rather, the government must show a real, concrete likelihood of removing the specific immigrant in the reasonably foreseeable future.[314]

2. Extending *Zadvydas* and Moving Toward Greater Due Process Protection

In 2005, the Supreme Court answered the question left open by its decision in *Zadvydas* when it held that the six-month presumptive limit on post-removal order detention applied not only to *removable* immigrants but to *inadmissible* immigrants as well.[315] In *Clark v. Martinez*,[316] the Supreme Court held that even inadmissible immigrants who have not legally entered the country are protected from indefinite detention.[317] The Court insisted that the holding must apply to all categories of aliens because it would not make sense to interpret the statute to contain a reasonableness time limit as to one class, but not the other.[318] Although the Court avoided the question of whether inadmissible immigrants are entitled to the same due process

309. *Id.* at *5 ("[R]espondents' past successes in removing aliens to India did not amount to a significant likelihood of removal of Singh in the reasonably foreseeable future.").

310. *Id.*

311. *Id.* at *7. The case was eventually dismissed as moot as Singh was deported to India. *Id.* at *7–8.

312. *See id.* at *4–5.

313. *Id.* at *5.

314. *Id.*

315. Clark v. Martinez, 543 U.S. 371, 378–79, 386 (2005).

316. 543 U.S. 371 (2005).

317. *Id.* at 378–79.

318. *Id.*

rights that removable immigrants are,[319] the Court's decision signaled an important break with past traditions.[320] Historically, the government, relying on the legal fiction of nonentrance, has given the least number of rights and protections to immigrants found at the border.[321] Thus, *Martinez* represents a significant step toward greater due process rights for all immigrants because the Supreme Court declined to use nonentry as a reason to siphon away the due process protections that are afforded to other classes of immigrants.

In addition, in *Prieto-Romero v. Clark*,[322] the U.S. Court of Appeals for the Ninth Circuit extended the *Zadvydas* six-month limit on post-removal order detention to another immigration statute.[323] *Prieto-Romero* concerned section 1226(a), a statute authorizing discretionary detention pending removal,[324] whereas *Zadvydas* required the Court to interpret section 1231(a)(6),[325] a statute authorizing mandatory detention for inadmissible or criminal aliens. Nevertheless, the court applied the six-month rule from *Zadvydas*, reasoning that it would be "incongruous" to conclude "that Congress intended *other* detention statutes to authorize the indefinite detention of aliens, where such detention would clearly pose . . . constitutional concerns."[326]

The Ninth Circuit has even applied the principle in *Zadvydas* to pre-removal order detention.[327] In *Tijani v. Willis*,[328] the Ninth Circuit held that an alien who was detained for two years and eight months while awaiting a removal decision was entitled to release on bail unless the government could establish that he posed a risk of flight or a danger to his community.[329] The court did not address the

319. *Id.* at 381–82.

320. For an illustration of how courts have previously restricted the due process rights of immigrants stopped at the border, see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 214–16 (1953). *See also supra* note 250 (listing cases that discuss limitations on due process rights of aliens who have not legally entered the country).

321. *See supra* note 250.

322. 534 F.3d 1053 (9th Cir. 2008).

323. *Id.* at 1062–63.

324. *Id.* at 1057.

325. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

326. *Prieto-Romero*, 534 F.3d at 1063.

327. *See* Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005).

328. 430 F.3d 1241 (9th Cir. 2005).

329. *Id.* at 1242.

constitutional issues that prolonged pre-removal order detention raised, however, because it held that the statute called for "expedited removal," and two years and eight months was clearly not expeditious.[330] Nevertheless, the court challenged the scope of the plenary power doctrine, stating that "[d]espite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal."[331]

In *Nadarajah v. Gonzales*,[332] the Ninth Circuit again chose to impose *Zadvydas*-type time limitations on pre-removal order detention.[333] In *Nadarajah*, an asylum-seeker who was repeatedly tortured in Sri Lanka was detained for nearly five years, despite having prevailed at every level of administrative review.[334] The court insisted that this amounted to indefinite detention and rejected the government's argument that his detention was finite because "someday" the Attorney General would review his case and his detention would thereby come to an end.[335] The court held that the government is without authority, under the current detention statutes, to detain an alien indefinitely,[336] and because removal was not reasonably foreseeable, the court called for the alien's release.[337]

There is no principled justification for the immigration detention system. The common justifications fail because immigrants *do* have due process rights and the government's plenary power to detain them is *not boundless*. Moreover, several lower courts have demonstrated a willingness to recognize even greater due process rights and to impose more limits on the government's plenary power, suggesting that the time is ripe to reevaluate the immigration detention system.

330. *Id.*
331. *Id.*
332. 443 F.3d 1069 (9th Cir. 2006).
333. *Id.* at 1076–78.
334. *Id.* at 1071.
335. *Id.* at 1081.
336. *Id.* at 1079.
337. *Id.* at 1082.

VI. RECOMMENDATIONS

Although *Zadvydas* established some protections for post-removal order detainees, the entire immigration detention system requires comprehensive reform. The government needs to implement procedures that are geared toward protecting pre-removal order detainees from unconstitutional deprivations.

Pre-removal order detainees should be given more, not less, protection than post-removal order detainees receive because pre-removal order detainees may have legitimate claims to remain in the United States.[338] Post-removal order detainees' claims have been foreclosed, and yet they are protected from prolonged detention.[339] Pre-removal order detainees, on the other hand, may have valid claims for political asylum, their criminal offenses may not warrant expedited removal, and they may be lawful permanent residents or even citizens. And yet, pre-removal order detainees are not protected from prolonged detention.[340] Moreover, these individuals arguably have more to lose because detention can interfere with their ability to challenge their removal.[341] Detention makes it more difficult for immigrants to obtain counsel,[342] it severely hinders an immigrant's ability to conduct legal research,[343] and it interferes with an immigrant's access to medical and psychological services[344]—services that may be critical to a successful claim.[345] It is illogical that pre-removal order detainees have fewer rights and receive fewer protections than their post-removal order counterparts enjoy.

The traditional preventive detention safeguards should be applied to immigration detention. At the very least, there should be individualized hearings and strictly enforced time limits on pre-removal order detention. Furthermore, in order for this to become a constitutionally sound system, the conditions of confinement must

338. *See* Demore v. Kim, 538 U.S. 510, 560–61 (2003) (Souter, J., dissenting) (noting that from a constitutional standpoint, pre-removal order detainees actually have a stronger claim against confinement than post-removal order detainees do).

339. *See id.*

340. *See supra* Parts III, IV.B.

341. *Demore*, 538 U.S. at 554 (Souter, J., dissenting).

342. *See* Brané & Lundholm, *supra* note 25, at 159 (citing COLE, *supra* note 125, at 35) ("Statistics indicate that as many as 80% of immigration detainees are not represented . . . .").

343. *See supra* Part III.A.2.

344. *See supra* Part III.A.3.

345. *See supra* Part III.A.3.

drastically improve so as to reflect the regulatory purpose of immigration detention.

A. Noncitizens Should Receive Individualized Hearings Before They Are Detained

An immigrant facing detention should receive an adversarial hearing where an impartial party determines whether the immigrant poses a risk of flight or a danger to his or her community. That is, before the government drastically infringes on an immigrant's liberty rights, the government should have to show that detaining the immigrant is in the government's interest.

Currently, mandatory detention statutes permit the government to presume that all immigrants who are subject to removal proceedings are either dangerous or likely to abscond, despite the fact that the offenses that trigger mandatory detention do not necessarily suggest either a propensity for violence or a risk of flight.[346] Adversarial hearings are therefore needed in order to probe that presumption. If the immigrant poses neither a risk of flight nor a danger to his or her community, then detention should not be authorized.

Using *Salerno* as a guide, DHS should be required to demonstrate by clear and convincing evidence that the immigrant is either likely to abscond or poses a danger to the community.[347] The immigrant should be given the opportunity to testify, present witnesses, proffer evidence, and cross-examine other witnesses.

Asylum-seekers who have passed their credible-fear interview and do not pose a danger to the public should be automatically paroled and referred to shelters and pro bono legal clinics, where they can receive the physical, psychological, and legal assistance that they require.

B. Pre-Removal Order Detention Should Be Subject to Strict Time Limits

Furthermore, there should be time constraints placed on pre-removal order detention because the Court has time and again held

346. *See supra* Part IV.A.

347. The act in *Salerno* used "clear and convincing" as the burden of proof. United States v. Salerno, 481 U.S. 739, 741 (1987). Proof by a preponderance of the evidence would likely suffice in the immigration context.

that prolonged detention is unconstitutional.[348] In *Zadvydas*, for example, the Court indicated that prolonged detention is unconstitutional, but it found that pre-removal order detention, unlike post-removal order detention, is not prolonged because it has an "obvious termination point."[349] The Court drew a similar conclusion in *Demore* when it upheld the constitutionality of pre-removal order detention without individualized hearings on grounds that pre-removal order detention is "brief."[350] Had the Court appreciated the true nature of pre-removal order detention in each case, it would have reached the opposite conclusion. Limits on pre-removal order detention, therefore, will fit squarely within the thrust of the *Zadvydas* holding, just as soon as the Court acknowledges that pre-removal order detention is anything but brief.

Some immigrants wait in pre-removal order detention for months or even years.[351] In order to address this problem, the government should impose deadlines on pre-removal order detention, just as it has done in the post-removal order context.[352]

Moreover, to remedy the lag that currently exists between the time when a detainee is taken into custody and when he or she receives charging papers,[353] DHS should require ICE to promptly provide detainees with charging documents within twenty-four hours of being taken into custody. Charging papers inform detainees of the charges against them and formally place them in removal proceedings.[354] Unbelievably, it can take months for a detainee to receive these papers.[355] Not only do such delays prolong the already protracted removal process, but they can also prevent detainees from accessing an immigration court for a bond hearing or petition for habeas relief until DHS has served charging documents with the immigration court.

348. *See, e.g.*, *Salerno*, 481 U.S. at 748 n.4 ("[A]n arrestee is entitled to prompt detention hearing.").

349. Zadvydas v. Davis, 533 U.S. 678, 697 (2001); Bradley B. Banias, *A "Substantial Argument" Against Prolonged, Pre-Removal Mandatory Detention,* 11 RUTGERS RACE & L. REV. 31, 36–39 (2009).

350. Demore v. Kim, 538 U.S. 510, 511 (2003).

351. *See id.* at 558 (Souter, J., concurring in part and dissenting in part).

352. *See Zadvydas*, 533 U.S. at 699.

353. *See supra* note 226.

354. Kessler, *supra* note 226, at 584–85.

355. *See supra* note 226.

DHS should also establish a reasonable time frame for removal proceedings. This article proposes that detainees receive a hearing on the merits before an immigration judge within ninety days of receiving charging documents.

Those who resist this model suggest that immigrants will simply pursue "dilatory tactics" in order to run out the clock and gain release.[356] However, to alleviate this worry, the clock could simply temporarily stop running whenever an immigrant requests a continuance or otherwise stalls the proceedings.[357]

C. The Current Detention System Should Be Overhauled so as to Improve the Conditions of Confinement

Detention will sometimes be in the government's best interest. Once it is determined that an immigrant is a flight risk or poses a danger to his or her community, then that individual should enter a detention system. However, the nature of the detention must reflect the regulatory purpose of civil detention.

1. Immigration Detention Must Become More Civil

First of all, the government should reform the detention system so as to create an intelligible distinction between civil custody and penal incarceration. If immigration detainees are still to be held in jail facilities, then they should be segregated from the criminal population at all times. Also, staff at these facilities should be trained to understand the differences between criminal inmates and civil detainees, and they should be familiarized with the divergent regulations that govern the treatment of each population, respectively. Moreover, immigrants in detention should enjoy greater freedom; they should be entitled to more lenient visitation privileges and more opportunities for recreation. Immigrants in detention should not be subjected to physical restraints unless restraints are necessary to protect the immigrant or any other person from immediate harm. They should also have the option of no-contact visits in order to avoid invasive strip searches.[358]

356. CONSTITUTION PROJECT, *supra* note 17, at 24.

357. *Id.*

358. *See* Tumlin, *supra* note 23, at 14–15.

On the whole, immigration detention should look more like civil custody and less like jail.

2. Immigration Detention Facilities Should Be Subject to Binding Regulation

Additionally, because there is currently no legitimate regulatory oversight, the government should establish standards for detention facilities and codify these regulations into the law. Without enforceable rules, there is no way to hold facilities accountable when they fail to maintain suitable detention conditions. And, as indicated above, detention facilities have come under great scrutiny for failing to meet even the most basic detainee needs, such as adequate food, water, and medical care.

Binding regulation is even more important if detention remains privatized. As discussed above, for-profit private facilities have strong financial incentive to cut corners, which leads to substandard detention conditions. Thus, in order to counteract this incentive, legitimate consequences should be imposed on facilities that fail to comply with the minimum detention standards. The facilities should face monetary sanctions for minor violations and should lose their contracts and be shut down entirely for major or repeated incidents of noncompliance. Moreover, detainees must be able to initiate litigation if a facility or its management fails to comply with the regulations. Finally, as an additional check on the system, the government should adopt policies in order to promote increased transparency with respect to facility audits.

3. The Government Should Embrace Alternatives to Detention

The government should also utilize alternatives to detention for nondangerous immigrants who pose only a low or moderate risk of flight. ICE currently has three alternative programs in place, but none are available to noncitizens who are subject to mandatory detention.[359] Some advocates have suggested that conceptualizing the alternatives as "soft" detention or "constructive custody" could make them available to mandatory detainees.[360] If mandatory detainees

359. KERWIN & LIN, *supra* note 21, at 31.

360. *Id.*

could enter these alternative forms of custody, "the potential savings to the government and benefits to the individuals would be immense."[361]

The three alternative programs incorporate varying degrees of supervision and self-reporting. The programs include different combinations of electronic monitoring, curfews, in-person reporting, and unannounced home visits. According to ICE, it costs anywhere from thirty cents to fifteen dollars a day to supervise an immigrant under one of these programs.[362] In contrast, it costs $141 a day to hold an immigrant in detention.[363] Not only are these alternatives less expensive, but they also appear to work. ICE has reported that for each of its three models, 87 percent, 96 percent, and 93 percent of immigrants appear for their removal hearings, respectively.

DHS should consider rigorous in-home detention as an alternative to custodial detention, especially for mandatory detainees whose criminal records do not indicate violent tendencies.[364]

Alternative models, moreover, are in many instances more appropriate, especially with respect to asylum-seekers and torture survivors. Once asylum-seekers demonstrate that they have a credible fear, and unless they pose a danger to the community, they should be paroled and recommended to shelters where they can receive the necessary physical, emotional, and legal support that they require.

VII. CONCLUSION

"[D]ue Process requires that the nature and duration of commitment bear some reasonable relation to purpose for which the individual is committed."[365] Yet, Vinodbhai Patel was detained for nearly a year despite the fact that his confinement furthered no governmental purpose. Patel was a nonviolent entrepreneur with strong social and family ties. He was neither a danger nor a flight risk. Patel's confinement, both in nature and duration, was

361. *Id.*

362. *Id.* at 32.

363. *Id.* at 4–5 (citing Michelle Roberts, *Immigrants Face Long Detention, Few Rights*, DESERET NEWS (Mar. 16, 2009), http://www.deseretnews.com/article/705291116/Immigrants-face-long-detention-few-rights.html).

364. CONSTITUTION PROJECT, *supra* note 17, at 5.

365. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

unreasonable. Had he received the same procedural protections that inhere in all other preventive detention contexts, the unconstitutionality of his detention would have been apparent.

The United States places hundreds of thousands of immigrants in detention every year, at unspeakable costs to the nation as well as to the individuals who must struggle to navigate the broken system. Many of the immigrants who are currently clogging the detention system are like Vinodbhai Patel—they pose neither a risk of flight, nor a danger to their community—and yet they are stripped of their fundamental rights and tossed into an already congested system.

In *Zadvydas*, the Supreme Court acknowledged that noncitizens, even those who are unlawfully present, have a powerful interest in avoiding physical confinement, and so the Court placed a deadline on post-removal order detention. Several lower courts have recognized that pre-removal order detainees have at least an equal interest, if not a greater one, in avoiding unnecessary confinement, and the courts have thereby called for greater procedural protections. As the dissent in *Demore* pointed out, "[t]hese cases yield a simple distillate": it is unconstitutional to mandatorily detain large groups of immigrants without affording them any procedural safeguards.[366] "Due process calls for an individual determination before someone is locked away."[367]

366. Demore v. Kim, 538 U.S. 510, 551 (2003) (Souter, J., concurring in part and dissenting in part).

367. *Id.*