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RETHINKING IMMIGRATION DETENTION

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In recent years, scholars have drawn attention to the myriad ways in which the lines between criminal enforcement and immigration control have blurred in law and public discourse.[1] This Essay analyzes this convergence in the context of immigration detention. For decades, observers have analyzed a wide range of detention-related concerns,[2] including mandatory custody,[3] coercion and other due process violations,[4] inadequate access to counsel,[5] prolonged and indefinite custody,[6] inadequate conditions of confinement,[7] and violations of

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1. See, e.g., Brookings Inst. & Univ. of S. Cal. Annenberg Sch. for Commc'n, Democracy in the Age of New Media: A Report on the Media and the Immigration Debate 12, 23–27 (2008) (analyzing and concluding media coverage of immigration since 1980 has "focused overwhelmingly" on criminality and other forms of illegality); Jennifer Chacón, Managing Migration Through Crime, 109 Colum. L. Rev. Sidebar 135, 135–36 (2009) (discussing scholarship on convergence of criminal justice and immigration control regimes); Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 469, 472, 500–10 (2007) [hereinafter Legomsky, New Path] (arguing immigration law has "absorb[ed] the theories, methods, perceptions, and priorities" of criminal law enforcement); Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367, 376 (2006) (arguing line between immigration law and criminal law "has grown indistinct").

2. E.g., Paul W. Schmidt, Detention of Aliens, 24 San Diego L. Rev. 305, 306 (1987).

3. E.g., Donald Kerwin & Charles Wheeler, The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill, 75 Interpreter Releases 1433, 1433 (1998).

4. E.g., Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), aff'd, 919 F.2d 549 (9th Cir. 1990).

5. E.g., Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 Conn. L. Rev. 1647 (1997) [hereinafter Taylor, Promoting].

6. E.g., Arthur C. Helton, The Legality of Detaining Refugees in the United States, 14 N.Y.U. Rev. L. & Soc. Change 353, 364–65 (1986); Legomsky, New Path, supra note 1, at 489–92.

7. E.g., Margaret H. Taylor, Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine, 22 Hastings Const. L.Q. 1087, 1111–27 (1995) [hereinafter Taylor, Challenging Conditions].

international law.[8] With the number of detainees skyrocketing since the 1990s—owing to expansion of the categories of noncitizens subject to removal proceedings and custody and the resources dedicated to enforcement[9]—these concerns have rapidly proliferated.[10]

For many noncitizens, detention now represents a deprivation as severe as removal itself.[11] Some commentators even resist the very term "detention" as misplaced, masking circumstances approximating criminal "incarceration" or "imprisonment."[12] If convergence more generally has given rise to a system of *crimmigration* law, as observers maintain,[13] then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*.

A recent report by Dora Schriro, a senior Department of Homeland Security (DHS) official, gives official imprimatur to crucial aspects of this picture, acknowledging explicitly that most detainees are held—systematically and unnecessarily—under circumstances inappropriate for immigration detention's noncriminal purposes.[14] The acknowledgment

8. E.g., Michelle Brané & Christiana Lundholm, Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks, 22 Geo. Immigr. L.J. 147, 154–64 (2008).

9. See Anil Kalhan, The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement, 41 U.C. Davis L. Rev. 1137, 1149–68 (2008) (discussing expansion of interior enforcement); Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 Harv. L. Rev. 1936, 1938–43 (2000) (discussing expansion of deportability grounds).

10. Between 2007 and 2009 alone, at least twenty-six reports documented detention-related concerns. See Nat'l Immigration Forum, Summaries of Recent Reports on Immigration Detention 2007–2009 (2010), available at http://www.immigrationforum.org/images/uploads/DetentionReportsSummaries2007-2009.pdf (on file with the *Columbia Law Review*) (summarizing twenty-six such reports). For representative examples, see, e.g., Constitution Project, Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings (2009), available at http://www.constitutionproject.org/manage/file/359.pdf (on file with the *Columbia Law Review*); Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States (2009), available at http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0 (on file with the *Columbia Law Review*); Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 Fordham L. Rev. 541 (2009).

11. See Mary E. Kramer, Immigration Consequences of Criminal Activity 123 (3d ed. 2008) ("In the vast majority of cases, the one consequence an individual client fears more than any other—usually more so than removal itself—is detention . . . .").

12. See, e.g., Mark Dow, American Gulag: Inside U.S. Immigration Prisons 16–17 (2004) ("Legalistic distinctions aside, someone who is detained or imprisoned is a prisoner."); Subhash Kateel & Aarti Shahani, Families for Freedom Against Deportation and Delegalization, *in* Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today 258, 264 (David C. Brotherton & Philip Kretsedemas eds., 2008) (arguing detainees "are treated no differently than prisoners"); Taylor, Challenging Conditions, supra note 7, at 1113 & n.126 (discussing comparisons between detention and criminal imprisonment).

13. E.g., Stumpf, supra note 1, at 376.

14. Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 10, 15 (2009). Schriro has since left DHS.

has constitutional significance. To facilitate removal—long understood to be a civil sanction, not criminal punishment[15]—detention and other forms of custody are constitutionally permissible to prevent individuals from fleeing or endangering public safety.[16] However, freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects,"[17] and if the circumstances of detention become excessive in relation to these noncriminal purposes, then detention may be improperly punitive and therefore unconstitutional.[18]

In response, the Obama Administration has pledged reforms to reconstruct this regime as a "truly civil detention system."[19] This Essay considers the possibilities and limits of these proposals, situating detention within the broader convergence of immigration control and criminal enforcement. Part I discusses the evolution of detention policies and practices and some ways in which they have become excessive. Part II analyzes the government's reform proposals, which target excessive conditions of confinement but leave other excessive practices intact. Part III situates detention within the broader context of the government's expansion of immigration enforcement. Notwithstanding the proposed reforms, the expansion of enforcement means that DHS will continue to detain noncitizens, in the words of a senior official, "on a grand scale"—which will significantly constrain its ability to dismantle the more quasi-punitive features of the detention regime.[20] While excessive detention conditions may well be tempered for many individuals, large-scale immcarceration seems here to stay for the foreseeable future.

I. CONSTRUCTING A QUASI-PUNITIVE DETENTION REGIME

A. *The Expansion of Immigration Detention*

The growth in immigration detention in recent years has been remarkable. In 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. Over the same period, the overall number of individuals detained each year has swelled from

15. See Fong Yue Ting v. United States, 149 U.S. 698, 728–30 (1893) (observing that deportation proceedings have "all the elements of a civil case" and are "in no proper sense a trial or sentence for a crime or offense").

16. Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001); David Cole, In Aid of Removal: Due Process Limits on Immigration Detention, 51 Emory L.J. 1003, 1006–07 (2002).

17. *Zadvydas*, 533 U.S. at 590.

18. United States v. Salerno, 481 U.S. 739, 747 (1987); Wong Wing v. United States, 163 U.S. 228, 237 (1896); see also Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial [criminal] detainee not be punished.").

19. Nina Bernstein, U.S. to Overhaul Detention Policy for Immigrants, N.Y. Times, Aug. 6, 2009, at A1.

20. John T. Morton, Assistant Sec'y of Homeland Sec. for Immigration & Customs Enforcement, Speech Before Migration Policy Institute (Jan. 25, 2010), at http://www.c-spanvideo.org/program/291598-1.

approximately 81,000 to approximately 380,000.[21] Almost half of all removal proceedings now involve detainees, up from one-third of proceedings as recently as 2004.[22] Federal officials also induce the short-term detention of thousands of noncitizens for immigration purposes by lodging detainers requesting state and local officials to hold noncitizens in their custody until immigration officials can apprehend them.[23]

This growth has been fueled by enforcement policies that subject ever-larger categories of individuals to removal charges and custody, in many cases without the individualized bond hearings to which individuals ordinarily are entitled.[24] First, individuals alleged to be removable on many criminal grounds—which now include a sweeping array of offenses, both serious and minor, and have become the government's highest interior enforcement objective[25]—statutorily must be "take[n] into [immigration] custody . . . when the alien is released" from criminal custody, and the government interprets this provision to preclude release from detention except under narrowly defined circumstances.[26] Second, many noncitizens arriving in the United States, including returning permanent residents and asylum-seekers with a "credible fear" of persecution, must be detained if charged as inadmissible. Although these individuals may be released under the parole authority of the United States Immigration and Customs Enforcement (ICE), immigration judges are precluded from independently reviewing ICE's parole and custody determinations.[27] Third, many individuals with final administrative removal orders may be detained, at ICE's discretion and without immigration judge review, for extended periods while judicial review is pending or ICE is attempting to

21. Donald Kerwin & Serena Yi-Ying Lin, Migration Policy Inst., Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities? 6–7 (2009), available at http://www.migrationpolicy.org/pubs/2009.php (on file with the *Columbia Law Review*) (numbers from 2001 and 2008); Taylor, Challenging Conditions, supra note 7, at 1107 (numbers from 1994).

22. Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book, at O1 fig.23 (2009), available at http://www.justice.gov/eoir/statspub/fy08syb.pdf (on file with the *Columbia Law Review*).

23. Christopher N. Lasch, Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers, 35 Wm. Mitchell L. Rev. 164, 173–82 (2008); Fact Sheet, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Law Enforcement Support Center (Nov. 19, 2008), at http://www.ice.gov/pi/news/factsheets/lesc.htm (on file with the *Columbia Law Review*).

24. 8 U.S.C. § 1226(a)(2) (2006) (authorizing release on bond); U.S. Dep't of Homeland Sec., Office of Immigration Statistics, 2008 Yearbook of Immigration Statistics 95 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf (on file with the *Columbia Law Review*) (documenting increase in individuals removed from United States from 23,000 in 1985 to over 358,000 in 2008).

25. See, e.g., Kalhan, supra note 9, at 1155–57 (discussing congressional expansion of grounds of deportability).

26. 8 U.S.C. § 1226(c) (2006).

27. Id. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A); see also id. § 1182(d)(5) (authorizing humanitarian parole).

effectuate removal,[28] although detention may not extend beyond a period "reasonably necessary to secure removal."[29]

Without distinguishing among these categories, the Schriro Report states that two-thirds of detainees are subject to "mandatory detention."[30] At the same time, the number of detainees without *any* criminal conviction—who may not be subject to mandatory custody—doubled between 2005 and 2009.[31] Officials spend $1.7 billion annually to run "the largest detention system in the country," a sprawling network of over 500 facilities nationwide.[32] Approximately seventy percent of detainees are held in jails under ad hoc agreements, up from approximately twenty-five percent fifteen years ago.[33]

B. *Detention's Excessiveness*

Plainly, detention imposes serious hardships by its nature, depriving individuals of the ability to work and earn income, attend school, and maintain relationships.[34] The resulting economic, emotional, and psychological harms are visited upon not just detainees, but also their family members, who may be U.S. citizens or legal residents and may include children or other dependents.[35] With limited access to attorneys, witnesses, and sources of evidence, detainees—including U.S. citizens who are improperly detained[36]—face more barriers than their nondetained counterparts in presenting effective defenses against removal.[37] Such hardships induce many detainees to acquiesce to

28. Id. § 1231(a)(2).

29. Zadvydas v. Davis, 533 U.S. 678, 699–701 (2001) (defining six months as presumptively reasonable); see also Clark v. Martinez, 543 U.S. 371, 386 (2005) (extending *Zadvydas* to inadmissible noncitizens); 8 C.F.R. § 241.13–241.14 (2009) (detailing procedures governing post-final order custody review).

30. Schriro, supra note 14, at 6.

31. Transactional Records Access Clearinghouse, Detention of Criminal Aliens: What Has Congress Bought? (2010), at http://trac.syr.edu/immigration/reports/224 (on file with the *Columbia Law Review*); see also Kerwin & Lin, supra note 21, at 22 (finding fifty-eight percent of detainees have no criminal record).

32. Schriro, supra note 14, at 6; Nat'l Immigration Forum, The Math of Immigration Detention 1 (2009), at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (on file with the *Columbia Law Review*).

33. Schriro, supra note 14, at 10, 15; Taylor, Challenging Conditions, supra note 7, at 1106. Eleven percent of detainees are held in government owned but privately operated facilities, while sixteen percent are held in privately owned and operated facilities. Schriro, supra note 14, at 15.

34. E.g., Constitution Project, supra note 10, at 14.

35. E.g., Dorsey & Whitney LLP, Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy 48–57 (2009), available at http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf (on file with the *Columbia Law Review*).

36. E.g., Andrew Becker & Patrick J. McDonnell, Citizens Snared in the Net, L.A. Times, Apr. 9, 2009, at A1.

37. E.g., Taylor, Promoting, supra note 5, at 1651–52; cf. John S. Goldkamp, Questioning the Practice of Pretrial Detention: Some Empirical Evidence From Philadelphia, 74 J. Crim. L. & Criminology 1556, 1557 (1983) (noting that defendants

removal simply to obtain release from custody—even if they have valid claims to remain in the United States, including claims to asylum or other discretionary relief.

These deprivations have been exacerbated by a range of detention-related policies and practices, as several examples illustrate. First, detention has been worsened by inadequate conditions of confinement—particularly with ICE's expanded use of county jails, whose conditions long have been "excoriat[ed]" as the "worst blight in American corrections."[38] Overcrowding and lack of adequate telephone access, visitation hours, ventilation, food, clean quarters, and functioning showers and toilets have long been documented, and verbal and physical abuse have also been common.[39] Inadequate health care has been a particularly serious problem.[40] Over 100 detainees have died in custody since 2003, often due to neglect of their health needs.[41] Conditions also have been severe for many detainees, who are frequently commingled with and subjected to the same treatment as criminal suspects and offenders; observers have frequently documented excessive use of physical restraints.[42]

Second, many detainees endure due process violations and hardships arising from routine transfers to facilities far from where most detainees reside. Transfers have multiplied with ICE's expansion of its detainee population and network of facilities: Because of shortages of detention space in California and the Northeast, ICE transfers detainees

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who are detained before trial are "impaired [in] their ability to prepare an adequate defense").

38. Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1686 n.434 (2003) (quoting criminologist). Jails tend to be more dangerous and "inherently more chaotic" than prisons; because of rapid turnover, "classification of jail inmates is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis." Id. at 1686–87 & n.434.

39. E.g., Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA 29–43 (2009); Nat'l Immigration Project of the Nat'l Lawyers Guild et al., Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees 5–6 (2007), available at http://www.nationalimmigrationproject.org/detention%20petition%20for%20rulemaking%20-%207-09.pdf (on file with the *Columbia Law Review*).

40. See generally Fla. Immigrant Advocacy Ctr., Dying for Decent Care: Bad Medicine in Immigration Custody (2009), available at http://www.fiacfla.org/reports/DyingForDecentCare.pdf (on file with the *Columbia Law Review*) (documenting "urgent crisis in medical care for ICE detainees").

41. Nina Bernstein, Officials Obscured Details of Migrant Deaths in Jail, N.Y. Times, Jan. 10, 2010, at A1 [hereinafter Bernstein, Officials Obscured Details]; see also All Things Considered: The Death of Richard Rust (NPR radio broadcast Dec. 5, 2005), transcript available at http://www.npr.org/templates/story/story.php?storyId=5022866 (on file with the *Columbia Law Review*) (discussing death of Richard Rust from heart attack while in immigration custody).

42. See, e.g., Amnesty Int'l, supra note 39, at 37–39 (discussing "inappropriate and excessive use of restraints"); Constitution Project, supra note 10, at 15 (noting that many detainees are "held in prison-like conditions" with pretrial criminal suspects and convicted offenders). Most facilities—accounting for half of all detainees—commingle immigration detainees with local criminal populations. Schriro, supra note 14, at 10.

to far-flung locations "where there are surplus beds."[43] From 2003 to 2007, the number of transfers more than doubled.[44] Transfers exacerbate the problems that invariably arise in detention, disrupting detainees' ability to present effective arguments for release and against removal by interfering with attorney-client relationships, delaying and complicating proceedings, and even changing the applicable substantive law.[45] In many instances, attorneys and family members have been unable to locate detainees for extended periods.[46]

Third, existing policies and practices almost certainly have caused *overdetention*: detention of individuals who pose no actual flight risk or danger to public safety or are held under overly restrictive circumstances. As custody, bond, and parole decisions increasingly have come to rest on broadly defined categories—for example, an individual's prior conviction[47] or status as an asylum-seeker arriving by boat from Haiti[48]—rather than individualized determinations of flight risk or dangerousness, the number of detainees presenting no such risks has likely increased, although the precise extent is difficult to ascertain.[49] Variations on overdetention result from regulations automatically staying immigration judges' custody and bond decisions pending administrative appeal,[50] bonds that are routinely set too high for detainees to pay,[51] and custody of individuals under excessively severe restraints.[52]

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43. Schriro, supra note 14, at 6–9; see also Human Rights Watch, supra note 10, at 21 ("ICE's haphazard system of placing detainees . . . helps to explain why its transfer system is equally haphazard."); All Things Considered: Immigration Transfers Add to System's Problems (NPR radio broadcast Feb. 11, 2009), transcript available at http://www.npr.org/templates/story/story.php?storyId=100597565 (on file with the *Columbia Law Review*) (discussing reasons for lack of detention space in Northeast).

44. Human Rights Watch, supra note 10, at 29–30.

45. See id. at 58–61, 66–71 (detailing difficulties in representation of detainees presented by transfer system). In practice, a detainee's ability to return venue to pre-transfer locations is limited. Id. at 61–65.

46. See id. at 24, 79–83 ("[D]etainees can literally be 'lost' from their attorneys and family members for days or even weeks after a transfer."); Kerwin & Lin, supra note 21, at 10–11 (discussing unreliability of detainee location procedures).

47. 8 U.S.C. § 1226(c) (2006).

48. See In re D-J-, 23 I. & N. Dec. 572, 574 (Att'y Gen. 2003) (denying parole to Haitian asylum-seeker).

49. See Am. Bar Ass'n, Comm'n on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases ES-25 (2010); Margaret H. Taylor, Dangerous By Decree: Detention Without Bond in Immigration Proceedings, 50 Loy. L. Rev. 149, 170 (2004) (discussing increase in "no-bond directives based on categorical presumptions").

50. 8 C.F.R. § 1003.19(i)(2) (2009); see also Zavala v. Ridge, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (holding predecessor provision unconstitutional).

51. Nationwide, the average bond is almost $6,000. While immigration judges may release noncitizens on recognizance, many are reluctant and uncertain about their authority to do so. Amnesty Int'l, supra note 39, at 17–18; cf. All Things Considered: Bail Burden Keeps U.S. Jails Stuffed with Inmates (NPR radio broadcast Jan. 21, 2010), transcript available at http://www.npr.org/templates/story/story.php?storyId=122725771 (on file with the *Columbia Law Review*) (noting two-thirds of criminal pretrial detainees are nonviolent offenders who cannot afford bail).

52. See Amnesty Int'l, supra note 39, at 37–39 (discussing "inappropriate and

Finally, for many individuals, detention lasts for prolonged or indefinite periods of time. Although adjudicators expedite proceedings involving detainees, neither the Sixth Amendment nor any statutory speedy trial guarantee applies to immigration proceedings.[53] With agency adjudicators and federal courts plagued with "staggering" immigration caseloads and insufficient resources, and with transfers causing additional delays, thousands of noncitizens have languished in detention for months and even years.[54] Approximately five percent of detainees—close to 19,000 individuals each year—are held for more than four months, and approximately 2,100 individuals are held for more than one year.[55] In many cases, detention has lasted much longer.[56]

The result for many noncitizens is a pattern of excessiveness that spans the entire detention process—from who is being detained in the first place and on what basis, to the severity of confinement, to the ultimate effect on removal proceedings. Immigration detention has embraced the "aesthetic" and "technique" of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody's permissible purposes.[57]

II. DISMANTLING EXCESSIVE DETENTION?

The Schriro Report acknowledges that most immigration detainees are held under circumstances inappropriate to their noncriminal status. Based on the report's findings, the government has pledged to overhaul the detention regime significantly. Section II.A analyzes the Schriro Report and the government's proposals, which could have important implications for how detention is understood. Section II.B considers the limits of these initiatives, which, according to one expert, are "positive"

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excessive use of restraints").

53. See, e.g., Argiz v. U.S. Immigration, 704 F.2d 384, 387 (7th Cir. 1983) (holding neither Sixth Amendment, Speedy Trial Act, nor Interstate Agreement on Detainers guarantees speedy deportation hearing).

54. Human Rights Watch, supra note 10, at 58–61 (detailing ways in which transfers delay bond hearings); Transactional Records Access Clearinghouse, Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow (2009), at http://trac.syr.edu/immigration/reports/208 (on file with the *Columbia Law Review*) (discussing growing backlog of immigration cases); see Jill E. Family, A Broader View of the Immigration Adjudication Problem, 23 Geo. Immigr. L.J. 595, 598–611 (2009) (discussing large caseloads, backlogs, and other weaknesses in immigration adjudication); Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. Ill. L. Rev. 829, 855 (discussing increases in immigration caseloads before U.S. courts of appeals).

55. Kerwin & Lin, supra note 21, at 16–20; Schriro, supra note 14, at 6.

56. E.g., Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 945 (9th Cir. 2008) (more than seven years); Nadarajah v. Gonzales, 443 F.3d 1069, 1071 (9th Cir. 2006) (almost five years); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (almost three years); Ly v. Hansen, 351 F.3d 263, 265 (6th Cir. 2003) (500 days).

57. Sharon Dolovich, Foreword: Incarceration American-Style, 3 Harv. L. & Pol'y Rev. 237, 237–39 (2009).

but "inadequate in comparison to the scope of the problem."[58]

A. *Reforming Detention Conditions*

Notably, the Schriro Report characterizes the misalignment between detention's noncriminal purposes and its quasi-punitive practices not as the result of inadequate implementation, but rather as a more fundamental, systemic failure. As Homeland Security Secretary Janet Napolitano recently stated, "[t]he paradigm was wrong."[59] Most detention facilities, the report notes, were designed to hold criminal suspects and offenders, not immigration detainees, and most detention officials have experience in law enforcement, not civil detention and alternatives to detention.[60] Even the government's detention standards—which advocates initially welcomed[61]—inappropriately draw from "criminal incarceration policies and practices" designed for criminal pretrial detainees, and are overly restrictive for most immigration detainees.[62]

In response to the Schriro Report, DHS intends to improve day-to-day facilities oversight and implementation of its existing detention standards.[63] Longer term, DHS plans to rely less on excess capacity in correctional facilities, moving towards a more centralized system of facilities specifically designed for civil immigration purposes.[64] DHS also intends to calibrate the severity of detention more closely to the risks posed by particular detainees and to use alternatives to detention when feasible.[65]

Although the extent to which these changes will be implemented is uncertain, this emphasis on distinct, noncriminal approaches to immigration custody remains significant. While some courts have assumed that the severity of immigration detention should be evaluated

58. Susan Carroll, Immigrant Facilities Subpar, Houston Chron., Feb. 5, 2010, at A1 (quoting Linton Joaquin, general counsel of National Immigration Law Center).

59. Nina Bernstein, Ideas For Immigrant Detention Include Converting Hotels and Building Models, N.Y. Times, Oct. 6, 2009, at A14 [hereinafter Bernstein, Ideas].

60. Schriro, supra note 14, at 4, 16; see Dow, supra note 12, at 9 (quoting former official's view that INS lacked "expertise in corrections" when it began to expand detention).

61. INS Hopes to Bring Uniformity to Detention Facilities' Processes with Release of Comprehensive Standards, 77 Interpreter Releases 1637, 1637 (2000) (quoting American Bar Association President Martha Barnett).

62. Schriro, supra note 14, at 16; see Taylor, Challenging Conditions, supra note 7, at 1126 n.194 (questioning whether standards imported from criminal pretrial context are "appropriate guidelines for the civil detention of aliens").

63. Morton, supra note 20.

64. U.S. Immigration and Customs Enforcement, 2009 Immigration Detention Reforms (2009), at http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm (on file with the *Columbia Law Review*).

65. Fact Sheet, U.S. Dep't of Homeland Sec., ICE Detention Reform: Principles and Next Steps 2 (2009), available at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf (on file with the *Columbia Law Review*).

using the same constitutional standards governing pretrial criminal custody,[66] others have insisted that because noncriminal detention rests on different premises, higher constitutional standards must prevail—and the Schriro Report appears to concur.[67] By drawing attention to ways in which detention systematically falls short of those higher standards, the Schriro Report and the government's proposals could help to reframe how courts and others understand the nature of immigration custody, aligning that understanding more closely with the noncriminal purposes that custody may permissibly advance.

B. *The Limits of Proposed Reforms*

Though ambitious and important, the Obama Administration's proposals leave intact a range of practices that contribute to detention's excessiveness for many noncitizens. The government appears particularly disinclined to implement more robust oversight mechanisms and substantive constraints on its detention authority, such as enforceable detention standards, stronger rules limiting transfers, narrower interpretations of detention statutes, or more widely available hearings before immigration judges to review ICE's custody and bond decisions. Moreover, while DHS appears prepared to detain low-risk individuals in less restrictive settings and expand alternatives to detention, it remains unclear whether those programs will meaningfully reduce the overall severity of custody.

1. *Detention Standards.* — Like its predecessors, the Obama Administration has declined to promulgate binding, enforceable detention standards, maintaining that doing so would be "laborious, time consuming, and less flexible" than focusing on improved facilities

66. See, e.g., Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) (applying criminal pretrial standards to immigration detention). Courts also often assume that the Eighth Amendment standard of treatment for convicted offenders also applies to pretrial criminal suspects. Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 886 n.15 (2009) (hereinafter Dolovich, Cruelty). However, given the distinct purposes for their custody, pretrial detainees arguably are entitled to higher levels of protection under the Due Process Clause. See David C. Gorlin, Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis, 108 Mich. L. Rev. 417, 417 (2009) ("[T]he substantive component of the Due Process Clause provides pretrial detainees with greater protection than the Eighth Amendment provides to convicted prisoners.").

67. See, e.g., al-Kidd v. Ashcroft, 580 F.3d 949, 977–78 (9th Cir. 2009) (observing that when government detains material witnesses "who are not charged with crimes, it is under an obligation not to treat them like criminals"); Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004) ("With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held . . . ."); Peter H. Schuck, INS Detention and Removal: A "White Paper," 11 Geo. Immigr. L.J. 667, 671 (1997) ("[T]he civil nature of removal-related detention . . . implies greater obligations on the INS with respect to the conditions of confinement.").

management.[68] Since DHS has apparently concluded that its current standards are inadequate and hopes to overhaul the detention regime altogether, this desire for flexibility might seem understandable. However, the inadequacies in DHS's existing oversight efforts raise questions about its ability to implement even higher standards if they are not independently enforceable.[69] Immigration detention has long been characterized by a "climate of governmental indifference" to detainees' well-being and a culture of secrecy and impunity.[70] Officials and their contractors face great incentives to skimp on the resources necessary to hold detainees under even minimally fair and humane conditions, much less costlier standards exceeding that minimum.[71]

Especially since DHS will continue to rely upon contract facilities, binding standards—with stronger complaint mechanisms and judicial enforceability—could play a valuable role in improving detention conditions, especially if they help clarify what "truly civil" detention requires.[72] Indeed, apparently lacking confidence in DHS's capacity to implement higher standards on its own, members of Congress have introduced legislation that would require DHS to implement enforceable regulations and stronger compliance mechanisms.[73]

2. *Transfers.* — Nor has the government adopted meaningful standards regulating detainee transfers. Unlike transfers in correctional systems, which are subject to a number of constraints, the sole "determining factor" for immigration detention transfers is "whether the transfer is required for operational needs."[74] ICE has "staunchly

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68. Letter from Jane Holl Lute, Deputy Sec'y of U.S. Dep't of Homeland Sec., to Michael J. Wishnie, Yale Law Sch., & Paromita Shah, Nat'l Immigration Project of the Nat'l Lawyers Guild, at 5–6 (July 24, 2009), available at http://clearinghouse.net/chDocs/public/IM-NY-0045-0004.pdf (on file with the *Columbia Law Review*) (denying petition for rulemaking).

69. See Karen Tumlin et al., Nat'l Immigration Law Ctr., A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers, at vii (2009), available at http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf (on file with the *Columbia Law Review*) (finding DHS efforts to monitor compliance with detention standards "woefully deficient").

70. Serena Hoy, The Other Detainees, Legal Affairs, Sept./Oct. 2004, at 58; see Bernstein, Officials Obscured Details, supra note 41 at A1 (describing a "culture of secrecy" permeating immigration detention).

71. See, e.g., Dow, supra note 12, at 96–97, 103–04 (discussing ways contract facilities "cut corners at the expense of prisoners' physical well-being" to save money).

72. See Nat'l Immigration Project of the Nat'l Lawyers Guild et al., supra note 39, at 12 (arguing binding regulations should clarify "differing requirements of non-punitive and punitive detention"); Schlanger, supra note 38, at 1683 ("[T]he evolution of good professional practice in corrections has been greatly influenced by court cases, and vice versa."); Taylor, Challenging Conditions, supra note 7, at 1127 (arguing "judicial intervention is *indispensable*" to improvement of detention conditions (quoting Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring))).

73. Strong STANDARDS Act, S. 1550, 111th Cong. (2009); Immigration Oversight and Fairness Act, H.R. 1215, 111th Cong. (2009).

74. Immigration and Customs Enforcement, ICE/DRO Detention Standard: Transfer of Detainees 2 (2008), available at http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf (on file with the

opposed" any substantive rules guiding and limiting transfers, or making it easier for detainees to change venue, as members of Congress have proposed.[75] Instead, ICE has pledged only to implement a detainee locator system and to follow new managerial protocols before transferring individuals.[76] While these changes may ensure that fewer detainees "disappear" altogether within ICE's facilities network, they will do relatively little to rein in the haphazard transfer practices that currently prevail.

3. *Prolonged Detention.* — The government's initiatives also do not address prolonged detention. Although the Supreme Court has upheld the constitutionality of mandatory detention under the criminal deportability grounds for the "brief period necessary" to hold and conclude removal proceedings,[77] the Court also has held that, absent special circumstances, detention beyond a period reasonably necessary to effectuate removal—which the Court presumptively set at six months—raises serious due process concerns.[78] Lower courts have identified similar concerns arising from prolonged detention while proceedings are pending, and have accordingly construed detention provisions not to authorize prolonged detention without individualized bond hearings.[79] To the extent that the executive branch is similarly obliged to avoid constitutional concerns[80] when interpreting ambiguous statutes, the government might be expected to construe these provisions similarly. Instead, the government has chosen to interpret them rather expansively.[81]

4. *Overdetention.* — The government has eschewed other reasonable statutory interpretations that would help limit unnecessary overdetention. For example, the government could interpret the criminal mandatory custody statute not to apply to individuals with bona

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Columbia Law Review).

75. Human Rights Watch, supra note 10, at 6; Protect Citizens and Residents From Unlawful Detention Act § 4(g), S. 1549, 111th Cong. (2009).

76. U.S. Dep't of Homeland Sec., Office of Inspector General, Immigration and Customs Enforcement's Tracking and Transfers of Detainees 3–4 (2009), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf (on file with the *Columbia Law Review*); Morton, supra note 20.

77. Demore v. Kim, 538 U.S. 510, 513 (2003). On the record before the Court, the average time to conclude removal proceedings was forty-seven days. Id. at 529–30.

78. Zadvydas v. Davis, 533 U.S. 678, 690–96, 699–701 (2001); see also *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (noting permanent resident detained under 8 U.S.C. § 1226(c) "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified").

79. See, e.g., Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 945 (9th Cir. 2008); Nadarajah v. Gonzales, 443 F.3d 1069, 1078 (9th Cir. 2006); Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005); Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003).

80. See Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1212–17, 1223–28 (2006) (discussing applicability of canon of constitutional avoidance to executive actors).

81. Markowitz, supra note 10, at 564–65 (criticizing DHS for adopting "broadest possible reading" of mandatory custody provisions).

fide challenges to removal,[82] individuals who are not taken into ICE custody immediately after being released from criminal custody,[83] or individuals whose release from criminal custody does not involve circumstances connected to any removable offense[84]—permitting instead the individualized custody and bond hearings to which noncitizens ordinarily are entitled. DHS also could—as it now has with arriving asylum-seekers[85]—more actively exercise its parole authority or prosecutorial discretion to release returning permanent residents who have been detained upon arrival in the United States if they present neither a flight risk nor a danger to public safety.[86] As with prolonged detention, however, the government has instead largely opted for aggressive interpretations of mandatory custody provisions.[87]

5. *Severity of Custody.* — DHS appears prepared to temper overdetention by calibrating the severity and restrictiveness of custody more closely to the risks posed by particular detainees, both by using less restrictive facilities than currently in use[88] and by expanding "alternatives to detention" programs involving less restrictive forms of custody and

82. See, e.g., *Tijani*, 430 F.3d at 1246–47 (Tashima, J., concurring) ("Only those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention."); Gonzalez v. O'Connell, 355 F.3d 1010, 1019–21 (7th Cir. 2004) ("[S]everal district courts [have] held that § 1226(c) is unconstitutional as applied to detainees who have a good-faith claim that they will ultimately be permitted to remain in the country.").

83. See, e.g., Waffi v. Loiselle, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (finding mandatory detention statute inapplicable to alien taken into immigration custody "well over a month" after release from criminal custody); Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004) (finding mandatory detention statute inapplicable to alien released from criminal custody "years" before being taken into immigration custody).

84. See, e.g., Saysana v. Gillen, 590 F.3d 7, 18 (1st Cir. 2009) ("[T]he statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute, not merely any release from any non-DHS custody."); Ortiz v. Napolitano, 667 F. Supp. 2d 1108, 1112 (D. Ariz. 2009) ("Here, this Court . . . concludes that the statute clearly requires a nexus between the deportable offense and the release from custody."); Garcia v. Shanahan, 615 F. Supp. 2d 175, 182 (S.D.N.Y. 2009) ("The mandatory detention provision cannot be retroactively applied to aliens who were released from custody for removable offenses prior to October 9, 1998—even if they are later released from custody for a nonremovable offense.").

85. Suzanne Gamboa, Feds Revising Asylum Detention Policies, Associated Press, Dec. 16, 2009 (discussing new ICE policy providing that arriving asylum-seekers with "credible fear" of persecution will generally be released from detention and paroled into United States).

86. See Letter from Linda Kenepaske, Chair, Immigration and Nationality Law Comm., Ass'n of the Bar of the City of N.Y., to Janet Napolitano, Sec'y of Homeland Sec. (July 20, 2009), available at http://www.nycbar.org/pdf/report/uploads/20071784-LettertoDept.HomelandSecreDHS.pdf (on file with the *Columbia Law Review*) (advocating greater use of parole and prosecutorial discretion).

87. See, e.g., Matter of Saysana, 24 I. & N. Dec. 602, 603 (B.I.A. 2008) (noting government's argument that mandatory detention applies even to release unrelated to any offense in 8 U.S.C. § 236(c)); Matter of Rojas, 23 I. & N. Dec. 117, 118 (B.I.A. 2001) (noting government argument that alien was subject to removal under § 237(a)(2)(A)(iii) despite being "free in the community before being detained" by INS).

88. Schriro, supra note 14, at 23.

supervision, such as electronic monitoring, telephonic and in-person reporting, curfews, and home visits.[89] It remains unclear how the government will classify and match individuals with the appropriate level of custody, although early indications suggest that these decisions may rest on broad categorizations similar to those guiding ICE's existing custody decisions.[90] Given concerns over ICE's existing capacity to make these kinds of determinations, the government may face great pressure to hold individuals under circumstances that are as severe and restrictive as possible.[91]

Appropriately crafted alternatives programs could temper the extent of overdetention. While their effectiveness remains unclear, officials generally report high levels of compliance by program participants,[92] and the Schriro Report recommends their expansion, which could realize significant fiscal savings.[93] To be meaningful as "alternatives," such programs should only include individuals who otherwise would have been detained, rather than released on recognizance or bond, and should not involve restraints more restrictive than necessary to accomplish the permissible purposes of custody. Indeed, such programs should appropriately be understood as alternative forms of custody, since they still impose substantial restrictions on liberty.[94] To this end, DHS could implement these

89. Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison 47–50, 63–67 (2009); Schriro, supra note 14, at 20–21; see Vera Institute of Justice, Appearance Assistance Program Final Planning Report 32–37 (1996), available at http://www.vera.org/download?file=1156/AAP%2BFinal%2BPlanning.pdf (on file with the *Columbia Law Review*) (suggesting home detention might qualify as "custody" required by immigration statute).

90. When announcing DHS's initiatives, for example, Napolitano distinguished categorically between "serious felons," who "deserve to be in the prison model," and "others," such as "women" and "children." Bernstein, Ideas, supra note 59, at A14.

91. Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Maritime, and Global Counterterrorism of the H. Comm. on Homeland Security, 111th Cong. (2009) (statement of Chris Crane, Vice President of Detention and Removal Operations, Nat'l Immigration and Customs Enforcement Council 118 of the AFL-CIO), available at http://homeland.house.gov/hearings/index.asp?ID=228 (on file with the *Columbia Law Review*) (criticizing proposals to use less restrictive facilities); see Kerwin & Lin, supra note 21, at 24–32 (critically assessing ICE's information tracking and risk assessment capacities).

92. E.g., Kerwin & Lin, supra note 21, at 31–32 (reporting appearance rates in existing ICE programs ranging from eighty-seven percent to ninety-six percent). But see Susan Carroll, Flaws Found in Options for Immigrant Detention, Houston Chron., Oct. 20, 2009, at A1 (reporting lower levels of compliance based on records of contractors administering alternatives programs).

93. While the daily costs of detention can exceed $100 per detainee, alternatives programs currently cost between thirty cents and fourteen dollars per detainee each day. Schriro, supra note 14, at 11, 20–21.

94. Kerwin & Lin, supra note 21, at 31 (characterizing alternatives programs as "less restrictive *forms* of civil custody"); cf. Gall v. United States, 552 U.S. 38, 48 (2007) (recognizing that although imprisonment may be "qualitatively more severe" than probation, probation nevertheless "substantially restricts [probationers'] liberty"); Erin Murphy, Paradigms of Restraint, 57 Duke L.J. 1321, 1347–64 (2008) (analyzing

programs not just for individuals who are clearly entitled to bond hearings, but also for individuals whose detention it currently deems "mandatory," since those individuals would remain under custody and the statute arguably requires no more.[95]

However, if not implemented appropriately, expansion of these programs could create a large-scale regime of "alternatives to release," rather than true "alternatives to detention."[96] Observers have expressed concerns that existing alternatives programs have been overly restrictive—for example, including individuals who otherwise would be entitled to release on recognizance or bond and relying heavily on electronic monitoring and home confinement when less intrusive supervision would suffice.[97] Nor has the government interpreted the mandatory custody statute to permit alternatives to detention as a sufficient form of "custody."[98] If implemented in an overly restrictive manner, alternatives programs could simply extend the quasi-punitive nature of immigration custody beyond detention itself into other forms of physical restraint.

III. CONVERGENCE AND THE ENFORCEMENT-DETENTION NEXUS

Ultimately, as the Schriro Report acknowledges, the scale and severity of immigration custody are functions of immigration enforcement policies more generally, not simply detention policies as such.[99] And despite the Obama Administration's pledge to overhaul detention, it has also made clear that it plans to dramatically expand its predecessors' aggressive enforcement efforts, particularly by widening programs to enlist state and local cooperation in federal immigration enforcement.[100] Even leading reform advocates in Congress appear

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constitutional interests implicated by restraints other than punitive incarceration).

95. Unlike other detention-related provisions, 8 U.S.C. § 1226(c) requires "custody," rather than "detention." Compare 8 U.S.C. § 1226(c) (2006) ("custody"), with § 1225(b)(2)(A) ("shall be detained"), § 1225(b)(1)(iii)(IV) ("shall be detained"), and § 1231(a)(2) ("shall detain"). Certain alternatives to detention may qualify as custody. See United States ex rel. Marcello v. Dist. Dir., 634 F.2d 964, 967 (5th Cir. 1981) (noting for habeas corpus purposes, noncitizen is sufficiently in "custody" when "any significant restraint on liberty" exists, including reporting requirements and travel restrictions).

96. Human Rights First, supra note 89, at 66–67.

97. Kramer, supra note 11, at 175 ("If an individual has no criminal record . . . and family support in the community, there really is no good reason to [require a curfew or electronic monitoring]. . . . If an IJ orders release on bond and the bond is posted, arguably, ICE cannot or should not impose an additional burden."); Schriro, supra note 14, at 20.

98. E.g., Matter of Aguilar-Aquino, 24 I. & N. Dec. 747, 750–53 (B.I.A. 2009) (interpreting "custody" to mean "actual physical detention," not to encompass home confinement and electronic monitoring).

99. Schriro, supra note 14, at 11–13 (discussing "nexus" between enforcement policies and growth of detainee population).

100. See Spencer S. Hsu, DHS Reshapes Its Immigration Enforcement Program, Wash. Post, Oct. 16, 2009, at A3 (discussing expansion of cooperation agreements under 8 U.S.C. § 1357(g)); Julia Preston, Immigrants Are Matched to Crimes, N.Y. Times, Nov. 13, 2009, at A13 (discussing expansion of "Secure Communities" program).

inclined to preserve expansive criminal removal provisions and to expand resources for enforcement and detention—especially with facilities contractors themselves actively advocating expanded use of detention.[101]

Accordingly, the number of individuals subject to immigration custody will invariably increase in the years to come, and DHS officials emphasize that detention will continue "on a grand scale."[102] DHS recently announced, for example, that its "Secure Communities" partnership with state and local law enforcement agencies had, during its first year alone, identified 111,000 noncitizens with criminal convictions—many of whom may be subject to detention.[103] By 2013, DHS hopes to implement Secure Communities in every local jurisdiction nationwide. As the government expands these enforcement initiatives, the number of potential detainees will continue to increase dramatically.

In this context, the government will face considerable pressures not only to hold more noncitizens in custody, but to do so at minimal cost.[104] As Sharon Dolovich has explained in the criminal context, "incarceration is expensive. When . . . the public's taste for incarceration is considerable, the state may . . . try to do the minimum possible to meet its burden, and perhaps to do even less if it can get away with it."[105] So, too, with immigration detention. When faced with the choice of devoting resources to improve conditions or to acquire additional detention space, the government may face considerable pressure to choose the latter.[106] While these budgetary pressures could also prompt

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101. See Christopher Nugent, Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens, 5 U. Md. L.J. Race, Religion, Gender & Class 243, 254–55 & n.46 (2005) (discussing fiscal benefits of immigration detention for state, local, and private contractors); Shoba Sivaprasad Wadhia, The Policy and Politics of Immigrant Rights, 16 Temp. Pol. & Civ. Rts. L. Rev. 387, 408 (2007) (discussing provisions in 2006 Senate immigration reform bill expanding detention); see also How to Make Money and Increase Safety By Working With ICE, CorrectionsOne, http://www.correctionsone.com/facility-design-and-operation/articles/2080068-How-to-make-money-and-increase-safety-by-working-with-ICE (discussing ICE-led workshop on how local jails can "potentially make money by helping ICE detain illegal immigrants") (last visited June 25, 2010).

102. Morton, supra note 20; see Michelle Roberts, ICE: Detention Overhaul Won't Lead to Fewer Beds, Associated Press, Aug. 12, 2009.

103. Preston, supra note 100, at A13; see generally Nat'l Immigration Law Ctr., More Questions Than Answers About the Secure Communities Program (2009), available at http://www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf (on file with the *Columbia Law Review*) (providing general questions and answers about Secure Communities program); Michelle Waslin, Immigration Pol'y Ctr., The Secure Communities Program: Unanswered Questions and Continuing Concerns (2009), available at http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_112309.pdf (on file with the *Columbia Law Review*).

104. See Jessica M. Vaughan & James R. Edwards, Jr., Ctr. for Immigration Studies, The 287(g) Program: Protecting Home Towns and Homeland 22–23 (2009) (advocating increase in detention space to accommodate expanded enforcement).

105. Dolovich, Cruelty, supra note 66, at 972–73.

106. See Stephen H. Legomsky, The Detention of Aliens: Theories, Rules, and

DHS to expand less costly alternatives to detention,[107] the close association of immigration control with criminal enforcement will continue to place pressures upon the government to hold noncitizens under restrictive, quasi-punitive forms of custody.[108]

CONCLUSION

The Obama Administration's initiatives certainly have potential to demonstrate, as one observer puts it, "that it's possible to be tough without being unfair and inhumane."[109] But the excessive, quasi-punitive nature of detention today arises from more than the inadequate conditions of confinement that these initiatives principally target. Rather, that excessiveness arises from a broader constellation of detention-related practices, immigration laws "clothed with . . . many attributes of the criminal law,"[110] and a surrounding discourse that strongly associates immigration with criminality. To fully dismantle this quasi-punitive regime, it may not be sufficient to focus exclusively on improving conditions of confinement. Absent a more fundamental reconsideration of immigration control policies premised upon convergence with criminal enforcement, fully realizing "fairness and humanity" will remain an aspiration in tension with the "toughness" that has dominated immigration policy in recent years.

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Discretion, 30 U. Miami Inter-Am. L. Rev. 531, 547 (1999) (arguing pressures to secure additional detention space can cause officials to "cut[] corners on humane treatment").

107. Cf. Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1285–90 (2005) (discussing role of fiscal constraints in reducing criminal incarceration rates and sentence lengths).

108. See Vaughan & Edwards, supra note 104, at 22–23 (recommending increased funding for detention space); see also Susan Carroll, Officials to Ease Rules at Migrant Centers, Hous. Chron., June 8, 2010, at A1 (noting opposition by labor union for ICE detention facility guards to reforms easing severity and restrictiveness of detention for low-risk detainees).

109. Edward Alden, Obama Quietly Changes U.S. Immigration Policy, New America Media, Dec. 28, 2009, at http://news.newamericamedia.org/news/view_article.html?article_id=f35b300ec73d76f7ccc97e547a14056a (on file with the *Columbia Law Review*).

110. Stumpf, supra note 1, at 376.