LESSONS LEARNED FROM IMMIGRATION DETENTION'S PAST

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INTRODUCTION

The immigration detention system in the United States is gargantuan; it is responsible for locking up more human beings than that of any other country.[1] For those within the system, winning release from detention while fighting against deportation is key for so many reasons. Detention wastes human potential by dehumanizing individuals put inside a cage, instead of permitting them to support their families and communities.[2] It creates losses to those communities[3] and makes noncitizens' deportation cases harder to win.[4] Throughout

[1] ELLIOTT YOUNG, FOREVER PRISONERS: HOW THE UNITED STATES MADE THE WORLD'S LARGEST IMMIGRATION DETENTION SYSTEM 22 (2021) (noting United States locks up far more immigrants than any other country). As of February 2025, Immigration and Customs Enforcement ("ICE") held 41,169 persons in detainment. *Strange Inconsistencies in ICE Detention Statistics*, TRANSITIONAL RECS. ACCESS CLEARINGHOUSE (Feb. 19, 2025), https://tracreports.org/whatsnew/email.250218.html [https://perma.cc/57UU-V852]. Detention numbers reached 54,082 during the first Trump Administration. AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 5-6 (2019), https://fas.org/sgp/crs/homesec/R45804.pdf [https://perma.cc/Z7U3-33F4].

[2] *See* Mary Holper, *Discretionary Immigration Detention*, 74 DUKE L.J. 961, 981-82 (2025) (describing how detainees' community ties are ruptured through detention, including through loss of employment); Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 611-12 (2021) (describing findings by Department of Homeland Security Office of Inspector General in 2019 that ICE detainees suffered from misuse of segregation, overuse of restraint and strip searches, lack of access to recreation time and visits, spoiled food, and lack of access to sanitary items, and detailing deaths in immigration detention due to lack of proper medical care); Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 105 (2019) [hereinafter Ryo, *Understanding Immigration Detention*] (reporting studies finding verbal harassment, procedural failings, and excessive use of force on immigration detainees, in addition to "volunteer work programs" that are "tantamount to forced labor"); Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024-31 (2018) (describing how immigration detention fosters legal cynicism as detainees perceive it to be punitive due to its uncertain length, inscrutable rules, and guards' discretion to discipline, which can impact discretionary relief); Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 4-5 (2018) (citing reports from immigration detention illustrating rising number of deaths and suicides, substandard medical care, physical and sexual abuse, exploitative labor practices, lack of access to legal counsel, and transfers which interfere with legal representation and cut off detainees from their communities).

[3] Alina Das and Stephen Legomsky have detailed immigration detention's costs to communities, due to the lack of employment of the person who is detained and the potential need for remaining family members to seek public assistance, including foster care. The costs to the community also include the direct harms to the detained person, including exacerbation of one's trauma when detained, inability to obtain evidence for one's defense to deportation, and deterrent effects of detention on pursuing defenses to deportation. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 143-45 (2013); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIA. INTER-AM. L. REV. 531, 541-42 (1999).

[4] Out of jail, a noncitizen is more likely to get a lawyer and obtain corroborating evidence to support a defense, both of which are key to winning a deportation case. Mary Holper,

immigration detention's history, noncitizens with limited resources have had to make tradeoffs—use all of one's allocated resources to fight against deportation, or spend some of those limited resources fighting against detention?[5] My clinic students and I have chosen to allocate our resources fighting against detention, even when such efforts have proven futile.[6] Given the importance of release from detention, this Essay examines three lessons from the history of immigration detention that can inform how we view detention today, and how we advocate to limit its use or abolish it entirely.

I. LESSONS LEARNED FROM IMMIGRATION DETENTION'S PAST

First, not many people know that one motivating factor behind the start of immigration detention was shipping companies' financial needs.[7] The shipping companies brought people to the United States from other countries, so they

Unzipping Detention From Deportation, 100 TUL. L. REV. (forthcoming 2025-26) (manuscript at 38-39) [hereinafter Holper, *Unzipping Detention*] (on file with author). The noncitizen also gains time by moving off of the detained docket. This time facilitates obtaining expert and other witnesses and developing one's own testimony, which can be difficult to do because immigration relief is so centered on the trauma that one has suffered, and traumatic memories do not always quickly and readily flow off one's tongue in a coherent manner. *Id.* Finally, release allows noncitizens to endure lengthy court and appeals processes, whereas detention operates to deter noncitizens from pursuing valid forms of relief. *See* Ryo, *Understanding Immigration Detention*, *supra* note 2, at 109 ("[D]etention may deter those individuals who are in detention from pursuing valid claims of relief from removal because they cannot withstand the pain of detention."); Ryo & Peacock, *supra* note 2, at 32 (reporting data that, of adults released from immigration detention in fiscal year 2015, about one-third were detained for more than thirty days, 1,800 were detained between one and two years, 273 were detained between two and three years, and 117 were detained for more than three years).

[5] Mary Holper, *The Great Writ's Elusive Promise*, CRIMMIGRATION: INTERSECTIONS OF CRIM. L. & IMMIGR. L. 1, 1 (2020) (describing Hobbesian choice detainees face between hiring lawyers for immigration court or for habeas corpus petitions, if either can even be afforded); DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 17, 19-20 (2012) (discussing small numbers of habeas corpus petitions challenging immigration detention at Ellis Island during period before WWI, "probably because most migrants and their lawyers directed their energy and moneys to attacking the substantive immigration decision that had led to detention through the statutory right of appeal" and contrasting this with large number of habeas corpus petitions challenging immigration detention at Angel Island during same time period).

[6] Holper, *Unzipping Detention*, *supra* note 4, at 15-18 (discussing habeas litigation for immigration detainee who was released pursuant to his removal proceedings, which rendered his habeas petition moot, and describing how this is common in detention litigation); Laila L. Hlass & Mary Yanik, *Studying the Hazy Line Between Procedure and Substance in Immigration Detention Litigation*, 58 HARV. C.R.-C.L. L. REV. 203, 262 (2023) (discussing how the mooting of habeas corpus petitions due to release without district court resolving issues presented is a "shadow win" which "inhibit[s] the development of a body of decisional law and shield[s] the facts from further scrutiny").

[7] *See* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 63, 90 (2014) (describing 19th century policies placing deportation and detention costs on shipping companies carrying rejected noncitizens).

were obligated to hold the intending immigrants on the ship while inspecting officers decided whether the migrants were allowed to land.[8] They were also required to bring back the migrants who did not pass inspection into the United States.[9] Inspecting that many intending immigrants proved to be time-consuming, so the shipping companies created detention facilities to "free up" their ships for departure from the U.S. port.[10] The intending immigrants would be allowed to get off the boat, creating what we would today think of as "parole" into the United States,[11] and be inspected elsewhere in what were some of the earliest immigration detention facilities.[12] These unsanitary dockside sheds served as an alternative to holding the intending migrants on the "coffin ships," which caused numerous deaths on the journey to the United States.[13] The passenger ships would be relieved of their human cargo, freeing them up to continue their journeys back and forth across the ocean to earn profits for the shipping company.[14] Both the east and west coasts, at Ellis Island and Angel Island respectively, eventually saw the construction of more permanent detention facilities to replace the use of dockside sheds.[15]

[8] *Id.* at 63.

[9] *Id.* ("When an immigration inspector denied admission to noncitizens, the vessel that brought them bore the responsibility of returning them.").

[10] *See* WILSHER, *supra* note 5, at 12-13 (noting "[t]he practical problems of inspection of thousands of immigrants per day . . . without detention facilities. In any case of doubt the immigrant had to be either allowed entry or sent back to the ship and expelled"); *id.* at 19 (describing how issues processing large number of immigrants resulted in shipping companies' use of unsanitary dockside sheds as temporary detention facilities).

[11] Stumpf, *supra* note 7, at 63 (describing laws permitting temporary presence of noncitizens onto U.S. territory); *see also* Lee, *supra* note 2, at 572-73 (discussing immigration law's "entry fiction," which designates a person as unentered or arriving even as ICE transports them into interior for detention and even as they are released on parole, and describing this phenomenon as "fictive suspension of time and space, a legal freezing of bodies at the threshold of entry").

[12] *See* Stumpf, *supra* note 7, at 63 (describing 19th century policies of removing noncitizens from vessels for inspection).

[13] *See* Lee, *supra* note 2, at 584-86 (describing humanitarian objectives underscoring early removal of noncitizens from notoriously dangerous conditions of transatlantic ships).

[14] *See* Stumpf, *supra* note 7, at 64 (noting construction of immigrant processing facilities enabled transatlantic ships to transition from conducting inspections on board).

[15] *Id.*; WILSHER, *supra* note 5, at 15-23 (describing how detention durations were on average longer at Angel Island than Ellis Island, due to relative ease of admission of European immigrants as compared to Asian immigrants). Phil Torrey describes how on the east coast, detention was a tool to facilitate admission, whereas on the west coast, detention was a tool of racial discrimination. Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J.L. REFORM 879, 885-87 (2015).

Immigration detention for the benefit of corporate interests remains a key feature of the system today.[16] The private prison industry profits handsomely from Immigration and Customs Enforcement ("ICE") detention, which in turn fuels this industry's lobbying efforts in Congress to maintain and expand the number of ICE detention beds.[17] Local jails also earn money through contracting with ICE to provide detention beds.[18] For rural communities with few economic opportunities, ICE detention contracts represent a cash cow, providing a steady supply of money and jobs.[19] Moreover, ICE detention periods have proven to be longer in private prisons and rural communities.[20] This system results in a "commodification of traditional government functions," which leads to further dehumanization of the persons detained in these jails-turned-cash cows.[21] The siren

[16] *See* Ryo, *Understanding Immigration Detention*, *supra* note 2, at 102-03 (describing financial incentives of immigrant detention within private prison industry); Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145, 146 (2018) (describing influence of money in immigrant detention resulting from role of private for-profit prisons).

[17] Ryo, *Understanding Immigration Detention*, *supra* note 2, at 103 (citing study showing that "the mere presence of a privately owned or operated detention facility in a legislator's district, net of their campaign donations, increases the likelihood that the legislator will cosponsor punitive immigration legislation"); Gilman & Romero, *supra* note 16, at 148 (describing how private prison industry persuaded Congress to maintain immigration detention bed quota whereby Congress funds 33,000-34,000 immigration detention beds); *id.* (demonstrating how increased money spent on lobbying by two largest for-profit prison companies between 2006-2014 yielded expansion of immigration beds during that time period).

[18] Ryo, *Understanding Immigration Detention*, *supra* note 2, at 102 (describing financial incentives for local jails to contract with ICE to meet their bedspace needs).

[19] *See* Gilman & Romero, *supra* note 16, at 147 ("Corporations are able to depict themselves as providing efficient solutions for the government while creating jobs and contributing to the economy."); Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM), https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks [https://perma.cc/7S4K-8SUB] (describing ICE contracts as lucrative because ICE pays local jails five times as much as state pays them to jail someone in criminal justice system).

[20] Ryo & Peacock, *supra* note 2, at 52 (finding notable pattern connecting confinement in privately operated facilities and facilities outside major urban areas and significantly longer detention times).

[21] *See* Gilman & Romero, *supra* note 16, at 146 (describing negative impact of financial incentives in immigration detention and criminal justice more generally); Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 33 (2017) ("Private immigration detention can also be critiqued on moral grounds based upon objections to the very notion that private companies can profit from institutions that deprive human beings of their liberty."). Gilman and Romero also demonstrate that even when ICE has turned to alternatives to detention, the private prison industry benefited by providing electronic surveillance services to ICE. Gilman & Romero, *supra* note 16, at 152 (describing private prison's adoption of electronic ankle monitoring business for prior detainees to replace lost profits from decreased detention).

song of immigration detention beds can mask the reality that ICE detention does not fulfill its promise to foster long-term economic growth in a community.[22]

The second lesson that is weaved into this country's history of immigration detention is that the practice has historically included the regular use of alternatives to detention.[23] Release to community-based charitable organizations was common throughout the history of immigration detention because there simply were not enough detention beds.[24] Release on bond to a charitable society also provided a guarantee that an intending immigrant would not become a public charge.[25] Immigration inspectors engaged in some of the earliest exercises of discretion to avoid the harsh consequences of a mandatory detention law for both pragmatic and humanitarian reasons.[26] The Supreme Court described placements in settings like mission homes as a "more suitable" alternative to passenger ships to hold someone pending their inspection into the United States.[27]

Today, ICE has an official alternatives to detention program, which uses advanced technologies such as electronic monitoring and smartphone apps.[28] These technologies were not available to immigration inspectors when they first utilized alternatives to immigration detention.[29] However, instead of providing

[22] DET. WATCH NETWORK, COMMUNITIES NOT CAGES: A JUST TRANSITION FROM IMMIGRATION DETENTION ECONOMICS 6 (2021) (citing studies that show "prison construction correlates with lower increases in employment, retail sales, household wages, housing units, and home values as compared to towns without prisons").

[23] Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 9-10 (2022) (noting use of alternatives to detention in United States is as old as immigration detention itself, citing examples dating back to 1800s).

[24] WILSHER, *supra* note 5, at 19 (noting that lack of space for immigrant detention led to releases to mission homes); Lee, *supra* note 2, at 587-88 (describing mission homes' nonpunitive character, as they were "boardinghouses located in dense urban communities that offered residents shelter, food, clothing, transportation, and social services").

[25] *See* Torrey, *supra* note 15, at 885-86 (describing how, for European-intending immigrants, earliest days of federal immigration law saw only two grounds of exclusion: likelihood to become public charges and health-based grounds).

[26] *See* WILSHER, *supra* note 5, at 13-17 (detailing early solutions used in 1880s to remove detained intending immigrants from ships that brought them); Holper, *supra* note 2, at 1000-02 (describing administrative law scholars' justifications for exercise of discretion, one of which is when rigid rules create inequities that can be circumvented for humanitarian purposes, and classifying release on parole despite laws mandating detention as an example); Lee, *supra* note 2, at 641 (explaining the "how" of exclusion "was in tension with the desire to spare immigrants from dangerous conditions onboard their ships").

[27] *See* Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892); *see also* Lee, *supra* note 2, at 608-09 (describing mission homes as "livable places—not jails").

[28] Holper, *supra* note 23, at 13-14 (describing three sub-programs ICE established in 2004 as technological alternatives to detention); Lee, *supra* note 2, at 616-28 (describing ICE's many options for surveillance through modern technologies in addition to their Intensive Supervision Appearance Program ("ISAP"), first operationalized in 2004).

[29] *See id.* at 615-16 (noting early immigration enforcement was nearly impossible due to lack of resources, and comparing these conditions to today when agents utilize modern technologies for immigration enforcement).

alternatives to detention, this program has facilitated the surveillance and monitoring of those whom ICE never would have detained in the first place—earning it the title "alternatives to release."[30] But even those who ask immigration judges ("IJs") to consider alternatives to detention in bond hearings often have their requests to be put in an electronic cage rejected[31] because our system has come to assume that a physical jail should be the default solution.[32]

As a final observation of immigration detention's history, the use of "mandatory detention" was not always as expansive as it is today. Mandatory detention means detention without the ability to argue that, based on one's individual facts and circumstances, one is not a danger or flight risk.[33] This process would normally take place before an immigration judge in what is called a "bond hearing," giving someone the option to be out of jail while they fight their deportation case.[34] While there are many flaws with bond hearings,[35] this Essay focuses on those who have no such right to a hearing because they are in mandatory

[30] Holper, *supra* note 23, at 27-28 (discussing increase in ICE's presence in foreign national communities following use of electronic monitoring as alternative to detention); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 56 (2010) (noting inappropriate implementation of detention alternatives threatens creating regime of "alternatives to release").

[31] Holper, *supra* note 23, at 15-17 (describing judicial discretion over ICE detention decisions and general reluctance among courts to impose orders on ICE agents). Courts have not agreed on whether due process requires an immigration judge to consider alternatives to detention. *See, e.g.*, O.F.C. v. Decker, No. 22 Civ. 2255, 2022 WL 4448728, at *10 (S.D.N.Y. Sept. 12, 2022) ("[C]ourts in this District overwhelmingly agree that IJs must consider these two factors—alternatives to imprisonment and ability to pay—when determining bond for a detained immigrant."). *But see* Martinez v. Clark, 124 F.4th 775, 786 (9th Cir. 2024) ("Due process does not require immigration courts to consider conditional release when determining whether to continue to detain an alien under § 1226(c) as a danger to the community.").

[32] CÉSAR CUAUHTÉMOC GARCIA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 149 (2019) ("Treating ICE's alternatives to detention as a step up is only possible after accepting the agency's premise that everyone deserves confinement.").

[33] *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 604 (2010) (noting mandatory detention "prioritizes abstract legal categories over case-specific facts, [and] does a poor job of assessing whether a person is actually a flight or security risk"); Legomsky, *supra* note 3, at 543 ("All the theories of mandatory detention necessarily assume that certain cases have enough in common to make rough generalizations possible.").

[34] *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 169 (2016) (describing immigration bond hearings, the colloquial term for custody redetermination hearings).

[35] *See, e.g.*, Holper, *supra* note 2, at 972-82 (critiquing immigration bond hearings as "implicit bias minefields," in which judges make dangerousness determinations against persons society already has deemed dangerous, with detainee bearing burden to disprove dangerousness, and as structure in which non-independent adjudicators make quick decisions without opportunity for deliberation); Gilman, *supra* note 34, at 171-202 (critiquing bond process for starting with presumption of detention, which insufficiently considers whether detention is needed, and relies too heavily on money bonds).

detention throughout their removal proceedings. There are two kinds of mandatory detention: status-based and crime-based.

Status-based mandatory detention was first for those stopped at a port of entry. Known by the pejorative term "arriving aliens," the law says they "shall be detained"; immigration judges cannot decide bond for them.[36] The law mandating their detention is old—it has gone through many permutations—but the mandatory detention of those seeking admission to the United States dates back to the late 1800s.[37] The Supreme Court blessed such detention in one infamous 1953 case, *Shaughnessy v. United States ex rel. Mezei*,[38] holding that people stopped at the border have no due process rights, which, in Mezei's case, was extended to mean that he had no due process right to be free from indefinite detention.[39] For many years, despite its mandatory language, paroling migrants

[36] 8 U.S.C. § 1225(b)(1)(B)(ii) (stating "arriving aliens" with credible fears of persecution "shall be detained" for further processing of asylum applications); 8 C.F.R. § 1003.19(h)(2)(i)(B) (2025) (immigration judges do not have jurisdiction to decide bond for "arriving alien" in removal proceedings); 8 C.F.R. § 1001.1(q) (2025) (defining "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport").

[37] WILSHER, *supra* note 5, at 13 (describing Immigration Act 1891 as first to mention immigration detention and mandated detention during inspection); *id.* at 15 (describing Immigration Act 1893, which was first to place duty upon inspectors to detain those subject to further inquiry about whether they were permitted to land).

[38] 345 U.S. 206 (1953).

[39] *Id.* at 210-16 (classifying returning lawful permanent resident who was ordered removed as an "entering alien" who is not entitled to due process right to be free from indefinite detention when he was stateless and thus could not be sent to any country after he was ordered excluded); *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950) (holding that noncitizen seeking entry to United States had no constitutional right to admission and that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); Ekiu v. United States, 142 U.S. 651, 660 (1892) (reasoning that for noncitizens seeking entry into United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"). Notably, the Sixth Circuit Court of Appeals has distinguished *Mezei* on its facts and opined that the Supreme Court's due process analysis for civil detention has evolved since *Mezei* was decided in 1953. *See* Rosales-Garcia v. Holland, 322 F.3d 386, 413-14 (6th Cir. 2003) (distinguishing *Mezei* from case of paroled Cuban who was ordered excluded by stating "the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security" and because "the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns"). District courts also have distinguished *Mezei* on its facts. *See, e.g.*, Kouadio v. Decker, 352 F. Supp. 3d 235, 239 (S.D.N.Y. 2018) ("*Mezei* was decided in the interest of national security, against a petition whose detention was authorized under 'emergency regulations promulgated pursuant to the Passport Act.'" (quoting *Shaughnessy*, 345 U.S. at 214-15)). Furthermore, district courts have recognized the "rising sea of

into the United States was accompanied by paroling out of immigration detention.[40] That changed in the 1980s with the new Refugee Act, giving many more arriving migrants claims to relief from being summarily excluded from the United States. Professor Jonathan Simon has noted that many who reached the United States with these asylum claims under the 1980 Refugee Act were racialized as nonwhite.[41] As a result, the immigration authorities decided to use detention as a deterrent.[42] Status-based mandatory detention increased to deter future migrants, many of whom were asylum-seekers; the legal fiction permitting it remained throughout the years that it lay dormant.[43]

If the border remained fixed, status-based mandatory detention would have stayed there. But the problem is that the border has crept inward.[44] Status-based mandatory detention has metastasized with the combination of five events. The first was the 2004 expansion of expedited removal from those stopped at ports of entry to those stopped within one hundred miles of a land border and who have spent less than fourteen days in the United States.[45] Expedited removal, created in 1996, allows an immigration officer to deport a person without seeing a judge in a removal hearing.[46] Noncitizens who express a fear of return are

case law [which] acknowledges the historic development of due process jurisprudence in this field" and that "arriving aliens detained pursuant to § 1225(b) enjoy the same due process right afforded to many other classes of detained aliens." Ahad v. Lowe, 235 F. Supp. 3d 676, 687 (M.D. Pa. 2017) (listing case law which "consistently determined that detained aliens are entitled to some essential measure of due process in the form of a bond hearing once their detention reaches an unreasonable duration").

[40] *See* Lee, *supra* note 2, at 595-96 (describing how *Knauff* and *Mezei* cases presented a public relations problem, which led to closing of Ellis Island and announcement by Attorney General Brownell in 1954 that immigration detention would be rarely used).

[41] Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582-84 (1998) (noting 1980s asylum seekers from Central America and Caribbean were racialized as criminals despite qualifying under Refugee Act).

[42] *Id.* (explaining how detention policy was adopted to deter asylum seekers after Refugee Act limited quick removals).

[43] *See* Lee, *supra* note 2, at 593-99 (explaining how legal fiction of nonentry allowed detention to be revived as deterrent after years of being used to justify parole and avoid confinement).

[44] *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 174 (2007) (describing border as "detached from its traditional location at the perimeter of the country's edges . . . by relying on the legal fiction of removing unwanted migrants 'at the border' when they are already firmly within its perimeter").

[45] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879 (Aug. 3, 2004) ("[T]his notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any United States international land border.").

[46] *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 302(b)(1)(B), 110 Stat. 3009-5046, 5079-81 (1996) ("[I]f the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review."); ACLU, AMERICAN

supposed to be referred to an asylum officer for a credible fear interview[47] and, if they pass, they may explain their fear of persecution and torture to an immigration judge in removal proceedings.[48] The second contribution to expanding status-based mandatory detention was Attorney General Barr's 2019 *In re M-S-*[49] opinion to mandatorily detain those in this expanded category of expedited removal once they passed a credible fear interview and were seeking relief from persecution and torture in removal proceedings.[50] The third was the Supreme

EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 4 (2014), https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom [https://perma.cc/B5LY-SC8K] ("Asylum seekers, longtime residents, and others with rights to be in the United States can be deported without a hearing in a matter of minutes.").

[47] Two different studies by the United States Commission on International Religious Freedom ("USCIRF"), spaced a decade apart, demonstrated that officers who encountered noncitizens at ports of entry and were supposed to inquire about fear of return were not following the required procedures. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME I: FINDINGS & RECOMMENDATIONS 3, 5, 9 (2005) [hereinafter 2005 USCIRF Study], https://bit.ly/1GkjQfK [https://perma.cc/565Q-RGFB] (detailing authors' observation of inspections at seven major points of entry and finding that asylum-seekers were illegally turned back, which led them to recommend implementation and monitoring of quality assurance procedures to ensure that asylum-seekers are not turned away in error); *see also* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 17 (2016) [hereinafter 2016 USCIRF Study], https://bit.ly/2uydMQ8 [https://perma.cc/UJ7R-MT6G] (conducting follow-up study of expedited removal procedures and determining "that most recommendations from the 2005 Study remain unimplemented"). In 2024, the required procedures became less protective of asylum-seekers in this process. The Department of Homeland Security ("DHS") instituted regulations that require, in certain circumstances, noncitizens to affirmatively manifest their fear instead of responding to questions about their fear, which DHS believed were overly suggestive. *See* Securing the Border, 89 Fed. Reg. 81156, 81160 (Oct. 7, 2024) (claiming "shift to a manifestation standard has, as intended, reduced the gap between high rates of referrals and screen-ins and historic ultimate grant rates as well as increased processing efficiency for DHS"). Advocates have critiqued this new "shout test" for its failure to ensure that valid asylum-seekers have the opportunity to present their fears of persecution in order to gain access to the asylum process. *See Elimination of Fear Screening Referral Safeguards in Expedited Removal*, HUM. RTS. FIRST (Jan. 30, 2024), https://humanrightsfirst.org/library/elimination-of-fear-screening-referral-safeguards-in-expedited-removal/ [https://perma.cc/ 63KF-HNT5].

[48] 8 U.S.C. § 1225(b)(1)(A)-(B) (stating that noncitizens who express fear of return must be referred to asylum officer for credible fear interview and, if found credible, may pursue asylum before immigration judge); 8 C.F.R. § 208.30(b) (2025) (noting that removal must pause when fear is expressed, triggering referral to asylum officer for credible fear interview, with possible referral to full removal proceedings).

[49] 27 I&N Dec. 509 (A.G. Apr. 16, 2019) (interim decision).

[50] *Id.* at 518-19 (reversing *In re* X-K-, 23 I&N Dec. 731 (B.I.A. May 4, 2005), where Board interpreted relevant law to permit noncitizens in expanded expedited removal category to be released on bond once they passed credible fear interview and were in removal proceedings). The Attorney General's ability to convert from the nation's top prosecutor to the nation's top immigration adjudicator pursuant to 8 C.F.R. § 1003.1(h)(1) (2025) has been a subject of

Court's 2020 opinion in *Department of Homeland Security v. Thuraissigiam*,[51] a decision that held such noncitizens have no due process rights in the expedited removal process,[52] which the government interprets to mean they have no due process right to a bond hearing.[53]

Fourth, the Trump Administration has again expanded expedited removal to include those who are caught anywhere inside the United States and have been here less than two years.[54] Noncitizens who fear being swept up and deported

much critique. *See, e.g.*, Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1090-95 (2021) (discussing how attorney general decisions have undermined immigration detainees' liberty interests by substituting general detention rule for individual adjudication of whether detainee should be released on bond); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 153 (2017) (arguing that attorney general review authority has "interrupted the development of immigration law by the judiciary, altered legislative standards, and restructured the agency's own application of immigration policy, often with partisan interests in mind"). *But see* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 896 (2016) (defending regulation that permits attorney general to write immigration decisions as "robust tool for the advancement of executive branch immigration policy").

[51] 140 S. Ct. 1959 (2020).

[52] *Id.* at 1981-82 (rejecting argument that physical presence grants due process protections).

[53] As a result of *Thuraissigiam*, the Supreme Court vacated the Ninth Circuit's holding in *Padilla v. Immigration and Customs Enforcement*, which had held that recently-entered noncitizens had due process rights because they had made an entry into the United States. *See* Immigr. & Customs Enf't v. Padilla, 141 S. Ct. 1041, 1041-42, 1146-47 (2021); Padilla v. Immigr. & Customs Enf't, 41 F.4th 1194, 1195 (9th Cir. 2022); *see also* Lee, *supra* note 2, at 602-03 (detailing *Padilla* litigation). *Thuraissigiam* thus extended the "entry fiction" to a person who had made an entry, under prior understanding of this legal distinction. *See* Lee, *supra* note 2, at 573 ("[I]n *Thuraissigiam*, a majority of the Supreme Court extended entry fiction—at least with regard to rights to admission (not detention)—to an individual who technically entered under prior understandings."). The Court's *Thuraissigiam* opinion did not address the issue of the due process right to a bond hearing. 140 S. Ct. at 1981-82 (holding that recent unlawful entrants lack due process rights beyond those afforded by statute, and limiting decision to expedited removal context); Lee, *supra* note 2, at 573 (noting *Thuraissigiam* decision was limited to admissions decisions rather than detention decisions). On remand from the Ninth Circuit, the government argued that the Supreme Court's *Thuraissigiam* opinion compelled the district court to reject the plaintiffs' arguments that they had a due process right to bond hearings. Padilla v. Immigr. & Customs Enf't, 704 F. Supp. 3d 1163, 1170 (W.D. Wash. 2023). The district court disagreed, holding that *Thuraissigiam* does not bar their arguments that they have a due process right to bond hearings because the Supreme Court only analyzed due process rights in the expedited removal process and did not address the due process right to be free from detention pending those proceedings. *Id.* at 1171-72. The government has appealed this decision to the Ninth Circuit. *See* Padilla v. Immigr. & Customs Enf't, No. 2:18-cv-00928 (W.D. Wash.), *appeal pending*, No. 24-2801 (9th Cir.) (argument in May 2025).

[54] Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025) (rescinding previous notice that limited exercise of expedited removal procedures). Litigation immediately followed, seeking to block this expansion of expedited removal and arguing that the

by these judgeless procedures must go about their daily routines armed with proof that their time in the United States has surpassed the two-year mark.[55] Technically, they will have the opportunity to see a judge if they pass a credible fear interview, but the mechanics of asking about that fear and referring someone for that interview are up to the ICE officer who encounters them.[56] Because they are in expedited removal, *In re M-S-* dictates that they, too, will be in mandatory detention upon passing the credible fear interview.[57]

Fifth, the Board has further expanded status-based mandatory detention to include those who were never in expedited removal proceedings. In a 2025 decision,[58] the Board decided that a noncitizen who entered without inspection and

policy violates due process, as well as statutory rights under the Immigration and Nationality Act and rights under the Administrative Procedure Act ("APA"). *See* Complaint, Make the Rd. N.Y.C. v. Huffman, 1:25-cv-00190 (D.D.C. Jan. 22, 2025) [hereinafter Make the Road Complaint] (alleging violations of Immigration and Nationality Act, the APA, and due process). It should be noted that during Trump's first presidency, litigation followed an attempt to expand expedited removal in the same way. At that time, the District Court for the District of Columbia preliminarily enjoined the rule, finding that the Trump Administration had not followed the appropriate procedures under the APA. Make the Rd. N.Y.C. v. McAleenan, 405 F. Supp. 3d 1, 11 (D.D.C. 2019) (granting plaintiffs' motion for preliminary injunction and preliminarily enjoining DHS from expedited removal expansion). The D.C. Circuit vacated the preliminary injunction, reversing the APA claims. *See* Make the Rd. N.Y.C. v. Wolf, 962 F.3d 612, 618 (D.C. Cir. 2020). Because neither court addressed the due process and statutory claims prior to President Biden's vacatur of the policy expanding expedited removal, the court never reached the merits of these claims. *See* Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (Mar. 21, 2022) ("This Notice rescinds the July 23, 2019 Notice, Designating Aliens for Expedited Removal, which expanded to the maximum extent permitted by the Immigration and Nationality Act (INA) the application of expedited removal procedures to noncitizens not already covered by previous designations."); Minute Order, Make the Rd. N.Y.C. v. McAleenan, 1:19-cv-02369 (D.D.C. Feb. 8, 2021) (staying consideration of renewed preliminary injunction challenging 2019 expansion of expedited removal).

[55] *See Expanded Expedited Removal: What It Means and What to Do*, NAT'L IMMIGR. F., https://web.archive.org/web/ 20250319031839/ https://immigrationforum.org/article/ expanded-expedited-removal-what-it-means-and-what-to-do/ ("[P]resenting documentation to verify your citizenship, legal status, or to demonstrate two years of presence in the United States, as discussed below, could lead to a quicker release.").

[56] Make the Road Complaint, *supra* note 54, ¶ 62 ("[M]ultiple reports have documented that immigration enforcement officers routinely make factual errors in completing the forms required for expedited removal. Although the officers are required to take sworn statements from the individual, the sworn statements that are recorded in the forms are 'often inaccurate and nearly always unverifiable.'") (quoting 2005 USCIRF Study, *supra* note 47, at 53, 55, 74 and 2016 USCIRF Study, *supra* note 47, at 21).

[57] *See In re* M-S-, 27 I&N Dec. 509, 518-19 (A.G. Apr. 16, 2019) (interim decision). ("[A]ll aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond.").

[58] *In re* Q. Li, 29 I&N Dec. 66 (B.I.A. May 15, 2025) (interpreting 8 U.S.C. § 1225(b) mandatory detention provisions to apply to noncitizen who was caught just north of the southern border and placed in regular removal proceedings after illegally entering the United States).

who was in regular removal proceedings was subject to status-based mandatory detention.[59] Gone is the need to first place someone in expedited removal proceedings to invoke mandatory detention.[60] Gone is the need to limit status-based mandatory detention to those who are stopped at the port of entry.[61] All of these five events have coalesced to ensure that an increasingly large number of noncitizens who entered without inspection are now subject to status-based mandatory detention.[62]

In addition to status-based mandatory detention, there is crime-based mandatory detention. This is for those who are removable because of a crime-related ground of inadmissibility or deportability.[63] Crime-based mandatory detention began in 1988, and was limited to those convicted of the brand-new category of immigration law offense, "aggravated felony."[64] At the time, the aggravated

[59] *Id.* at 67-69. A legal challenge is underway to a similarly-expansive reading of the statute governing status-based mandatory detention by the Tacoma, Washington immigration judges; the district court has granted a preliminary injunction to prevent the judges' interpretation that applies 8 U.S.C. § 1225(b) to all persons who entered without inspection. *See* Vazquez v. Bostock, No. 3:25-cv-05240, 2025 U.S. Dist. LEXIS 78395, at *3-4, *11-12, *36-47 (W.D. Wash. Apr. 24, 2025).

[60] *See id.* (interpreting 8 U.S.C. § 1225(b)'s mandatory detention provisions to apply to noncitizen whom the government did not place in expedited removal).

[61] *See In re M-S-*, 27 I&N Dec. at 518-19. In *In re M-S-*, the Attorney General considered the regulation listing who is not eligible for bond, 8 C.F.R. § 1003.19(h)(2)(i), which only lists "arriving aliens," as defined by 8 C.F.R. § 1001.1(q). *In re M-S-*, 27 I&N Dec. at 518; 8 C.F.R. § 1001.1(q) (defining "arriving alien" as "applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport"). The Attorney General stated that this bond regulation "does not provide an exhaustive catalogue of the classes of aliens who are ineligible for bond." 27 I&N Dec. at 518; *see also In re Q. Li*, 29 I&N Dec. at 68 (reasoning that 8 U.S.C. § 1225(b) applies even if the person is not an "arriving alien" under regulatory definition at 8 C.F.R. § 1001.1(q)).

[62] The Attorney General and Board have clarified that such noncitizens may still seek parole from ICE. *See In re Q. Li*, 29 I&N Dec. at 69; *In re M-S-*, 27 I&N Dec. at 519. However, as the district court in *Padilla* opined, the ICE parole process is "not an adequate substitute for a bail hearing to test the legitimate need for continued detention" because it does not afford an in-person adversarial hearing before a neutral decisionmaker, the ICE officer need not make any factual findings or provide their reasoning, and there is no right to administratively appeal that decision. 704 F. Supp. 3d 1163, 1174 (W.D. Wash. 2023).

[63] *See* 8 U.S.C. § 1226(c) (2025) (describing circumstances under which Attorney General may release or take criminal aliens into custody).

[64] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (making new classification of deportable offenses related to manufacturing, distribution, and use of drugs); Margaret H. Taylor, Demore v. Kim*:* *Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 350 (David A. Martin & Peter H. Schuck eds., 2005) ("Initially, mandatory detention was linked to the statutory definition of an aggravated felony.").

felony category included only murder, drug-trafficking, and firearms.[65] Congress then amended the "aggravated felony" definition in 1994 to incorporate a broader range of offenses, which in turn created more crime-based mandatory detainees.[66] In 1996, Congress passed laws authorizing mandatory detention for an expanded list of those deportable or inadmissible for many crimes—not just the now-bloated "aggravated felony" category—and allowed no exceptions for lawful permanent residents or anyone else.[67] In 2003, the Supreme Court in *Demore v. Kim*[68] held that this crime-based mandatory detention statute did not violate detainees' due process rights,[69] even the rights of lawful permanent residents. The Court reasoned that Congress had carefully done its job in its legislative findings that these noncitizens who were removable for crimes were presumptively dangerous and presumptively a flight risk.[70] The Court also noted that the government presented statistics about how mandatory detention was actually quite brief.[71] Further attempts to limit the reach of the crime-based mandatory detention statute lost at the Supreme Court.[72]

[65] Taylor, *supra* note 64, at 350 ("The Anti-Drug Abuse Act of 1988 created this new category of deportable offenses, which originally encompassed only murder, drug-trafficking, or trafficking in firearms.").

[66] *Id.* (citing Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321-22). Because courts held that the prior version of the mandatory detention statute violated the Due Process Clause for those who were lawful permanent residents, Congress amended the statute so that mandatory detention did not apply to those lawfully admitted to the United States. *See* Donald Kerwin, *Detention of Newcomers: Constitutional Standards and New Legislation (Part One)*, 96-11 IMMIGR. BRIEFINGS 1, 7-8 (1996); Taylor, *supra* note 64, at 350 (citing Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 and Miscellaneous and Technical Immigration and Naturalization Amendments Act, Pub. L. No. 102-232, § 306, 105 Stat. 1733, 1751 (1991)).

[67] Taylor, *supra* note 64, at 352-53 (citing Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (1996) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 303(a), 110 Stat. 3009, 3009-585 (1996)).

[68] 538 U.S. 510 (2003).

[69] *Id.* at 522-31 (noting Congress may make rules as to noncitizens that would be unacceptable if applied to citizens in exercise of its broad power over naturalization and immigration).

[70] *Id.* at 526 (finding that, as a result of legislative scheme, individualized findings of dangerousness are not required for detention).

[71] *Id.* at 521, 528-29 (upholding § 1226(c) detention based on statistics that most removal proceedings conclude within months, with median duration of thirty days); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.").

[72] *See, e.g.*, Nielsen v. Preap, 139 S. Ct. 954, 963-69 (2019) (rejecting reading of crime-based mandatory detention statute, 8 U.S.C. § 1226(c), which permits mandatory detention only if detainee is released immediately from state custody into ICE custody); *Jennings*, 138 S. Ct. at 846-48 (rejecting reading of crime-based mandatory detention statute, 8 U.S.C. § 1226(c), to permit periodic bond hearings when detention becomes prolonged).

The most recent expansion of crime-based mandatory detention is the Laken Riley Act (the "LRA"), enacted in January 2025.[73] The LRA expands mandatory detention by severing it from any requirement of conviction or proof of criminal conduct through the justice system. Under the LRA, noncitizens present without inspection are now subject to mandatory detention if they are arrested for or charged with burglary, theft, larceny, shoplifting, assault on a law enforcement officer, or any crime that results in death or serious bodily injury.[74] This law presumes dangerousness for someone based on a mere arrest or charge.[75] The Supreme Court in *Demore* allowed Congress to presume dangerousness because of a criminal conviction;[76] the detainee whose case was at issue had gone through "the full procedural protections our criminal justice system offers."[77] One can see the criminal justice process (however paltry) as a substitute for the procedural protection of an individualized bond hearing.[78] But here, the criminal justice process has just started, involving only an arrest and/or charge, with no completed process to establish guilt.[79]

II. LESSONS FROM THE PAST INFORMING THE FUTURE

How do these lessons from the past inform the future? First, follow the money. Those who wish to reduce and ultimately eliminate the use of immigration detention can seek to end the profits that corporations make from putting people in cages. Without the construction of new detention beds, and with the

[73] Pub. L. No. 119-1, 139 Stat. 3 (2025).

[74] 8 U.S.C. § 1226(c)(1)(E) (requiring Attorney General to detain any noncitizen who is inadmissible due to lack of status or proper visa and who "is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person").

[75] *See* discussion *supra* note 33 (explaining how mandatory detention eliminates ability to assess whether individual is dangerous or flight risk).

[76] *Demore*, 538 U.S. at 513, 518-19 (explaining that detainee who brought challenge did not dispute that he was convicted of a mandatory detention crime, and that Congress's decision to mandate detention of convicted noncitizens was justified by concerns they would commit further crimes or evade removal if released).

[77] *Id.* at 513.

[78] *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 35 (1st Cir. 2021) (explaining mandatory detention "specifically applies to a class of noncitizens who had already been convicted (beyond a reasonable doubt) of committing certain serious crimes"); Castro-Almonte v. Searls, 22-cv-861, 2023 U.S. Dist. LEXIS 23070, at *12-13 (W.D.N.Y. Feb. 9, 2023) ("*Demore* also highlights the 'process' that has been built into a mandatory detention under Section 1226(c)—for example, that Section 1226(c) applies to detainees whose convictions were generally 'obtained following the full procedural protections [the] criminal justice system offers.'" (quoting *Demore*, 538 U.S. at 513)).

[79] *See* 8 U.S.C. § 1226(c)(1)(E).

removal of existing ones, ICE cannot fill those beds.[80] Cutting off the construction of new immigration detention facilities, alongside advocacy to end local jails' contracts with ICE, remains a key goal of abolishing immigration detention.[81] Advocates also encourage funding to help communities where detention facilities have provided jobs, helping them transition to other forms of employment.[82]

Second, propose alternatives to detention as a middle ground between absolute freedom and a cage.[83] Those who wish to advocate for release to judges or ICE officers must first confront the system's presumption that detention is the only way to meet the government's goals of protecting the community and ensuring the noncitizen's return to court.[84] A counter to this presumption is to present a condition of release, whereby the detained noncitizen agrees to some limits on their freedom.[85] The government's goal of ensuring that a noncitizen returns to court and attends any future appointments with ICE is easily met through the use of alternatives to detention,[86] which can ensure that ICE always knows where a person is located.[87] Such alternatives can alleviate flight risk

[80] *See* IMMIGRANT LEGAL RES. CTR., CERES POL'Y RSCH. & DET. WATCH NETWORK, IF YOU BUILD IT, ICE WILL FILL IT: THE LINK BETWEEN DETENTION CAPACITY AND ICE ARRESTS 4 (Sept. 2022), https://www.detentionwatchnetwork.org /pressroom/reports [https:// perma.cc /52JV-ECE4] (demonstrating link between detention capacity and ICE arrests).

[81] *Id.* at 8-9.

[82] DET. WATCH NETWORK, COMMUNITIES NOT CAGES: A JUST TRANSITION FROM IMMIGRATION DETENTION ECONOMIES 27 (2021), https://www.detentionwatchnetwork.org/pressroom/reports [https://perma.cc/X8WJ-V3Q3] (recommending administration develop Just Transition Economic Development Fund to "aid communities transitioning away from immigration detention economies," providing "just pathways for workers to transition to other jobs").

[83] Holper, *supra* note 23, at 47-48 (describing how electronic monitoring has come to reside in "middle ground" between freedom from detention for immigration detainees and the strongest version of plenary power, which would reject that any noncitizen has right to be free in United States while fighting against deportation).

[84] GARCIA HERNÁNDEZ, *supra* note 32, at 149.

[85] Holper, *supra* note 23, at 47-49 (describing Justice Breyer's proposed doctrinal middle ground between imprisonment and supervision, "under release conditions that may not be violated" (quoting Zadvydas v. Davis, 533 U.S. 678, 696 (2001)); Fatma Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155-64 (2017) (discussing several alternatives to detention, including release on own recognizance, parole, bond, supervised release, and electronic monitoring).

[86] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30 (2014) (providing ICE's statistics showing that 99% of persons enrolled in full-service ISAP program appeared for future hearings, with 95% appearing for their final removal hearings).

[87] Holper, *supra* note 23, at 31-42 (discussing how electronic monitoring tracks individual's location, helping government achieve its goals of preventing flight risk and protecting community).

concerns and also ensure community safety.[88] Examples of conditions on release are: prohibiting a noncitizen from going within a certain distance from a victim's address or place of work, using breathalyzer technology to ensure that their blood alcohol level is not too high prior to starting the car, and working with a community-based organization that provides supportive services and can track attendance.[89] These alternatives assume everyone must be surveilled by some responsible other, but they are often preferable to a cage.[90] In the federal pretrial detention scheme, courts agree to such alternatives because they can reasonably assure the safety of the community.[91] Immigration advocates have learned that they must ask for specific conditions of release before the immigration judge in a bond hearing; otherwise, they cannot later complain in a habeas corpus proceeding that the judge failed to consider such conditions.[92]

Third, prepare to go to federal court. Those who wish to contain the expansion of mandatory detention should prepare their due process arguments, among other legal challenges. It is important to recall that the Supreme Court has held that the Due Process Clause of the Fifth Amendment applies to all "persons," regardless of whether they are citizens.[93] The Court has also applied civil

[88] *Id.* (explaining how electronic monitoring and other alternatives effectively protect community in several ways, including ensuring attendance at rehabilitation programs or enforcing no-contact conditions to safeguard individuals at risk).

[89] *Id.* at 34 (listing several conditions of release that can help government meet its goals).

[90] *Id.* at 60-61 ("With such monitoring, the government can meet its goals of immigration detention, but those subject to these new virtual walls are no less free.").

[91] *Id.* at 33-34 (explaining how alternatives promote community safety); *see also* United States v. Patriarca, 948 F.2d 789, 792-95 (1st Cir. 1991) (upholding pretrial release for mafia boss on conditions of release including house arrest with video and electronic monitoring); United States v. Debrum, No. 15-10292, 2015 WL 6134359, at *1 (D. Mass. Oct. 19, 2015) (defendant charged with "enticing or coercing a minor to engage in sexual activity" and "enticing or coercing a minor to engage in sexually explicit conduct in order to produce images of that conduct" released pretrial with restrictions on access to wireless network).

[92] In *Brito v. Garland*, the First Circuit did not affirm the district court's holdings with respect to requiring immigration judges to consider alternatives to detention and a detainee's ability to pay. 22 F.4th 240, 252-56 (1st Cir. 2021). The First Circuit did not opine on the merits of these constitutional claims, but rather reversed because petitioners had not exhausted the alternatives to detention claim before the IJ, and the named plaintiffs did not have standing to address the ability to pay claim. *Id.* The First Circuit noted, "it is easy to see how conditions of release might shape an IJ's determination as to whether a noncitizen poses a flight risk or danger to the community." *Id.* at 254; *see also* Massingue v. Streeter, No. 19-cv-30159, 2020 WL 1866255, at *6 (D. Mass. Apr. 14, 2020) (refusing to consider whether immigration judge failed to consider home detention as condition of release because noncitizen failed to present it at bond hearing).

[93] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[F]or the Due Process Clause applied to all 'persons' within the United States . . . whether their presence here is lawful, unlawful, temporary, or permanent."); *see also* Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025) (stating "'[i]t is well established that the Fifth Amendment entitles aliens to due process of law' in the context of removal proceedings" in deciding that noncitizens can challenge their summary removal under the Alien Enemies Act (quoting Reno v. Flores, 507 U.S. 292, 306 (1993))).

detention case law, with its presumption of liberty, to the question of indefinite immigration detention.[94] While the Court upheld crime-based mandatory detention against a due process challenge in its 2003 *Demore* opinion, that was because the Court assumed that Congress had carefully done its work and found that noncitizens convicted of certain crimes were presumptively dangerous or flight risks.[95] The Court allowed the criminal justice system's processes leading up to the conviction to substitute for the process of a bond hearing.[96] The Court also erroneously assumed such mandatory detention lengths were brief.[97] With the Laken Riley Act, Congress made no such careful findings, given the urgency to pass the law and present it to President Trump for signing at the outset of his presidency in January 2025.[98] Mandatory detention lengths have proven to be anything but brief.[99] And the idea that an arrest for shoplifting creates a

[94] Zadvydas, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.") (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); *id.* ("[T]his Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive 'circumstances,' . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" (first quoting United States v. Salerno, 481 U.S. 739, 746 (1987); then quoting *Foucha*, 504 U.S. at 80; and the quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997))).

[95] *See* Demore v. Kim, 538 U.S. 510, 513 (2003) (holding that "Congress, justifiably concerned" that noncitizens "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"); Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 83-89 (2016) (describing Congress' creation of "presumptively unbailable" detainees based on criminal convictions). Margaret Taylor describes how the Court in *Demore* painted a much more careful picture of the legislative findings than what actually occurred prior to the passage of 8 U.S.C. § 1226(c). Taylor, *supra* note 64, at 348-54 (detailing legislative history leading up to passage of 8 U.S.C. § 1226(c) and stating, "[i]n sum, Congress did not enact the statute that mandated detention without bond for Hyung Joon Kim and other non-citizen offenders with anything close to the careful consideration depicted in the *Demore* decision").

[96] *Demore*, 538 U.S. at 513, 524-25.

[97] *Id.* at 528-29 (differentiating *Demore* from *Zadvydas* by explaining that "detention here is of a much shorter duration," with definite termination point and often lasting less than ninety days); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.").

[98] *See* Alexander Bolten, *Senate Democrats Boil Over Laken Riley Missteps*, HILL (Jan. 21, 2025, 6:00 AM), https://thehill.com/homenews/senate/5096575-senate-democrats-frustrated-laken-riley-act/ [https://perma.cc/JFQ2-CFAF] ("Democrats facing competitive reelections in 2026 and who represent swing states, however, were eager to vote to advance the bill . . . which is likely to pass the House and make it to President Trump's desk.").

[99] *See, e.g.*, Reid v. Donelan, 390 F. Supp. 3d 201, 211-12 (D. Mass. 2019) (reporting statistics for class of immigration detainees subject to mandatory detention, which shows median length of detention at 363 days); Freya Jamison, *When Liberty is the Exception: The*

presumption of danger and a flight risk sufficient to substitute for the individualized process provided in a bond hearing flies in the face of the presumption of innocence.[100]

Given that those in expanded expedited removal and many other noncitizens who have entered the United States are the newest targets of status-based mandatory detention,[101] it will become important to distinguish the Supreme Court's 2020 decision in *Thuraissigiam*. The case was not about the due process right to a bond hearing.[102] Just because those who are stopped just after crossing the border have no due process rights in removal proceedings does not mean that someone arrested anywhere within the United States after up to two years of presence also has no due process protections.[103] This stretches the border entirely too far. There are also important Fourth Amendment protections for those subject to these "shadow deportations," as they are seized by government officials with no authorization by a neutral judge[104]—not even an immigration judge, whose neutrality is questionable.[105]

Scattered Right to Bond Hearings in Prolonged Immigration Detention, 5 COLUM. HUM. RTS. L. REV. ONLINE 146, 149, 156-69 (2021) (analyzing 249 habeas petitions decided under various tests to determine whether mandatory detention was unreasonably prolonged in federal district courts during one decade and showing that current tests produce lengthy adjudications and disparate outcomes in similar cases); *id.* at 165 (concluding from data that "median length of detention for the subset of petitioners who were denied a bond hearing was 468 days" and that "50% of all denials occurred between 352.5 and 602 days of detention").

[100] *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

[101] *See In re* Q. Li, 29 I&N Dec. 66, 67-69 (B.I.A May 15, 2025) (concluding noncitizen who entered without inspection and was placed in regular removal proceedings was ineligible for bond); *In re* M-S-, 27 I&N Dec. 509, 518-19 (A.G. Apr. 16, 2019) (interim decision) (concluding that all noncitizens transferred from expedited to full proceedings—after establishing credible fear of persecution or torture—are ineligible for bond).

[102] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981-82 (2020) (ruling on expedited removal procedures and not considering request for bond hearing); *see also* Padilla v. ICE, 704 F. Supp. 3d 1163, 1171-72 (W.D. Wash. 2023) (reasoning that the *Thuraissigiam* Court did not decide the due process right to a bond hearing pending removal proceedings).

[103] *See* David Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 689-90 (2000) (acknowledging reality where those not apprehended at border and who have presence in United States have more due process rights than those stopped at the border).

[104] Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 940, 946-55 (2018) (explaining that reasonableness of each detainee's seizure is determined by Department of Homeland Security supervisor, not neutral immigration judge—implicating several Fourth Amendment concerns).

[105] *See* Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN. L. REV. 1275, 1278-79 (2020).

CONCLUSION

To conclude, there is work ahead for both detainees and their lawyers who will bring these lawsuits, and for federal judges who must carefully analyze the constitutional and statutory rights of immigration detainees. Detainees must endure these legal battles instead of succumbing to what ICE prefers—that they remain invisible,[106] then give up and go home, choosing an airplane bound for their country of origin instead of continued confinement in an ICE cage.[107] There is work to be done by activists, who must challenge the citing of new immigration detention centers and help communities transition away from economic reliance on immigration detention. What cannot be done is remain silent. As a former supervisor of mine once wrote, "It is silence that becomes complicity with the government in an attack on immigrants, their rights, liberties, and dignities. *We* have given them this power and it is ours to take back."[108] The lessons of the past can remind us that the future is not entirely hopeless.

[106] *See* Ryo, *Understanding Immigration Detention*, *supra* note 2, at 105 ("[A]ll immigrant detainees—by institutional design—are hidden from public view and cut off from the wider society in varying degrees.").

[107] *See Thuraissigiam*, 140 S. Ct. at 1970-71 ("While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.").

[108] Abira Ashfaq, *We Have Given Them This Power: Reflections of an Immigration Attorney*, 10 NEW POL. 66, 75 (2004) (emphasis added).