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Notes

MEZEI'S DAY IN COURT: DEBTORS' PRISONS, SUBSTANCE ABUSE, AND THE PERMISSIVENESS OF CIVIL DETENTION IN AMERICAN IMMIGRATION LAW

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ABSTRACT—American immigration law mandates the civil detention of certain classes of migrants while their legal cases proceed through the courts. Due to the peculiar nature of immigration law, many migrants find themselves detained for years on end without receiving the level of due process that normally attends imprisonment. This Note draws on historical and comparative analysis to argue that the mandatory detention provisions of American immigration law are not civil, but functionally criminal, and that detained migrants are therefore owed a modicum of due process that they do not currently receive.

This Note traces the history of immigration law in the United States, surveying the laws and cases that gave rise to the mandatory civil detention of certain classes of migrants. This Note then examines recent Supreme Court cases challenging these provisions. Analogizing migrant detention to debtors' prisons in early modern England and involuntary civil commitment in the substance abuse crisis, this Note identifies four features that help discern civil from criminal detention. Finally, this Note applies those four features to the mandatory detention of migrants under the Immigration and Nationality Act, concluding that this detention is functionally criminal imprisonment, demanding greater due process for migrants.

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INTRODUCTION

In the spring of 1948, Ignatz Mezei decided to visit his dying mother. He left his home in Buffalo and set sail for Europe to care for her.[1] Mr. Mezei had lived in upstate New York for a quarter century.[2] During World War II, Mr. Mezei exercised his civic duty on behalf of the United States, volunteering his time and energy to help the American war effort. He worked for the U.S. Coast Guard, served as an air raid warden, donated blood, and sold war bonds.[3] But after the war, he experienced great difficulty in navigating postwar Europe, and found himself unable to enter Romania to visit his dying mother. So, Mr. Mezei secured an immigration quota visa from the American consulate in Budapest and sailed back to the United States to return to his wife and home.[4]

Upon his arrival at Ellis Island, immigration inspectors told a very different story. In their eyes, Mr. Mezei was not a civic-minded, star-spangled Buffalo resident, but a stranger of mysterious origin, ostensibly

[1] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953) (Black, J., dissenting); United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 67 (S.D.N.Y. 1951), *aff'd in part*, *rev'd in part*, 195 F.2d 964 (2d Cir. 1952), *rev'd*, 345 U.S. 206 (1953).

[2] *Mezei*, 345 U.S. at 216.

[3] *Shaughnessy*, 101 F. Supp. at 67.

[4] *Mezei*, 345 U.S. at 208.

born in Gibraltar to parents of Romanian or Hungarian descent.[5] They accused him of having joined a communist cell that operated under the direction of the Communist Party when he first came to the United States in 1924.[6] They claimed that he harbored communist sympathies and served as the secretary and president of the Buffalo chapter of the communist propaganda machine.[7] The Supreme Court characterized his trip to Europe as a curious disappearance behind the Iron Curtain.[8] The Attorney General determined that Mr. Mezei's release into the United States after returning from Europe would be prejudicial to the public interest, and ordered his exclusion from the country.[9] Mr. Mezei was promptly detained in the Communist Ward at Ellis Island until the government could effectuate his departure.[10]

After his final order of removal, Mr. Mezei tried—and failed—to depart Ellis Island for another country. He applied for admission to over a dozen European, Latin American, and South American countries. Every country refused his application.[11] Mezei was "likely to be detained indefinitely, perhaps for life, for a cause known only to the Attorney General."[12]

Later courts have read *Mezei* as a command of judicial deference in cases where a noncitizen is subjected to indefinite civil detention when trying to enter the United States.[13] Just as Mr. Mezei was condemned to languish in

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[5] *Id.*

[6] Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 972–73 (1995).

[7] *Id.* at 974–75.

[8] *Mezei*, 345 U.S. at 214.

[9] *Id.* at 208.

[10] Weisselberg, *supra* note 6, at 971.

[11] *Mezei*, 345 U.S. at 219–20 (Jackson, J., dissenting). Justice Jackson remarked that since the United States had adjudged Mezei a "Samson who might pull down the pillars of our temple," it is not surprising that other, "less strongly established and less stable" countries would refuse to admit him. *Id.* at 220.

[12] *Id.* at 220. After nearly four years of detention, the government quietly released him as it closed down Ellis Island. Richard A. Serrano, *Detained, Without Details*, L.A. TIMES (Nov. 1, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-nov-01-na-ignatz1-story.html [https://perma.cc/4HEU-ZNWF].

[13] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting) (finding that the holding of *Mezei* should be expanded to control cases involving noncitizens who are firmly within the territory of the United States and wish to remain); Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citing *Mezei* in stating that Congress's legislative power is at its height when determining the admissibility of noncitizens); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) (citing *Mezei* in noting that the "Court's general reaffirmations of this principle [of judicial deference to Congress and the President in the immigration context] have been legion"). In a recent Third Circuit case involving families seeking to avoid expedited removal from the United States, the court held that *Mezei* controlled. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 443 (3d Cir. 2016). Notably, this case traced the arc of the Supreme

an Ellis Island jail cell for the rest of his life, migrants today can be subjected to indefinite civil detention for years at a time, all without being able to see a judge to contest their detention.[14]

This Note focuses on the permissiveness of indefinite civil detention in American immigration law. It draws on analogies to early modern English debtors' prisons and involuntary civil commitment in the substance abuse crisis to argue that the Supreme Court should recognize that indefinite civil detention under the Immigration and Nationality Act (INA) is not actually civil—it is functionally criminal.

Indefinite civil detention, and the accompanying human toll, continues through to today.[15] Hours before taking the stage in Orlando, Florida for the official kickoff of his reelection campaign,[16] President Trump took to Twitter to ignite debate on his signature issue of immigration. The President unveiled a major deportation operation, announcing that "[n]ext week, ICE [Immigrations and Customs Enforcement] will begin the process of removing the millions of illegal aliens[17] who have illicitly found their way into the United States." [18] The announcement blindsided senior ICE

Court's plenary power cases, finding that *Mezei* rolled back earlier cases that were friendlier to noncitizens. *Id.*

[14] *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2012); *see also* Kelsey Lutz, *The Implications of* Jennings v. Rodriguez *on Immigration Detention Policy*, MINN. L. REV. BLOG (Feb. 4, 2019), https://minnesotalawreview.org/2019/02/04/the-implications-of-jennings-v-rodriguez-on-immigration-detention-policy/ [https://perma.cc/8XJK-GAX5] ("[T]housands of [noncitizens] each year [are] detained pursuant to a series of immigration statutes requiring mandatory detention . . . ."); Domenico Montanaro et al., *Supreme Court Ruling Means Immigrants Could Continue to Be Detained Indefinitely*, NPR (Feb. 27, 2018, 10:24 AM), https://www.npr.org/2018/02/27/589096901/supreme-court-ruling-means-immigrants-can-continue-to-be-detained-indefinitely [https://perma.cc/ZN3H-FN7B] ("The U.S. Supreme Court ruled . . . that immigrants, even those with permanent legal status and asylum seekers, do not have the right to periodic bond hearings.").

[15] Albeit without the intrigue and espionage that colored the facts of *Mezei*.

[16] Maggie Haberman et al., *Trump, at Rally in Florida, Kicks Off His 2020 Re-election Bid*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/us/politics/donald-trump-rally-orlando.html [https://perma.cc/AJ7E-ANNH].

[17] The terms used to describe noncitizens vary widely and can be politically charged. When quoting or discussing a source, this Note will use whatever term is supplied in the source material. When discussing the issue more generally, this Note will use the terms "noncitizen" or "migrant."

[18] Donald J. Trump (@realDonaldTrump), TWITTER (June 17, 2019, 6:20 PM), https://twitter.com/realDonaldTrump/status/1140791400658870274 [https://perma.cc/5VCZ-TYQX]. Days later, President Trump delayed the operation for two weeks, announcing that the operation would go forward barring legislative overhaul from Congress. Christian Vasquez, *Trump Delays ICE Deportation Raids Hours After Defending Them*, POLITICO (June 22, 2019, 10:24 AM), https://www.politico.com/story/2019/06/22/trump-defends-immigration-actions-1376706 [https://perma.cc/RH9M-9HRR].

officials[19] and enraged congressional Democrats.[20] Most importantly, it put immigrants in a state of fear, racing to understand their rights and what might happen to them.[21]

Many immigrants fear civil detention, the deprivation of liberty for noncriminal purposes.[22] Individuals held in civil detention may never have been charged with a crime.[23] Civil detainees are held in facilities that are often indistinguishable from criminal detention centers.[24] Civil detention is a central feature of American immigration law,[25] used as a means of effectuating the removal of immigrants or maintaining custody of immigrants pending court actions.[26]

The same week President Trump announced the ICE operation, news articles detailing the wretched conditions of immigration detention centers drew public attention. Harrowing accounts of these centers detailed the ways in which those detained were denied basic human necessities. Children were

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[19] Zolan Kanno-Youngs & Michael D. Shear, *ICE Signals Mass Immigration Arrests, but Not the 'Millions' Trump Promised*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/us/politics/trump-immigration-deportations.html?module=inline [https://perma.cc/TLC2-SQCG].

[20] Vasquez, *supra* note 18.

[21] After news of the raids broke, the ACLU and the Refugee and Immigrant Center for Education and Legal Services published posts on social media aimed at informing immigrants of their rights should they be approached or detained by immigration officials. Aaron Rupar et al., *Trump Postpones ICE's Planned Deportation Raids in 10 Big Cities*, VOX (June 23, 2019, 8:54 AM), https://www.vox.com/policy-and-politics/2019/6/21/18701408/ice-deportation-raids-10-cities [https://perma.cc/4YUP-9VU2].

[22] Emily Ryo, Essay, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 238 (2019) ("Immigration detention in the U.S. is civil confinement for which the officially stated purpose is to facilitate the removal of individuals who do not have permission to remain in the country."); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010) (discussing the use of civil detention as a means of depriving an individual of liberty for the noncriminal purpose of effectuating the individual's removal).

[23] Many noncitizens detained under the mandatory detention provisions have never been charged with a crime. Lutz, *supra* note 14 (noting that the categories of noncitizens detained under these statutes include not only the criminally charged but also asylum seekers and noncitizens initially determined to be inadmissible).

[24] Kalhan, *supra* note 22, at 50 ("Most detention facilities . . . 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."). *See generally* Megan Shields Casturo, Comment, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN ST. L. REV. 825, 833–36 (2018) (surveying the dire conditions of privately owned detention centers, which house a majority of ICE detainees).

[25] Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT'L IMMIGR. F. (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/ [https://perma.cc/VJ6K-TTK8]; *see also* Ryo, *supra* note 22, at 239 ("The Trump Administration has expanded immigration detention by subjecting a greater number of individuals to detention and by making it more likely that detention will be prolonged.").

[26] *See* 8 U.S.C. §§ 1225(b), 1226(c) (2012).

denied toothbrushes, toothpaste, and soap.[27] In one Texas center, the overwhelming majority did not have the opportunity to bathe for long periods of time after entering the United States.[28] Toddlers without diapers were left with no option but to relieve themselves in their pants.[29]

While lawyers and district court judges have grappled over the conditions in these centers,[30] the Supreme Court is wrestling with broader questions on the issue of civil detention: What does the Constitution permit? Who may be detained in civil detention, and for how long? How do we understand the rights of immigrants and the permissiveness of civil detention? With recent decisions in *Jennings v. Rodriguez*[31] and *Nielsen v. Preap*[32] and continued hard-line immigration policies from the Trump Administration,[33] civil detention has become a prominent question for the Court. Neither of these recent cases addressed the constitutional permissiveness of the indefinite civil detention of migrants, and cases raising this question are percolating in the lower courts.[34]

This Note draws on history and comparative analysis to argue that the indefinite detention of immigrants should be considered a criminal rather than a civil process, and that those detained are therefore owed a modicum of due process that they do not currently receive. The Note proceeds in four Parts. Part I traces the history of immigration law in the United States. It

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[27] Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html [https://perma.cc/6VU7-R3RB].

[28] *Id.* For a broader discussion of conditions in detention centers, see Lizzie O'Leary, *'Children Were Dirty, They Were Scared, and They Were Hungry'*, ATLANTIC (June 25, 2019), https://www.theatlantic.com/family/archive/2019/06/child-detention-centers-immigration-attorney-interview/592540/ [https://perma.cc/H25X-R7GK].

[29] Dickerson, *supra* note 27.

[30] *See, e.g.*, Manny Fernandez, *Lawyer Draws Outrage for Defending Lack of Toothbrushes in Border Detention*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/sarah-fabian-migrant-lawyer-doj.html [https://perma.cc/6HD7-QQFP].

[31] 138 S. Ct. 830, 851 (2018) (declining to rule on the constitutional issue because the Court of Appeals ruled on statutory grounds rather than addressing the merits of the constitutional issue).

[32] 139 S. Ct. 954, 972 (2019) (ruling on statutory grounds because the respondents did not raise a head-on constitutional challenge to the statutes).

[33] *See, e.g.*, Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020) https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/ [https://perma.cc/M8HA-F64T] (detailing a Trump administration strategy that requires mental health professionals to turn over notes from mandatory therapy sessions to immigration officials, which professional therapy associations consider a violation of patient confidentiality).

[34] *Nielsen*, 139 S. Ct. at 972; *Rodriguez*, 138 S. Ct. at 851. The Supreme Court remanded *Rodriguez*, and district courts are currently opining on the constitutional issue. *See, e.g.*, Kouadio v. Decker, 352 F. Supp. 3d 235, 241 (S.D.N.Y. 2018) (ruling that a noncitizen detained for thirty-four months under a mandatory detention statute has a constitutional right to a bail hearing).

surveys the origins of federal regulation, examines Supreme Court cases defining the contours of civil detention, and discusses the origins and modern understanding of the federal government's plenary power over immigration. Part II examines recent Supreme Court cases challenging the indefinite civil detention of migrants. Part III then explores two nonimmigration civil detention analogies: debtors' prisons in early modern England and involuntary civil commitment in the substance abuse crisis context. Part IV draws on the analogies in Part III, identifies four features that help discern civil from criminal detention, and argues that the mandatory detention provisions of the Immigration and Nationality Act are functionally criminal.

I. HISTORY OF IMMIGRATION REGULATION

This Part examines the federal government's expansive powers over immigration. It traces the development of this power at the Supreme Court and examines how the power has been interpreted and applied.

A. Birth of the Plenary Power: Landmark Cases on Immigration and the Constitution

At the time of the Founding, the United States was a nation that welcomed open immigration and the free flow of migrants, and for over a century, Congress did not regulate immigration.[35] The federal government's first major treaty in the field of immigration sought to encourage immigration between the United States and China.[36] Over a decade of governmentally encouraged immigration followed. The Chinese population grew steadily in the Western States, and anti-Chinese sentiment ensued, particularly among industrialists and politicians.[37]

In response, Congress enacted the Chinese Exclusion Act of 1882, suspending Chinese immigration to the United States.[38] Notably, although this Act barred new Chinese immigrants from entering the country, it included an express exemption allowing Chinese subjects already present in

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[35] Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 205 (2004).

[36] Treaty with China, U.S-China, July 28, 1868, 16 Stat. 739 (known as the Burlingame Treaty).

[37] *The Burlingame-Seward Treaty, 1868*, U.S. DEP'T ST.: OFF. HISTORIAN, https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty [https://perma.cc/B2U9-UUYL].

[38] Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 58–59 ("[T]he coming of Chinese laborers to the United States . . . is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come . . . to remain within the United States.").

the United States to leave and reenter.[39] Six years later, Congress passed another act revoking this reentry exception,[40] barring Chinese immigrants living in America but traveling abroad from returning to the United States, even if they had valid reentry papers.[41] It was under this framework that immigration law cases first reached the Supreme Court.

In 1889, the Supreme Court decided *Chae Chan Ping v. United States*, the landmark case[42] that gave rise to the plenary power doctrine. The Court upheld the 1888 Act, ruling that the "government of the United States . . . can exclude aliens from its territory,"[43] establishing the federal government's plenary power over immigration. Since *Chae Chan Ping*, the political branches have possessed absolute power over immigration at the border, and Congress has continued to legislate heavily in the area of immigration.[44] The source of authority for the plenary power has not materially changed since *Chae Chan Ping*. In justifying the plenary power, the Court still uses what essentially amounts to a penumbral analysis,[45] drawing on a mosaic of disparate enumerated powers to create a reservoir of authority[46] that imbues

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[39] *Id.* § 3 (specifying that the prohibition "shall not apply to Chinese laborers who were in the United States" at the time the treaty took effect).

[40] Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504.

[41] This statutory framework forbidding the reentry of resident aliens echoes through centuries of history to today. Consider the plight of a lawful permanent resident of the United States on an inbound flight to America at the moment President Trump's first travel ban took effect, which barred reentry of lawful permanent residents. *See* Exec. Order No. 13769, § 3(c), 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017) (superseded by Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017)).

[42] Weisselberg, *supra* note 6, at 946–51 (describing the importance of *Chae Chan Ping* and the subsequent rise of the plenary power).

[43] Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).

[44] *See, e.g.*, Immigration and Nationality (McCarran-Walter) Act of 1952, 8 U.S.C. §§ 1101–1537 (2012); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[45] The constitutional justification for the plenary power doctrine closely resembles the oft-criticized "penumbral" analysis in *Griswold v. Connecticut*. 381 U.S. 479, 484 (1965) (holding that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"). *But see id.* at 508–10 (Black, J., dissenting) (criticizing the majority's penumbral analysis); Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 488 (2011) (criticizing the penumbral analysis in privacy cases as "intellectually confusing"); William J. Watkins, Jr., *The Driver's Privacy Protection Act: Congress Makes a Wrong Turn*, 49 S.C. L. REV. 983, 996 n.124 (1998) ("A 'penumbra' is a seemingly strange place to discover constitutional guarantees.").

[46] *Chae Chan Ping*, 130 U.S. at 604; *see also* U.S. CONST. art. I, § 8, cl. 3 (supporting the plenary power doctrine's rationale that if Congress may "regulate Commerce with foreign Nations," it necessarily possesses a broader foreign affairs power); *id.* art. I, § 8, cl. 4 (Naturalization Clause) (supporting the plenary power doctrine's rationale that if Congress may regulate which immigrants may enter the *political* community via naturalization, it may also regulate which immigrants may enter the *physical* community,

the federal government with plenary power over the regulation of immigration.

In the century that followed *Chae Chan Ping*, the plenary power doctrine evolved rapidly. In *Fong Yue Ting v. United States*, the Court held that the federal government's power to exclude aliens, as defined in *Chae Chan Ping*, naturally extends to the power to deport aliens.[47] Importantly, *Fong Yue Ting* introduced the civil/criminal distinction in immigration law. When Fong Yue Ting argued that his expulsion violated due process, the Court ruled that because "[t]he order of deportation is not a punishment for crime," but rather a noncriminal, civil action, Fong Yue Ting's Fourteenth Amendment due process rights "have no application."[48]

The Court more directly addressed the civil/criminal distinction in *Wong Wing v. United States*. After finding that Wong Wing was unlawfully present within the United States, a commissioner ordered he be imprisoned at hard labor for sixty days and then deported from the United States.[49] Wong Wing succeeded in arguing that imprisonment at hard labor was not a civil punishment but rather a criminal punishment that violated his Fifth and Sixth Amendment rights to a speedy and public trial.[50] Although the Court had previously affirmed the lower court rulings in *Chae Chan Ping* and *Fong Yue Ting*, this time the Court ruled that the commissioner in *Wong Wing* had gone too far. Finding that imprisonment at hard labor is a criminal punishment, the Court ruled that the government may criminally punish an alien only after a criminal trial that affords the alien the full panoply of rights found in the Fifth and Sixth Amendments.[51]

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i.e., immigration into the United States); *id.* art. I, § 8, cl. 11 (supporting the plenary power doctrine's rationale that if Congress may "declare War," it possesses a broader foreign affairs power that provides authority for regulating immigration); *id.* art. I, § 9, cl. 1 (Slave Importation Clause) (supporting the plenary power doctrine's rationale that if Congress may not regulate the importation of "Persons" *prior* to 1808, it may do so *after* 1808). Needless to say, none of these enumerated powers squarely grants the political branches the authority to regulate immigration, and plenary power proponents aggregate these disparate enumerated powers to support the plenary power doctrine. To find the federal government's implied, unenumerated power to regulate immigration, the Supreme Court "listed powers that were all expressly enumerated in the Constitution." Weisselberg, *supra* note 6, at 945.

[47] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893). The Court relied upon the same justification as in *Chae Chan Ping*, reinforcing the theory that the plenary power draws its authority from various enumerated powers in the Constitution as well as powers that are "inherent in sovereignty." *Id.* at 705 (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

[48] *Id.* at 730.

[49] Wong Wing v. United States, 163 U.S. 228, 239 (1896) (Field, J., concurring in part and dissenting in part) (reciting the facts of the case).

[50] *Id.* at 233–34, 237 (majority opinion).

[51] *Id.* at 237. *Wong Wing* is commonly regarded as a "crimmigration" case. Mary D. Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 105 (2013). For a discussion of the criminalization of

In *Wong Wing*, the Supreme Court thus drew a line between civil immigration laws and criminal punishment.[52] This line has endured,[53] forming the basis for indefinite civil detention that is the subject of this Note. To avoid the stringent judicial process that accompanies the criminal treatment of noncitizens, the federal government has long cabined exclusion, removal, and detention within the civil context. This has allowed the scope of the plenary power to expand in more recent Supreme Court cases.

In these more recent cases, the Supreme Court has circumscribed judicial review of the actions of the political branches in the immigration context.[54] The plenary power pulls back the traditional constitutional protections of due process and equal protection: so long as the government's exercise of this power is a civil action based on a "facially legitimate and bona fide reason,"[55] the political branches may make laws concerning aliens—such as the indefinite civil detention statutes—that "would be unacceptable if applied to citizens."[56]

B. The Plenary Power Applied: Indefinite Civil Detention

The Supreme Court thus established by the end of the nineteenth century that detention of migrants is a civil matter. But saying that the government has plenary power to enforce this penalty does not describe the contours of that power. Furthermore, the constitutionality of this power has been questioned by a long line of cases which have asked: Does the plenary power permit the federal government to detain noncitizens for lengthy, often

immigration law, or "crimmigration," see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[52] Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1576 (2008).

[53] The civil/criminal distinction has recently come under scrutiny by the Supreme Court. *See* Transcript of Oral Argument at 34, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Damon Root, *Neil Gorsuch, Civil Asset Forfeiture, and the Original Meaning of the 14th Amendment*, REASON (Dec. 4, 2018, 10:20 AM), https://reason.com/2018/12/04/neil-gorsuch-civil-asset-forfeiture-and [https://perma.cc/K6TK-J3RU]. At issue in *Timbs* was a state's efforts to seize a criminal defendant's vehicle via civil asset forfeiture. The State of Indiana conceded before the Indiana Supreme Court that this instance of civil asset forfeiture was punitive. Transcript of Oral Argument, *supra*, at 48.

[54] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (ruling that the government's exercise of the plenary power is "largely immune from judicial control," even in cases where the governmental action seemingly violates equal protection or due process); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (articulating a standard for judicial review under the plenary power, holding that the Court will only ask whether the government has demonstrated a "facially legitimate and bona fide" reason for exercising the plenary power).

[55] *Kleindienst*, 408 U.S. at 769.

[56] Mathews v. Diaz, 426 U.S. 67, 80 (1976).

indefinite periods of time without a bond hearing while the government either determines the migrant's admissibility[57] or tries to effectuate the migrant's removal?[58] This question is still alive at the Supreme Court, most recently raised (and avoided) in *Jennings v. Rodriguez*[59] and *Nielsen v. Preap*,[60] discussed in Part II. This Part explores the ways the Court has addressed or avoided this question over time.

The Supreme Court first addressed this question in a pair of cases in the early 1950s. Taken together, *United States ex rel. Knauff v. Shaughnessy*[61] and *Shaughnessy v. United States ex rel. Mezei*[62] represent the high-water mark of the plenary power doctrine.[63] In *Knauff*, the Court addressed the exclusion and detention of an alien married to an American citizen. Ellen Knauff was a German woman who fled Nazi Germany in 1939.[64] She resettled in England as a refugee, where she served as a flight sergeant in the British Royal Air Force during World War II.[65] She later served as a civilian employee with the War Department of the United States[66] and married Kurt Knauff, an American citizen and U.S. Army veteran of World War II.[67]

On August 14, 1948, Ellen Knauff arrived at Ellis Island, seeking entry and naturalization under American immigration laws and the War Brides Act.[68] Immediately, she was temporarily excluded and subsequently detained at Ellis Island.[69] After sitting in a jail cell for two months, Ellen Knauff learned the unfortunate news: the Attorney General had ordered her excluded because "her admission would be prejudicial to the interests of the United

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[57] I.e., asylum seekers. Under the law, 8 U.S.C. §1225(b) (2012) mandates that asylum seekers who establish a credible fear of persecution "*shall* be detained for further consideration of the application" (emphasis added).

[58] I.e., aliens who have been ordered removed. *See* 8 U.S.C. §§ 1225(b), 1226(c) (2012).

[59] 138 S. Ct. 830, 851 (2018).

[60] 139 S. Ct. 954, 972 (2019).

[61] 338 U.S. 537 (1950).

[62] 345 U.S. 206 (1953).

[63] Weisselberg, *supra* note 6, at 954.

[64] *Knauff*, 338 U.S. at 539.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Weisselberg, *supra* note 6, at 955.

[69] *Knauff*, 338 U.S. at 539.

States."[70] Denied a hearing to challenge her exclusion, Knauff filed a habeas petition.[71]

In denying her petition and condoning both her exclusion and her indefinite civil detention on Ellis Island, the Supreme Court delivered an enduring articulation of judicial deference in the plenary power context: admission is a privilege, not a right.[72] As such, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[73] With this judgment, the Supreme Court emphasized judicial deference to the political branches' immigration decisions,[74] a notion alive and well in modern immigration law jurisprudence.[75] *Knauff* still serves as jumping-off point for determining how much due process an alien receives.[76]

Three years later, the Supreme Court decided *Shaughnessy v. United States ex rel. Mezei*, bringing the plenary power doctrine to its zenith. Mezei was ordered excluded under the same statute and regulations as Ellen Knauff.[77] Writing for the Court, Justice Clark framed the issue as one of continued exclusion: since Ignatz Mezei was a noncitizen seeking entry into the United States, the Court would defer to the political branches' determinations on immigration matters.[78] Citing *Chae Chan Ping*, *Fong Yue Ting*, and *Knauff* as support, Justice Clark noted that exclusion is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[79] Mr. Mezei's temporary

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[70] *Id.* at 539–40. The government contended that Ellen Knauff engaged in espionage while serving in the U.S. Army's Civil Censorship Division by supplying secrets to Czechoslovakian officials. Weisselberg, *supra* note 6, at 960–61.

[71] Her petition was based primarily on the War Brides Act, ch. 591, 59 Stat. 659 (1945). *Knauff*, 338 U.S. at 540.

[72] *Knauff*, 338 U.S. at 542 ("Such privilege is granted to an alien only upon such terms as the United States shall prescribe.").

[73] *Id.* at 544 (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

[74] Weisselberg, *supra* note 6, at 956.

[75] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2012) (noting that a "searching inquiry into the persuasiveness of the President's justifications is inconsistent with . . . the deference traditionally accorded the President in [the immigration] sphere").

[76] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing the extremely deferential *Knauff* standard before discussing the facts of the case and how much due process the respondent is afforded); *see also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (citing the same standard). *But see* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (contrasting the scant process due to noncitizens, for whom the "it has been possible to characterize [the] private interest [of entering the United States] . . . as a mere privilege subject to the Executive's plenary power" with the more robust due process analysis afforded to the citizen-petitioner in that case).

[77] Weisselberg, *supra* note 6, at 965.

[78] *Mezei*, 345 U.S. at 207, 213.

[79] *Id.* at 210.

harborage on Ellis Island did not change his status or confer any additional rights;[80] rather, just like Ellen Knauff, Ignatz Mezei was an alien at the doorstep of the United States seeking the privilege of admission into the country.[81] As such, the Court applied the standard of judicial deference articulated in *Knauff*.[82] Mr. Mezei had been denied entry to the United States, but he was free to leave Ellis Island for another country at any time.[83]

If only that were so! In dissent, Justice Jackson recast the issue as about exclusion rather than detention.[84] Whereas the majority opinion declared that Mr. Mezei was free to depart the United States at any time and thus end his indefinite civil detention on Ellis Island, Justice Jackson noted that this would be true "if only he were an amphibian!"[85] With this rejoinder, Justice Jackson cut through the majority opinion's legal fiction and revealed the practical result of the decision. In condoning Mezei's continued detention, the Court had elevated the plenary power to its high-water mark.

Mezei is a landmark decision in the indefinite civil detention line of cases. Conservative justices relied on Justice Clark's majority opinion as controlling in future cases.[86] Liberal justices drew on Justice Jackson's dissenting opinion, expressing serious doubts that modern statutes

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[80] *Id.* at 215.

[81] *Id.* at 212 (noting that for the purposes of rights and due process, Mezei was considered an "alien on the threshold of initial entry"). Scholars and commentators refer to this phenomenon as the "entry fiction." *See* Zainab A. Cheema, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After* Boumediene, 87 FORDHAM L. REV. 289, 306 (2018).

[82] *Mezei*, 345 U.S. at 216.

[83] *Id.* at 220 (Jackson, J., dissenting) (ridiculing the government's such assertion).

[84] *Id.* ("Realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound.").

[85] *Id.*

[86] *See* Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Scalia, J., dissenting) ("Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General."). Some scholars read the plenary power doctrine as historically rooted in the Court's reticence to upset international affairs. *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002). Justice Field initially articulated this reticence in *Chae Chan Ping v. United States*. 130 U.S. 581, 609 (1889) ("If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject."). But with the global balance of power more stable and predictable than in centuries past, some scholars believe that the plenary power doctrine is "historically contingent on a global system whose time is passing." *See* Spiro, *supra*, at 340–42. This view of the plenary power argues that, because the threat posed by judicial intervention in this area is greatly diminished, *Zadvydas* might signal the Court has reason to limit the application of the plenary power doctrine to terrorism-related cases. *Id.*

mandating the indefinite civil detention of noncitizens could pass constitutional muster in light of the historical significance of habeas corpus.[87]

For instance, in a more recent line of cases, the Court addressed the plenary power in the context of indefinite civil detention. In *Zadvydas v. Davis*,[88] the Court considered the validity of an immigration statute[89] that permitted the Attorney General to indefinitely detain an alien who had been ordered removed from the country. Kestutis Zadvydas, a resident alien of the United States, had been ordered deported to Germany following a string of drug, theft, and battery offenses.[90] Although Zadvydas was born in a displaced persons camp in postwar Germany, the German government did not consider him a German citizen.[91] As a result, Mr. Zadvydas found himself in the same legal limbo as Ignatz Mezei—not welcome in America and not accepted anywhere else. Like Mr. Mezei, Mr. Zadvydas faced the prospect of spending the rest of his life in civil detention, all without ever having the chance to challenge his detention.

Although the government argued that *Mezei* controlled, authorizing Mr. Zadvydas's continued civil detention without a bond hearing,[92] the Court distinguished Mr. Zadvydas's circumstances from Mr. Mezei's. Whereas Mezei's harborage on Ellis Island did not count as entry into the United States,[93] permitting the Court to treat him as if he had been "stopped at the border"[94] for constitutional purposes, Mr. Zadvydas was firmly within the interior of the United States. His presence within the country placed Mr. Zadvydas on different legal footing, providing him with more constitutional protections than an alien requesting admission at the border.

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[87] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 876 (2018) (Breyer, J., dissenting) ("[S]ince Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right.").

[88] 533 U.S. at 678.

[89] 8 U.S.C. § 1231(a)(6) (2012). The text of this statute authorizes the Attorney General to detain a removable alien indefinitely beyond the ninety-day removal period established in 8 U.S.C. § 1231(a)(1)(A).

[90] *Zadvydas*, 533 U.S. at 684–85.

[91] *Id.*

[92] *Id.* at 692 ("The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy v. United States ex rel. Mezei* as support." (citation omitted)).

[93] I.e., the "entry fiction."

[94] *Zadvydas*, 533 U.S. at 693 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953)); *see also id.* at 719–20 (Kennedy, J., dissenting).

Writing for the Court, Justice Breyer invoked the substantive canon of constitutional avoidance[95] in addressing the detention statute. Rather than strike the statute in its entirety, Justice Breyer read it to include an implicit six-month limit on the civil detention of aliens.[96] Justice Breyer was careful to note that this implicit limit does not mean that every alien must be released after six months.[97] Rather, after six months of indefinite civil detention, an alien is entitled to a hearing to contest his or her detention and show good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, and the burden then shifts to the government to rebut that showing.[98] With this decision, Justice Breyer did not question the general doctrine of the plenary power.[99] Instead, he relied on the border/interior distinction to rule that the plenary power does not permit the federal government to condemn an alien already present in the United States to an indefinite term of imprisonment because of the government's inability to effectuate that alien's removal.[100]

But in the mirror image of Justice Jackson in *Mezei*, Justice Scalia reframed the issue in *Zadvydas*. In his view, this case was not about detention; it was about whether an alien like Mr. Zadvydas—who has no legal right to be in the country—has a constitutional right to be *released* into the interior of the United States.[101] Justice Scalia rejected the Court's attempt to distinguish *Mezei*,[102] writing that *Mezei* should control this case, permitting the continued indefinite civil detention of Mr. Zadvydas.[103] In

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[95] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[96] *Zadvydas*, 533 U.S. at 701.

[97] *Id.*

[98] *Id.*

[99] Soon after the opinion, scholars argued that because *Zadvydas* reads more naturally as a case about fundamental justice than principled constitutional reasoning, it does not signal the demise of the plenary power doctrine. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 386 (2002) ("*Zadvydas*, then, reads like some of the important Warren Court opinions. Pursuing a just goal against the backdrop of unfriendly precedents, it reaches, compromises, and confounds on the way to a value-laden result . . . . [I]f the sun were directly overhead, it will shine brightly but cast almost no shadow.").

[100] *Zadvydas*, 533 U.S. at 695.

[101] *Id.* at 702–03 (Scalia, J., dissenting).

[102] Although the ruling in *Zadvydas* affords migrants squarely within the United States a bond hearing every six months, scholars have found it significant that the Court did not reconsider or overrule *Mezei*. In distinguishing *Mezei* rather than overturning it, the opinion in *Zadvydas* "preserves a foundational case in the plenary power edifice[,]" signaling that *Zadvydas* is not the demise of the plenary power doctrine. Aleinikoff, *supra* note 99, at 374.

[103] *Zadvydas*, 533 U.S. at 704–05 (Scalia, J., dissenting) ("Congress undoubtedly thought that both groups of aliens—inadmissible aliens at the threshold and criminal aliens under final order of removal—

doing so, Justice Scalia's dissent revived *Mezei* as an authoritative statement of the plenary power[104]—over aliens detained at the border as well as aliens detained within the interior of the United States.[105]

As the foregoing analysis demonstrates, the Court has held that the federal government has plenary power to "temporarily" indefinitely detain migrants at the border or pending deportation. The key fact upon which the Court's analysis has turned is that such detention is civil, not criminal. This Note now examines the most recent cases to present these issues at the Supreme Court, wherein the Court avoided addressing the constitutionality of such detentions, restricting its analysis to textual interpretation of the laws at issue.

II. *JENNINGS V. RODRIGUEZ* & *NIELSEN V. PREAP*

So far, this Note has surveyed landmark cases that have shaped the contours of the plenary power. These cases are not only consequential—they are also deeply personal. In each case—*Chae Chan Ping*, *Wong Wing*, *Knauff*, *Mezei*, *Zadvydas*—the Court considered the plenary power and indefinite civil detention in the context of a detailed personal narrative—a war bride hoping to reunite with her husband;[106] a Buffalo family man who just wanted to go home;[107] a stateless convict with nowhere to go.[108] Justice

could be constitutionally detained on the same terms . . . . Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General.").

[104] Surveying immigration cases after *Zadvydas*, namely the travel ban case, other scholars suggest that the plenary power is in retreat, or perhaps just less visible in Supreme Court opinions, due to changing views of the doctrine's historical roots in racism and xenophobia. *See, e.g.*, Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 719–21 (2019) ("Without saying so explicitly, the Court in *Trump* [*v. Hawaii*] invoked . . . plenary power over immigration by citing three older cases embracing that doctrine . . . . Changing legislative, judicial, and public views of human rights and racism have undercut the doctrine's reach and standing—a likely reason the *Trump* majority invoked its tenets without explicitly naming it." (footnote omitted)).

[105] Two years after *Zadvydas*, the Court took up another case involving a mandatory civil detention statute. In *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003), the Court upheld an immigration statute, 8 U.S.C. § 1226(c), that mandated the detention of certain aliens pending their removal. The Immigration and Naturalization Service ordered Hyung Joon Kim deported, and Kim was detained pending his removal. *Id.* at 513. This detention lasted six months. *Id.* at 531. In upholding the mandatory detention statute, the Court stressed the temporary nature of Kim's detention: unlike Zadvydas's detention, which was "'indefinite' and 'potentially permanent,'" Kim's detention was shorter in duration, and only stretched on for six months because Kim had requested a continuance. *Id*. If Kim had not done so, the government would have been able to more quickly effectuate Kim's removal and thus end his civil detention.

[106] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 539 (1950).

[107] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 207 (1953).

[108] *Zadvydas*, 533 U.S. 678.

Jackson found it "fortunate[]" that in nineteenth- and twentieth-century America, it was still "startling" to find a person held indefinitely without accusation of crime or a judicial trial.[109]

Twenty-first-century America is not so fortunate. Changes in the immigration law landscape have precipitated a dramatic increase in the number of migrants facing indefinite civil detention.[110] To counter the uptick in illegal immigration, President Clinton signed the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA)[111] into law, expanding the federal government's authority to indefinitely detain select classes of aliens.[112] *Jennings v. Rodriguez*[113] and *Nielsen v. Preap*[114] arose in this regulatory landscape.

A. Jennings v. Rodriguez

Alejandro Rodriguez, a Mexican citizen and lawful permanent resident of the United States, was convicted of drug and theft offenses in 2004.[115] The government detained Rodriguez under one of the mandatory civil detention statutes pending his removal.[116] After three years of incarceration, Rodriguez—alongside a class of similarly situated lawful permanent residents—filed a habeas corpus petition challenging his detention.[117] Rodriguez argued that the mandatory civil detention statutes[118] do not authorize lengthy civil detention without a bond hearing.[119] Unlike prior civil detention cases like *Mezei* and *Zadvydas*, *Jennings* was a class action suit on behalf of thousands of noncitizens subjected to indefinite civil detention,

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[109] *Mezei*, 345 U.S. at 218 (Jackson, J., dissenting).

[110] Melinda Juárez et al., *Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation*, 6 J. MIGRATION & HUM. SECURITY 74, 76–77 (2018).

[111] Act of Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009.

[112] Memorandum from President William Clinton to the Heads of Executive Departments and Agencies: Deterring Illegal Immigration, 60 Fed. Reg. 28, 7885, 7887 (Feb. 10, 1995) ("The Administration's deterrence strategy includes strengthening the country's detention and deportation capability. No longer will criminals and other high risk deportable aliens be released back into communities because of a shortage of detention space and ineffective deportation procedures.").

[113] 138 S. Ct. 830 (2018).

[114] 139 S. Ct. 954 (2019).

[115] *Jennings*, 138 S. Ct. at 838.

[116] *Id.* Rodriguez was detained pursuant to 8 U.S.C. § 1226.

[117] *Id.*

[118] Namely, 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c).

[119] *Jennings*, 138 S. Ct. at 838; *see also* Miriam Peguero Medrano, *Not Yet Gone, and Not Yet Forgotten: The Reasonableness of Continued Mandatory Detention of Noncitizens Without a Bond Hearing*, 108 J. CRIM. L. & CRIMINOLOGY 597, 621 (2018) (summarizing *Jennings*'s procedural posture).

underscoring the now-widespread nature of civil detention in immigration law.[120]

In the Ninth Circuit, Alejandro Rodriguez argued that prolonged mandatory detention without any possibility of review by a neutral arbiter raised grave constitutional concerns.[121] Drawing on Justice Breyer's decision in *Zadvydas*, Rodriguez asked the Ninth Circuit to read the relevant statutory provisions to require a bond hearing when an alien's detention exceeds six months.[122] The Ninth Circuit did exactly that.[123] The court engaged in constitutional avoidance, construing the statute to contain an implicit six-month limit on detention, after which aliens would be able to challenge the validity of their continued detention.[124]

Writing for the Supreme Court, Justice Alito reversed the Ninth Circuit and remanded the case.[125] While acknowledging that the statutes pose constitutional concerns, Justice Alito remarked that constitutional avoidance is only appropriate when the language is susceptible to multiple plausible interpretations.[126] Reviewing the language of the relevant statutory provisions, Justice Alito found that the plain text of these provisions is unambiguous, mandating civil detention for select classes of aliens.[127] Since the language of these provisions does not permit the sort of ambiguity found

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[120] *See The Supreme Court, 2017 Term—Leading Cases: Federal Statutes: Immigration and Nationality Act*, 132 HARV. L. REV. 417, 417–18 (2018). *Jennings* was a class action suit on behalf of aliens detained pursuant to four statutory provisions. The first provision—§ 1225(b)—applied to asylum seekers. 8 U.S.C. § 1225(b)(1)(B)(ii) (2012) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien *shall be detained* for further consideration of the application for asylum." (emphasis added)). The second provision—§ 1226(c)—applies to aliens convicted of certain enumerated crimes. 8 U.S.C. § 1226(c)(1)(A)–(B) ("The Attorney General *shall take into custody* any alien who . . . is inadmissible by reason of having committed any offense covered in [various sections of the Immigration and Nationality Act] . . . [or] is deportable by reason of having committed any offense covered in [various sections of the Immigration and Nationality Act] . . . ." (emphasis added)). The third provision—§ 1226(a)—applies to immigrants facing removal proceedings. 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). The final provision—§ 1231(a)—applies to immigrants who have been ordered removed from the country. 8 U.S.C. § 1231(a)(1)–(2) ("During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien . . . .").

[121] Rodriguez v. Robbins, 715 F.3d 1127, 1132 (9th Cir. 2013).

[122] *Id.* at 1132, 1138.

[123] *Id.* at 1146.

[124] *Id.* at 1133.

[125] Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

[126] *Id.*

[127] *Id.* at 848.

in the *Zadvydas* statute,[128] the Court held that the Ninth Circuit was wrong to read in a six-month limit on civil detention.[129] Justice Alito went so far as to suggest that the Ninth Circuit's interpretation of the statute tortures the text.[130] Notably, the Supreme Court did not reach the issue of whether these mandatory detention provisions can pass constitutional muster. Because the Ninth Circuit decided *Jennings* on a textual basis, the Court found no occasion to consider the respondents' constitutional arguments.[131]

Writing in dissent, Justice Breyer first responded to the majority's reading of the statute. Justice Breyer found that the majority's reading of the detention statute—as prohibiting an alien from obtaining a bail hearing to seek release from civil detention—raised grave doubts about the statute's constitutionality, even against the backdrop of the plenary power.[132] Justice Breyer addressed the respondents' constitutional arguments, drawing on Anglo-American history in his opinion.[133] Justice Breyer noted that because they are denied an opportunity to challenge their detention and seek release via a bond hearing, aliens subjected to these provisions are deprived of liberty without due process of law.[134]

Importantly, Justice Breyer acknowledged the limitations of the Anglo-American historical argument in the civil detention context.[135] Most of the historical cases he cited involve criminal proceedings; on the other hand,

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[128] The Court distinguished 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) from the detention statute at issue in *Zadvydas*, 8 U.S.C. § 1231(a)(6) (2012). 8 U.S.C. § 1231(a)(6) uses the word "may," *permitting*, but not requiring, the Attorney General to detain aliens ordered removed from the country. *Jennings*, 138 S. Ct. at 844; *see also* 8 U.S.C. § 1231(a)(6) ("An alien ordered removed . . . *may* be detained." (emphasis added)). While the use of the word "may" allowed the *Zadvydas* court to find ambiguity in the statute, the detention statutes at issue in *Jennings* use the word "shall," *requiring* the Attorney General to detain certain classes of aliens. *Jennings*, 138 S. Ct. at 844; *see also* 8 U.S.C. § 1225(b)(1)(B)(ii) ("[T]he alien *shall* be detained . . . ." (emphasis added)).

[129] *Jennings*, 138 S. Ct. at 851.

[130] *Id.* at 848 ("[T]he dissent evidently has a strong stomach when it comes to inflicting linguistic trauma [upon the words of Congress].").

[131] *Id.* at 851.

[132] *Id.* at 861 (Breyer, J., dissenting) (citing United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

[133] *Id.* ("The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention.").

[134] *Id.* (citing to Wong Wing v. United States, 163 U.S. 228, 237–38 (1896)); *see also* U.S. CONST. amend. V.

[135] Justice Breyer notes that there are not many different forms of civil detention. *Jennings*, 138 S. Ct. at 864 (Breyer, J., dissenting). After discussing the Anglo-American history of providing a bail hearing to detained individuals, Justice Breyer acknowledges that "[t]he cases before us, however, are not criminal cases. Does that fact make a difference? The problem is that there are not many instances of civil confinement . . . . Mental illness does sometimes provide an example. Individuals dangerous to themselves or others may be confined involuntarily to a mental hospital." *Id.*

aliens indefinitely detained under the Immigration and Nationality Act are subjected to civil detention.[136] To blunt this counterargument, Justice Breyer analogized to cases involving the involuntary confinement of persons suffering from mental illness.[137] Although these individuals do not possess "what we could call 'a right to a bail hearing,'" they nevertheless have the equivalent right to a hearing prior to confinement, as well as the right to challenge their detention at least annually.[138] In Justice Breyer's view, the same rationale should apply in the context of mandatory civil detention of aliens.[139] Based on this analogy and the historical importance of the right to seek bail in the Anglo-American tradition, Justice Breyer would have affirmed the Ninth Circuit's reading of the statute, affording aliens the right to challenge their detention and seek bail if their detention extends longer than six months.[140]

The cases that formed the *Jennings* class action suit are currently percolating on remand. As early as December 2018, lower courts have begun issuing rulings on the constitutional issue of whether the plenary power authorizes the indefinite detention of certain classes of aliens without the opportunity to seek bail.[141] The Supreme Court will face these circumstances again—and this time, they will likely need to address the constitutional question.

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[136] *Id.*

[137] *Id*. at 864. Justice Breyer's dissent in *Jennings* analogizes to involuntary hospitalization to better understand the importance of bail hearings. This Note engages in a similar exercise to understand the permissiveness of involuntary civil detention.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 876 ("I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail.").

[141] *See, e.g.*, Rodriguez v. Marin, 909 F.3d 252, 256–57 (9th Cir. 2018) (remanding *Jennings* to the district court to decide the constitutional issue, citing approvingly to *Zadvydas* and United States v. Salerno, 481 U.S. 739 (1987), and suggesting that the detention statutes are unconstitutional by noting that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" (quoting *Salerno*, 481 U.S. at 755)); Kouadio v. Decker, 352 F. Supp. 3d 235, 241 (S.D.N.Y. 2018) (ruling in favor of a noncitizen detained under one of these provisions, holding that "34 months of detention is too long without an opportunity for bail"). Interestingly, the Ninth Circuit excerpted a quote from Justice Breyer's dissent in *Jennings* that highlights the Magna Carta argument. The lower court seems to think that the historical argument is one of Mr. Rodriguez's best arguments. The three-judge panel also hints at an originalist lens, claiming that the framers would likely have found this unconstitutional. *Rodriguez*, 909 F.3d at 257.

B. Nielsen v. Preap

Just one year later, the Court decided another case examining the application of a mandatory civil detention statute. In *Nielsen v. Preap*,[142] litigants challenged the application of 8 U.S.C. § 1226(c), which requires the Secretary of Homeland Security to arrest aliens who have committed certain crimes "when [they were] released" from criminal custody and to place them into civil detention without the opportunity for a bond hearing.[143] In this case, Preap argued—and the Ninth Circuit agreed—that this mandatory detention applies only when an alien is arrested and detained *immediately after* he or she is released from criminal custody.[144] The respondents in this case had committed certain crimes covered by 8 U.S.C. § 1226(c); however, they were not arrested immediately after their release from criminal custody.[145] Some were not arrested until several years later.[146] In short, these plaintiffs were not challenging the constitutionality of these mandatory detention provisions; rather, they contended that these provisions should not apply to them because of the significant lag time between their release from criminal custody and their civil detention. This lag time, in their reading of the statute, does not qualify as an arrest "when . . . released" from criminal custody.[147]

Justice Alito, again writing for the Court, overturned the Ninth Circuit on textual grounds and ruled that the mandatory detention provision of 8 U.S.C. § 1226(c) applied to the respondents.[148] The several-year lag time between Preap's release from criminal custody and his arrest and detention by immigration officials did not bar the government from applying the statute and holding him in civil detention.[149] Having again decided a mandatory civil detention case on textual grounds, the Court did not reach the merits of the constitutionality of the provision itself. The Court did, however, acknowledge the elephant in the room, noting that "[w]hile respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional

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[142] 139 S. Ct. 954 (2019).

[143] 8 U.S.C. § 1226(c) (2018); *Preap*, 139 S. Ct. at 960.

[144] *Preap*, 139 S. Ct. at 961.

[145] *Id.*

[146] *Id.* Mony Preap, the lead plaintiff in the case, had not been detained by immigration officials until seven years after his release from criminal custody. *Id.*

[147] *Id.* at 964.

[148] *Id.* at 964–65.

[149] For the Court's extensive discussion of the text of 8 U.S.C. § 1226(c), see *id.* at 964. The Court's textual analysis of § 1226(c) is not relevant to the subject of this Note.

challenges to applications of the statute as we have now read it."[150] In short, the Court noted that *Preap* is a narrow decision that only addresses the statutory construction of 8 U.S.C. § 1226(c).[151] Given the proper vehicle,[152] the Court indicated it will consider the constitutional issue.

In dissent, Justice Breyer again countered the Court's textual analysis, and again explored the historical argument, suggesting that because the right to a bail hearing is so deeply ingrained in Anglo-American jurisprudence, statutes that deny a person this important right will likely fail constitutional muster.[153] Specifically responding to Justice Kavanaugh's concurrence urging that the issue before the court is "narrow,"[154] Justice Breyer indicated that the Court cannot continue to punt on the constitutional issue. Since the Court cannot decide these issues without considering the "basic American legal value[]" of the right to not be deprived of liberty without due process, the Court will eventually need to rule on the constitutionality of these provisions.[155]

III. ANALOGS OF MODERN CIVIL DETENTION

This Part of the Note seeks to answer the question: where else in history do we see institutions that resemble civil detention, and how, if at all, does it help us better understand civil detention in the modern American immigration system? In studying these analogies, this Note seeks to detail the context and legal bases of these forms of detention, and to examine whether, despite the limits of these comparisons, they are instructive regarding the civil detention of migrants.

A. Debtors' Prisons in Early Modern England: Proto-Civil Detention

A skeptical reader might initially question the value of examining debtors' prisons as an analogy to modern civil detention of migrants in the American immigration system. Debtors' prisons seem, on the surface, quite different from modern civil detention of migrants—they existed in a different country and were abolished a long time ago.[156] Nevertheless, history is one

[150] *Id.* at 972.

[151] *Id.*

[152] I.e., *Jennings* returning to the Supreme Court.

[153] *Preap*, 139 S. Ct. at 976, 985 (Breyer, J., dissenting).

[154] *Id.* at 973 (Kavanaugh, J., concurring).

[155] *Id.* at 985 (Breyer, J., dissenting).

[156] Although debtors' prisons were abolished over a century ago in England, some scholars argue that they have come roaring back in modern America, with hundreds of thousands of individuals jailed in pretrial detention due to inability to pay cash bail. Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/

of the best tools available to grapple with the issues of today.[157] And as this Note reveals, how debtors' prisons worked and the reasons they were abolished hold lessons for the topic at hand.

Imprisonment in a debtors' prison followed a civil action between two private individuals. When a creditor sought to recover debts owed to him by a debtor, he could have the debtor detained in a debtors' prison until the debtor could pay.[158] Imprisonment for debt was thus technically a civil action between two private citizens that resulted in the use of state resources—the state maintained the facilities and detained debtors on behalf of creditors.[159] Under this regime, the British legal system did not technically permit imprisonment for debt; rather, debtors were "committed" to a debtors' prison for contempt of court for failing to pay a creditor.[160]

Imprisonment for debt involved lengthy, indefinite stays in prison. Legally speaking, a debtor could terminate the imprisonment by paying the debt and satisfying the creditor.[161] Of course, the ability of the debtor to voluntarily end their confinement was a fiction for those who lacked the ability to pay. As a result, the British Attorney General noted that imprisonment for debt was "the power which a creditor had to imprison a debtor for an unlimited time until the debt was paid."[162] One historian detailed the fate of a woman who died in prison after forty-five years of

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[https://perma.cc/4KEU-72BS]. *See generally* Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq [https://perma.cc/7J2B-DBWR] (arguing debtors' prisons live on today with Americans jailed for failure to pay private debts as well as debts accrued through involvement in the criminal justice system, such as public defender fees and DNA testing fees).

[157] As Winston Churchill once said, "The longer you can look back, the farther you can look forward." OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 6th ed. 2018) (ebook). Justice Jackson understood the value of historical analysis, citing to the context of the Magna Carta to understand the importance of freedom from arbitrary detention in the Anglo-American legal tradition. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land."). He also drew on more modern history, namely his experience as the American prosecutor at Nuremberg. In reflecting on the fate of Ignatz Mezei, Justice Jackson saw strong overtones of the travesties of Nazi Germany's judicial system. Jackson likened Mezei's indefinite civil detention without a judicial hearing to the Third Reich's system of "protective custody," in which the arrested "could claim no judicial or other hearing process." *Id*. at 225–26.

[158] Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155–56 (1982).

[159] *See id.*

[160] Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 355–56 (2014) (explaining the technical legal basis for imprisonment for debt).

[161] Cohen, *supra* note 158, at 155–56.

[162] 197 Parl Deb HC (4th ser.) (1869) col. 421.

imprisonment for a debt of £19.[163] Whereas other European countries had mostly enacted legislation limiting imprisonment for debt to one year, debtors in England had no such relief.[164]

In addition to lengthy prison stays, imprisonment for debt was notorious for wretched conditions in state-sponsored prisons.[165] By the late eighteenth and nineteenth centuries, approximately 10,000 Englishmen were imprisoned for debt annually under horrid conditions.[166]

Although members of all social classes filled debtors' prisons, conditions varied greatly. Whereas wealthier and better-connected debtors could pay to be transferred to prisons with more pleasant conditions, poorer debtors lived in squalor, facing illness, hunger, and death.[167] The poorest of the poor faced starvation and disease.[168] Large numbers of debtors were crammed into small spaces—in one ward of the Marshalsea Prison, thirty-two men occupied a sixteen-by-fourteen foot cell.[169] Such conditions resulted in a horrid stench, and on summer nights, some debtors "perished for want of Air."[170]

Debtors' prisons also blurred the line between civil and criminal law. Imprisonment for debt dates back to the thirteenth century.[171] As such, one historian argued that it is "a relic of the time when there was no clear distinction between civil and criminal law."[172] This indistinct division between the civil and the criminal endured for centuries. In Marshalsea Prison, populations were mixed, with the criminally convicted serving their

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[163] Bruce Kercher, *The Transformation of Imprisonment for Debt in England, 1828 to 1838*, at 2 AUSTL. J.L. & SOC'Y 60, 65 (1984).

[164] ROGER LEE BROWN, A HISTORY OF THE FLEET PRISON, LONDON 108 (1996).

[165] Although many debtors' prisons were privately operated and for-profit, they were functionally public institutions, akin to modern-day private prisons, contracted by the government. *See* Jerry White, *Pain and Degradation in Georgian London: Life in the Marshalsea Prison*, 68 HIST. WORKSHOP J. 69, 71 (2009) ("Next to churches, prisons were the most important public buildings in the metropolis. . . . [T]heir even greater importance to the body politic demanded that prisons be rebuilt before the churches or almost any other public institution after the Great Fire.").

[166] Ware, *supra* note 160, at 352; *see also* White, *supra* note 165 (detailing the wretched living conditions inside Marshalsea, a prison notorious for poor treatment of debtors).

[167] Kercher, *supra* note 163, at 64.

[168] White, *supra* note 165, at 82–83.

[169] *Id.* at 69.

[170] *Id.*

[171] Cohen, *supra* note 158, at 154.

[172] Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 27 (1926).

sentences in the very same prisons as innocent debtors.[173] Frequently, debtors were treated far worse than actual criminals.[174]

Compassionate humanitarians and evangelicals campaigned for reform and abolition, believing that lengthy prison stays under horrific conditions confused innocent debtors with guilty criminals. An eighteenth century philanthropist released a report on the state of prisons, drawing public attention to imprisoned debtors, "the most pitiable objects in our gaols [jails]."[175] In response, prisoner welfare charities assisted "innocent" debtors, working to secure their releases.[176] One notable such charity was the Thatched House Society. This charity focused on obtaining the release of "petty-sum" debtors, and was successful in liberating over 15,000 debtors in the last quarter of the eighteenth century.[177] Another such compassionate charity succeeded in releasing tens of thousands of imprisoned debtors, demonstrating that "social opinion was outraged by [imprisonment for debt] and there was public clamor for reform."[178]

The issue soon percolated through the halls of government. As early as 1790, some members of the House of Commons "felt that it was a disgrace to have imprisonment for debt in a civilised nation, the true law of the land having been perverted by practice."[179] Over the ensuing decades, various British governmental committees studied the issue of imprisonment for private debts.[180]

Parliament then engaged in a series of debates on the issue, articulating their reasons for abolishing imprisonment for debt.[181] British lawmakers who sought reform focused on how this system confused innocent debtors—imprisoned due to misfortune, exploitation by creditors, or simply poverty—with guilty criminals. During debate on the Debtors Act of 1869, one Member of Parliament reflected this sentiment, insisting that "the man who

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[173] White, *supra* note 165, at 71.

[174] Kercher, *supra* note 163, at 67.

[175] *Id.* at 62 ("Howard's were the first and most important of many revelations of prison conditions, which were to raise awareness about civil prisoners. That awareness [fueled] the abolition campaigns.").

[176] *Id.*

[177] Cohen, *supra* note 158, at 163. This society went so far as to work with a debtor's creditor to release the debtor from existing liability as well. *Id*.

[178] Ware, *supra* note 160, at 353 (quoting a 1969 government report on the issue).

[179] Kercher, *supra* note 163, at 66.

[180] *Id.* at 74–93.

[181] It is important to note that reform- and abolition-minded Victorians made a wide array of arguments for change, including constitutional arguments, utilitarian arguments, and, as this Note emphasizes, humanitarian and fairness arguments. *Id.* at 62–74. Commercial and aristocratic interests remained a powerful roadblock to reform. *Id.* at 66–67.

was merely unfortunate should not be regarded or treated as a criminal."[182] Another lawmaker argued that the practice of imprisoning debtors "confounded the innocent with the guilty."[183] They squarely addressed the legal fiction underpinning this entire system: "[T]he plea here that the imprisonment was not for debt but for contempt of Court was a transparent fiction."[184] Debtors, they thought, were not really being detained for contempt, but punished for debt, "for penal imprisonment it was."[185] Parliament thus passed the Debtors Act of 1869, which largely abolished imprisonment of debtors. The Act provided that "no person shall be arrested or imprisoned for making default in payment of a sum of money."[186] Parliament did, however, retain one exception to the general abolition of imprisonment for debtors: Section 5 of the Act retained imprisonment for debtors who had the resources to pay but nevertheless refused.[187]

Then, as now, civil detention in a state prison facility improperly conflated civil with criminal law. Although civil detention of migrants is ostensibly a form of civil detention, the legal fiction is unconvincing. In civil detention of migrants, as in Victorian debtors' prisons, the state uses government facilities to detain (imprison) migrants for lengthy, [188] sometimes indefinite, periods of time. In both types of detention, state resources are used to restrict the liberty of competent people who are not being detained for having committed a crime, but for breaking a civil statute.[189] In neither case is there an inquiry into *why* the person meets the standard for confinement, only that they do meet that standard.[190] Even the conditions in certain Department of Homeland Security (DHS) facilities could easily be confused

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[182] P.E. Rock, *Civil Debtors: The Report of the Payne Committee*, 9 BRIT. J. CRIMINOLOGY 398, 399 (1969).

[183] 194 Parl Deb HC (3d ser.) (1869) col. 776.

[184] 197 Parl Deb HC (3d ser.) (1869) col. 572.

[185] 197 Parl Deb HC (3d ser.) (1869) col. 421.

[186] Debtors Act 1869, 32 & 33 Vict. c. 62 (Eng.).

[187] *Id.* (providing that courts may imprison debtors "for a term not exceeding six weeks, or until payment of the sum due . . . [p]rovided . . . that the person making default either has or has had since the date of the order or judgment the means to pay the sum").

[188] *Compare* Jennings v. Rodriguez, 138 S. Ct. 830, 860–61 (2018) (Breyer, J., dissenting) (citing statistics on migrants being detained for years on end without a bond hearing), *with supra* notes 163–164 and accompanying text.

[189] *Compare* Lutz, *supra* note 14 (noting that the mandatory detention statutes apply even to migrants who have not been charged with a crime, such as asylum seekers), *with* Cohen, *supra* note 158, at 155 (detailing the technically noncriminal nature of imprisonment for debt).

[190] *See generally Jennings*, 138 S. Ct. 830 (holding that §§ 1225(b), 1226(a), and 1226(c) do not afford detained migrants the right to periodic bond hearings).

with those of Victorian debtors' prisons,[191] and these conditions are not themselves aimed at rectifying the reason for which the person is being detained. And most importantly, in neither situation is there any real possibility of alleviating the confinement, since the conditions for release cannot always be met.[192]

B. Involuntary Civil Commitment in the Substance Abuse Crisis

There is another category of civil detention that provides an instructive analogy to the civil detention of migrants: civil commitment of individuals suffering from addiction or mental illness. As the opioid crisis deepens, civil commitment has become a more pronounced and controversial policy response. Individuals with Substance Use Disorder (SUD) may be involuntarily committed and hospitalized. Thirty-seven states and the District of Columbia have civil commitment laws that cover the civil commitment of individuals suffering from alcoholism and SUD.[193]

Roughly a century of case law supplies the legal foundation for involuntary civil commitment. As early as 1905, the Supreme Court held that the states may use their police powers to abridge individual autonomy in order to protect the health and safety of citizens.[194] Decades later, the Supreme Court decided *Robinson v. California*, a case in which a defendant was arrested and sentenced to jail time for violating a state statute that made it a crime to be addicted to narcotics.[195] Although the Court ruled that a state cannot criminalize the status of drug addiction, a state may effectuate "involuntary confinement" treatment programs "in the interest of the general health and welfare" of the public.[196] The Court's subsequent ruling in

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[191] *Compare* Dickerson, *supra* note 27, *with* 195 Parl Deb HC (3d ser.) (1869) col. 173 ("In White cross Street Prison . . . the County Court debtors were imprisoned in something like the cages for wild beasts at the Zoological Gardens . . . ."), *and* White, *supra* note 165, at 69 (detailing the conditions of debtors' prisons).

[192] Debtors languished in prison for years if they could not afford to pay their debt. *See* Ware, *supra* note 160, at 355 (differentiating between recalcitrant debtors who could refuse to pay their debt with poor debtors who truly could not afford to). Likewise, detention is mandatory under the immigration provisions, and there are limited ways that a migrant can be released from detention. *See* Transcript of Oral Argument at 24–25, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204). At oral argument, counsel for the government conceded that options for release are limited and caused laughter in the courtroom after suggesting that a detained migrant "always has the option of terminating the detention by accepting a final order of removal and returning home."

[193] Ish P. Bhalla et al., *The Role of Civil Commitment in the Opioid Crisis*, 46 J.L. MED. & ETHICS 343, 343 (2018).

[194] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

[195] 370 U.S. 660, 666 (1962).

[196] *Id.* at 664–65.

O'Connor v. Donaldson imposes two requirements on such involuntary confinement programs: the involuntarily confined individual must be dangerous to himself or others, or must be incapable of caring for his own needs by himself or with the help of friends and family.[197] That is, the state cannot civilly commit an individual suffering from substance abuse or mental illness unless they have to.

Involuntary civil commitment laws vary by jurisdiction, but they share substantial similarities in the legal process leading up to involuntary civil commitment. Generally, a medical professional must examine the individual and certify in writing that the individual requires intensive treatment for his or her condition.[198] Typically, a showing must be made that the individual is gravely disabled, dangerous to himself or others, incapacitated, unable to manage his personal affairs and basic needs, or that the individual is suffering from a "loss of control."[199] Family members are the most common petitioners.[200] Lastly, due process considerations demand that the committed individual receive a judicial hearing within a short period of time after being committed in order to contest the commitment.[201] Taken together, this body of law undergirds the constitutional status of state civil commitment laws in the United States.[202]

This abridgment of individual autonomy is considered civil, not criminal.[203] When the state commits someone for substance abuse issues, it does so for the purpose of "provid[ing] the individual with treatment, not punishment."[204] Although no two state civil commitment laws are identical,

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[197] 422 U.S. 563, 576 (1975).

[198] NAT'L JUDICIAL OPIOID TASK FORCE, NAT'L CTR. FOR STATE COURTS, INVOLUNTARY COMMITMENT AND GUARDIANSHIP LAWS FOR PERSONS WITH A SUBSTANCE USE DISORDER 1 (2018), https://www.ncsc.org/~/media/4EC4A03001EB4E5BB5F649FE2D4F7802.ashx [https://perma.cc/A6SX-8VDX].

[199] *Id.*

[200] Bhalla et al., *supra* note 193, at 345.

[201] *See* Logan v. Arafeh, 346 F. Supp. 1265, 1269 (D. Conn. 1972), *aff'd sub nom.* Briggs v. Arafeh 411 U.S. 911 (1973).

[202] For a detailed overview of case law on this subject, see Heather Gray, *Constitutional Considerations of Involuntary Commitment for Substance Use Disorder and Alcoholism*, NAMSDL NEWS (Sept. 21, 2016), https://namsdl.org/wp-content/uploads/NAMSDL-News-September-21-2016.pdf [https://perma.cc/QW9Z-G9K7].

[203] Because such detention is civil, rather than criminal, the Supreme Court has held that individuals subjected to involuntary civil detention for medical treatment "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).

[204] Thomas L. Hafemeister & Ali John Amirshahi, *Civil Commitment for Drug Dependency: The Judicial Response*, 26 LOY. L.A. L. REV. 39, 47 (1992) (citing Donahue v. R.I. Dep't of Mental Health, 632 F. Supp. 1456, 1462 (D.R.I. 1986)).

they generally specify that the purpose of involuntary civil commitment is to ensure that the individual receives the medical treatment he or she needs.[205]

The length of time that an individual may be involuntarily committed for treatment varies, ranging from three days to one year.[206] Importantly, though, many state civil commitment laws have a maximum time limit for involuntary civil commitment.[207] This raises the question: what happens when a medical professional believes that an individual is in need of further treatment, but the statutory time limit for civil commitment has been reached? Several jurisdictions permit the state to keep the individual detained in civil commitment if a court orders that additional treatment is necessary.[208] Many do not, permitting the individual to leave civil commitment even if he or she still suffers from substance abuse or mental health issues.[209]

Like involuntary hospitalization statutes, mandatory migrant detention statutes are, on paper, civil. But analogizing migrant detention to involuntary hospitalization reveals significant differences. The extent of state involvement is a telling feature. Whereas migrant detention involves significant state resources to detain and house migrants for long periods of time, involuntary hospitalization involves the state only for procedural issues.[210] This also speaks to the physical reality of the detention: migrants are detained in DHS jails, whereas individuals suffering from substance abuse are committed to hospitals. The former, closely resembling actual criminal incarceration, is a far cry from the latter, which amounts to medical care.

Furthermore, the purpose for the detention is another instructive touchpoint of this analogy. State civil commitment laws exist "to provide the

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[205] *See, e.g.*, MASS. GEN. LAWS ch. 123, § 35 (2018) (stating that the civil commitment "shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health"); VA. CODE ANN. § 37.2-809 (2016) (specifying that a medical professional must assert that the individual "is in need of hospitalization or treatment" for such a petition to be granted); *see also* John E.B. Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 VILL. L. REV. 367, 401 (1984) ("[T]he governmental purposes are the protection of society and the provision of treatment designed to alleviate suffering and return the patient to a fulfilling life in the community.").

[206] NAT'L JUDICIAL OPIOID TASK FORCE, *supra* note 198, at 1.

[207] HAZELDEN BETTY FORD FOUND., INVOLUNTARY COMMITMENT FOR SUBSTANCE USE DISORDERS (2017), https://www.hazeldenbettyford.org/education/bcr/addiction-research/involuntary-commitment-edt-717 [https://perma.cc/HD2P-UHM5].

[208] *Id.* ("After the maximum period of 'detention' ends, and if the court does not order additional treatment, individuals are released.").

[209] *Id.*

[210] *See supra* notes 200–204 and accompanying text.

individual with treatment, not punishment,"[211] and the practice of involuntary hospitalization is true to this purpose, with hospitals and medical staff providing treatment for the illness. On the contrary, although the stated purpose of migrant detention is custodial,[212] the actual practice of migrant detention does not hew closely to this purpose. Migrant detention does accomplish this custodial goal, but it also goes far beyond it, acting as a performative deterrent to future migrants.[213] As such, the actual purpose of these two forms of detention are dissimilar.

These two subjects are also dissimilar on the standard for confinement. The state must clear a high bar to commit an individual to involuntary hospitalization.[214] This standard is clearly civil in nature because the state is only looking to permit such hospitalization when it is in the best interests of the individual's health or to address a direct and present threat to others' safety. As such, the standard for confinement that renders involuntary hospitalization civil rather than criminal does not resemble the standard of confinement for migrant detention, which is an extremely low bar of merely asking whether the migrant falls under one of the categories identified in the statute.[215] This standard looks to the state's interests rather than the individual's and does not allow for an individualized assessment. Thus, they more closely resemble criminal incarceration standards.[216]

Lastly, civil commitment and migrant detention are not analogous in terms of length of detention and, more importantly, the process for receiving review. Nearly all state statutes permitting civil commitment have a maximum length of confinement.[217] But more importantly, even in states that permit indefinite civil commitment, the individual may not be indefinitely detained without a hearing.[218] This process of requiring regular hearings to

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[211] Hafemeister & Amirshahi, *supra* note 204, at 47.

[212] Ryo, *supra* note 22, at 238 ("Immigration detention in the U.S. is civil confinement for which the officially stated purpose is to facilitate the removal of individuals who do not have permission to remain in the country.").

[213] *See id.* at 239.

[214] The individual must be dangerous to himself or others or must be incapable of caring for his own needs with the help of family and friends. *See* NAT'L JUDICIAL OPIOID TASK FORCE, *supra* note 198, at 1.

[215] *See* Lutz, *supra* note 14 (identifying the categories of migrants that are subject to mandatory detention).

[216] Arguably, the mandatory detention provision is worse than many provisions of the criminal sentencing guidelines, which, aside from provisions prescribing mandatory minimum sentences, are largely nonbinding guidelines that require judges to consider an individual's criminal history and personal circumstances when ordering a sentence for a criminal offense. *See* 18 U.S.C. § 3553 (2012).

[217] *See* NAT'L JUDICIAL OPIOID TASK FORCE, *supra* note 198, at 1.

[218] HAZELDEN BETTY FORD FOUND., *supra* note 207.

authorize continued involuntary detention is exactly what migrants are denied. There is no process providing a migrant with periodic review or bond hearings under the statute, at which the migrant may challenge his or her detention.[219] Overall, comparing the length of detention and process (or lack thereof) of challenging indefinite detention demonstrates that mandatory detention under the immigration statutes is importantly dissimilar to civil commitment for substance abuse or mental illness.

Although the power of the government was and is not as plenary in either of the situations to which this Note analogizes as it is in American immigration law, the difference is less salient than it may seem. The lack of plenary power in these other contexts does not materially change what we can learn from them. This Note draws on these analogies to help modern readers and lawyers understand what has traditionally been considered permissive civil detention in Anglo-American history. Each analogy carries with it lessons that we can apply to modern immigration detention. The debtors' prison analogy demonstrates that the length of detention, physical reality of detention, penal nature of detention (even if technically a "coercive" form of detention), and degree of government involvement beg the question of whether detention is truly "civil." Likewise, the substance abuse analogy informs us that a time limit or process for challenging prolonged detention is a hallmark of civil detention, and that we should be mindful of whether the use of detention is tailored to its purpose—in that analogy, coercive detention to force individuals to seek medical attention.

The effect of the plenary power in American immigration law is that courts engage in limited and highly deferential review of the actions of the political branches, namely the actions of the executive branch and the laws of Congress, but this deference will not keep the issue from the Supreme Court. The dissenting Justices in *Jennings* and *Preap* are prepared to address the constitutional issue even in light of the plenary power, and the author of the majority opinions in those cases—Justice Alito—has signaled that the Court is receptive to addressing the constitutional issue.[220] Justice Thomas appears to be the only sitting Justice with a firm view that these statutes—read in context of the plenary power—largely preclude judicial review of immigration decisions.[221] This Note now turns to an examination of where

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[219] Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("[N]either provision can reasonably be read to limit detention to six months.").

[220] *See supra* notes 150–152 and accompanying text.

[221] Daniel L. Kaplan, *Neil Gorsuch: A Preliminary Assessment*, 33 CRIM. JUST. 27, 28 (2019) (noting that in *Jennings v. Rodriguez*, "Justice Gorsuch joined Justice Thomas's concurrence expressing the view that the Act barred any court from taking jurisdiction to address the question . . . [b]ut . . . notably declined

the law of indefinite detention of migrants ought to develop in light of the Court's jurisprudence and these analogies.

IV. APPLICATIONS TO THE CIVIL DETENTION OF MIGRANTS

The Supreme Court will eventually need to address the constitutionality of the provisions permitting indefinite civil detention of migrants.[222] While no analogy can equip us with all of the wisdom necessary to handle the issue of indefinite detention of migrants, the analogies in Part III impart lessons that transcend time and context—lessons that help us grapple with the permissiveness of the mandatory detention provisions of American immigration law.

From the above analogies, this Note has identified four features central to the inquiry of distinguishing civil from criminal detention: (1) length of detention; (2) level of government involvement in detention; (3) physical reality of detention; and, most importantly, (4) purpose of detention. In scrutinizing these features of detention in the American immigration context, this Note argues that these four features turn a difference in degree into a difference in kind, rendering the indefinite civil detention of migrants functionally criminal detention. The Supreme Court has made such functional findings before, ruling that "though [some statutes] may be civil in form, [they] are in their nature criminal."[223] It should do so again.

It is true that the Supreme Court has addressed the difference between civil and criminal detention and condoned the use of civil detention in the immigration context.[224] A skeptical reader might therefore consider this issue closed. But the modern world is very different from that of Mr. Wing. It is unwise to blindly apply the holding of *Wong Wing* without considering how circumstances have changed since 1896.

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to join a footnote in which Justice Thomas hinted that the Act might contain a still more sweeping preclusion of judicial review of immigration decisions").

[222] In *Preap*, the Supreme Court acknowledged that litigants may raise a head-on constitutional challenge to mandatory detention provisions, reserving that question for another day. Nielsen v. Preap, 139 S. Ct. 954, 972 (2019). Meanwhile, the dissenting opinions reached the constitutional question. *Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting).

[223] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 634 (1886) (finding that a civil state statute was functionally a criminal statute because it compelled the production of an individual's private papers and records to the government in order to establish a criminal charge, constituting an unreasonable search and seizure in violation of the Fourth Amendment).

[224] *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (establishing that noncitizens subject to criminal proceedings must receive the constitutional protections of the Fifth and Sixth Amendments but permitting nonpunitive civil detention of noncitizens to effectuate removal).

The Court in *Wong Wing* thought "it clear that [civil] detention, or temporary confinement," in order to effectuate removal is valid.[225] In that case, however, the challenged statute actually contained a time limit of one year.[226] The modern mandatory civil detention statutes contain no such time limit.[227] Unlike Mr. Wing, whose civil detention would certainly terminate after one year, migrants subjected to the modern mandatory detention provisions face much lengthier, indefinite terms of detention.[228] It is time for a fresh look at whether these provisions truly create civil, not criminal, detentions.

Beginning with the first feature—length of detention—the criminal nature of these provisions is most obviously gleaned from their lack of time limits and process for challenging indefinite detention. One of the primary lessons learned from the study of debtors' prisons is that if detention is to be civil, it demands a time limit. English debtors were consigned to detention indefinitely, detained (ostensibly by their creditors) until they agreed to pay the debt. Due to their inability or unwillingness to pay their debts, English debtors faced indefinite detention.[229] In contrast, the detention of individuals suffering from addiction or mental illness requires a built-in time limit for detention to truly be "civil." Many state statutes permitting civil commitment for substance abuse include a time limit on detention.[230] Furthermore, unlike the debtors' laws of Victorian England, current state civil commitment laws that permit indefinite hospitalization beyond the statutory maximum prescribe process that affords the hospitalized individual with periodic hearings to challenge the prolonged hospitalization.[231]

Indefinite detention of migrants is more closely analogous to detention for debt than to the civil commitment of individuals suffering from addiction

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[225] *Id.* at 235.

[226] "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor *for a period of not exceeding one year* and thereafter removed from the United States, as hereinbefore provided." Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25, 25 (emphasis added) (repealed 1943).

[227] *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2012).

[228] Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting) ("The record shows that the Government detained some asylum seekers for 831 days (nearly 2 & [a half] years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before they won their cases and received asylum. It also shows that the Government detained one noncitizen for nearly four years *after* he had finished serving a criminal sentence, and the Government detained other members of this class for 608 days, 561 days, 446 days, 438 days, 387 days, and 305 days—all before they won their cases and received relief from removal." (citations omitted)).

[229] *See* Kercher, *supra* note 163.

[230] *See supra* note 209 and accompanying text.

[231] *See Jennings*, 138 S. Ct. at 864 (Breyer, J., dissenting).

or mental illness. Regarding length of detention, Justice Breyer observed that the government detained some migrants for years before they eventually won their cases.[232] The government even detained one migrant for nearly four years *after* he had finished serving a criminal sentence.[233] And regarding the process for periodic review of indefinite detention, the Court in *Jennings* expressly held that the mandatory detention provisions cannot be read in a manner that permits such periodic review.[234] On this feature, migrant detention is more closely analogous to imprisonment for debt than involuntary hospitalization, and the Supreme Court should look to the history of debtors' prisons for guidance.[235]

Thus, at a minimum, civil detention requires periodic review, and should more generally require a firm end point unless the government can show that continued detention is necessary and provide the detained individual with periodic hearings to challenge the detention. Scholars and amici who support the mandatory detention provisions as "civil" statutes misunderstand this. Writing in support of the government in *Jennings*, amici contended that "[d]etention pending completion of removal proceedings always has an identifiable endpoint."[236] But this is no more true now than it was for Mr. Mezei.[237] Mr. Rodriguez, the subject of the class action who had been detained for three years under the INA provisions before finally filing a habeas petition, would surely say otherwise.[238] As would Mr. Mezei, who would have spent the rest of his life languishing in indefinite detention on Ellis Island but for the good graces of President Eisenhower.[239]

History informs us that detention without a time limit or process for periodic hearings to challenge prolonged detention is "penal imprisonment."[240] In some instances, indefinite detention under the mandatory detention provisions is a fate perhaps even worse than a criminal

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[232] *Id.* at 860.

[233] *Id.*

[234] *See supra* note 129 and accompanying text.

[235] To be clear, the claim is not that detention is unconstitutional simply because it is indefinite, but that it is *criminal* because it is indefinite without periodic review.

[236] Brief for 29 U.S. Representatives et al. as Amici Curiae Supporting Petitioners at 8, *Jennings*, 138 S. Ct. 830 (2018) (No. 15-1204).

[237] *Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting) (discussing statistics on the lengthy detention of migrants with no clear end point); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting) ("[Mr. Mezei] seems likely to be detained indefinitely, perhaps for life . . . .").

[238] *Jennings*, 138 S. Ct. at 838.

[239] Mr. Mezei had been detained on Ellis Island for nearly four years but was quietly released in 1954 when the Eisenhower Administration closed Ellis Island. Serrano, *supra* note 12.

[240] *See supra* note 185 and accompanying text.

sentence.[241] Defendants convicted of a crime stand before a judge who reads them their sentence.[242] Before they even begin technically serving their term of imprisonment, they are given notice of the maximum term for which they will be imprisoned.[243] That is not the case for migrants detained under the mandatory detention provisions of the INA.[244] As written, the provisions of American immigration law authorizing the indefinite "civil" detention of migrants are a "transparent fiction,"[245] and no amount of civil gloss—from Congress or the courts—can change that. Only a time limit or process affording periodic hearings to challenge continued detention can. Without such limitations, these provisions are functionally criminal.

Second, the degree of government involvement can help us distinguish civil from criminal detention. Debtors' prisons implicated an enormous amount of state involvement and state resources. Although the detention was civil on paper, the English government supplied the infrastructure for such confinement. The government supplied the prisons, prison guards, and all attending resources necessary to detain debtors.[246] In contrast, the government is minimally involved in the confinement of individuals who suffer from substance abuse. The government's involvement is limited to a judge assenting to a medical professional's assessment that an individual must be committed to effectuate treatment.[247] The individual is then hospitalized rather than imprisoned.[248]

Thus, comparing imprisonment for debt with involuntary hospitalization teaches us that heavy government involvement in the management of detainees is an indicator that detention is not civil, but rather criminal. With migrant detention, the degree of government involvement and state resources is even greater than in debtors' prisons. The Department of

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[241] *Jennings*, 138 S. Ct. at 865–66 (Breyer, J., dissenting) (discussing the treatment of indefinitely detained migrants as perhaps even worse than that of ordinary defendants charged with crimes).

[242] *Sentencing*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/sentencing [https://perma.cc/PR6J-EQ2F].

[243] *Id.* Criminal defendants who are detained in pretrial detention typically have that time credited toward their term of imprisonment. 18 U.S.C. § 3585(b) (2012).

[244] HILLEL R. SMITH, CONG. RESEARCH SERV., IMMIGRATION DETENTION: A LEGAL OVERVIEW 18 (2019).

[245] This term is borrowed from a 1869 debate in Parliament about a debt imprisonment bill. 197 Parl Deb HC (3d ser.) (1869) col. 572.

[246] Or, the government contracted out this work to private companies to perform this service on behalf of the state. *See* White, *supra* note 165, at 71, 73.

[247] *See supra* notes 198–201 and accompanying text.

[248] *See* Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 31 (2010) (detailing the process of hospitalization as civil confinement for individuals suffering from various illnesses, including substance abuse).

Homeland Security supplies the detention facilities, staffs them with agents of the state, and supplies resources necessary to detain these migrants.[249] The degree of government involvement in the detention of migrants is so great that much of the work is actually outsourced to the private sector.[250] The degree of government involvement in the detention of migrants under the mandatory detention provisions is far more robust than the degree of government involvement in the debtors' prisons of Victorian England.[251]

Third, the physical reality of detention is helpful in discerning civil from criminal detention. The Court should rule that these provisions are functionally criminal because migrant detention centers are indistinguishable from prisons. Private prison corporations and county correctional departments operate over 70% of these detention facilities.[252] As migrant advocates demonstrate, the facilities that incarcerate immigrants under these provisions operate under a penal model.[253] The conditions inside are virtually indistinguishable from conventional prisons. Armed guards process immigrants, taking their clothing and belongings and issuing them a prison jumpsuit.[254] The physical reality of debtors' prisons is instructive on this point. In 1869, Members of Parliament commented extensively on the wretched conditions of debtors' prisons.[255] This supplied an additional reason for abolishing debtors' prisons through the Debtors Act of 1869. Today's Court should not avert its eyes from the reality of migrant detention centers:

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[249] The Department of Homeland Security touted this as one of its funding priorities, highlighting that the 2019 DHS budget includes $2.8 billion for detention beds as part of its expanding effort to enforce immigration laws. U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2019 BUDGET IN BRIEF 4 (2018), https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf [https://perma.cc/KN9C-WN5A].

[250] Esther Fung, *Donald Trump Has Been Very Good for Publicly Listed Prison Owners*, WALL ST. J. (Feb. 26, 2019), https://www.wsj.com/articles/donald-trump-has-been-very-good-for-publicly-listed-prison-owners-11551189601?mod=article_inline [https://perma.cc/8CAK-YERH]. For data on the skyrocketing numbers of detained migrants, see Allison Crennen-Dunlap, *Abolishing the ICEberg*, 96 DENV. L. REV. 148, 155 (2019), which asserts that: "Since 1996, the population of migrant detainees has tripled, and the U.S. now operates the world's largest immigration detention system." This closely resembles the practice of imprisonment for debt, in which the British government contracted out much of this work to the private sector in order to accommodate the scale of detention. *See* White, *supra* note 165 and accompanying text.

[251] Ware, *supra* note 160, at 352–53 (stating that approximately 10,000 Englishmen were detained for debt annually by the late eighteenth and early nineteenth centuries).

[252] Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html [https://perma.cc/V39U-V4VA].

[253] Brief for Advancement Project, et al. as Amici Curiae Supporting Respondents at 33–34, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363).

[254] *Id.*

[255] *See* 195 Parl Deb HC (3d ser.) (1869) col. 173.

if it looks like a prison, operates like a prison, and literally smells like a prison, the incarceration cannot be characterized as anything other than imprisonment.[256]

To be sure, individuals suffering from substance abuse by no means have an easy go with involuntary hospitalization. The pain and anguish that accompany substance abuse—and its treatment via hospitalization—are real.[257] Individuals suffering from substance abuse battle not only their inner suffering but also the physical manifestations of addiction and withdrawal, which in many cases can prove fatal. But this suffering is not inflicted by the state. This suffering is a result of the disease itself.

Detention for any reason is uncomfortable. On this third feature—the physical reality of detention—the relevant question is *what* is inflicting that discomfort. Asking this question of the indefinite detention of migrants yields a clear answer: the United States is causing this discomfort through the wretched conditions of migrant detention centers.

The fourth feature relevant to discerning civil from criminal detention—the purpose of detention—is the most difficult to analyze. Through the above analogies, this Note has examined forms of detention that serve specific purposes, namely custodial detention, coercive detention, and penal detention. The stated purpose of any given form of detention ought to be scrutinized. Was detention in a debtors' prison *truly* a form of coercive detention, serving the purpose of forcing debtors to pay their debts? Parliament said no.[258] Although detention for debt ostensibly served the purpose of coercion, it was functionally penal. Civil confinement for substance abuse is likewise muddled on this feature. Individuals suffering from substance abuse are involuntarily hospitalized for a purpose that is some mix of custody and coercion: the suffering individual needs to be supervised (custodial detention) and forced to undergo medical treatment (coercive detention).

Indefinite detention of migrants does not map neatly onto the framework of custodial detention, coercive detention, or penal detention. The stated purpose of migrant detention is custodial: the United States detains migrants in order to facilitate their removal from the country.[259] In reality, it

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[256] *See* Dickerson, *supra* note 27.

[257] *See generally* Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281 (2003) (discussing the physical and mental suffering that accompanies addiction as well as the efficacy of treatment through involuntary civil commitment).

[258] *See* 197 Parl Deb HC (3d ser.) (1869) col. 572; 197 Parl Deb HC (3d ser.) (1869) col. 421; 194 Parl Deb HC (3d ser.) (1869) col. 776.

[259] *See* Ryo, *supra* note 22, at 238.

is also coercive: the relevant statutes mandate detention in order to force migrants to appear for their legal proceedings.[260]

In the wake of *Jennings*, legal scholars have argued that migrant detention actually serves a penal purpose, namely the "criminalization of Mexican and Central American immigrants."[261] Unlike the members of today's Court, Supreme Court Justices from over a century ago were more inclined to recognize aspects of the immigration system as penal rather than civil.[262] In addressing the broader question of whether deportation itself is penal, Justice Brewer, dissenting in *Fong Yue Ting*, stated that "it needs no citation of authorities to support the proposition that deportation is punishment."[263] Justice Field, the creator of the plenary power doctrine, also dissented in *Fong Yue Ting*, expressing what one scholar called "outrage at the majority's willingness to leave whatever constitutional protections a noncitizen might hold to the whims of the political branches of government."[264] To be sure, Justices Brewer and Field did not live in a world of robust detention of migrants. *Fong Yue Ting* was not decided against the backdrop of thousands of noncitizens subjected to indefinite detention. But given these Justices' conviction that deportation is a criminal punishment, a modern reader might infer that their reasoning (and outrage) would likewise apply to the widespread indefinite detention of migrants. Detention to facilitate punishment should itself be understood to be punishment. Sadly, the proposition that deportation and migrant detention serve a penal purpose is in retreat. As the same scholar notes, Justice Breyer's dissenting opinions in *Jennings* and *Preap* do "not go[] so far as to argue that detention and deportation are a form of punishment," as his nineteenth century predecessors did.[265]

Although that proposition is in retreat, this Note argues that it is true: migrant detention serves a penal purpose, and is therefore punishment, which renders it criminal rather than civil. As far back as *Wong Wing v. United States*, the Supreme Court has recognized that immigration detention may

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[260] *See supra* notes 212–213 and accompanying text.

[261] Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 137 (2018).

[262] Crennen-Dunlap, *supra* note 250, at 101–02 (discussing how Justice Breyer's views seem much more moderate than Justice Brewer's, Justice Field's, and Chief Justice Fuller's views espoused in dissenting opinions in the late nineteenth century).

[263] Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

[264] Crennen-Dunlap, *supra* note 250, at 101.

[265] *Id.* at 96.

not be used for penal purposes.[266] This pronouncement continued through to recent cases, such as *Zadvydas* and *Demore*, in which the Court assumed that the indefinite detention provisions "are nonpunitive in purpose and effect,"[267] and upheld one such provision "on the basis of its non-punitive purposes."[268] These assumptions are wrong. Contrary to the Supreme Court's assumptions, these provisions *are* punitive in nature because "imposing mandatory detention appears to have little purpose but to punish an individual on the basis of a crime for which she has already served her criminal sentence—an outcome that would be difficult or impossible to reconcile with the commands of the Constitution."[269] Functionally, these provisions impose mandatory detention without trial by jury and other constitutional protections.

This Note also finds that migrant detention serves a fourth purpose which may be far more perverse than custodial, coercive, or penal detention: theatrical detention.[270] The President has weaponized migrant detention for political profit and general migration deterrence. In August of 2019, the Trump Administration unveiled a new regulation to replace the Flores Settlement, which was an agreement between the Clinton Administration and immigration activists that mandated a minimum level of care for migrant children and placed a limit on how long the government could detain them.[271] The New York Times reports that "[t]he administration's goal with the new rule is deterrence, and its message to families fleeing Central America is blunt: Come here and we will lock you up."[272] President Trump stated this himself, remarking that his Administration's zero-tolerance policy is coming

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[266] 163 U.S. 228, 243–44 (1896) (ruling that subjecting immigrants to imprisonment at hard labor before removal violated the Constitution's Due Process Clause).

[267] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[268] Brief for National Immigrant Justice Center as Amicus Curiae Supporting Respondents at 17, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363); *see also* Demore v. Hyung Joon Kim, 538 U.S. 510, 518–19 (2003).

[269] Brief for National Immigrant Justice Center, *supra* note 268, at 18–19 (citing *Demore*, 538 U.S. at 518–19).

[270] Historically, theatrical punishments such as stockades were used as a form of public shaming and a deterrent. Brian Palmer, *Can We Bring Back the Stockades? The Constitutionality of Public Shaming*, SLATE (Nov. 15, 2012, 4:37 PM), https://slate.com/news-and-politics/2012/11/public-shaming-sentences-can-judges-subject-criminals-to-humiliation.html [https://perma.cc/V2NA-QJ5R].

[271] Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 21, 2019) https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html [https://perma.cc/QY5H-HQ9Z].

[272] *Id.*

together "like[] a beautiful puzzle."[273] Migrant detention is no longer merely custodial, coercive, and penal—it is performative. "[W]hen they see you can't get into the United States," or what happens upon arrival, the President will have accomplished his goal of using migrant detention as a general deterrent against future migrants.[274] The message is clear: the drawbridge is up, the country is closed, and if a migrant still manages to enter the United States, they will languish away in migrant detention.[275]

In calling for the Court to recognize the mandatory detention provisions as functionally criminal, this Note appears to be calling for a radical departure from case law. But in light of the features underlying the Court's past decisions in this area, it is not so radical as it seems. While the Court has continued to assume such detentions are civil, it has not meaningfully analyzed how the circumstances and realities of modern immigration detention affect this label.[276] And even if the Supreme Court continues to read these provisions as civil provisions, the above analogies are still helpful in understanding the permissiveness of civil detention.

CONCLUSION

This Note traces the history of the regulation of immigration in the United States and the current civil detention regime in American immigration law. In doing so, this Note examines the evolution of the plenary power. With *Jennings* and *Preap*, the Supreme Court has had two

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[273] *Remarks by President Trump Before Marine One Departure*, THE WHITE HOUSE (Aug. 21, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-60/ [https://perma.cc/3BJ7-WQH9].

[274] *Id.*

[275] In a prescient letter to the editor from the month Ellis Island closed, one contemporary noted that the "plight [of migrants moved from civil detention on Ellis Island to civil detention in other facilities] is exactly the same as if they were common criminals." Pearl S. Buck, Letter to the Editor*, Plight of Immigrants: Closing of Ellis Island Said to Work Hardship on New Arrivals*, N.Y. TIMES (Nov. 16, 1954) https://timesmachine.nytimes.com/timesmachine/1954/11/16/96507313.pdf (last visited Mar, 27, 2020). This contemporary was concerned about the effect of treating migrants as criminals. "I am sure that the American people would not want this to happen." *Id.* Her concerns—raised in 1954—ring true today regarding the effect on America's standing on the world stage. "[I]t is inevitable that news of such treatment will go abroad and serve as bad propaganda for our country." *Id.*

[276] As recently as 2003, the Supreme Court has repeatedly held that immigration-related detention is not criminal punishment. Demore v. Hyung Joon Kim, 538 U.S. 510, 531 (2003). Troublingly, the Court continues to cite to *Wong Wing v. United States* in support of this. The circumstances and realities of immigration-related detention have changed drastically since 1896. As one scholar argues, the expanded use of migrant detention that resembles criminal incarceration has contributed to the significant overlap between criminal and immigration law, also known as "crimmigration." Stumpf, *supra* note 51, at 376 ("Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.").

opportunities to rule on the indefinite civil detention of migrants since the beginning of the Trump Administration. As the practice of indefinite civil detention becomes more pronounced, the Supreme Court will eventually need to weigh in on the constitutionality of this facet of American immigration law. Two analogies—debtors' prisons in early modern England and involuntary civil commitment of individuals suffering from substance abuse—provide both historical and modern perspectives on the permissiveness of civil detention. Drawing on history and function, this Note has argued that the Supreme Court should rule that the mandatory detention provisions are functionally criminal, despite their civil label. While such a ruling would not be without precedent,[277] it is a tall order in light of the centuries of case law treating these detention provisions as civil provisions and denying migrants the right to a bond hearing.

In exploring this civil/criminal distinction, this Note has sought to tell the stories of those affected by civil detention, who have been treated like criminals without any of the attending rights of the criminally accused. Two years into his detention on Ellis Island, Ignatz Mezei penned a short letter to a federal judge in New York. "Let me go free," he pleaded. "I did not kill anybody, I did not steal anybody, I did not make any crime."[278] It is time for the Supreme Court to answer his plea.

[277] *See* Boyd v. United States, 116 U.S. 616 (1886).

[278] Serrano, *supra* note 12.