



## ARTICLE

## How Immigration Detention Became Exceptional

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**Abstract.** Over the last five years, the United States has held around 37,000 people in immigration detention every day. Over 70% are held without any chance of bond. For those who manage to obtain a bond hearing, they bear the burden of proving that they are neither dangerous nor a flight risk. This scheme would be plainly illegal under the constitutional law governing other forms of civil confinement. But current precedent suggests that immigration detention is and always has been exceptional.

This Article argues that immigration detention exceptionalism is a modern doctrine, not one compelled by history. Immigration detention, at its inception, was part of a system of mass civil confinement of the poor—in workhouses, juvenile facilities, and mental asylums—that lacked meaningful constitutional limits. This civil confinement system also functioned as a form of state immigration control, both targeting immigrants and confining them at rates wildly disproportionate to citizens. Immigration detention was not exceptional for its lack of constitutional safeguards, which was an unremarkable feature of all civil confinement systems at the time.

Immigration detention's initial exemption from the constitutional law that has come to govern other forms of civil confinement was largely a historical accident. Immigration detention was the first domino to fall in a backlash against the mass civil confinement of the mid-century. When the Court began constitutionally regulating other forms of civil confinement, the thirty-year hiatus on immigration detention had already begun. As a result, when the Court in the 1970s placed constitutional limits on all other forms of civil confinement, it simply had no cause to address immigration detention. Only recently has

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the modern Court—citing anachronistic nineteenth-century precedent—placed immigration detention on a different constitutional footing than its civil-confinement counterparts.

This Article shows how the detention of immigrants, far from being exceptional, was at its inception a central part of civil confinement. This history reframes immigration detention exceptionalism as a modern innovation, undercutting the Court's defense of the current regime and placing the arguments for transforming immigration detention on even firmer footing.

**Table of Contents**

Introduction .....264

I. Civil Confinement in the Nineteenth Century .....269

    A. Tools of Pre-Carceral Control: The Eighteenth Century .....270

    B. Early Civil Confinement .....273

        1. Workhouses and almshouses.....273

        2. Houses of refuge .....277

        3. Mental asylums.....279

II. The Birth of Immigration Detention.....281

    A. State Control over Immigration .....282

    B. Immigration Federalization.....286

    C. Early Immigration Detention.....288

III. Civil Confinement at Its Apex.....290

    A. The Decline of the Workhouse .....291

    B. The Expansion of Civil Confinement.....292

        1. Juvenile detention.....292

        2. Psychiatric institutions .....296

        3. Narcotics farms and sexual psychopath commitment .....299

    C. Japanese American Internment and Immigration Detention .....303

        1. Japanese American internment.....304

        2. Mid-century immigration detention .....308

IV. The Creation of an Unconstitutionalized Immigration Detention.....312

    A. The Temporary Closure of Immigration Detention.....313

    B. Civil Confinement Law .....315

    C. Immigration Detention as Civil Confinement Law.....320

    D. Immigration Detention as Exceptional.....325

    E. Evading Constitutional Scrutiny.....328

V. Implications.....330

Conclusion.....332

## Introduction

By most measures, immigration detention is the largest civil confinement system<sup>1</sup> in the United States.<sup>2</sup> It is also unique among American incarceration systems for placing the burden on the person being confined to prove he is neither a flight risk nor dangerous and in providing no automatic hearing before a neutral arbiter to dispute the government's facts.<sup>3</sup> In the immigration world, this exceptionalism is taken for granted. The Supreme Court, in upholding the constitutionality of bail-free immigration detention, has emphasized that immigration detention exceptionalism has a 100-year history—that since the nineteenth century, Congress has had broad latitude to confine noncitizens when enforcing its immigration laws.<sup>4</sup> Immigration activists often describe modern-day mass immigration detention as an unprecedented civil carceral phenomenon when arguing for its speedy

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1. Nonpunitive incarceration is sometimes called “detention” or “commitment.” I use the terms “confinement” and “incarceration” in this Article to describe the total restriction of a person’s liberty through confinement to an institution, whether or not that confinement is civil and “nonpunitive” or punitive and attendant to the criminal legal system. Many of the facilities under discussion are virtually indistinguishable from facilities for punitive incarceration in the criminal legal system—in fact, noncitizens held as “immigrant detainees” are often housed in criminal-system jails. See Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming*, NAT’L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://perma.cc/5FEY-83RG> (finding that 29% of people held by Immigration and Customs Enforcement (ICE) on a given day in November 2017 were held in state jails pursuant to contract).
  2. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://perma.cc/8DW3-PY9S> Although the daily population of youth detention overtook that of immigration detention between 2019 and 2022, see *id.* (estimating a daily population of 36,000 people in youth detention and 32,000 people in immigration detention between 2019 and 2022), more people overall were still detained in immigration detention than in youth detention. Compare JOSH ROVNER, THE SENT’G PROJECT, TOO MANY LOCKED DOORS 2 (2022), <https://perma.cc/SE3D-9HEF> (estimating that in 2019, there were 240,000 instances of young people committed or detained in the juvenile system), with U.S. IMMIGR. & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4-5 (n.d.), <https://perma.cc/D6KV-949N> (documenting 510,854 initial book-ins to ICE detention in 2019). Immigration detention is still dwarfed by pretrial detention—roughly 445,000 people are held in local jails pending trial on any given day. See Sawyer & Wagner, *supra*.
  3. See 8 U.S.C. § 1226 (bonding hearings); 8 C.F.R. § 236.1(c)(8) (2022) (burden of proof); see also Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 76, 81-94 (2016) (describing in detail the bond process for those subject to mandatory or discretionary detention).
  4. See, e.g., *Demore v. Kim*, 538 U.S. 510, 523 (2003) (“As we said more than a century ago, deportation proceedings ‘would be vain if those accused could not be held in custody pending the inquiry into their true character.’” (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896))).

abolition.<sup>5</sup> But the idea that immigration detention has always been exceptional has been largely unquestioned.

This Article argues that this historical narrative of immigration detention exceptionalism is wrong—and that getting the history right matters for getting the law right. Over immigration law’s almost 150-year history, the law of civil confinement has radically changed. As civil confinement’s rationales shifted from paternalism to public safety, its constitutional requirements levelled up. Immigration detention has been isolated from that change, not because of some enduring difference between immigration detention and other forms of confinement, but largely because of historical accident.

To start with, mass civil incarceration is not new. Only the constitutional law that regulates it is. The first prison abolitionist movement—in the 1960s and 1970s—reacted in part to skepticism of the paternalism of a mass civil confinement that had begun in the mid-nineteenth century.<sup>6</sup> In 1961, there were around 800,000 people in psychiatric institutions, an estimated 90% of whom had been involuntarily confined.<sup>7</sup> In 1950, more than 44,000 children were held in juvenile facilities<sup>8</sup> with few to no formal confinement proceedings.<sup>9</sup> For context, although criminal confinement had also reached its highest peak thus far, prisons and jails held only 226,344 people on a given day in 1960.<sup>10</sup>

This overlooked history of mass civil incarceration is also a history of mass immigration detention. It began with a shift to carceral control over immigrant families in the mid-nineteenth century. In eighteenth-century America, states and localities were responsible for their own poor—including orphaned children and people with physical or psychiatric disabilities.<sup>11</sup>

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5. See, e.g., Heidi Altman & Marta Ascherio, Nat’l Immigrant Just. Ctr., Policy Brief: 5 Reasons to End Immigrant Detention 2 (2020), <https://perma.cc/26CF-YXRY> (arguing that the current detention system is “historically anomalous” in support of ending immigrant detention).

6. See *infra* Part IV.B.

7. *Jackson v. Indiana*, 406 U.S. 715, 737 n.22 (1972) (citing *Constitutional Rights of the Mentally Ill: Hearings Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 87th Cong. pt. 1, at 11, 43 (1961) [hereinafter *Hearings: Constitutional Rights of the Mentally Ill*] (statement of Sen. Alexander Wiley, Member, S. Comm. on the Judiciary); and *id.* (statement of Albert Deutsch)).

8. MARGARET WERNER CAHALAN, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ NO. 102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 104 tbl.5-1 (1986), <https://perma.cc/VW4L-NELX>.

9. See *infra* Part III.B.1.

10. CAHALAN, *supra* note 8, at 29 tbl.3-2.

11. See *infra* Part I. I use “poor” here to conform with the categorization of the time. As I discuss, this group included a diverse range of people, including the economically disadvantaged and those with physical or psychiatric disabilities. Because eighteenth- and nineteenth-century categorizations do not mirror our modern understanding of  
*footnote continued on next page*

Attempts to determine who was responsible for the maintenance of a given pauper created the first immigration system in this country as localities determined from where a pauper came, and often deported him back there.<sup>12</sup> As immigration increased in the nineteenth century, states and localities began confining their poor in almshouses, workhouses, mental asylums, and houses of refuge for children.<sup>13</sup>

People confined in these facilities did not have the benefit of criminal process. Because states formally justified the confinement through paternalistic rationales, these facilities fell outside the constitutional protections of criminal law. Through the *parens patriae* doctrine—a state’s benevolent power and obligation to provide for its citizens—courts largely declined to subject the processes for confinement to workhouses, mental asylums, and juvenile facilities to constitutional scrutiny.<sup>14</sup>

These facilities both overincarcerated immigrants and were often funded by them. For instance, immigrants comprised 88% of the St. Louis City Workhouse’s population in 1853, during a decade in which they represented approximately 13% of Missouri’s population.<sup>15</sup> In 1846, seven years after it was built,<sup>16</sup> more than half of the people confined in the Boston Lunatic Hospital were foreign-born.<sup>17</sup> And New York City funded its newly built House of Refuge partially out of an \$8,000 annual grant from the Hospital and Passenger Fund, collected from a per capita tax on immigrants arriving by ship.<sup>18</sup>

This mass civil incarceration of immigrants motivated the push to federalize immigration law as the states asked the federal government to take responsibility for their immigrant poor.<sup>19</sup> Against this backdrop of mass civil incarceration with very little process, the Supreme Court first approved detention attendant to removal proceedings.<sup>20</sup> The lack of constitutional

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health or difference, I often use historical terms to illustrate how categories of people were perceived and targeted at the time.

12. See *infra* Part I.A.

13. See *infra* Part I.B. Here, I again use the common terminology of the time rather than the modern term, “psychiatric institution.”

14. See *infra* Part I.B.

15. Luke Ritter, *Immigration, Crime, and the Economic Origins of Political Nativism in the Antebellum West*, J. AM. ETHNIC HIST., Winter 2020, at 62, 67-68.

16. See Patrick T. Collins, City of Bos. Archives & Recs. Mgmt. Div., Guide to the Boston Lunatic Hospital at South Boston Records 1 (n.d.), <https://perma.cc/7QFM-LVSU>.

17. ELLIOTT YOUNG, FOREVER PRISONERS: HOW THE UNITED STATES MADE THE WORLD’S LARGEST IMMIGRANT DETENTION SYSTEM 60 (2021).

18. See NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 38-40 (2014).

19. See *infra* Part II.A.

20. See *Wong Wing v. United States*, 163 U.S. 228, 235-37 (1896).

safeguards in immigration detention at the turn of the twentieth century was common to all forms of civil confinement, not some special characteristic attaching only to immigrant detention.

Civil confinement only increased throughout the early twentieth century, reaching its peak shortly after the time of Japanese American internment. From the 1910s to the 1940s, the states and federal government invented new forms of civil confinement based more on perceived dangerousness, including narcotics farms and institutions for so-called “sexual psychopaths.”<sup>21</sup> These institutions were closer to the criminal legal system, and the government confined people in them based on newly perceived psychological pathologies of addiction and violence.<sup>22</sup> Although Japanese American internment is rightly seen as an anomalous scar in American history and jurisprudence, its race- and ideology-based justification was created against a legal landscape of expansive civil confinement that already existed. This landscape provided few constitutional safeguards, and its rationales tended increasingly toward confining people under supposed pathologies of dangerous behavior. Similarly, the immigration detention cases of the 1950s reviewed instances of confinement justified solely by the perceived dangers of Communist ideology.<sup>23</sup> Showing an increasing discomfort with dangerousness-based confinement outside of the criminal system, the Court largely failed to evaluate the confinement itself in its cases evaluating both Japanese American internment and immigration detention. Instead, it analyzed only the legality of the policies that inevitably resulted in detention.<sup>24</sup>

After the backlash to these cases, the government closed immigration detention facilities for around thirty years starting in 1954.<sup>25</sup> At the same time, the Supreme Court began reevaluating the legality of civil confinement, now largely based on perceived dangerousness, and critiquing the supposedly paternalistic rationales of the nineteenth century. In a series of cases during the 1960s and 1970s, the Court undermined the *parens patriae* doctrine, instead placing most forms of civil confinement under the police power and subjecting them to constitutional scrutiny.<sup>26</sup> Using the constitutional guarantees of substantive and procedural due process and equal protection, the Court created a new rubric to govern civil confinement. The Court evaluated justifications on which the confinement must be based, the relationship between those justifications and the length of detention, and what burden the government must

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21. See *infra* Part III.B.

22. See *infra* Part III.B.

23. See *infra* Part III.C.2.

24. See *infra* Part III.C.

25. See *infra* Part IV.A.

26. See *infra* Part IV.B.

meet to prove them. I call this new schema—or the constitutional law that restricts the government’s power to civilly confine—civil confinement law.<sup>27</sup>

During the creation of civil confinement law, the constitutionality of immigration detention went largely unexamined because of its prior termination at the policy level. At the end of the twentieth century, when the Court first reexamined immigration detention, it seemed that civil confinement law would govern.<sup>28</sup> But in 2003, the Court abruptly changed course, carving out a new exceptionalism from the civil confinement rubric for immigration detention.<sup>29</sup> The Court has now normalized immigration detention as an exceptionalist carveout from other forms of civil confinement.<sup>30</sup> It has justified this exceptionalism by its timelessness—the idea that immigration detention has always been different, justifying a difference today in the constitutional carceral schemes we apply to detained citizens versus detained noncitizens.

This Article makes two contributions. First, it explains how immigration detention grew out of state projects to regulate the poor through carceral control and was subject to the same constitutional rules as other state civil

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27. Other scholars have synthesized some forms of civil incarceration via the frameworks of preventive detention, civil commitment, and immigration detention. See generally Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85 (2011) (synthesizing preventive-detention doctrine through wartime detention, immigration detention, quarantine, and civil commitment); Stella Burch Elias, *Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV. 99 (2009) (presenting three preventive-detention frameworks designated as pretrial detention, immigration detention, and national security detention); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009) (describing preventive-detention statutes for immigrants, material witnesses, those accused of providing material support, and enemy combatants and recommending the constitutional principles that should govern them); Natsu Taylor Saito, *Interning the “Non-alien” Other: The Illusory Protections of Citizenship*, LAW & CONTEMP. PROBS., Spring 2005, at 173 (examining enemy combatant detention in the historical context of the internment of citizen “Others”); Mark Noferi, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533 (2014) (comparing immigration detention with “sexually violent predator” commitment); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002) [hereinafter Cole, *In Aid of Removal*] (discussing post-9/11 mechanisms for preventive detention, focusing on immigration law). I use the term “civil confinement law” to cover a range of forms of civil confinement without assuming either paternalistic (as with some forms of civil commitment and juvenile detention) or dangerousness-based (as with preventive detention) rationales for confinement. See also Paulina D. Arnold, *Constructing Civil Confinement Law* (Feb. 8, 2023) (unpublished manuscript), <https://perma.cc/4AUX-MWBM>.

28. See *infra* Part IV.C.

29. See *infra* Part IV.D.

30. See Cole, *In Aid of Removal*, *supra* note 27, at 1007.

confinement facilities. Second, it shows how the Court's failure to include immigration detention in its initial constitutional regulation of civil confinement was an accident of history, coinciding with immigration detention's temporary termination. Through unpacking both of these contributions, this Article demonstrates that immigration detention exceptionalism is a modern doctrine rather than a timeless classification.<sup>31</sup>

Part I describes the initial paternalistic justifications for civil confinement, as well as the court-approved summary processes required to confine people. Part II explains the birth of federal immigration detention as, in part, a response to the confinement of immigrants in state civil facilities. Part III describes civil confinement based increasingly on dangerousness in the mid-twentieth century, and traces judicial anxiety about its lack of constitutional regulation through Japanese American internment and McCarthy-era immigration detention. Part IV charts the Supreme Court's construction of a rubric for civil confinement law, as well as the Court's shift from assimilating immigration detention into civil confinement law to carving it out as exceptional. Part V briefly explores the reasons for the Court's switch and examines how lower courts have handled the tension between immigration detention exceptionalism and civil confinement law.

## **I. Civil Confinement in the Nineteenth Century**

Although prisons and detention centers are now firmly entrenched in the modern landscape as governmental tools of punishment and protection, the ideas that led to systematic incarceration had not yet taken hold in eighteenth-century America.<sup>32</sup> Society justified the birth of the prison at the time as a compassionate departure from the capital punishment, physical torture, and

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31. In this Article, I am concerned with immigration detention rather than removal proceedings. Immigration detention, like all other modern forms of civil confinement, is formally justified by flight risk (from removal proceedings) and/or dangerousness. *See, e.g.*, 8 C.F.R. § 236.1(c)(3), (8) (2022) (permitting the release of detained noncitizens only if release would not pose a danger or present a flight risk). I elsewhere make the normative argument for distinguishing between the process required for detention and the process required for removal in constitutional analyses of immigration detention. *See* Paulina D. Arnold, *Divorcing Detention from Removal* (Feb. 8, 2023) (unpublished manuscript), <https://perma.cc/GUH2-E6CV>. Here, I take this distinction as an important premise and analyze only the evolution of the constitutional law governing immigration detention, meaning the standards the government must satisfy to lock someone up while trying to remove him.

32. *See* BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 49 (1999) (describing the shift from informal social control to "state-administered institutional controls" in the early nineteenth century).

public shaming that had previously dominated the punitive landscape.<sup>33</sup> In this Part, I show that civil confinement, primarily of immigrants, with few constitutional process limits was commonplace at the turn of the nineteenth century. At that time, although formally justified through paternalistic rationales, civil confinement became the primary method of government control over socially disfavored groups. Immigrants were inextricably intertwined with both its goals and its execution. The early nineteenth century saw the invention of mental asylums, houses of refuge, almshouses, and workhouses.<sup>34</sup> None of these institutions required a criminal conviction for involuntary confinement, and most relied on state or local administrative bodies to decide people's admission or release. Courts routinely rejected habeas challenges from people confined with summary or no process, regarding civil confinement as essentially benevolent and part of the social contract. Through both explicit and implicit targeting, each of these new civil institutions confined disproportionate numbers of immigrants.

#### A. Tools of Pre-Carceral Control: The Eighteenth Century

Civil confinement grew out of states' responsibilities to their citizens, in a kind of precursor to modern immigration law.<sup>35</sup> In early America, individual localities were responsible for taking care of their poor,<sup>36</sup> a term understood at the time to include children, the elderly, immigrants, and people with physical or psychiatric disabilities.<sup>37</sup> This local responsibility meant that the law of

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33. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 61 (AldineTransaction, rev. ed. 2005) (1971); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 73-74 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

34. See *infra* Part I.B.

35. For excellent in-depth analyses of state settlement and deportation laws before the federalization of immigration law, see generally HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017); and Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). See also Kerry Abrams, *The Hidden Dimensions of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1355-57 (2009) (noting the different histories of state settlement laws and federal immigration law and arguing that both are important to understanding immigration regulation).

36. William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 114 (1997). Responsibility for the poor did not equate to benevolence; poor people were forced to work. See *id.* at 112. If they would not work, they were often subjected to whipping or banishment. See *id.*

37. *Id.* at 113. States typically did not include enslaved Black people, free Black people, or Native Americans within the ambit of "the poor" for whom a locality was responsible. See William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 35 (1996).

“settlement,” which governed to which town any individual belonged, was paramount.<sup>38</sup> Because immigration law had not yet been federalized, “settlement” law was also inextricably tied to immigration—it defined where someone was from and the locality to which they belonged, whether that was a neighboring town, state, or country. Coastal states, as the receivers of many foreign settlers, even funded their “settlement” responsibilities through bonds or taxes levied on arriving foreign immigrants.<sup>39</sup> As states’ obligations to their poor grew, they began looking for more efficient solutions to take care of them, which resulted in warehousing through civil confinement.<sup>40</sup> Understanding who was most affected by the settlement laws helps explain how immigrants became so disproportionately overrepresented in the carceral facilities that often targeted the unsettled.

Eighteenth-century guidelines for how towns should determine “settlement,” and consequently for which paupers they were responsible, look similar to modern immigration law. People could achieve settlement through a combination of length of residence, wealth, and status.<sup>41</sup> The more property you owned somewhere, often the faster you could achieve settlement in that place.<sup>42</sup> Settlement could also be inherited or achieved through working as an apprentice or servant for a term of years.<sup>43</sup> The “overseers of the poor” in a given town or locality made the settlement determination.<sup>44</sup> If a pauper was legally “settled” in that locality, the town had to take responsibility for him.<sup>45</sup> If not, the town could either send him back to wherever he had legal settlement<sup>46</sup> or, in some states, the town could seek reimbursement from the place where he was legally settled for any care it provided.<sup>47</sup>

The law of settlement had an outsized impact on immigrants.<sup>48</sup> In early America, if an immigrant who had never been legally settled fell on hard times, the overseers, having no one to charge for her care, would sometimes expel her back to Europe.<sup>49</sup> Additionally, again in an echo of modern immigration

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38. See Michael B. Katz, *Poorhouses and the Origins of the Public Old Age Home*, 62 MILBANK MEM’L FUND Q. HEALTH & SOC’Y 110, 113 (1984).

39. HIROTA, *supra* note 35, at 46–47.

40. See *infra* Part I.B.

41. Quigley, *supra* note 36, at 142.

42. See *id.* at 142–43.

43. See *id.* at 143.

44. See Quigley, *supra* note 37, at 61.

45. See Quigley, *supra* note 36, at 140–42.

46. HIROTA, *supra* note 35, at 43.

47. Quigley, *supra* note 36, at 142.

48. See *id.* at 141.

49. See HIROTA, *supra* note 35, at 43.

tolling statutes, coastal states could refuse to allow a new arrival to accrue time toward settlement unless and until she had notified the overseers of her arrival.<sup>50</sup> As immigration increased through the late eighteenth century, states tightened these notice requirements. In Rhode Island, shipmasters had to provide a list of “all foreign passengers to the overseers within forty-eight hours of arrival” or face a fine.<sup>51</sup> Any strangers hosted for more than one week had to be reported to the town council, and anyone who knowingly brought in an unsettled poor person was subject to a one-hundred-dollar fine.<sup>52</sup> For newly arriving immigrants without many resources, these laws could force them to choose between remaining stateless or risking immediate deportation.<sup>53</sup>

Before the early nineteenth century, the overseers dealt with their settled poor based on their perceived financial potential. If someone was reasonably self-sufficient and had no family to take him in, the overseers might pay him a small stipend, give him necessities, or pay a private home to house him.<sup>54</sup> Commonly, the overseers would auction off the poor at annual local meetings.<sup>55</sup> People would bid an amount that they hoped to receive from the town in exchange for taking in a pauper; if they thought the pauper could work a lot, they might ask for less money, whereas they might ask for more if they expected less work.<sup>56</sup> Whoever asked for the least would receive the contract.<sup>57</sup> Children from poor families were often taken from their parents and “bound out” to masters until they achieved the age of majority.<sup>58</sup>

Faced with the complexities of auctioning off large numbers of people, larger localities began searching for more efficient solutions for the management of their poor. From the mid-eighteenth century to the mid-nineteenth century, localities and states began to experiment with larger-scale warehousing and indenturing of the poor.

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50. See Quigley, *supra* note 36, at 143, 145-46 (describing New York’s provision).

51. *Id.* at 145.

52. *Id.*

53. See Neuman, *supra* note 35, at 1852.

54. See Quigley, *supra* note 36, at 151-52; see also Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 423-24 (2018) (describing colonial treatment of people with mental illness and cognitive disabilities).

55. Quigley, *supra* note 36, at 152.

56. *Id.*

57. *Id.* at 152-53.

58. See *id.* at 153-55.

## B. Early Civil Confinement

The institutionalization of the poor began partially to save more crowded localities money and partially to enforce settlement laws.<sup>59</sup> States began warehousing their poor in workhouses, almshouses, houses of refuge, and mental asylums. Each type of facility locked people up with little or no process. Because judges viewed these new institutions as appropriate exercises of benevolent state power, they routinely rejected habeas challenges by involuntarily confined people. Each new form of civil confinement explicitly or implicitly targeted immigrants and disproportionately confined them.

### 1. Workhouses and almshouses

Workhouses and almshouses are perhaps the least-researched forms of civil confinement, but they were some of the first to appear. Almshouses warehoused poor people who were unable to work, whereas workhouses confined the able-bodied poor and those convicted of petty crimes.<sup>60</sup>

Workhouses targeted the “idle poor”—poor, able-bodied migrants, including those who were either ineligible for settlement or had not yet settled.<sup>61</sup> For example, Rhode Island’s 1798 statute authorized confinement in the workhouse for “idle, indigent persons, as shall from time to time be found in the said town, who by their ill courses are likely to become a town charge[,]” “any stragglers who do not belong to said town, and if they cannot give a good account of themselves[,]” as well as people who had previously been “ordered out of town and later caught begging.”<sup>62</sup> Even more explicitly, the Connecticut workhouses, called “houses of correction” although distinct from the explicitly punitive jails and prisons of the era,<sup>63</sup> targeted “persons who *wander about*,” including “lewd, idle, dissolute, profane and disorderly persons, *that have no settlement in this colony*.”<sup>64</sup> Using the law of settlement, these statutes institutionalized people who had been unable to settle in a given locality.

During the nineteenth century, states with large immigration ports also began enacting increasingly anti-immigrant settlement laws.<sup>65</sup> Massachusetts

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59. See ROTHMAN, *supra* note 33, at 28-29.

60. See Quigley, *supra* note 36, at 156; STACY HORN, DAMNATION ISLAND: POOR, SICK, MAD & CRIMINAL IN 19TH-CENTURY NEW YORK 95 (1st paperback ed. 2019).

61. See Quigley, *supra* note 36, at 156; see also ROTHMAN, *supra* note 33, at 25-27.

62. Quigley, *supra* note 36, at 156 (quoting a Rhode Island statute).

63. See ROTHMAN, *supra* note 33, at 27.

64. *Id.* at 27 (quoting a Connecticut statute).

65. These laws coincided with an increase in northern states’ racist exclusion of formerly enslaved people from settlement. See Neuman, *supra* note 35, 1866-73.

imposed explicit citizenship requirements for settlement.<sup>66</sup> Both New York and Massachusetts began requiring that ships carrying foreign passengers indemnify the state and localities against anyone who might become a public charge within a handful of years.<sup>67</sup> The use of the settlement laws as part of the criteria for confinement in the workhouse therefore increasingly targeted and disproportionately impacted immigrants.

Localities justified establishing almshouses, or poorhouses, more for the efficient administration of the poor than for the reform or punishment of the unsettled.<sup>68</sup> For instance, in 1756, after previously tightening residency requirements, the Pennsylvania legislature ordered the construction of a workhouse to protect against “idle and dissolute persons . . . from neighboring provinces.”<sup>69</sup> In the same year, the legislature, noting how expensive care of the city’s poor had become, authorized Philadelphia to construct an almshouse in order to provide the poor with “so comfortable a subsistence as might [not] otherwise be supplied.”<sup>70</sup> But despite the supposed distinction between almshouses, framed as serving the deserving poor, and workhouses, framed as targeting the undeserving, most localities did not maintain separate institutions in practice.<sup>71</sup>

In terms of process requirements for confinement, workhouses often occupied a liminal space between criminal and civil law.<sup>72</sup> In Rhode Island, confinements were entirely civil: The overseers could command the constable or town sergeant to confine someone and, once confined, a person’s only recourse was an appeal to the town council.<sup>73</sup> At New York’s infamous Blackwell’s Island workhouse, however, people were confined through both criminal and civil law. Those convicted of petty crimes like vagrancy or prostitution by police justices might be confined to the workhouse,<sup>74</sup> but the

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66. *See id.* at 1848.

67. *Id.* at 1849, 1853-54.

68. *See* ROTHMAN, *supra* note 33, at 28.

69. *Id.* (quoting a Pennsylvania statute).

70. *See id.* (quoting a Pennsylvania statute).

71. *See id.* at 293. This distinction between the deserving and undeserving poor has been persistent in the American imagination. For an examination of how the distinction was embedded in twentieth-century welfare law with racial dimensions, see Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1091-96 (2017).

72. For a discussion of how the boundaries between the almshouse, the workhouse, and the prison were porous for the transient poor, especially those designated as “vagrants,” see KRISTIN O’BRASSILL-KULFAN, *VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC* 114-15 (2019).

73. *See* Quigley, *supra* note 36, at 156.

74. *See In re Twelve Commitments*, 19 Abb. Pr. 394, 395-96, 398-99 (N.Y.C.P. 1865).

able-bodied poor might also be transferred there from the almshouse.<sup>75</sup> Those confined under the criminal laws for vagrancy or disorderly conduct faced “summary convictions”<sup>76</sup>—the arresting officer would explain what had happened to the police justice, usually out of earshot of the defendant, and the police justice would then decide whether to sentence the defendant to the penitentiary or the workhouse.<sup>77</sup>

State courts routinely rejected constitutional challenges from those confined against their will in workhouses and almshouses because they saw the confinement as essentially benevolent. In 1869, the Connecticut Supreme Court of Errors upheld a father’s confinement, without any criminal process, in the New Haven Almhouse for refusing to pay child support.<sup>78</sup> The court rejected the father’s due process challenge.<sup>79</sup> It reasoned that, although the statute authorizing his involuntary confinement in an almshouse would “doubtless conflict with the constitution” if abandoning a child were a “crime or misdemeanor,” the statute’s object was “entirely different.”<sup>80</sup> Noting that towns had the burden of maintaining the poor at public expense, the court explained that “paupers, before and since the adoption of the constitution, have been subject to the orders of the selectmen, or person contracted with for their support.”<sup>81</sup> As such, the poor had to “labor,” if able, so that they might, “in some degree, contribute to their own support.”<sup>82</sup> If a man failed to support his children such that the state had to support them, the state could force him to work to lessen its burden.<sup>83</sup> Although confinement in an almshouse would be “penal in its consequences,” this was no reason “to declare [the statute] inoperative.”<sup>84</sup> “If [a man] is in fact a pauper, either at common law, or by force of the statute, no [constitutional] rights are infringed, and he must submit to the inconveniences of his situation.”<sup>85</sup> In this way, the court imported

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75. See HORN, *supra* note 60, at 95. Pennsylvania similarly allowed the transfer of the able-bodied poor from the almshouse to the workhouse. See *Commonwealth v. Wilson*, 25 Pa. D. 536, 537 (Quar. Sess. 1916) (describing an 1871 Pennsylvania statute that directed the managers of almshouses and poorhouses “to transfer [to the workhouse], within twenty-four hours after entrance in said almshouse, all able-bodied paupers, adults or minors, except such as may be necessary to employ in the service of said almshouses”).

76. *In re Twelve Commitments*, 19 Abb. Pr. at 395-97.

77. See HORN, *supra* note 60, at 97.

78. *McCarthy v. Hinman*, 35 Conn. 538, 539 (1869).

79. *Id.* at 539-40.

80. *Id.* at 540.

81. *Id.*

82. *Id.*

83. See *id.*

84. See *id.* at 540-41.

85. *Id.* at 541.

settlement law rationales into its analysis of the civil confinement of paupers in workhouses and almshouses.

Thirty years later, the court doubled down on its reasoning. It upheld the involuntary confinement of a family to the Farmington almshouse, rejecting their constitutional challenge.<sup>86</sup> In stark language, the court held:

No constitutional right was violated by the proceedings in controversy. Town paupers belong to a dependent class. The law assigns them a certain status. This entitles them to public aid, and subjects them, in a corresponding degree, to public control. . . . Nor was it necessary to provide for the issue of any legal process for taking to the almshouse paupers in need of support and unwilling to go there, whether found in the same town or in any other within the limits of the state. The statute, of itself, is a sufficient warrant.<sup>87</sup>

Courts did not view summary process for confinement due to poverty as a constitutional problem; instead, such confinement was a necessary obligation of localities and an “inconvenience” to which the poor must subject themselves.

By the mid-nineteenth century, many of the workhouses for which we have data overwhelmingly confined immigrants, and did so at rates much higher than immigrants were incarcerated in formal penitentiaries. In Missouri between 1850 and 1859, when immigrants represented only 13% of the state’s population, 48% of “felons incarcerated in the Missouri Penitentiary in Jefferson City were foreign-born.”<sup>88</sup> In the St. Louis City Workhouse, foreign-born people comprised 88% of those confined over a six-month period in 1853, and a striking 90% for the year 1855.<sup>89</sup> Immigrants were similarly overrepresented in the available data for almshouses. In New York City in 1857, 75% of the people confined in the Blackwell’s Island almshouse and workhouse were immigrants.<sup>90</sup> In Illinois, 49% of people confined in almshouses in 1871 were immigrants, including 92% of people confined in the Chicago almshouse.<sup>91</sup>

Given that immigrants were both targeted and disproportionately affected by settlement laws, and that settlement could form part of the legal basis for confinement to the almshouse or workhouse, these numbers are perhaps unsurprising. Historians have also speculated that police officers had a disproportionate presence in immigrant neighborhoods,<sup>92</sup> or that police

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86. See *Harrison v. Gilbert*, 43 A. 190, 191-92 (Conn. 1899).

87. *Id.*

88. Ritter, *supra* note 15, at 67.

89. See *id.* at 68.

90. See ROTHMAN, *supra* note 33, at 290-91.

91. *Id.* at 291.

92. See Ritter, *supra* note 15, at 68-73.

justices simply neglected to evaluate those who could not speak English.<sup>93</sup> Regardless of the reasons, states and localities disproportionately locked up large numbers of immigrants in workhouses and almshouses with little process, which courts approved as constitutional.

## 2. Houses of refuge

During the colonial era, children were either bound out as workers or confined to almshouses or workhouses alongside adults.<sup>94</sup> At the beginning of the nineteenth century, reformers became increasingly concerned with the idea that early childhood was formative for later behavior and began building specialized facilities for juvenile confinement.<sup>95</sup>

These facilities targeted children perceived as unruly or whose parents were perceived as unfit with the aim of reforming them and instilling more upright societal values.<sup>96</sup> The first age-segregated youth institutions, or “houses of refuge,” appeared on the East Coast in the early nineteenth century: in New York and Boston in 1825, and Philadelphia in 1828.<sup>97</sup> Children were confined to these institutions in a variety of ways. Some were referred by overseers of the poor, some through criminal charges, and some from policemen rounding up homeless young people.<sup>98</sup> Parents could commit unruly children, but unruly parents could also have their children taken from them and committed.<sup>99</sup>

Juvenile confinement facilities faced constitutional challenges earlier than workhouses, from parents trying to get their children back. The courts rejected the idea that confinement violated the rights of either the parent or the child, again based on the paternalistic rationales justifying the confinement. *Ex parte Crouse*,<sup>100</sup> an 1839 challenge brought by a father against his daughter’s confinement to the Philadelphia House of Refuge, is sometimes credited with bringing the concept of *parens patriae* into American law.<sup>101</sup> Children could be confined in the House of Refuge by an alderman or justice of the peace “in

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93. See HORN, *supra* note 60, at 97-98.

94. See Quigley, *supra* note 37, at 59-60, 62, 78-79.

95. See STEVEN L. SCHLOSSMAN, LOVE & THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF “PROGRESSIVE” JUVENILE JUSTICE, 1825-1920, at 19-20, 50 (1977); FELD, *supra* note 32, at 17-18, 23-24, 49.

96. See FELD, *supra* note 32, at 49; SCHLOSSMAN, *supra* note 95, at 24.

97. FELD, *supra* note 32, at 48-49.

98. *Id.* at 51.

99. See *id.*

100. 4 Whart. 9 (Pa. 1839) (per curiam).

101. See *id.* at 9; FELD, *supra* note 32, at 52. *Parens patriae* was an English chancery law practice describing “the power of the state to act *in loco parentis*” to protect “the property interests and the person of [a] child.” *In re Gault*, 387 U.S. 1, 16 (1967).

consequence of vagrancy, or of incorrigible or vicious conduct.”<sup>102</sup> Or similar conduct might show that the child was beyond her parents’ control.<sup>103</sup> Or the conduct might have stemmed “from the moral depravity” of a parent, to a degree that “such parent or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant.”<sup>104</sup> Mary Ann Crouse’s mother had sought her daughter’s confinement for “vicious conduct” that she could not control, and Mary Ann’s father argued that this confinement was unconstitutional without trial by jury.<sup>105</sup>

The Pennsylvania Supreme Court reasoned that the House of Refuge “is not a prison, but a school.”<sup>106</sup> Although it noted that the “school” functioned as a prison for children, the court emphasized its paternalistic rationale. The court held that “[w]here reformation, and not punishment, is the end, [the House of Refuge] may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol” without any threat to its constitutionality.<sup>107</sup> Because reformation was its object, by “training its inmates to industry,” “imbuing their minds with principles of morality and religion,” and “above all, by separating them from the corrupting influence of improper associates,” confinement in the prison abridged rights no more “than what is borne . . . in every school.”<sup>108</sup> Mary Ann was “snatched from a course which must have ended in confirmed depravity,” and “restraint of her person” was therefore not only “lawful, but it would be an act of extreme cruelty to release her from it.”<sup>109</sup>

Just like workhouses were a natural extension of a locality’s responsibility to provide for its poor, “the public has a paramount interest in the virtue and knowledge of its members,” and so “the business of education belongs to it.”<sup>110</sup> Although parents were “ordinarily” entrusted with the education of their children, such control was at the “sufferance” of the public.<sup>111</sup> If the parents were “incompetent or corrupt,” “unequal to the task of education, or unworthy of it,” the state could take the child away for reformation under its *parens patriae* power.<sup>112</sup>

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102. *Ex parte Crouse*, 4 Whart. at 10.

103. *Id.*

104. *Id.*

105. *Id.* at 9-10.

106. *Id.* at 11.

107. *See id.*

108. *Id.* (emphasis added).

109. *Id.*

110. *See id.*

111. *Id.*

112. *See id.*

The population numbers tell less of an immigration story for houses of refuge because there is no way to identify children born in the United States to immigrant parents. But the connection to immigrants is clear both from the way these institutions were funded and how they were perceived by the media. The *New York Times* in 1860 described the influx of young people into the New York House of Refuge as partially coming “from the children of poor and often vicious emigrants.”<sup>113</sup> As a result of this perception, agents often targeted immigrant neighborhoods looking for vagrant children.<sup>114</sup> And managers funded the institution partially out of an \$8,000 annual grant from the Hospital and Passenger Fund, collected from a per capita tax on immigrants arriving by ship.<sup>115</sup>

Although houses of refuge did not rely on the settlement laws in the same way as workhouses and almshouses, the justifications for their existence similarly targeted immigrants. The fear of an unsettled and unruly class of young people led to a desire to control the children of the urban and immigrant poor.<sup>116</sup> There was no constitutional issue with warehousing the children of the immigrant poor to indoctrinate them into American values.

### 3. Mental asylums

People with mental illness were not meaningfully differentiated from the poor for most of the eighteenth century, unless they were violent.<sup>117</sup> As ideas about the potential for treatment began to proliferate, states and localities started building asylums.<sup>118</sup> The first mental asylum was built in 1773 in Williamsburg, Virginia, and remained the only one of its kind in America until 1824.<sup>119</sup> When these institutions began to proliferate during the mid-nineteenth century, their confinement procedures were largely informal.<sup>120</sup> Friends or relatives could request an order of admission from hospital staff—the staff member would scribble some words on a scrap of paper, sign his name, and effect the

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113. *Our City Charities. The New-York House of Refuge for Juvenile Delinquents*, N.Y. TIMES, Jan. 23, 1860, at 2.

114. See BERNSTEIN, *supra* note 18, at 39-40.

115. *Id.* at 40.

116. See FELD, *supra* note 32, at 49.

117. See SAMUEL JAN BRAKEL, JOHN PARRY & BARBARA A. WEINER, *THE MENTALLY DISABLED AND THE LAW* 12-13 (3d ed. 1985).

118. See *id.* at 13; HORN, *supra* note 60, at 5-6.

119. BRAKEL ET AL., *supra* note 117, at 13.

120. See *id.* at 22. In fact, restricting someone’s liberty for reasons of mental illness was significantly easier than interfering with their property, which involved strict procedural protections. See *id.* at 14.

confinement.<sup>121</sup> This informal confinement could last indefinitely. New York's 1842 commitment statute, which became a model for many other states, mandated confinement in a state facility for every case of "lunacy" for a minimum of six months or until the person was "cure[d]," if ever.<sup>122</sup>

Like confinement to houses of refuge, courts justified the involuntary confinement of the mentally ill through paternalistic rationales, including covert or overt reference to the state's *parens patriae* power.<sup>123</sup> The Massachusetts Supreme Judicial Court's 1845 decision on a civil commitment in *In re Oakes* relied heavily the *parens patriae* doctrine in upholding the state's commitment power.<sup>124</sup> Josiah Oakes' sons had him confined in the McLean Hospital for the Insane in modern-day Somerville after his wife's death.<sup>125</sup> Mr. Oakes, an elderly, nonviolent man, had tried to marry a young woman of allegedly questionable character, attempted to publish an article that "the printer considered libelous," and engaged "in a large speculation in real estate."<sup>126</sup> After Mr. Oakes brought a habeas challenge to the constitutionality of his confinement, his sons produced a variety of witnesses, including two doctors, to testify to his erratic behavior.<sup>127</sup> Chief Justice Shaw held that the "great law of humanity" justified "restrain[ing] an insane person of his liberty" whenever his "own safety or that of others requires that he should be restrained" and if such restraint "is necessary for his restoration, or will be conducive thereto."<sup>128</sup> This involuntary confinement was simply an extension of the restraints of colonial times, which "have been in use and sanctioned by the courts" since "the time the constitution was adopted."<sup>129</sup> Confinement could continue for "as long as the necessity continues."<sup>130</sup> For Mr. Oakes, Chief Justice Shaw held that "the care which he would meet with at the hospital would be more conducive to his cure than any other course of . . . treatment."<sup>131</sup>

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121. *Id.* at 22.

122. Appleman, *supra* note 54, at 432 (quoting Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law* (pt. 2), 43 U. CIN. L. REV. 781, 808 (1974)).

123. See BRAKEL ET AL., *supra* note 117, at 24.

124. See *In re Oakes*, 1845 Mass. LEXIS 193, at \*5-6 (Mass. Jan. 1, 1845). Although *Ex parte Crouse* was decided before *In re Oakes*, *In re Oakes* is also often credited with bringing the *parens patriae* doctrine into American law. *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839) (per curiam); see, e.g., BRAKEL ET AL., *supra* note 117, at 24 n.17; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1209 (1974).

125. *In re Oakes*, 1845 Mass. LEXIS 193, at \*1-3.

126. See *id.* at \*3, \*9-11, \*13-14.

127. See *id.* at \*1-2.

128. See *id.* at \*4-7.

129. See *id.* at \*5.

130. *Id.* at \*7.

131. *Id.* at \*16.

As Elliott Young has recently unearthed, immigrants were staggeringly overrepresented in mental asylums—in both major cities and rural hospitals—through the mid-nineteenth and early twentieth centuries.<sup>132</sup> In 1846, seven years after it was built,<sup>133</sup> over half of the people confined in Boston’s “hospital for lunatics” were foreign-born.<sup>134</sup> From 1847 to 1870, over 77% of the patients at New York City’s Lunatic Hospital on Blackwell’s Island were immigrants.<sup>135</sup> In 1880, when less than half the city was foreign-born, immigrants made up 84% of the asylum’s patients.<sup>136</sup>

The reasons for this overrepresentation are less clear. It’s possible that, because of linguistic or cultural differences, immigrants were othered in ways that labelled them as potentially insane. Regardless of the reason, mental asylums joined workhouses, almshouses, and houses of refuge in disproportionately confining immigrants and their children based on paternalistic rationales, with little process and with few constitutional limitations.<sup>137</sup> It was within this landscape of constitutionally approved mass civil incarceration of immigrants with summary process that the federal government first took the reins of immigration enforcement and began detaining them.

## II. The Birth of Immigration Detention

The rise of civil confinement as the response to poverty corresponded with the rise of immigrants as an identifiable and socially disfavored class. Although immigrants had always been disproportionately poor,<sup>138</sup> new and larger waves of Irish Catholic and then Chinese immigration during the nineteenth century provoked increasing hostility to immigrants among Protestant Anglo-Americans.<sup>139</sup> Once the federal government asserted its authority over immigration, states began asking it to take financial and physical responsibility for the immigrants in their civil confinement facilities. The courts first endorsed the lack of formal process in immigration detention

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132. See YOUNG, *supra* note 17, at 60-61.

133. See Collins, *supra* note 16, at 1.

134. YOUNG, *supra* note 17, at 60.

135. *Id.*

136. *Id.*

137. See Appleman, *supra* note 54, at 435 (“By the turn of the [twentieth] century, a fairly large percentage of all detainees—asylum, correctional facility, or otherwise—were immigrants.” (citing Guyora Binder, *Penal Reform and Progressive Ideology*, 9 REVS. AM. HIST. 224, 226 (1981) (book review))).

138. See HIROTA, *supra* note 35, at 41.

139. See *id.* at 41-42; ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS* 11-12 (2020).

against this background of mass civil confinement of immigrants with summary process. Rather than a unique carveout for the immigration system, the lack of process in immigration detention was a regular feature of all civil confinement systems at the time.

In this Part, I focus on the increasing structure of state immigration enforcement and the parallel rise of civil confinement facilities, as well as how federal authorities replaced some of these structures and worked alongside others.<sup>140</sup> I then show how federal immigration detention simply supplemented existing forms of state confinement, rather than creating an exceptional system. The lack of process required to confine immigrants in these facilities was a feature common to all civil confinement facilities at the time and was not tied to immigration status.

#### A. State Control over Immigration

East Coast states noticed that their civil confinement facilities contained massively disproportionate numbers of immigrants and began to fund them by charging arriving immigrants. Nativists classified the arriving Irish as the undeserving poor, describing them as human refuse dumped on America by Europe and enjoying hospice at the almshouses at taxpayer expense.<sup>141</sup> New York in 1830 began imposing not only bonds to indemnify the city against the potential cost of poor arriving immigrants,<sup>142</sup> but taxes on every arriving immigrant.<sup>143</sup> In 1837, Massachusetts revised its passenger law, increasing its previous \$200 bond requirement to \$1,000, which remained in effect for ten years after arrival, for the landing of “any lunatic, idiot, maimed, aged or infirm persons . . . or [those] who have been paupers in any other country.”<sup>144</sup>

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140. Numerous scholars have discussed the foundational cases in immigration law, and I do not retread that territory here. The first cases discussing federal power over immigration arose in the context of federal statutes targeting Chinese immigration. These statutes were fueled by racist sentiment and violence against the Chinese, and Chinese immigrants responded to the laws by organizing efforts to challenge them in court. *See, e.g.,* Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7, 9-10 (David A. Martin & Peter H. Schuck eds., 2005).

141. *See* HIROTA, *supra* note 35, at 42, 60-61.

142. *See* GEORGE J. SVEJDA, U.S. DEP'T OF THE INTERIOR, CASTLE GARDEN AS AN IMMIGRANT DEPOT, 1855-1890, at 10-11 (1968). Shipmasters' attempts to avoid using these bonds to pay for immigrants' stays in state-run almshouses created some of the first forms of private immigration detention. *See* HIROTA, *supra* note 35, at 64. Shipmasters would instead send immigrants to privately run poorhouses and hospitals. *Id.*

143. *See* SVEJDA, *supra* note 142, at 11-12.

144. HIROTA, *supra* note 35, at 55 (quoting An Act Relating to Alien Passengers, ch. 238, § 2, 1837 Mass. Acts 270, 270).

Despite states' power to bond and expel immigrants,<sup>145</sup> East Coast states began asking for federal intervention. In 1837, the mayors of Boston, New York City, Philadelphia, and Baltimore submitted a joint petition to Congress "praying for its interference to prevent the great evils arising from the influx of paupers among us."<sup>146</sup>

During the Irish potato famine of the 1840s, Irish immigration and overrepresentation in civil confinement facilities, as well as anti-Irish sentiment and violence, reached a fever pitch. Irish immigrants made up over a quarter of Boston and New York City's populations in 1850.<sup>147</sup> In 1847, the Irish-born made up 57% of all people confined in Boston's House of Industry, and 87% of those foreign-born.<sup>148</sup> Boston's pauper aid expenditures tripled between 1845 and 1850.<sup>149</sup> Also in 1847, 85% of the immigrants confined in New York City's Bellevue Hospital were Irish.<sup>150</sup> In 1849, the city confined ten times as many Irish immigrants (1,006) in its almshouse as the next largest foreign-born group (92).<sup>151</sup>

In the midst of this influx, the Supreme Court in 1849 began questioning the passenger taxes used to fund the civil confinement facilities of New York and Boston. In consolidated cases from New York and Massachusetts, known as the *Passenger Cases*, the Supreme Court held that all regulation of foreign commerce belonged to Congress.<sup>152</sup> Passenger taxes targeting immigration infringed on this congressional power and were therefore unconstitutional.<sup>153</sup> Part of the Court's reasoning rested on the use of the tax not only for health purposes, which was within the power of the states, but also for the Society for the Reformation of Juvenile Delinquents,<sup>154</sup> which lobbied for and founded New York City's House of Refuge.<sup>155</sup> In practice, the Court's opinion had little effect. States simply revised their laws to conform to what they saw as the Court's concerns.<sup>156</sup> But the Court's emphasis on immigration as a federal

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145. *See* *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 141-43 (1837) (upholding state immigration bonds under state police powers).

146. HIROTA, *supra* note 35, at 56.

147. *Id.* at 58.

148. *Id.* at 59.

149. *Id.*

150. *Id.*

151. *See id.*

152. *See* *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 283, 408-09 (1849).

153. *Id.*

154. *See id.* at 403-04, 408.

155. *See* ROBERT S. PICKETT, *HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857*, at 50-63 (1969).

156. *See, e.g.*, HIROTA, *supra* note 35, at 145; Richard H. Leach, *The Impact of Immigration upon New York, 1840-60*, 31 N.Y. HIST. 15, 27-28 (1950).

responsibility increased the states' advocacy for federal funding and assistance with immigrants and their civil confinement.

East Coast cities and states responded to the increase of Irish immigrants in carceral facilities in a number of ways. They tried to remove poor Irish immigrants back to Europe, confine them in quarantine facilities before admitting them into the state, and intimidate them through mob violence.<sup>157</sup> Ultimately, New York and Massachusetts created state-level immigration commissioners, who managed the poverty assessment of arriving immigrants and oversaw the provision of immigrant taxes to local civil confinement facilities.<sup>158</sup>

New York City is a striking example of the inseparable entanglement of immigration and poverty-based confinement during this time. New York's confinement facilities, criminal and civil, were spread across a series of islands. In the early to mid-nineteenth century, the city purchased Blackwell's (now Roosevelt), Randall's, and Ward's Islands, which became home to a shifting and expanding set of mental asylums, hospitals, prisons, orphanages, and workhouses.<sup>159</sup> An immigrant landing in New York during this era of state-run immigration would arrive at Castle Garden in Lower Manhattan.<sup>160</sup> There, they might be detained pending evaluation or be sent to a variety of the island facilities. They could be sent to the smallpox hospital on Blackwell's Island if they had smallpox, or to the Emigrant Hospital on Ward's Island if they had other ailments.<sup>161</sup> An 1871 *Handbook for Immigrants to the United States* describes the system of civil facilities on Ward's Island.<sup>162</sup> It explicitly describes the passenger tax on immigrants as "entitl[ing]" the immigrant, "for the term of five years after his landing, to free admission to the institutions on Ward's Island."<sup>163</sup> It also describes the hospital and nursery, and the workhouses "for the use of destitute immigrants," where immigrants "are expected . . . to labor for the benefit of the institutions."<sup>164</sup> In practice, of course, admission to these institutions was often involuntary, and immigrants might find themselves first confined at Castle Garden pending an immigration evaluation, then

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157. HIROTA, *supra* note 35, at 58-63.

158. *See id.* at 66-68.

159. *See* J.F. RICHMOND, *NEW YORK AND ITS INSTITUTIONS: 1609-1871*, at 523-25 (New York, E.B. Treat 1871).

160. *See* SVEJDA, *supra* note 142, at 46-47. New York State designated Castle Garden as the exclusive landing place for immigrants in New York City in 1855. *Id.* at 34. It was the first such facility in the country. *Id.* at 44-45.

161. *See id.* at 84.

162. *See* AM. SOC. SCI. ASS'N, *HANDBOOK FOR IMMIGRANTS TO THE UNITED STATES*, app. at 115-16 (New York, Hurd & Houghton 1871).

163. *Id.* at 115 app.

164. *See id.* at 115-16.

quarantined in a hospital, and then confined to a workhouse if they could not support themselves.

On the West Coast, the development of civil confinement infrastructure also accompanied rising racist and anti-immigrant sentiment.<sup>165</sup> After California gained statehood in 1851, it began building state asylums modeled on East Coast institutions at an unprecedented rate.<sup>166</sup> At the same time, from 1850 to 1870, the China-born population of the United States increased from 750 to 63,000, living largely on the West Coast, overwhelmingly in California.<sup>167</sup> Anti-Chinese sentiment mirrored negative attitudes about the Irish in the East—the immigrants were seen as “uncivilized, unclean and filthy beyond all conception,” and considered unassimilable.<sup>168</sup> Built at the same time as rising anti-immigrant sentiment, California asylums were based less on paternalistic rationales, but instead were understood from the beginning as confinement facilities for perceived deviants.<sup>169</sup>

California mirrored the East Coast’s use of passenger taxes on immigrants to fund these new institutions. In 1852, the state passed a passenger tax that required a \$500 bond from shipmasters for each foreign passenger.<sup>170</sup> This bond was intended to “indemnify and save harmless” localities and state hospitals from any “relief, support or medical care” to the passengers within two years of their arrival.<sup>171</sup> If any passenger was deemed a “lunatic, idiot, deaf, dumb, blind, cripple or infirm person . . . likely to become permanently a public charge,” the shipowner was liable for an *additional* \$1,000 bond on top of the \$500.<sup>172</sup> All this money was to be paid into a fund for the maintenance of state hospitals.<sup>173</sup>

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165. The South had a markedly different attitude about the administration of its poor and stuck largely to eighteenth-century models in the nineteenth century without such a dramatic shift to institutionalization. See James W. Ely, Jr., “*There Are Few Subjects in Political Economy of Greater Difficulty*”: *The Poor Laws of the Antebellum South*, 10 AM. BAR FOUND. RSCH. J. 849, 872 (1985). Legal historian James Ely has noted that “[t]he association between immigrants and pauperism, so worrisome to northern observers, was muted in the South,” possibly due to “the region as a whole receiv[ing] few immigrants.” See *id.* at 874 (citing data that “only 10.7% of the South’s total population was foreign born in 1850 as compared with 45.4%” in the mid-Atlantic states).

166. Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIA. L. REV. 1, 17-18 (2018).

167. GOODMAN, *supra* note 139, at 11.

168. See *id.* at 12. (quoting *Chinese Immigration to California*, N.Y. DAILY TRIB., Sept. 29, 1854, at 4).

169. See Simon & Rosenbaum, *supra* note 166, at 18.

170. See Act of May 3, 1852, ch. 36, § 2, 1852 Cal. Stat. 78, 79, *invalidated by State v. S.S. Constitution*, 42 Cal. 578 (1872).

171. *Id.* § 2, 1852 Cal. Stat. at 79.

172. *Id.* § 5, 1852 Cal. Stat. at 80.

173. *Id.* § 8, 1852 Cal. Stat. at 81. In 1881, the San Francisco Chronicle reported on the desire to exclude Chinese people from the San Francisco City and County Hospital. See *No*  
*footnote continued on next page*

In the West, antipathy to immigration also became increasingly racialized. Although Protestant Anglo-Americans had been hostile to the perceived otherness of Irish Catholic immigrants, the systems of settlement and regulation of the poor had still been largely white,<sup>174</sup> because free Black people and American Indians had been historically excluded from the state's supposedly benevolent care.<sup>175</sup> Additionally, in the early 1880s, individuals migrating from Europe shifted from primarily Northern European to primarily Southern and Eastern European.<sup>176</sup> The 1880s and 1890s, as well as being the era of immigration federalization, also saw Irish Americans assimilating and beginning to condemn newer immigrants, most aggressively those from China.<sup>177</sup> This increasing racialization would become important as civil confinement facilities, including immigration detention, exploded over the early twentieth century, becoming increasingly punitive and increasingly filled with people of color.

## B. Immigration Federalization

After the Supreme Court invalidated the passenger taxes on arriving immigrants that funded state civil confinement facilities, states' cries for immigration federalization became more urgent and were eventually answered.

Initially, coastal states had tried to handle the costs of warehousing increasing numbers of the poor by enforcing state-level deportation policies, which meant giving state charity boards the power to deport.<sup>178</sup> In 1869 in Massachusetts and 1873 in New York, the respective state charity boards

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*Room for Chinese. They Are Denied Admission to the County Hospital*, S.F. CHRON., Nov. 20, 1881, at 3. A member of the Board of Health expressed concern that “[i]f they once opened the gates to the chronic and incurable diseases existing in Chinatown they would soon have the place full.” *Id.* The resolution adopted by the board, however, seems to have been aimed at warehousing those suffering from “chronic diseases of an incurable character” in a separate building in the hospital lot, *id.*, similar to the Emigrant Hospital in New York City.

174. See DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS* 12-22 (2005) (discussing the complexities of whiteness in changing immigrant populations from 1850 to World War I).

175. See Quigley, *supra* note 37, at 35. *But see* O'BRASSILL-KULFAN, *supra* note 72, at 53 (describing the African American population of indigent transient people as being overrepresented in the almshouses in the 1820s, but then almost completely absent by 1850); *id.* at 200 n.105 (describing how formerly enslaved people were folded into the settlement laws, which could lead either to being deported back to the districts where they had been enslaved or being held in bondage).

176. ROEDIGER, *supra* note 174, at 19.

177. See, e.g., REECE JONES, *WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL* 38-41 (2021).

178. See HIROTA, *supra* note 35, at 140-44.

acquired the authority to deport poor immigrant residents in workhouses, and assist them with voluntary deportation.<sup>179</sup> Between 1864 and 1878, the Massachusetts Board of State Charities expelled 32,672 paupers from Massachusetts, sending 2,489 people to “transatlantic ports” and Canada.<sup>180</sup>

The Supreme Court in 1876 fully invalidated passenger taxes,<sup>181</sup> which destroyed states’ ability to fund their civil confinement facilities through immigrants and led to an urgent call for federal regulation.<sup>182</sup> In 1882, Congress answered with the Immigration Act of 1882, which was based on the state immigration laws of New York and Massachusetts.<sup>183</sup> The Immigration Act levied a head tax of fifty cents per arriving immigrant, to be used both for “regulating immigration” and “for the care . . . [and] relief of such [immigrants] as are in distress.”<sup>184</sup> It also delegated to the states the task of inspecting passengers on arriving ships, and excluding and reporting “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”<sup>185</sup>

In 1891, Congress codified both federal control over immigration enforcement and a formal deportation policy. It established a federal immigration superintendent in the Treasury Department and directed that department to establish rules for border inspection.<sup>186</sup> And it ordered the deportation of immigrants who had entered the country unlawfully, as well as those already admitted if they became a public charge within one year.<sup>187</sup> The federal government also quickly opened its own immigration station on Ellis Island in 1892.<sup>188</sup>

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179. *Id.* at 140, 143.

180. *Id.* at 144.

181. *See* *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1876).

182. *HIROTA*, *supra* note 35, at 184-85. Notably, these arguments have resurfaced in litigation currently before the Supreme Court. Texas and Louisiana have asserted standing to challenge the Biden Administration’s immigration-enforcement-priorities memo on the basis that the memo injures their *parens patriae* powers. *See* Brief for Respondents at 13-15, *United States v. Texas*, No. 22-58 (U.S. Oct. 18, 2022), 2022 WL 12591050. In a striking echo of states’ nineteenth-century arguments, Texas and Louisiana assert that the lack of federal immigration enforcement harms their *parens patriae* authority because the states are spending too much money incarcerating immigrants in state prison facilities, as well as unspecified education and healthcare costs for ostensibly removable immigrants. *See id.*

183. *See* *HIROTA*, *supra* note 35, at 181.

184. Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214, 214.

185. *Id.* § 2, 22 Stat. at 214.

186. Act of Mar. 3, 1891, ch. 551, §§ 7-8, 26 Stat. 1084, 1085-86.

187. *Id.* § 11, 26 Stat. at 1086.

188. *See* *HIROTA*, *supra* note 35, at 9.

### C. Early Immigration Detention

The 1891 Act also for the first time specifically outlined guidelines for federal immigration detention. Federal inspection officers could “order a temporary removal” of immigrants from their ships “for examination at a designated time and place, and then and there detain them until a thorough inspection [was] made.”<sup>189</sup> During this detention, the superintendent had to ensure that the immigrants were “properly housed, fed, and cared for.”<sup>190</sup> This language mirrors the benevolent language associated with other forms of civil confinement.<sup>191</sup> Although the government was using its coercive power to confine someone, the statutory emphasis was on the site of confinement as a place of care.

Early constitutional challenges to federal immigration power challenged exclusion and deportation, not specifically detention without bail.<sup>192</sup> In these cases, the Court held that deportation was not punishment,<sup>193</sup> that Congress could constitutionally exclude whomever it wanted, including through racial classifications,<sup>194</sup> and that Congress could enforce the terms and conditions of entry without judicial oversight.<sup>195</sup> In each of these cases, the relief sought was entry into the country, to which release from detention was merely incidental. It was not until Congress in 1892 tried to punish Chinese immigrants found to have unlawfully entered with incarceration at hard labor that the Supreme Court began to weigh in on immigration detention.

In *Wong Wing v. United States*,<sup>196</sup> the Court formally addressed only incarceration at hard labor without criminal process for an immigration violation. The Geary Act—or “[a]n act to prohibit the coming of Chinese persons into the United States”—required that “any . . . Chinese person or person of Chinese descent” who could not affirmatively prove that he was entitled to lawful presence in the United States “shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed.”<sup>197</sup> *Wong*

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189. Act of Mar. 3, 1891, § 8, 26 Stat. 1085.

190. *See id.*

191. *See supra* Part I.B.

192. *See, e.g.,* *Fong Yue Ting v. United States*, 149 U.S. 698, 699-704 (1893); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 582-83 (1889).

193. *Fong Yue Ting*, 149 U.S. at 730.

194. *See Chae Chan Ping*, 130 U.S. at 603-06 (“If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.”).

195. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

196. 163 U.S. 228 (1896).

197. Geary Act, ch. 60, §§ 3-4, 27 Stat. 25, 25 (1892) (repealed 1943).

Wing, Lee Poy, Lee Yon Tong, and Chan Wah Dong were charged with being unlawfully present in the United States, and ordered to be imprisoned at hard labor in the Detroit House of Correction for sixty days, and then removed to China.<sup>198</sup> They sued out a writ of habeas corpus, arguing that, even if they could be lawfully excluded and deported, their incarceration at hard labor was an “infamous punishment” that violated the Fifth and Sixth Amendments without full criminal process.<sup>199</sup>

In a sign of the prevalence of confinement without full criminal process at the time, the government argued that the petitioners’ confinement was lawful by comparing it to the common “summary proceedings” for vagrancy or disorderly conduct that frequently resulted in confinement in the workhouse where people were incarcerated at hard labor.<sup>200</sup> The government referenced “many cases . . . [from] the state Supreme Courts, where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld.”<sup>201</sup> It argued that such status crimes, including unlawful presence, did not exist at common law and so were exempt from constitutional requirements.<sup>202</sup>

The Court rejected this argument, declaring that “for more than a century imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment.”<sup>203</sup> When Congress sought to promote its exclusion and deportation policy by subjecting immigrants “to infamous punishment at hard labor,”<sup>204</sup> it had to provide criminal process to avoid running afoul of the Equal Protection Clause.<sup>205</sup> Justice Field wrote separately to emphasize his dissent from the “harsh and illegal assertions, made by counsel of the Government . . . as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them.”<sup>206</sup> “It does not follow,” he argued, that “because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment.”<sup>207</sup>

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198. *Wong Wing*, 163 U.S. at 229.

199. *See id.* at 229, 233–34.

200. *See id.* at 234.

201. *Id.*

202. *See id.*

203. *Id.* at 237.

204. *Id.*

205. *See id.* at 238.

206. *See id.* at 239 (Field, J., concurring in part and dissenting in part).

207. *Id.* at 241.

The Court also briefly discussed civil immigration detention. While insulating the petitioners from criminal confinement, the Court took pains to ensure that the government could still civilly detain immigrants as part of the inspection or removal process. Reaffirming that “deportation is not a punishment for a crime,”<sup>208</sup> the Court noted that “detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.”<sup>209</sup> Analogizing to pretrial detention, the Court explained that, although “[d]etention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused . . . it is not imprisonment in a legal sense.”<sup>210</sup> It did not comment on the constitutionality of the summary convictions to workhouses upon which the government had relied in its argument.

At the turn of the century, then, immigration detention formed one small part of a regimen of civil confinement with summary process. Immigration detention continued to slowly expand through the construction of the federal government’s second dedicated immigration detention facility at Angel Island on the West Coast in 1910.<sup>211</sup> And so too did various forms of civil confinement, despite sporadic constitutional challenges.<sup>212</sup> While almshouses and workhouses gradually fell out of favor as the U.S. economy improved, psychiatric commitment and juvenile detention exploded.

### III. Civil Confinement at Its Apex

In the early twentieth century, federal immigration detention continued to grow slowly, while other forms of civil confinement expanded exponentially, with hardly any additional constitutional checks. Rates of confinement in psychiatric institutions and juvenile detention facilities peaked in the mid-twentieth century, around the same time that the federal government began pursuing Japanese American internment and confining noncitizens with perceived Communist affiliations. As civil confinement reached its apex, the Court became increasingly reluctant to evaluate its constitutionality. In this Part, I track the extreme rise of civil confinement,

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208. *See id.* at 236 (majority opinion).

209. *Id.* at 235.

210. *See id.*

211. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 28 (2019); *see also* Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody”*, 48 MICH. J.L. REFORM 879, 886-87 (2015) (arguing that the West Coast model of immigration detention functioned as a form of racial discrimination).

212. *See, e.g.,* *Harrison v. Gilbert*, 43 A. 190, 191-92 (Conn. 1899) (almshouses); *Commonwealth v. Fisher*, 62 A. 198, 198, 201 (Pa. 1905) (juvenile detention).

chart a shift in justifications from paternalism to perceived dangerousness, and show how this expansive, dangerousness-based system of civil confinement eventually required constitutional regulation from the Court.

#### A. The Decline of the Workhouse

The workhouse, as the civil confinement site most like a penitentiary because of its requirement of hard labor and its overlap with low-level criminal procedure,<sup>213</sup> was the first civil confinement facility to face meaningful constitutional scrutiny. In 1922, in *United States v. Moreland*,<sup>214</sup> the Supreme Court finally collapsed the distinction between confinement for hard labor in a workhouse pursuant to a “summary conviction” and criminal incarceration for hard labor in a penitentiary, requiring full criminal process for confinement in the workhouse.<sup>215</sup>

Charles Walter Moreland had been sentenced to the District of Columbia “workhouse” at hard labor for six months for failing to pay child support.<sup>216</sup> He received significant criminal process—including jury trial—but was not indicted by a grand jury, as he was charged pursuant to an information.<sup>217</sup> The Court held, based almost entirely on its reasoning in *Wong Wing*, that incarceration at hard labor without full criminal process violated the Fifth and Sixth Amendments.<sup>218</sup> The carceral setting at issue in *Wong Wing*—the Detroit House of Correction—was a different institution than the state prison, with the purpose of reform rather than punishment.<sup>219</sup> The Court reasoned that it was nevertheless the type of punishment rather than its setting that governed the constitutional issue, and that *Wong Wing* had decisively held that incarceration at hard labor without full criminal process violated the Fifth and Sixth Amendments.<sup>220</sup>

The case provoked a vigorous dissent from three Justices, who persisted in viewing the workhouse as a site of benevolent reform.<sup>221</sup> For the dissenting Justices, the D.C. workhouse provided gentle rehabilitation “in healthful and attractive surroundings,”<sup>222</sup> where hard labor formed part of a “compulsory

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213. See *supra* Part I.B.1.

214. 258 U.S. 433 (1922).

215. See *id.* at 439-41.

216. *Id.* at 434-35.

217. *Id.*

218. *Id.* at 439-41.

219. See *id.* at 439-40.

220. See *id.* at 439-41.

221. See *id.* at 441, 444-45 (Brandeis, J., dissenting).

222. See *id.* at 444.

education.”<sup>223</sup> The dissenters noted the long history of confinement in workhouses without full criminal process, because workhouses were “refuges” and “training schools in which bad habits were to be eradicated and good ones formed.”<sup>224</sup> Even if it had been held in the past that all incarceration at hard labor was an infamous punishment, the dissenting Justices advocated for distinguishing workhouses from prisons because of “changes of public opinion,”<sup>225</sup> with society having come to understand labor as being about dignity, not punishment.<sup>226</sup>

This vision of the benevolent necessity of civil confinement of disfavored groups encouraged the expansion of these facilities through the first half of the twentieth century without judicial oversight.<sup>227</sup>

## B. The Expansion of Civil Confinement

Over the first half of the twentieth century, confinements to psychiatric institutions and juvenile detentions rose enormously. The federal government also began creating its own versions of these institutions, and both state and federal actors invented new forms of civil confinement. The justifications for these new forms of confinement slowly shifted from benevolent warehousing of the socially disfavored to preventive control designed to combat their dangerousness. Such dangerous groups included allegedly unreformable sexually violent people, Communist ideologues, and supposedly unassimilable races of citizens.

### 1. Juvenile detention

The paternalistic rationales for reforming supposedly deviant children supported the creation of a full-fledged juvenile system in the twentieth century. States began creating specialized court systems for confinement proceedings. Reformers applied the same reasoning that had been used to justify houses of refuge to these new court systems: the unsuitability of adult mechanisms for children. Juvenile courts, like houses of refuge, supposedly did not punish children but reformed them.<sup>228</sup> Much like houses of refuge,

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223. *Id.* at 445.

224. *See id.* at 445-47.

225. *See id.* at 450-51 (quoting *Mackin v. United States*, 117 U.S. 348, 351 (1886)).

226. *Id.* at 449-50.

227. *Moreland* concerned only federal civil incarceration. Tennessee, Louisiana, and Kansas had all reached the opposite conclusion: that the imposition of hard labor did not require criminal process when it was imposed in a civil institution. *See* Reuben Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 HARV. L. REV. 299, 318-20 (1923).

228. *Id.* at 422.

juvenile proceedings to supervise and confine children were supposed to allow the state to stand in the shoes of unsuitable parents and reform children by instilling more appropriate societal values.<sup>229</sup> These juvenile courts dispensed with criminal process for children's confinement.<sup>230</sup> Over the first half of the twentieth century, the number of children confined in these civil facilities ballooned considerably.

Legal thinkers at the time believed that juvenile facilities were essentially benevolent. Jane Addams, a prominent social activist and reformer, remembered the opening of the Chicago Juvenile Court in 1899 as "almost a change in *mores*" for the court system.<sup>231</sup> Rather than relying on the adversarial system, a "child was brought before the judge with no one to prosecute him and no one to defend him."<sup>232</sup> Instead, everyone was "merely trying to find out what could be done on his behalf."<sup>233</sup> "The element of conflict was absolutely eliminated and with it, all notion of punishment as such . . ."<sup>234</sup> Regardless of whether confinement was "what could be done" on the child's behalf, due process was irrelevant.

Courts codified this attitude into law. Like its nineteenth-century evaluation of houses of refuge in *Ex parte Crouse*, the Pennsylvania Supreme Court wrote the leading case evaluating the constitutionality of the new juvenile courts.<sup>235</sup> Frank Fisher had been confined to the Philadelphia House of Refuge after being arrested for a felony.<sup>236</sup> He challenged Pennsylvania's 1903 Act governing juvenile courts on the grounds that it did not provide him with due process and unconstitutionally classified punishments for the same offense according to age.<sup>237</sup> The court rejected both arguments, holding that the Act in no way related to punishment. Fisher was not entitled to due process because "[t]o save a child from becoming a criminal . . . the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all, for the purpose of

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229. See *id.* at 422-23. For a discussion of how welfare programs in the twentieth century also policed families through morality standards, see Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 648-51 (2009).

230. See David S. Tanenhaus, *The Elusive Juvenile Court: Its Origins, Practices, and Re-inventions*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 419, 423 (Barry C. Feld & Donna M. Bishop eds., 2012).

231. *Id.* at 422-23 (quoting JANE ADDAMS, MY FRIEND, JULIA LATHROP 137 (1935)).

232. See ADDAMS, *supra* note 231, at 137.

233. *Id.*

234. *Id.*

235. See Tanenhaus, *supra* note 230, at 423.

236. See *Commonwealth v. Fisher*, 62 A. 198, 198 (Pa. 1905).

237. See *id.*

subjecting it to the state's guardianship and protection."<sup>238</sup> By definition, the court reasoned, there were not different classifications of punishment for the same offense because the Act "is not for the punishment of offenders but for the salvation of children."<sup>239</sup> Confinement by the state was equivalent to parents' confinement of a child to the home and was thus exempt from constitutional process requirements.<sup>240</sup>

By 1920, forty-six states had passed juvenile court laws.<sup>241</sup> And in an endorsement of the juvenile court as a model for confinement with summary process, Congress passed the Federal Juvenile Delinquency Act in 1938.<sup>242</sup> This Act allowed federal district courts to act as juvenile courts and commit juveniles "to the custody of the Attorney General," who in turn could "designate any public or private agency for the custody, care, subsistence, education, and training of the juvenile during the period" of confinement.<sup>243</sup>

Juvenile confinement in civil facilities grew enormously over the first half of the twentieth century. National Census Bureau data shows a steady increase until 1960 in the number of children per capita confined in these facilities.<sup>244</sup> Even with imperfect reporting and variations in survey design, 97 children aged ten to twenty per 100,000 were confined in 1880, a rate that almost doubled to 180 children per 100,000 in 1960.<sup>245</sup>

Data on the representation of immigrant children specifically is hard to come by, as many institutions stopped collecting it.<sup>246</sup> Additionally, as houses of refuge were created partially to control the children of immigrant *parents* rather than immigrant children, data about foreign-born children is less useful than for other civil confinement facilities.<sup>247</sup>

The twentieth century also brought changing racial dynamics to juvenile confinement. In the nineteenth century, especially in the post-emancipation

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238. *Id.* at 200.

239. *See id.* at 199.

240. *See id.* at 200.

241. Tanenhaus, *supra* note 230, at 427.

242. Federal Juvenile Delinquency Act, ch. 486, 52 Stat. 764 (1938) (codified as amended at 18 U.S.C. §§ 5031-5037).

243. *Id.* §§ 3-4, 52 Stat. at 765.

244. CAHALAN, *supra* note 8, at 107.

245. *Id.* at 105, 107.

246. *See id.* at 130 (reporting no data on the percentages of foreign-born children for certain years, and providing data only for public training schools during other periods).

247. An 1868 national survey of "reform schools" reported that 60% of children had immigrant parents, whereas only 15% were themselves born outside the United States. *Id.* at 131.

South, Black children were excluded from houses of refuge.<sup>248</sup> From the creation of juvenile courts, judges could choose to designate children as adults, confine them in juvenile facilities, place them in foster homes, put them on probation, or issue them a warning.<sup>249</sup> A warning was appropriate for children “whose homes and social influences were ‘thoroughly good’”; probation, for “those whose homes and social influences were ‘ineffective’”; and, lastly, institutional confinement for the “mentally or morally defective.”<sup>250</sup> Historian Barry Feld has argued that judges responded to Anglo-Protestant children, “like their own,” with leniency—“supervising them on probation”—and harshly reacted to immigrant youths—“routing them to the institutions.”<sup>251</sup> While white immigrant children, like those of Irish Catholics, were potentially reformable through removal and confinement, Black children, especially in the South, were viewed as “unworthy of reformation.”<sup>252</sup>

Over the twentieth century, Black and Brown children gradually went from being formally excluded from juvenile detention facilities to being overrepresented in them. Although much scholarship has examined the contemporary overrepresentation of Black and Brown children in carceral institutions, there has been little recent historical examination of the role of race in juvenile facilities earlier on in the twentieth century.<sup>253</sup> In 1910, while only 31% of white children were sent to adult prisons and jails rather than juvenile facilities, 71% of Black children were incarcerated in adult facilities.<sup>254</sup> Historian Miroslava Chávez-García has also documented how one of the leading California juvenile facilities for boys in the 1910s sent many Mexican American and Black children to institutions that practiced sterilization.<sup>255</sup> The Whittier “school” was built as a juvenile confinement institution to reform children separately from adult prisons.<sup>256</sup> There, juveniles were subjected to an intelligence test that resulted in the classification of many Mexican American and Black children as “feebleminded,” and therefore more likely to contribute

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248. See Miroslava Chávez-García, Essay, *In Retrospect: Anthony M. Platt’s The Child Savers: The Invention of Delinquency*, 35 REVS. AM. HIST. 464, 475 (2007).

249. See FELD, *supra* note 32, at 73-74.

250. *Id.* at 74 (quoting Paul Colomy & Martin Kretzmann, *Projects and Institution Building: Judge Ben B. Lindsey and the Juvenile Court Movement*, 42 SOC. PROBS. 191, 199 (1995)).

251. See *id.* at 73.

252. See Chávez-García, *supra* note 248, at 475.

253. See *id.* at 474-78.

254. CAHALAN, *supra* note 8, at 113, 117.

255. See Chávez-García, *supra* note 248, at 477.

256. See Miroslava Chávez-García, *Intelligence Testing at Whittier School, 1890-1920*, 76 PAC. HIST. REV. 193, 200-01 (2007).

to crime and delinquency.<sup>257</sup> As a result, with state support, the reform school began sending these children to “hospital[s] for the feeble-minded” for institutionalization and potential sterilization.<sup>258</sup> These vignettes illustrate how Black and Brown children were gradually swept into the category of “foreign” or “other” children in need of civil confinement, a category originally occupied largely by the children of white Irish Catholic immigrants.

While juvenile confinement remained formally under the legal umbrella of *parens patriae*, in practice it became increasingly linked to crime and punishment. Behind the benevolent rationale of *parens patriae* was the idea of a personal or moral deficiency that required fixing.<sup>259</sup> Juvenile courts had to play two roles: rehabilitating children and protecting the community from dangerous young people.<sup>260</sup> With these dual goals, confinement designed to coerce certain behaviors from wayward young people is difficult to distinguish from punishment.

## 2. Psychiatric institutions

Historian Elliott Young has recently analyzed data on the rise of civil commitments to psychiatric institutions in the first half of the twentieth century, arguing that, at its peak, rates of mass civil confinement were equivalent to those of modern-day mass criminal incarceration.<sup>261</sup> In 1961, it was estimated that, of the approximately 800,000 people in psychiatric institutions, 90% had been involuntarily confined.<sup>262</sup> The United States reached an all-time high of confining people in prisons and jails in 2007, doing so at a rate of 760 people per 100,000, for a total of 2.3 million people.<sup>263</sup> In 1955, the aggregated confinement rate for all psychiatric institutions and

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257. *See id.* at 208, 212-13. Chávez-García notes that California’s race-based intelligence hierarchy, with whites at the top, Black children in the middle, and Mexicans at the bottom, stemmed from racist beliefs long held in the West. *See id.* at 213-14. In Texas, for example, intelligence testers working with a different set of inherited racist beliefs placed Black children on the bottom, Mexicans in the middle, and white children on top. *See id.* at 213.

258. *See id.* at 214-26. Chávez-García notes that although the recommendation was to send the children to state psychiatric institutions for “treatment” and sterilization, in practice the school often sent them to a separate reform school for older boys in order to improve its intelligence-testing numbers. *See id.* at 201, 219-26.

259. *See FELD, supra* note 32, at 76.

260. *See id.* at 77.

261. *See YOUNG, supra* note 17, at 62-63.

262. *Jackson v. Indiana*, 406 U.S. 715, 737 n.22 (1972) (citing *Hearings: Constitutional Rights of the Mentally Ill, supra* note 7, at 11, 43 (statement of Sen. Alexander Wiley, Member, S. Comm. on the Judiciary & statement of Albert Deutsch)).

263. *YOUNG, supra* note 17, at 62.

prisons was also 760 people per 100,000,<sup>264</sup> but civil commitment accounted for 82% of confinements.<sup>265</sup> Although imprisonment rates were much lower in 1955, the rate of involuntary civil commitment meant that the total confinement rate was as high as in 2007.<sup>266</sup>

The populations of psychiatric institutions grew rapidly in the early twentieth century before reaching this peak.<sup>267</sup> At the turn of the century, this growth was fueled by an overrepresentation of immigrants, causing panic about “insane aliens.”<sup>268</sup> In 1906, the U.S. Census Bureau was concerned enough to publish a special report entitled *Insane and Feeble-Minded in Hospitals and Institutions 1904*.<sup>269</sup> The report sorted the population into “White” and “Colored,” and evaluated only whether those labeled “White” were foreign-born.<sup>270</sup> This necessarily limited sample still shows a staggering overrepresentation of immigrants in psychiatric institutions. Although white foreign-born people older than ten years of age comprised only 20% of the population in 1900, they represented 34% of those confined to psychiatric institutions at the end of 1903.<sup>271</sup> On the East Coast, they reached over 40% of those in psychiatric institutions, and in the West, 50%.<sup>272</sup>

The entanglement of the immigration system with state civil confinement facilities continued, with a *New York Times* headline in 1912 complaining of “too many insane aliens.”<sup>273</sup> The article reported that New York State was expending one-sixth of its annual revenues on caring for its confined mentally ill, and the article blamed the influx of immigrants for this burden.<sup>274</sup>

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264. *Id.* at 63 (citing Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 43-44 (2011)); cf. Appleman, *supra* note 54, at 435 (“By 1923, asylums incarcerated more individuals than did all other types of custodial institutions combined.”).

265. See Harcourt, *supra* note 264, at 41 (describing the 1955 rate of confinement in psychiatric institutions as 620 people per 100,000). The United States institutionalized people in psychiatric institutions at rates near or above 600 adults per 100,000 throughout the 1940s and 1950s. *Id.* at 42 fig.1.

266. See YOUNG, *supra* note 17, at 62-63, 62 fig.2.4.

267. See *id.* at 61, 61 fig.2.3.

268. See *id.* at 60-61 (capitalization altered) (quoting *Too Many Insane Aliens. Lunacy Commission Wants Legislation to Facilitate Their Deportation*, N.Y. TIMES, Mar. 18, 1912, at 9).

269. See *id.* at 60-61.

270. See, e.g., BUREAU OF THE CENSUS, DEP’T OF COM. & LAB., *INSANE AND FEEBLE-MINDED IN HOSPITALS AND INSTITUTIONS 1904*, at 82 tbl.3 (1906).

271. YOUNG, *supra* note 17, at 61.

272. *Id.*

273. *Too Many Insane Aliens. Lunacy Commission Wants Legislation to Facilitate Their Deportation*, *supra* note 268, at 9 (capitalization altered).

274. See *id.*

In 1901, the Supreme Court placed confinement in psychiatric institutions under some constitutional oversight in *Simon v. Craft*,<sup>275</sup> ruling that the Fourteenth Amendment's Due Process Clause required Alabama civil commitment proceedings to give a supposedly insane person notice and an opportunity to defend herself.<sup>276</sup> In practice, however, some states allowed notice to be given to friends or family members rather than the detained person,<sup>277</sup> and the opportunity to defend oneself did not always mean that a person had to be present at her hearing.<sup>278</sup> Civil commitment continued to be based on a treatment rationale, with faith in physicians over process. Some states allowed commitment solely based on medical testimony, allowing only postcommitment appeals or habeas relief rather than any kind of precommitment hearing.<sup>279</sup> A 1953 analysis of commitment statutes described well the sentiment of the time, noting that "there is little to fear from 'wrongful commitments' with competent and honest psychiatrists."<sup>280</sup> Despite the Court's holding in *Simon v. Craft*, state processes for civil commitment remained largely unchecked through the first half of the twentieth century.<sup>281</sup>

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275. 182 U.S. 427 (1901).

276. *See id.* at 436-37. The extremely high rates of civil commitment, as well as the impact of civil commitment on women in higher classes of society who had been committed by their husbands, meant there was more discussion of the legal procedures for civil commitment. In the late nineteenth century, E.P.W. Packard, who had been committed by her husband, succeeded in getting some states to pass statutes requiring jury trials for civil commitment. *See* Klein & Wittes, *supra* note 27, at 158-60. *But see* THOMAS BROWN, DOROTHEA DIX: NEW ENGLAND REFORMER 338-40 (1998) (describing the conflict between renowned reformer Dorothea Dix's paternalistic attitude toward those committed for insanity and Packard's focus on judicial process). Jury trials did not necessarily result in decarceration: In Illinois, where Packard's reform efforts were centered, jury trials resulted in more commitments of supposedly "sane" people than other forms of procedure. *See* William J. Curran, *Hospitalization of the Mentally Ill*, 31 N.C. L. REV. 274, 276 (1953). Jury trials gradually fell out of favor by the mid-twentieth century. *See id.* Some historians have argued that this move away from process concerns was driven by mounting anxiety about the need to institutionalize supposedly insane immigrants. *See, e.g.,* Simon & Rosenbaum, *supra* note 166, at 15-16 ("Concerns over the fate of impoverished laborers living in cities swollen with uneducated immigrants displaced an earlier generation's concerns about over-incarceration [in psychiatric institutions] without due process."). By 1953, only Texas required juries for civil commitment. *See* Curran, *supra*, at 276.

277. Curran, *supra* note 276, at 280.

278. *See id.* at 282-83.

279. *See id.* at 284.

280. *See id.*

281. *See* William H. Fisher & Thomas Grisso, *Commentary: Civil Commitment Statutes—40 Years of Circumvention*, 38 J. AM. ACAD. PSYCHIATRY & L. 365, 365 (2010) ("Before the late 1960s, commitment standards were so ill-defined that nearly unlimited latitude was available to judges and to interested parties seeking to have an individual admitted to and retained in a psychiatric institution.").

3. Narcotics farms and sexual psychopath commitment

The rise of involuntary civil commitment to psychiatric institutions based on a treatment rationale encouraged experimentation with other forms of involuntary confinement for treatment. Many of these programs were tied to the criminal legal system and designed to mandate treatment for the kinds of people previously considered socially deviant and confined in workhouses—drunks, addicts, and sexual offenders.<sup>282</sup> Institutions for those addicted to narcotics were often known as “narcotics farms,” while those with supposedly “psychopathic personalities” could be confined to psychiatric institutions. With the advent of these programs, a second therapeutic confinement scheme, which focused more on dangerousness and antisocial behavior rather than ostensibly benevolent care, arose parallel to the criminal system. The psychiatrist who pioneered the theory and development of narcotics farms began his career as an assessor of immigrants on Ellis Island, which is unsurprising because the first narcotics panic was also partially an immigrant panic.<sup>283</sup> The rationales for confinement to these new institutions show the emergence of dangerousness-based justifications alongside supposedly paternalistic treatment justifications.

In the nineteenth century, some reformers tried and largely failed to create inebriate asylums,<sup>284</sup> alongside other forms of civil confinement, to treat “[h]abitual drunkards.”<sup>285</sup> Reform-minded groups had become concerned with the drinking habits of certain other groups, including Catholic immigrants.<sup>286</sup> At the time, public drunkenness was a crime, and courts typically viewed

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282. See *supra* Part I.B.1. Although those addicted to drugs or alcohol had long been confined to workhouses, they were also often included in statutes governing the confinement of the mentally ill, and their confinement was constitutionally justified on the same paternalistic basis. See Alan M. Dershowitz, *Constitutional Dimensions of Civil Commitment*, in 4 *DRUG USE IN AMERICA: THE PROBLEM IN PERSPECTIVE* 397, 413, 417 (1973).

283. See CAROLINE JEAN ACKER, *CREATING THE AMERICAN JUNKIE: ADDICTION RESEARCH IN THE CLASSIC ERA OF NARCOTIC CONTROL* 129, 158 (2002). Historian Caroline Jean Acker speculates that the complex task of screening immigrants was perfectly suited to young psychiatrists seeking to create models for diagnosis. See *id.* at 129-30.

284. See David T. Courtwright, *A Century of American Narcotic Policy*, in 2 *EXTENT AND ADEQUACY OF INSURANCE COVERAGE FOR SUBSTANCE ABUSE SERVICES: COMMISSIONED PAPERS ON HISTORICAL, INSTITUTIONAL, AND ECONOMIC CONTEXTS OF DRUG TREATMENT* 1, 3 (Drug Abuse Servs. Rsch. Series No. 3, 1992) (describing largely voluntary inebriate asylums and noting the failure of late-nineteenth-century efforts to involuntarily institutionalize people suffering from addiction). *But see* Kathleen Thomsen Hall & Paul S. Appelbaum, *The Origins of Commitment for Substance Abuse in the United States*, 30 *J. AM. ACAD. PSYCHIATRY & L.* 33, 34-42 (2002) (discussing the enactment of substance-commitment codes in fourteen states in the late nineteenth century despite widespread opposition).

285. See Hall & Appelbaum, *supra* note 284, at 33.

286. See Courtwright, *supra* note 284, at 2.

confinement for drunkenness more as an exercise of the state's coercive police power than the state's benevolence.<sup>287</sup> Unlike other forms of civil confinement justified by the *parens patriae* power, courts required due process of law to civilly confine inebriates.<sup>288</sup>

Narcotics use, although widespread, received much less attention until it became linked to the same groups targeted by other civil confinement schemes.<sup>289</sup> In the 1910s and early 1920s, heroin use became associated with young white immigrant men,<sup>290</sup> just as opium had been associated with Chinese people.<sup>291</sup> Reformers aggressively emphasized a link between heroin, cocaine, and crime,<sup>292</sup> and Congress began criminalizing unregistered narcotics distributors and unscrupulous prescribers.<sup>293</sup>

The originators of civil commitment for narcotics users also saw “the addicts”<sup>294</sup> as “vicious and declassé.”<sup>295</sup> The psychiatric construction of the addict paralleled the nineteenth-century construction of the deserving and undeserving poor that resulted in the creation of workhouses. This construction stemmed from the work of Lawrence Kolb, who spent six years as a psychiatrist screening and classifying immigrants on Ellis Island.<sup>296</sup> Kolb distinguished two categories of addicts—“innocent” and “vicious” types—the first “accidental” or “normal,” and the second “psychoneurotic” or “psychopathic.”<sup>297</sup> These distinctions mirrored those that had historically been used to classify the civilly confined—with Protestant Anglo Americans, seen as deserving and reformable, being sent to almshouses or paroled at home, and Irish immigrants and their children, seen as incorrigible or lazy, being sent to workhouses or reform schools.<sup>298</sup>

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287. See, e.g., *In re Janes*, 30 How. Pr. 446, 452-54 (N.Y. Sup. Ct. 1866) (contrasting the commitment of an “inebriate” with that of a “lunatic” and concluding that “[l]unatics may be rightfully restrained of their liberty without legal process and without the intervention of a committee . . . [but] whoever confines an inebriate must do so by due process of law”).

288. See *id.* at 453; see also Hall & Appelbaum, *supra* note 284, at 39-40 (collecting case studies).

289. See Courtwright, *supra* note 284, at 2-4.

290. See *id.* at 3.

291. See *id.* at 2, 5 tbl.1.

292. See *id.* at 5-6.

293. See *id.* at 6-7.

294. I use “the addict” here in the same way as “the poor” in Part I—to describe the categorization of the time. Narcotics were relatively new, and doctors pathologized “the addict” in creating civil treatment centers.

295. See Courtwright, *supra* note 284, at 10.

296. See ACKER, *supra* note 283, at 129-30.

297. *Id.* at 142.

298. See *supra* Parts II.A, III.B.1.

The federal government led the way in confining people addicted to narcotics. In 1929, Congress passed the Narcotic Farms Act,<sup>299</sup> which established two U.S. Public Health Service (PHS) institutions at Lexington, Kentucky and Fort Worth, Texas.<sup>300</sup> Walter Treadway, the mastermind of the PHS facilities, had also trained by screening immigrants at Ellis Island.<sup>301</sup> The facilities were termed “narcotic farms,”<sup>302</sup> paralleling rural “work farm” workhouses like the one at issue in *United States v. Moreland*.<sup>303</sup> Kolb was appointed as the Lexington facility’s first medical director, overseeing its construction and the creation of its treatment regimen.<sup>304</sup> From the outset, both facilities were intended to function as both prison and treatment center.<sup>305</sup> Kolb had defined two categories of patients: those accidentally addicted to narcotics through medical treatment, and those whose “psychopathic” profile led to addiction.<sup>306</sup> At Lexington, psychiatrists refined these typologies—predictably, the “true psychopath[s]” were usually immigrants or first-generation Americans,<sup>307</sup> whereas the “accidental[.]” addicts usually had both parents born in the United States.<sup>308</sup> These early experiments in civil confinement in narcotics farms would pave the way for federal and state civil commitment codes for those addicted to narcotics passed during the second half of the twentieth century.<sup>309</sup>

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299. Act of Jan. 19, 1929, ch. 82, 45 Stat. 1085 (repealed 1944).

300. See *id.* §§ 2, 5, 45 Stat. at 1085-86; James F. Maddux, *Clinical Experience with Civil Commitment*, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 35, 35-36 (Carl G. Leukefeld & Frank M. Tims eds., Nat’l Inst. on Drug Abuse Rsch. Monograph No. 86, 1988). Zealous federal enforcement efforts aimed at preventing doctors from prescribing narcotics to addicts led to the closure of most outpatient treatment clinics in the early twentieth century. See Dershowitz, *supra* note 282, at 414-15.

301. See ACKER, *supra* note 283, at 158-59.

302. See *id.* at 158.

303. See *supra* Part III.A.

304. ACKER, *supra* note 283, at 163-64.

305. *Id.* at 158.

306. See *id.* at 176.

307. See *id.* at 178.

308. See *id.* at 176, 178.

309. See Arthur Robin Williams, Shelly Cohen & Elizabeth B. Ford, *Statutory Definitions of Mental Illness for Involuntary Hospitalization as Related to Substance Use Disorders*, 65 PSYCHIATRIC SERVS. 634, 635 (2014) (describing the rise of civil-commitment codes in the 1960s and 1970s); see also NARCOTIC ADDICT EVALUATION AUTH., STATE OF CAL. DEP’T OF CORR., ALL ABOUT THE CIVIL ADDICT PROGRAM 1 (1988) (California); William J. Curran, *Massachusetts Drug Addiction Act: Legislative History and Comparative Analysis*, 1 HARV. J. ON LEGIS. 89, 91-95 (1964) (New York and Massachusetts); Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438 (codified in scattered sections of the U.S. Code) (federal).

Similar to juvenile detention, the changing racial demographics of individuals confined to narcotics facilities mirrored changing constructions of deviancy. When the PHS facilities were first constructed, narcotics use was seen as a problem large among white people and Chinese immigrants.<sup>310</sup> But over the first half of the twentieth century, the population of Black and Latine people in civil narcotics facilities exploded.<sup>311</sup> In 1936, only about 1% of those confined at the Lexington facility were “Hispanic.”<sup>312</sup> By 1966, over a quarter were.<sup>313</sup> Similarly, the percentage of Black people admitted to PHS facilities went from about 10% between 1945 and 1950 to over 40% between 1955 and 1960.<sup>314</sup>

Around the same time that the federal government established the two narcotics farms, states began confining those with supposedly “psychopathic” personalities, usually “sexual psychopaths.”<sup>315</sup> In 1939, Minnesota passed a law targeted at “psychopathic personalit[ies],” defined as someone with “emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts,” or some combination of these characteristics, that rendered him “irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.”<sup>316</sup> The law provided that statutes applying to “insane persons” should also apply to people with “psychopathic personalit[ies],” allowing for their confinement.<sup>317</sup> The confinement procedure was fairly formal; the accused person could have counsel assigned, and there would be an examination by two doctors and a formal hearing.<sup>318</sup> In 1940, the Supreme Court upheld the statute against a constitutional challenge, holding that the procedures were facially valid.<sup>319</sup> But it did not invoke the *parens patriae* doctrine. Instead, it cited the legislature’s power to control “a dangerous element in the community,”<sup>320</sup> or the state’s police power. Like civil commitment for narcotics addiction, the

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310. See Courtwright, *supra* note 284, at 3, 11.

311. See *id.* at 11-15.

312. *Id.* at 12.

313. Courtwright, *supra* note 284, at 12.

314. See *id.* at 13, fig.1.

315. See TREVOR HOPPE, ILAN H. MEYER, SCOTT DE ORIO, STEFAN VOGLER & MEGAN ARMSTRONG, WILLIAMS INST. UCLA SCH. OF L., CIVIL COMMITMENT OF PEOPLE CONVICTED OF SEX OFFENSES IN THE UNITED STATES 3 (2020). Between 1935 and 1955, twenty-six states and D.C. passed commitment statutes for “sexual psychopath[s]” and “mentally disordered sex offender[s].” See *id.* at 2-3.

316. See Act of Apr. 21, 1939, ch. 369, §§ 1-2, 1939 Minn. Laws 712, 712-13.

317. See *id.* § 2, 1939 Minn. Laws at 713.

318. *Id.*

319. See *Minnesota ex rel. Pearson v. Prob. Ct. of Ramsey Cnty.*, 309 U.S. 270, 276-77 (1940).

320. See *id.* at 275; see also Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV. 549, 572 (2009).

confinement of “psychopathic personalities” moved the rationales for civil confinement toward being dangerousness-based, rather than paternalistic.

Although the initial legal justifications for civil commitment were based upon paternalistic impulses, states began to use more explicitly dangerousness-based justifications for civil confinement. Much like workhouses, these new forms of civil confinement targeted social deviance, using indefinite confinement outside of the criminal legal system for incapacitation and public safety. Although white or Chinese immigrants were often targeted initially, due to changing racializations of immigrants in the popular imagination, Black and Latine people began to be confined at higher rates. The dangerousness- and deviance-based rationales for civil confinement prefigure the civil confinement of perceived ideological deviants in the mid-century, specifically Japanese American internment and ideology-based immigration detention.

### C. Japanese American Internment and Immigration Detention

For many scholars, the history of preventive detention begins with World War II and Japanese American internment,<sup>321</sup> which began in the early months of 1942.<sup>322</sup> Through the mid-century, immigration detention also took an ideological turn, with noncitizens detained and removed based on the perceived dangerousness of their Communist ideologies. This Subpart examines the birth of this form of national security detention within the context of the existing civil confinement scheme, which had almost reached its apex at the time. In 1948, 627 out of every 100,000 adults were institutionalized in psychiatric facilities.<sup>323</sup> Although we do not have national data from 1940, more than 44,000 children were present in juvenile institutions during the 1950 census.<sup>324</sup> For context, only around 178,000 people were present in state and federal prisons during the 1950 census.<sup>325</sup>

Although the explicit justifications for civil confinement institutions largely relied upon the state’s benevolent *parens patriae* power, the history of these institutions reveals a desire to control socially disfavored groups, including immigrants and their children. Throughout the early twentieth century, the rationales for confinement became more dangerousness-based,

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321. See, e.g., MASUMI IZUMI, THE RISE AND FALL OF AMERICA’S CONCENTRATION CAMP LAW: CIVIL LIBERTIES DEBATES FROM THE INTERNMENT TO MCCARTHYISM AND THE RADICAL 1960S, at 18 (2019) (noting that “with the exception of during the Civil War . . . prior to World War II—even in national security crises—the American government never officially resorted to preventive detention for internal security purposes”).

322. See *id.*

323. Harcourt, *supra* note 264, at 41.

324. See CAHALAN, *supra* note 8, at 104 tbl.5-1.

325. See *id.* at 29 tbl.3-2.

with the establishment of narcotic farms and “sexual psychopath” commitment.<sup>326</sup> Viewed through this lens, the federal turn to carceral control of perceived ideological deviants is less sudden, and can be seen instead as more a natural extension of a state carceral strategy that had been expanding since the mid-1800s.

Japanese American internment and ideology-based immigration detention were not paternalistic, but were instead justified by a desire to contain supposedly dangerous and subversive ideologies. They were also both run in large part by the INS. Although courts had routinely approved civil confinement based on paternalistic justifications, the Supreme Court became increasingly reticent to evaluate these ideology-based confinements. The Justices refused to evaluate the detention itself, instead taking pains to examine only the policies that inevitably led to detention. By justifying civil confinement based on danger, race, and ideology, these forms of confinement became the catalyst for public and judicial skepticism of the state’s ostensibly benevolent power to civilly confine.

### 1. Japanese American internment

Japanese American internment was, of course, different in important ways from other forms of mass civil confinement at the time—it was explicitly racialized, justified by executive order rather than statute, and explicitly connected to the war. But with the additional context of exponentially expanding civil confinement that initially targeted immigrants, it is perhaps less surprising that xenophobic fears in the mid-twentieth century resulted in carceral solutions.<sup>327</sup>

Through Japanese American internment, the Immigration and Naturalization Service (INS) played a central role in the federal scheme to control supposedly dangerous enemy ideologues through internment. Although the program of Japanese American internment did not distinguish between Japanese American citizens and noncitizens,<sup>328</sup> the INS ran much of its operations.<sup>329</sup> Beginning in 1942, people of Japanese, Italian, and German

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326. See *supra* Part III.B.3.

327. Historian Natsu Taylor Saito places Japanese American internment “in a long and on-going history of the use of internment as a tool for controlling the Other,” in contrast to how it is commonly viewed as “an aberration from the norm of constitutional protection that has been acknowledged as unjust.” Saito, *supra* note 27, at 175.

328. See IZUMI, *supra* note 321, at 22-24.

329. See TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 43 (2003). The FBI arrested most people and then transferred them to the INS. See *id.* at 43, 55. The INS temporarily held people in “detention stations” where they received initial hearings, after which the INS “recommended release, parole, or internment.” *Id.* at 56. Japanese Americans could be held in the INS facilities for  
*footnote continued on next page*

ancestry—referred to as “alien enemies”—were forced to register with the Attorney General.<sup>330</sup> The INS interned people in existing immigration detention facilities and makeshift “detention stations,” or held them in city and county jails.<sup>331</sup> Roughly a thousand “enemy aliens” were interned on Ellis Island alongside those seeking entry to the United States.<sup>332</sup> The United States also asked its Latin American allies to identify “potentially dangerous aliens” of Japanese, German, or Italian ancestry.<sup>333</sup> Notably, Peru sent more than 1,700 people of Japanese descent to the United States.<sup>334</sup> The U.S. Navy confiscated their passports in transit and, once they arrived, “the INS informed them that they were illegally entering the United States” because they had no valid passports and confined them in internment facilities in Texas and New Mexico.<sup>335</sup> Although legally justified through executive orders rather than immigration statutes,<sup>336</sup> the INS relied on its existing immigration detention infrastructure to coordinate and enforce Japanese American internment.

Much ink has been spilled about the injustice and unconstitutionality of Japanese American internment, including recently by the Court itself.<sup>337</sup> What is perhaps most notable, during an era of mass civil confinement with little process, is how hard the Court worked to avoid evaluating the constitutionality of Japanese American internment itself. None of the three

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extended periods of time, regardless of the agency’s recommendation or whether they were found to be dangerous. *See id.* at 58-63. Only if they were transferred to supposedly longer-term War Relocation Authority internment camps would they leave INS jurisdiction over their detention. *See id.* at 63-65.

330. *See* Proclamation No. 2537, 7 Fed. Reg. 329, 329 (Jan. 17, 1942). The dubious legal history of detaining “alien enemies” stems from the Alien Enemies Act, enacted as part of the infamous Alien and Sedition Acts of 1798. *See* Klein & Wittes, *supra* note 27, at 102. The “alien enemies” provision, used repeatedly over the years, is the only part of the Alien and Sedition Acts that has endured. *See id.* at 102-04.
331. KASHIMA, *supra* note 329, at 43, 104-23 (describing in detail the different short- and long-term INS internment camps).
332. *See Post-Peak Immigration Years: 1925-1954*, NAT’L PARK SERV., <https://perma.cc/X48L-QX7B> (last updated Feb. 26, 2015).
333. *See* KASHIMA, *supra* note 329, at 94.
334. *Id.* at 99.
335. *Id.* at 100. The United States tried to deport these Japanese Peruvians back to Peru toward the end of World War II, but Peru refused to accept them. *Id.* at 101-02. The United States then tried to deport them to Japan under “the preplanned rationale of their ‘illegal’ immigration,” but many refused to leave. *Id.* at 102.
336. *See id.* at 49-50.
337. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“[T]his Court [has] the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.” (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

cases examining Japanese American internment—*Hirabayashi v. United States*,<sup>338</sup> *Ex parte Endo*,<sup>339</sup> or *Korematsu v. United States*<sup>340</sup>—explicitly evaluated the constitutionality of the executive detention of Japanese Americans.

In each case, the Court artfully avoided evaluating the detention that was the result of the executive order at issue. In *Hirabayashi*, Gordon Hirabayashi, a senior at the University of Washington, was tried and sentenced to prison both for failing to remain at home during a curfew order and for failing to leave his home and report to a “Civil Control Station” for “evacuation.”<sup>341</sup> Had he reported to the station, he likely would have been evacuated to a designated internment camp.<sup>342</sup> Because his sentences on both counts were to run concurrently, the Court declined to evaluate the legality of the executive order authorizing the evacuation; instead, it evaluated only the curfew order.<sup>343</sup>

The Court recited at length the dangers tied to the attack on Pearl Harbor and the importance of wartime exigencies, as balanced against the relative inconvenience of a small curfew.<sup>344</sup> “[T]he danger of espionage and sabotage, in time of war and of threatened invasion,” the Court reasoned, “calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”<sup>345</sup> Because individuals of Japanese ancestry had not “assimilat[ed] as an integral part of the white population” and remained vulnerable to “the dissemination of propaganda” by the Japanese government, the U.S. government was justified in differentiating them from white citizens via a curfew.<sup>346</sup> Having thus upheld *Hirabayashi*’s conviction for violating the curfew order, the Court, with relief, reiterated that it did not need to address either the legality of evacuation or “the Government’s argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.”<sup>347</sup>

Similarly, the Court in *Ex parte Endo*—a habeas case specifically requesting release from internment—managed to avoid the constitutional question.<sup>348</sup> After the government conceded that there was no evidence that Mitsuye Endo

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338. 320 U.S. 81 (1943).

339. 323 U.S. 283 (1944).

340. 323 U.S. 214 (1944).

341. *See* 320 U.S. at 83-84.

342. *See id.* at 88-89.

343. *See id.* at 85, 105.

344. *See id.* at 93-102.

345. *Id.* at 100.

346. *See id.* at 96, 98, 101.

347. *See id.* at 105.

348. *See* 323 U.S. 283, 285, 297 (1944).

was “disloyal[],”<sup>349</sup> the Court decided only the narrow question of whether the War Relocation Authority had the power to detain “concededly loyal” citizens for purely administrative purposes.<sup>350</sup> It did not rule on the legality of the executive orders authorizing internment. The Court noted that the executive orders never explicitly mentioned detention at all; therefore, they could not justify the detention of a concededly *loyal* citizen on such a thin reed as administrative convenience.<sup>351</sup> It did not question evacuations justified by the need to guard against espionage and sabotage;<sup>352</sup> and it assumed that Endo’s original evacuation and detention were justified.<sup>353</sup> But once her loyalty was conceded, the Court reasoned, the executive orders no longer provided a colorable justification for detention.<sup>354</sup>

Even in *Korematsu*, which is widely understood as the case that upheld the legality of Japanese American internment,<sup>355</sup> the Court took extreme pains to avoid evaluating the constitutionality of the detention itself. In *Korematsu*, the Court had to evaluate the kind of exclusion order it had declined to examine in *Hirabayashi*. Fred Korematsu, like Gordon Hirabayashi, was convicted for remaining in an exclusion zone.<sup>356</sup> By remaining at home, he also refused to go to the assembly center that would have taken him to an internment camp.<sup>357</sup> After his conviction for remaining in an exclusion zone, he was nevertheless confined in an internment camp.<sup>358</sup> But the Court explicitly declined to evaluate “the whole subsequent detention program in both assembly and relocation centers” or the validity of provisions that would have required Korematsu to report to an internment camp.<sup>359</sup> “[W]ere this a case,” the Court opined, “involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice”—as in *Ex parte Endo*—“[o]ur task would be simple, our duty clear.”<sup>360</sup> But the Court protested, “we are dealing specifically with

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349. *See id.* at 294.

350. *See id.* at 295-97.

351. *See id.* at 300-04.

352. *See id.* at 302.

353. *Id.* at 301-02.

354. *See id.* at 302.

355. *See, e.g.,* Abby Vesoulis & Abigail Simon, *The Supreme Court Overturned a Ruling that Enabled Internment of Japanese-Americans During World War II*, TIME (June 26, 2018, 12:05 PM EDT), <https://perma.cc/HZ8A-TZ4K>.

356. *See Korematsu v. United States*, 323 U.S. 214, 216-17 (1944).

357. *See id.* at 230 (Roberts, J., dissenting).

358. *Id.* at 230-31.

359. *See id.* at 221-22 (majority opinion) (“It is sufficient here for us to pass upon the [exclusion] order which [Korematsu] violated.”).

360. *See id.* at 223.

nothing but an exclusion order.”<sup>361</sup> Echoing the reasoning in *Hirabayashi*, exclusion was a relatively small price to pay when placed against the potential “invasion of our West Coast” and the danger of “the presence of an unascertained number of disloyal” citizens of Japanese ancestry.<sup>362</sup>

The dissenters, including most famously Justice Jackson, highlighted the Court’s willful blindness to the real constitutional issue. The only way Korematsu could have avoided violating the exclusion order was to “submi[t] to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.”<sup>363</sup> Even during this time of mass civil confinement, the Court was uncomfortable evaluating constitutional justifications for detention based purely on race and perceived ideological dangerousness. A year after *Endo* and *Korematsu*, in August 1945, Japan surrendered and most internment camps closed shortly afterwards, but the INS continued detaining foreign nationals with U.S.-citizen children on Ellis Island, as well as at Crystal City, Texas, until January 1948.<sup>364</sup>

## 2. Mid-century immigration detention

Despite judicial distaste, Japanese American internment was, of course, not immediately repudiated. In fact, detention for “disloyalty” would only expand and gain statutory support in the early 1950s as other kinds of civil confinement grew. The ideology-based detentions that garnered the most publicity were sanctioned under the immigration laws, leading to a series of high-profile cases assessing immigration detention.

As is evident from the series of Court opinions discussing Japanese American internment, there were rising domestic fears of internal espionage or sabotage, which resulted in more political latitude to restrict civil liberties.<sup>365</sup> The fear of territorial invasion created by World War II and Pearl Harbor was further stoked by rising tensions between the United States and the USSR.<sup>366</sup> In 1950, these fears culminated in the passage of the Internal Security Act,<sup>367</sup> split into the “Subversive Activities Control Act”<sup>368</sup> and the

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361. *See id.*

362. *See id.* at 218-20, 223-24.

363. *Id.* at 243 (Jackson, J., dissenting).

364. KASHIMA, *supra* note 329, at 123.

365. *See* IZUMI, *supra* note 321, at 44-45.

366. *See id.*

367. *See id.* at 46.

368. *See* Internal Security Act of 1950, ch. 1024, §§ 1-32, 64 Stat. 987, 987-1019 (codified as amended in scattered sections of the U.S. Code).

“Emergency Detention Act.”<sup>369</sup> The first part required Communist organizations to register with the government and created more restrictive immigration and naturalization laws targeting “subversive activities.”<sup>370</sup> The second authorized, during a presidential declaration of an “internal security emergency,” the arrest and detention of anyone the government suspected “probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.”<sup>371</sup> The Emergency Detention Act provisions, while never officially used,<sup>372</sup> set the stage for the detention of perceived Communists under the immigration laws.

The Subversive Activities Control Act specified Communists as a class of excludable noncitizens.<sup>373</sup> As its justification, Congress emphasized that Communism presented “a clear and present danger to the security of the United States” through the use of “espionage, sabotage, terrorism, and any other means” to prepare for the “overthrow of the Government of the United States by force and violence.”<sup>374</sup> This threat required immigration restrictions, Congress argued, because the worldwide Communist movement was directed by the USSR.<sup>375</sup>

The Internal Security Act expanded immigration detention; the detainee population of Ellis Island alone increased from 400 to 1,200 people after its passage.<sup>376</sup> If the government charged a noncitizen with deportability based on Communist affiliation,<sup>377</sup> it had discretion, pending the outcome of that person’s immigration proceeding, to detain her, release her on bond amounting to “not less than \$500,” or release her on conditional parole.<sup>378</sup> In 1951, there was a mass arrest of allegedly Communist noncitizens living in the New York

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369. *See id.* §§ 100-16, 64 Stat. at 1019-31, *repealed by* Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified as amended in scattered sections of the U.S. Code).

370. *See* IZUMI, *supra* note 321, at 46.

371. *See* Internal Security Act of 1950 §§ 102-03, 64 Stat. at 1021 (capitalization altered).

372. IZUMI, *supra* note 321, at 1, 3.

373. *See* Internal Security Act of 1950 § 22, 64 Stat. at 1006. Earlier deportations of political radicals, such as the “Red Scare” raids that resulted in the 1919 deportation of Emma Goldman on the so-called “Soviet Ark,” *see* IZUMI, *supra* note 321, at 17, 188 n.27, took place under the Anarchist Exclusion Act and its 1918 expansion, *see* Burt Neuborne, Harisiades v. Shaughnessy: A Case Study in the Vulnerability of Resident Aliens, in IMMIGRATION STORIES, *supra* note 140, at 87, 95; *see also* Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (excluding “anarchists”); Immigration Act of 1918, ch. 186, §§ 1-2, 40 Stat. 1012, 1012 (authorizing the deportation of “anarchists”).

374. *See* Internal Security Act of 1950 § 2, 64 Stat. at 987-89.

375. *See id.*

376. *See Post-Peak Immigration Years: 1925-1954*, *supra* note 332.

377. *See* Internal Security Act of 1950 § 22, 64 Stat. at 1008.

378. *See id.* § 23, 64 Stat. at 1010-12.

area who were confined without bail on Ellis Island under the Internal Security Act.<sup>379</sup> Shortly afterwards, the Supreme Court for the first time addressed a constitutional process challenge to immigration detention.

In *Carlson v. Landon*,<sup>380</sup> four noncitizens, charged as Communists under the Subversive Activities Control Act, challenged the constitutionality of their detention without bail while their immigration cases were pending.<sup>381</sup> They argued that detention based solely on Communist Party membership, without any evidence of flight risk, violated the Fifth and Eighth Amendments.<sup>382</sup> The Court held that detention pending the resolution of deportation proceedings was justified so that detained noncitizens did not have “opportunities to hurt the United States” before removal.<sup>383</sup> Since Congress’s stated purpose for the Internal Security Act was “to deport all alien Communists as a menace to the security of the United States,” the Attorney General could detain noncitizens pending deportation based on “evidence of [Communist Party] membership plus personal activity in supporting and extending the Party’s philosophy concerning violence.”<sup>384</sup> The Court noted that detention without bail for those charged based on Communist Party membership was not a blanket requirement, but was subject to the discretion of the Attorney General—in fact, most noncitizens charged with deportability on this ground received bail.<sup>385</sup> Nevertheless, against the background of mass civil confinement and justified by an Act that also authorized the detention of citizens suspected of espionage, the Court upheld the detention without bail of immigrants charged with Communism because they posed a violent threat to the U.S. government.<sup>386</sup>

Ellen Knauff and Ignatz Mezei were also high-profile detention casualties of the espionage panic at this time. Both were excluded from the United States because they supposedly posed unspecified security risks, which resulted in their extended, and in Mezei’s case indefinite, detentions on Ellis Island.<sup>387</sup> In deciding their cases, the Court took a similar route to its analysis in *Korematsu*: Rather than evaluate the legality of the extended detentions themselves, it

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379. See *Post-Peak Immigration Years: 1925-1954*, *supra* note 332.

380. 342 U.S. 524 (1952).

381. See *id.* at 528-29, 529 n.10.

382. See *id.* at 529 n.10, 533-34.

383. See *id.* at 538.

384. *Id.* at 541.

385. See *id.* at 541-42.

386. See *id.* at 542.

387. See Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 593-94 (2021); Shaughnessy v. United States *ex rel. Mezei*, 345 U.S. 206, 214 (1953).

evaluated only the legality of the exclusions.<sup>388</sup> The Court characterized Mezei's almost two-year detention as a humanitarian response to the "hardships" to him and "inconvenience" to his shipmaster that would have resulted from the original system of confinement on a ship.<sup>389</sup> Rather than detention, his confinement was a "temporary harborage, an act of legislative grace," preferable to being held on a ship or, apparently, thrown into the ocean.<sup>390</sup> In these cases, the Court affirmed what is now known as the "entry fiction" doctrine, or the idea that a noncitizen who has entered the physical borders of the United States may still be treated as being outside of it for purposes of exclusion under the immigration laws.<sup>391</sup>

Justice Jackson dissented from both cases.<sup>392</sup> In *Shaughnessy v. United States ex rel. Mezei*, Justice Jackson critiqued the majority's failure to acknowledge the constitutional issue raised by Mezei's detention.<sup>393</sup> He noted that Ellis Island was Mezei's "refuge" only insofar as "he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian!"<sup>394</sup> For Justice Jackson, "when indefinite confinement becomes the means of enforcing exclusion . . . due process requires that the alien be informed of its grounds and have a fair chance to overcome them."<sup>395</sup>

These civil confinement cases—from *Korematsu* to *Mezei*—show both just how far confinement without process in the name of social order had gone and reveal an increasing discomfort with its lack of constitutional constraints. The Court upheld summary civil confinement of both citizens and noncitizens based on race and ideology without directly evaluating the restriction of liberty at the center of these cases. When the Court did address the constitutional issue directly, as in *Carlson*, it took pains to emphasize features that looked like process—for instance, that most detainees received

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388. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-47 (1950); *Mezei*, 345 U.S. at 213 ("Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding."). The Court granted Ellen Knauff release on bond while her appeal was pending, but she was afterwards returned to Ellis Island for detention. See *supra* note 387, at 594 & n.153.

389. See *Mezei*, 345 U.S. at 209, 215.

390. *Id.* at 215; see *id.* at 220 (Jackson, J., dissenting) ("Government counsel ingeniously argued that Ellis Island is [Mezei's] 'refuge' whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian!").

391. See *Lee*, *supra* note 387, at 567-68, 593-94.

392. See *Knauff*, 338 U.S. at 550-52 (Jackson, J., dissenting) ("The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern."); *Mezei*, 345 U.S. at 218-28 (Jackson, J., dissenting).

393. See *Mezei*, 345 U.S. at 219-21 (Jackson, J., dissenting).

394. *Id.* at 220.

395. *Id.* at 227.

discretionary bail<sup>396</sup>—over dissents that characterized the schemes as more draconian.<sup>397</sup> As a result of these high-profile ideology-, race-, and danger-based confinements, when the public decided civil confinement had gone too far, immigration detention was the first domino to fall.

#### IV. The Creation of an Unconstitutionalized Immigration Detention

The high-profile legal challenges to Japanese American internment and ideology-based immigration detention,<sup>398</sup> combined with a growing deinstitutionalization movement, led to skepticism of the paternalistic rationales underlying an unchecked government power to confine and a reevaluation of the broad exemption of civil confinement schemes from constitutional scrutiny.<sup>399</sup> Over the 1960s and 1970s, the Supreme Court began setting constitutional limits on juvenile detention, civil commitment, and “sexual psychopath” detention, creating a schema that I call civil confinement law. But the Court did not address immigration detention. Right before the Court turned to civil confinement, the INS closed its seaport immigration detention centers and started a new policy of presuming parole pending immigration proceedings.<sup>400</sup> Because of immigration detention’s status as one of the most visible and disfavored forms of civil confinement, it was targeted early on for institutional closure. As a result, ironically, immigration detention would be omitted from this new constitutional regulation. When the Court revisited immigration detention in the twenty-first century, rather than assimilating it into civil confinement law, it carved out an exception by citing

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396. See *Carlson v. Landon*, 342 U.S. 524, 541-42 (1952).

397. See *id.* at 568 (Frankfurter, J., dissenting) (“[W]e are advised by the Solicitor General that it has been the Government’s policy since the Internal Security Act to terminate bail for all aliens awaiting deportation proceedings whom it deems to be present active Communists, barring only those for whom special circumstances of physical condition or family situation compel an exception . . . . All those whom the Government believes to be active Communists are considered unbailable without individualized consideration of risk from their continued freedom.”).

398. See DAN BERGER & TOUSSAINT LOSIER, *RETHINKING THE AMERICAN PRISON MOVEMENT* 44-46 (2018) (discussing how the legal strategies for challenging Japanese American internment were the precursor to the prisoners’ rights movement in the 1960s and 1970s); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 958 & n.123 (1995).

399. See, e.g., HOPPE ET AL., *supra* note 315, at 5 (discussing the “deinstitutionalization” movement, beginning in the 1960s, which turned away from involuntary civil commitment to psychiatric hospitals); Courtwright, *supra* note 284, at 16 (discussing “[d]issatisfaction with the big, revolving-door institutions” for those addicted to narcotics starting in the 1950s).

400. See Herbert Brownell, Jr., U.S. Att’y Gen., Address at Naturalization Ceremonies 5-6 (Nov. 11, 1954), <https://perma.cc/Z66E-7WWE>.

anachronistic nineteenth-century precedent—from the era of civil confinement with extremely limited process.

#### A. The Temporary Closure of Immigration Detention

Ellen Knauff's supporters, in particular, marshalled enormous public outrage about her case.<sup>401</sup> The Court had authorized her detention based on secret government evidence against a background of mass civil confinement and a panic about foreign espionage. Justice Jackson's dissent reflected the beginnings of a public sentiment that the espionage panic and confinement as a remedy had gone too far. Both the *St. Louis Post-Dispatch* and the *New York Post* mounted huge publicity campaigns supporting Ellen Knauff and openly criticized both the Supreme Court's opinion and the lack of process she received.<sup>402</sup> The *New York Post* wrote that "Justice Jackson's dissent . . . far more eloquently voices the American conscience,"<sup>403</sup> while the *New York Times* argued that "the law should be revised."<sup>404</sup> *Time* magazine described the *St. Louis Post-Dispatch*'s publicity campaign for Knauff as "[m]ore effective" than Justice Jackson's dissent.<sup>405</sup> The Justice Department quietly released Knauff and Mezei into the United States soon after the resolutions of their cases.<sup>406</sup> After such negative press associated with people held at Ellis Island, the government began to reevaluate its immigration detention policies.

In 1954—only a few years after *Carlson, Knauff*, and *Mezei*—the government largely stopped detaining noncitizens for the pendency of their immigration proceedings.<sup>407</sup> It closed Ellis Island.<sup>408</sup> Speaking to a group of new citizens at a naturalization ceremony, the Attorney General characterized the government's new detention policy as a "step forward toward humane administration of the Immigration laws."<sup>409</sup> He announced the closure of "six seaport detention facilities,"<sup>410</sup> now deemed unnecessary because "[o]nly those deemed likely to abscond" or whose freedom might be "adverse to the national

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401. See Weisselberg, *supra* note 398, at 958 & nn.123-24.

402. See *id.*

403. *The Banished War Bride*, N.Y. POST, Feb. 14, 1950 (§ 1), at 33.

404. *The Knauff Case*, N.Y. TIMES, May 7, 1950, at 12E.

405. See *Woman with a Country*, TIME, Apr. 17, 1950, at 57, 58.

406. See Lee, *supra* note 387, at 596. Even though Mezei formally lost his case before the Board of Immigration Appeals, the government nevertheless paroled him into the country. Weisselberg, *supra* note 398, at 983-84.

407. See Brownell, *supra* note 400, at 5.

408. Lee, *supra* note 387, at 596.

409. See Brownell, *supra* note 400, at 1, 5.

410. *Id.* at 5-6.

security or the public safety” would be detained.<sup>411</sup> The Attorney General anticipated a reduction in the number of people detained from 38,000 in 1954 to under 1,000 in 1955.<sup>412</sup> As a signal of the twilight of ideology-based detention, Ellis Island’s closure coincided with the beginning of censure proceedings against Joseph McCarthy in the Senate.<sup>413</sup>

For the next twenty-six years, very few people were confined in long-term immigration detention.<sup>414</sup> Instead, most were released while immigration courts heard their cases.<sup>415</sup> César Cuauhtémoc García Hernández has noted how even Justice Clark, who had coordinated Japanese American internment, wrote for a majority of the Supreme Court that this new policy “reflects the

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411. *See id.* at 5.

412. *See id.*

413. *See Lee, supra* note 387, at 596 & n.169.

414. *See* GARCÍA HERNÁNDEZ, *supra* note 211, at 47; MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 6-7* (2004). Historian Kelly Lytle Hernández’s excellent history of the U.S. Border Patrol complicates this view somewhat. *See generally* KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* (2010). Although the INS closed its seaport detention facilities, it continued deporting thousands of Mexicans through regular enforcement and mass deportation operations like the infamous Operation Wetback in 1954. *See id.* at 143-44, 156, 163-64, 169. As part of these removals, people were regularly held in immigration facilities in preparation for voluntary departure or deportation. *See id.* at 198. Because the Border Patrol detained people to facilitate their quick removal, these detentions were likely too brief to generate legal challenges. *See id.* at 143 (noting that, even before the closure of the seaport detention centers, noncitizens detained for removal at the border were held for an average of seven and a half days).

Lytle Hernández describes the Operation Wetback model at work in one border town in 1952:

“Some 100 Border Patrolmen in trucks, cars equipped with radios, and airplanes, touched off a mass raid” . . . By 8 A.M., the officers had apprehended more than three thousand Mexican nationals. By noon, total apprehensions for the day reached five thousand. “All through the morning, trucks and buses shuttled between huge tomato warehouses at Russelltown, used as a temporary detention camp, and the bridge at Hidalgo.” At the bridge, the patrolmen handed the deportees the following note:

You have entered the United States illegally and in violation of the laws of your land and also those of the United States. . . . Wetbacks are unable to work for more than a few hours before they are apprehended and deported. Remember these words and transmit the news to your families and countrymen if you want to do them a favor.

*Id.* at 156 (first quoting *Raiders Hint Employers to Be Prosecuted*, VALLEY EVENING MONITOR (McAllen, Tex.), July 30, 1952; and then quoting *Wetbacks Warned to Stay in Mexico*, CALLER-TIMES NEWS SERV. (Corpus Christi, Tex.), n.d. (on file with the National Border Patrol Museum)). The “deportees were then ‘escorted across the river’ and ‘turned over to Mexican authorities,’” before being “placed on trains with armed guards and transported to the interior of Mexico.” *Id.* (quoting *Raiders Hint Employers to Be Prosecuted, supra*).

415. *See* DOW, *supra* note 414, at 6-7.

humane qualities of an enlightened civilization.”<sup>416</sup> This decarceral instinct, sprung from distrust of the government’s power to confine with little process or justification, would expand to a critique of other forms of mass civil confinement and result in sweeping change to the legal landscape of civil confinement.<sup>417</sup> But during that sweeping change, immigration detention’s vanguard closure meant that the Court had no cause to address it when constitutionally regulating all other forms of civil confinement.

## B. Civil Confinement Law

In the early 1940s, the federal government interned thousands of Japanese Americans. In the 1950s, it passed laws authorizing the arrest and detention of suspected saboteurs. In the 1950s and early 1960s, civil confinement in psychiatric institutions and juvenile facilities reached their highest peaks yet.<sup>418</sup> As part of this carceral trend, prisons also incarcerated a record number of people, reaching 226,344 in the 1960 census, more than seven times the number in 1880.<sup>419</sup>

This mid-century mass incarceration did not go unnoticed. A mass reevaluation of confinement across the criminal and civil systems began in the 1960s.<sup>420</sup> Alongside the civil rights movement, academics, judges, and policymakers began questioning the underlying rationales for confinement, including the mass civil confinement then commonplace.<sup>421</sup> Prison activists became increasingly organized and began demanding reform through collective action and legal challenges, sometimes alongside young people confined in juvenile facilities.<sup>422</sup> Historian Barry Feld notes how, in the 1960s, “a number of

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416. GARCÍA HERNÁNDEZ, *supra* note 211, at 47 (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958)).

417. Outside of the high-profile challenges to immigration detention, it is perhaps unsurprising that immigration detention was the first domino to fall once the public began questioning the paternalistic justifications underlying mass civil incarceration. In *Wong Wing*, the government had compared punishment in the immigration system to summary process in workhouses, *see supra* Part II.C, which were the first civil confinement institutions to face the Court’s constitutional regulation, *see supra* Part III.A. And the Court in *Wong Wing* had noted immigration detention’s similarity to pretrial detention, justified by the police power rather than the *parens patriae* power that enabled other forms of civil incarceration. *See supra* Part II.C. For more on how the shifting justifications for civil incarceration play out in modern civil confinement law cases, *see* Arnold, *supra* note 27. For why immigration detention should fit neatly into the modern canon of civil confinement law, *see* Arnold, *supra* note 31.

418. *See* Simon & Rosenbaum, *supra* note 166, at 16; CAHALAN, *supra* note 8, at 104 tbl.5-1.

419. *See* CAHALAN, *supra* note 8, at 29 tbl.3-2.

420. *See, e.g.*, GARCÍA HERNÁNDEZ, *supra* note 211, at 55.

421. *See id.*; FELD, *supra* note 32, at 89; Simon & Rosenbaum, *supra* note 166, at 16-17.

422. *See* BERGER & LOSIER, *supra* note 398, at 53, 65-67.

political and cultural forces combined to undermine the Progressives' consensus about state benevolence, to erode support for imposing middle-class values on others, and to question the desirability of rehabilitation."<sup>423</sup>

Skepticism of confinement justified by state paternalism grew exponentially. In 1971, David Rothman published his seminal work, *The Discovery of the Asylum*, which described the warehousing of the socially undesirable in mental hospitals and prisons as part of a pattern of social control disguised as benevolence.<sup>424</sup> In September of that same year, prisoners seized control of the Attica Correctional Facility for five days, catalyzing a nascent abolitionist movement that critiqued the foundational justifications for confinement.<sup>425</sup> As a sign of just how much momentum this carceral critique gained, only around ten days later, Congress repealed the Emergency Detention Act portion of the Internal Security Act of 1950, fearing that it could be used to reprise a system resembling Japanese American internment camps.<sup>426</sup> In 1975, the National Advisory Commission on Criminal Justice Standards and Goals, created by President Nixon, wrote that the prison "is obsolete, cannot be reformed, should not be perpetuated through the false hope of forced 'treatment'; it should be repudiated as useless for any purpose other than locking away persons who are too dangerous to be allowed at large in free society."<sup>427</sup>

In the midst of this national atmosphere, the Supreme Court in the late 1960s and 1970s for the first time began setting a series of constitutional limits on the government's power to confine for nonpunitive reasons. These civil confinement opinions came after the Warren Court's famous "due process revolution" in criminal procedure in the 1960s,<sup>428</sup> but were largely a product of the Burger Court.

I explore the development of civil confinement law in other work, but I highlight Gerald Gault's case here to show the beginning of the Court's reexamination of the paternalistic rationales underlying civil confinement. In

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423. FELD, *supra* note 32, at 89.

424. See ROTHMAN, *supra* note 33, at xviii.

425. See Liz Samuels, *Improvising on Reality: The Roots of Prison Abolition*, in *THE HIDDEN 1970S: HISTORIES OF RADICALISM* 21, 21, 26-28 (Dan Berger ed., 2010).

426. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004); Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified as amended in scattered sections of the U.S. Code).

427. GARCÍA HERNÁNDEZ, *supra* note 211, at 55-56 (quoting Corr. Task Force, Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, *Major Institutions*, in *A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION* 3, 22-23 (Calvert R. Dodge ed., 1975)).

428. See Raquel E. Aldana & Thomas O'Donnell, *A Look Back at the Warren Court's Due Process Revolution Through the Lens of Immigrants*, 51 U. PAC. L. REV. 633, 633-36 (2020) (noting that the Warren Court period from 1953 to 1969 coincided with a time when "very few constitutional substantive and procedural due process rights were recognized in the civil context").

*In re Gault*,<sup>429</sup> the Court for the first time imposed process requirements on juvenile commitments. Gerald had challenged his confinement to a juvenile facility for inadequate process.<sup>430</sup>

The Court began by describing the *parens patriae* doctrine as being “a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme,” but critiqued how “its meaning is murky and its historic credentials are of dubious relevance.”<sup>431</sup> Citing the reasoning in *Ex parte Crouse*,<sup>432</sup> the Court noted that the *parens patriae* doctrine was justified by the idea “that a child, unlike an adult, has a right ‘not to liberty but to custody.’”<sup>433</sup> Under this theory, moving the child from parental custody to state custody “does not deprive the child of any rights, because he has none.”<sup>434</sup> The Court reasoned that the distinction between civil and criminal confinement rested on *parens patriae*, noting that “[t]he constitutional and theoretical basis for this peculiar system is—to say the least—debatable.”<sup>435</sup>

The Court then explained how, despite the high ideals involved, the creation of a separate juvenile system had not been realized in practice.<sup>436</sup> For Gerald, the Court emphasized, “It is of no constitutional consequence—and of limited practical meaning—that the institution to which he [was] committed [was] called an Industrial School.”<sup>437</sup> It went on to declare that, “however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.”<sup>438</sup>

Ultimately, the Court did not reject the criminal/civil distinction in juvenile proceedings or mandate that juvenile proceedings follow the precepts of criminal procedure. Instead, it outlined some baseline constitutional process requirements that mirrored some criminal procedural protections. Although it was murky about their constitutional origins,<sup>439</sup> the

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429. 387 U.S. 1 (1967).

430. *See id.* at 4.

431. *See id.* at 16.

432. *See supra* Part I.B.2.

433. *See In re Gault*, 387 U.S. at 17 & n.21 (quoting Curtis C. Shears, *Legal Problems Peculiar to Children’s Courts*, 48 A.B.A. J. 719, 720 (1962)).

434. *See id.*

435. *See id.*

436. *See id.* at 17-22.

437. *Id.* at 27.

438. *Id.*

439. *See id.* at 33, 41, 49, 55 (referencing Fifth Amendment criminal procedure protections in discussions of the required process, but not stating that they apply directly to juvenile proceedings).

Court justified these requirements by the “awesome prospect of incarceration,” whether civil or criminal.<sup>440</sup>

The significance of *In re Gault* to civil confinement law was not lost at the time. The *Harvard Law Review* comment on the case noted that the civil/criminal distinction had “been the dominant justification for relaxed procedural standards in several systems of purportedly ‘civil’ commitment—for juveniles, alcoholics, sexual deviates, narcotics addicts, and especially mental patients.”<sup>441</sup> In each enumerated civil confinement situation, “conduct disturbing to the community triggers an adjudicative proceeding whose sanction of ostensibly benign but nonetheless involuntary confinement is in reality prison-like.”<sup>442</sup> The Court’s emphasis of the prison-like character of the sanctions rather than the civil or criminal label “cast[] a long shadow over the conceptual device which has enabled many commitment systems to isolate themselves from procedural review.”<sup>443</sup>

This analysis would prove to be prescient as the Court turned to civil confinement and began synthesizing civil confinement law. It examined the constitutionality of all the forms of civil confinement so far discussed—including juvenile detention,<sup>444</sup> commitment to psychiatric institutions,<sup>445</sup> and “sexual psychopath” commitment.<sup>446</sup> Instead of the paternalistic *parens patriae* power, all these forms of confinement were brought under the police power’s umbrella, designed for societal safety rather than paternalistic care.

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440. See *id.* at 36-37.

441. See *The Supreme Court, 1966 Term—Constitutional Law: Involuntary Commitment—Juvenile Court Procedures*, 81 HARV. L. REV. 171, 174 (1967).

442. *Id.*

443. See *id.* at 174-75.

444. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that a child charged as a juvenile delinquent with an act that would be a crime if committed by an adult must have such crime “proved beyond a reasonable doubt”); *In re Gault*, 387 U.S. at 55, 57 (1967) (placing constitutional limits on juvenile commitments).

445. See *Addington v. Texas*, 441 U.S. 418, 427, 433 (1979) (requiring a “clear and convincing” standard for civil commitments); *O’Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975) (holding that “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom”); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 250 (1972) (limiting commitments for short-term psychiatric evaluations to a presumptive time period of six months); *Jackson v. Indiana*, 406 U.S. 715, 720, 738 (1972) (requiring that “the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed”); *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966) (holding unconstitutional on equal protection grounds a state law that relaxed the procedural standards for civil commitment following the completion of a prison term).

446. See *Specht v. Patterson*, 386 U.S. 605, 607-10 (1967) (holding unconstitutional a statute authorizing judges in criminal cases to civilly commit people convicted of sexually violent offenses for up to life instead of sentencing them to a prison term).

The cases began to cross-reference each other, pulling standards from different forms of civil confinement. This created what I call 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.<sup>447</sup> These principles include: that the government bears the burden of proof;<sup>448</sup> that there must be some adversarial hearing before a neutral arbiter;<sup>449</sup> that the type and duration of any form of civil confinement must bear a reasonable relationship to its justification;<sup>450</sup> that evaluative confinement is presumptively limited to around six months;<sup>451</sup> that a criminal charge or conviction cannot be a shorthand for dangerousness;<sup>452</sup> and that process can be assessed along a scale,<sup>453</sup> with more process required for more punitive or stigmatized confinement,<sup>454</sup> and less process for less punitive or stigmatized confinement.<sup>455</sup>

Although civil confinement law was largely formulated by the Burger Court in the 1970s, its principles have been extended and reaffirmed by the Rehnquist and Roberts Courts. Even as the decarceral fervor of the 1970s dwindled and a law-and-order mentality once again led to mass confinement,<sup>456</sup> the legal principles underlying civil confinement law remained. Civil confinement law still governs what the Court often refers to as “regulatory,” as opposed to “punitive” or criminal, confinement.<sup>457</sup> This civil category includes pretrial detention,<sup>458</sup> confinement for dangerous mental illness,<sup>459</sup> so-called “sexually violent predator” or “SVP” commitment,<sup>460</sup> civil commitment for intellectual disability,<sup>461</sup> the executive detention of so-called

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447. For an analysis of how these doctrines evolved and are interconnected, see Arnold, *supra* note 27.

448. See *Addington*, 441 U.S. at 427.

449. See *McNeil*, 407 U.S. at 249.

450. See *Jackson*, 406 U.S. at 738.

451. See *McNeil*, 407 U.S. at 250.

452. See *Jackson*, 406 U.S. at 729-30; *Baxstrom v. Herold*, 383 U.S. 107, 114-15 (1966).

453. See *Addington*, 441 U.S. at 427-31.

454. See, e.g., *In re Gault*, 387 U.S. 1, 27-28 (1967); *In re Winship*, 397 U.S. 358, 367 (1970).

455. See, e.g., *Addington*, 441 U.S. at 427-28.

456. See GARCÍA HERNÁNDEZ, *supra* note 211, at 57-60.

457. See *Bell v. Wolfish*, 441 U.S. 520, 537 (1979); see also *United States v. Salerno*, 481 U.S. 739, 747 (1987).

458. See *Bell*, 441 U.S. at 535-37; *Salerno*, 481 U.S. at 746-47.

459. See *Foucha v. Louisiana*, 504 U.S. 71, 78-83 (1992).

460. See *Kansas v. Hendricks*, 521 U.S. 346, 356-60 (1997).

461. See *Heller v. Doe*, 509 U.S. 312, 330-33 (1993).

“enemy combatants,”<sup>462</sup> and even civil contempt.<sup>463</sup> In each case, the Court relies on the punitive/nonpunitive distinction first articulated in *Wong Wing*, and then uses the principles of civil confinement law to delineate process limits on the supposedly nonpunitive confinement.

### C. Immigration Detention as Civil Confinement Law

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.<sup>464</sup> As many scholars have documented, immigration detention was not immune from the wave of mass incarceration that began in the 1980s. The federal government reinitiated immigration detention in 1981 in response to the arrivals of many Cuban and Haitian refugees.<sup>465</sup> The number of people in immigration detention increased through the 1990s with the advent of the anti-drug panic of the “War on Drugs,” as immigration law became a crucial tool for enforcement.<sup>466</sup>

In 1996, Congress passed two laws that created a “‘seismic change’ in immigration detention.”<sup>467</sup> Together, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>468</sup> and the Illegal Immigration Reform and

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462. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-33 (2004).

463. See *Turner v. Rogers*, 564 U.S. 431, 441-45 (2011).

464. See *DOW*, *supra* note 414, at 6-7.

465. See, e.g., Lee, *supra* note 387, at 609 & n.253 (citing Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 29 (1984) (“The effect of this influx [of migrants from the Caribbean Basin] upon detention was dramatic and immediate; during 1982, more than one million person-days were spent in INS detention, almost double the figure for 1980.”); and Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 579 (1998) (“Immigration imprisonment was reinvented in 1981 in response to the massive immigration flow to south Florida in the spring of 1980 that became known as the Mariel boatlift.”)); GARCÍA HERNÁNDEZ, *supra* note 211, at 61-62; *DOW*, *supra* note 414, at 7.

466. See, e.g., Lee, *supra* note 387, at 609 & n.254; Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137 (2013) (“The federal government has increased the daily number of individuals in immigration detention from 6,785 in 1994 to over 34,069 in 2012.”); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014); *DOW*, *supra* note 414, at 8-9.

467. GARCÍA HERNÁNDEZ, *supra* note 211, at 68 (quoting Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209, 209 (1997)); see also *DOW*, *supra* note 414, at 9.

468. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

Immigrant Responsibility Act (IIRIRA)<sup>469</sup> removed in large part immigration officials' discretion to release noncitizens on bond and expanded the classes of noncitizens subject to mandatory detention.<sup>470</sup> The enforcement agencies also altered their decisionmaking, shifting from a presumption in favor of liberty<sup>471</sup> to a presumption in favor of detention.<sup>472</sup> The result was dramatic: From 1994 to 2001, the average daily immigration detention population more than tripled, from 5,532 to 19,533 people.<sup>473</sup>

When the Court first examined what due process might require for immigration detention, it looked to civil confinement law. In cases going opposite ways, the Court in 1993 and 2001 invoked civil confinement law to justify its decisions.

In 1993, the Court addressed the constitutional limits on immigration detention for the first time in almost half a century. In *Reno v. Flores*,<sup>474</sup> the Supreme Court upheld an immigration regulation that authorized the detention of unaccompanied minors rather than requiring their release to a "responsible adult."<sup>475</sup> The regulation required that a noncitizen child be released to a parent, legal guardian, or adult relative unless the government determined that he was unlikely to appear at his hearing or was a danger to himself or others.<sup>476</sup> If the relevant relative was also detained, the government had discretion to release both relative and child together,<sup>477</sup> or the relative could designate another appropriate adult to care for the child.<sup>478</sup> In "unusual

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469. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of the U.S. Code).

470. See DOW, *supra* note 414, at 9. Congress created the category of noncitizens subject to "mandatory detention"—or detention without the possibility of bond—as part of anti-drug legislation passed in 1988. See GARCÍA HERNÁNDEZ, *supra* note 211, at 67-68.

471. See, e.g., *In re Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk." (citations omitted)).

472. See 8 C.F.R. § 236.1(c)(8) (2021) (establishing that an immigration officer has discretion to release a noncitizen if the noncitizen "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding").

473. DOW, *supra* note 414, at 9.

474. 507 U.S. 292 (1993).

475. See *id.* at 294-300, 303, 315. *Reno v. Flores* was one part of a 1985 class-action suit brought by unaccompanied minors, which resulted in a 1997 settlement on detention conditions and release requirements that has been the subject of continued litigation and enforcement. See HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 43-47 (2019) (summarizing the history of the *Flores* litigation).

476. See *Flores*, 507 U.S. at 297 (citing 8 C.F.R. § 242.24(b)(1) (1992)).

477. *Id.* (citing 8 C.F.R. § 242.24(b)(2) (1992)).

478. See *id.* (citing 8 C.F.R. § 242.24(b)(3) (1992)).

and compelling circumstances,” the government also had discretion to release the child to another adult who executed an agreement to care for the child and ensure his presence at future hearings.<sup>479</sup>

The Court construed this regulation as requiring release “from all other custody into the custody of [the child’s] parents, legal guardian, or even close relatives” when requested.<sup>480</sup> But the *Flores* litigation was brought by a class of unaccompanied minors who had *not* been released subject to these provisions but had been placed in juvenile detention facilities pending the resolution of their immigration hearings.<sup>481</sup> The “right at issue” for the Court, therefore, was “the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.”<sup>482</sup>

The Court couched its analysis of this right in the terms of civil confinement law. It acknowledged the right to be free from punitive confinement without criminal process protections,<sup>483</sup> but it reasoned from civil confinement law that children have a lessened liberty interest because they are always in custodial settings of some form.<sup>484</sup> Indeed, the Court explained that, under *parens patriae*, the State *must* take custody of children who lack suitable parental supervision.<sup>485</sup> The Court found that the conditions in which the children were held, which had supposedly been reformed to comply with a protective order, were “decent and humane” enough to avoid being punitive in nature and so survived constitutional scrutiny.<sup>486</sup> Only after undertaking this analysis rooted in civil confinement law did the Court reference a potential immigration detention exceptionalism to shore up its holding. The Court noted a potential distinction between the detention of citizen and noncitizen children only to address “[i]f we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles.”<sup>487</sup>

Most of the debate over the holding even took place on civil confinement law grounds. Justice O’Connor, joined by Justice Souter, wrote separately to

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479. *Id.* (quoting 8 C.F.R. § 242.24(b)(4) (1992)).

480. *Id.* at 302.

481. *See id.* at 294, 302.

482. *Id.* at 302.

483. *See id.* at 301 (citing *United States v. Salerno*, 481 U.S. 739, 746-48 (1987); and *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)).

484. *See id.* at 302 (citing *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

485. *See id.* (citing *Schall*, 467 U.S. at 265).

486. *See id.* at 301, 303, 315.

487. *See id.* at 305-06.

emphasize the terms of civil confinement law,<sup>488</sup> rejecting the premise that “a child, unlike an adult, has a right ‘not to liberty but to custody.’”<sup>489</sup> Justice O’Connor would have placed the *parens patriae* rationale not as a limit on a child’s liberty interest, but as part of the scope of acceptable justifications under civil confinement law.<sup>490</sup>

When assessing the detention of immigrant children, then, the Court first analyzed the scope of the confinement under civil confinement law, and only then turned to whether the children’s noncitizen status affected the scope of their rights.

In 2001, the Court again applied civil confinement law, this time to evaluate the constitutional scope of adult immigration detention. In a 5-4 decision, it held in *Zadvydas v. Davis* that a statute allowing detention after a removal order must “contain an implicit ‘reasonable time’ limitation” or risk raising “serious constitutional concerns.”<sup>491</sup> The Court’s conclusion mirrored the civil confinement law principle that evaluative confinement has a presumptive six-month limit.<sup>492</sup>

Kestutis Zadvydas and Kim Ho Ma were both legal permanent residents who had grown up in the United States, but had been ordered deported based on criminal convictions.<sup>493</sup> The government had trouble effecting their deportations because neither Zadvydas’s nor Ma’s countries would accept them, but the government declined to release either from detention.<sup>494</sup> With no possibility of imminent deportation, the Court noted that such detention was “potentially permanent.”<sup>495</sup> Because indefinite, potentially permanent detention would raise a “serious” constitutional question,<sup>496</sup> the Court read a “reasonable time” limitation into the statute authorizing post-removal detention. If the government failed to remove someone within six months of his removal order, his continued detention would become unreasonable if he

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488. *See id.* at 315-16 (O’Connor, J., concurring) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80-81 (1992); and *Salerno*, 481 U.S. at 748).

489. *See id.* at 316 (quoting *In re Gault*, 387 U.S. 1, 17 (1967)).

490. *See id.* at 317.

491. *See* 533 U.S. 678, 681-82 (2001).

492. *See id.* at 700-01 (describing temporal presumptions in other carceral contexts and suggesting that Congress doubted the constitutionality of a detention lasting longer than six months); *see also* *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) (approving short-term evaluative confinement based on a statute prescribing a presumptive maximum of six months of confinement).

493. *See Zadvydas*, 533 U.S. at 684-86.

494. *See id.*

495. *Id.* at 691.

496. *See id.* at 696.

showed that there was “no significant likelihood of removal in the reasonably foreseeable future,” and the government could not rebut that showing.<sup>497</sup>

In its constitutional avoidance discussion, the Court relied heavily on civil confinement law. It described the constitutional scheme that governs “nonpunitive,” or civil, confinement.<sup>498</sup> Then, in examining the government’s stated justifications for the detention at issue, it referenced the civil confinement law principle that detention must bear “[a] reasonable relation to the purpose for which the individual [was] committed.”<sup>499</sup> The government had offered flight risk and dangerousness as its justifications for continued detention after failing to effect deportation,<sup>500</sup> justifications familiar in civil confinement law.<sup>501</sup> The Court reasoned from civil confinement law that the flight-risk justification was “weak or nonexistent” if the government had no reasonable expectation that it could deport someone.<sup>502</sup>

In examining the dangerousness justification, the Court noted civil confinement law’s rules for evaluating preventive detention based on dangerousness.<sup>503</sup> It emphasized the requirement for “strong procedural protections,”<sup>504</sup> such as judicial safeguards and proof of dangerousness by clear and convincing evidence, as well as the need for the dangerousness to be of some special nature.<sup>505</sup> Additionally, the Court noted that, where detention was potentially indefinite, dangerousness was not enough, but civil confinement law required “some other special circumstance, such as mental illness, that helps to create the danger.”<sup>506</sup>

Against the background of these requirements, the Court explained the “obvious” and “serious constitutional problem” that the immigration detention at issue could pose.<sup>507</sup> It noted that the only procedural safeguards were administrative, not judicial, and that the noncitizen bore “the burden of proving he [was] not dangerous.”<sup>508</sup> And the Court reasoned that a noncitizen’s

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497. *See id.* at 701.

498. *See id.* at 690.

499. *See id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (alterations in original)).

500. *See id.*

501. *See United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (listing civil-confinement regimes that rely on flight risk and dangerousness).

502. *See Zadvydas*, 533 U.S. at 690.

503. *See id.* at 690-91.

504. *Id.* at 691 (citing *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997); *Salerno*, 481 U.S. at 747, 750-52; and *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992)).

505. *See id.*

506. *See id.* (citing *Hendricks*, 521 U.S. at 358, 368).

507. *See id.* at 691-92.

508. *Id.* at 692.

“removable status itself” could not meet the special-circumstance requirement because it “bears no relation to a detainee’s dangerousness.”<sup>509</sup> This reasoning is significant because it echoes the civil confinement law principle that a conviction—on which the deportation orders for both Zadvydas and Ma were based—is not shorthand for dangerousness.<sup>510</sup>

The Court also rejected the government’s arguments that noncitizen status itself could constitutionally justify indefinite detention,<sup>511</sup> and that the Court was interfering with Congress’s plenary power to admit and exclude.<sup>512</sup> The Court instead characterized its decision as a choice between confinement and release under government supervision, rather than a grant of legal status to live “at large” in the country.<sup>513</sup>

On June 28, 2001, when *Zadvydas* was decided, it seemed that immigration detention would be assimilated into civil confinement law. Less than two years later, however, the Court would fail to mention a single civil confinement law case when issuing a constitutional due process holding on immigration detention.<sup>514</sup> One Justice—Justice O’Connor—switched sides.<sup>515</sup> In between these two decisions, less than three months after *Zadvydas* came down, on September 11, 2001, the United States experienced its most significant territorial attack since Pearl Harbor.

#### D. Immigration Detention as Exceptional

The Court last evaluated the constitutionality of immigration detention in 2003, when it carved out a new exceptionalist law distinguishing immigration detention from other forms of civil confinement. In *Demore v. Kim*, the Court evaluated 8 U.S.C. § 1226(c), one of IIRIRA’s mandatory detention provisions, which required the government to detain any noncitizen convicted of certain enumerated crimes, including “any ‘aggravated felony,’” while his removal proceedings were ongoing.<sup>516</sup> The Court held that the government could constitutionally detain someone under a statutory mandatory detention scheme “for the brief period necessary for [his] removal proceedings,” because of

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509. *See id.* at 691-92.

510. *See supra* Part IV.B.

511. *See Zadvydas*, 533 U.S. at 692-94.

512. *See id.* at 695-96.

513. *See id.* at 696 (quoting Brief for Respondents at 47, *Zadvydas*, 533 U.S. 678 (No. 99-7791), 2001 WL 28667).

514. *See Demore v. Kim*, 538 U.S. 510, 561 & n.16 (2003) (Souter, J., concurring in part and dissenting in part).

515. *See id.* at 512.

516. *See id.* at 513-14, 513 n.1, 514 n.2 (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)).

Congress's concerns that noncitizens with criminal convictions might otherwise commit other crimes or fail to appear for their immigration proceedings.<sup>517</sup>

The Court evaluated the constitutional requirements for immigration detention without reference to any civil confinement law precedent.<sup>518</sup> Instead, it cited history. Acknowledging that noncitizens have the right to due process in immigration proceedings, the Court cited *Wong Wing* for the proposition that detention had been a “constitutionally valid aspect” of those proceedings for “more than a century.”<sup>519</sup> The Court noted that “prior to 1907 there was no provision permitting bail for *any* [noncitizens] during the pendency of their deportation proceedings.”<sup>520</sup> In so doing, the Court established nineteenth-century precedent as its constitutional baseline.

In addition to characterizing immigration detention as being governed by hundred-year-old precedent, the *Demore* Court returned to the constitutional scheme that governed when civil confinement was greatest in scale but least protective of process rights—the era that triggered the creation of civil confinement law. As a policy justification for its holding, the Court emphasized the dangers and challenges associated with noncitizens with criminal convictions,<sup>521</sup> echoing the national security concerns in civil confinement cases from the mid-twentieth century.<sup>522</sup> The Court invoked *Carlson v. Landon* for the proposition that dangerousness, determined by reference to a statutory scheme rather than an individualized assessment, justified detention.<sup>523</sup> Through citing anachronistic precedent, the Court used

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517. *Id.* at 513.

518. *See id.* at 523-31. The Court extensively discussed *Reno v. Flores* and *Zadvydas v. Davis* without referencing the civil confinement law principles on which their holdings rested. The Court described *Flores* as simply in line with “this Court’s longstanding view that the Government may constitutionally detain deportable aliens.” *See id.* at 526. And it distinguished *Zadvydas* on the facts, without any reference to civil confinement law. *See id.* at 527-31.

519. *See id.* at 523 (citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1986)).

520. *Id.* at 523 n.7.

521. *See id.* at 517-21.

522. *See supra* Part III.C.

523. *See Demore*, 538 U.S. at 524-25. Notably, this assertion had no basis in the *Carlson* Court’s reasoning. The *Demore* Court had to justify both that the *Carlson* scheme was functionally mandatory and that none of the noncitizens received individualized findings of dangerousness by citing statements from the *Carlson* dissenters that are in direct conflict with the facts described by the majority. *Compare id.* at 524 (“Although the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail to those aliens in light of what Justice Frankfurter viewed as the mistaken ‘conception that Congress had made [alien Communists] in effect unbailable.’” (alteration in original) (quoting *Carlson v. Landon*, 342 U.S. 524, 559, 568 (1952) (Frankfurter, J., dissenting))), *with Carlson*, 342 U.S. at 541-42 (“There is no evidence or contention that all persons arrested as deportable under § 22 of the Internal Security Act for Communist membership are denied bail. In

*footnote continued on next page*

*Wong Wing* and *Carlson* to set up an exception from civil confinement law for mandatory immigration detention.<sup>524</sup>

The pivot away from civil confinement law did not go unnoticed. Justice Souter, joined by Justices Stevens and Ginsburg, wrote a dissent that decried the Court's refusal to engage with civil confinement law.<sup>525</sup> Justice Souter emphasized that *Zadvydas* had already applied civil confinement law to immigration detention: "Nowhere [in *Zadvydas*] did we suggest that the 'constitutionally protected liberty interest' in avoiding physical confinement, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens considered in [civil confinement law cases]."<sup>526</sup> "On the contrary," he reasoned, "we cited those cases and expressly adopted their reasoning, even as applied to [noncitizens] whose right to remain in the United States had already been declared forfeited."<sup>527</sup> He also stressed that *Zadvydas* had applied "principles developed in over a century of cases on the rights of

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fact, a report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases." (citation omitted)); compare *Demore*, 538 U.S. at 525 ("There was no 'individualized findin[g] of likely future dangerousness as to any of the aliens and, in at least one case, there was a specific finding of nondangerousness." (alteration in original) (citing *Carlson*, 342 U.S. at 549 (Black, J., dissenting))), with *Carlson*, 342 U.S. at 541 ("[E]vidence of membership *plus personal activity in supporting and extending the Party's philosophy concerning violence* gives adequate ground for detention." (emphasis added)). Had the majority accepted the dissenters' characterizations, it would have rendered the statute at issue in *Carlson* unconstitutional under the majority's reasoning. See *Carlson*, 342 U.S. at 541-42 (upholding the constitutionality of the statute based on evidence that the "large majority" of people arrested as deportable for Communist membership were given bail and that the petitioners were detained based on evidence of membership as well as "personal activity in supporting and extending the [Communist] Party's philosophy concerning violence").

524. Justice Rehnquist wrote the majority in *Demore*. 538 U.S. at 512. He was also one of Justice Jackson's law clerks under *Mezei*. See Weisselberg, *supra* note 398, at 968. We know that he disagreed with the Justice's dissent—which represented public opinion and helped catalyze mid-century termination of immigration detention—because we have his memorandum on the case. See *id.* at 968 n.191 (citing Memorandum from William H. Rehnquist, Law Clerk, to Justice Robert Jackson 1 (n.d.) (on file with the Robert H. Jackson Papers, Library of Congress)). Then-clerk Rehnquist wrote of *Mezei* that "when we come to this guy . . . I have some trouble crying. He was in this country twenty-five years and never bothered to become a citizen . . ." *Id.* (quoting Memorandum from William H. Rehnquist, *supra*, at 1). Rehnquist was unconcerned with *Mezei*'s detention because *Mezei* was "perfectly free to get on the first outbound boat that comes along . . . I think the government is right." *Id.* (quoting Memorandum from William H. Rehnquist, *supra*, at 2).

525. See *Demore*, 538 U.S. at 540, 560-61, 561 n.16 (Souter, J., concurring in part and dissenting in part).

526. See *id.* at 553.

527. *Id.*

aliens and the limits on the government's power to confine individuals."<sup>528</sup> The majority failed to cite any of these civil confinement law cases and instead referred back to cases from the nineteenth and mid-twentieth centuries, before the advent of civil confinement law.<sup>529</sup> To uphold the constitutionality of mandatory immigration detention, then, the Court attempted to characterize its holding as being compelled by a hundred years of precedent, but it in fact carved out a new exceptionalist category for immigration detention.

#### E. Evading Constitutional Scrutiny

*Demore* was the last time that the Court substantively addressed the due process requirements for immigration detention.<sup>530</sup> Over the past twenty years, the Court has addressed only whether the language of certain statutes authorizes detention without a bond hearing, declining to evaluate constitutional challenges to that detention.<sup>531</sup> Even in the biggest detention case in recent memory, *Jennings v. Rodriguez*, in which the respondents challenged a variety of detention statutes that did not require periodic bond hearings, the Court went to extraordinary lengths to avoid a constitutional holding.<sup>532</sup> Several courts of appeals had held, based on *Zadvydas*'s constitutional avoidance rationale, that noncitizens detained for over six months were entitled to a bond hearing as a condition of continued detention.<sup>533</sup> The Supreme Court, after hearing an initial argument in the case,

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528. *Id.* at 560.

529. *See id.* at 561 n.16 ("The Court tellingly does not even mention *Salerno*, *Foucha*, *Hendricks*, or *Jackson*."); *id.* at 523-24 (majority opinion) (relying heavily on *Wong Wing* and *Carlson*).

530. In 2005, the Court applied the reasoning from *Zadvydas* to another class of noncitizens detained under the same statute. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005). Justice Scalia, writing for the majority, conducted no new constitutional analysis but couched the issue in terms of whether the "construction . . . that we applied [in *Zadvydas*] to the second category of [noncitizens] covered by the statute applies as well to the first . . ." *Id.* at 372, 378. *Martinez* addressed only this question of statutory interpretation and did not conduct a renewed analysis of the potential unconstitutionality of indefinite detention.

531. *See, e.g.*, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2283-84, 2291 n.9 (2021) (holding that the statutory language clearly precluded a bond hearing and so declining to reach the constitutional avoidance argument); *Jennings v. Rodriguez*, 138 S. Ct. 830, 842-48 (2018) (holding that the statutory language authorizing detention was clear and so declining to reach the constitutional avoidance or constitutional questions).

532. *See* 138 S. Ct. at 838-39.

533. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1132-33, 1138 (9th Cir. 2013); *Lora v. Shanahan*, 804 F.3d 601, 606, 616 (2d Cir. 2015); *see also Reid v. Donelan*, 819 F.3d 486, 494, 499-502 (1st Cir. 2016) (reading civil confinement law's reasonableness requirement into an immigration detention statute and requiring a bond hearing once the duration of detention becomes unreasonable); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1202-03 (11th Cir. 2016) (same).

asked for additional briefing and argument on the constitutionality of the statutes at issue, rather than an interpretation of them based on constitutional avoidance.<sup>534</sup> The constitutionality of the statutes was therefore argued twice—one argument focused on constitutional avoidance, and the other focused on whether the statutes that authorized prolonged detention without bond were unconstitutional.<sup>535</sup> Yet in its final opinion, the Court reached neither the constitutional question on which it requested supplementary briefing, nor the original constitutional avoidance question, and instead resolved the case on pure statutory grounds, remanding it to the Ninth Circuit to resolve the constitutional issues.<sup>536</sup>

In 2019, the Court again engaged in an extensive statutory interpretation analysis to hold that noncitizens could be rearrested and subjected to mandatory detention years after completing the criminal sentence that rendered them removable.<sup>537</sup> The Court similarly disposed of the constitutional avoidance question quickly, holding that the canon was inapplicable because the statute itself was clear.<sup>538</sup> The Court has subsequently continued this trend and shows no sign of taking up the direct constitutional question soon. Last term, it once again examined only the text of an immigration detention statute without addressing its constitutional implications.<sup>539</sup>

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534. See Order in Pending Case at 1, *Jennings*, 138 S. Ct. 830 (No. 15-1204).

535. *Jennings* was first argued on November 30, 2016, under the Obama Administration. See 138 S. Ct. at 830. It was reargued on October 3, 2017, under the Trump Administration. See *id.* Although the statutes under review remained the same, the stakes were raised even higher. Between January 20, 2017, and September 30, 2017, ICE booked 42% more people into immigration detention as compared to the same period during the previous year, rising from 75,946 people to 108,077 people. See U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10 fig.10 (n.d.), <https://perma.cc/6RPW-HFRL>.

536. See *Jennings*, 138 S. Ct. at 842, 846, 851. Rather than seeking the resolution of the constitutional claims, however, the Court seemed to indicate that the Ninth Circuit should dismiss the case altogether. The Court encouraged the Ninth Circuit, before reaching the constitutional claims, to first consider (1) whether it had jurisdiction over constitutional, not statutory, claims, (2) whether the class of detained immigrants would meet the class relief requirements of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and (3) whether a class action was an “appropriate way” to resolve the class’s due process claims. See *Jennings*, 138 S. Ct. at 851-52. In short, the Court seemed in no hurry to answer the constitutional questions raised by prolonged immigration detention without bond.

537. See *Nielsen v. Preap*, 139 S. Ct. 954, 961-72 (2019).

538. See *id.* at 971-72.

539. See *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1832-35 (2022) (holding that 8 U.S.C. § 1231(a) does not entitle a noncitizen, after six months of detention, to a bond hearing at which the government must demonstrate by clear and convincing evidence that the noncitizen is a flight risk or a danger to the community).

## V. Implications

Why the switch between *Zadvydas* and *Demore*? It's easy to understand the step back from civil confinement law in immigration jurisprudence as part of the paranoia and accompanying restrictions on civil liberties associated with post-9/11 America. Although the government began building a more racialized, criminalized, and carceral immigration system in the late 1980s, this system still looked like it would be assimilated into existing constitutional norms. Instead, much like how the attack on Pearl Harbor ushered in Japanese American internment and indefinite, ideology-based immigration detention, the 9/11 attacks generated fears that compromised civil liberties in the name of national security.<sup>540</sup> Just as the fears in the mid-century largely affected regular people like Ellen Knauff and Ignatz Mezei rather than actual saboteurs, the lack of constitutional regulation in immigration detention now simply authorizes the mass warehousing of regular noncitizens. The Court's reticence to directly take on constitutional questions related to immigration detention may reflect a discomfort with the tension between continuing to uphold civil confinement law for other forms of civil confinement while maintaining the exceptionalist detention carved out by *Demore*. As with the Japanese American internment cases, the Court may not want to examine the constitutionality of detention that, if upheld, could erode liberty protections across the carceral landscape. An enormous number of people are still held in immigration detention, and the numbers show little sign of slowing down, even after the brief dip that accompanied COVID-19 in 2020 and 2021.<sup>541</sup> And there is significant public backlash, with a detention-abolition movement that has significant momentum.<sup>542</sup>

Nevertheless, the Court shows little sign that, were it to address the question, it would assimilate immigration detention into the civil confinement canon. Instead, it has revived the entry-fiction doctrine from *Mezei* to suggest that recent arrivals to American soil may enjoy no due process protections at all.<sup>543</sup> And it recently held that district courts have no

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540. See IZUMI, *supra* note 321, at 172-74.

541. See, e.g., *Immigrant Detention Numbers on Their Way Back Up After Pandemic Slump?*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 10, 2022), <https://perma.cc/SUW4-7A4V> (charting the recent rise in the number of people in ICE detention and documenting the highest number of ICE arrests since March 2021).

542. See, e.g., Sharry Aiken & Stephanie J. Silverman, Introduction, *Decarceral Futures: Bridging Immigration and Prison Justice Towards an Abolitionist Future*, 25 CITIZENSHIP STUD. 141, 141-43 (2021) (charting the rise of abolitionist praxis across a range of global movements challenging immigration detention).

543. See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1981-83 (2020). *But cf.* Diana G. Li, Note, *Due Process in Removal Proceedings After Thuraissigiam*, 74 STAN. L. REV. 793, 796-97 (2022) (arguing that lower courts should limit *Thuraissigiam's* holding to its facts to avoid giving legal force to its due process dicta).

power to entertain class-wide challenges to immigration detention, which will likely require any future constitutional challenges to proceed through piecemeal individual habeas petitions.<sup>544</sup>

Several scholars have remarked upon the Court's troubling, anachronistic approach to its recent immigration cases. Adam Cox and Cristina Rodríguez have argued that, much like current immigration detention exceptionalism, previous immigration cases make sense only in their historical context.<sup>545</sup> Federal government lawyers regularly cite "the canonical cases" that "upheld immigration policies that blatantly discriminated on the basis of race, sex, ideology, and other grounds that today receive special protection under the Constitution."<sup>546</sup> But these cases were decided in eras "when the same policies would have been accepted as a matter of ordinary constitutional law, or at least when the domestic law was in a state of development."<sup>547</sup> Only in *Trump v. Hawaii*,<sup>548</sup> they contend, did the Court for the first time "uph[ol]d an immigration policy that openly discriminated on the basis of race or religion during a period of constitutional history when such a policy would have been clearly unconstitutional in the domestic setting."<sup>549</sup> The same is true when the Court imports a nineteenth-century understanding of process requirements for civil confinement into modern law. In so doing, the Court breathes exceptional life into the plenary power doctrine, allowing the explicitly racist and xenophobic constitutional norms of an earlier American age to apply only to an underclass of noncitizens on U.S. soil.<sup>550</sup>

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544. See *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2062-63 (2022). For a discussion of how piecemeal habeas litigation in immigration detention contributes to "legal complexity, opaqueness, and ultimately uncertainty regarding the legal contours of prolonged detention," see 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. (manuscript at 7) (forthcoming 2023), <https://perma.cc/5XJM-NZ3Y> (to locate, select "View the live page").

545. See ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 234-35 (2020).

546. See *id.* at 234.

547. *Id.* at 235. For instance, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), which upheld Chinese exclusion, was decided seven years before *Plessy v. Ferguson*, 163 U.S. 537 (1896), which "upheld Jim Crow segregation" and the principle of "separate but equal." *Id.* at 234-35.

548. 138 S. Ct. 2392 (2018).

549. See COX & RODRÍGUEZ, *supra* note 545, at 235.

550. Nikolas Bowie and Norah Rast have argued that the very concept of plenary power—that Congress is less constrained by the Constitution when it exercises its immigration power—is based on a misreading of what were essentially cases about the Commerce Clause and treaty power. See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1424-26 (2022). On this reading, every time the Court cites these nineteenth-century immigration cases, it is creating and entrenching a congressional power enumerated nowhere in the Constitution. See *id.* at 1425-26.

Even though the Supreme Court has recently either evaded constitutional questions about immigration detention or strengthened immigration exceptionalism, *Demore* and *Jennings* were not the last words on civil confinement law in immigration detention. Instead, lower courts have taken up when and how to apply it. Since *Jennings* disfavored constitutional avoidance as a means of reading due process into immigration laws, lower courts have had to decide which procedural protections the Constitution mandates for immigration detention. When faced with direct constitutional questions about whether the government may detain someone without bearing the burden of proof and, if so, for how long, lower courts have begun to apply civil confinement law. Across several circuits, courts have applied civil confinement law to shift the burden of proof to the government to justify prolonged detention by presenting evidence of flight risk or dangerousness.<sup>551</sup> Elsewhere, courts have followed *Demore's* historical immigration detention exceptionalism,<sup>552</sup> sometimes adding their own historical analysis.<sup>553</sup> When one of these cases reaches the Court, the Justices will have to finally decide whether nineteenth-century civil confinement norms or modern constitutional law governs immigration detention.

### Conclusion

In early experiments with confinement, constitutional law used to tolerate a civil confinement landscape with little process. Courts were unwilling to question the paternalistic justifications put forward by the states for warehousing their poor. As mass civil confinement continued to grow and swept in more explicitly dangerousness-based rationales, alongside a vast expansion of state and federal administrative power, courts eventually became more skeptical of unchecked power to civilly confine. This skepticism has

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551. See, e.g., *Hernandez-Lara v. Lyons*, 10 F.4th 19, 37-38, 41 (1st Cir. 2021) (requiring the government to justify prolonged discretionary detention with a showing of dangerousness by clear and convincing evidence or flight risk by a preponderance of the evidence); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 206, 213-14 (3d Cir. 2020) (requiring the government to justify prolonged mandatory detention by clear and convincing evidence of flight risk of dangerousness); *Velasco Lopez v. Decker*, 978 F.3d 842, 845-46, 855-57 (2d Cir. 2020) (requiring the government to justify prolonged discretionary detention by clear and convincing evidence of flight risk or dangerousness).

552. See *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1210-12, 211 n.9 (9th Cir. 2022) (declining to place the burden of proof on the government in all discretionary detention based partially on historical immigration detention exceptionalism); *Miranda v. Garland*, 34 F.4th 338, 364-66 (4th Cir. 2022) (declining to follow *Hernandez-Lara* because of immigration detention exceptionalism beginning with *Wong Wing*).

553. *Rodriguez Diaz*, 53 F.4th at 1217-19 (Bumatay, J., concurring) (concurring specifically to further unpack the historical basis for immigration detention exceptionalism).

manifested in a civil confinement law jurisprudence that, while allowing for civil confinement, limits the grounds for its justifications, puts the government to an evidentiary burden, and requires a neutral assessment before the government can lock someone away.

The Court's new exceptionalist carveout from this law for immigration detention ignores this progression of constitutional law and history. Modern historians see nineteenth- and early-twentieth-century civil confinement as about "social control" of perceived deviants rather than true benevolence. Immigrants, in many ways, were an original target for social control. The category of "deviant other" morphed from Irish Catholic immigrants to Chinese immigrants to supposedly unreformable or unassimilable categories of "dangerous" people. Through these dangerousness-based forms of civil confinement, the courts saw more clearly the hazards to individual liberty of a constitutionally unregulated confinement scheme alongside the explicitly punitive criminal system and began synthesizing constitutional limits. But it's hardly surprising that when the legal community began to reject mass civil confinement in the second half of the twentieth century and to question the paternalism of its initial justifications, immigration detention was the first domino to fall. Ironically, of course, immigration detention's vanguard position in the public backlash meant that the Court had no cause to address it when reevaluating the constitutional regulation necessary to check other forms of civil confinement.

Through basing immigration detention exceptionalism on history, the Court effectively lifted the nineteenth-century approval of summary process for paternalistic civil confinement selectively into immigration detention, despite a half century of civil confinement law precedent to the contrary. This Article's reevaluation of the history of civil confinement highlights the Court's error. Immigration detention was not uniquely excepted from constitutional scrutiny at the turn of the nineteenth century: *all* civil confinement was. Only because immigration detention was so exceptionally condemned in the mid-century did it escape constitutional scrutiny in the 1970s. This additional historical context allows us to reject the persistent narrative of immigration detention as enduringly exceptional and instead question why, under modern doctrine, the Court has chosen to carve out immigration detention as different.