

## **Legality and Morality of US Detention Centers**

**Nealay Vasavda**  
**Union College**

Over the course of the past several years – particularly in the 2016 presidential election cycle – much attention has been paid to America’s disturbing history of mandatory minimum sentencing laws and mass incarceration. Much less attention, however, has been paid to the mandated detention of undocumented immigrants. As a result of sweeping changes to U.S. immigration laws instituted by President Clinton in 1996, detainment of such immigrants has skyrocketed in the past two decades (Esposito & Davis, 2010). While the government held approximately 6,000 migrants in detention on any given day in 1994, that number exceeded 20,000 by 2001 and 33,000 by 2008 (Kalhan, 2010, p. 44). It has been well-documented that such detainment is not a short-term ordeal. Close to 19,000 individuals each year are detained for more than four months and approximately 2,100 are held for upwards of one year – sometimes even longer (Kalhan, 2010, p. 49). Though detainment was primarily intended to assist with repatriation administrative proceedings, immigrant detainment centers in the United States have since strayed away from this original purpose and have become quasi-punitive in nature. As such, adopting perspectives from punishment theory, in what follows, I argue that U.S. immigrant detention practices are both morally indefensible and inconsistent with American civil law.

### **Enacted Immigrant Detention Policy**

Since 2003, the over 300 adult and 3 family immigrant detention centers in

the United States have been run by the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) (Dow, 2007, p. 535; Esposito & Davis, 2010; Sayed, 2011, p. 1843). Pursuant to the Immigration and Nationality Act, ICE is authorized to detain criminal migrants *solely* during their removal process (Sayed, 2011, p. 1833; Schriro, 2015, p. 60), but since the passage of this act, the conditions under which detention is mandated have grown. Changes have since been made to U.S. immigration policy that have increased detention practices primarily as a response to massive waves of Cuban, Haitian and Central American immigration. At the time, detention was seen as a deterrent and a way to control unauthorized immigration (Sayed, 2011, p. 1836).

The use of detention was expanded under President Clinton, after the passage of the *Antiterrorism and Effective Death Penalty Act* (AEDPA) and the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRARA). These policies widened the definition of what constitutes an aggravated felony and applied mandatory detention policies even to non-felons. Under the new policies, detention was expanded to groups including "arriving non-citizens" (Esposito & Davis, 2010; Sayed, 2011, pp. 1837-1839). For clarity, "arriving non-citizens" are immigrants whom immigration officials deem are not "clearly and beyond a doubt" entitled to be admitted into the country (Sayed, 2011, p. 1839). Detaining non-criminal aliens makes the matter much more complicated – and this is where the primary problem begins.

Although ICE conflates "illegal alien" with "criminal" (Dow, 2007, p. 535), dealing with unauthorized immigration is a civil, not criminal, matter (Kalhan, 2010, p. 44; Schriro, 2015, p. 60). While entering the country without proper

authority is in fact a federal misdemeanor (Vargas, 2012), a person cannot be sent to prison simply for being in the United States without authorization from immigration authorities (Donohue, 2008; Garcia, 2006, p .1; Snider, 2014). Being guilty of what is referred to as “unlawful presence” is a violation of civil immigration laws for which the government can impose the penalty of deportation, but not incarceration. A person could be undocumented without having entered the country illegally. For instance, it is wholly possible for an alien to have overstayed their welcome after legally arriving to the United States on a work, student or travel visa (Issue Brief: Criminalizing Undocumented Immigrants, 2010; Snider, 2014). Therefore, the distinction between illegal entry and unlawful presence is critical. Clarifying the appropriate punishment and proceedings for dealing with a misdemeanor versus a civil infraction will shed more light on this issue.

While the federal misdemeanor of illegal entry is a jailable offense, mere unlawful presence is not. Generally, a misdemeanor is punishable by a fine and/or short-term incarceration. Even in committing a misdemeanor – literally, a “less serious” offense – violators are still entitled to certain rights. All aliens still have civic standing, that is, they possess legal personhood and thus are entitled to some protections. That said, because an alien violated civil immigration laws, the government can still impose civil penalties e.g. deportation. To accomplish this, the government is entitled to temporarily detain suspected aliens until their case is brought to court. If the United States is able to prove that the alien did in fact enter the country illegally and was not merely residing in the country without permission, then (and only then) the government may proceed with a sentencing of incarceration. Otherwise, if the alien is found guilty merely of unlawful presence

and it is the defendant's first offense, the appropriate action is deportation only (Issue Brief: Criminalizing Undocumented Immigrants, 2010; Snider, 2014).

Before a trial can occur however, the suspect must be detained first.

Immigrant detention centers were established to effectuate removal of undocumented aliens if their removal was found to be necessary (Kalhan, 2010, p. 44; "Unlocking Human Dignity," 2015, p. 164; Young, 2011). Thus, detained immigrants are generally awaiting deportation or a decision on their immigration claims (Esposito & Davis, 2010). Detention and other forms of civil custody are in fact constitutionally permissible in order to prevent flight or as a tool to protect others (Kalhan, 2010, p. 44; "Unlocking Human Dignity," 2015, p. 164). That is not what is in question here. Rather, the issue is the prison-like nature of their treatment. The word "prison-like" is actually generous as nearly the entire detained population is being held in *actual* prisons or jails (Esposito & Davis, 2010). The detention of arriving non-citizens and other aliens for minor civil violations, coupled with the punitive nature of detention, makes it clear there has been a grotesque systematic diversion from the law's original intent.

### **The Reality of Immigrant Detention Centers**

The facilities used by ICE as detention centers were originally built (and arguably still operate) as jails and prisons (Schriro, 2015, pp. 60-61). While the people in custody are referred to as "detainees," make no mistake: they are de facto prisoners (Dow, 2007, p. 535). They are unnecessarily held under circumstances inappropriate for immigrant detention's non-criminal purposes (Kalhan, 2010, p. 43). In the halls of these centers, unauthorized aliens with no criminal record are placed in close quarters with violent offenders – in punitive conditions akin to

prison. Here, they succumb to violations of their due process rights, inadequate access to legal counsel and often, brutal and indefinite custody (Esposito & Davis, 2010; Kalhan, 2010, p. 42).

Despite their non-citizen status, undocumented aliens in fact have a right to due process though this right is not always guaranteed in practice (Young, 2011). According to the Fourteenth Amendment, due process is the requirement that the state respect all of a person's legal rights. The wording of the Fourteenth Amendment is critical here as it guarantees equal protection of the law “to any person” – not just citizens.<sup>1</sup> An unauthorized alien is undoubtedly a “person.” As such, they are – by law – owed common procedural rights such as a fair trial and the right against self-incrimination. They are not, however, entitled to a court-appointed attorney or the right to be arrested only on “probable cause” (Parker, 2015). In the 1982 case of *Plyler v. Doe*, the Supreme Court of the United States upheld this position; the majority wrote, “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” This sentiment was echoed again in 2001, where in the case of *Zadvydas v. Davis*, the Court held that due process extends to aliens “within” the United States’ border (Schriro, 2015, p. 61). Yet as I stated, many immigrants in these centers are deprived of this right.

Worse still, many detainees are frequently subjected to the same (or worse) kind of treatment as criminal suspects and offenders (Kalhan, 2010, p. 47). They

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<sup>1</sup> U.S. Const. amend. XIV.

also suffer from center overcrowding, as well as inadequate access to a telephone, fewer visitation rights, poor ventilation, insufficient food, deficient healthcare, and malfunctioning lavatories (Esposito & Davis, 2010; Kalhan, 2010, p. 47). Verbal and physical abuse (use of tasers, denial of meals, rape) are commonplace (Esposito & Davis, 2010). Since 2003, over 100 detainees have died in custody – many as a result of neglect of health concerns (Kalhan, 2010, p. 47). It is fitting to recall in light of this that these people technically are not prisoners; they are under administrative detention (Dow, 2007, p. 540).

Immigrant families are particularly vulnerable in these harsh conditions. Kept in jail-like conditions, migrant children suffer from the impaired development of their emotional and physical well-being (Esposito & Davis, 2010). It has been shown that “detention can cause children anxiety, depression, sleep difficulties, regression in academic achievement and language development, social withdrawal, and post-traumatic stress” (“Unlocking Human Dignity,” 2015, p. 164). Women have also reported the separation from their children as the greatest hardship of detention (Esposito & Davis, 2010). Thus, it is clear that what was intended to be essentially a short-term processing mid-point for immigrants actually has become a long-term psychological and physical nightmare.

Part of the problem is a lack of independent oversight. ICE operates on a set of internal standards which do not carry the force of law (Esposito & Davis, 2010). Moreover, although the practices in these centers are in violation of a number of international regulations (Esposito & Davis, 2010; Kalhan, 2010, pp. 42-43), the U.S. has generally pushed back against external pressure. The American government has argued that there is no generally established principle which

presumes liberty for undocumented migrants present in a country in violation of its immigration laws (Schriro, 2015, p. 63). As a result, this phenomenon has continued – even expanded – under the policies of the Obama administration (Kalhan, 2010, p.56).

Based on the evidence presented above, and considering the fact that immigrant detention centers in the United States also utilize the cells, uniforms, restraint chairs and shackles of the U.S. penal system (Dow, 2007, p. 536), it is clear that immigrant detention is criminally punitive in effect. It may in fact even be punitive in purpose, but the kind of civil punitive outcomes originally desired (deportation) differ profoundly from the criminal and civil punishments in place now. (Remember, many of these immigrants are still deported after suffering in these detention centers). If we consider the immigrant detention system's practices and policies as a form of punishment, it will be useful to measure them against two prominent theories of punishment. I proceed to this examination in the next two sections.

### **Retributivist Punishment Theory**

From a retributivist perspective, punishment is justified on the grounds that wrongdoers *deserve* to be held accountable (Wacks, 2015, p. 308). The notion is that lawbreakers ought to “pay” for their actions as a matter of moral desert (Wacks, 2015, p. 311). Retributivists hold that the state actually has a duty to punish – one that arises simply from the fact that a wrong was committed (Wacks, 2015, p. 313). In this way, retributivists consider imposing punishment a matter of moral principle. Unlike the consequentialist, who I will turn to in the next section, the retributivist is indifferent to whether or not punishment yields an additional

social good. Though the retributivist may actually find it positive that after-the-fact, a beneficial social outcome arose from a punishment, she is primarily concerned with the fact that the punishment was carried out.

Many retributivists hold that there is a threshold for the degree of severity of punishment that can be administered to wrongdoers. It is plausible to hold that the retributivist would find the “double punishment” of undocumented immigrants excessive. If an undocumented immigrant is unlawfully made to suffer in a punitive detention center, and then is deported, or is later incarcerated and deported, the immigrant has unduly suffered. Some may want to argue that undocumented immigrants deserve to be treated the same as our worst criminals in addition to being deported. I disagree. But for now I want to show how the practice exceeds the bounds of legality.

According to Title 8 of the United States criminal code, as amended by the aforementioned IIRIRA, “improper entry by an alien” is punishable by the civil penalty of a fine of between \$50 and \$250 and/or a maximum of six months in jail (Cornell University Legal Information Institute, 1992; Garcia, 2006, p. 2; Snider, 2014; U.S. Citizenship and Immigration Services, 1996; United States Department of Justice, [n.d.]). To pursue misdemeanor charges, the government is required to prove beyond a reasonable doubt that the alien entered the country illegally (Garcia, 2006, p. 2; Snider, 2014). This is more difficult to prove than it may sound. However, if the government does pursue this route and is successful, then incarceration post-trial is justified. Yet because of the burden seeking a misdemeanor sentence places on prosecutorial resources and detention facilities, most immigration cases in the United States remain civil proceedings seeking a



minimal punishment of deportation (Garcia, 2006, p .2). Thus, while there is nothing immoral about the intended purpose of detention, incarceration-like detention is wholly unjustified.

Detention and imprisonment are not synonymous. In *Wong Wing v. United States* (1896), the Supreme Court ruled that administrative custody for the purpose of deportation differed from criminal custody: “Detention... is not imprisonment in a legal sense” (Dow, 2007, p. 536). Further, in *Zadvydas v. Davis* (2001), Justice Kennedy wrote, “detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish” (Dow, 2007, p. 536). As a matter of law, *only* persons who plead or are proven guilty of criminal offenses may be incarcerated as punishment; ICE is not authorized to detain unauthorized aliens for the purpose of punishing them (Schriro, 2015, p. 57). So while the state has the authority to incarcerate individuals convicted of a criminal offense, non-criminal immigrant detention is limited to detaining unauthorized aliens who are subject to deportation for violating administrative immigration law (Schriro, 2015, p. 57). This difference between a criminal and civil offense is equally important to note.

Civil law seeks to redress wrongs by compelling compensation or restitution. Its purpose is to impose punishment only to the extent necessary to make good the wrong that has been committed. Insofar as a non-criminal unauthorized alien is punished, albeit civilly, by this metric the retributivist should be satisfied. It does not matter whether one thinks that unauthorized immigration ought to be considered criminal; as it stands, it is a civil offense and by the tenets of the law itself, the punitive treatment endured by those in detention centers goes

against the rule of law. How these centers operate in practice is not as intended by the legislator: to hold detainees for administrative processing.

One might argue that some detainees have entered the country illegally, so their punitive detention in effect serves – in that case – as their mandated jail sentence. I find this a flawed argument. First and foremost, again, the purpose of detention is not the same as the purpose of incarceration. Since not every detainee is culpable, it is irresponsible (and illegal) to prematurely punish each person by subjecting them to such treatment. It is further likely that those who did commit the misdemeanor of illegal entry would later be incarcerated if the court finds them guilty, thus subjecting them to double punishment, exceeding the threshold of desert. Deportation of non-criminal immigrants (“non-criminal” being the key word here) alone and as a civil administrative proceeding seems to be the appropriate 'punishment'. To in effect imprison these immigrants, violate their human rights, possibly incarcerate them again and then deport them on top of that, is excessive. A similar conclusion can be drawn from consequentialist theory.

### **Consequentialist Punishment Theory**

Consequentialism, as I mentioned earlier, is exclusively concerned with the social outcomes that would come from punishment. According to the consequentialist, punishment ought to be forward-looking. It should attempt to persuade wrongdoers to recognize the error of their ways and then return them to society with a new outlook on life – or at the very least, deter them and others from reoffending (Wacks, 2015, p. 308). Punishment is thus seen as a cost-effective method to achieve certain goods such as crime prevention, crime reduction and protection of the public (Wacks, 2015, p. 314).

Though this theory has its selective applications in civil law, it seems better-suited for criminal cases. Yes, locking up offenders will remove them from society and may deter them (and others) (Wacks, 2015, p. 314). However, in the case of immigration, the same could be said of deportation alone. It may be necessary to lock up offenders who are violent and society needs to be protected from them. However, what harm are non-violent immigrants doing to society? Some claim that undocumented immigrants damage prospects for home-grown labor because they are primarily concentrated in lower-skilled, low-paying jobs (Krogstad and Passel, 2015) or that they squeeze out American-born workers by undercutting wages (Constable, 2015). Yet many economists do not tend to find that such immigrants cause any sizeable decrease in wages and employment of U.S.-born citizens (Greenstone and Looney, 2012). As is evident, the issue of such consequences is hotly contested and contingent on how economic models are constructed (Frum, 2015). These arguments are highly controversial and too unsettled to address adequately here; I suspend discussion with the comment that, again, deportation alone seems the best consequentialist response.

Some may contend that locking up these immigrants in punitive detention centers is more likely to deter more immigrants from crossing the border without proper documentation. I simply do not believe this to be true. Research has shown that it is difficult for detainees to get contact with the outside world and for family members and lawyers of detainees to find them (Parker, 2015). Worse still, not only does ICE not enter detainee names into its locator system until at least 72 hours after they have been taken into custody, the U.S. Customs and Border Protection (CBP) agency does not even provide a locator service for individuals

detained in at least 130 small substations across the border (Parker, 2015). As I mentioned earlier, immigrants who are locked up in these detention centers also lack adequate communication abilities; the ability to make a phone call is often up to the discretion of the Border Patrol officer in charge (Parker, 2015). A detainee who manages to get permission still needs to be able to purchase expensive phone cards because detention centers often block collect calls (Parker, 2015). It is thus wholly possible that the people who the government seeks to deter from entering the country without authorization may not even know what the detention centers are like. Even if deterrence is achieved, which has been documented in some cases (Aguirre, 2015; Kristof, 2015), the conditions of detention nonetheless remain immoral and illegal.

Again, I circle back to the argument I made earlier. Even if a consequentialist thinks that punishing non-criminal undocumented immigrants is necessary for deterrence or rehabilitation (though I fail to see how this would be applicable), I hold that treating them as criminals is excessive. Yes, we have borders – though some political theorists argue that state sovereignty is waning with the onset of globalization (Brown, 2010, p. 23) – but to treat all unauthorized aliens like our worst rapists and murderers cannot be just.<sup>2</sup> The conditions inside immigrant detention are simply unconscionable and out of proportion to the non-criminal offense committed.

## **Conclusion**

The Department of Homeland Security and the Bureau of Immigration and

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<sup>2</sup> As an aside, I am also skeptical about the appropriateness of our treatment of these criminals too.

Customs Enforcement ought to be held accountable for upholding humane and safe standards in its detention centers. While I agree that some form of civil immigrant detention may be necessary for short periods in some circumstances (the screening and processing of non-citizens, to hold persons unlikely to appear for their hearings, or to hold those who pose a danger to the general population) (“Unlocking Human Dignity,” 165), the improperly punitive system we have cannot be justified by retributivist nor consequentialist theories which supports the conclusion it is both immoral and unlawful.

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