Detention Policy and Practice of the United States

César Cuauhtémoc García Hernández

Once uncommon, in recent decades detention has become a central feature of immigration law enforcement practices in the United States. Through law and policy, federal authorities regularly deprive people of their liberty because of activity related to migration. Tens of thousands of law enforcement officers employed by multiple bureaucracies are tasked with taking migrants into custody. From rural desert passes near the country's international boundaries to urban metropolises far inland, federal immigration officers and their counterparts in local law enforcement agencies investigate and apprehend migrants daily on suspicion of violating immigration law. Once apprehended, migrants are confined in a host of facilities modeled on penal standards. At times, federal officials detain migrants in county jails designed to house people suspected or convicted of criminal activity. In other instances, migrants are sent to stand-alone facilities that are owned or operated by private corporations, but that resemble penal facilities in their command-and-control style of operations. In these facilities, there are able-bodied adults and people with severe mental illness. There are children held alongside their parents and, at times, children who have been separated from their parents. Some migrants are detained pending civil administrative proceedings in which the Department of Homeland Security or Department of Justice determine whether they will be allowed to remain in the United States. Others are detained pending criminal prosecution for one of several crimes inextricably associated with migration. Starting in the 1980s, Congress has required detention of some migrants suspected of being removable from the United States. In most circumstances, however, confinement results from discretionary decisions adopted as institutional policy or delegated to individual adjudicators.

Origins

For roughly a century after seceding from Great Britain, few federal laws existed regulating international movement of people. Of those laws that were enacted during this period, the power to detain people who were not citizens of the United States were limited. A statute enacted in June 1798 by the nation's first Congress, for example, allowed the president to deem some people "dangerous to the peace and safety of the United States" and, upon notice outlined in the law, order them deported. Despite granting the president the sweeping power to determine whose presence was dangerous to the nation, Congress did not grant the president a similarly broad power to detain people. Instead, Congress authorized detention only if a targeted individual did not heed the notice to depart the country, was subsequently found in the United States, failed to obtain a presidential license allowing continued presence in the country, and was convicted of the newly created crime of violating this law.[1]

Despite this early reticence to grant the executive all but the most limited powers to detain people who are not U.S. citizens, legislators soon had second thoughts. The most notable example, enacted in July 1798, empowered the president to designate citizens aged fourteen years or more of hostile countries as "alien enemies" who could be "apprehended, restrained, secured and removed." More than two centuries later, that statute, known as the Alien Enemies Act, remains part of federal law.[2]

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[1] Act of June 25, 1798, 1 Stat. 570.

[2] Act of July 6, 1798, 1 Stat. 577 (codified as amended at 50 U.S.C. § 21).

In addition to Congress's limited attention to international movement, federal legislation also regulated movement of people across state boundaries. Constitutionally, two provisions bolstered the country's thriving practice of chattel slavery. The federal constitution's "Migration Clause" allowed slavery to continue unimpeded by federal legislation through the early nineteenth century. Its "Fugitive Slave Clause" meant that enslaved people could not view states in which slavery had been abolished as a safe haven. To bolster the power of enslavers to capture and forcibly remove black people into slavery as these constitutional provisions allowed, Congress enacted statutes in 1793 and 1850 imposing significant consequences on anyone who interfered with these efforts.[3]

Federal legislation was important during the nation's first century, but it was not the only important site of legal activity regarding detention of black people. A robust practice of regulating the movement of free black people thrived at all sub-federal levels. During this period, states and localities regularly enacted laws regulating who could enter their jurisdictions and under what conditions they could be removed. In 1807, for example, the Ohio legislature enacted a statute barring any black person from settling in the state without posting a $500 bond with a county court; failure to do so required removal.[4] At times, states, counties, and cities or towns paired mobility regulation with the possibility of confinement. Maryland, for example, in 1844 barred entry of any free black person even if they did not plan to settle there. For violating that offense once, a fine of $20 was possible. Failure to pay the fine could result in imprisonment and sale "to the highest bidder, whether such bidder be a resident of this State or not, to serve as a slave."[5]

Numerous states adopted similar provisions. Normatively, each legal enactment was premised on the notion that black people possessed, at most, a tenuous claim to citizenship. Maryland's 1844 statute provides a concrete illustration. Any free black person who met the statute's residency requirements could lose its permission to live in the state if they left the state for more than thirty days.[6] These constraints on mobility "thwarted free black efforts to reunite their families and to obtain lawful employment outside of Maryland," legal historian Martha S. Jones explains.[7] Within a few years, any pretense to respect a free black person's desire to make autonomous decisions was stripped away by the U.S. Supreme Court's infamous declaration in *Dred Scott v. Sandford* that black people, "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations…had no rights which the white man was bound to respect."[8] Denied citizenship under federal law, black people remained aliens in fact and in law.

Within a few years, the Civil War's bloodshed would be followed by ratification of the Fourteenth Amendment, overturning *Dred Scott* and expanding citizenship to formerly enslaved people, their descendants, and other black people. But constitutional law in the United States would continue to distinguish between citizens and foreigners, giving political authorities immense flexibility to regulate the lives of migrants in the late nineteenth century. In the last quarter of the nineteenth century, Congress adopted multiple statutes limiting entry by people of

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[3] Act of February 12, 1793, 1 Stat. 302; Act of September 18, 1850, 9 Stat. 462, § 7.
[4] 1806 Ohio Laws 53, chp. viii, § 1.
[5] 1860 Md. Laws 458, art. 66, §§ 44-45.
[6] 1860 Md. Laws 458, art. 66, § 49.
[7] Martha S. Jones, *Leave of Court: African American Claims-Making in the Era of Dred Scott v. Sandford, in* CONTESTED DEMOCRACY: FREEDOM, RACE, AND POWER IN AMERICAN HISTORY 54, 59 n.24 (Manisha Sinha & Penny Von Eschen eds. 2007).
[8] Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

Chinese descent. First the Page Act of 1875 barred access to the United States for people suspected of prostitution activity, a pretext for targeting Chinese women traveling alone. A few years later, the Chinese Exclusion Act launched a series of measures banning an increasingly large number of prospective Chinese migrants.

To determine who was subject to the growing list of exclusions, government officials created bureaucratic sorting processes. For a time, migrants suspected of being excludable were held onboard the ships on which they had arrived, a practice that quickly proved unpopular with trans-oceanic shipping companies. With the federal government's agreement, these companies soon built onshore facilities where migrants were confined while authorities determined who would be allowed to continue into the United States and who would be returned to China. Operated at the companies' expense, these facilities provided shoddy shelter, social reformers claimed at the time. In response, efforts began to enlist the federal government in building its own detention facilities, a step that the federal government took in 1892 when it opened the dual-purpose Ellis Island immigration station and in 1910 when it opened a detention facility at Angel Island in San Francisco Bay.[9]

Legal Authority

In the late nineteenth century when Congress enacted the laws that necessitated sorting migrants deemed undesirable from those who could be permitted into the United States, the law was anything but clear that confinement under the powers of the federal government was lawful as part of the immigration decision-making process. After all, throughout the nation's first century, it had been states and localities, not the federal government, that had heavily regulated cross-border movement of people. In a pair of cases decided in the 1880s and 1890s, the Supreme Court unequivocally announced for the first time that the federal government was indeed empowered to take on this task. As the Court explained in its 1893 decision *Fong Yue Ting v. United States*, "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[10]

To exclude or deport is one thing. To imprison is another. Four years after *Fong Yue Ting*, the Supreme Court clarified that while exclusion and deportation are distinct from imprisonment, the former can justify the latter. In *Wong Wing v. United States*, the Court reviewed an 1892 statute mandating "imprison[ment] at hard labor for a period of not exceeding one year" for any person of Chinese descent found to be in the United States unlawfully. The statute afforded migrants few protections, going so far as to impose on them the burden of proving their lawful right to be present in the United States.[11] In *Wong Wing*, the Supreme Court found no constitutional problem with this treatment. So long as officials were attempting to effectuate immigration laws governing entry or deportation, confinement as part of the immigration decision-making problem 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," the Court explained. On the other hand, if the government's goal was to convict someone of a crime—even a crime related to migration—

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[9] CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 25-27 (2019).

[10] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

[11] Act of May 5, 1892, 27 Stat. 25, §§ 3-4.

however, more process was necessary. To punish someone through imprisonment or confiscation of property, the Court announced, Congress "must provide for a judicial trial to establish the guilt of the accused."[12] The statute thus survived the Court's review. More than that, the Court set the legal foundation for the bifurcated immigration prison practice that would flourish a century later: civil immigration detention and criminal confinement. The legal framework that *Wong Wing* first articulated has become more complex, but the demarcation between imprisonment authorized by civil law and imprisonment authorized by criminal law remains.

Of the two sources of confinement available for people who violate immigration laws, civil immigration detention is the more common. Through the Immigration and Nationality Act, the federal statutory scheme that governs immigration law, Congress grants the Department of Homeland Security broad authority to take migrants into custody. Immigration officers working for either of DHS's principal immigration law-enforcement agencies, Customs and Border Protection and the Immigration and Customs Enforcement agency, may arrest and detain anyone who is not a U.S. citizen pending a decision about their removal. As the word "may" suggests, this is a discretionary power. Since discretion allows immigration officials to mold their exercise of the power to detain, presidential administrations regularly adjust policies in an ostensible effort to align enforcement practices with political considerations. During the presidency of Barack Obama, the Director of ICE, John Morton, issued a "not exhaustive" list of nineteen factors officers in the field were instructed to consider when deciding whether to take a particular person into custody.[13] Under President Donald J. Trump, his Secretary of Homeland Security, John Kelly, reversed course, explaining, "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," adding "Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws." Despite this sweeping pronouncement, Kelly went on to list seven factors that DHS officials were instructed to prioritize.[14] Likewise, Alejandro Mayorkas, Secretary of Homeland Security under President Joe Biden, issued a three-tier civil immigration enforcement priorities scheme which applies to CBP and ICE decisions about who to detain among other aspects of their work.[15]

Though the INA gives immigration officials discretion regarding detention, agency officials often take a broader view. Instead of grounding the power to shift detention practices in the statute, DHS often points to an inherent need to allocate finite resources prudently. In 2011, for example, the top official at ICE at the time, John Morton, explained that the agency "has limited resources to remove those illegally in the United States," thus it "must prioritize the use of its enforcement personnel, detention space, and removal assets…"[16] Secretary Mayorkas put the consideration more explicitly when he noted, "We do not have the resources to apprehend

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[12] Wong Wing v. United States, 163 U.S. 228, 235, 237 (1896).

[13] Memorandum from John Morton, Director, Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to All Field Office Directors, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 4 (June 17, 2011).

[14] Memorandum from John Kelly, Secretary, U.S. Dep't of Homeland Security, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, *Enforcement of the Immigration Laws to Serve the National Interest* 2, 4 (Feb. 20, 2017).

[15] Memorandum from Alejandro N. Mayorkas, Secretary, U.S. Dep't of Homeland Security, to Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, *Guidelines for the Enforcement of Civil Immigration Law* 3-4 (Sept. 30, 2021).

[16] Memorandum from John Morton, Director, Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to All Field Office Directors, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 2 (June 17, 2011).

and seek the removal of every one of these noncitizens."[17] Indeed, agency officials, including Mayorkas, regularly explain their need to exercise discretion by pointing to longstanding legal principles of prosecutorial discretion. According to the U.S. Supreme Court, "Discretion in the enforcement of immigration law embraces immediate human concerns" alongside some decisions that "involve policy choices that bear on this Nation's international relations." As such, "A principal feature of the removal system is the broad discretion exercised by immigration officials."[18]

As a matter of legal doctrine, discretionary decisions about civil immigration detention are governed by a two-part framework: dangerousness and flight risk.[19] Other possible objectives—for instance, the desire to deter other migrants from coming to the United States—are generally impermissible considerations. In 2014, the Obama administration responded to an increase in the arrival of family units at the nation's southwestern border by quickly opening multiple facilities dedicated to detaining parents alongside their children. Defending the government's family detention policy, Justice Department lawyers argued that "one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration." A federal court found this practice illegal, explaining that deterrence is an especially weak justification when "neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country."[20]

In assessing dangerousness and flight risk, immigration officials can weigh a host of factors, including past residences, family ties, employment history, and criminal history.[21] In practice, it appears that ICE typically takes the view that migrants would endanger the public or abscond if released. Reviewing records from ICE's Baltimore field office, Mark Noferi and Robert Koulish found that ICE's risk classification assessment algorithm recommended that less than 1 percent of people taken into the agency's custody be released.[22] A follow-up study by Koulish and co-author Kate Evans found little reason to expect a change in outcome. On the contrary, after analyzing government documents obtained through an information access request, the researchers learned that while migrants' risk profiles remained steady, the risk assessment "designers reworked the algorithm to generate a moderate risk level instead." That is, the agency altered its risk assessment framework "so that characteristics previously designated as representing a low risk of danger were deemed moderate risks.[23]

In addition to discretionary detention, Congress has directed immigration officials to take entire categories of people into custody. The Immigration and Nationality Act currently provides that DHS "shall take into custody" any migrant who fits into four broad categories specified in the statute, including just about everyone facing removal because of a criminal history.[24] Though

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[17] Memorandum from Alejandro N. Mayorkas, Secretary, U.S. Dep't of Homeland Security, to Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, *Guidelines for the Enforcement of Civil Immigration Law* 2 (Sept. 30, 2021).
[18] Arizona v. United States, 567 U.S. 387, 396 (2012).
[19] Matter of Siniauskas, 27 I&N Dec. 207, 209 (BIA 2018).
[20] R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 189-90 (D.D.C. 2015).
[21] Matter of R-A-V-P-, 27 I&N Dec. 803, 805 (BIA 2020).
[22] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Georgetown Immigr. L.J. 45, 50 (2015).
[23] Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24.3 Lewis & Clark L. Rev. 789, 794, 847 (2020).
[24] 8 U.S.C. § 1226(c)(1), INA § 236(c)(1).

the statute imposes an obligation on immigration officials to hold covered individuals in "custody," the Board of Immigration Appeals, the nation's highest administrative appellate tribunal in the immigration law realm, interprets custody as synonymous with confinement. Reviewing the statutory text's legislative history, the Board acknowledged that in the discretionary detention statute Congress replaced the word "custody" with the word "detain." "[T]he interpretation of these two terms can vary significantly," the Board added, before explaining, "although a person who is in custody is not necessarily in detention, one who is in detention is necessarily in custody."[25] Put differently, the be detained means to be locked up involuntarily, but to be in custody can include living at home with family, being able to work and partake of social and cultural activities. Despite recognizing that these words carry meaningful distinctions, and that Congress has at times chosen one or the other, the Board nonetheless concluded that "Congress used the terms 'custody' and 'detain' interchangeably and did not intend for them the be afforded different meanings."[26] As a decision of the Board, a division of the Justice Department, this interpretation is subject to reconsideration by the U.S. Attorney General. To date, no Attorney General has done so. Consequently, the statutory provision that requires custody of some individuals is typically referred to as the "mandatory detention" statute.

Just as DHS officers are prohibited from releasing someone covered by the mandatory detention statute, immigration judges likewise have no authority to do so. At most, immigration judges may determine whether a specific person falls within the mandatary detention statute's reach. These proceedings impose the burden on the migrant to show that the federal government is not "substantially likely" to prove that they are removable for one of the four broad categories identified in the statute.[27] Clearly this is a difficult burden to reach, made worse by the substantial percentage of detained migrants who are not represented by legal counsel.

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, this authorization was approved by a Republican-controlled Congress and Democratic president, Bill Clinton. Mandatory detention has enjoyed support from Republican and Democratic administrations since then. ICE and federal government lawyers regularly adopt expansive views of the statute's reach. In 2001 and 2010, for example, the Board took the position that the mandatory detention statute applies to migrants covered by the four specified categories even if they had been out of governmental custody for some time. Over the ensuing decade, Justice Department lawyers under multiple presidential administrations defended this position in the federal appellate courts, finding ultimate success at the Supreme Court in 2019.[28]

While most people detained are adults, young migrants are also detained. In some instances, family units are detained together. Other times children are held without any familiar adult caretakers. In 2018, the Trump administration came under scrutiny for a policy of separating children from their parents or other adult caretakers. That policy was certainly unusual in its scope. The head of the U.S. Justice Department at the time, Jeff Sessions, suggested that all parents would lose their children if they entered the United States without the federal government's permission.

The Trump era policy, however, was far from the only moment or manner by which federal immigration officials have detained children. In the 1980s, children were held at the

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[25] Matter of Aguilar-Aquino, 24 I&N Dec. 747, 751-52 (BIA 2009).
[26] Matter of Aguilar-Aquino, 24 I&N Dec. 747, 752 (BIA 2009).
[27] Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).
[28] CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 100-101 (2nd ed. 2021) (summarizing litigation).

Guantánamo, Cuba facility. Early that decade, the now-disbanded Immigration and Naturalization Service adopted a policy of limiting release of children who came into its custody.[29] In the 1990s, the INS entered into a legally binding agreement governing its treatment of detained migrant children, called the *Flores* Settlement Agreement in reference to the litigation that led to the decree. That agreement remains in effect, though it now binds DHS since it now exercises the detention authority previously delegated to the INS.[30] Under the *Flores* agreement, DHS must use "the least restrictive setting" for holding children. As a result, DHS typically moves children out of the most common facilities within a matter of days. Indeed, children unaccompanied by an adult caretaker are moved out of DHS custody altogether. They are instead handed over to the Office of Refugee Resettlement, a unit of the U.S. Department of Health and Human Services. Despite a different custodial entity, ORR facilities reflect securitization principles, featuring hard perimeters, constant surveillance of internal movement by children, and restricted access to relatives, civic society observers, journalists, and others. Meanwhile, children held with their adult relatives are locked in other facilities that share many of the same securitized components.

Aside from civil immigration detention, federal law also authorizes confinement during criminal prosecutions related to migration activity. Since the administration of President George W. Bush, criminal prosecutions for unauthorized entry and unauthorized reentry have been exceedingly common. In fiscal year 2018 alone, almost 100,000 people were prosecuted for those offenses, marking a 650 percent increase from twenty years earlier.[31] Like with any criminal prosecution, people facing federal immigration crime charges can be detained. Formally, pretrial detention is a type of civil confinement no matter the underlying criminal charge. Accordingly, the Bail Reform Act dictates that pretrial detention is permissible only if other conditions will not "reasonably assure" public safety and appearance at court hearings.[32] Despite the presumption of release, almost everyone charged with an immigration crime is likely to be held in the government's custody for at least part of the time the prosecution is pending. Indeed, in fiscal year 2018, ninety-five percent of immigration crime defendants were subjected to pretrial detention, well in excess of people charged with other federal crimes.[33]

Like with civil immigration detention related to removal proceedings, government attorneys have at times taken the position that migrants detained while facing criminal prosecution for unauthorized entry or reentry should never be released. Courts have not been nearly as receptive to these claims in the context of civil confinement related to criminal prosecutions as they have when ICE holds people pending removal proceedings. Instead, courts have insisted that the standard dangerousness and flight risk assessments apply. In addition, courts insist that the presumption of liberty can only be overcome if the government shows evidence of dangerousness or flight risk. More consequently, courts have refused to allow the federal government to hold immigration crime defendants without the ability to go before a judge to request release. In the federal pretrial detention context, therefore, there is no equivalent to the sweeping mandatory detention power that Congress has given immigration officials and which the courts have permitted.

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[29] Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).
[30] Flores v. Reno, CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997).
[31] CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 164 (2nd ed. 2021).
[32] 18 U.S.C. § 3142(e)(1).
[33] CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 174 (2nd ed. 2021).

The legal framework governing pretrial detention at the state level is more complicated. Several states controlled by the rightwing Republican Party have adopted measures to facilitate or require pretrial detention of migrants. None is more prominent than Arizona. In 2010, the Arizona legislature enacted Senate Bill 1070, often referred to as the "show me your papers" law, which Governor Jan Brewer signed. Among the many aspects of migrant life that S.B. 1070 touched was their ability to remain free after encountering state or local law enforcement officers. One provision of the law allowed police to arrest people without a judicial warrant if they had probable cause to believe that the person had merely committed a crime that would potentially make them removable from the United States. The Supreme Court ultimately concluded that this section of S.B. 1070 was unconstitutional. The Court's decision, however, was not grounded in any substantive right to remain free from warrantless arrests. Instead, in *Arizona v. United States*, the Court held that this provision gives state law enforcement officers more power to arrest people who might be removable than does federal law. As such, the state law violates the U.S. Constitution's Supremacy Clause, which privileges federal laws over state laws when the latter creates an obstacle to fulfilling the former.[34]

Other states have likewise used their criminal law authority to make migrant detention easier by limiting access to bail. These efforts have shown mixed results. Utah, for example, enacted a statute instructing state courts to presume that migrants are a flight risk, making pretrial release on bail less likely.[35] This law remains enforceable. By contrast, the Missouri Supreme Court declared unconstitutional the state's statute barring anyone who a state judge "reasonably believes" to be in the United States without the federal government's permission from receiving bail.[36]

Pretrial detention tied to criminal proceedings of any kind often leads to conviction and the possibility of punitive confinement. Almost everyone prosecuted of federal immigration crimes is convicted. In fiscal year 2019, fully ninety-seven percent of people prosecuted for committing an immigration crime in federal district court were convicted. Of these, only 0.3 percent were convicted after a trial; the rest plead guilty.[37] Regardless of how they were convicted, 59.3 percent of convicted federal immigration crime offenders were sentenced to a term of imprisonment with a median sentence of ten months. Though significant, both figures fall well below national averages for all crimes. Overall, 72.2 percent of convicted federal offenders were sentenced to a term of imprisonment in fiscal year 2019 with a median sentence of thirty months.[38]

Unlike legal questions that affect civil immigration detention and pretrial detention that is tied to criminal proceedings despite its formal characterization as civil, there is no doubt about the legality of post-conviction confinement. Since the Supreme Court's 1896 demarcation between civil immigration detention and post-conviction confinement, punitive confinement has been permissible so long as it follows a trial.[39] In the modern era, the trial has almost entirely been replaced by nothing more than the theoretical possibility of a trial. Despite that shift, the legal basis for post-conviction incarceration remains the same. If criminal prosecutions for immigration crimes stick to some semblance of standard criminal proceedings governed by

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[34] Arizona v. United States, 567 U.S. 387, 410 (2012) (discussing S.B. 1070, § 6).
[35] Utah Code Ann. § 17-22-9.5(4).
[36] Lopez-Matias v. State, 504 S.W.3d 716, 720 (Mo. 2016).
[37] Mark Motivans, *Federal Justice Statistics, 2019*, at 10 tbl.6 (Oct. 2021).
[38] Mark Motivans, *Federal Justice Statistics, 2019*, at 11 tbl.7 (Oct. 2021).
[39] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

constitutional law and various statutory mandates, they are allowable. After completion of a sentence for a federal immigration crime, people convicted of immigration offenses are typically handed over to ICE for removal from the United States.

Contemporary detention policies

In the period since 2002, detention policy and practice in the United States has been characterized by rapid growth and naturalization. Policies adopted by multiple presidential administrations have shifted the federal government's approach toward families. Meanwhile, as a matter of practice, the nation's detention apparatus is regularly criticized for its poor conditions of confinement and profit-seeking by private entities. This section addresses the policy and practice of contemporary detention operations in turn.

Aside from shifting enforcement priorities, detention policy reveals starkly contrasting approaches toward family units. During the administration of President George W. Bush, ICE—then in its earliest moments, having launched in 2003—separated children from adult relatives who they were traveling with when apprehended by federal officials.[40] Displeased, many members of Congress criticized the administration's position. In response, ICE launched the T. Don Hutto Family Detention Center in Taylor, Texas, northeast of Austin, a former state prison converted into a facility dedicated to detaining migrant families together.

Within a few years, the Bush administration's family detention practice would itself come under scrutiny. Only months after President Barack Obama's inauguration in 2009, ICE closed the Hutto facility. At the time, *The New York Times* described this decision as a significant example of the new administration's desire to differentiate itself from its predecessor's policies.[41] For several years, ICE operated a single facility for families: a converted nursing home in Berks County, Pennsylvania that could hold fewer than 100 people. By the middle of 2014, the new administration was following the old administration's lead. That summer large numbers of migrants began leaving Central America and arriving at the southwestern border of the United States. Seemingly unaware that many of these migrants would arrive as family units to request asylum, the Obama administration quickly set up new detention units for families at a federal law enforcement training site in Artesia, New Mexico, a remote desert location. Always described as a temporary facility, the Artesia location was remarkably out of reach. Aside from being located on a larger law enforcement training campus with an intimidating array of federal agencies and new recruits, Artesia itself is a small town almost entirely devoid of legal and social services. In a comically ironic twist, the nearest town of any measurable size is Roswell, the community made famous as the supposed landing site of extraterrestrial aliens. A few months after opening the temporary Artesia facility, ICE began transferring migrant families to two new facilities in Texas designed as permanent sites in which to house detained migrant families: the South Texas Family Residential Center in Dilley and the Karnes County Residential Center in Karnes City.

Inheriting family detention centers in Pennsylvania and Texas, the Trump administration enthusiastically expanded its detention efforts overall. Families were no exception. Despite thousands of beds available at these locations, administration officials decided on a different policy approach. Combining various trends that had developed over the previous quarter century, Trump administration officials decided to take children away from their parents and prosecute

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[40] Danielle Hawkes, *Note, Locking Up Children: Lessons from the T. Don Hutto Family Detention Center*, 11 J. L. & Fam. Studies 171, 172-73 (2008).

[41] Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, at A1 (Aug. 5, 2009).

the parents for unauthorized entry or unauthorized reentry. President Trump's first attorney general, Jeff Sessions, described the administration's policy as a simple prosecutorial prerogative: "If you cross this border unlawfully, then we will prosecute you. It's that simple….If you are smuggling a child, then we will prosecute you and that child will be separated from you…."[42] As news of the administration's approach gained attention, Sessions' colleague in the president's Cabinet, Secretary of Homeland Security Kirstjen Nielsen, denied that DHS was separating families, going so far as to describe journalists and advocates claiming this to be the case as "irresponsible and unproductive."[43] Soon, of course, Secretary Nielsen's denials were overshadowed by migrants' testimonials and acknowledgements from President Trump, Sessions, and others. Yielding to criticism from many influential figures within the Republican Party, including his daughter Ivanka Trump and his wife Melania Trump, President Trump ordered the family separation practice to stop. By then, more than 2,300 children had been forcibly taken from their parents.[44] Numerous reports suggest that the practice continued for some time after the president's order.

Aside from the psychological toll of the separation itself, the family separation policy also resulted in incarceration of adults and children. Adults were detained pending criminal prosecution for a federal immigration crime. Meanwhile, children were sent to facilities operated on behalf of the Office of Refugee Resettlement, a division of the U.S. Department of Health and Human Services. ICE is legally obligated to transfer into ORR custody anyone classified as an unaccompanied minor within seventy-two hours of reaching that conclusion.[45] Once in ORR custody, these children are housed in facilities operated on the agency's behalf by a shifting array of private contractors. As a result of the *Flores* Settlement Agreement entered into in 1997 that still binds the federal government, children in ORR custody must be held in the "least restrictive setting that is in the best interests of the child."[46]

The Biden administration has adopted less severe policies. At least in its first year, it did not return to the most extreme version of family separation practiced in 2017. In contrast, it reduced the number of children held alongside their parents even as the overall number of detained migrants crept upward from the end of January 2020. Still, the Biden administration continues to operate at least one facility dedicated to detaining family units just as it continues to partner with private entities to detain unaccompanied youth.

Contemporary detention practices

Though detention policies change, contemporary detention practices feature many of the same components from administration to administration. Two stand out: the carceral model of conditions of confinement and the profit motive that fuels many of the federal government's private partners.

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[42] U.S. Dep't of Justice, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

[43] DHS Secretary Kirstjen Nielsen denies family separation policy exists, blames media (June 18, 2018), https://www.cbsnews.com/news/dhs-sec-kirstjen-nielsen-denies-family-sepration-policy-exists-blames-media/.

[44] *With Thousands of Children Still Separated, Deadline to Reunite Immigrants Quickly Approaching*, CBS News (July 6, 2018), https://www.cbsnews.com/news/with-thousands-of-children-still-separated-deadline-to-reunite-immigrants-quickly-approaching/.

[45] 8 U.S.C. § 1232 (b)(3).

[46] 8 U.S.C. § 1232(c)(2)(A); Flores v. Reno, CV 85-4544-RJK, ¶ 14 (C.D. Cal. Jan. 17, 1997), available at https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

People prosecuted for and convicted of federal immigration crimes are introduced into the criminal legal system, so it is to be expected that they are confined in jails and prisons. Indeed, the U.S. Marshals Service operates the pretrial detention regime associated with federal immigration crime prosecutions. The USMS is responsible for detaining anyone charged with a federal crime who either is denied release on bond or is unable to pay the bond amount. Rather than operate its own facilities, the USMS contracts with private prison corporations or county jails to house pretrial detainees.

Upon conviction, those immigration offenders sentenced to serve a term of imprisonment are transferred into the custody of the Bureau of Prisons, the agency that operates the nation's federal prison system. At the end of 2019, 5.3 percent of people in the BOP's custody had been convicted of an immigration crime.[47] Though the BOP operates many of its own facilities, historically, the BOP has relied more heavily on private prison corporations to detain immigration crime defendants than people charged with other federal crimes. For many years beginning in 1999, the agency funded a series of "criminal alien requirement" facilities, all of which are operated by private prison corporations. Though most of the people held in CAR facilities were convicted of something other than an immigration crime, they are disproportionately held in the CAR initiative's private prisons. Analyzing BOP population data for 2018, Emma Kaufman found that approximately one-third of people held in CAR prisons had been convicted of an immigration crime.[48] In 2021, the Biden administration announced that the Justice Department would begin to end its relationship with private prison companies. When contract terms reach their end point, the Justice Department is not to seek renewal. Though a meaningful shift, by allowing contracts to come to their agreed end date the administration's piecemeal approach is necessarily slow.

Unlike their criminal law enforcement counterparts in the Justice Department, DHS ostensibly imprisons migrants as part of their civil law authority to identify people who are potentially removable from the United States and, subsequently, remove them if immigration law requires or permits that outcome. Despite the non-punitive nature of civil immigration detention, the facilities in ICE's network have the look and feel of criminal facilities. To begin, ICE relies heavily on county jails which purport to be nothing more than criminal confinement sites. ICE contracts for use of beds at county jails across the United States. County jails operating under contract with ICE typically are not dedicated solely to ICE detainees. Instead, ICE's detainees usually are held in the facility at the same time as people arrested for crimes nearby or sentenced to confinement for less than one year.

In addition, the dedicated facilities operated by or on behalf of ICE are modeled on penal norms. In 2009, ICE's Director of the Office of Detention Policy and Planning, Dora Schriro, wrote that ICE's detention standards "are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons." Perhaps unsurprisingly as a result, "Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways," Schriro added.[49] More than a decade later, Schriro's characterization remains relevant. Indeed, most of the twenty-five facilities that Schriro visited in her 2009 review remained operational at the beginning of 2022.

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[47] E. Ann Carson, *Prisoners in 2019*, NCJ 255115, at 22 tbl. 15 (Oct. 2020).
[48] Emma Kaufman, *Segregation by Citizenship*, 132 Harv. L. Rev. 1379, 1404 (2019).
[49] Dora Schriro, U.S. Dep't of Homeland Security, Immigr. and Customs Enforcement, *Immigration Detention Overview and Recommendations* 4 (Oct. 2009).

Even more than the BOP, ICE relies very heavily on private prison corporations. In September 2016, for example, almost two-thirds of its detainee population was held in private facilities.[50] These facilities regularly come under sharp criticism for their poor conditions of confinement.[51] Likewise, government agencies frequently note that ICE lacks the capacity for adequate oversight. For example, in 2018 the DHS Inspector General noted that ICE's inspections of detention facilities are "further diminished by ICE's failure to ensure that identified deficiencies are consistently corrected."[52] A year later, the Inspector General found, "Between October 1, 2015, and June 30, 2018, ICE imposed financial penalties on only two occasions, despite documenting thousands of instances of the facilities' failures to comply with detention standards."[53] Despite these significant shortcomings, ICE continues relying heavily on private prison corporations. The Biden administration's 2021 policy of scaling back the Justice Department's reliance on private prisons has no bearing on DHS's operations.

Reform efforts

As detention has become an increasingly more visible component of immigration law and policy in the United States, so too have efforts to reform its use. Advocates have adopted a series of reform tactics targeting methods of confinement and juridical legal principles that govern detention. These efforts have met varying degrees of success.

Through the lens of time, immigration detention can itself be imagined as a reform. In the final quarter of the nineteenth century when Congress began to feverishly bar greater numbers of migrants, federal officials turned to detention as a means of determining who could be allowed into the United States and who merited quick expulsion. Rather than hold people onboard trans-oceanic ships, government authorities worked with shipping companies to move prospective migrants into onshore holding facilities. Soon, civic reformers criticized these facilities as unhygienic and lobbied the federal government to build its own detention facilities. The earliest sites dedicated to detaining migrants resulted from these reform efforts.

Decades later, attempts to improve the physical location and conditions of confinement remain steadfast features of immigration detention advocacy. In the 1990s, for example, advocates criticized the Bush administration's use of the military base in Guantánamo, Cuba to hold migrants. As a candidate for the presidency, Bill Clinton promised to end this practice, only to be slow to fulfill his promise after securing electoral victory. Later, Clinton's administration held migrants on-board Coast Guard vessels, processing their asylum claims expeditiously in the middle of the ocean. Critics again pounced on the administration, with some even lamenting that the Guantánamo site was no longer in service to hold migrants. Years later, advocates criticized Clinton's successor, George W. Bush, for separating children from their parents. The Bush

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[50] U.S. Dep't of Homeland Security, Homeland Security Advisory Council, Report of the Subcomm. on Privatized Immigration Detention Facilities 6 tbl.1 (Dec. 2016).

[51] See, e.g., Donald Kerwin, Ctr. for Migration Studies, Immigrant Detention and COVID-19: How a Pandemic Exploited and Spread Through the U.S. Immigrant Detention System 6-7 (Aug. 2020) (criticizing poor management of COVID-19 infections among staff at various private prisons operated on behalf of ICE); Human Rights First, Ailing Justice: New Jersey – Inadequate Medical and Mental Health Care Services in Immigration Detention 6-8 (Feb. 2018) (criticizing medical treatment at the Elizabeth Contract Detention Facility operated by CoreCivic).

[52] U.S. Dep't of Homeland Security, Office of the Inspector General, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG-18-67, at 11 (June 2018).

[53] U.S. Dep't of Homeland Security, Office of the Inspector General, ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards, OIG-19-18, at 7 (Jan. 2019).

administration responding by opening a facility dedicated to holding migrant families together. A familiar pattern repeated itself over the ensuing administrations. Under President Barack Obama, ICE shuttered the family-detention center only to open similar facilities later during his tenure.

Similar evolutions have played out in the legal arena over the doctrine of immigration detention. Late in the nineteenth century, advocates challenged the constitutionality of migrant detention directly. That strategy failed in *Fong Yue Ting* and *Wong Wing*. Instead, those judicial decisions began the consistent trend of courts demarcating detention's outer limits in a manner that is consistently more accepting of confinement than is permissible in other contexts. For example, the Supreme Court takes the position that indefinite detention is not permissible after a migrant has been ordered removed from the United States but where federal officials have been unable to effectuate removal.[54] In other cases, though, the Court has authorized immigration officials to detain migrants for prolonged periods with minimal judicial oversight. In *Johnson v. Arteaga-Martinez*, for example, the Court announced that DHS is not obligated to consider releasing someone who has been detained for at least six months and who has a legal claim pending. Disagreeing with a lower court, every member of the Supreme Court took the position that the government could consider Antonio Arteaga-Martinez for release, but the statute enacted by Congress does not require this.[55] The fact that the lower court's decision meant that Arteaga-Martinez had been released without issue was not only irrelevant; it was mistaken.

Advocates' efforts have not been without success. Through their efforts, the Supreme Court long ago declared that imprisonment meant to punish migrants for violating immigration law must be accompanied by judicial trial.[56] Migrants are entitled to legal representation "at no expense to the government."[57] More recently, migrants who are too mentally ill to assist in their own defense have been declared entitled to appointed legal counsel. Rape and sexual abuse are prohibited. Medical care is guaranteed.

Despite these and other important legal victories, immigration detention is robust and operates on a solid doctrinal foundation. Tens of thousands of migrants are detained daily for violating immigration law, couched as a means of enforcing immigration law rather than punishing migrants for violating legal strictures. In any given year, approximately half of all migrants who are detained while they undergo legal proceedings lack legal counsel. Physical violence, including sexual assault, inside detention centers are not uncommon, affecting even children. Medical care is notoriously poor, at times contributing to a detained migrant's death.

Abolition detention

Responding to decades of reform that have produced an entrenched policy and practice of detention in the United States in which tens of thousands of people are confined every day, executive officials adopt a sweeping view of detention's utility, courts offer extraordinary deference, and migrants suffer, advocates have increasingly adopted a more absolutist embrace of an immigration law regime that altogether lacks detention. Abolitionist in spirit and aims, advocates and scholars in this mold proclaim "a world without cages."[58] In many respects, abolitionist goals dovetail neatly with reformist agendas. Abolitionists and reformists, for

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[54] Zadvydas v. Davis, 533 U.S. 678 (2001).
[55] Johnson v. Arteaga-Martinez, No. 19-896, slip op. at 6-7 (June 13, 2022).
[56] Wong Wing v. United States, 163 U.S. 228, 235, 237 (1896).
[57] 8 U.S.C. § 1362.
[58] A WORLD WITHOUT CAGES: BRIDGING IMMIGRATION AND PRISON JUSTICE (Sharry Aiken & Stephanie J. Silverman eds. 2022).

example, abhor sexual abuse of migrants and call for immigration judges to have a role in detention decision-making. Where abolitionists split from reformers, though, is in their unwillingness to accept a tamer version of confinement. Reformers advocate for confinement for a more tailored subset of migrants, a proposal typically contemplated to also result in fewer detained migrants. On the other hand, migrant detention abolitionists want no one to be confined due to a pending or confirmed violation of immigration law.

Much more nascent than reform efforts, advocates who embrace a call to abolish immigration detention are quickly developing a theory of immigration law and policy that does not rely on confinement. Inspired in part by the Immigration and Naturalization Service's policy and practice from 1954 to the late 1970s of detaining migrants only in exceptional circumstances, immigration detention abolitionists articulate a historically grounded, normative defense of freedom of migrant mobility. Led by activist groups dominated by people of color like Mijente, the end of immigration detention abolition focuses on the harms brought by detention on migrants. As the most perceptive and impactful abolitionist immigration law scholar Angélica Cházaro explains, the abolitionist emphasis on harmed communities inverts the "common sense" position that severe exercises of state power are necessary. "Reorienting allegiance away from an unquestioning attachment to the abstraction of the rule of law and toward the populations such abstraction preserves as deportable" is paramount, Cházaro writes.[59] Cházaro's description clarifies that developing a program for abolishing immigration detention requires more than simply detailing the doctrinal details of abolition's current or future possibility. Likewise, abolition requires more than detailing the policy shifts required to end migrant confinement.

More fundamentally, abolishing immigration detention requires reshuffling priorities through a democratic reassessment of political constituencies. Instead of responding to the white nativists of the late nineteenth century or the anti-crime zealots of the late twentieth century willing to overlook the racially disparate consequences of their chosen policies, abolitionists put at the center of their analyses the migrant communities most affected by state exercises of deprivations of liberty. Rather than accept the "common sense" of heavy-handed policing practices that rely on confinement to enforce immigration law, abolitionists offer an alternative "common sense" that human mobility is a time-honored inevitability and that migrants occupy a central role in human history. As the philosopher Thomas Nail put it, "it was migrants of all kinds throughout history, not states, who were the true agents of political inclusion and cosmopolitanism."[60]

Conclusion

Across 150 years, immigration detention policy and practice in the United States has adopted several forms. With origins in the late nineteenth century's blatantly racist opposition to Chinese migration, immigration detention began in the ugliest moments of the nation's persistent embrace of white supremacy. Bolstered a century later by the late twentieth century's attempt to use confinement to solve many perceived social ills, immigration detention has never been severed from its sordid past. Despite that association, the policy and practice of migrant detention retains strong support among policymakers and courts. The current iteration of immigration detention is certainly entrenched, but with its growth dating only to the 1980s there is room to doubt its inevitability as detention abolitionists are currently doing.

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[59] Angélica Cházaro, *The End of Deportation*, 68 U.C.L.A. L. REV. 1040, 1047 (2021).

[60] Thomas Nail, *Sanctuary, Solidarity, Status!*, *in* OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT 23, 27 (Reece Jones ed. 2019).