

DANGEROUSNESS ON THE LOOSE: CONSTITUTIONAL LIMITS TO IMMIGRATION DETENTION AS DOMESTIC CRIME CONTROL

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The United States immigration detention regime that was reborn in the 1980s is not only unprecedented in scale, but also in rationale. Whereas immigration detention had historically been justified primarily as a means of ensuring immigration compliance, with a secondary purpose of protecting national security, today's system increasingly functions in collaboration with criminal law enforcement systems to incapacitate allegedly dangerous individuals for the purpose of preventing potential domestic crime. Regardless of the validity of judicial deference when immigration detention truly serves to aid in the removal process, this Note argues that such deference cannot legitimately be extended to the newly ascendant crime control function of immigration detention. At minimum, Due Process requires immigration detention procedural safeguards that are parallel to those in other preventive detention contexts, in which the government bears the burden of individually demonstrating a need for confinement.

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INTRODUCTION

Ellis Island—the last federal immigration detention facility of its day—closed in 1954.¹ In the years after Ellis Island’s closure, only a small number of individuals faced detention during immigration proceedings.² Within a decade, the practice appeared to be destined for extinction, along with the racial quotas and exclusions of the previous immigration regime that had ended in 1952.³ Many welcomed this apparent demise of widespread immigration detention,⁴ recognizing the deprivation of physical liberty to be a uniquely intrusive exercise of government power.⁵ The trajectory toward a more humanized and

¹ Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 304 (1983).

² *Aliens in Custody Show Sharp Drop*, N.Y. TIMES, Jan. 27, 1955, at 25. By January of 1955, Attorney General Herbert Brownell Jr. reported that “[o]nly seventy-five aliens” were in immigration detention, down from a daily average of 972 physical detentions in previous years. *Id.*

³ See Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 579 (1998) (describing immigration detention as a “forgotten” issue by the beginning of the 1960s).

⁴ See, e.g., Editorial, *Aliens’ Entry*, N.Y. TIMES, Nov. 18, 1954, at 32 (“The closing of Ellis Island, long-time symbol of the difficulties—and often undue hardships—in gaining admission to this country is dramatic and welcome evidence of the determination . . . to treat aliens with more consideration.”).

⁵ For individuals detained during the course of removal proceedings, detention works a second harm by significantly impairing their ability to obtain evidence and legal counsel essential to contesting the grounds of their alleged removability. This challenge has been recognized since the inception of immigration detention. See *In re Lum Poy*, 128 F. 974, 976 (C.C.D. Mont. 1904) (recognizing the “great hardship” in refusing bail to individuals who “cannot obtain the necessary evidence to prove the facts” relevant to contesting deportability while detained). The hardship remains great today. See, e.g., Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability*

cost-effective policy—and the limitation of physical confinement to exceptional circumstances—appeared both logically and fiscally sound.⁶

In the 1980s, however, the immigration detention system was resurrected, starting with the opening of new detention facilities originally devoted to confining arriving noncitizens apprehended at the border.⁷ The system quickly expanded to include individuals apprehended within the United States, as Congress began to prioritize the immigration detention of individuals with criminal convictions.⁸ Over the following decades, the immigration detention system has grown into “the behemoth of American preventive detention,”⁹ becoming the nation’s largest detention and supervised release program.¹⁰ On any given day, an average of 32,953 individuals around the United States are in the physical custody of the Department of Homeland Security (DHS), with approximately 363,064 individuals detained per year.¹¹ As the system has grown, the executive branch has presented this unprecedented scale of immigration detention both to the public and the courts as a necessary and constitutional part of effective immigration enforcement.¹²

and Adequacy of Counsel in Removal Proceedings, *New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 367 (2011) [hereinafter *Accessing Justice*] (discussing the correlation between detention and the inability to access counsel).

⁶ See, e.g., *Ellis Island Ends Alien Processing*, N.Y. TIMES, Nov. 13, 1954, at 20 (citing \$900,000 in government savings from closing Ellis Island).

⁷ See generally Simon, *supra* note 3 (discussing the “rebirth” of immigration detention in response to the influx of Haitian and Cuban unauthorized migration).

⁸ See *infra* Part III.A.1 (chronicling the tightening nexus between criminal law and immigration enforcement and detention).

⁹ Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SECURITY J. 85, 152 (2011).

¹⁰ DORA SCHIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

¹¹ ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2012), available at <http://www.fas.org/sgp/crs/homesec/RL32369.pdf> (citing statistics for fiscal year 2012, as of December 13, 2011). Throughout this Note, I refer to “individuals in immigration detention,” or “immigration detainees,” rather than “detained immigrants” or “detained aliens.” Individuals in immigration custody are not always noncitizens. See generally Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 608 (2011) (critiquing U.S. immigration detention of citizens and estimating that in 2010 over 4000 U.S. citizens were detained or deported under immigration authorities).

¹² The oft-cited quote of John Morton, Director of Immigration and Customs Enforcement (ICE), illustrates this attitude: “[It] isn’t a question of whether or not we will detain people. We will detain people, and we will detain them on a grand scale. . . . It’s a necessary power.” Jenna Green, *ICE Warms Up to Detainees: Immigration Chief Promises Overhaul of ‘Haphazard’ System*, NAT’L L.J., Feb. 8, 2010, at 1; see also Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the*

This Note challenges contemporary claims that all immigration detention is inherently part of immigration enforcement, and asserts instead that civil detention to control domestic crime—even in the context of immigration proceedings—serves a unique purpose that requires elevated procedural protections. The Supreme Court historically has upheld immigration detention based on the specific purposes it allegedly serves. Initially, it was a constitutionally permissible liberty deprivation only to the extent necessary to enforce compliance with immigration proceedings. Subsequently, it became a means to incapacitate national security threats, which gradually expanded to authorize general civil detention for potential dangerousness. Recent doctrinal developments threaten to obscure the distinctions between compliance enforcement detention, national security detention, and domestic crime control detention—suggesting that confinement during the course of pending immigration proceedings might be *per se* constitutional.¹³ But the distinct rationales offered for immigration detention mandate differentiated constitutional scrutiny. Specifically, the detention of noncitizens as a means of controlling crime within the United States does not merit the judicial deference shown to executive action that serves traditional immigration or national security purposes. Rather, incapacitation to prevent future domestic crime generally requires robust procedural protections, and these protections should be retained even if a detainee is simultaneously in removal proceedings. At a minimum, the government should bear the burden of proving an individualized reason for detention.

This Note proceeds in three parts. In Part I, I provide a brief genealogy of immigration detention, identifying its three historical purposes: (1) to ensure the compliance of potential flight risks, (2) to neutralize potential national security threats, and (3) to control future domestic crime. I then explore the constitutional justifications for each category of executive detention. The first purpose is widely recognized as constitutional by virtue of the executive's ability to enforce compliance with immigration adjudication and possible removal orders. I argue that the second purpose, which the Court recognized as an independent justification in the 1950s, stems from the execu-

United States, 22 STAN. L. & POL'Y REV. 429, 452 (2011) (discussing U.S. immigration policy's increasing focus on confining foreigners in the process of deportation); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–45 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf (identifying the explosion in immigration detention); *infra* Part I (providing a genealogy of immigration detention).

¹³ See *infra* Part II.C (discussing the broad language in *Demore v. Kim*, 538 U.S. 510 (2003)).

tive's obligation to enforce national security. Today, both the executive and judicial branches rely on national security precedent to justify the expanded role of domestic crime control detention, without any clear constitutional justification, and despite the absence of procedural protections that are essential to domestic crime control detentions outside of immigration proceedings.

In Part II, I argue that these three separate purposes—compliance with immigration proceedings, national security defense, and domestic crime control—do not support an undifferentiated authority to detain individuals during removal proceedings, but rather implicate distinct constitutional concerns. The political branches have broad powers to protect the sovereign independence of the United States by regulating immigration and foreign security threats. However, when those powers are not implicated, the law affords strong constitutional protections to noncitizens while they reside in the United States. I apply this analysis to the Supreme Court's reasoning in *Demore v. Kim*, demonstrating that the opinion obscured these distinctions while implicitly relying on them.

In Part III, I present the implications of this analysis. At a time when alternatives to detention diminish the compliance enforcement justification of physical detention, the federal government increasingly deploys immigration enforcement and detention as integrated tools of domestic crime control. I argue that the ascendance of crime control detention means immigration detention's anemic procedural protections should not receive judicial deference, and that both mandatory and discretionary detentions still must require the government to prove an individualized reason for detention.

I

A GENEALOGY OF IMMIGRATION DETENTION

Today's immigration facilities house both detainees who are discretionarily detained based on individualized determinations that they are flight risks or dangers to the community, and those who are mandatorily detained pursuant to statute.¹⁴ Both discretionary and

¹⁴ For a detailed survey of the Immigration and Nationality Act (INA) provisions authorizing immigration detention, see Klein & Wittes, *supra* note 9. The authors discuss the detention of arriving noncitizens for physical and mental exams pursuant to 8 U.S.C. § 1222 (2006); detention of potentially inadmissible arriving aliens pursuant to 8 U.S.C. § 1225(b)(2)(A) (2006); discretionary detention of noncitizens pending removal proceedings pursuant to 8 U.S.C. § 1226(a) (2006); mandatory detention of noncitizens alleged to be deportable based on specified criminal acts pursuant to 8 U.S.C. § 1226(c)(1) (2006); and detention of noncitizens after a final removal order prior to their deportation pursuant to 8 U.S.C. § 1231(a)(2), (a)(3) (2006). See Klein & Wittes, *supra* note 9, at 141–44.

mandatory immigration detention are formally civil, rather than criminal. Because the detention purportedly serves a regulatory rather than punitive function, detainees do not enjoy constitutional rights to a speedy trial by an impartial jury, or the right to appointed counsel, and are afforded minimal procedural protections.¹⁵

Under the Immigration and Nationality Act (INA), the Attorney General has discretion to detain individuals for the duration of removal proceedings,¹⁶ during which individuals can contest the alleged grounds for their removal and apply for various forms of relief.¹⁷ Generally, DHS Immigration and Customs Enforcement (ICE) officers make custody determinations at the initiation of removal proceedings, which are reviewable by the Attorney General through the Executive Office of Immigration Review (immigration judges in the first instance, and the Board of Immigration Appeals at the appellate level). Since 1996, regulations provide that the detainee bears the burden of proving that he or she “is likely to appear for any future proceeding,”¹⁸ and “would not pose a danger to other persons or to property.”¹⁹

In addition, approximately two-thirds of immigration detainees are subject to mandatory detention, regardless of any individualized flight risk or dangerousness concerns.²⁰ Furthermore, 8 U.S.C. § 1226(c) requires detention without bond during removal proceedings for noncitizens who are removable on a broad range of statutory grounds, including nonviolent convictions for controlled substance offenses and two or more convictions for “crimes involving moral tur-

¹⁵ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (“[R]emoval proceedings are civil in nature.”); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 115 (2008) (analyzing the right to counsel for individuals in immigration detention under civil detention precedent).

¹⁶ A removal proceeding is the formal process by which the federal government can exclude noncitizens who have not been formally admitted to the country, or deport those who have already been admitted. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 514–16 (5th ed. 2009) (defining “removal proceeding”).

¹⁷ *Id.*; see also 8 U.S.C. § 1226(a) (setting forth general authority of the Attorney General to arrest, detain, and release aliens pending a removal decision); SISKIN, *supra* note 11, at 2 (discussing the “broad authority” of the Attorney General under the INA). Since the creation of the Department of Homeland Security (DHS), the Secretary of Homeland Security or his delegates have authority to administer immigration detention. *Id.*

¹⁸ 8 C.F.R. § 236.1(c)(8) (2012).

¹⁹ 8 C.F.R. § 1003.19(h)(3) (2012). Other articulations of this test add a third prong: The detainee cannot be a “threat to the national security.” *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006) (citing *In re Adeniji*, 22 I. & N. Dec. 1102 (B.I.A. 1999)).

²⁰ See, e.g., SCHRIRO, *supra* note 10, at 2 (finding that sixty-six percent of individuals in immigration detention on September 1, 2009 were subject to mandatory detention).

pitude.”²¹ Those subject to mandatory detention during proceedings are afforded only a *Joseph* hearing, an administrative hearing in immigration court in which the detainee bears the burden of establishing that she is not “properly included” within the mandatory detention provision.²²

This Part provides a brief genealogy of the current legal regime in order to contextualize the distinct purposes of immigration detention. I build on other scholarship documenting this history²³ by highlighting that today’s massive detention system, with its minimal procedural safeguards, evolved from an initial focus on securing the border toward a contemporary emphasis on preventing domestic crime.²⁴ Initially constitutionally upheld as a necessary part of the deportation process, immigration detention took on a secondary role of incapacitating noncitizen potential threats to national security during the course of removal proceedings. While the Supreme Court originally affirmed this preventive detention based on a national security rationale, that precedent was subsequently relied on to support dangerousness detention for domestic crime control—first in the expansion of preventive detention pending criminal trials, and then within the immigration system.

²¹ See Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610–11 (2010) (analyzing and critiquing the applicability of 8 U.S.C. § 1226(c)). For a more thorough analysis of the five categories of noncitizens subject to mandatory detention, see Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1838–41 (2011). Another set of standards governs detention after a final order of removal is entered. See 8 U.S.C. § 1231 (2006); 8 C.F.R. § 241.4(a) (2012) (outlining the post-order detention process).

²² See Sayed, *supra* note 21, at 1834 (citing *In re Joseph*, 22 I. & N. Dec. 799, 806 (B.I.A. 1999) (placing the burden on the detainee to prove that the government “is substantially unlikely to establish . . . the charge or charges that would otherwise subject the [individual] to mandatory detention)).

²³ See, e.g., DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 34–36 (2012) (describing the emergence of U.S. detention practice); Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 18–52 (2010) (discussing the history of U.S. detention of noncitizens, beginning with the Alien and Sedition Act); Klein & Wittes, *supra* note 9, at 145–52 (identifying the origins of modern immigration law); Simon, *supra* note 3, at 579 (analyzing early 1980s detention practices); Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* 18–20 (Ctr. on Migration, Policy, and Soc’y, Working Paper No. 80, 2010), available at <http://ssrn.com/abstract=1867366> (explaining the legislative origins of modern immigration law).

²⁴ See generally Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1897–98 (2000) (discussing the evolution from border control to social control).

A. *Immigration Detention as a “Necessary Means”
of Immigration Law Enforcement*

In one of the earliest immigration cases, *Wong Wing v. United States*, the Court considered the nature and limits of immigration detention.²⁵ The *Wong Wing* Court held that immigration statutes imposing hard labor as punishment on noncitizens without trial violated the Fifth and Sixth Amendments of the Constitution. The Court simultaneously opined that general immigration detention without trial was permissible:

We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.²⁶

For the *Wong Wing* Court, the purpose of immigration detention was to effectuate exclusion or expulsion. In the following decades, the courts rarely reviewed immigration detention as a distinct exercise of executive power, but rather continued to approach it as “a tool ancillary to border control.”²⁷

Immigration detention withered following the overhaul of U.S. immigration laws in the 1950s and the 1954 closing of what was then the last federal facility for imprisoning immigrants.²⁸ But in 1981, the federal government redeployed detention, again to serve a compliance enforcement function, when it sought to counter the sudden influx of unauthorized Haitian and Cuban migration to southern Florida by opening the Krome Avenue Detention Center outside of Miami.²⁹ Throughout its expansion over the last three decades, enforcement

²⁵ 163 U.S. 228, 235 (1896).

²⁶ *Id.* In *Wong Wing*, the “inquiry into the true character” of the individual appears to refer to whether the person was “lawfully entitled to be or remain in the United States.” *Id.* at 233 (citing the Chinese Exclusion Act of 1892, 27 Stat. 25). There is no indication in the opinion that the Court contemplated any inquiry into potential dangerousness.

²⁷ WILSHER, *supra* note 23, at 34–35. From the first statutory authorization of immigration detention in 1891 through the Second World War, detention also was functionally deployed as a means of internal control—confining dissidents and “enemy aliens.” *See id.* at 30 (identifying immigration restrictions to limit communism). Despite this operational reality, it continued to be reviewed by the judiciary as a necessary means of effectuating immigration authority. *Id.* at 34–35.

²⁸ Simon, *supra* note 3, at 579.

²⁹ *Id.*; *see also* Silverman, *supra* note 23, at 10–11 (2011) (reviewing the opening of the Krome Avenue Detention Center as a response to unauthorized migration).

compliance has remained a central purpose of the immigration detention system.³⁰

B. Immigration Detention as Defense of National Security

In addition to its initial justification “as part of the means necessary to give effect” to exclusion or deportation,³¹ the Executive has also deployed immigration detention to confine individuals allegedly dangerous to national security.

The historical roots of detaining noncitizens potentially dangerous to national security are nearly as old as the country itself.³² Throughout U.S. history, the executive branch has periodically exercised this detention power in times of perceived national emergency, although frequently through mechanisms outside of the immigration system.³³ However, it was not until the height of the Cold War that the Supreme Court first acknowledged national security as an independent rationale for detaining noncitizens in immigration proceedings, “where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.”³⁴ In *Carlson v. Landon*, the Court upheld the discretionary denial of bail to six noncitizens charged with being members of the Communist Party—even absent evidence that the noncitizens presented any flight risk.³⁵ The Court found that because the grounds of deportation were designed to protect the national security, “[d]etention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.”³⁶

³⁰ A 2009 DHS report distinguished the administrative purposes of immigration detention—“to hold, process, and prepare individuals for removal”—from “the punitive purpose of the Criminal Incarceration system.” SCHRIRO, *supra* note 10, at 2.

³¹ *Wong Wing*, 163 U.S. at 235.

³² See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–92 (2002) (discussing the Alien Enemies Act of 1798 and the Court’s finding of its constitutionality in the World War II internment cases).

³³ See, e.g., Sayed, *supra* note 21, at 1836 n.13 (2011) (describing noncitizen detention as a “recurring phenomenon during periods of national emergency,” and citing the Red Scare raids of the 1920s, the detention of “enemy aliens” during the First and Second World Wars, the detention of alleged Communist noncitizens during the Cold War, and the detention of noncitizen Muslims following the September 11 attacks).

³⁴ *Carlson v. Landon*, 342 U.S. 524, 542 (1952).

³⁵ *Id.*

³⁶ *Id.* at 538. The dissenters indicated that this conflation of immigration enforcement power and public safety was by no means self-evident from prior precedent. See *infra* notes 37 and 38 and accompanying text. However, the majority reasoned that, at least in this case, both detention and deportation were justified by the same national security concerns: “As all alien Communists are deportable . . . because of Congress’ [sic] understanding of their attitude toward the use of force and violence in such a constitutional democracy as

In its facts and its reasoning, *Carlson* appeared to be a national security case, informed by deference to the legislative concerns about “clear and present” threats to the government of the United States.³⁷ Indeed, it was cited as such in the general bond standard of immigration custody determination until 1996: “An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, [citing *Carlson*], or that he is a poor bail risk.”³⁸

C. *Immigration Detention as Incapacitation to Prevent Domestic Crime*

In recent years, *Carlson*’s reasoning has been extended to support dangerousness detention as a tool for control of potential domestic criminal action, first outside of the immigration system and then within it. Borrowing a phrase employed by scholars of the intersection between criminal and immigration law, I term this purpose “domestic crime control,”³⁹ to differentiate it from the immigration and national security purposes of detention. In the context of civil detention, this term takes on a very specific meaning: Civil confinement to prevent domestic crime is not primarily punitive or deterrent, but rather a physical incapacitation to prevent future criminal action.

Less than twenty years after *Carlson*, President Nixon proposed legislation in the non-immigration, criminal law context “whereby

ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party’s philosophy concerning violence gives adequate ground for detention.” *Carlson*, 342 U.S. at 541.

³⁷ The *Carlson* Court pointedly cited the Internal Security Act that provided the basis of the detainees’ deportability and detention. The Act was justified as a defense of national sovereignty and discussed the Communist movement as “a clear and present danger to the security of the United States . . .” *Id.* at 535 n.21 (quoting Internal Security Act § 2(15), 50 U.S.C. § 781(15) (1952)).

³⁸ *In re Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); see also *In re Valdez*, 21 I. & N. Dec. 703, 706 (B.I.A. 1997) (citing *Patel*’s “national security” and bail risk language as the governing standard until 1996).

³⁹ While “domestic crime control” is not language employed by the courts in this context, the phrase builds on the work of Professor Daniel Kanstroom, who has contrasted “crime control” deportations with deportations designed to “maintain the credibility and legitimacy of our immigration laws.” Kanstroom, *supra* note 24, at 1892; see also Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 107–08 (2005) (citing Kanstroom, *supra* note 24, and further elaborating the blurred boundaries between these two distinct justifications); cf. Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement’s Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 233 (2010) (discussing the unprecedented convergence of immigration processes and “crime control”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 394 (2006) (contrasting federal responsibility for immigration control with traditional state responsibility for “crime control”).

dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community.”⁴⁰ Attorney General Mitchell published a constitutional defense of the proposal,⁴¹ citing *Carlson v. Landon* to support his argument.⁴² Attorney General Mitchell’s article inspired Professor Laurence Tribe to write an impassioned response. Professor Tribe critiqued the proposal’s “inherent capacity for unrestrained growth,” and its contradiction with “basic concepts of criminal justice” that rely on the moral and deterrent effects of sanction rather than preemptive imprisonment to control domestic criminal threats.⁴³

After extensive hearings, President Nixon’s nationwide preventive-detention bills died in committee.⁴⁴ However, President Nixon succeeded in incorporating a preventive detention provision into the District of Columbia Court Reform and Criminal Procedure Act of 1970.⁴⁵ The D.C. bill became a model for the subsequent federal Bail Reform Act of 1984,⁴⁶ which incorporated dangerousness into the standard criteria for pre-trial detention in federal courts across the

⁴⁰ 27 CONG. Q. WEEKLY REP. 238 (Feb. 7, 1969).

⁴¹ John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969).

⁴² See *id.* at 1234 (“Moreover, detention has been authorized in noncriminal areas prior to any judicial determination. Thus, in *Carlson v. Landon* the Supreme Court upheld the denial of bail to alien Communists pending deportation proceedings . . .”).

⁴³ Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375–76 (1970). Professor Tribe noted that civil detention as a form of crime prevention has a seductive appeal: “Since no detained defendant will commit a public offense [or fail to appear for their hearing], each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results.” *Id.* at 374–75. Professor Tribe provides an illustration with Lewis Carroll’s classic fictional example: “The Queen observes that the King’s Messenger is ‘in prison now, being punished; and the trial doesn’t even begin till next Wednesday; and of course the crime comes last of all.’ Perplexed, Alice asks, ‘Suppose he never commits the crime?’ ‘That would be all the better, wouldn’t it?’ the Queen replies.” *Id.* (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 88 (Harper & Bros. ed. 1902)).

⁴⁴ Sam J. Ervin, Jr., Chair of the Senate Judiciary Subcommittee on Constitutional Rights, declaimed the practice of preventive detention as “unconstitutional, tyrannical, and useless as an instrument for the enforcement of criminal law,” and refused to report the bill out of committee, and the Subcommittee of the House Judiciary Committee did likewise. See Sam J. Ervin, Jr., *Preventive Detention, A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 116 (1983) (citing 115 CONG. REC. 19,778 (1969) (statement of Sen. Ervin)).

⁴⁵ Pub. L. No. 91-363, 84 Stat. 473 (July 29, 1970). See Ervin, *supra* note 44 (discussing Department of Justice advocacy for the bill); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 504 (2012) (noting the D.C. Crime bill as the first time in U.S. history that judges were permitted to detain an individual pre-trial without bail based on dangerousness).

⁴⁶ See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 569 (1986) (noting the 1984 Act’s relationship with the prior D.C. legislation).

country.⁴⁷ The Court of Appeals for the Second Circuit held that pre-trial detention on the ground of danger to the community (as opposed to flight risk) was “repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.”⁴⁸ However, the Supreme Court reversed,⁴⁹ citing *Carlson v. Landon* in support of the proposition that, even outside the exigencies of war, “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh the individual’s liberty interest.”⁵⁰ Chief Justice Rehnquist, writing for the majority, emphasized the procedural protections afforded to pretrial detainees as important factors in analyzing both substantive and procedural due process challenges.⁵¹

Shortly after receiving the Supreme Court’s blessing in *United States v. Salerno*, the “danger to the community” reasoning and language of the Bail Reform Act migrated into an immigration detention

⁴⁷ See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 746–50 (2011) (chronicling the rise of “community safety” pre-trial detention, and noting the innovations of the 1984 Act).

⁴⁸ *United States v. Salerno*, 794 F.2d 64, 71–72 (2d Cir. 1986), *rev’d*, 481 U.S. 739 (1987).

⁴⁹ *Salerno*, 481 U.S. at 741 (upholding a statute requiring the pre-trial detention of arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions “will reasonably assure . . . the safety of any other person and the community” (citing 18 U.S.C. § 3142(e) (Supp. III 1982))); see also Baradaran, *supra* note 47, at 731–32 (arguing that the introduction of “dangerousness” as a barrier to bail for pre-trial arrestees is a relatively recent innovation that conflicts deeply with the presumption of innocence).

⁵⁰ *Salerno*, 481 U.S. at 748. The introduction of dangerousness as a criterion for pre-trial detention was part of the “increasing prominence of the ‘dangerousness criterion’ as justification for confinement by the government.” Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 122 (2005). The last decades of the twentieth century saw a trend toward “actuarial” incapacitation within the criminal system. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007); cf. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 2–3 (1995). This trend was mirrored in “quasi-criminal legal systems,” such as civil commitment of sexual offenders (frequently following a finding of criminal liability). See Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 725 (2010) (discussing “quasi-criminal” dangerousness detention systems).

⁵¹ The majority opinion noted repeatedly that the Bail Reform Act required the government to bear the burden of convincing a neutral decision maker by clear and convincing evidence “that no conditions of release can reasonably assure the safety of the community or any person.” *Salerno*, 481 U.S. at 750 (citing 18 U.S.C. § 3142(f)). In assessing the procedural sufficiency of the Act, the majority discussed the “extensive safeguards” afforded to detainees, including “procedures by which a judicial officer evaluates the likelihood of future dangerousness [that] are specifically designed to further the accuracy of that determination.” *Id.* at 751. These safeguards are: a right to counsel, clear statutory guidelines, the government’s burden of clear and convincing proof, the requirement that the judicial officer include written findings of facts and reasons for a decision to detain, and the opportunity for immediate appellate review of detention. *Id.* at 751–52.

system in the infant stages of its most recent incarnation—but largely stripped of the procedural protections that had been guaranteed to citizen pretrial detainees.⁵² Federal detention centers reopened in the 1980s to detain Cuban, Haitian, and Central American migrants apprehended at the border and depicted as threats to public safety.⁵³ While the “threat to the national security or . . . a poor bail risk” language remained the general standard for discretionary detention,⁵⁴ in 1988 Congress introduced the predecessor of today’s mandatory detention statute. The new statute required detention of individuals charged by the INS as aggravated felons.⁵⁵ Congress amended this provision in 1990 to require the release of any individual who the Attorney General determines “is not a threat to the community and . . . is likely to appear before any scheduled hearings.”⁵⁶ This statute introduced into the context of immigration detention the broader “threat to the community” language, which “seem[ed] to have been modeled upon the same language . . . in the Bail Reform Act of 1984.”⁵⁷

In 1996, Congress enacted a pair of immigration reform bills following the Oklahoma City bombing: the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁵⁸ and the Antiterrorism and Effective Death Penalty Act (AEDPA).⁵⁹ These reforms vastly increased immigration penalties and criminal law violations, respec-

⁵² See *infra* Part III.B (discussing the absence of procedural protections in immigration detention).

⁵³ See, e.g., Simon, *supra* note 3, at 582–83. Simon highlights the contrast between the earlier waves of refugees fleeing Communist regimes in Hungary, Poland, and Southeast Asia in the 1950s (who were treated as heroes), and the 1980s influx of refugees from Cuba, El Salvador, Guatemala, and Haiti (depicted as “criminals and deviants”). Because of the Refugee Act of 1980, the United States could not deport individuals who met the international definition of a refugee. The United States thus developed the immigration imprisonment strategy as a deterrent, and allegedly as a public safety system. *Id.*

⁵⁴ *In re De La Cruz*, 20 I. & N. Dec. 346, 349 (B.I.A. 1991) (citing *In re Patel*, 15 I. & N. Dec. 666 (B.I.A. 1976), as the governing standard for detention pending proceedings).

⁵⁵ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (codified as amended at 8 U.S.C. § 1252(a)(2) (2006)) (“The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien’s sentence for such conviction.”).

⁵⁶ Immigration Act of 1990 § 504, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049, 5050 (codified as amended at 8 U.S.C. § 1252(a)(2)(B) (2006)).

⁵⁷ *De La Cruz*, 20 I. & N. Dec. at 355 (Heilman, Board Member, dissenting). The language had immigration resonances from asylum law’s definition of particularly serious crimes, but had not previously been applied as a detention standard.

⁵⁸ IIRIRA, Pub. L. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

⁵⁹ AEDPA, Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). Cf. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1842 (2007) (describing the political context of the statutes’ enactment).

tively, which expanded the criminal grounds for deportability and narrowed the forms of relief available to immigrants.⁶⁰ The 1996 laws also significantly broadened the scope of criminal convictions that mandate immigration detention. However, the transitional rules allowed release for some individuals who would otherwise be subject to mandatory detention. Those individuals instead were subject to a new crime control restriction that they “not pose a danger to the safety of other persons or of property”⁶¹

Additionally, although neither of the statutes authorized a change in discretionary bail standards, the accompanying regulations shifted the presumption of release, “add[ing] as a requirement for ordinary bond determinations under section 236(a) of the Act that the alien must demonstrate that ‘release would not pose a danger to property or persons,’ even though section 236(a) does not explicitly contain such a requirement.”⁶² Soon after this new language was introduced, the Board of Immigration Appeals clarified that “danger to property or persons” was not limited to threats of direct violence, but also more broadly served to control the danger of potential domestic crime.⁶³ Today, in the discretionary detention context, an accusation of dangerousness is an absolute bar to release on bond unless disproved by the detainee.⁶⁴

The constitutional limitations of this emerging domestic crime control preventive detention have not been clearly addressed by the Court. As I will explore in Part II, incapacitation to prevent future domestic crime—unlike detention to ensure compliance with immigration proceedings or to serve a national security function—has not historically been afforded deference as an exercise of the immigration power. Yet, as Part III explains, domestic crime control immigration detention also lacks the procedural protections that are essential for preventive detentions in other domestic crime control contexts.

⁶⁰ For a brief summary, see Heeren, *supra* note 21, at 610–11.

⁶¹ IIRIRA § 303(b)(3), 110 Stat. 3009 (1996). See *In re Valdez-Valdez*, 21 I. & N. Dec. 703, 706–07 (B.I.A. 1997) (discussing the more restrictive detention standards under IIRIRA and AEDPA, as well as the comparatively more lenient temporary standard).

⁶² *In re Adeniji*, 22 I. & N. Dec. 1102, 1117 (B.I.A. 1999) (quoting 8 C.F.R. § 236.1(c)(8) (2011)); see also AUSTIN T. FRAGOMEN, JR. ET AL., *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 7:5.2 (4th ed. 2012) (describing this regulation as a “reversal of the long established policy under which a noncriminal alien was presumptively eligible for release”).

⁶³ See *In re Melo-Pena*, 21 I. & N. Dec. 883, 886 (B.I.A. 1997). The Board noted “that the transition rules do not limit ‘danger to the safety of other persons or of property’ to the threat of violence. Distribution of drugs is also a danger to the safety of persons.” *Id.* (quoting IIRIRA § 303(b)(3), 110 Stat. 3009 (1996)).

⁶⁴ See *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

II

ALIEN RIGHTS IN CRIME CONTROL DETENTION

Both discretionary and mandatory immigration detention are constrained by the limits of the Constitution, even to the extent that they are analyzed as exercises of Congress's immigration power.⁶⁵ In addition, however, Congress's plenary power over immigration does not extend to all actions regulating noncitizen lives. Although the Court has recognized both enforcing compliance with immigration proceedings and protecting national security as exercises of Congress's immigration power, that deference cannot extend to detention that only serves the purpose of domestic crime control.

A. Plenary Power and "Aliens' Rights"

The difference between regulation of "flight risks" and "national security threats" on the one hand, and civil detention for potential dangerousness on the other, mirrors a fundamental distinction in American immigration law between laws that protect the national character and safety of the United States from foreign invasion and laws that regulate noncitizens' lives within the United States.⁶⁶ One recent immigration casebook articulates this underlying difference as between laws "relating to *immigration*" and laws "relating to noncitizen *immigrants*."⁶⁷ This distinction has constitutional dimensions: Judicial deference to Congress's plenary power over immigration law "is widely understood to draw a sharp constitutional distinction between rules that select immigrants and rules that otherwise regulate them."⁶⁸

1. Immigration Law and the Plenary Power

Congressional power to regulate immigration initially emerged in the context of controlling which noncitizens could enter the United

⁶⁵ See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting that Congress's "'plenary power' to create immigration law . . . is subject to important constitutional limitations"); see also *Monestime v. Reilly*, 704 F. Supp. 2d 453, 459 (S.D.N.Y. 2010) ("[I]t is of no import that Monestime is detained under a 'mandatory' detention statute—what a statute requires of a federal official and what the Constitution demands are not always in harmony.").

⁶⁶ See generally Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008) (recognizing and critiquing this duality as American immigration law's organizing principle).

⁶⁷ See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 212 (6th ed. 2008).

⁶⁸ Cox, *supra* note 66, at 346.

States.⁶⁹ In *Chae Chan Ping v. United States*, the first case to articulate the federal immigration power, the Supreme Court upheld the federal government's right to exclude a Chinese laborer from entering the United States.⁷⁰ The Court envisioned this power as a necessary part of protecting the national borders, affirming the federal right to exclude "vast hordes of [foreign] people crowding in upon us."⁷¹ It was in this context that the Supreme Court found the federal power to exclude noncitizens to be implied as "an incident of every independent nation,"⁷² notwithstanding the Constitution's silence on the matter.

The Court expanded the same reasoning to include the federal right to deport noncitizens from the country in *Fong Yue Ting v. United States*.⁷³ Just four years after *Chae Chan Ping*, the Court found that "[t]he right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."⁷⁴ In *Fong Yue Ting*, three Chinese laborers were arrested because they could not meet the statutory requirement of providing at least one credible White witness to testify that they were residents of the United States at the time of the passage of the Chinese Exclusion Act of 1882.⁷⁵ As in *Chae Chan Ping*, the immigration enforcement in question was not directly related to undesirable individual social conduct within the United States, but rather was affirmed as a means of controlling the procedural conditions for noncitizens to enter and remain within the United States.⁷⁶

⁶⁹ Indeed, a common definition of "immigration law" is "the federal law governing the admission and expulsion of aliens" Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992) (citing Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256).

⁷⁰ 130 U.S. 581 (1889). The Chinese Exclusion Act of 1882 (and the subsequent expansion of the exclusion grounds in 1888), which *Chae Chan Ping* sought to challenge, was the product of intense, racially infused resistance to the influx of Chinese immigration. See Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249, 249–50 (2006) (discussing the variety of motivations for the passage of the Chinese Exclusion Laws).

⁷¹ *Chae Chan Ping*, 130 U.S. at 606.

⁷² *Id.* at 603.

⁷³ 149 U.S. 698 (1893).

⁷⁴ *Id.* at 707.

⁷⁵ *Id.* at 725–32.

⁷⁶ *Id.* at 728 (emphasizing that federal immigration enforcement power was not rooted in proving individual wrongdoing, but rather that "congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed . . . without judicial trial . . . just as it might have authorized such officers absolutely to prevent his entrance into the country").

Chae Chan Ping and *Fong Yue Ting* set the tone for future cases evaluating detention as an exercise of immigration enforcement power. Their reasoning laid the foundation for the continuing categorization of immigration enforcement as civil, rather than criminal, proceedings. They have thus been afforded exceptional judicial deference as exercises of Congress's plenary power over immigration,⁷⁷ itself justified as a defense against a perceived external threat grounded in the "foreign relations [power], the war power, and the maintenance of a republican form of government."⁷⁸

Judicial deference to immigration detention—at least as part of the means necessary to effectuate removal—also arose in this sphere.⁷⁹ Although cases over the last decade demonstrate that an invocation of plenary power will not necessarily place an issue beyond the purview of judicial review,⁸⁰ the continued judicial deference to executive immigration detention practices is justified by explicit and implicit references to this power.⁸¹

2. *Alien Rights: Law Regulating Immigrants*

Since its inception, Congress's plenary power over regulating who can enter or remain in the country has existed in tension with laws that regulate noncitizens' lives within the United States outside of the immigration selection. While differentiating between these two spheres may prove difficult,⁸² the Court's recognition of constitution-

⁷⁷ See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (exploring the concept of Congress's plenary power over immigration).

⁷⁸ *Demore v. Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)). See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

⁷⁹ See *supra* Part I.A (discussing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896), as emblematic of the longstanding assumption that detention is a necessary part of the removal process).

⁸⁰ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (finding "important constitutional limitations" to the executive and legislative "plenary power" in the field of immigration); *INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (establishing that Congress's plenary immigration power must be exercised using constitutionally permissible means); *Landon v. Plasencia*, 459 U.S. 21, 32–35, 37 (1982) (recognizing due process rights of a legal permanent resident returning to the United States). But see *infra* Part II.C (discussing post-September 11 deference to an invocation of plenary power in a case challenging mandatory detention).

⁸¹ See *supra* Parts I.A, B (surveying the rise of judicial deference to immigration detention because of the presumed link to immigration proceedings).

⁸² See *Cox, supra* note 66, at 357–65 (asserting that the selection-regulation dichotomy is unstable, inconsistently applied, and irrational).

ally protected “aliens’ rights” preceded the plenary power doctrine, and has continued to stand in stark contrast to it.⁸³

Three years before *Chae Chan Ping*, in *Yick Wo v. Hopkins*, the Supreme Court emphasized that the Equal Protection Clause covers “all persons” within the jurisdiction, regardless of citizenship.⁸⁴ Thus, the Court found that a San Francisco ordinance discriminatorily applied to prevent Chinese residents from getting permits to operate laundries violated the Equal Protection Clause.⁸⁵ Several years after *Chae Chan Ping*, in *Wong Wing v. United States*, the Supreme Court held that full criminal constitutional protections must be afforded to Chinese immigrants who had been sentenced to hard labor for violating immigration laws.⁸⁶ In addition, the Court held that the First and Fifth Amendments, and the Due Process Clause of the Fourteenth Amendment “extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.”⁸⁷

Although the boundaries of this “alien rights” doctrine have been fiercely contested,⁸⁸ in subsequent cases the Court generally reviewed state policies that discriminated on the basis of citizenship with strict scrutiny.⁸⁹ Additionally, federal laws which receive deference when Congress or the President acts “in the area of immigration and natu-

⁸³ See Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725, 742–48 (1996) (tracing the development of the “aliens’ rights tradition” and its conflict with the plenary power in the realm of immigration).

⁸⁴ 118 U.S. 356, 369 (1886).

⁸⁵ *Id.* at 362–63.

⁸⁶ 163 U.S. 228, 237 (1896).

⁸⁷ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (“None of these provisions acknowledges any distinction between citizens and resident aliens.” (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

⁸⁸ See, e.g., Kanstroom, *supra* note 24, at 1927 (summarizing scholarly attempts to reconcile the deference that plenary power affords to immigration law with the rights-oriented “alienage jurisprudence”); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1304 & n.25 (2011) (noting scholarly works that criticize the plenary power theory); Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 386 (2007) (commenting that while “rational basis scrutiny can be applied to immigration statutes, it is no longer clear that the plenary power doctrine always precludes the application of a more stringent standard of review when a statute infringes fundamental rights or raises equal protection concerns”).

⁸⁹ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))). However, strict scrutiny is not generally applied when the State deals “‘with matters firmly within a State’s constitutional prerogatives’” in order “‘to preserve the basic conception of a political community.’” *Foley v.*

ralization”⁹⁰ coexist with an understanding that “[j]ust because the object of government power is an alien does not mean that the government is exercising its immigration power.”⁹¹ While the magnitude of this deference has not always been clear, “a consistent thread is that courts often frame their reasoning in terms of the dichotomy between immigrant selection and regulation”⁹² Whereas the Court will give the federal government wide latitude in the area of controlling who enters or remains in the country, less deference is afforded to government action that infringes on noncitizen rights within the country.⁹³ This is particularly descriptive of the application of criminal law to noncitizens, where—at least in theory—“the treatment of noncitizens caught up in the criminal system is separate and apart from their treatment under the plenary power doctrine and decisions regarding admission or removal.”⁹⁴

B. *The Constitutional Significance of the Immigration-Detention Nexus*

The traditional distinction between criminal and immigration law illuminates an important limit on the justifications for immigration detention: While the political branches claim extensive discretion in the exercise of the immigration power, that deference does not extend to all executive and legislative action governing noncitizens’ lives within the United States. Specifically, while Congress may alter the rules governing noncitizens’ rights to remain in the country, their rights to be free of physical confinement, at least when apprehended within the United States,⁹⁵ are not absolutely compromised by their lack of citizenship.

Connelie, 435 U.S. 291, 296 (1978) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647–48 (1973)).

⁹⁰ *Mathews v. Diaz*, 426 U.S. 67, 82 (1976). See also *ALENIKOFF ET AL.*, *supra* note 67, at 1191–285, 1354–418 (discussing a variety of federal laws that differentiate between citizens and noncitizens in rights related to civic membership).

⁹¹ LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 54 (2006).

⁹² Cox, *supra* note 66, at 393 (citing cases).

⁹³ See Motomura, *supra* note 69, at 1626, 1647–48 (contrasting “[t]he stunted growth of constitutional immigration law . . . with the flowering of constitutional protections for aliens in areas other than immigration law” that extended constitutional protections to noncitizens including Due Process guarantees, the Fifth Amendment Takings Clause, and other substantive and procedural criminal protections).

⁹⁴ Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1291 (2010).

⁹⁵ This Note focuses on the treatment of individuals who have entered the country, who are most likely to be at the junction of U.S. criminal enforcement and immigration enforcement, and who have been held to enjoy the protection of the Fifth Amendment. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United

Recent precedent may “confuse[] the power to deport with the power to detain,”⁹⁶ leading to a common assumption that civil detentions during the course of immigration proceedings are exercises of the plenary power over immigration based solely on the presumed immigration purpose of the detention.⁹⁷ However, as Justice Souter summarized in his dissenting opinion in *Demore v. Kim*, the Court has not held that the “‘constitutionally protected liberty interest’ in avoiding physical confinement, even for aliens already ordered removed, [is] conceptually different from the liberty interest of citizens considered in [other civil confinement contexts].”⁹⁸ Indeed, the Supreme Court had recognized the “clear applicability of general due process standards: physical detention requires both a ‘special justification’ that ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint’ and ‘adequate procedural protections,’ ”⁹⁹ at least for individuals who have entered the country and whose detention cannot thus fall within the legal fiction of “exclusion.”¹⁰⁰ The majority in *Demore* did not overrule the precedent cited

States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98 & n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))). I do not discuss individuals detained after apprehension at the border, many of whom are also subject to mandatory detention. Cf. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 1–20 (2007) (describing differing forms of deportation, and distinguishing post-entry social control).

⁹⁶ David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1038 (2002). See also 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, 64 (2006) (documenting disagreement among the lower courts regarding the application of the plenary power doctrine to substantive due process and pre-removal detention, and citing *Motomura*, *supra* note 69, at 1670–71).

⁹⁷ See, e.g., *Motomura*, *supra* note 69, at 1665 (discussing largely unsuccessful arguments that “physical incarceration removes the case from the immunity that the plenary power doctrine typically confers on an exclusion or deportation decision”).

⁹⁸ 538 U.S. 510, 553 (2003) (Souter, J., concurring in part and dissenting in part) (quoting *Zadvydas*, 533 U.S. at 690) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Jackson v. Indiana*, 406 U.S. 715 (1972)).

⁹⁹ *Demore*, 538 U.S. at 553 (quoting *Zadvydas*, 533 U.S. at 690).

¹⁰⁰ For noncitizens deemed to be apprehended at the border, the question of detention has proved considerably more complex, as certain constitutional protections have not been held to extend to those seeking entry. See *supra* note 95 and accompanying text (discussing constitutional distinctions). The detention of those detained at entry (particularly asylum seekers) also raises significant concerns. See, e.g., Eleanor Acer, *Lack of Immigration Court Review of Detention Violates U.S. Commitments Under International Law*, HUMAN RIGHTS FIRST (Apr. 6, 2012), <http://www.humanrightsfirst.org/2012/04/06/lack-of-immigration-court-review-of-detention-violates-u-s-commitments-under-international-law/>.

by Justice Souter's dissent,¹⁰¹ nor did it expressly disclaim the liberty interest of noncitizens within the country. Rather, the *Demore* majority emphasized that the liberty rights of noncitizens may be subject to unique limitations and conditions by virtue of Congress's power over immigration.¹⁰²

Thus there is no indication that noncitizens within the United States are subject to unreviewable executive detention outside of immigration proceedings. Rather, since *Wong Wing*, the judiciary historically has deferred to immigration detention because it directly served the purpose of enforcing compliance with the immigration selection function of the proceedings.¹⁰³ The *Carlson* Court expanded that latitude to executive detention as a means of protecting the national government from foreign threats, invoking national security concerns that parallel the foreign affairs justifications underlying the plenary power.¹⁰⁴

By contrast, civil detention to prevent potential domestic criminal activity by itself has never been deemed a purpose that deserves judicial deference. Criminal incarceration, the traditional context for determinations of dangerousness, is a sphere of full doctrinal equality between citizens and noncitizens.¹⁰⁵ Even in detention serving a preventive function (such as pre-trial criminal detention or civil commitments), both citizens and noncitizens receive relatively robust procedural protections under the Due Process Clause.¹⁰⁶

The fact that a liberty deprivation takes place in the context of removal proceedings does not transform it into detention with an immigration purpose.¹⁰⁷ The prevention of domestic crime may be a

¹⁰¹ The continued validity of *Zadvydas*, even following *Demore*, was reaffirmed in *Clark v. Martinez*, 543 U.S. 371 (2005) (expanding the application of *Zadvydas*'s statutory interpretation).

¹⁰² See *infra* note 116 and accompanying text (analyzing the *Demore* Court's reliance on congressional immigration power).

¹⁰³ See *supra* Part I.A (elaborating on the original enforcement compliance purpose of immigration detention).

¹⁰⁴ See *supra* Part I.B (explaining national security context of the *Carlson* decision). See also Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1582 (2011) (discussing doctrinal recognition of national security as a compelling government interest which has been afforded judicial deference).

¹⁰⁵ See *supra* note 94 and accompanying text.

¹⁰⁶ See *United States v. Salerno*, 481 U.S. 739, 746–47 (1987) (pre-trial criminal detention); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (civil commitments). Indeed, the robust protections guaranteed to noncitizens in the domestic crime control context provided at least one of the reasons that the government increasingly turned to pretextual immigration detentions in the wake of the September 11, 2001 attacks. See *infra* note 130 and accompanying text (reviewing the use of pretextual detentions).

¹⁰⁷ See Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461,

legitimate and even compelling government interest¹⁰⁸ as well as an expressed priority of exclusion and deportation enforcement.¹⁰⁹ But that shared goal does not mean that civil detention for potential dangerousness serves the *immigration enforcement* purpose of controlling the admission or expulsion of noncitizens, just as pre-trial detention, civil commitment, or criminal incarceration do not serve immigration enforcement purposes when they incapacitate potential criminals who happen to be noncitizens. Nor should *Carlson's* national security reasoning authorize procedurally infirm crime control detention. Alienage alone does not transform a danger to the community into a national security threat.

In *Zadvydas v. Davis*, the Supreme Court apparently recognized these distinctions, noting that “preventive detention based on dangerousness” (as opposed to detention designed to prevent flight or protect the national security) was analogous to other civil confinements outside of the immigration context.¹¹⁰ To avoid serious constitutional concerns, the *Zadvydas* Court held that the statute authorizing immigration detention after a final order of removal must be interpreted as limited to the “period reasonably necessary to secure removal.”¹¹¹ The Court was clear that detention based on dangerousness had been upheld “only when limited to specially dangerous individuals and subject to strong procedural protections.”¹¹²

1508 (2011) (noting that the hard labor at issue in *Wong Wing* was not “insulated from constitutional scrutiny simply because Congress had placed the sanction within the deportation system”).

¹⁰⁸ *Salerno*, 481 U.S. at 749.

¹⁰⁹ See *infra* Part III.A.1 (elaborating on the integration of criminal and immigration enforcement).

¹¹⁰ 533 U.S. 678, 690–91 (2001). The Court distinguished detention reasonably necessary to bring about removal and the special deference afforded in national security contexts from detention justified only by allegations of potential domestic criminal activity. See *id.* at 696 (making explicit that the Court did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”). National security detentions are explicitly provided for in a distinct section of the INA (which as of this writing has not been used). See 8 U.S.C. § 1226A(a) (2006) (providing for the “[d]etention of terrorist aliens”); Stephanie Cooper Blum, “*Use It and Lose It: An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*,” 16 LEWIS & CLARK L. REV. 677, 679, 717–21 (2012) (hypothesizing explanations for this provision’s non-use). Although immigration enforcement operates in the name of homeland security, “current removal policies have almost nothing to do with national security.” Chacón, *supra* note 59, at 1856. Even following September 11, 2001, when an estimated 1200 persons were taken into immigration custody, none were ultimately charged with engaging in or aiding terrorism. See *id.* at 1875 n.261 (citing Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, at 4.14).

¹¹¹ *Zadvydas*, 533 U.S. at 699.

¹¹² *Id.* at 691.

C. Disambiguating Demore

Despite *Zadvydas*'s statement that detention as domestic crime control demands rigorous constitutional scrutiny,¹¹³ the Supreme Court's next immigration detention case, *Demore v. Kim*, contained broad language that could be read as condoning, by virtue of the plenary power, all detention during the course of immigration proceedings.¹¹⁴

On closer examination, however, *Demore*'s constitutional deference should be understood as rooted in the *immigration enforcement purpose* of the detention and premised on limitations to that detention which made it reasonable in relation to that purpose. Its holding can be extended no further.

Without explicitly differentiating between the flight risk and domestic crime control rationales for detention, the *Demore* Court upheld brief mandatory detention "during removal proceedings for a limited class of deportable aliens," as a legitimate response to "[t]he INS's near-total inability to remove deportable criminal aliens."¹¹⁵ In rejecting the Due Process claims of the detainee challenging his no-bond detention, the majority cited broad language that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens,"¹¹⁶ and concluded with the seemingly expansive phrase that

¹¹³ *Id.* at 695.

¹¹⁴ *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.").

¹¹⁵ *Id.* at 518. The Court elaborated "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." *Id.* at 513.

¹¹⁶ *Id.* at 522. Elsewhere, the Court quotes the full precedent, which cabins its applicability to congressional acts executed "[i]n the exercise of its broad power over naturalization and immigration" *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). As the *Demore* dissent maintained, that quoted language had previously stood for the proposition that "through the exercise of the deportation and exclusion power, Congress exposes aliens to a treatment (expulsion) that cannot be imposed on citizens." *Demore*, 538 U.S. at 548 n.9 (Souter, J., concurring in part and dissenting in part). The majority's citations for this firm and repeated endorsement were *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), a federal welfare benefits case in which the Court held that not all noncitizens could advance a "constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests"; *Reno v. Flores*, 507 U.S. 292, 302 (1993), a juvenile immigration custody case which had explicitly found that the "freedom from physical restraint" . . . is not at issue in this case" since the children were not put in "shackles, chains, or barred cells"; *Fiallo v. Bell*, 430 U.S. 787 (1977), a challenge to congressional definitions of a special preference immigration status; *United States v. Verdugo-Urguidez*, 494 U.S. 259 (1990), which specifically distinguished the Fourth Amendment's applicability to the search of a Mexican citizen's Mexican residence

“[d]etention during removal proceedings is a constitutionally permissible part of that process.”¹¹⁷

However, the Court’s reasoning implicitly qualified this sweeping conclusion in two ways. First, Chief Justice Rehnquist devoted much of the majority decision to reviewing Congress’s rationale for the statute, and the extensive statistical evidence and legislative history that provided support for this rationale—paralleling his opinion for the Court in *Salerno*, where the Court found a compelling government interest in public safety that justified the Bail Reform Act.¹¹⁸ For example, much of the majority’s analysis focused on the flight risk purpose of mandatory detention, emphasizing that “Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.”¹¹⁹ The opinion also noted congressional concerns about the dangerousness of “criminal aliens,” as reflected in recidivism studies relied upon by Congress.¹²⁰ In doing so, the Court seemingly credited “danger to the community” as another valid justification of mandatory detention. The opinion’s extensive discussion of the justifications for mandatory detention suggests that not *all* detentions during removal proceedings would necessarily be found constitutional.

Secondly, although the decision itself did not clearly distinguish between the flight risk and crime control rationales, the *Demore* Court implicitly assumed that by targeting individuals who were evading removal and subjecting them to detention for only a brief period of time, the statute was reasonably related to an immigration enforcement purpose. This assumption that detention functioned as part of the removal process was evidenced in the decision’s core holding that “[d]etention during removal proceedings is a constitutionally permissible part of that process.”¹²¹ The Court made this explicit by distinguishing *Zadvydas*’s post-final order detention not only based on the indefinite duration of that detention, but also on the fact that once removal was “no longer practically attainable”¹²² and detention was only serving a domestic crime control function, that

from the Fifth and Fourteenth Amendments; and Justice Kennedy’s dissenting opinion in *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting).

¹¹⁷ *Demore*, 538 U.S. at 531.

¹¹⁸ See *United States v. Salerno*, 481 U.S. 739, 747 (1987) (citing legislative history to support a finding of a compelling government interest).

¹¹⁹ *Demore*, 538 U.S. at 528.

¹²⁰ *Id.* at 518–19.

¹²¹ *Id.* at 531.

¹²² *Id.* at 527 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

detention “did not serve its purported immigration purpose.”¹²³ By contrast, the Court explained that detaining “deportable criminal aliens *pending their removal proceedings* . . . necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”¹²⁴ In other words, the Court assumed that immigration detention *necessarily* served the immigration purpose of enforcing compliance with removal proceedings, the heart of the plenary power.

The Court seemed to thoroughly credit Congress’s assessment that detention of individuals with criminal convictions was necessary to prevent such individuals from evading immigration enforcement. The decision made multiple references to a 1995 Senate Report entitled “Criminal Aliens in the United States” as an important piece of legislative history. Among other findings, this report noted:

While INS has responsibility for deporting all criminal aliens, the agency is unable to even identify most of the criminal aliens eligible for deportation. . . . [C]riminal aliens who come in contact with state and local law enforcement officials are often not identified as aliens because it is difficult for untrained personnel to accurately determine citizenship. Consulting INS is often fruitless since the INS file system, which is name based, cannot reliably be used to identify criminal aliens because of the widespread use of aliases by such aliens.¹²⁵

The assumption of an immigration enforcement purpose for detention also helps explain the majority’s repeated invocation of the statement that “Congress may make rules as to aliens that would be unacceptable if applied to citizens.”¹²⁶ The majority did not assert that noncitizens could be detained by congressional mandate for any purpose and by any means throughout their stay in the United States, but only that the immigration detention statute was entitled to deference because there was strong evidence of important justifications for the policy, and because it “necessarily” served an immigration enforcement purpose by preventing flight risk. Thus, the *Demore* Court assumed that detention necessarily serves an immigration function.

¹²³ *Id.* at 527.

¹²⁴ *Id.* at 527–28.

¹²⁵ PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, at 2 (1995). As set forth below, this premise is no longer accurate. *See infra* Section III.A (highlighting recent technological integrations).

¹²⁶ *Id.* Cf. Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 365, 365 (2005) (noting that “the Court repeated three times . . . the familiar incantation” that different rules apply to citizens and aliens).

But just because detention prevents flight does not mean that it serves an immigration enforcement purpose, absent a showing that the individual presents a flight risk if not detained.

The Court's assumption, unstable when it was decided, has become even less tenable since. First, as set forth below, in the intervening years since Congress enacted mandatory detention, new data and reporting systems have been put in place that ameliorate the concern that noncitizens with criminal convictions will escape identification and removal. At the same time, however, the Board of Immigration Appeals has determined that dangerousness is a threshold question in discretionary custody determinations, such that an alien "who presents a danger to persons or property should not be released during the pendency of removal proceedings," without ever reaching the question of whether the individual presents a flight risk.¹²⁷ As detention increasingly serves as a system of civil confinement for potential dangerousness, *Demore's* assumption that mandatory detention is entitled to the deferential review typically afforded to immigration legislation grows ever more suspect.

III SAFEGUARDING LIBERTY IN THE AGE OF "IMMCARCERATION"

This Note has chronicled how the "danger to the community" rationale became a central justification for a detention system that historically merited judicial deference as a necessary part of immigration enforcement or a means to protect national security. Although this conflation has gone largely unchallenged,¹²⁸ it raises serious constitutional and policy concerns of inequitable and needless liberty deprivations. These concerns are exacerbated by the discriminatory dynamics of immigration enforcement, which indicate that this form of executive detention will disproportionately impact racial minorities.¹²⁹ In

¹²⁷ *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

¹²⁸ The lack of a bright line between national security and crime control, see generally Chacón, *supra* note 59, combined with the Attorney General's broad and statutorily unreviewable discretionary authority to detain have made potential challenges particularly difficult. See 8 U.S.C. § 1226 (2006) (granting the Attorney General discretionary authority and barring review). Moreover, the government has always been able to resort to the flight-risk rationale of immigration detention. Cf. Michelle Roberts, The Associated Press, *AP Impact: Immigrants Face Detentions, Few Rights*, SEATTLE TIMES (Mar. 13, 2009), http://www.seattletimes.com/html/nationworld/2008863779_apdetainedimmigrants.html?syndication=rss (citing ICE spokeswoman Cori Bassett's assertion that "[detention] is ensuring compliance, and if you look at the stats, for folks who are in detention, the stats are pretty darn high").

¹²⁹ The racial undertones of immigration detention merit a substantive analysis that is outside the scope of this Note. For research that highlights the racialized impact of immi-

addition, the growing reliance on pretextual uses of immigration detention suggests that immigration detention's minimal procedural safeguards could make it an increasingly alluring alternative system of domestic crime control—but only for a “particular, racially lopsided fraction of the United States population.”¹³⁰

Two current trends in immigration detention—the criminalization of immigration enforcement and the development of meaningful alternatives to physical confinement—further destabilize the fiction that immigration detention necessarily serves a compliance purpose, either in motivation or in effect. As a result, due process protections should not be triggered only by indefinite or even prolonged detention; rather, the due process inquiry must parallel the balancing test of dangerousness-based liberty deprivations in other civil contexts. This recalibration would necessitate significantly more robust procedural protections for both mandatory and discretionary immigration detainees, minimizing costly and needless deprivations of liberty.

gration laws, see MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2005). See also Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 37–38 (1999) (highlighting continued constitutionality of racial discrimination in immigration context); Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 674 (2011) (“Crimmigration has . . . expanded and entrenched a ‘criminal alien’ social construct that both legitimizes and increases the harsh measures against Latinos.”). See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (discussing centrality of race and class in modern treatment of noncitizens).

¹³⁰ David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 162 (2012) (critiquing the ad hoc instrumentalist use of immigration enforcement as an alternative form of criminal punishment). Pretextual uses of immigration detention (as well as other forms of civil detention) were widely deployed following September 11, 2001. See David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004) (critiquing the reliance on immigration detention following September 11); David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate Testimony Before the National Commission on Terrorist Attacks Upon the United States, December 8, 2003*, 18 GEO. IMMIGR. L.J. 305, 308–09 (2004) (defending the pretextual usage of immigration detention for national security purposes). Today, pretextual uses of immigration detention have been relied on in federal prosecutions of immigration crime, as defendants are kept in immigration custody while awaiting a probable cause determination. See Eagly, *supra* note 94, at 1306 (collecting cases and noting the “obvious evidentiary difficulties in proving pretextual motive” given that courts place the burden of proving pretext on the defendants); Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 2010 CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CAL., BERKELEY LAW SCH. 15, available at http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (describing criminal defendants' immigration detention for twelve days prior to criminal probable cause determinations and up to fourteen days before first appearing before a magistrate).

A. *The Ascendancy of Crime-Control Detentions*

Two trends indicate the continuing rise of crime control as an immigration detention rationale. First, the recent convergence of criminal and immigration law (termed “cimmigration law”) has given rise to what Anil Kalhan has termed “immcarceration,” immigration detention produced by the fusion of criminal and immigration enforcement.¹³¹ At the same time, a combination of technological advances and innovative community supervision models has dramatically increased the feasibility of meaningful alternatives to detention (ATDs) for “flight risks” alone.¹³² ICE has already implemented a range of ATDs, including electronic monitoring,¹³³ telephonic and in-person reporting, curfews, and home visits, reserving physical detention for those deemed dangerous.¹³⁴ President Obama’s proposed 2013 budget reflects the importance of both of these trends in the foreseeable future.¹³⁵ Together, these developments indicate a trend

¹³¹ Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010). Although Kalhan uses the term to refer more broadly to the excessive and quasi-punitive nature of the current detention regime, the term is particularly fitting in the context of detention for the purpose of controlling domestic crime.

¹³² See, e.g., INT’L DETENTION COAL., *THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION* (2011), available at <http://idcoalition.org/cap/> (identifying emerging best practices in detention alternatives around the world).

¹³³ Some reject the characterization of electronic monitoring as an *alternative* to detention because it is so highly restrictive. See, e.g., DETENTION WATCH NETWORK & MILLS LEGAL CLINIC, *POLICY BRIEF: COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION 3* (2010), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf. Without minimizing the significant liberty restraint that electronic monitoring represents, I include electronic monitoring as a technical alternative to physical incarceration because of its implications regarding who will still remain physically detained.

¹³⁴ See, e.g., ICE, *ALTERNATIVES TO DETENTION FOR ICE DETAINEES FACT SHEET* (2009), available at <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487> [hereinafter ICE, ATD FACT SHEET] (defining ATDs as mechanisms “to ensure compliance with a removal order for aliens . . . who present a low risk of flight, and who pose no danger to the community”); Kalhan, *supra* note 131, at 55 (reviewing the literature on alternatives to detention).

¹³⁵ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013*, at 118, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/homeland.pdf> [hereinafter 2013 BUDGET]. The DHS budget boasts among its “funding highlights” that it “[a]ligns resources with risk in immigration detention by focusing on criminal aliens [and other priorities] . . . and expand[s] resources for electronic monitoring and intensive supervision.” *Id.* The document elaborates that: “Consistent with its stated enforcement priorities and recent policy guidance, ICE will continue to focus resources on those individuals who have criminal convictions or fall under other priority categories. For low risk individuals, ICE will work to enhance the effectiveness of Alternatives to Detention, which costs significantly less than detention.” *Id.* at 120.

toward reserving physical incarceration as a tool of incapacitating criminal risk.

1. *Increased Interoperability Between Criminal and Immigration Systems*

Since the federal government introduced mandatory and discretionary immigration detention for potential dangerousness in its current form in 1996, civil immigration enforcement has become increasingly integrated into the criminal justice system. This raises concerns about the “asymmetric incorporation” of criminal justice goals and methodologies into a civil system that lacks the basic procedural protections of the criminal law.¹³⁶ This convergence continues, as ICE focuses its attentions on “dangerous and repetitive criminal aliens”¹³⁷ using the mechanisms of the criminal justice system,¹³⁸ and as capacities for technological data sharing between executive agencies improve. This is particularly troubling because ICE, which has no authority to detain individuals incarcerated in federal, state, or local facilities,¹³⁹ instead detains supposedly dangerous individuals at the moment of their release from criminal incarceration—after the criminal system has determined that the time has come to release the individual into society.

In the last several years, ICE has consolidated fourteen programs for apprehending noncitizens through local law enforcement into an omnibus program called “Agreements of Cooperation in Communities to Enhance Safety and Security” (ICE ACCESS).¹⁴⁰

¹³⁶ See Mark T. Fennell, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 261, 262 (2009) (noting that increasingly severe immigration sanctions demand an “equivalent increase in procedural due process protection”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469, 472, 500–10 (2007). For a review of the recent literature on the criminal-immigration fusion, see Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement’s Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 232 (2010) (citing recent scholarly work on “the ill-suited marriage of civil and criminal standards that reconfigures the standards of both systems, and insulates the immigration system from many reforms taking place within the criminal system”); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 42 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf (same).

¹³⁷ SCHRIRO, *supra* note 10, at 11.

¹³⁸ A majority of those detained are apprehended either through the Criminal Alien Program (48%) or through the Office of State and Local Coordination (12%). *Id.* at 12.

¹³⁹ SISKIN, *supra* note 11, at 1.

¹⁴⁰ See Julie L. Myers, Assistant Sec’y, U.S. Immigration & Customs Enforcement, *ICE ACCESS: A Partnership Approach to Fighting Crime*, POLICE CHIEF (Apr. 2008), http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1461&issue_id=42008.

The most recent integration project is currently underway. Invoking the language of crime prevention, ICE is in the process of implementing "Secure Communities," an integration program that introduces information sharing capability between various criminal and immigration databases.¹⁴¹ Through Secure Communities, the fingerprints of everyone arrested and booked by local law enforcement are not only checked against FBI criminal history records, but they are also checked against DHS immigration records; ICE then determines if immigration enforcement action is required, considering the immigration status of the individual, the severity of the crime, and the individual's criminal history.¹⁴² ICE has stressed both the novelty of this innovation, and the role of the program in ensuring public safety.¹⁴³

Immigration authorities' reliance on criminal law enforcement mechanisms, coupled with the immigration system's capability to detain based on criminal records, indicate that incapacitation to prevent future criminality has assumed unprecedented prominence as a justification for immigration detention. In addition to the 1996 statutory mandate to detain individuals based on certain criminal grounds of deportability, ICE has made clear that detention will increasingly

¹⁴¹ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *SECURE COMMUNITIES: QUARTERLY REPORT* (2011), available at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy104thquarter.pdf (discussing the interoperability of FBI and DHS systems). Despite the initial lack of transparency as to whether individual states or localities could opt out of participation in this program, ICE projects that there will be criminal-immigration interoperability throughout the country by 2013. See *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Feb. 13, 2012). For a history of the project, see UNCOVER THE TRUTH, <http://uncoverthetruth.org/campaign> (last visited Feb. 13, 2012) (documenting a FOIA case requesting information about Secure Communities). For a history and critiques of the program, see Hannah Weinstein, *S-Comm: Shattering Communities*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 395 (2012).

¹⁴² *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Feb. 13, 2012).

¹⁴³ Letter from John Morton, Assistant Sec'y, Dep't of Homeland Security, to Rep. Zoe Lofgren (April 28, 2011), available at <http://uncoverthetruth.org/wp-content/uploads/2011/0429mortonresponse.pdf> ("Secure Communities provides ICE with unprecedented capability to focus its enforcement efforts on criminal aliens booked into our nation's jails. By removing those aliens whose criminal history demonstrates a willingness to violate our laws, ICE is better able to fulfill its responsibility to keep our communities safe. As such, enhancement of public safety through the expansion of Secure Communities is one of our top priorities."). The public safety rationale is not entirely explicit, but it appears to be a combination of both deterrence and incapacitation. See, e.g., Sumathi Reddy, *Immigration Backers Cheer Cuomo Action*, WALL ST. J., June 2, 2011, available at <http://online.wsj.com/article/SB10001424052702303657404576359962487244504.html> ("Supporters of Secure Communities say it is a deterrent to crime and boosts public safety.").

be reserved for allegedly dangerous detainees with criminal convictions.¹⁴⁴

2. *Alternatives to Detention*

Simultaneously, new alternatives to detention (ATDs) exist which can ensure compliance with immigration proceedings for those individuals not deemed dangerous. These alternatives include previously technologically unimaginable methods, including ankle bracelet electronic monitoring devices.¹⁴⁵ While cautioning against unnecessarily imposing electronic monitoring on individuals who would otherwise be fully released from custody, immigrant advocates may support dependable and increasing reliance on ATDs as a substitute for physical detention, averting unnecessary liberty deprivations and resulting in significant taxpayer savings.¹⁴⁶ As discussed above, the administra-

¹⁴⁴ See 2013 BUDGET, *supra* note 135; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Prosecutorial Discretion Memo] (prioritizing national security and public safety apprehensions and detentions); *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 26–27 (2012) (statement of Kevin Landy, Assistant Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement) (describing the new Risk Classification Assessment's focus on ensuring that criminal aliens are prioritized for detention); *id.* at 44 (statement of Chris Crane, President, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees) (testifying about ICE's announced goal of prioritizing detention of convicted criminals, focusing on the “worst of the worst,” and expressing concern that “increased targeting of the most violent criminals will result in a more violent, aggressive and overall dangerous detainee population in ICE facilities nationwide”).

¹⁴⁵ See LUTHERAN IMMIGRATION AND REFUGEE SERV., UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY 5–15 (2011), *available at* <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf> (describing the development of alternatives to detention over the last two decades, including GPS and other forms of electronic monitoring).

¹⁴⁶ The current cost of immigration detention is approximately \$166 per detainee per day at a capacity of 33,400 beds, while some alternatives to detention range from thirty cents to \$22 a day. *See id.* at 11 (citing NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 2 (2011), *available at* <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>). *See also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 57 (2012), *available at* <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>; H.R. REP. NO. 109-476, at 38 (2006). H. DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 32 (2009), *available at* http://www.migrationpolicy.org/news/2009_9_10.php.

tion continues to signal its commitment to exploring these cost-saving alternatives.¹⁴⁷

Although increased reliance on ATDs could mean a net decrease in physical detention, it appears that alternatives to detention will also serve to emphasize detention's crime control purpose. ICE justifies ATDs by virtue of their positive correlation with compliance enforcement,¹⁴⁸ but refuses to consider alternatives to detention for those who are characterized as dangers to the community.¹⁴⁹ Even immigrant rights advocates have generally accepted this distinction,¹⁵⁰ focusing on ATDs as means to "ensure that [immigrants] show up for their immigration court dates"¹⁵¹ rather than as methods to control dangerousness. While those deemed to be high flight risks may still be detained, many low-level flight risks could be released—unless they are also deemed to be dangers to the community. As a result, the functional impact of ATDs will likely be a relative decrease in reliance on physical confinement as a means of removal proceedings compliance and a renewed focus of detention as a means to confine potential dangers to the community.

B. Fifth Amendment Limits on Crime Control Detention

As the Court has emphasized, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects,"¹⁵² and this Clause extends to noncitizens, at least after entry into the United States.¹⁵³ In light of the

¹⁴⁷ See 2013 BUDGET, *supra* note 135, at 120.

¹⁴⁸ For example, in fiscal year 2010, ATDs "exceeded the target for appearance rates for Immigration Hearings by 35.8 percent: the target was 58 percent and the actual fiscal year 2010 rate was 93.8 percent." NATIONAL IMMIGRATION FORUM, MATH OF IMMIGRATION DETENTION 6 (Aug. 2011), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> [hereinafter MATH OF IMMIGRATION DETENTION] (citing U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 44 (2012), available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>).

¹⁴⁹ See *supra* note 134 and accompanying text (describing eligibility for ATDs).

¹⁵⁰ See MATH OF IMMIGRATION DETENTION, *supra* note 148, at 1 ("Physical detention . . . should only be used in limited circumstances, such as for holding immigrants whose release would pose a serious danger to the community.").

¹⁵¹ DETENTION WATCH NETWORK & MILLS LEGAL CLINIC, *supra* note 133, at 1.

¹⁵² *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

¹⁵³ See *supra* note 95 (discussing the distinction between noncitizens who have entered the United States and those apprehended at the border). See also César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 23–31 (2011) (reviewing the role of modern Due Process jurisprudence in immigration law); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461,

ascendancy of the potential dangerousness justification discussed above, as well as the proliferation of ATDs which can ensure compliance enforcement, detentions during the course of immigration proceedings can no longer be assumed to necessarily serve an immigration compliance or national security purpose. Absent these traditional justifications, immigration detention for potential dangerousness should be reviewed with the more robust Fifth Amendment scrutiny generally applied to other preventive detentions.

Outside of the immigration context, at a minimum, Due Process protections require “that laws not authorize more [preventive detention] than they need to.”¹⁵⁴ *Zadvydas* articulated this standard in assessing dangerousness detention absent flight risk, noting that preventive detention is “limited to specially dangerous individuals and subject to strong procedural protections.”¹⁵⁵ This limitation suggests, as I argue in the following subsections, that both current mandatory and discretionary detention procedures are constitutionally infirm.

1. *Mandatory Detention: Individualized Determinations as a Minimum Requirement of Due Process*

The mandatory detention scheme is a particularly severe infringement on standard Due Process principles, which have always assumed that *some* individual determination was a procedural prerequisite of preventive detention.¹⁵⁶ Since *Demore* upheld mandated detentions in 2003, the system faced mounting attacks, emphasizing the procedural insufficiency of the *Joseph* hearing (particularly given the high burden of proof on the detainee and the lack of appointed counsel),¹⁵⁷ ICE’s

1465–66 (2011) (analyzing the applicability of Due Process analysis in the deportation context).

¹⁵⁴ Klein & Wittes, *supra* note 9, at 89. Critics suggest the standard for preventive detention may be much stricter, characterizing preventive detention as a constitutional aberration. *See id.* (discussing claims that preventive detention “runs counter to American values and law”). *Cf.* Abhi Raghunathan, “*Nothing Else but Mad*”: *The Hidden Costs of Preventive Detention*, 100 GEO. L.J. 967, 969 (2012) (discussing the ambiguity regarding the standard for preventive detention).

¹⁵⁵ *Zadvydas*, 533 U.S. at 691. In support, the Court in *Zadvydas* compared two previous cases. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld a program that “limited confinement to a small segment of particularly dangerous individuals” and “provided strict procedural safeguards.” *Id.* at 368. However, in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court struck down a “detention [program] of insanity acquittees who are no longer mentally ill” which placed “the burden on the detainee to prove that he is not dangerous.” *Id.* at 81–83.

¹⁵⁶ *See Demore v. Kim*, 538 U.S. 510, 551 (2003) (Souter, J., dissenting) (“[Our] cases yield a simple distillate[:] Due process calls for an individual determination before someone is locked away.”).

¹⁵⁷ *See supra* notes 21 and 22 and accompanying text (discussing applicability and critiques of mandatory detention); Mark Noferi, *Cascading Constitutional Deprivation: The*

refusal to include electronic monitoring and ATDs in its interpretation of mandatory custody,¹⁵⁸ and the prolonged nature of detentions beyond the length that *Demore* contemplated.¹⁵⁹ Since *Demore*, changes both in the integration of criminal and immigration enforcement and in the rise of ATDs intensify these Due Process critiques by challenging *Demore*'s assumption that detention is a necessary component of immigration enforcement, as opposed to a civil detention for domestic crime control purposes.

First, the *Demore* Court deferred to Congress's concern that the INS was unable to effectuate the removal of "criminal aliens," both because the INS could not identify removable individuals due to the gap between the criminal and immigration systems, and because the INS had proved unable to ensure compliance with removal proceedings.¹⁶⁰ These realities have now changed considerably with the merging of the criminal justice and immigration enforcement systems, as well as the introduction of more efficient and comprehensive technologies and systems allowing ICE to identify and track noncitizens (both within the criminal justice system and through ATDs).¹⁶¹ Together, the cooperation and technological fusion of the immigration and criminal systems and the development of ATDs mean that com-

Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. (forthcoming 2012) (manuscript at 69–91) (making the argument for a Due Process right to appointed counsel at *Joseph* hearings).

¹⁵⁸ See Heeren, *supra* note 21, at 632–33 (noting that courts have defined "custody" to include conditions of parole for habeas corpus purposes, but that DHS currently refuses to consider monitoring ATDs for individuals subject to mandatory detention).

¹⁵⁹ Both the Ninth and Third Circuits have found that, under certain circumstances, prolonged mandatory detention during removal proceedings would raise constitutional concerns. See *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (citing Justice Kennedy's *Demore* concurrence and finding that due process demands a hearing even for mandatory detainees once the duration of detention becomes unreasonable); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008) (requiring a bond hearing for detainees initially subject to detention under 8 U.S.C. § 1226(c) if their removal is stayed pending direct judicial review or if their cases have been remanded); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (holding that § 1226(c) only authorizes mandatory detention where removal hearings are "expeditious"). For recent critiques of mandatory detention, see Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1503 (2011) (critiquing mandatory detention procedures as unconstitutional); Heeren, *supra* note 21 (contending that mandatory detention is both unfair and inefficient, as it does not correlate well to flight risk or dangerousness, improperly allocates burdens of proof, and subjects detainees to prolonged conditions of confinement designed for short-term detention); Sayed, *supra* note 21 (arguing that immigrant detainees deserve more procedural protections than "enemy combatants" but currently receive less).

¹⁶⁰ See *supra* Part II.C (summarizing the *Demore* Court's analysis of the government interest in mandatory detention).

¹⁶¹ See *supra* Part III.A (reviewing the two causes of crime control detention's ascendance).

pliance concerns are increasingly addressed in ways that do not require detention. Accordingly, mandatory detention can no longer be deferred to as a response to the government's "near-total inability to remove deportable criminal aliens."¹⁶²

Moreover, the *Demore* majority's assumption that immigration detention necessarily serves an immigration purpose has been called into question. Even mandatory detention, which on paper applies to anyone with qualifying convictions (allegedly as part of the removal process), is applied selectively in practice.¹⁶³ As a result of immigration enforcement officers' immense prosecutorial discretion in deciding whom to detain,¹⁶⁴ and based on announced enforcement priorities,¹⁶⁵ it appears that individuals will increasingly be taken into custody based on ICE's untried perception of dangerousness,¹⁶⁶ and subsequently subject to mandatory detention based on specific grounds of removability.

Because the compliance enforcement justification of mandatory detention has weakened even as detention increasingly confines individuals based on potential dangerousness, the minimal procedural protections afforded mandatory detainees raise Due Process concerns that can no longer be justified by the immigration enforcement purpose upheld in *Demore*.

2. "*Danger to the Community*": Putting the Government to Its Burden

Even outside of the mandatory detention context, discretionary bond determinations for immigration detainees receive significantly less procedural protection than nearly any other preventive deten-

¹⁶² *Demore v. Kim*, 538 U.S. 520, 520 (2003).

¹⁶³ ICE has stated that it must prioritize the use of its enforcement personnel, detention space, and removal resources in light of the fact that it only has capacity to remove "approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States." Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All ICE Employees (Mar. 2, 2011) [hereinafter Morton Priorities Memo], available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> ("Subject: Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens").

¹⁶⁴ See generally Morton Prosecutorial Discretion Memo, *supra* note 144 (building on and emphasizing the discussion in Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Serv., to Regional Dirs., Dist. Dirs., Chief Patrol Agents, and Regional and Dist. Counsel (Nov. 17, 2000), concerning the discretion of immigration officers regarding the initial arrest of those subject to mandatory detention).

¹⁶⁵ See *supra* note 144 (discussing public safety prioritization of immigration detention).

¹⁶⁶ See *supra* Part III.A. See also Morton Priorities Memo, *supra* note 163, at 1 (enumerating "individuals who pose a clear risk to national security" or "a clear danger to public safety" as the first priority for apprehension and detention, as well as for removal).

tion,¹⁶⁷ casting doubt on the procedure's legitimacy when deployed in the service of ordinary crime control.

In discretionary determinations, the respondent—frequently a noncitizen with limited English proficiency and rarely represented by counsel¹⁶⁸—must affirmatively request a neutral adjudication, and bears the burden of proving that he or she “would not pose a danger to property or persons.”¹⁶⁹ Statutory provisions also purport to bar any judicial review of the Attorney General's discretionary decision in the matter.¹⁷⁰ These procedures stand in stark contrast to pre-trial criminal detention, despite the facial similarities of the flight risk and danger to the community criteria.¹⁷¹ For pre-trial detentions, individuals must be brought before an independent judge for a probable cause hearing within forty-eight hours of arrest, and detention for dangerousness is constitutionally protected by a series of judicial safeguards, including a requirement that “[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”¹⁷²

As reviewed above, the minimal procedural protections in immigration proceedings were originally upheld with the understanding that detention served either an immigration enforcement or national security purpose.¹⁷³ With the first introduction of a broader “danger to the community” standard for immigration detention in 1990, at least one dissenting member of the BIA advanced the position that the parallels between the immigration detention statutory language and the wording of the Bail Reform Act should be interpreted similarly.¹⁷⁴ Specifically, the dissent suggested that the statute at issue should not create a rebuttable presumption against release, that the

¹⁶⁷ Cf. Noferi, *supra* note 157, at 6 (comparing procedural protections in immigration detention to criminal pre-trial detention, civil commitment, and national security detention).

¹⁶⁸ See *Accessing Justice*, *supra* note 5, at 359–60 (discussing the low representation rates in removal proceedings in New York City and nationwide, particularly for detainees, and enumerating the distinctive characteristics of individuals facing removal, including “relative lack of familiarity with the legal system” and “language barriers”).

¹⁶⁹ 8 C.F.R. § 1236.1(c)(8) (2009); *In re Adeniji*, 22 I. & N. Dec. 1102 (B.I.A. 1999).

¹⁷⁰ See *supra* Part I.A (discussing discretionary detention procedures). Cf. Simon, *supra* note 3, at 600–01 (discussing the lack of democratic accountability in executive detentions of noncitizens).

¹⁷¹ See *supra* notes 56 and 57 and accompanying text (discussing parallels between immigration detention and criminal pre-trial detention).

¹⁷² See *Salerno*, 481 U.S. at 750–52 (citing 18 U.S.C. § 3142(f)). Cf. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 965 (2002).

¹⁷³ See *supra* Parts I.A–B (analyzing the evolution of immigration detention rationales).

¹⁷⁴ See *In re De La Cruz*, 20 I. & N. Dec. 346 (B.I.A. 1991) (Heilman, Board Member, dissenting) (asserting that “[i]mmigration bond hearings before an immigration judge gen-

burden of persuasion should remain with the government, and that the standard of proof should be “clear and convincing” for the threat to the community prong, and “clear preponderance” for the flight risk prong.¹⁷⁵

However, the majority of the Board rejected this approach as a pure matter of statutory construction, neglecting the constitutional questions at issue, and finding that the statute at issue created a rebuttable presumption against release for legal permanent residents convicted of aggravated felonies, placing the burden on the respondent to disprove both dangerousness and flight risk.¹⁷⁶ This decision and others paved the way for the construction of the 1996 regulations which—without any statutory support—shifted the burden to all detained noncitizens first to disprove dangerousness as a preliminary matter, and then to disprove flight risk.¹⁷⁷

The increased trend toward detention for potential dangerousness demands an inversion of the current order of operations and burdens of proof. Currently, *Matter of Guerra* requires the detainee to first establish that she is not a danger to the community, before getting the opportunity to prove that she is not a flight risk.¹⁷⁸ As a matter of constitutional logic, by contrast, in order to invoke the immigration authority to detain, the government should first be required to establish an immigration enforcement purpose for the detention, namely compelling the appearance of an immigrant who is likely to abscond if released. Only after that point should danger to the community be considered as a distinct supplemental factor. As a distinguishable prong of the analysis, detentions justified by potential dangerousness should be “limited to specially dangerous individuals and subject to strong procedural protections.”¹⁷⁹ At minimum, these protections should include placing the burden of proving “special dangerousness” on the government, as is required in the discretionary hearings pro-

erally comport with the procedural safeguards required by the Bail Reform Act of 1984” and that the determination of dangerousness should also be parallel).

¹⁷⁵ *Id.* These standards mirror the federal bail standards. The Bail Reform Act explicitly requires clear and convincing evidence for detention based on dangerousness. 18 U.S.C. 3142(f) (2006). The eight circuits that have provided guidance require only a preponderance of the evidence to establish flight risk. *See* JOHN L. WEINBERG, PRACTICING LAW INST., FEDERAL BAIL AND DETENTION HANDBOOK § 6.7 (2012).

¹⁷⁶ *See De La Cruz*, 20 I. & N. Dec. at 353–56 (Heilman, Board Member, dissenting) (analyzing the text and history of 18 U.S.C. § 242(a)(2) (2006), as amended by Section 504 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5049).

¹⁷⁷ *See supra* Part I.C (discussing the evolution of current bond standards).

¹⁷⁸ *See In re Urena*, 25 I. & N. Dec. 140 (2006) (citing *In re Guerra*, 24 I. & N. Dec. 37 (B.I.A. 2006)).

¹⁷⁹ *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001).

vided for by *Zadvydas* and the Third and Ninth Circuits, and the vast majority of other preventive detentions.¹⁸⁰

CONCLUSION

The U.S. immigration detention regime that was reborn in the 1980s is not only unprecedented in scale, but also in rationale. Whereas the Court historically justified immigration detention as a means of ensuring immigration compliance, followed by a secondary purpose of protecting national security, today's system increasingly functions in collaboration with criminal law enforcement to incapacitate for the purposes of confining individuals based on accusations of potential dangerousness levied without the traditional procedural protections attached to civil confinement.

Whatever the validity of judicial deference when immigration detention truly serves to aid in the removal process, this Note has argued that such deference cannot legitimately be extended to immigration detention's newly ascendant crime-control function. Courts analyzing immigration detention challenges should preserve the conceptual and constitutional distinctions between the rationales for detention. Immigration detention's increasing use of potential domestic dangerousness as a rationale to confine individuals demands due process procedural safeguards that parallel protections in other preventive contexts. At a minimum, Due Process requires the government to bear the burden of individually demonstrating a need for confinement.

¹⁸⁰ See *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) (quoting *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008)); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)) (requiring the government to prove flight risk or danger to the community by clear and convincing evidence in cases where bond hearings were judicially imposed); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (holding that after detention duration becomes unreasonable, "the Due Process clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purpose of the detention statute"). See also *Demore v. Kim*, 538 U.S. 510, 550 (2008) (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))); Klein & Wittes, *supra* note 9, at 186 (articulating the minimum standard for preventive detention as a test of necessity, inquiring into the direness and certainty of potential consequences for failing to detain, and whether the detention is structured in a fashion that minimizes the possibility of erroneous or excessive incarceration). Cf. Chelgren, *supra* note 159, at 1518 (surveying lower courts' applications of *Zadvydas*); Raghunathan, *supra* note 154, at 971–85 (detailing the allocations of burdens of proof in civil commitment hearings); Sayed, *supra* note 21, at 1834 (contrasting the allocation of the burden of proof in immigration detention with procedures for Guantánamo detainees).