Immigration Detention as Continuing Seizure

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Abstract

The jurisprudence on challenges to immigration confinement has oscillated wildly over the past four decades. Immigration detention has no true custodial analog in purpose, duration, or justification. It is civil in name but manifestly criminal in form and function. Federal courts have traditionally understood that the Fifth Amendment's Due Process Clause protects immigrant detainees but have recently applied an elevated Eighth Amendment standard to these challenges.

Recent circuit decisions place this quagmire on display. During COVID-19, courts decided for—then against—medically vulnerable immigrants seeking release on disability and health grounds. Across these cases, courts migrated away from civil constitutional principles and toward the penological end of the doctrinal spectrum.

To correct this drift, this Article advocates for broadening the constitutional framework governing immigration confinement. If the Eighth Amendment is the constitutional law for the guilty, and the Fifth Amendment is the constitutional law for the accused, immigration detention belongs under the Fourth Amendment's constitutional law for the seized. Removal proceedings never result in a guilty adjudication, making comparisons to criminal pretrial custody inappropriate. And immigration arrests lack independent probable cause determinations, placing them on doubtful constitutional ground.

Aligning immigration detention under the Fourth Amendment would check the growing tolerance of detention's severity, resolve inconsistent Fifth Amendment application across circuits, and require courts to assess whether custody is reasonable and as unrestrictive as possible. In an era of radical detention expansion, the Fourth Amendment can reaffirm the Constitution's commitment to liberty while opening more varied pathways to challenge immigration confinement.

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Table of Contents

Introduction

Over the entire expanse of immigration jurisprudence, courts have faithfully beaten the same drum: Immigration law is civil[1]—not criminal—and deportation is not a punishment.[2] Immigration detention itself is a relatively modern creation,[3] and it lacks an explicit

1 Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("[R]emoval proceedings are civil in nature . . . .").

2 *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[D]eportation is not a punishment for crime.").

3 *See generally* Paulina D. Arnold, *How Immigration Detention Became Exceptional*, 75 Stan. L. Rev. 261 (2023) (tracing early immigration detention to the mid- to late nineteenth

constitutional clause for scrutinizing its lawfulness. That said, federal courts liken immigration custody[4] to "pretrial detention,"[5] which is a form of confinement that resides within the criminal law continuum.[6] Challenges to immigration detention are traditionally assimilated, therefore, under the Due Process Clause of the Fifth Amendment.[7]

Despite its nonpunitive designation, impacted persons, advocates, and families know all too well that immigration detention mimics the harshest form of criminal incarceration.[8] It inflicts serious harm—even death[9]—on those caught within its barbs,[10] and has been described as

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century alongside the rise of civil confinement of predominately poor individuals—many of whom were immigrants—within workhouses, mental institutions, juvenile facilities, and orphanages as a means of paternalistic control).

4 Throughout this Article, this Author deliberately toggles between "custody" and "confinement" when discussing immigration detention, as these terms carry more civil—as opposed to criminal—connotations and associations.

5 E.D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) (joining other circuits in holding that those in immigration custody are entitled to the same due process rights as citizen detainees who are in pretrial custody facing a criminal charge, but who have not yet been convicted).

6 *See infra* Section I.B.

7 *See infra* Sections II.A–.B; U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

8 *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346, 1383–85 (2014) [hereinafter Hernández, *Immigration Detention*] (cataloguing the evolution of immigration civil detention toward a highly punitive, carceral system in form and function); *see also* César Cuauhtémoc García Hernández, Migrating to Prison 88 (2019) (same).

9 *See* ACLU, Am. Oversight & Physicians for Hum. Rts., Deadly Failures: Preventable Deaths in U.S. Immigration Detention 34–54 (2024), https://www.aclu.org/publications/deadly-failures-preventable-deaths-in-us-immigrant-detention [https://perma.cc/Z6CS-3W9G] (finding that inadequate or inappropriate care, medical negligence, inhumane conditions, delayed or incomplete treatment and medication, and flawed emergency response contributed to the deaths of seventy immigrant detainees since 2017); ACLU, Det. Watch Network & Nat'l Immigrant Just. Ctr., Fatal Neglect: How ICE Ignores Deaths in Detention 5 (2016), https://www.aclu.org/publications/fatal-neglect-how-ice-ignores-death-detention [https://perma.cc/W4ZM-JXSA] ("There have been 56 deaths in [Immigration and Customs Enforcement ("ICE")] custody during the Obama administration, including six suicides and at least one death after an attempted suicide. This report focuses on the eight deaths where [ICE Office of Detention Oversight ("ODO")] identified non-compliance with ICE medical standards as contributing causes; the ODO identified four of these deaths as preventable." (citations omitted)).

10 *See* Clara Long, Hum. Rts. Watch, ACLU, Nat'l Immigrant Just. Ctr. & Det. Watch Network, Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention 39 (2018), https://www.aclu.org/publications/code-red-fatal-consequences-dangerously-substandard-medical-care-immigration-detention [https://perma.cc/29LQ-LWJT] (describing the poor medical care offered in immigration detention facilities); *see also* Rebecca Merton, Cynthia Galaz & Christina Fialho, Freedom for Immigrants, Immigration Detention Is Psychological Torture: Strategies for Surviving in Our Fight for Freedom 17 (2019), https://www.freedomforimmigrants.org/s/FFI_MentalHealth-339c.pdf [https://perma.cc/HLS4-CBD6] (describing abuses faced by immigration detainees).

violative of the "basic principles of humanity."[11] And yet, immigration detention has grown exponentially since the late twentieth century.[12] The United States now commands the largest and most expansive immigration detention apparatus in the world.[13]

Scholars, advocates, and communities have fought for decades to dismantle immigration detention, arguing, among other things, that it is economically detrimental;[14] that detention facilities are medically negligent;[15] that they lack administrative and congressional oversight;[16] that detention itself is constitutionally unjustified;[17] that the entire system is derived from racist origins;[18] and that conditions are so abhorrent

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11 Tom Dreisbach, *Government's Own Experts Found "Barbaric" and "Negligent" Conditions in ICE Detention*, NAT'L PUB. RADIO (Aug. 16, 2023, at 05:01 ET), https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions [https://perma.cc/52X2-B4NF] ("In examining more than two dozen facilities across 16 states from 2017 to 2019, these expert inspectors found 'negligent' medical care (including mental health care), 'unsafe and filthy' conditions, racist abuse of detainees, inappropriate pepper-spraying of mentally ill detainees and other problems that, in some cases, contributed to detainee deaths.").

12 *See* SILKY SHAH, UNBUILD WALLS 37–41 (2024); Arnold, *supra* note 3, at 320–21 (explaining how, after a lull in the use of immigration detention in the mid-twentieth century, immigration detention saw an increase during the 1980s "war on drugs"—followed by an even more dramatic spike after the passage of two laws in 1996 that created mandatory classes of noncitizens who are subject to "mandatory detention").

13 *See* SILKY SHAH, MARY SMALL & CAROL WU, DET. WATCH NETWORK & CTR. FOR CONST. RTS., BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET 1 (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf [https://perma.cc/YH5B-3SZ3].

14 *See* Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 227–28 (2021) (detailing the annual cost in millions to the state of New Jersey when its noncitizen residents are detained, from lost wages and tax revenue to increased childcare needs); Erica Bryant, *ICE Is Wasting Millions of Dollars on Unnecessary Detention Beds*, VERA INST. OF JUST. (July 7, 2018), https://www.vera.org/news/ice-is-wasting-millions-of-dollars-on-unnecessary-detention-beds [https://perma.cc/LZU8-NFF3].

15 STAFF OF H. COMM. ON OVERSIGHT & REFORM & SUBCOMM. ON C.R. & C.L., 116TH CONG., THE TRUMP ADMINISTRATION'S MISTREATMENT OF DETAINED IMMIGRANTS 28–30 (2020) ("Documents obtained by the Committee, including ICE and contractor audit documents, identify glaring deficiencies in the medical care provided to detainees at facilities operated by for-profit contractors. According to these internal documents, detainees in these facilities often do not receive critical treatment or face delays, and many facilities lack sufficient medical staff and fail to provide necessary care to detainees with chronic medical conditions.").

16 *See* Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186, 1240–44 (2025) (challenging the prevailing judicial assumptions behind immigration detention through a careful review of legislative and regulatory history across three periods of detention expansion).

17 *See* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 151–54 (2022) (cataloging constitutional challenges to detention throughout the COVID-19 pandemic under the Fifth and Fourteenth Amendments).

18 *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 246, 251 (2017) (examining the legislative and social history behind immigration detention, the origin of which Professor García Hernández describes as a "fear of people of color that itself

as to be in contravention of international treaty obligations.[19] And yet, immigration detention not only endures[20] but flourishes[21] like a hideous bloom.

At the core of the current crisis, there is a fundamental and multifaceted contradiction. On the one hand, the ever-increasing criminalization of acts associated with migration,[22] coupled with anti-immigrant invectives, move immigration law closer to criminal law,[23] in turn justifying an agenda that frames immigration law as a crime-control objective.[24]

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stems from economic exploitation of Latin Americans, and ends by revealing it for the project of racial subordination that it is"); *see also* Alina Das, No Justice in the Shadows 7 (2020) (noting that since the late nineteenth century, "political leaders have relied on criminality to justify racial exclusions in immigration law"); Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 Calif. L. Rev. 1597, 1611 (2022) (describing how immigration law is built on racial hierarchies, and how "[w]hite supremacy ideology animates historic and modern immigration law and policies targeting immigrants of color").

19 Physicians for Hum. Rts., Harv. Immigr. and Refugee Clinical Program & Peeler Immigr. Lab, "Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf [https://perma.cc/W7H8-C34B] ("[I]n 2011 the UN Special Rapporteur on Torture called for an 'absolute prohibition' on solitary confinement for more than 15 days. Additionally, the Rapporteur recognized that shorter periods of solitary confinement for legitimate disciplinary reasons can constitute 'cruel, inhuman or degrading treatment or punishment where the physical conditions of prison regime (sanitation, access to food and water) fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering.'"(footnotes omitted) (quoting Press Release, U.N. Office of the High Comm'r for Hum. Rts., UN Special Rapporteur on Torture Calls for the Prohibition of Solitary Confinement (Oct. 18, 2011))).

20 Brian Bennett, *Biden, Who Campaigned on Closing For-Profit Migrant Detention Centers, Still Relies on Them amid Border Surge*, TIME (Jan. 1, 2024, at 17:06 ET), https://time.com/6550047/joe-biden-immigration-private-prisons/ [https://perma.cc/F7AG-JWP2] ("Since Biden came into office in January 2021, those held in immigration custody has more than doubled from 14,195 on Jan. 22, 2021 to 36,755 on Dec. 3, 2023, according to the Transactional Records Access Clearinghouse (TRAC), a research institution at Syracuse University that collects and analyzes federal immigration data.").

21 *See Featured Issue: Immigration Detention and Alternatives to Detention*, Am. Immigr. Laws. Ass'n (Mar. 14, 2025), https://www.aila.org/library/featured-issue-immigration-detention#numbers [https://perma.cc/F2V4-RZXY] ("For FY2024, Congress has provided funding to detain a daily average of 41,500 noncitizens at a cost of approximately $3.4 billion. During FY2023, Congress provided funding to detain a daily average of 34,000 noncitizens at a cost of approximately $2.9 billion.").

22 Jennifer M. Chacón, *Managing Migration Through Crime*, 109 Colum. L. Rev. Sidebar 135, 137–40 (2009) (detailing how federal, state, and local laws have increasingly created new crimes out of migration-related acts—such as unlawful entry, hiring undocumented workers, marriage fraud, carrying or using false identity documents, harboring unlawfully present persons, etc.—in effect controlling migration through the criminal justice system).

23 *See infra* Section III.C; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376 (2006) ("Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.").

24 Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1573–75 (2010).

Yet because immigration law remains technically civil, it exists outside the ambit of many safeguards traditionally extended to criminal pretrial detainees.[25] In immigration, there is no right to counsel, no right to a speedy trial, no presumption of what period of pretrial confinement is too long, and no protection against retroactivity.[26] Furthermore, and paradoxically, immigration law also excludes immigrants from the rights associated with *civil* custody, such as the provision of an advocate or a favorable burden of proof that places the onus on the detaining agency to establish that confinement is necessary—and imposed in the least restrictive manner possible.[27] Immigration law has evolved into a Frankensteinian creation. It incorporates the worst of civil and criminal law and procedure, while rejecting the protections of both.[28]

This Article offers a new constitutional framework for challenging immigration detention. It proposes that, rather than continuing to rely on only the Fifth and Eighth Amendments—the latter of which provides only the rarest relief in the criminal justice context[29]—advocates should look to the Fourth Amendment's protection against unlawful seizure to challenge the fact, duration, and conditions of confinement.[30] Articulated by Justice Ruth Bader Ginsburg in *Albright v. Oliver*,[31] this Article draws on the "continuing seizure" theory.[32] Under this theory, seizure is not a singular event; rather, it is a status defined by an individual's location along an investigatory continuum, and seizure ends only when that individual is extended certain procedural rights.[33] This Article is the first to apply the concept of continuing seizure to immigration detention. This Article argues that because the Fourth Amendment's

25 Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & Econ. Dev. 533, 536–37 (2014) ("All these [human rights abuses in immigration detention] have occurred without procedural protections that criminal defendants receive, such as appointed counsel, making immigration detention in many ways the worst of both the civil and criminal worlds.").

26 *See infra* Section III.A.

27 *See infra* Section III.A.

28 *See infra* Part III.

29 *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 Harv. L. Rev. F. 302, 302–03 (2022) ("It is hardly a secret that American carceral institutions routinely burden prisoners' fundamental liberties and fail to provide even minimally safe and healthy living conditions. Yet with prison law's moral center of gravity tilting so far in the direction of defendants, plaintiffs bringing constitutional claims in federal court can expect to win only in the most extreme cases, leaving the prison environment largely free of judicial regulation." (footnote omitted)).

30 U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

31 510 U.S. 266 (1994).

32 *See id.* at 279 (Ginsburg, J., concurring).

33 *See id.* at 280.

procedural rights are *never* extended to noncitizens following their apprehension, *all* immigration detention violates the Fourth Amendment. This violation continues even after authorities grant noncitizens conditional release from custody.

The atmosphere for detention challenges has never been so bleak, and as such, this Article's proposal has never been more imperative. Courts have been giving increasing deference to the federal government's purported interest in detention,[34] and the Supreme Court has held that immigration detention is a "constitutionally valid aspect of the deportation process."[35] Although other forms of civil detention are presumptively limited to six months,[36] many classes of immigrants are never allowed to seek release, no matter how long they are held.[37] A decades-old conviction can trigger sudden and indefinite detention.[38] Immigration detention numbers continue to balloon,[39] average detention

34 *See, e.g.*, 8 C.F.R. § 236.1(c)(8) (2025) (relating to the discretionary release of a noncitizen on the conditional guarantee that, among other conditions, a noncitizen will attend future hearing dates); *id.* § 1003.19(h)(3) (relating to a noncitizen's potential danger to the community); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 326 (3d Cir. 2020) (holding that the district court failed to consider "the objectives of immigration detention: ensuring appearance at detention proceedings and protecting the public from harm").

35 Demore v. Kim, 538 U.S. 510, 523 (2003) (holding that no-bond detention during the pendency of removal proceedings is constitutional).

36 Arnold, *supra* note 3, at 318–20 (describing what Professor Arnold calls "civil confinement law," which has developed "acceptable justifications and processes" that include a number of guiding principles, such as the presumptive limitation of six months for the civil confinement of juveniles, "sexually violent predator[s]," persons with mental illnesses who are considered dangers, and persons with intellectual disabilities).

37 *See Demore*, 538 U.S. at 531 (2003) (holding that certain detainees could be held indefinitely pending their removal proceedings without an opportunity for a bond hearing); *see also* Jennings v. Rodriguez, 583 U.S. 281, 311–12 (2018) (holding that 8 U.S.C. § 1225(b) and § 1226(c) unambiguously require mandatory detention for the duration of removal proceedings and that no six-month limitation created by the Second and Ninth Circuits can be read into the statute).

38 *See* Nielsen v. Preap, 586 U.S. 392, 408 (2019) (holding that the "when the alien is released" language of 8 U.S.C. § 1226(c)(1) does not implicate "immedia[cy]" and instead, ICE is required to detain the immigrant even if years have passed and the individual is living in the community).

39 *See* Nat'l Immigrant Just. Ctr., Snapshot of ICE Detention: Inhumane Conditions and Alarming Expansion 4 (2024), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2024-09/ICE-Detention-Snapshot_September-2024.pdf [https://perma.cc/63K8-9SMV] (finding that, in 2024, "[37,000] people [were] detained each day on average, an alarming 140% increase from the start of the Biden administration"); *see also* Melina Juárez, Bárbara Gómez-Aguiñaga & Sonia P. Bettez, *Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation*, 6 J. on Migration & Hum. Sec. 74, 77 (2018) (noting an increase in detention during the first Trump Administration).

times increase,[40] conditions continue to deteriorate,[41] constitutional limits dwindle,[42] and even enforcement agencies concede that there is little accountability or oversight of the very system they manage.[43]

The jurisprudence states that a pretrial detainee's rights should be "at least as great" as the rights that the Eighth Amendment extends to prisoners.[44] In practice, immigrants' challenges to detention often falter for a shared reason: the petitioner's inability to prove that their custodian had deliberate indifference to their injury.[45] Some courts have pushed the burden further, requiring claimants to show that their custodians had a subjective intent to harm them.[46] Procedural rules

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40 *See* Am. Immigr. Council & Am. Immigr. Laws. Ass'n, Policy Brief: Increase in Indefinite ICE Detention Without Foreseeable Removal Dates During COVID-19 Pandemic 2 (2021), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/increase_in_indefinite_ice_detention_without_foreseeable_removal_dates_jan_2021.pdf [https://perma.cc/QK74-J5L2] ("In recent months, legal service providers and AILA practitioners around the country have reported that a significant proportion of people currently detained are being held post-order of removal beyond the 90 days allowed with no foreseeable end to their detention.").

41 *See generally* Sarah Decker & Anthony Enriquez, Robert F. Kennedy Hum. Rts. et al., Inside the Black Hole: Systemic Human Rights Abuses Against Immigrants Detained & Disappeared in Louisiana (2024), https://www.laaclu.org/sites/default/files/inside_the_black_hole_systemic_human_rights_abuses_against_immigrants_detained_disappeared_in_louisiana.pdf [https://perma.cc/362A-F3BG] (describing human rights abuses and poor conditions at ICE detention centers in Louisiana).

42 *See* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 Loy. L. Rev. 149, 160–61 (2004) (discussing how the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S. Code), and other ad hoc policy changes enabled the no-bond detention of Arab and Muslim men without having to comport with longstanding legal requirements).

43 *2009 Immigration Detention Reforms*, ICE (Dec. 12, 2011), https://www.ice.gov/factsheets/2009detention-reform [https://perma.cc/46VG-G7CW] ("The present immigration detention system is sprawling and needs more direct federal oversight and management. While ICE has over 32,000 detention beds at any given time, the beds are spread out over as many as 350 different facilities largely designed for penal, not civil, detention. ICE employees do not run most of these. The facilities are either jails operated by county authorities or detention centers operated by private contractors."); *see also* Physicians for Hum. Rts., Harv. Immigr. and Refugee Clinical Program & Peeler Immigr. Lab, *supra* note 19, at 8 (explaining that oversight mechanisms meant to ensure compliance with solitary confinement policies at ICE facilities have been "repeatedly flagged as failing").

44 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (using the Due Process Clause of the Fourteenth Amendment to hold that pretrial detainees have due process rights that are "*at least as great* as the Eighth Amendment protections available to a convicted prisoner" (emphasis added)).

45 *See, e.g.*, Das, *supra* note 16, at 1202–04, 1248 (detailing the Third Circuit's application of a "deliberate indifference standard" in overruling several district courts' rulings in favor of immigrants challenging their detention on substantive due process grounds during the COVID-19 pandemic).

46 *See* Nechelle Nicholas, *Cruel and Unusual Punishment: The Eighth Amendment and ICE Detainees in the COVID-19 Crisis*, 42 Pace L. Rev. 223, 234–37 (2021) (pointing out the procedurally complex situation immigrants find themselves in when it comes to challenging the fact,

controlling who can file what type of claim, where, and on what grounds further impair immigrants' rights to bring constitutional challenges to their confinement.[47]

During the COVID-19 pandemic, courts briefly appeared ready to slow or even reverse the steady gravitation away from constitutional protections for detained noncitizens. In the 2022 class action *Fraihat v. U.S. Immigration and Customs Enforcement*,[48] medically vulnerable detainees alleged that the unsanitary and overcrowded conditions in immigration detention centers placed them at serious risk of injury or death should they contract the virus.[49] The Central District of California agreed and issued a nationwide preliminary injunction ordering U.S. Immigration and Customs Enforcement ("ICE") to consider the release of all detainees with enumerated physical and mental health conditions across all its facilities.[50] A second class action brought in the Middle District of Pennsylvania, also animated by the COVID-19 pandemic, offered similar instruction and held that the continued detention of immigrants in "unsanitary, tightly-packed environments" amounted to punishment.[51] On strategic calls and litigation debriefs, many expressed hope that *Fraihat* offered a replicable model for successful constitutional challenges to detention—especially in light of the Pennsylvania district court's finding that the detention of certain populations likely amounted to "punishment."[52]

It was not to be. The Ninth Circuit vacated the California district court's preliminary injunction the following year.[53] Around that same time, the Third Circuit also applied an elevated, quasi-criminal standard to immigrants' complaints that their detention put them at mortal risk

duration, or conditions of their confinement, which more closely resembles the Eighth Amendment standard for relief).

47 *See* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than Enemy Combatants and Why They Deserve More*, 111 Colum. L. Rev. 1833, 1851–52 (2011) ("The *Joseph* hearing is thus the only pre-removal opportunity for the immigrant to win release from detention before his detention becomes prolonged. Habeas review is available to all noncitizens in immigration detention; however, courts generally order release only when detention has been unconstitutionally prolonged." (footnotes omitted)).

48 445 F. Supp. 3d 709 (C.D. Cal. 2020).

49 *See id.* at 728–34.

50 *Id.* at 750–51.

51 Thakker v. Doll, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020).

52 *See id.*; *Fraihat*, 445 F. Supp. 3d at 746–47, 749; Rebekah Wolf, *Ninth Circuit Lifts Injunction Protecting People in ICE Detention from COVID-19*, Am. Immigr. Council (Oct. 21, 2021), https://www.americanimmigrationcouncil.org/blog/ninth-circuit-lifts-injunction-protecting-people-in-ice-detention-from-covid-19/ [https://perma.cc/S9L7-ANYH].

53 Fraihat v. ICE, 16 F.4th 613, 651 (9th Cir. 2021).

of injury and death.[54] Advocates were back to where they started, if not in a worse position.

Analyzing immigration custody through a Fourth Amendment lens would orient claims for relief under the "objectively unreasonable" standard.[55] An additional advantage is that claimants would circumvent negative case law that upholds prolonged detention on statutory grounds[56] by instead forcing a strictly constitutional inquiry.

This Article proceeds in five parts. Part I locates seizure within various custodial postures along the criminal justice continuum and within the universe of civil law. The Section discusses the 1994 Supreme Court decision *Albright v. Oliver*, in which Justice Ginsburg articulated that seizure is an elastic status that continues beyond initial interactions with law enforcement and ends only when certain procedural protections are in place.[57]

Part II provides an overview of the *Bell* to *Kingsley* progression of Fifth Amendment jurisprudence relating to pretrial detention.[58] The Supreme Court's decision in *Kingsley v. Hendrickson*[59] should support an objective reasonableness standard as applied to immigration detention,[60] but for now, there exists an ongoing dispute within the circuit courts over its full application.[61] This confusion enabled the decisions

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54 *See* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 317, 331 (3d Cir. 2020) (holding that the district court's order mandating the release of twenty-two medically vulnerable detainees during the COVID-19 pandemic was in error because the detainees failed to show (1) a substantial likelihood of success on the merits that their conditions of confinement violated due process under the Fifth Amendment, (2) that the "government was deliberately indifferent to their serious medical needs," (3) that they would suffer irreparable harm, and (4) that a preliminary injunction was in the public interest).

55 *See infra* note 184 and accompanying text.

56 *See* Garland v. Aleman Gonzalez, 596 U.S. 543, 550 (2022) (holding that district courts cannot grant class action injunctive relief to noncitizens challenging statutory provisions under the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.), and that "[8 U.S.C] § 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions [of immigration laws]"); Laila L. Hlass & Mary Yanik, *Studying the Hazy Line Between Procedure and Substance in Immigrant Detention Litigation*, 58 Harv. C.R.-C.L. L. Rev. 203, 205 (2023) (describing how most challenges to the length of detention have "raised questions of statutory interpretation—rather than direct constitutional challenges—and in all of them, the Supreme Court ruled for the government, declining to recognize further legal limits on immigrant detention," and thus advocating for a strengthened constitutional approach).

57 *See id.* at 277–79 (Ginsburg, J., concurring).

58 *See* Bell v. Wolfish, 441 U.S. 520 (1979); Kingsley v. Hendrickson, 576 U.S. 389 (2015).

59 576 U.S. 389 (2015).

60 *See id.* at 396–97 ("[P]retrial detainee[s] must show only that the force purposely or knowingly used against [them] was objectively unreasonable.").

61 *See, e.g.*, Fraihat v. ICE, 16 F.4th 613, 659 (9th Cir. 2021) (Berzon, J., dissenting) (arguing that by relying on cases prior to *Kingsley*, the court applied an erroneous subjective standard).

in *Fraihat v. U.S. Immigration and Customs Enforcement*[62] and *Hope v. Warden York County Prison*.[63]

Part III showcases the ways that the law excludes immigrants from the statutory and procedural rights and protections extended to every other confined population, civil and criminal, laying bare the urgency of a new constitutional understanding of immigration detention.

Part IV makes the case for the Fourth Amendment as an appropriate space to conceptualize and treat immigration custody. Immigration detention is more akin to what scholars describe as the "twilight zone"[64] of postarrest and pre-judicial custody,[65] while also residing in the liminal space between civil and criminal confinement. This Section also confronts and neutralizes potential arguments against a Fourth Amendment application within civil law generally and immigration law specifically.

Part V briefly explores the actual vehicles for enforcing Fourth Amendment violations within the immigration detention context. Specifically, this Part evaluates implied causes of action for prospective injunctive relief. This Part analyzes the *Ex parte Young*[66] doctrine and habeas corpus class action relief under the Fourth Amendment as methods to challenge the fact and duration of detention.

An anticipated criticism of this Article's proposal is that it does not serve abolition's overall decarceral objective, as it presupposes the legitimacy of immigration detention in the first place. Although a valid concern, expanding constitutional rights to noncitizens is always transformative. This Article's proposal opens new pathways for detained immigrants to raise challenges to their detention, and it can be pursued alongside the movement's long-term goals of reform and harm mitigation.[67] Finally, the acknowledgment of a Fourth Amendment right within immigration detention places a stricter constitutional liability on federal agencies enforcing immigration laws and, in turn, requires them to rein in their harmful policies.

I. Locating Seizure Across Custodial Statuses

The ambitious question at the center of this piece is this: Must immigration detention claims be analyzed only under the Due Process

62 *See id.* at 636–37.

63 972 F.3d 310, 326–27 (3d Cir. 2020).

64 *See, e.g.*, Irene M. Baker, Comment, Wilson v. Spain*: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 St. John's L. Rev. 449, 468 (2001).

65 *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1013–14 (2013).

66 209 U.S. 123 (1908).

67 *See* Hlass, *supra* note 18, at 1606 (identifying that harm reduction—specifically, the minimizing of "violence experienced by those entangled in carceral systems"—can be pursued alongside transformational change).

Clause of the Fifth Amendment,[68] or does the Fourth Amendment[69] offer an additional venue? To answer this question, this Article examines where courts place the custodial cousins of immigration detention on the rights continuum and identifies when they ripen into different doctrinal statuses.

The Supreme Court has used the term "sacred" when describing the right to be free from restraint without "clear and unquestionable authority of law."[70] Legal historians assert that the authors of the Bill of Rights were heavily concerned with oppressive government and its abuse of power, a theme that animated the Fourth Amendment's creation.[71] The Fourth Amendment applies to all forms of confinement[72] and to almost all people.[73]

In true constitutional tradition, the text of the Fourth Amendment itself is short, leaving it to the courts to decipher its scope and actual application—a landscape that has been described by one scholar as "hopelessly confusing,"[74] and a "byzantine patchwork" by another.[75] It is well established that the Fourth Amendment attaches to

68 U.S. CONST. amend. V.

69 *Id.* amend. IV.

70 Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

71 *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 394, 400 (1974) ("But the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit.").

72 *See, e.g.*, INS v. Delgado, 466 U.S. 210, 218–19 (1984) (finding no seizure when immigration agents stood watch outside factory doors during sweep because individuals within would not be prevented from leaving).

73 Though not the subject of this Article, the Supreme Court considered the question of whether the Fourth Amendment applies to noncitizens in *United States v. Verdugo-Urquidez* and found that it did under certain conditions:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

494 U.S. 259, 265 (1990). *But see* District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (finding that the Fourth Amendment's use of the term "'the people' . . . refers to all members of the political community, not an unspecified subset"); Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 248–49 (2012) (finding authority among constitutional scholars and historians for the premise that "noncitizens would have been understood to be juridical 'persons' between 1789 and 1791, when the Fifth Amendment was proposed and ratified").

74 Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1469 (1985).

75 Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011).

initial encounters with law enforcement.[76] Thereafter, courts diverge on whether, when, and how seizure continues. Nonetheless, the Fourth Amendment embodies a firm moral commitment: that law enforcement must not infringe on the integrity of those it seizes, and that any seizure must be in the least restrictive manner possible.

A. Civil Seizure

Although seizure is traditionally associated with criminal law, it finds applications in civil law as well. Indeed, seizure, like immigration custody, exists in a space that is "something in between" civil and criminal law.

In her illuminating piece *How Immigration Detention Became Exceptional*, Paulina D. Arnold explains how immigration detention evolved from "a system of mass civil confinement of the poor" through forcible placement in almshouses, workhouses, juvenile facilities, narcotics farms, and asylums.[77] As other forms of civil confinement were placed under strict constitutional scrutiny—and eventually, robust procedural protections—immigration detention was excluded.[78] Its exemption was not a deliberate jurisprudential choice, but rather, a historical accident: "Throughout the late 1960s and 1970s, during the development of civil confinement law, there was little occasion to evaluate the legality of or constitutional schema for immigration detention, because most people in immigration proceedings were released pending the resolution of their case."[79]

Seizure is often associated with the criminal justice system. The Fourth Amendment, however, "applies not only to governmental searches and seizures in criminal investigations, but also in various *civil* proceedings."[80] This application is because an individual's privacy and personal security interest can suffer regardless of whether the government is investigating "violations of criminal law *or* breaches of other statutory or regulatory standards."[81] Finding otherwise, the Court has held, would "be . . . 'to say that the individual and his private property

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76 *See, e.g.*, Torres v. Madrid, 592 U.S. 306, 318 (2021) ("[B]rief seizures are seizures all the same.").

77 Arnold, *supra* note 3, at 261.

78 *Id.* at 315–19 (describing what Professor Arnold calls "civil confinement law," or a "rubric of acceptable justifications and processes that apply when the government chooses to confine someone outside of the criminal legal system," which largely developed in the 1970s as reaction against harsh conditions of confinement that were justified by—and disguised as—"benevolence").

79 *Id.* at 320.

80 McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 544 (1st Cir. 1996); *see* Soldal v. Cook County, 506 U.S. 56, 69–71 (1992); Camara v. Mun. Ct., 387 U.S. 523, 534 (1967) (holding that the Fourth Amendment applies to civil and administrative searches).

81 O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (emphasis added) (quoting New Jersey v. T.L.O., 469 U.S. 325, 335 (1985)).

are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'"[82]

The Fourth Amendment applies to civil proceedings, including involuntary commitment proceedings for persons suffering from mental health concerns who are considered "dangerous."[83] In *Glass v. Mayas*,[84] the plaintiff brought a 42 U.S.C. § 1983 action "against several doctors and a nurse for violating his constitutional rights by involuntarily hospitalizing him for psychiatric care."[85] The Second Circuit explicitly stated that "the Fourth Amendment applies to involuntary commitment."[86]

Courts have additionally held that civilly detained "sexually violent predators" ("SVPs") are likewise afforded Fourth Amendment protections.[87] And in another context, the Supreme Court extended the Fourth Amendment protections against unreasonable searches and seizures to juveniles, holding that "it is manifest that the Fourth Amendment applies to juveniles."[88]

Courts have recognized the tension between labeling a juvenile proceeding "civil" when the implications and consequences for the individual are more akin to outcomes for the criminally accused.[89] In *In re Gault*,[90] the Court similarly stated that the "civil" designation afforded to juvenile proceedings did not suspend their constitutional rights.[91] To hold that rights ordinarily associated with criminal process should

82 *T.L.O.*, 469 U.S. at 335 (quoting *Camara*, 387 U.S. at 530).

83 Glass v. Mayas, 984 F.2d 55, 58 (2d Cir. 1993); *see* Villanova v. Abrams, 972 F.2d 792, 795–96 (7th Cir. 1992).

84 984 F.2d 55 (2d Cir. 1993).

85 *Id.* at 55.

86 *Id.* at 58; *see id.* ("'Although confinement of the mentally ill by state action is generally analyzed under the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment, we analyze the distinct right to be free from an unreasonable government seizure of the person for whatever purpose.' We agree with these decisions and conclude that the Fourth Amendment applies to involuntary commitment." (citations omitted) (quoting Maag v. Wessler, 960 F.2d 773, 775 (9th Cir. 1991))); *see also* Gooden v. Howard County, 954 F.2d 960, 967–69 (4th Cir. 1992) (en banc) (holding the same); *Villanova*, 972 F.2d at 796–97 (same); *In re* Barnard, 455 F.2d 1370, 1373–74 (D.C. Cir. 1971) (same); United States v. Doe, 801 F. Supp. 1562, 1566–67 (E.D. Tex. 1992) (same).

87 *See* Serna v. Goodno, 567 F.3d 944, 948 (8th Cir. 2009); Belton v. Sharpe, Civ. No. 10-3071, 2010 WL 4923352, at *7 (D.N.J. Nov. 29, 2010) ("[I]nvoluntarily committed patients and SVPs, like pretrial detainees, are entitled to some protection under the Fourth Amendment.").

88 *Doe*, 801 F. Supp. at 1567; New Jersey v. T.L.O., 469 U.S. 325, 333–34 (1985); *see also* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("[T]he Fourth Amendment . . . pertains to all citizens.").

89 *See, e.g.*, *In re* Gault, 387 U.S. 1, 49–50 (1967).

90 387 U.S. 1 (1967).

91 *Id.*; *see also Doe*, 801 F. Supp. at 1568 (noting that the rights "of counsel, confrontation, and cross-examination, and the privilege against self-incrimination[,] applied because the likely consequences of a juvenile delinquency proceeding were the same as those of a criminal trial: incarceration in a state institution").

be denied to juvenile civil detainees "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience."[92]

Within the immigration-adjacent context, a federal judge in the Eastern District of New York held in 2025 that a state authority violated several noncitizens' Fourth Amendment rights when the state confined them in a local sheriff's office pursuant to an ICE detainer, after they had posted bail.[93]

It is evident that the Fourth Amendment transcends the civil and criminal binary, and constitutional infringements must be "candidly appraised" across all areas of civil and criminal law.[94] What is less clear is when civil seizure formally ends, but criminal seizure case law provides more guidance on the question.

B. *Pretrial Seizure*

Pretrial detention is a designation of custody for individuals who are suspected of criminal conduct but who are still legally innocent.[95] Immigration detention's "pretrial" designation is therefore curious, as the term attaches to no other form of civil confinement—and no element of immigration proceedings can ever result in a criminal conviction.[96] Nevertheless, it is imperative to explore seizure within the pretrial landscape because the inquiry demonstrates the Fourth Amendment's elasticity, and it wards off a potential complaint that the Fourth Amendment finds no purchase in pretrial detention—and therefore, in immigration detention at all.

Pretrial detention's primary justification is that it ensures public safety.[97] It includes an expanse of preconviction postures, and different

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92 *Gault*, 387 U.S. at 36.

93 Orellana v. County of Suffolk, No. 17-cv-4267, 2025 WL 481723, at *3, *15 (E.D.N.Y. Jan. 2, 2025).

94 *See* Breed v. Jones, 421 U.S. 519, 529 (1975) ("[D]etermining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings,' and that 'the juvenile process . . . be candidly appraised.'" (alterations in original) (first quoting *Gault*, 387 U.S. at 50; and then quoting *In re* Winship, 397 U.S. 358, 365–66 (1970))). Though not directly on point relating to the Fourth Amendment, courts have located a First Amendment right in civil contempt confinement. *See, e.g.*, Chen v. FBI, 687 F. Supp. 3d 115, 130 (D.D.C. 2023).

95 DeAnna Pratt Swearingen, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due-Process Rights*, 62 Ark. L. Rev. 101, 107 (2009).

96 Am. Immigr. Council, Alternatives to Immigration Detention: An Overview 1 (2023), https://www.americanimmigrationcouncil.org/report/alternatives-immigration-detention-overview/ [https://perma.cc/8YR7-5H2E]; Am. Immigr. Council, The Removal System of the United States: An Overview 5 (2022), https://www.americanimmigrationcouncil.org/fact-sheet/removal-system-united-states-overview/ [https://perma.cc/5HVZ-FHE7].

97 Noah Speitel, Note, *Holding the Big House Accountable: The Sixth Circuit Concludes a Pretrial Detainee's Fourteenth Amendment Deliberate Indifference Claim Is a Wholly Objective*

constitutional liabilities attach through the formal initiation of judicial proceedings, indictment, arraignment, preliminary hearing, or filing an accusatory instrument.[98]

There are elusive moments when courts across jurisdictions agree on the beginning and end of seizure within the criminal context. Certainly, the Fourth Amendment is implicated in the early phases of the criminal justice process where there has been a deprivation of an individual's liberty.[99] Without much controversy, courts have found that seizure occurs during a traditional arrest.[100] There is also little dispute that seizure occurs when a person surrenders pursuant to an arrest warrant,[101] when they are stopped and questioned,[102] and during investigatory detentions.[103] Checkpoints also constitute seizure.[104]

Seizure is defined by *how* an individual is held, in addition to *when*.[105] The threshold Fourth Amendment question is whether government actors have, "by means of physical force or show of authority," restrained a citizen's liberty.[106] The restraint of liberty must be intentionally applied.[107]

When a suspect flees, evades, resists, or momentarily breaks from apprehension by an arresting agent, the Fourth Amendment's exclusionary rule does not apply during the specific period of nonsubmission.[108] Put another way, seizure can be interrupted for the purpose of *evidence*.

Determination, 68 VILL. L. REV. 699, 705 (2023) (explaining that Congress expanded the purpose of pretrial detention to include preventing danger to society, which was upheld by the Supreme Court).

98 *See* Mark S. Bruder, Comment, *When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability in* Justice v. Dennis, 62 ST. JOHN'S L. REV. 735, 742–44 (1988) (tracing how arrestees, pretrial detainees, and convicted prisoners are treated under differing constitutional doctrines when raising challenges to confinement).

99 *See* Gerstein v. Pugh, 420 U.S. 103, 112–14 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents.").

100 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) ("An arrest, of course, qualifies as a 'seizure' of a 'person' . . . .").

101 *See* Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 62–68 (2015) (cataloguing Supreme Court jurisprudence around the seizures of persons during formal, custodial arrests).

102 Terry v. Ohio, 392 U.S. 1, 19 (1968).

103 Davis v. Mississippi, 394 U.S. 721, 726–27 (1969).

104 Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); Gouldin, *supra* note 101, at 77 ("[T]he Court expressly established that checkpoint stops (whether at permanent checkpoints or at temporary roadblocks) are 'seizures' within the Fourth Amendment.").

105 Gouldin, *supra* note 101, at 81 (explaining that while most seizure-of-persons cases involve a "when" inquiry, unreasonable force cases involve "how" a lawful seizure occurred).

106 *Terry*, 392 U.S. at 19 n.16; *see* Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

107 *Brower*, 489 U.S. at 596–97 (holding Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*").

108 *See* Darby G. Sullivan, *Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in* United States v. Dupree, 55 VILL. L. REV. 235, 251–53 (2010)

That said, when a *person* is concerned, the Supreme Court has held that the "application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."[109] This distinction is relevant because it demonstrates that a person's bodily, personal rights are stronger than their evidentiary rights insofar as the Fourth Amendment is concerned.[110]

In *Graham v. Connor*,[111] the Supreme Court declined to explicitly state whether seizure could continue into pretrial detention.[112] On the other hand, the Court came close to doing so in *Albright v. Oliver*, stating that "[t]he Framers considered the matter of *pretrial deprivations of liberty* and drafted the Fourth Amendment to address it."[113] It has thus fallen on the lower courts to puzzle over which constitutional doctrine applies to pretrial custody—with chaotic results.[114]

For instance, the Third Circuit has held that a person can continue to raise Fourth Amendment challenges—even after an indictment—when they have been released pursuant to a number of restrictions to their liberty, such as travel limitations and weekly check-ins.[115] Noting that it has adopted a broad approach to seizure,[116] the court concluded that the question of whether a person can still raise Fourth Amendment claims after an indictment turns on the combination of restrictions imposed upon them.[117]

(discussing the circuit split on whether "submission" is required for there to be a seizure, or if a person is not considered "seized" if they resist, run, or break away).

109 Torres v. Madrid, 592 U.S. 306, 325 (2021).

110 *See infra* Section IV.B (distinguishing seizure rights related to the person from the jurisprudence limiting immigrants' Fourth Amendment rights related to the exclusion of evidence obtained during home and workplace raids).

111 490 U.S. 386 (1989).

112 *See id.* at 395 n.10 ("Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.").

113 *Id.* at 274 (emphasis added).

114 *See* Struve, *supra* note 65, at 1012 (arguing that lower courts' treatment of pretrial detainees' claims "is substantively undesirable, and, in a number of instances, chaotic [because] [t]he law varies among circuits, by type of claim, and even (sometimes) as to the same type of claim in the same circuit"); Baker, *supra* note 64, at 468 ("The fact that there is no clear defining point at which arrest ends and pretrial detention begins has created considerable confusion in the federal courts.").

115 Gallo v. City of Philadelphia, 161 F.3d 217, 222 (3d Cir. 1998); *see also infra* notes 155–58 and accompanying text (discussing the Third Circuit's view on continuing seizure).

116 *Gallo*, 161 F.3d at 224.

117 *Id.* at 225; *see also* Swartz v. Insogna, 704 F.3d 105, 112 (2d Cir. 2013) ("We have consistently held that a post-arraignment defendant who is 'obligated to appear in court in connection with [criminal] charges whenever his attendance [i]s required' suffers a Fourth Amendment deprivation of liberty." (quoting Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997))).

In *Murphy v. Lynn*,[118] the Second Circuit stated that seizure unquestionably continues within the meaning of the Fourth Amendment when an individual is detained following an arraignment.[119] Some scholars argue that conditions of release following an arraignment constitute continuing seizure,[120] and that there is "no logical distinction between arrestees and pretrial detainees."[121] The Supreme Court in *Terry v. Ohio*[122] put forth a broad notion of seizure when it stated that "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime."[123] It did not, however, elaborate on when a seizure formally ends.[124]

What, then, are the contours and limitations of seizure? Does it end when an individual is transferred to criminal custody, or when, as Justice Ginsburg frames it, a person is "release[d] from a police officer's physical grip"?[125]

C. *Continuing Seizure*

Justice Ginsburg did not divine the notion of "continuing seizure" when she joined the majority in *Albright v. Oliver*. In 1975, the Supreme Court embraced a similar concept when it held that the liberties protected by the Fourth Amendment were expansive enough to include an accused's freedom to travel while on pretrial release.[126] But Justice Ginsburg articulated a robust justification for the theory—and provided lower courts with a framework for contemplating the full meaning of seizure.

The case arose from an incident involving an alleged sale of a "look alike" controlled substance.[127] Mr. Albright, the accused, surrendered and was released on bond with instructions not to leave the state of Illinois

118 118 F.3d 938 (2d Cir. 1997).

119 *Id.* at 944–45.

120 *See* Rebecca Laden, *Bond Conditions as Fourth Amendment Seizures*, 44 CARDOZO L. REV. 1211, 1230–37 (2023) (arguing for an expansion of the continuing seizure doctrine where an individual is released on bond but has restraints placed on their freedom of movement).

121 Baker, *supra* note 64, at 455.

122 392 U.S. 1 (1968).

123 *Id.* at 16.

124 *See id.* at 16–20.

125 Albright v. Oliver, 510 U.S. 266, 278 (1994).

126 Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (citing 18 U.S.C. § 3146(a)(2), (5) (1970) as examples of "pretrial release . . . conditions that effect a significant restraint of liberty"). These sections state that a judicial officer may, among other conditions, "place restrictions on the travel, association, or place of abode of the person during the period of release" or "impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." 18 U.S.C. § 3146(a)(2), (5) (1970).

127 Albright v. Oliver, 975 F.2d 343, 344 (7th Cir. 1992), *aff'd*, 510 U.S. 266 (1994).

without court approval.[128] Although the court initially found probable cause, the case was later dismissed for failure to state an offense.[129] Just over two years after the arrest, Mr. Albright brought suit alleging that he had been falsely arrested.[130] The court found that his claim was barred by the statute of limitations.[131] He then modified his civil rights suit against the arresting officer pursuant to 42 U.S.C. § 1983.[132] Specifically, Mr. Albright alleged that the officer had violated his substantive due process rights under the Fourteenth Amendment's guarantee to be free from malicious prosecution.[133] The Seventh Circuit dismissed the suit, in part because the court did not think that Mr. Albright was arguing that the officer intended to hinder his travel.[134] Furthermore, Mr. Albright was never significantly confined and thus did not have a substantive due process remedy under the Fourteenth Amendment.[135]

The Supreme Court granted certiorari and affirmed the judgment below dismissing Mr. Albright's claim.[136] In doing so, however, it held that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged."[137] The Court stated that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[138] The Justices held that the same principle is applicable to Mr. Albright's claim—and in fact, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[139] Put another way, the Fourth Amendment is explicit in the constitutional obligations it places on government actors, and therefore analysis under a more abstract doctrine—such as substantive due process—is inappropriate.

The Court declined to hypothesize as to whether Mr. Albright would have succeeded with a Fourth Amendment claim, as he had not

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 345.

132 *Id.* at 344–45.

133 *Id.* at 345.

134 *Id.* at 347.

135 *Id.* at 346–47 ("We said earlier that the due process phase of the case would be different if Albright had been incarcerated, and he would have been had he not posted bond.").

136 Albright v. Oliver, 510 U.S. 266, 268, 275 (1994).

137 *Id.* at 271.

138 *Id.* at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

139 *Id.* at 274.

raised it.[140] It did remark that "substantive due process, with its 'scarce and open-ended' 'guideposts' can afford him no relief."[141]

Justice Ginsburg joined the majority but wrote separately for the express purpose of further elaborating on why the Fourth Amendment was a doctrinal match for Mr. Albright's claims.[142] She began by stating that the Fourth Amendment, at its core, is an instruction to law enforcement—or as she called it, an "*injunction* against unreasonable seizures *imposed on police officers*."[143] She speculated that Mr. Albright likely did not pursue his Fourth Amendment rights because he was operating under two "doubtful assumptions": the first, that seizure ends when a person is released on bond, and the second, that the two-year statute of limitations had expired.[144] According to Justice Ginsburg, these two assumptions were erroneous for a shared reason: They were both predicated on the belief that seizure ends "upon . . . release from a police officer's physical grip."[145] The Fourth Amendment's instruction to law enforcement, she stated, is "more purposive and embracing" than the temporal and physical scope of the arrest itself.[146] The vitality of the Fourth Amendment "depends upon its constant observance by police officers."[147]

Justice Ginsburg drew upon the common law understanding of seizure's purpose, which is to ensure future court attendance.[148] Seizure, she expressed, is therefore any curtailment of liberty that supplants actual pretrial incarceration.[149] Bail requirements, an obligation to appear at future court hearings, or a prohibition on travel without preapproval all amount to methods of control that are less than full incarceration but more than complete liberty.[150] This view of seizure, she stated, "comports with common sense and common understanding" of the term.[151]

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140 *Id.* at 275.

141 *Id.* (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

142 *Id.* at 276 (Ginsburg, J., concurring).

143 *Id.* (emphasis added).

144 *Id.* at 277, 280.

145 *Id.* at 278, 280.

146 *Id.* at 277–78.

147 *Id.* ("This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers.").

148 *Id.* at 278 ("The purpose of an arrest at common law, in both criminal and civil cases, was 'only to compel an appearance in court' . . . ." (quoting 3 William Blackstone, Commentaries *290)).

149 *Id.* ("The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.").

150 *Id.* at 278–79 ("Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges.").

151 *Id.* at 278.

Since *Albright*, lower courts have shown varying degrees of imagination when evaluating the viability of continuing seizure. The Seventh Circuit has outright rejected the concept.[152] The Fourth Circuit has also repudiated the theory,[153] though in somewhat contradictory fashion, it held in another case that seizure includes any conduct that restrains an individual's liberty by means of physical force.[154] Other circuits have explicitly embraced the doctrine, and these decisions are instructive in glimpsing what continuing seizure looks like in application.

The Third Circuit's approach to continuing seizure is to consider the degree to which conditions are restrictive.[155] In *Black v. Montgomery County*,[156] the Third Circuit held that persons remain seized as long as they "experience[] 'constitutionally significant restrictions on [their] freedom of movement for the purpose of obtaining [their] presence at a judicial proceeding.'"[157] In another case, the Third Circuit held that "[p]retrial custody and some onerous types of pretrial, non-custodial restrictions constitute a Fourth Amendment seizure."[158]

The Second Circuit approaches continuing seizure similarly. It held that an order not to leave the state, combined with an obligation to attend future court appointments, constituted a seizure within the meaning of the Fourth Amendment.[159] It stated that "[t]he liberty deprivations regulated by the Fourth Amendment are not limited to physical detention."[160]

Finally, the Ninth Circuit endorsed the theory that a person continues to be seized after an arrest but during pretrial detention prior to a formal charge.[161]

Although the theory of continuing seizure might be experiencing a circuit split within the criminal context, it could find more purchase in

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152 Welton v. Anderson, 770 F.3d 670, 675 (7th Cir. 2014) ("We have repeatedly rejected the concept of 'continuing seizure' in the Fourth Amendment context . . . ."); *see also* Smith v. City of Chicago, 3 F.4th 332, 340 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022) (mem.).

153 Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) ("A review of the Supreme Court's basic jurisprudence reinforces our refusal to adopt the 'continuing seizure' theory of the Fourth Amendment." (quoting *Albright*, 510 U.S. at 276 (Ginsburg, J., concurring))).

154 Justice v. Dennis, 834 F.2d 380, 387–88 (4th Cir. 1987), *vacated*, 490 U.S. 1087 (1989).

155 Schneyder v. Smith, 653 F.3d 313, 320 (3d Cir. 2011) ("Pre-trial restrictions of liberty aimed at securing a suspect's court attendance are all 'seizures' . . . [because] the difference between detention in jail, release on bond, and release subject to compliance with other conditions is in the *degree* of restriction on the individual's liberty, not in the *kind* of restriction.").

156 835 F.3d 358 (3d Cir. 2016).

157 *Id.* at 368 (quoting *Schneyder*, 653 F.3d at 321–22 (2011)).

158 DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005).

159 Murphy v. Lynn, 118 F.3d 938, 945 (2d Cir. 1997).

160 *Id.*

161 *See* Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

civil contexts where the waters are less muddied by stages of perceived culpability.[162]

II. The *Bell* to *Kingsley* Progression of Substantive Due Process and Its Impact on Immigration Detention

This Part examines interpretations and applications of the Fifth Amendment's Due Process Clause[163] to accent the need for an expanded constitutional framework under which to review immigration custody's lawfulness.

Unlike the Eighth and Fourth Amendments—whose texts explicitly prohibit physically abusive government—the Fifth Amendment implicates "due process of law."[164] Substantive due process violations occur when excessive government action serves no legitimate stated interest,[165] while procedural due process violations occur when existing procedures are inadequate or fundamentally unfair.[166]

Substantive due process has been criticized as a "vague standard" that risks "inviting decisionmakers to consult their sensibilities rather than objective circumstances."[167] The Supreme Court has hesitated to expand substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[168]

A. *Due Process's Shifting Sands*

Substantive due process challenges to confinement fall primarily under three categories: excessive force, deliberate indifference, and conditions of confinement.[169] All confined, nonconvicted persons, including those held civilly, in pretrial detention, and in immigration custody, may raise a substantive due process challenge.[170]

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162 *See infra* notes 381–83 and accompanying text.

163 U.S. Const. amend. V.

164 *Contrast id.* (stating that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"), *with id.* amend. IV (banning "unreasonable searches and seizures"), *and id.* amend. VIII (banning excessive bail and fines alongside "cruel and unusual punishments").

165 *See* County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating the substantive due process guarantee protects against government power arbitrarily and oppressively exercised).

166 *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80–82 (1972).

167 Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th Cir. 1985) (referring to the "shocks the conscience" test of substantive due process).

168 Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

169 *See, e.g.*, *id.* at 117 (involving a deliberate indifference challenge); Bell v. Wolfish, 441 U.S. 520, 523 (1979) (involving a conditions-of-confinement challenge); Kingsley v. Hendrickson, 576 U.S. 389, 391 (2015) (involving an excessive force challenge).

170 *See, e.g.*, Fraihat v. ICE, 16 F.4th 613, 636 (9th Cir. 2021) (implicitly recognizing a right under the Fifth Amendment to challenge conditions of confinement, despite the fact that the court ultimately ruled against the plaintiffs in saying: "We begin with plaintiffs' primary claim that ICE

In *Bell v. Wolfish*,[171] the Supreme Court held that substantive due process shields individuals from the use of excessive force that amounts to "punishment."[172] The *Bell* Court recognized that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[173] The governing test is whether the conditions themselves constitute punishment, balancing the fact that "not all restrictions amount to punishment."[174] The restrictions must reasonably relate to a legitimate government interest, and when they do not, they are unreasonable and amount to punishment.[175]

Though the *Bell* petitioners were criminal pretrial detainees,[176] courts have since expanded *Bell*'s holding to encompass civil detainees. An example is *Jones v. Blanas*,[177] in which the Ninth Circuit articulated an informal hierarchy of protections, such that "pre-adjudication detainees retain greater liberty protections than convicted persons, and persons civilly committed retain greater liberty protections than persons criminally committed."[178] As the *Jones* court reasoned, "purgatory cannot be worse than hell."[179] The court went on to state that civilly committed persons awaiting a commitment hearing cannot be treated worse than those who have *actually* been civilly committed.[180]

In determining what qualifies as punishment, lower courts began to employ a four-part test articulated by the Second Circuit in *Johnson v. Glick*[181] to determine when force crossed a "constitutional line."[182] The *Johnson* court urged a balancing of factors, such as:

> the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good

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'failed to promulgate and implement medically necessary protocols and practices to protect medically vulnerable people' from COVID-19, and that this failure amounted to deliberate indifference in violation of the Fifth Amendment. We conclude that plaintiffs have not shown a likelihood of success or serious questions on the merits of this claim, and that the district court's determination otherwise turned on a misapprehension of the governing legal standards.").

171 441 U.S. 520 (1979).

172 *See id.* at 535–37.

173 *Id.* at 535.

174 *See* Dana Sherman, *Examining the Conditions of Confinement for Civil Detainees Under California's Sexually Violent Predators Act*, 68 HASTINGS L.J. 1441, 1449 (2017).

175 *Bell*, 441 U.S. at 539.

176 *Id.* at 523–24.

177 393 F.3d 918 (9th Cir. 2004).

178 Sherman, *supra* note 174, at 1450 (footnote omitted).

179 *Jones*, 393 F.3d at 933.

180 *Id.* (finding that conditions of confinement are presumptively punitive if "an individual awaiting [SVP] adjudication is detained under conditions more restrictive than those the individual would face following [SVP] commitment").

181 481 F.2d 1028 (2d Cir. 1973).

182 *Id.* at 1033.

faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[183]

The *Johnson* test essentially introduced a subjective element to due process challenges. This addition meant that a petitioner needed to prove a government official possessed actual knowledge that their conduct was harmful. Such a test is necessarily a more difficult one to satisfy.

Years later, however, in *Kingsley v. Hendrickson*, the Supreme Court reined in the *Johnson* test and held that excessive force claims brought by pretrial detainees should be analyzed under the objectively reasonable standard and *only* under that standard.[184] Courts were free to consider whether a government actor had subjective awareness that the force was unreasonable, but only insofar as their state of mind might offer *guidance* on whether a due process violation occurred.[185]

The *Kingsley* Court did not speak to whether the objective reasonableness test was also appropriate in *other* pretrial causes of action, such as deliberate indifference, conditions of confinement, inadequate medical care, or failure-to-protect claims.[186] Its silence resulted in a yawning circuit split[187]—one that endures today and manifests in immigration confinement challenges.[188]

The Second, Seventh, and Ninth Circuits have extended *Kingsley*'s objectively reasonable standard to inadequate medical care claims brought by pretrial detainees.[189] However, the Fifth, Eighth, and Eleventh circuits maintained the subjective component.[190] To prevail in these

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183 *Id.*

184 *See id.* at 396–97 ("[P]retrial detainee[s] must show only that the force purposely or knowingly used against [them] was objectively unreasonable.").

185 *Id.* at 402 ("[The *Johnson* test] does not suggest that the fourth factor (malicious and sadistic purpose to cause harm) is a *necessary* condition for liability. To the contrary, the words 'such . . . as' make clear that the four factors provide examples of some considerations, among others, that might help show that the use of force was excessive.").

186 *See* Speitel, *supra* note 97, at 710.

187 *Id.* (laying out the post-*Kingsley* circuit split on the deliberate indifference claim, explaining that "[s]ome circuits have broadly interpreted the Court's decision to require the modification of the subjective prong of a deliberate indifference claim's analysis beyond the excessive force context, while other circuits have narrowly construed the Court's holding to the specific facts of the *Kingsley* case, retaining the subjective prong of the claim's analysis").

188 *See infra* Sections II.A–.B.

189 1 Michael B. Mushlin, Rights of Prisoners § 3:11.50 (5th ed. 2024) (citing Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017); Miranda v. County of Lake, 900 F.3d 335 (7th Cir. 2018); Gordon v. County of Orange, 888 F.3d 1118 (9th Cir. 2018)).

190 Hannah T. Nguyen, *Time to Ditch Deliberate Indifference: COVID-19, Immigrant Challenges, and the Future of Due Process*, 58 Am. Crim. L. Rev. Online 17, 20 (2020) ("The Fifth, Eighth, Tenth, and Eleventh Circuits, however, have either retained the subjective element of the deliberate indifference test in due process claims, or declined to decide the applicability of *Kingsley* to such cases.").

jurisdictions, a plaintiff must show that the conditions posed a substantial risk of injury or serious harm, *and* that the government defendant actually knew of the risk of harm, but chose to disregard it.[191]

In *Strain v. Regalado*,[192] the Tenth Circuit held that objective reasonableness was "unique" to use-of-force cases.[193] In 2021, the *Strain* plaintiffs sought certiorari, arguing that *Kinglsey* was based on *Bell*[194]—itself a conditions-of-confinement case in which the Court held that a plaintiff need only prove that the challenged government action was not rationally related to a legitimate governmental purpose.[195] The Supreme Court denied certiorari on October 4, 2021, leaving the question of *Kinglsey*'s reach unresolved.[196]

The immigration detention realm has felt this lack of *Kingsley* clarity acutely, where lower courts' refusal to follow *Kingsley*'s objectively reasonable standard beyond excessive force has had devastating consequences for noncitizens—even in the circuits that are traditionally viewed as favorable for immigrants, like the Third and Ninth Circuits.

B. Fraihat v. U.S. Immigration and Customs Enforcement

In the spring of 2020, as the world was engulfed in the earliest stages of the COVID-19 pandemic, immigrants and advocates were coming forward with terrifying accounts of overcrowding, sick detainees and detention center personnel, and a lack of even the most basic hygienic necessities known to help control the spread of the disease, like soap.[197] In April of that year, a group of detained immigrants with certain health risk factors sought declaratory and injunctive relief in the

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191 *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

192 977 F.3d 984 (10th Cir. 2020).

193 *See id.* at 991.

194 Petition for Writ of Certiorari at 16–17, Strain v. Regalado, 142 S. Ct. 312 (2021) (No. 20-1562).

195 Bell v. Wolfish, 441 U.S. 520, 561 (1979).

196 *See* Amy Howe, *Court Issues Orders from "Long Conference," but Relists Some High-Profile Cases*, SCOTUSBLOG (Oct. 5, 2021, at 00:00 ET), https://www.scotusblog.com/2021/10/court-issues-orders-from-long-conference-but-relists-some-high-profile-cases/ [https://perma.cc/QR2V-5MZC].

197 *See, e.g.*, Nicolas Morales, *We Were Left to Sicken and Die from the Coronavirus in Immigration Detention. Here's How I Got Out*, L.A. TIMES (May 8, 2020, at 03:00 PT), https://www.latimes.com/opinion/story/2020-05-08/immigration-detention-coronavirus-release [https://perma.cc/4QQP-LWK4] ("The Elizabeth Detention Center has capacity for just over 300 people. At nearly all times, I was packed into a large room with other immigrants. Our beds were close together, with only two to three feet between them. We shared toilets, showers, sinks, communal surfaces and breathing air. We did not have hand sanitizer or masks. We could not disinfect our shared surfaces. We could not maintain any meaningful distance among us, let alone six feet of distance. We were never permitted outside; there is no meaningful outdoor space.").

Central District of California under the Fifth Amendment and claimed a substantive due process violation.[198] The plaintiffs had a range of physical and mental health conditions that placed them at heightened risk of serious illness or death should they contract the virus.[199] They alleged that ICE's detention practices constituted "deliberate indifference" to their medical needs and a "reckless disregard" of the infection's known health risks to them specifically.[200]

The plaintiffs did not pursue a strictly *Kingsley*-based argument. Put another way, the plaintiffs did not allege that their conditions of confinement were objectively unreasonable. They instead relied on a line of argument located within the Ninth Circuit's decisions in *Jones v. Blanas* and *King v. County of Los Angeles*[201] to argue that the plaintiffs' confinement was presumptively punitive because the conditions within the detention centers were as restrictive as those under which pretrial criminal detainees are held.[202]

The district court granted a preliminary injunction by finding that the plaintiffs were likely to succeed in establishing that ICE was deliberately indifferent to their medical needs, and therefore in violation of the Fifth Amendment's Due Process Clause[203] and the Supreme Court's holding in *Bell.*[204] ICE's failures to act—specifically, to protect detainees from contracting the virus, to issue guidance regarding vulnerable populations, or to consider releasing medically vulnerable detainees—were "likely 'akin to reckless disregard.'"[205] The court pointed to ICE's discretion to release individuals, even those who were mandatorily detained, and that its refusal to release medically vulnerable detainees or to even consider alternatives to detention caused the plaintiffs harm.[206]

Next, the district court found that a preliminary injunction was warranted because the plaintiffs were likely to succeed in alleging that the conditions of their confinement amounted to punishment in violation of substantive due process.[207] The court stated that "[i]f a civil detainee is not afforded 'more considerate' treatment than that available in a criminal pretrial facility, this creates a rebuttable presumption

198 Fraihat v. ICE, 445 F. Supp. 3d 709, 718–19 (C.D. Cal. 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021).

199 *Id.* at 719.

200 *Id.* at 744.

201 885 F.3d 548 (2018).

202 Brief for Plaintiffs-Appellees at 38–39, Fraihat v. ICE, 16 F.4th 613 (9th Cir. 2021) (No. 20-55634).

203 *Fraihat*, 445 F. Supp. 3d at 742, 750–51.

204 *Id.* at 747 (citing Bell v. Wolfish, 441 U.S. 520 (1979)).

205 *Id.* at 744.

206 *Id.* at 746–47.

207 *Id.* at 746.

of punitiveness."[208] A defendant can rebut this presumption by offering legitimate, nonpunitive justifications for the restrictions, but if the stated objectives could be accomplished through alternative, less harsh means, the presumption is not overcome.[209]

The district court was unpersuaded by ICE's argument that the detention of medically vulnerable immigrants ensured future court attendance while promoting public safety.[210] Attendance at court hearings, the court found, "is not possible for those who are sick or dying, and is impossible for those who are dead."[211] Furthermore, facility outbreaks diminished public safety as they "further tax community health resources."[212]

In issuing its preliminary injunction, the district court mandated that ICE make "timely custody determinations for detainees" with certain health risk factors.[213] And most remarkably, the court's preliminary injunction applied nationwide to all detention centers under ICE's purview.[214]

The effect of the district court's decision in *Fraihat* was seismic. Individuals with chronic health conditions such as high blood pressure, liver disease, cancer, chronic respiratory disease, diabetes, and autoimmune disorders could seek immediate release from ICE custody.[215] So too could those over the age of fifty-five, pregnant detainees, and those living with serious mental health disabilities.[216] ICE published protocols on how to submit release requests, and although ICE has not released firm data on how many requests were granted, custody numbers decreased by around a third following the decision.[217]

The euphoria would not endure. The Ninth Circuit, long considered a favorable venue for noncitizens, intervened the next year to

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208 *Id.* at 746–47 (quoting Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004)) (finding that detention of this population and inaction to protect them was arbitrary and "excessive given the nature and purpose of civil detention").

209 *Id.* at 746–47 (citing longstanding Ninth Circuit precedent spanning decades of jurisprudence).

210 *Id.* at 747.

211 *Id.*

212 *Id.*

213 *Id.* at 751.

214 *See id.*

215 *See* S. Poverty L. Ctr., Fraihat v. ICE COVID-19 Release, https://www.splcenter.org/wp-content/uploads/files/webinar_guide_community_training_fraihat_v._ice_covid-19_release_dec_2020_final.pdf [https://perma.cc/3B24-NAH9] (last visited Mar. 18, 2026) (listing the conditions that would make one eligible).

216 *See id.*

217 *See Immigration Detention and COVID-19*, Brennan Ctr. for Just. (Jan. 7, 2022), https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19 [https://perma.cc/U8HE-RX8S].

reverse each of the district court's rulings.[218] In doing so, it summoned familiar specters of "deliberate indifference," "reckless disregard," and "legitimate government objective" in finding that the plaintiffs' lawsuit must fail on *all* counts.[219]

From the opinion's opening line, the court's outrage was palpable: "In March 2020, toward the beginning of the COVID-19 pandemic, the plaintiffs in this case sought a preliminary injunction that would effectively place this country's network of immigration detention facilities under the direction of a single federal district court."[220] From there, the opinion descends into a withering dissection of the district court's decision: that the injunction "imposed a broad range of obligations on the federal government," that the relief plaintiffs sought was "sweeping," and that the plaintiffs' requested preliminary injunctive relief far exceeded their individual circumstances and was "extraordinary beyond measure."[221] But it was the district court itself that was most upbraided by the circuit, because it "assum[ed] the authority to dictate, at both a macro and a granular level, ICE's national response to the COVID-19 pandemic."[222] In doing so, the district court engaged in a far-reaching intrusion on the executive branch, a "judicial revision" of nationwide policies, and a "judicial intervention" of great magnitude.[223]

The Ninth Circuit used a much softer and more deferential tone toward ICE. It wrote that although ICE's initial response to the pandemic was "imperfect," and despite whatever "shortcomings" could be discerned in ICE's pandemic protocol, in no way did ICE demonstrate system-wide deliberate indifference.[224]

Throughout, the court evaluated ICE's conduct through a subjective lens, searching for evidence of whether the government acted with reckless or deliberate disregard for the detainees' well-being.[225] In its quest, the court spent eight pages walking through all the measures, policies, recommendations, action plans, memoranda, protocols, and guidance that ICE implemented early in the pandemic.[226]

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218 Fraihat v. ICE, 16 F.4th 613, 618–19, 647, 651 (9th Cir. 2021) (holding that: (1) "plaintiffs have not shown that ICE acted with deliberate indifference," (2) plaintiffs failed to establish that the conditions of their confinement constituted "punishment," (3) plaintiffs failed to show a likelihood of success on the merits of their section 504 claim, and (4) the court could not justify the issuance of a nationwide preliminary injunction).

219 *Id.* at 645, 647, 651.

220 *Id.* at 618.

221 *Id.* at 618–19.

222 *Id.* at 619.

223 *Id.*

224 *Id.* at 618–19.

225 *See, e.g.*, *id.* at 637.

226 *Id.* at 620–28.

Ultimately, the Ninth Circuit concluded that all of ICE's efforts to safeguard detainees, however inadequate, did not rise to the level of deliberate indifference or reckless disregard.[227] Even if ICE's early response to the pandemic was "slow out of the gate," the plaintiffs could not demonstrate deliberate indifference "on an ongoing basis."[228]

The Ninth Circuit did not follow *Kingsley*—a point raised by Judge Marsha Berzon in dissent, who took great issue with the majority's use of a "subjective, instead of the proper, objective, standard" in reviewing the plaintiffs' claims.[229] She said that the lower court had articulated the proper standard, which is one of "objective indifference, not subjective indifference."[230] As a result, Judge Berzon stated that the majority's analysis was "replete with consideration of subjective factors."[231] Under a purely objective analysis, government actors must take more than "*some* measures" to reduce risks to their wards, and instead, they must implement objectively reasonable available measures to address the risk—not measures that they believed in good faith were adequate, but in fact, were not.[232]

Of final note on *Fraihat* is that the majority wove an Eighth Amendment cruel and unusual punishment decision—*Estelle v. Gamble*[233]—into its deliberate indifference analysis: "Neither 'mere lack of due care,' nor 'an inadvertent failure to provide adequate medical care,' nor even '[m]edical malpractice,' without more, is sufficient to meet [the reckless disregard] standard."[234] Whether the circuit erred in summoning *Estelle* to shape its analysis of deliberate indifference under the Fifth Amendment is not the subject of this piece. It does, however, expose the court's willingness to conflate constitutional principles in evaluating immigration detention.

C. Hope v. Warden York County Prison

Around the time that the *Fraihat* class action was filed, twenty-two immigrant detainees in Pennsylvania filed a habeas corpus petition seeking immediate release on the basis that their conditions of confinement

227 *Id.* at 637 ("[P]laintiffs have not made 'a clear showing' that in responding to the evolving and unprecedented COVID-19 pandemic, ICE acted with 'deliberate indifference' to medical needs or in 'reckless disregard' of health risks.").

228 *Id.* at 639.

229 *Id.* at 651 (Berzon, J., dissenting).

230 *Id.* at 659 (emphasis omitted) (quoting Gordon v. County of Orange, 888 F.3d 1118, 1120 (9th Cir. 2018)).

231 *Id.* at 660.

232 *Id.*

233 429 U.S. 97 (1976).

234 *Fraihat*, 16 F.4th at 636 (alteration in original) (quoting *Estelle*, 429 U.S. at 105–06).

violated the Fifth, Eighth, and Fourteenth Amendments.[235] They alleged that their ages and specific healthcare needs, coupled with the detention center's COVID-19 risk prevention practices, placed them at fatal risk should they contract the virus.[236] The District Court for the Middle District of Pennsylvania granted preliminary injunctive relief and ordered their release,[237] seeing "no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments."[238] Their detention, therefore, amounted to unconstitutional punishment.[239]

On review, the Third Circuit began by holding that habeas corpus was an acceptable mechanism to challenge conditions of confinement and seek release.[240] Although the petitioners had a cognizable habeas corpus claim, it was an extraordinary remedy that should be limited to the "cases of special urgency."[241] The governing question was whether the petitioners were likely to succeed on the merits.[242]

Doctrinally, the court held that although the detainees were "not . . . convicted,"[243] they simply did not possess "the full range of freedoms of an unincarcerated individual."[244] Beyond that, the court only vaguely surmised that "the substantive due process guarantees afforded detainees like Petitioners are *at least as robust* as Eighth Amendment protections afforded prisoners."[245] Applying this framework, the Third Circuit held that the district court abused its discretion in finding that the petitioners would have prevailed.[246] The Third Circuit called on *Bell* rather than *Kingsley* to analyze whether the detainees' conditions of confinement did in fact amount to "punishment" and were therefore unconstitutional.[247]

Using the *Bell* framework, the court asked if the detention conditions at the two centers were intended to punish the detainees, and if not, whether the conditions were rationally related to a legitimate

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235 Hope v. Warden York Cnty. Prison, 972 F.3d 310, 317, 325 (3d Cir. 2020).

236 *Id.* at 318.

237 *Id.* at 317.

238 *Id.* at 327 (quoting Thakker v. Doll, 451 F. Supp. 3d 358, 371 (M.D. Pa. 2020)) (discussing a similarly situated case decided three days before petitioners filed their habeas corpus case in the matter at issue).

239 *Id.*

240 *Id.* at 324 ("We have never held that a detainee cannot file a habeas petition to challenge conditions that render his continued detention unconstitutional.").

241 *Id.* (quoting Hensley v. Mun. Ct., 411 U.S. 345 (1973)).

242 *Id.* at 325.

243 *Id.* at 326.

244 *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 546 (1979)).

245 *Id.* at 325 (emphasis added).

246 *Id.*

247 *Id.* at 326–27.

government objective or excessive given their purpose.[248] In answering that question, the court found that the government's detention of medically vulnerable detainees during a global pandemic was rationally related to three legitimate government objectives.[249] Those objectives were (1) ensuring future court attendance, (2) "protecting the public," and (3) "managing the detention facilities."[250] Of note, the court did not answer the question as to whether the detention was excessive.[251]

Finally, the court examined whether detention center personnel were deliberately indifferent to the detainees' serious medical needs.[252] The court held that "[t]o establish deliberate indifference, Petitioners must show the Government knew of and disregarded an excessive risk to their health and safety."[253] Based on this standard, and similar to the court in *Fraihat*, the Third Circuit found that "Petitioners fell well short of establishing that the Government was deliberately indifferent toward their medical needs."[254]

If medically vulnerable civil detainees, confined together in unsanitary and life-threatening conditions during a global pandemic, cannot prevail in challenging their detention, can they ever? *Fraihat* and *Hope* imply that under the deliberate indifference standard, the firm answer is no.

III. Immigration Detention as Sui Generis

The *Fraihat* and *Hope* decisions are but two portraits of the inhospitality shown toward immigration detention challenges. They suggest that no conditions of confinement, no matter the callousness, present a constitutional problem. But these cases are an encrustation of a long history of unfavorable treatment of noncitizens in the legal landscape—a treatment that has no constitutional parallel.

This next Section excavates the procedural and statutory pitfalls that noncitizens face. The existence of immigration custody in what is nominally "civil" but manifestly criminal—with none of the recognized rights associated with either civil or criminal law—underscores the immense urgency of identifying an additional framework for analyzing immigration detention's constitutionality.

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248 *Id.* at 328 (citing *Bell*, 441 U.S. at 538).

249 *Id.* at 326–27. Counsel for the detainees did not allege that their custodial agents "intended to harm them," so the court moved to the second part of the analysis: whether the conditions were rationally related to a legitimate government purpose, and if so, whether the conditions were excessive to that purpose. *Id.* at 328.

250 *Id.* at 327.

251 *Id.* at 329.

252 *Id.*

253 *Id.* (emphasis omitted).

254 *Id.* at 331.

A. Crisis of Rights

As compared to the rights and remedies attached to criminal and regulatory custody, immigration detention is on a planet of its own. Although it shares key commonalities with other forms of civil custody—such as paternalistic origins,[255] a preventative rather than punitive nature,[256] and never resulting in a criminal conviction—it lacks nearly all statutory and procedural guarantees.[257]

Civil commitment requires observance of "strict procedural safeguards" and evidentiary standards.[258] For example, an individual facing commitment as an SVP is entitled to a trial in which the government bears the burden of showing beyond a reasonable doubt that the individual is, in fact, an SVP and that their confinement is necessary.[259] They are provided counsel at government expense and have the right to cross-examine witnesses.[260] A finding of dangerousness alone is insufficient to uphold indefinite involuntary commitment.[261] And although there is a five-year statute of limitations for every other federal civil penalty enforcement action, no such statute of limitations exists in immigration law.[262]

Courts understand immigration detention to fall within the pretrial genus of custody,[263] and this interpretation is even urged in some scholarship.[264] There is otherwise no specific provision that defines immigration custody as pretrial. The presumption that immigration custody is "pretrial" is not unreasonable; like pretrial criminal custody, immigration detention is ostensibly justified as a measure to guarantee future court

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255 *See* Arnold, *supra* note 3, at 270.

256 Noferi, *supra* note 25, at 547.

257 *See id.* at 543–46 (describing the differences).

258 Zadvydas v. Davis, 533 U.S. 678, 691 (2001) (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)).

259 *Hendricks*, 521 U.S. at 353.

260 *Id.*

261 *Id.* at 358 ("We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'").

262 *See* 28 U.S.C. § 2462; *see also* United States v. Phattey, 943 F.3d 1227, 1283 (9th Cir. 2019) ("Because denaturalization proceedings do not constitute a penalty for purposes of 28 U.S.C. § 2462, that statute does not provide Phattey a statute-of-limitations defense.").

263 *See supra* notes 201–02 and accompanying text.

264 *See, e.g.*, Liamarie Quinde, *Protecting the Substantive Due Process Rights of Immigrant Detainees: Using COVID-19 to Create a New Analogy*, 112 J. CRIM. L. & CRIMINOLOGY 369, 400–01 (2022) (advocating for immigration custody to be evaluated under the pretrial custody standard under the Fifth Amendment rather than under the criminal standard within the Eighth Amendment).

attendance and ensure public safety.[265] And, like pretrial criminal custody, immigration custody cannot constitute "punishment."[266]

Performing a side-by-side comparison of pretrial criminal procedure and immigration procedure, however, breaks the spell that the two share a kinship.[267] Although the actual form, appearance, and organization of immigration confinement bear all the hallmarks of the strictest version of criminal incarceration, detained immigrants benefit from almost none of the rights enjoyed by pretrial detainees, such as the right to a jury trial,[268] *Miranda* warnings,[269] or protection against ex post facto retroactivity.[270]

First among the major departures between criminal and immigration law is the right to counsel. Persons facing pretrial criminal custody are guaranteed an attorney at government expense at each phase of their criminal proceedings.[271] Those in immigration custody, however, are not guaranteed an attorney at government expense at any phase.[272] This inequity remains true, despite the fact that the consequences of a deportation order are potentially life-altering—or life-ending.

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265 *See* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. Mia. Inter-Am. L. Rev. 531, 537–39 (1999); Demore v. Kim, 538 U.S. 510, 513 (2003) ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."); Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. Rev. 1485, 1492–94 (2012) (explaining the development of the stated justifications for immigration detention, the first being to ensure court compliance, and the second to protect national security).

266 Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 Loy. L.A. L. Rev. 1477, 1489–90, 1490 n.85 (2011) (pointing out that the Department of Homeland Security ("DHS") is not authorized to detain persons for punitive purposes, as punishment is "unique[ly]" within the province of the criminal justice system).

267 Kreimer, *supra* note 265, at 1490 ("Because the detention purportedly serves a regulatory rather than punitive function, detainees do not enjoy constitutional rights to a speedy trial by an impartial jury, or the right to appointed counsel, and are afforded minimal procedural protections.").

268 *See id.*

269 *See* Navia-Duran v. INS, 568 F.2d 803, 808 (1st Cir. 1977); Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975); Chavez-Raya v. INS, 519 F.2d 397, 399–402 (7th Cir. 1975).

270 Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("It always has been considered that that which [the Constitution's Ex Post Facto Clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." (footnote omitted)); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) (holding that the Ex Post Facto Clause has no application to deportability and deportation proceedings).

271 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

272 Those in removal proceedings can be represented by counsel if they can privately afford to pay for it, or if they are fortunate enough to be detained within a geographical area with a robust legal services presence. *See* 8 U.S.C. § 1362.

Second, pretrial criminal detainees are guaranteed the right to a speedy trial,[273] and their detention is subject to "stringent time limit[s]."[274] Immigrant detainees, meanwhile, can be held for months, or even years, before the conclusion of their proceedings[275]—many without the opportunity to request a bond hearing before an immigration judge.[276]

Third, pretrial preventative detainees are entitled to a presumption that their detention is only justified in the most serious of cases. The Bail Reform Act of 1984[277] expanded the government's right to preventively hold a narrow group of pretrial detainees charged with serious felonies.[278] The Supreme Court upheld the Bail Reform Act's constitutionality because it found that Congress intended such preventative detention to be used sparingly, only against the most dangerous of persons, and for an extremely limited time period.[279]

The opposite is true for detained noncitizens.[280] ICE commands a near-unbridled right to detain any noncitizen whom the agency believes

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273 *See* Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174; U.S. Dep't of Just., Justice Manual § 9-17.000 (2018) ("The Act establishes time limits for completing the various stages of a federal criminal prosecution. Government attorneys should comply with the time limits established by the act.").

274 United States v. Salerno, 481 U.S. 739, 747 (1987); *see also* 18 U.S.C. §§ 3161–3174 (laying out different detention limits based on the circumstances).

275 *See* Detention Watch Network, Communities Not Cages: A Just Transition from Immigration Detention Economies 28 (2021), https://www.detentionwatchnetwork.org/sites/default/files/reports/Communities%20Not%20Cages-A%20Just%20Transition%20from%20Immigration%20Detention%20Economies_DWN%202021.pdf [https://perma.cc/K5QZ-7RWN] ("Due to the onerous nature of the U.S. immigration system and courts, immigrants spend months or even years in detention centers meant for short term stays.").

276 *See* 8 C.F.R. §§ 1241.1–.19 (2025) (explaining the administrative rules for apprehension and detention of noncitizens who are ordered removed).

277 18 U.S.C. §§ 3141–3150.

278 *Salerno*, 481 U.S. at 747 (holding that pretrial detention could only be sought for the "most serious of crimes" and with "stringent time limitations").

279 Chelgren, *supra* note 266, at 1490 ("The Bail Reform Act entitled the arrestee to numerous procedural protections during the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Bail Reform Act also mandated that detainees be housed separately from convicts, and another piece of legislation, the Speedy Trial Act, strictly limited the maximum length of detention." (footnote omitted)).

280 *See id.* at 1492 ("Given the ubiquitous nature of . . . protections in other preventive detention schemes, it is striking that virtually no protections attach to immigration detention. Immigrants are not entitled to pre-detention adversarial hearings concerning whether they pose a threat to their community or are likely to abscond . . . . Even if an immigration judge determines that the immigrant is eligible for parole, DHS can override this decision and require continued detention. If an immigrant wants to challenge mandatory detention based on criminal offenses, the immigrant carries a heavy burden of proof and must show that the government is *substantially unlikely* to prevail. Furthermore, there is no time limit imposed on pre-removal order detention. Detention is not restricted to the 'most serious' crimes, as an immigrant can be detained based on relatively minor traffic-related offenses or simply for requesting political asylum." (footnotes omitted) (quoting

is either present in the United States without authorization, whose lawful status has expired, or who may be deportable.[281] ICE's detention authority is almost without limit, and no time period is presumptively unconstitutional.[282]

Fourth, in pretrial custody hearings, the government bears the burden of establishing that detention is necessary by clear and convincing evidence.[283] For noncitizens in immigration proceedings, it is they—often without counsel[284]—who bear the burden of proving they *do not* pose a danger to the public and that they *do not* present a flight risk.[285]

And finally, immigration proceedings can never result in a criminal conviction.[286] Although some immigrants are detained *on account of* prior criminal activity, removal proceedings themselves are not criminal.[287] The analogy between the two processes is therefore a false one—and one that imports the stigma of the pretrial criminal posture, without any of the rights.[288]

B. *Crisis of Release*

The past several decades have seen a widening of ICE's authority to detain and a narrowing of avenues for release. In 1996, Congress passed twin pieces of legislation that not only expanded the class of criminal conduct that subjected noncitizens to detention and deportation but also compelled ICE to automatically detain these same

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Donald Kerwin & Serina Yi-Ying Lin, Migration Pol'y Inst., Immigration Detention: Can ICE Meet Its Legal Imperitives and Case Management Responsibilities? 2 (2009), https://www.migrationpolicy.org/sites/default/files/publications/detentionreportSept1009.pdf [https://perma.cc/8YZG-NK8R])).

281 8 U.S.C. § 1226 (authorizing the arrest and detention of a noncitizen pending a determination on whether they shall be removed from the United States); *see also* Hillel R. Smith, Cong. Rsch. Serv., LSB10362, Immigration Arrests in the Interior of the United States: A Primer 1 (2025) (summarizing the conditions when ICE may arrest and detain an alien pending a removal decision).

282 *See* Demore v. Kim, 538 U.S. 510, 529, 531 (2003).

283 18 U.S.C. § 3142(e)(1); *see* United States v. Rodriguez, 897 F. Supp. 1461, 1463 (S.D. Fla. 1995); United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015); United States v. Arena, 894 F. Supp. 580, 585–86 (N.D.N.Y. 1995).

284 *See Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes—Overall Bond Grant Rates Have Dropped*, Transactional Recs. Access Clearinghouse (June 19, 2023), https://tracreports.org/reports/722/ [https://perma.cc/7VLJ-DCAR] (analyzing court data to find that noncitizens were represented fifty-nine percent of the time in their bond hearings).

285 *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 541 (1952).

286 *See generally* Am. Immigr. Council, Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice (2013), http://americanimmigrationcouncil.org/wp-content/uploads/2025/01/aic_twosystemsofjustice.pdf [https://perma.cc/GC9H-YX3Z] (discussing many of the issues highlighted above).

287 *See id.* at 1.

288 *See id.*

individuals.[289] Under this law, noncitizens face mandatory custody for a range of criminal conduct, including minor and nonviolent offenses such as shoplifting and possession of a small amount of marijuana.[290] Old offenses—even where noncitizens had completed their sentences and were long rehabilitated—permanently exposed immigrants to the risk of mandatory custody.[291] Even asylum seekers presenting themselves at a point of entry are subject to automatic detention.[292]

The only two administrative avenues for release are bond and parole.[293] Those subject to mandatory detention are foreclosed from accessing either of these remedies.[294] Instead, mandatorily detained persons can only seek release prior to a final order through a *Joseph* hearing[295] or a writ of habeas corpus following a final removal order.[296]

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289 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-128, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276–79 (codified as amended in scattered sections of 8 U.S.C.); Jennings v. Rodriguez, 583 U.S. 281, 295 (2018).

290 8 U.S.C. § 1226(c)(1)(A) (describing how those immigrants inadmissible under any offense included in 8 U.S.C. § 1182(a)(2), which includes all controlled substance crimes, must be detained); *see id.* § 1182(a)(2).

291 *See id.* § 1226(c) (requiring the detention of noncitizens who are removable because of specified criminal activity regardless of when the crime occurred); Lori A. Nessel, *When Time Stands Still: Eliminating Immigration "Death Sentences*,*"* 75 SMU L. Rev. 369, 373 ("The government can, and increasingly does, initiate deportation proceedings against long-time, law-abiding members of society based on actions that occurred long ago.").

292 *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 8 C.F.R. § 235.3(c) (2025) (requiring mandatory detention of inadmissible aliens with limited parole opportunities).

293 *See* 8 U.S.C. §§ 1225(b)(1), 1226(a) (allowing certain detainees to petition the government for discretionary release on parole); Am. Immigr. Council, Seeking Release from Immigration Detention 2 (2019) [hereinafter, Seeking Release], https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/seeking_release_from_immigration_detention.pdf [https://perma.cc/2PNV-6XX4]. *See generally* Am. Immigr. Council, The Use of Parole Under Immigration Law (2024), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_use_of_parole_under_immigration_law_2024.pdf [https://perma.cc/MU7F-QYT9] (describing the various circumstances and procedures for seeking parole). Immigration judges can grant a discretionary bond to those who are not in mandatory custody, or ICE can elect to set a bond upon first encountering and detaining a person suspected of removability. Seeking Release, *supra*, at 2.

294 Seeking Release, *supra* note 293, at 2.

295 *See In re* Joseph, 22 I. & N. Dec. 799, 800, 807 (B.I.A. 1999); Sayed, *supra* note 47, at 1851–52 ("The *Joseph* hearing is thus the only pre-removal opportunity for the immigrant to win release from detention before his detention becomes prolonged. Habeas review is available to all noncitizens in immigration detention; however, courts generally order release only when detention has been unconstitutionally prolonged." (footnote omitted)).

296 Zadvydas v. Davis, 533 U.S. 678, 682, 688 (2001) (holding that noncitizens cannot be indefinitely detained if they cannot be deported, and that "[28 U.S.C.] § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

Habeas corpus entitles detained noncitizens to challenge their detention by arguing that they are "in custody in violation of the Constitution or laws or treaties of the United States."[297] Although habeas corpus is available to detained noncitizens, immigrant petitioners have unique procedural burdens, rules, and barriers that make an already serpentine process even more difficult to maneuver—and they often must do so without counsel.[298] And although an incarcerated prisoner can file a habeas corpus action to lessen the duration of their custody under the Eighth Amendment, immigrant detainees—as civil detainees—cannot.[299]

For noncitizens filing habeas corpus actions seeking a custody review, success is elusive.[300] A recent study found that ninety-eight percent of the 243 habeas corpus petitions filed over a five-year period in the Northern District of Alabama—where immigrants were held at the notorious Etowah Detention Center—were denied.[301] When a habeas corpus petition is successful, district courts will merely direct the immigration judge to conduct another bond hearing.[302]

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297 28 U.S.C. § 2241(c)(3); *see* INS v. St. Cyr, 533 U.S. 289, 301 (2001). These challenges are generally based in an allegation that DHS has not proven that the noncitizen is actually present in the United States in violation of an immigration law. *See* Hernandez D. Stroud, Katherine Yon Ebright & Ames Grawert, *Habeas Corpus, Explained*, Brennan Ctr. for Just. (June 18, 2025), https://www.brennancenter.org/our-work/research-reports/habeas-corpus-explained [https://perma.cc/GG4H-NJR8].

298 Hlass & Yanik, *supra* note 56, at 240 (detailing the many roadblocks immigrants face when attempting to exercise their habeas corpus rights, such that the mechanism is rendered almost impossibly difficult—e.g., detained immigrants "must direct their habeas petition at the warden of the facility where they are being held, whose name the detained immigrant might not know because they are a private prison executive or county or state employee who is contracting with ICE").

299 *See, e.g.*, Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024, 1038 (W.D. Wash. 2019).

300 *See* Freya Jamison, Note, *When Liberty Is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention*, 5 Colum. Hum. Rts. L. Rev. Online 146, 149, 162–76 (2021) (examining ten years of quantitative data out of 249 federal court habeas corpus adjudications in New York, New Jersey, and Pennsylvania, and finding "lengthy adjudications and disparate outcomes in similar cases," and denials of the majority of petitions filed); *see, e.g.*, Hosh v. Lucero, 680 F.3d 375, 377–78 (4th Cir. 2012) (reversing a district court's ruling that a longtime permanent resident was entitled to a bond hearing after he had been detained for years following a criminal conviction).

301 Immigrant Rts. Clinic at N.Y.U. Sch. of L. & Families for Freedom, The Writ of Habeas Corpus: How a United States District Court Circumvents Oversight of Unlawful Detention 5 (2016), https://www.prisonlegalnews.org/media/publications/Writ_of_Habeas_Corpus_-_How_a_United_States_District_Court_Circumvents_Oversight_of_Unlawful_Detention_NYU_Law__FFF_2016.pdf [https://perma.cc/J3NV-5A8V].

302 Jamison, *supra* note 300, at 152 ("If a federal judge finds a due process violation, the case then typically moves to immigration court, where an [immigration judge] holds a bond hearing to determine whether the noncitizen may be released from custody pending their actual deportation.").

Federal courts have begun imposing an additional expectation on immigrant habeas corpus petitioners: that they challenge the underlying charges of removability.[303] Finally, the Supreme Court in *Garland v. Aleman Gonzalez*[304] further reduced noncitizens' habeas corpus rights when it held that a provision of the Immigration and Nationality Act[305] forbids lower federal courts from granting class-wide injunctive relief.[306]

Adding to immigrants' diminishing rights and remedies—or perhaps informed by it—is anti-immigrant sentiment and the criminalization of acts associated with migration. The next Section acknowledges the conflation of immigration and criminality, which in turn underscores the urgent need for an expanded constitutional scheme.

C. *Crisis of Conscience*

The United States's sprawling immigration detention system might appear monolithic from the outside, but within the system, the federal government holds a diverse ecosystem of individuals in myriad procedural postures: persons found at or near a border lacking documentation, asylum seekers, permanent residents, and longstanding but undocumented residents of the United States with no criminal record. Some detainees are held because they possess prior deportation orders[307] or a criminal history, but the majority of those in ICE custody have no criminal history—not even a minor one.[308] And an entire subset of detained noncitizens—newly arrived asylum seekers presenting themselves at a port of entry[309]—have exercised their statutory, lawful

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303 Quinde, *supra* note 264, at 375–76 (mapping district and circuit court holdings that required claimants to challenge their underlying grounds of removability).

304 596 U.S. 543 (2022).

305 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

306 *Garland*, 596 U.S. at 545 (limiting 8 U.S.C. § 1252(f)(1)).

307 8 U.S.C. § 1231(a).

308 *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, Transactional Recs. Access Clearinghouse (Apr. 3, 2020), https://tracreports.org/immigration/reports/601/ [https://perma.cc/K6M8-V7FU] ("In March 2020, in fact, more than six out of ten (61.2%) had no conviction, not even for a minor petty offense. The latest detailed case-by-case records obtained and analyzed by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University also reveal that even among immigrant detainees who have a conviction, few of these convictions are for what ICE labels as serious crimes where individuals are thought to pose a threat to public safety.").

309 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating the detention of asylum seekers).

right to seek protection in the United States.[310] A lingering question, therefore, is why courts tolerate the most pitiless version of custody.[311]

Courts' applications of unfavorable doctrinal standards may have evolved, in part, from the fact that immigration and criminal law are co-constitutive in organization, form, and function.[312] Detention itself bears all the hallmarks of the worst forms of criminal incarceration.[313] Many immigrants are held in maximum security facilities surrounded by barbed wire,[314] have limited—or no—freedom of movement or access to fresh air and natural light,[315] and are subjected to prolonged periods of solitary confinement.[316]

Some scholars even go to deliberate lengths to reframe immigration detention as "immigration prison."[317] The ubiquity of terms such

310 *Id.* § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.").

311 *See supra* notes 9–19 and accompanying text.

312 Shah, *supra* note 12, at 71–75.

313 *See* Hernández, *Immigration Detention*, *supra* note 8, at 1383–85 (cataloguing the evolution of immigration civil detention toward a highly punitive, carceral system in form and function).

314 *Id.* at 1390.

315 *See* Azadeh N. Shahshahani, *The Reality of Life Inside Immigration Detention*, ACLU (Nov. 20, 2012), https://www.aclu.org/news/immigrants-rights/reality-life-inside-immigration-detention [https://perma.cc/WY7F-VN6H] ("In detention, immigrants continue to be subject to punitive treatment, and are denied basic needs, such as contact with lawyers and loved ones, inadequate [sic] food and hygiene, and access to fresh air and sunlight.").

316 Emily Baumgaertner, *Federal Records Show Increasing Use of Solitary Confinement for Immigrants*, N.Y. Times (Feb. 7, 2024), https://www.nytimes.com/2024/02/06/health/solitary-confinement-immigrants-us.html [https://perma.cc/G6K8-GGN5] ("The average length of time in solitary confinement over the last five years was 27 days, almost twice the number that the U.N. believes constitutes torture. More than 680 cases of isolation lasted at least three months, the records show; 42 of them lasted more than one year.").

317 *See, e.g.*, Felipe De Jesús Hernández, *Abolishing the Toxic "Tough-On-Immigration" Paradigm*, 31 Harv. Kennedy Sch. J. Hisp. Pol'y 45, 50 (2019) [hereinafter Hernández, *Abolishing*]; Felipe De Jesús Hernández, *Extrajudicial Segregation: Challenging Solitary Confinement in Immigration Prisons*, 137 Harv. L. Rev. F. 175, 178–79 (2024).

as "criminal alien,"[318] "illegals,"[319] and even "crimmigration"[320] no doubt contributes to the blurring of immigration and criminal law for political gain.[321] And of course, language likening noncitizens to "rapists" and "drug dealers," describing them as "the worst," falsely accusing them of eating household pets, and questioning if they are even human at all,[322] indubitably reinforces the "immigrant as criminal" illusion.

The criminal narrative becomes self-fulfilling and circular.[323] Acts of migration are criminalized,[324] immigration detention looks like prison,

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318 *See, e.g.*, *Criminal Alien Statistics Fiscal Year 2020*, U.S. Customs & Border Prot. (Sep. 18, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-alien-statistics-fy2020 [https://perma.cc/G6Z4-ARDV] (defining criminal aliens as "aliens who have been convicted of one or more crimes, whether in the United States or abroad, prior to interdiction by the U.S. Border Patrol; it does not include convictions for conduct that is not deemed criminal by the United States"); *The Consequences of Criminal Aliens on U.S. Communities*, H. Comm. on the Judiciary, Subcomm. on Immigr. Integrity, Sec., & Enforcement (July 13, 2023), https://judiciary.house.gov/committee-activity/hearings/consequences-criminal-aliens-us-communities [https://perma.cc/3AJU-8KWZ] (describing an upcoming House of Representatives hearing that will examine "sanctuary cities that shield illegal aliens at the expense of American taxpayers," "the Biden Administration's lax policies that allow criminal aliens to remain in the United States indefinitely," and "how drug cartels and gangs exploit radical open-borders policies and U.S. immigration law to terrorize communities, harm Americans, and burglarize homes and businesses across the country").

319 Samuel David Garcia, *Why No One Should Call Undocumented Immigrants "Illegals*,*"* Seattle Times (July 19, 2019, at 13:30 ET), https://www.seattletimes.com/opinion/why-no-one-should-call-undocumented-immigrants-illegals/ [https://perma.cc/7YEM-4KAR] ("So much of that crucial sense of humanity is lost when people refer to [noncitizens] as 'illegals.' When people refer to undocumented immigrants as 'illegals,' they stop seeing them as humans and start seeing them as criminals that have inherently harmed society.").

320 *See, e.g.*, César Cuauhtémoc García Hernández, Crimmigration Law 1 (2d ed. 2021). The term "crimmigration" refers to the melding of "immigration" and "criminal law." *See id.* It is used widely in law school classrooms and courtrooms (by all parties) and has entered the common parlance. *See id.*

321 *See* Hernández, *Abolishing*, *supra* note 317, at 46 ("[I]mmigrants are systematically linked to criminality to facilitate their permanent exploitation and marginalization . . . .").

322 Eugene Scott, *Trump's History of Making Offensive Comments About Nonwhite Immigrants*, Wash. Post: The Fix (Jan. 11, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/01/11/trumps-history-of-controversial-remarks-about-nonwhite-immigrants/ [https://perma.cc/XX5D-RBR4]; Merlyn Thomas & Mike Wendling, *Trump Repeats Baseless Claim About Haitian Immigrants Eating Pets*, BBC (Sep. 15, 2024), https://www.bbc.com/news/articles/c77l28myezko [https://perma.cc/G5EZ-U2XV]; *Trump Says Some Migrants Are "Not People" and Warns of a "Bloodbath" If He Loses*, Nat'l Pub. Radio (Mar. 17, 2024, at 17:39 ET), https://www.npr.org/2024/03/17/1239078695/trump-says-some-migrants-are-not-people-and-warns-of-a-bloodbath-if-he-loses [https://perma.cc/J3UF-2UDB].

323 *See* Chacón, *supra* note 24, at 1579 ("These trends—the increasing prosecution of immigration crimes, the use of the civil removal system as an adjunct for criminal punishment, and the criminalization of the means and mechanisms of civil removal—have all contributed to the criminalization of immigration in the United States.").

324 *See* Shah, *supra* note 12, at 79 ("People seeking asylum were routinely charged with immigration crimes, making it more difficult for them to make a case for relief after serving their sentence . . . . In 2013 nearly one hundred thousand people were prosecuted for immigration crimes,

and then detention of immigrants is accepted because immigrants are criminals.

The unforgiving treatment of immigrants folds into social theories of punishment.[325] Professor Shannon Dolovich describes the "canons of evasion"[326] that the Supreme Court employs to "create a doctrinal environment decidedly unfavorable to prisoners' claims."[327] These canons are the broad deference to prison officials' acts and decisions, a presumption of constitutionality, and a maneuver Professor Dolovich refers to as "substitute question," which shifts the inquiry away from the facts, the impacted individual's experience, or the class as a whole.[328] Through the use of these three evasive moves, "the state nearly always wins—almost regardless of the facts."[329] These canons are on display in the *Fraihat* and *Hope* decisions.[330]

Professor Catherine Struve describes what she calls "the constitutional law for the guilty."[331] It is a notion she calls "[d]eeply embedded" in the jurisprudence of who can be punished and to what degree.[332] Society

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and unlawful reentry prosecutions carrying more severe sentences had increased by 76 percent since Obama had taken office."); U.S. Customs & Border Prot., s*upra* note 318 (demonstrating that by far the largest category of "criminal aliens" during the five year survey had been convicted of unlawful entry or illegal reentry).

325 Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 922 (2009) ("The terms of this bargain allow society to remove convicted offenders from the public space on the condition that the state assumes the burden of attending in an ongoing way to prisoners' basic human needs. As a consequence, those charged with meeting the state's part of the bargain—its carceral burden—must remain conscious of prisoners' humanity and consequent capacity for suffering.").

326 *See* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* The New Criminal Justice Thinking 111, 113 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

327 Dolovich, *supra* note 29, at 303 ("[I]n practice, courts hearing prison law cases will often side with defendants even when plaintiffs' claims are strong on the merits and even when defendants' proffered arguments strain credulity. To achieve this effect requires a judicial readiness to see the state's case through an especially sympathetic lens and to exhibit a studied indifference to plaintiffs' constitutional rights and lived experience.").

328 Dolovich, *supra* note 326, at 112 ("Supreme Court doctrine governing substantive constitutional challenges in the criminal context systematically encourages judges at all levels to sidestep the basic question and instead to affirm the constitutionality of state action on grounds having little to do with the facts of the case. This effect is achieved, over and over again, through three basic doctrinal moves, which I call *deference*, *presumption*, and *substitute question*."(footnote omitted)).

329 *Id.* at 113.

330 Nicholas, *supra* note 46, at 238–39 (noting that the deliberate indifference standard under the Eighth Amendment and under the Fifth and Fourteenth Amendments is analyzed under the same rubric, essentially closing any meaningful doctrinal gap between the two).

331 Struve, *supra* note 65, at 1033; *see* Quinde, *supra* note 264, at 370 (theorizing that the reason so many federal courts denied immigrants' conditions-of-confinement habeas corpus challenges during the COVID-19 pandemic was likely due to the conflation of immigration detention with criminal custody).

332 Struve, *supra* note 65, at 1033.

and courts appear willing to tolerate harsh treatment of criminals, perhaps as a matter of comeuppance.[333] The mythology of the "criminal alien" and the dichotomies of "good" versus "bad" and "deserving" versus "undeserving" fold conveniently into the immigration detention system.[334] Scholars have speculated that judges possess an "unconscious discomfort with an immigrant's violation of an immigration law and potentially unlawful status."[335] And observers who have mapped judicial responses to detention challenges during the COVID-19 pandemic have speculated that judicial unwillingness to grant relief "seemed to reflect dated ideas about the danger and moral worth of people in government custody."[336]

Applying theories of culpability to justify the treatment of any person—detained or not, immigrant or not, convicted or not—is problematic. But doing so is useful for understanding why courts confuse civil custodial standards with criminal ones. Some commentators—in an effort to resist the movement toward punitive detention—have urged a more faithful application of substantive due process through the Fifth Amendment.[337] There stands no reason to disagree with this application. Until the *Kingsley* objective reasonableness standard is correctly applied to immigration custody, however, a stronger constitutional liability is needed.

IV. Immigration Detention Is Continuing Seizure

Professor Mary Holper has called the Fourth Amendment the "forgotten Amendment" as applied to immigration detention, and sees great promise in its invocation: In this way, the Fourth Amendment provides one lens through which to view an immigration system where individuals who are detained for a variety of reasons, with a variety of statuses, and with differing ties to the United States all suffer the same constitutional harm—detention without review by a neutral judge.[338]

All immigration detention constitutes seizure, even in a hypothetical future in which immigration judges are neutral and independent. It continues to be seizure throughout the entirety of an individual's removal proceeding—beyond a bond hearing or a removability determination, which are arguably immigration law's closest analogs to a

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333 *Id.* ("This notion is sometimes framed as a matter of 'just deserts,' sometimes as an assumption that society is unwilling to pamper criminals, and sometimes as a reflection of the fact that the Eighth Amendment limits punishment only if it is 'cruel and unusual.'").

334 Das, *supra* note 18, at 9–12.

335 Quinde, *supra* note 264, at 391.

336 Garrett & Kovarsky, *supra* note 17, at 122.

337 *See, e.g.*, Nicholas, *supra* note 46, at 237.

338 Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges*,*"* 104 Minn. L. Rev. 1275, 1294 (2020).

probable cause hearing. Seizure continues even after an immigrant is released from custody if any condition or restriction is placed upon them.

A. Seizure Begins with an Immigration Arrest, and Continues Through the Entirety of the Removal Proceedings

Points of entry—e.g., the border or airports—are checkpoints, and the Fourth Amendment attaches there without controversy.[339] The Supreme Court has already held that the Fourth Amendment applies to enforcement at the border.[340] Those apprehended near or within 100 miles of the border are stopped on suspicion of being present in the United States without authorization.[341] They are immediately detained in order to determine their identity and right to remain.[342] These stops are, therefore, investigatory, and as such, the Fourth Amendment attaches.[343]

The detention of asylum seekers pending and during their "credible fear interview" also constitutes an investigatory stop.[344] Placed in "expedited removal," asylum seekers are detained mandatorily at *least* until such time that they are assessed to determine whether they have a threshold claim for protection—a process that can take weeks or months.[345] The interviews are nonadversarial inquiries and follow a question-and-answer format.[346] Even when an applicant "passes" their credible fear interview, they remain in detention without a bond hearing.[347]

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339 *See supra* notes 103–04 and accompanying text.

340 United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) ("In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.").

341 *Id.* at 882–83.

342 *Id.* at 884.

343 *See supra* Section I.B.

344 Inter-Am. Comm'n on Hum. Rts., Report on Immigration in the United States: Detention and Due Process ¶ 113 (2010), https://cidh.org/countryrep/USImmigration/Chap.IV.a.htm [https://perma.cc/5SUY-DWEG].

345 *See id.* ¶ 127 (stating that according to the government's statistics, "an arriving alien asylum seeker spent an average of 81 days in detention once the 'credible fear' screening process had been completed"); *see also* Letter from the Immigr. Just. Campaign to Tracy L. Renaud, Acting Dir., U.S. Citizenship & Immigr. Servs., Tae Johnson, Acting Dir., ICE, & Jean King, Acting Dir., Exec. Off. of Immigr. Rev. (June 28, 2021), https://immigrationjustice.us/wp-content/uploads/2021/08/Detained-Asylum-Seeker-Grievance-Letter_28-June-2021.pdf [https://perma.cc/2TD3-VHZ3] ("Many asylum seekers detained in these facilities report waiting several weeks, or months, for their [credible fear interview] to take place. For example, the average wait time for an interview in the Aurora Detention Center is between two to three months.").

346 *See* Inter-Am. Comm'n on Hum. Rts., *supra* note 344, ¶ 116.

347 *See In re* M-S-, 27 I. & N. Dec. 509, 515 (A.G. 2019). At the writing of this Article, the Attorney General's decision in *In re M-S-* is still in force, though it remains in ongoing litigation.

Most immigration detentions arise out of warrantless arrests. Immigration officers are encouraged—but not required[348]—to seek a warrant from "the Attorney General" before taking a noncitizen into custody.[349] They are statutorily empowered to "arrest any alien . . . in the United States, if [the officer] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[350] Even if an officer secures a warrant in advance of an immigrant's arrest, no judge will review it, assess whether it is supported by probable cause, or sign it.[351] Instead, an ICE officer's own signature on their own warrant satisfies the statute's legal requirement.[352] Any ICE "warrant," therefore, is fictional.

The warrantless characteristic of immigration custody lands it squarely within the Fourth Amendment's ambit.[353] The Supreme Court has held that following a person's apprehension, the Fourth Amendment requires "a neutral determination of probable cause" by a detached magistrate.[354] The Court has placed emphasis on the word "neutral," holding that a prosecutor's own probable cause determination necessarily conflicts with the Fourth Amendment's rigorous standard.[355]

Scholars have rightly observed that the Fourth Amendment should be implicated during moments within the immigration detention process. Professor Michael Kagan has argued that detention of immigrants pursuant to so-called "ICE detainers" are unlawful seizures because immigration judges do not review the detainers prior to an immigrant's arrest.[356] And Professor Holper took this argument further, persuasively arguing that immigration judges are *never* neutral arbiters, and thus can

See Court Docket, Padilla v. U.S. Immigration & Customs Enforcement, Docket No. 24-2801 (9th Cir. May 2, 2024), Bloomberg L.: Ct. Dkts., https://www.bloomberglaw.com/product/blaw/document/X1Q6OMHVPA82 [https://perma.cc/F34Z-P6MZ] (last visited June 8, 2026).

348 *See* 8 U.S.C. § 1357(a) (stating that immigration officials must obtain a warrant to initiate detention, unless there is inadequate time to obtain one); 8 C.F.R. § 287.5 (2025).

349 8 U.S.C. § 1226(a).

350 *Id.* § 1357(a)(2).

351 Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 157 (2015) ("Immigration arrest warrants do not include review and authorization by a judicial officer, nor by any other neutral adjudicator such as an immigration judge.").

352 *Id.* ("In immigration enforcement, the 'warrant' issues with the officer's signature alone.").

353 Struve, *supra* note 65, at 1019–22 (discussing the "partly overlapping set of circuits" that have adopted a Fourth Amendment approach to warrantless arrests, with seizure continuing through a probable cause determination that the individual has committed a crime).

354 Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

355 *Id.* at 117 (holding that a prosecutor's charging document alone does not satisfy the Fourth Amendment's requirement for probable cause, as prosecutors are not only not neutral, but are, in fact, an adverse party).

356 Kagan, *supra* note 351, at 126, 168 (arguing that warrantless immigration arrests violate the Fourth Amendment because no neutral arbiter evaluates whether the arresting agent had probable cause to do so).

never make a probable cause determination that comports with the Fourth Amendment.[357]

The bond hearing is immigration law's closest analog to a probable cause hearing. During a bond hearing, an immigration judge evaluates whether a detained noncitizen is *not* a flight risk and is *not* a danger to the community.[358] These hearings often take place without defense counsel, and the detainee bears all the burdens of proof.[359]

A bond hearing's structure runs afoul of Supreme Court precedent governing probable cause determinations, which mandates that the arresting agency "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[360] The burden of proof in other forms of civil law is on the arresting agency to show, by clear and convincing evidence, that the confinement is justified.[361]

The Supreme Court has mandated that probable cause hearings in the criminal context occur within forty-eight hours after arrest.[362] For civil involuntary commitment, most states require that a probable cause hearing take place within a certain period of confinement.[363] The Supreme Court has held that such hearings must take place within three days for juveniles.[364] Far from taking place within any specific time frames, a noncitizen can spend weeks or months in custody before receiving a bond hearing before an immigration judge—if ever.[365] An immigrant's seizure, therefore, continues uninterrupted.

The Fourth Amendment mandates that a *neutral* arbiter must conduct the probable cause hearing.[366] Professor Holper argues that because immigration judges are neither neutral nor independent members of

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357 *See* Holper, *supra* note 338, at 1279 (making the case that, because immigration judges are neither Article I nor Article III judges and are not independent from the Executive Branch, probable cause findings should be made by neutral federal magistrate judges).

358 *See, e.g.*, *In re* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

359 *Id.*

360 *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Rsrv. L. Rev. 75, 97 n.87 (2016) (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

361 Addington v. Texas, 441 U.S. 418, 425 (1979) (holding that involuntary commitment requires a showing of clear and convincing evidence that the confinement is justified and necessary).

362 *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

363 Margaret J. Lederer, *Not So Civil Commitment: A Proposal for Statutory Reform Grounded in Procedural Justice*, 72 Duke L.J. 903, 917–22 (2023) (explaining that many states mandate that a probable cause hearing for involuntary civil commitment take place within seventy-two hours and that that hearing be conducted with counsel).

364 Schall v. Martin, 467 U.S. 253, 277 (1984).

365 *See, e.g.*, Immigrant Legal Res. Ctr., Representing Clients in Bond Hearings: An Introductory Guide 5 (2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170915.pdf [https://perma.cc/3M5M-ZRZL] ("Once you request a bond hearing, the immigration judge will probably schedule one a few days to a few weeks away.").

366 *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948).

the judiciary, bond hearings do not constitute probable cause determinations.[367] After all, immigration judges are not judges at all[368] but attorneys for the Department of Justice,[369] which is itself a law enforcement apparatus.[370]

Immigration judges are not shielded from political influence when the President appoints the Attorney General, who in turn controls the immigration courts.[371] The Attorney General can and has been known to certify immigration cases to themselves, making new law—or overturning old law—with the stroke of a pen.[372] That law is immediately binding on all immigration judges.[373]

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367 *See* Holper, *supra* note 338, at 1282 (arguing that "the lack of a truly neutral judge available to review DHS arrest decisions exposes the entire immigration detention system to a Fourth Amendment challenge," because there is no true determination of probable cause that might otherwise end a pretrial detainees' Fourth Amendment rights); Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 Md. L. Rev. 1076, 1125 (2021).

368 *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts*,*"* 33 Geo. Immigr. L.J. 261, 309 (2019).

369 8 C.F.R. § 1003.10(a) (2025) ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the Act. Immigration judges shall act as the Attorney General's delegates in the cases that come before them."); *see also* Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 Fed. Law. 25, 29 (2012) ("[I]mmigration judges are viewed by the DOJ as 'attorneys' who are employed by the U.S. government, rather than true judges—a status that is in constant tension with the role immigration judges actually fulfill.").

370 *See About DOJ*, U.S. Dep't of Just., https://www.justice.gov/about [https://perma.cc/4VZF-49XQ] (last visited Mar. 26, 2026) (stating that the Justice Department's primary mission is "to uphold the rule of law, to keep our country safe, and to protect civil rights").

371 *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 848–52 (2016); Jain, *supra* note 368, at 264 ("[Immigration judges] wear judicial robes and preside from behind judges' benches, but they do not enjoy the decisional protections of Administrative Law Judges, who are statutorily shielded from sanction for their rulings."); *Time for an Independent Immigration Court*, A.B.A. Wash. Letter (Feb. 27, 2022), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-22-wl/article-i-courts-0222wl/ [https://perma.cc/7MLE-NYBS] ("The immigration courts are currently housed within the Department of Justice (DOJ). Immigration judges serve as career DOJ attorneys with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. They have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. In addition, under the current certification process, the Attorney General can refer cases to him or herself for consideration, essentially acting as chief judge.").

372 *See* V. Barbara Jensen, *A Supreme Court unto Himself: The Disastrous Effects of the Attorney General's Self-Certification Power on Immigration*, Minn. J.L. & Ineq.: Ineq. Inquiry Blog, at 2 (Feb. 13, 2021), https://journals.law.umn.edu/lawineq/2021/02/12/a-supreme-court-unto-himself-the-disastrous-effects-of-the-attorney-generals-self-certification-power-on-immigration [https://perma.cc/6UK6-LLM8] ("The Attorney General has the power under 8 U.S.C. § 1103(g)(2) and 8 C.F.R. § 1003.1(h)(1) to overturn BIA decisions, as well as circuit court precedent, on nearly any immigration case they see fit.").

373 Jensen, *supra* note 372, at 5.

Because there is no neutral arbiter making a probable cause determination, seizure does not, and cannot, end with a bond hearing.[374] For that same reason, an immigration judge's ruling that a noncitizen is removable as charged[375] fails to meet the minimum probable cause threshold. Presuming that a hypothetical neutral judge made a probable cause determination, such a determination would remain constitutionally deficient, and as such, seizure continues. Noncitizens shoulder each burden of proof and production throughout their removal proceedings and are not provided with an attorney to assist them.[376] This procedural deficiency invalidates the notion that an immigrant's confinement has exited the governance of the Fourth Amendment.[377]

Justice Ginsburg articulated that, in common law, seizure is the entire period from arrest to trial because the accused's liberty interests are implicated throughout.[378] Through this lens, a noncitizen's seizure begins with arrest and endures until they are either removed or released after being granted relief. Under this theory, release without relief does not end seizure. Any condition of release—bond payment, the encumbrance of an anklet monitoring device, reporting requirements, restrictions on movement, or an obligation to appear at a future hearing date before the immigration court—constitutes continuing seizure. As Justice Ginsburg stated: "A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still 'seized' in the constitutionally relevant sense."[379]

Some lower courts share this view and acknowledge that conditions of release could qualify as seizure if they were significant in their restriction of an individual's liberty.[380] Fourth Amendment commentators have endorsed a uniform minimum threshold whereby a combination

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374 *See* Bailey v. United States, 568 U.S. 186, 192 (2013) (reaffirming the general requirement for probable cause and a warrant to detain an individual, even when proximate to a residency lawfully searched).

375 8 C.F.R. § 1240.1(a)(1) (2025) ("[T]he immigration judge shall have the authority to . . . [d]etermine removability pursuant to section 240(a)(1) of the Act.").

376 *See supra* notes 271–72, 360 and accompanying text.

377 *See, e.g.*, Kreimer, *supra* note 265, at 1488 ("Rather, incapacitation to prevent future domestic crime generally requires robust procedural protections, and these protections should be retained even if a detainee is simultaneously in removal proceedings. At a minimum, the government should bear the burden of proving an individualized reason for detention."); *supra* notes 323–25 and accompanying text (noting the vicious cycle of immigration detention as criminal detention); Struve, *supra* note 65, at 1066 ("Moreover, to the extent that any of the Justices are inclined to give special protections to arrestees who have not yet received a judicial determination of probable cause, the implication is that the standards applicable *after* such a judicial determination may be somewhat less protective than the Fourth Amendment standard.").

378 *See* Albright v. Oliver, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

379 *Id.* at 279.

380 *See* Laden, *supra* note 120, at 1228.

of pretrial release factors—a requirement to appear in court plus any restriction on travel—constitutes continuing seizure.[381]

Finally, even and especially within theories of culpability,[382] immigration detention never leaves the Fourth Amendment. Immigrants are the "least guilty" of any pretrial detainee. Noncitizens cannot enter the same custodial space as the accused or convicted, as their proceedings will never result in a criminal charge—let alone a conviction. Far from being guilty, many immigrants are even asserting their legal rights to come to the United States as provided for in the Immigration and Nationality Act.[383] Theories of who "deserves" harsh conditions of confinement should militate toward a Fourth Amendment test of detention's lawfulness.[384]

The next Section examines potential counterarguments to a seizure theory, with a keen eye trained on major Supreme Court precedent examining the Fourth Amendment's exclusionary rule's role in immigration proceedings.

B. *Reconciling a Seizure Theory of Immigration Detention with Exclusionary Rule Precedent*

A cynic might question how a seizure theory could pass muster, given major Supreme Court decisions holding that the exclusionary rule does not protect noncitizens from unlawful seizures of evidence. For example, courts have held that a noncitizen cannot suppress evidence obtained during ICE raids or during investigatory stops by Customs and Border Protection agents.[385]

As explained here and as argued by other commentators, such a critique is unavailing. This and other longstanding precedent are concerned with admissions of alienage for *removal proceedings* purposes. And far from foreclosing the Fourth Amendment's application to seizures of a noncitizen's person, the Supreme Court, in *Immigration and Naturalization Service v. Lopez-Mendoza*,[386] located a noncitizen's Fourth Amendment interest during an immigration arrest.[387]

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381 *See id.* at 1234–35 (arguing that "[r]estrictions on an individual's capacity to travel, either as an overt prohibition or a mere requirement that an individual seek permission to leave the state, are sufficiently onerous such that they should be considered Fourth Amendment seizures").

382 *See supra* notes 325–36 and accompanying text.

383 *See* 8 U.S.C. § 1158(a)(1).

384 *See supra* Section III.C; *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

385 *See, e.g.*, United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1273–74 (D. Utah 2003) (denying a noncitizen's motion for suppression of evidence under the Fourth Amendment because the petitioner "lack[ed] a substantial sufficient connection" to the United States).

386 468 U.S. 1032 (1984).

387 *See id.* at 1042–43.

In *Fong Yue Ting v. United States*,[388] three Chinese nationals challenged their deportation orders on equal protection grounds.[389] They argued that the Geary Act of 1892[390]—which required that all persons of Chinese origin carry a Certificate of Residence at all times or face immediate expulsion—was unconstitutional.[391] The Court disagreed, holding that the Constitution delegated to the government the absolute right to exclude or deport anyone or any group, for any reason, even if that reason was based on a singular characteristic.[392]

The Court stated that deportation was not a punishment.[393] Because deportation is not a punishment, removal proceedings are not criminal—and as such, the immigrants are not entitled to the full panoply of constitutional protections: "He has not, therefore, been deprived of life, liberty, or property without due process of law, and the provisions of the Constitution, securing the right of trial by jury, *and prohibiting unreasonable searches and seizures* and cruel and unusual punishments, have no application."[394]

The *Fong Yue Ting* Court was concerned with the constitutional rights that may be implicated in removal proceedings. Petitioners did not challenge the fact, manner, or conditions of their arrest, and as such, the Court did not address whether any constitutional rights under the Fourth Amendment attached to their custody.[395] Furthermore, *Fong Yue Ting*'s strength has been diminished by roughly a century of precedent that specifically posits a due process right in removal proceedings.[396]

Roughly a century later, in *Lopez-Mendoza*, the Court recognized a Fourth Amendment right in immigration arrests while simultaneously limiting a Fourth Amendment right in evidence obtained during that

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388 149 U.S. 698 (1893).

389 *See id.* at 699–704.

390 Ch. 60, 27 Stat. 25 (1892) (repealed 1943).

391 *Fong Yue Ting*, 149 U.S. at 699 n.1.

392 *Id.* at 713–14.

393 *Id.* at 730 ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.").

394 *Id.* (emphasis added).

395 *See id.* at 704.

396 *See* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, Just Sec. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/ [https://perma.cc/H5FZ-B7ZH] (explaining that over the past one hundred years, the Supreme Court has recognized that "noncitizens who were discovered at large inside U.S. territory" have "due process right[s] to a hearing on their right to remain" (emphasis omitted)).

same arrest.[397] The question before the Court was "whether an admission of unlawful presence in this country made subsequently to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing."[398] The Court held that the exclusionary rule did not apply.[399]

The case arose after legacy Immigration and Naturalization Service ("INS") officers arrested Adan Lopez-Mendoza at his place of work.[400] The agents did not have a warrant, but Mr. Lopez-Mendoza admitted that he was a Mexican national upon questioning.[401] Mr. Lopez-Mendoza later sought to terminate the proceedings on the basis that his arrest was illegal, and as such, any admission of his nationality was excludable under the Fourth Amendment.[402] The immigration judge ruled that the legality of the arrest had no bearing on Mr. Lopez-Mendoza's actual removal proceeding.[403]

A second individual and party to the suit, Elias Sandoval-Sanchez, also sought to suppress his admission of alienage during a workplace raid on the basis that it was the "fruit of an unlawful arrest."[404] The Court of Appeals found that the immigration officers had, in fact, violated Mr. Sandoval-Sanchez's Fourth Amendment rights, and consequently, the exclusionary rule barred the inclusion of his oral statements.[405] Relying on *Fong Yue Ting*, the Supreme Court stated that a deportation hearing's exclusive purpose is "not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."[406] A person's "body" is "never itself suppressible as a fruit of an unlawful arrest."[407] Regardless of the arrest's legality, "deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation."[408] And as "[i]mportant as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end."[409]

As with *Fong Yue Ting*, *Lopez-Mendoza* is uniquely concerned with whether the Fourth Amendment applies to removal proceedings rather than immigration arrests or detention. But more to the point,

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397 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984).
398 *Id.* at 1034.
399 *Id.*
400 *Id.* at 1035.
401 *Id.*
402 *Id.* at 1035–36.
403 *Id.* at 1035.
404 *Id.* at 1037.
405 *Id.* at 1038.
406 *Id.* at 1038–39.
407 *Id.* at 1039.
408 *Id.* at 1043.
409 *Id.* at 1046.

the *Lopez-Mendoza* Court did locate a Fourth Amendment interest during immigration arrests.[410] In what it describes as "most important" to its decision, the Court goes to great lengths to discuss how INS had a "comprehensive scheme for deterring Fourth Amendment violations by its officers."[411] For example, new officers "receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law."[412] The agency has a policy to exclude evidence "seized through intentionally unlawful conduct" from the removal proceeding.[413] Additionally, the agency "has in place a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations."[414] And although "INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur," the agency's commitment to reduce such violations carries deterrence value.[415]

Scholars agree that *Lopez-Mendoza* buttresses a Fourth Amendment right during immigration arrests. Professor Holper writes: "Because the *Lopez-Mendoza* decision dealt only with the remedy of evidentiary exclusion, it implicitly recognized that the Fourth Amendment applies to such an arrest, as subsequent courts have clarified."[416]

First, if there exists a hierarchy of Fourth Amendment rights, courts have generally found that an individual's right to bodily integrity during encounters with law enforcement is stronger than their right to evidentiary integrity.[417] Second, although the "exclusionary rule generally does not apply to removal proceedings," a "critical exception[]" to that general rule applies "when the agency egregiously violates a petitioner's Fourth Amendment rights."[418]

Lower courts have also applied the Fourth Amendment to immigration arrests, and even to evidence. In *Lopez-Rodriguez v. Mukasey*,[419] police officers made a forceful and warrantless entry into Luz Lopez-Rodriguez's home, then sought to use the evidence obtained there to establish his removability.[420] The Ninth Circuit stated that a Fourth Amendment violation "is 'egregious' if 'evidence is obtained

410 *See id.* at 1042–45.

411 *Id.* at 1044.

412 *Id.* at 1045.

413 *Id.*

414 *Id.*

415 *Id.*

416 Holper, *supra* note 338, at 1288 (footnote omitted) (citing other scholars in agreement).

417 *See supra* notes 108–09 and accompanying text (discussing how courts have found that a seized person's exclusionary rights can be interrupted, suspended, or even forfeited if they break away, resist, or flee during an apprehension, or attempt to conceal evidence during the stop).

418 Sanchez v. Sessions, 904 F.3d 643, 649 (9th Cir. 2018).

419 536 F.3d 1012 (9th Cir. 2008).

420 *Id.* at 1014.

by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should [have known] is in violation of the Constitution.'"[421]

In Mr. Lopez-Rodriguez's case, the court found that the officer's conduct was, in fact, egregious, specifically because "the extensive training INS agents receive in Fourth Amendment law" placed the officer on notice that his conduct was outside the bounds of the Constitution.[422] As such, the "fruits of the constitutional violation . . . should have been suppressed."[423] The Fourth Circuit held that to *not* find that Fourth Amendment violations are possible in immigration would "ignore the fact that eight [J]ustices in *Lopez-Mendoza* seem to have agreed that the exclusionary rule applies in removal proceedings in some form."[424]

The next Section proposes two primary Fourth Amendment causes of action and briefly addresses their likelihood of success.

V. Vehicles for Enforcing Fourth Amendment Violations in Immigration Detention

Applying the Fourth Amendment to immigration detention gives courts a novel and wide authority to evaluate the constitutionality and the limits of immigration detention. The Fourth Amendment's advantage over the traditionally invoked Fifth Amendment is that the Fourth Amendment "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct,"[425] and as such, is free from abstract and ever-shifting notions of due process.[426]

Judicially created causes of action are not new.[427] Courts even have a responsibility to "adjust their remedies so as to grant the necessary relief" when federally protected rights derived from the Constitution

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421 *Id.* at 1018 (alterations in original) (emphasis omitted) (quoting Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994)).

422 *Id.* at 1019 (quoting Orhorhaghe v. INS, 38 F.3d 488, 503 n.23 (9th Cir. 1994)).

423 *Id.*

424 Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015).

425 Graham v. Connor, 490 U.S. 386, 395 (1989).

426 *See* Albright v. Oliver, 510 U.S. 266, 275 (1994); *supra* notes 167–68 and accompanying text.

427 *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (creating a Fourth Amendment damages remedy against federal agents engaged in unreasonable conduct); Davis v. Passman, 442 U.S. 228, 234–35, 248–49 (1979) (creating a new cause of action under the Fifth Amendment in holding that its equal protection component confers a federal constitutional right to be free from gender discrimination that does not serve important governmental objectives or is not substantially related to the achievement of such objectives); Carlson v. Green, 446 U.S. 14, 16, 18–20 (1980) (expanding *Bivens* to Eighth Amendment inadequate medical care claims against federally employed medical providers in federal prisons).

have been invaded.[428] Creating Fourth Amendment causes of action for detained immigrants will provide a workable standard against which courts could assess whether detention is objectively reasonable. This shift will hold ICE accountable to an enforceable constitutional liability. Immigration detention will require extraordinary justification.

This final Section briefly proposes several viable vehicles for bringing Fourth Amendment causes of action, organized under prospective injunctive relief and habeas causes of action.

A. *Prospective Injunctive Relief*

Noncitizens can bring Fourth Amendment challenges to conditions of confinement in one of two ways: through a cause of action that already exists under an existing federal statute or under an implied cause of action for prospective relief through the *Ex parte Young* doctrine.[429]

Ex parte Young stands for the notion that sovereign immunity is unavailable to state officials acting unconstitutionally, even if the state explicitly authorized those actions.[430] When a state official's conduct "comes into conflict" with the provisions and authority of the Constitution, that official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[431] The *Ex parte Young* doctrine "allows private parties to sue individual state officials for *prospective* relief."[432] The case is foundational to canonical precedent that provides for injunctive relief as a remedy for anticipated unconstitutional acts committed by federal officials.[433] These suits allege continuing or future injury, rather than

428 Bell v. Hood, 327 U.S. 678, 684 (1946).

429 *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

430 *Id.*

431 *Id.*

432 MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 337 (7th Cir. 2000) (emphasis added).

433 *See* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 702 (1949) (allowing a suit against a federal official in his official capacity where the official's actions were outside the scope of his authority, specifically in violation of the Constitution or federal statutes); *Bell*, 327 U.S. at 684 (holding that federal courts have jurisdiction over claims seeking to enjoin federal officials from acting unconstitutionally); Bolling v. Sharpe, 347 U.S. 497, 498 (1954) (establishing the principle that federal courts can enjoin federal officials from *continuing* unconstitutional policies); Trudeau v. FTC, 456 F.3d 178, 187 (D.C. Cir. 2006) (recognizing an implied right of action under the First Amendment and the Due Process Clause of the Fifth Amendment for injunctive relief against federal officials); Sierra Club v. Trump, 929 F.3d 670, 707 (9th Cir. 2019) (allowing an injunction against federal officials to stop ongoing violations of the Appropriations Clause and other constitutional provisions); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (making clear that injunctive relief remains available to address ongoing constitutional violations committed by the Executive Branch); Schweiker v. Chilicky, 487 U.S. 412, 421 (1988) (reiterating that injunctive relief is still available to stop ongoing constitutional violations).

isolated, past injury.[434] For declaratory relief, a claimant must show the "immediacy and reality" of a constitutional violation, rather than an "abstract question."[435]

Under both prospective injunctive and declaratory relief standards, detained immigrants would be well positioned to challenge injurious conditions of confinement. Immigration detention is already known to inflict serious harm.[436] Past and current harm is relevant to the question of "whether there is a real and imminent threat of repeated [future] injury."[437] Because immigrants' seizure continues during the entire pendency of the removal proceeding,[438] relief would also remain available to noncitizens wishing to challenge onerous or overly restrictive conditions of release.

The prospective quality of *Ex parte Young* circumvents a fading *Bivens*[439] cause of action that only allows for damages for past abusive conduct, and that has been greatly enfeebled by Supreme Court precedent.[440] An implied right of action directly under the U.S. Constitution has great potential to enjoin federal agencies from ongoing constitutional violations.

B. Habeas Corpus

Detainees can file a writ of habeas corpus to shorten their period of incarceration,[441] and courts have not yet questioned whether habeas corpus constitutes a valid vehicle to challenge the length and fact of

434 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (holding that a "plaintiff must show that [they] 'ha[ve] sustained or [are] immediately in danger of sustaining some direct injury' as the result of the challenged official conduct" (quoting Golden v. Zwickler, 394 U.S. 103, 108–10 (1969))).

435 *Zwickler*, 394 U.S. at 108–10.

436 *See* M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC Psychiatry, 2018, at 1, 14–17 (discussing relationship between detention and adverse mental health effects); Memorandum from John Roth, Inspector Gen., DHS, to Sarah R. Saldaña, Dir., ICE, ICE Still Struggles to Hire and Retain Staff for Mental Health Cases in Immigration Detention (July 21, 2016), https://www.oig.dhs.gov/sites/default/files/assets/VR/FY16/OIG-16-113-VR-Jul16.pdf [https://perma.cc/E6CA-95Y7]; *see also* Off. of Inspector Gen., DHS, Management of Mental Health Cases in Immigration Detention 1–5 (2011), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_11-62_Mar11.pdf [https://perma.cc/8MRN-AQ5B] (describing harmful conditions in ICE detention centers and the difficulty the agency has in addressing them). *See generally* Long, *supra* note 10 (cataloguing deaths in detention because of delayed or botched procedures, substandard care, inappropriate emergency response, excessive imposition of solitary confinement, and overall inadequate mental health care).

437 O'Shea v. Littleton, 414 U.S. 488, 496 (1974).

438 *See supra* Section IV.A.

439 403 U.S. 388 (1971).

440 *See, e.g.*, Egbert v. Boule, 596 U.S. 482, 499–502 (2022) (limiting *Bivens* claims for relief).

441 *See* Wilkinson v. Dotson, 544 U.S. 74, 81 (2005); U.S. Const. art. 1, § 9, cl. 2.

immigration detention.[442] For a preliminary injunction, a plaintiff must show that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest.[443]

Although this Article's primary concern is to assert the Fourth Amendment's place within immigration detention, a brief word about the potential success of hypothetical Fourth Amendment claims is warranted. It is this Author's view that noncitizens would see stronger outcomes under the Fourth Amendment than they currently do under the Due Process Clause, at least until such time that the *Kingsley* objective reasonableness standard is applied in those cases.[444]

C. Likelihood of Success on the Merits

Courts evaluating immigrants' Fourth Amendment challenges to the fact, duration, or conditions of confinement would be required to *objectively* balance ICE's purported interest in detention—ensuring court appearances and safeguarding the public—against the severity of the alleged intrusion.[445] The subjective element that bedevils so many Fifth and Eighth Amendment claims[446] is wholly "incompatible with a proper Fourth Amendment analysis."[447] The Fourth Amendment's standard of objectivity, although not immune to interpretation, is less susceptible to judicial bias.

The inquiries will be fact-sensitive[448] and will be viewed in the totality of the circumstances[449]—both of which should favor success for immigrants. First, release from detention greatly increases the chance of securing counsel, which in turn increases the chances of success on

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442 *See supra* Sections II.A–.B.

443 *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

444 *See supra* Part II.

445 *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985).

446 *See supra* notes 190–95 and accompanying text.

447 Graham v. Connor, 490 U.S. 386, 397 (1989).

448 *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."); Richard W. Zahn, California v. Hodari D.*: An Evolving Definition of Seizure Under the Fourth Amendment*, 27 NEW ENG. L. REV. 447, 448 (1992) (stating that all Fourth Amendment inquiries must begin with an examination of the facts, then turn to an evaluation of reasonableness).

449 *See Garner*, 471 U.S. at 8–9 ("[T]he question [is] whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."); Laden, *supra* note 120, at 1221 ("To assess reasonableness, one of the tests the Court often relies on is the 'totality-of-the-circumstances' test, which looks to the specific facts of each case and considers them in sum to determine whether a Fourth Amendment violation has occurred.").

the merits before an immigration judge.[450] For some, success on the merits might mean a grant of asylum and a life free from persecution and torture. For others, it might mean a grant or restoration of permanent residence or reunification with one's family. Either way, courts will need to balance the potential for serious harm to noncitizens' many interests if they remain detained against the potential for serious harm to the government's interest of ensuring future court attendance and promoting public safety if released.

Release serves the government's interest in ensuring court appearances. Ninety-nine percent of nondetained asylum seekers attend their court hearings,[451] and over ninety-five percent of all immigrants—asylum seekers and otherwise—appear for their hearings if represented by counsel.[452] Insofar as public safety is concerned, communities are safer and have lower crime rates as immigrant population numbers increase.[453]

It is in the public interest to reunite noncitizens with their families and communities. Detention harms spouses and children, who may be U.S. citizens,[454] and creates multigenerational impacts.[455] Average and middle-class households plunge into poverty when a noncitizen provider is detained, increasing the likelihood that the household will become a public charge.[456] Children of detained noncitizens are at

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450 Ingrid Eagly & Steven Shafer, Am. Immigr. Council, Access to Counsel in Immigration Court 16–18 (2016), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/access_to_counsel_in_immigration_court.pdf [https://perma.cc/WXM2-VWTF].

451 *Record Number of Asylum Cases in FY 2019*, Transactional Recs. Access Clearinghouse (Jan. 8, 2020), https://tracreports.org/immigration/reports/588/ [https://perma.cc/67UK-9GYF].

452 Am. Immigr. Council, Immigrants and Families Appear in Court: Setting the Record Straight 2 (2019), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf [https://perma.cc/77CR-PW4M]; *see also* Boaz, *supra* note 14, at 228 (noting that represented immigrants are more likely to be released from custody and appear at their removal hearings following release).

453 Lauren E. Bartlett, *One of the Greatest Human Tragedies of Our Time: The U.N., Biden, and a Missed Opportunity to Abolish Immigration Prisons*, 43 Mitchell Hamline L.J. Pub. Pol'y & Prac. 37, 48 (2022).

454 *See* Boaz, *supra* note 14, at 209–15 (discussing how immigrant detention policies harm mixed-status families and broadly contribute to the otherization of non-white individuals); Joanne Lin, *End It: 287(g) Is Beyond Repair and Harms Local Communities Every Day*, ACLU (Apr. 5, 2010), https://www.aclu.org/blog/end-it-287g-beyond-repair-and-harms-local-communities-every-day [https://perma.cc/5VW5-9HGU].

455 *See* Ralph De La Cruz, *"The Police Took Mommy": How Reporting a Crime Nearly Resulted in Deportation for Florida Woman*, Fla. Ctr. for Investigative Reporting (Jan. 31, 2011), https://fcir.org/2011/01/31/the-police-took-mommy-how-reporting-a-crime-nearly-resulted-in-deportation-for-florida-woman/ [https://perma.cc/T78P-T7YS] (describing how a mother and wife to U.S. citizens was detained and nearly deported after she reported a crime to local police).

456 Julia Preston, *The True Costs of Deportation*, Marshall Project (June 18, 2020, at 07:00 ET), https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation [https://perma.cc/URV6-R369] (finding that around 6.1 million U.S. citizen children have at least one

increased risk of being placed in the child welfare system[457] and funneled into the foster-care-to-prison pipeline.[458] And finally, detention is exorbitantly expensive.[459]

ICE has the authority to impose less restrictive "preventative" measures to ensure court attendance and promote public safety.[460] These measures include release on supervision, regular telephone check-ins, geographic travel restrictions, or an ankle monitoring device.[461] Under a Fourth Amendment paradigm, ICE must justify the reasonableness of full custody. As an individual's detention stretches into longer and longer periods, the reasonableness of the detention tilts further in favor of the noncitizen.

Finally, although outside the scope of this Article, there is potential for what Fourth Amendment scholars have described as the "collective right to effective constitutional remedies."[462] The Fourth Amendment, they advance, is concerned with "the *general* threat to the people" that is inherent in each individual act of tyranny.[463] Such a collective right of action should be especially recognized where disfavored groups are disproportionately subject to unlawful seizures.[464] Embracing a theory

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undocumented family member, and that household income "plummets by as much as 45 percent" when that family member is taken away—in turn forcing "many families that once were self-sufficient [to] rely on social welfare programs to survive").

457 *See* Am. Immigr. Council, U.S.-Citizen Children Impacted by Immigration Enforcement 4 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/S9GZ-PRG2] ("Children in foster care in counties with [section] 287(g) agreements in place were 29 percent more likely to have detained or deported parents compared to non-287(g) counties . . . .").

458 *See* Shanta Trivedi, *Police Feed the Foster Care-to-Prison Pipeline by Reporting on Black Parents*, NBC News (July 29, 2020, at 16:18 ET), https://www.nbcnews.com/think/opinion/police-feed-foster-care-prison-pipeline-reporting-black-parents-ncna1235133 [https://perma.cc/J9PX-3YFW] ("A survey of foster care alumni showed that, by their 25th birthdays, 81 percent of males had been arrested, and 35 percent had been incarcerated.").

459 *See* ICE, DHS, Budget Overview: Fiscal Year 2020 Congressional Justification 10 (2020), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf [https://perma.cc/G75R-MJU4] (showing that the United States spends billions of dollars each year incarcerating immigrants).

460 *See* Am. Immigr. Council, *supra* note 96.

461 *Id.* at 1–2.

462 David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. Rev. 425, 444–51 (2016) (arguing that the Fourth Amendment's use of the term "right of the people" versus "right of each person" is a deliberate choice). *But see* Orin S. Kerr, *The Limits of Fourth Amendment Injunctions*, 7 J. on Telecomms. & High Tech. L. 127, 138 (2009) (advocating for a limiting of injunctive relief under the Fourth Amendment).

463 David Gray, *Collective Rights and the Fourth Amendment After* Carpenter, 79 Md. L. Rev. 66, 82 (2019) (emphasis added).

464 *Id.* ("[The Fourth Amendment] commands that 'the people' shall live in a state free from fear of being the targets of unreasonable searches and seizures—and particularly searches and seizures wielded as tools to punish disfavored political and religious groups.").

of immigration detention as seizure unlocks an entire constellation of rights and remedies for noncitizens and could result in immediate and long-term change.

Conclusion

President Donald Trump has vowed to suspend the Constitution,[465] and he has already tested the waters by seeking to reinterpret the Fourteenth Amendment's guarantee of birthright citizenship.[466] It is more crucial than ever to think boldly about ways to defend the nation's founding document and harness its guiding principles for good. The Fourth Amendment can serve as a promising and powerful ally in this effort.

465 Hope Yen, *Trump Rebuked for Call to Suspend Constitution over Election*, AP News (Dec. 4, 2022, at 17:17 ET), https://apnews.com/article/social-media-donald-trump-8e6e2f0a092135428c82c0cfa6598444 [https://perma.cc/XKW9-ZVPU].

466 Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (titled "Protecting the Meaning and Value of American Citizenship").