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WEIGHING PAIN: HOW THE HARM OF IMMIGRATION DETENTION MUST BE FACTORED IN CUSTODY DECISIONS

LINUS CHAN*

INTRODUCTION

> *The next day they took me to the Metropolitan Detention The next day they took me to the Metropolitan Detention Center (MDC) in Brooklyn, New York. All of my life, I have never showed my body to anyone. They made me strip completely. They put me in maximum security. . . . Neither my father nor grandfather has ever been in such a situation. We are not that kind of people. I didn't speak English and I*

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> *didn't have a cellmate who could help translate for me. I was completely confused. My biggest concern was my children. Who would support my children if something happened to me? . . . I stayed in the high security jail for one and a half months. . . . I appeared in court in February 2002 and told the judge that I want to leave. A few months later, I was deported to Pakistan. If they were going to deport me, why they did not deport me in the beginning? . . . After staying in jail, my back muscles have stopped working. I have the sugar disease. The tension elevated my sugar levels. When I came back to Pakistan, I checked my sugar, and it was 429 points. It should be about 120 to 130 points.*
>
> —Saleem, *Underground America: Narratives of Undocumented Lives*[1]

> *For one thing, he says, Browder was losing weight. "Several times when I visited him, he said, 'They're not feeding me,'" the brother told me. "He definitely looked really skinny." In solitary, food arrived through a slot in the cell door three times a day. For a growing teenager, the portions were never big enough, and in solitary Browder couldn't supplement the rations with snacks bought at the commissary. He took to begging the officers for leftovers: "Can I get that bread?" Sometimes they would slip him an extra slice or two; often, they refused.*
> *Browder's brother also noticed a growing tendency toward despair. When Browder talked about his case, he was "strong, adamant: 'No, they can't do this to me!'" But, when the conversation turned to life in jail, "it's a totally different personality, which is depressed. He's, like, 'I don't know how long I can take this.'"*
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> —Gonnerman, *Before the Law*[2]

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1. *Inside an Immigrant Detention Facility*, VOICE OF WITNESS, https://voiceofwitness.org/immigrant-detention-stories [https://perma.cc/N5YU-HR9H].

2. Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/49YN-CQW6] (providing the account of a teenager held at Rikers for three years awaiting his trial who later killed himself in 2015); *see also* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/6EYF-6HN3].

Detention is harsh. Criminologists continue a long debate over whether the severity of punishment plays a role in deterring behavior.[3] And yet there is no debate that imprisonment after conviction is *meant* to be harsh and is intended to cause pain and suffering. Enduring the period of imprisonment is how one "pays off" the debt to society, and while criminal punishment cannot be "cruel [or] unusual," the pain is the point.[4] However, the two men[5] who are the subject of the quotes above are—at least under the law—not being punished for crimes at all. And yet both of them suffered the pains of imprisonment, ostensibly for regulatory reasons. Whereas pain and suffering may be the point of criminal punishment, how much pain and suffering should we permit for people who have not yet been adjudged guilty of any crime?

Various government agencies in the United States use detention to accomplish a variety of "nonpunitive" functions. From nearly the beginning of our nation's history, the mentally ill, who posed a danger to themselves or the community, could be imprisoned.[6] During wartime, or even times of insurrection, people could be detained on grounds of national security.[7] But perhaps the two most common forms of "civil" detention in the United States today are imprisoning people facing a criminal trial, or those facing deportation in the United States.

On any given day nearly 470,000 people are in jail awaiting trial without having been convicted.[8] At the same time around 50,000 people on any given day are detained in immigration detention, many of whom are awaiting deportation.[9] Pretrial detention causes all kinds of downstream harmful effects, including job loss, housing

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3. James Q. Wilson, *Thinking About Crime*, THE ATLANTIC ONLINE (Sept. 1983), https://www.theatlantic.com/past/docs/politics/crime/wilson.htm#:~:text=This%20debate%20over%20the%20way,be%20offenders%20fearful%20of%20punishment [https://perma.cc/7CCH-Q6KP].

4. U.S. CONST. amend. VIII.

5. Mr. Browder was a teenager at the time of his incarceration. *See* Gonnerman, *supra* note 2.

6. *See* Edward Lyon, *Imprisoning America's Mentally Ill*, PRISON LEGAL NEWS (Feb. 2019), https://www.prisonlegalnews.org/news/2019/feb/4/imprisoning-americas-mentally-ill [https://perma.cc/D39C-WKL9].

7. United States v. Salerno, 481 U.S. 739, 748–49 (1987).

8. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/E69L-UJ6M].

9. U.S. IMMIGR. & CUSTOMS ENF'T., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/9Y3H-EATW] (keeping in mind that ICE statistics don't desegregate populations awaiting a deportation order, or those with final orders of removal).

insecurity and even increased crime.[10] And consensus continues to grow that immigration detention also can lead to the same[11] or even unique harms.[12]

The United States is currently in the midst of a "third wave of potential pretrial detention reform."[13] And while certain reforms are gaining traction in an effort to reduce pretrial criminal detention, efforts to do the same for immigration detention have lagged.[14] Reformers and abolitionists make the case that immigration detention needs to be either restricted or eliminated entirely.[15] Nonetheless, the number of people held in detention for immigration purposes rises year after year.[16] Not only do the numbers of people in immigration detention grow, but the systems in place have grown less concerned with the harsh consequences of detention to the most vulnerable.[17]

While pregnant women and young children have historically been spared the harsh effects of detention, the last few years have exposed these groups to rising rates of incarceration. The Zero-Tolerance policy separated children from their mothers through the tool of incarceration, a practice that continued well into 2021.[18] The invocation of a public health emergency resulted in minors being expelled from the United States after being detained in hotel rooms.[19] Pregnant

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10. *See* SCAN OF PRETRIAL PRACTICES, PRETRIAL JUST. INST. 1, 19, 32 (2019), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=24bb2bc4-84ed-7324-929c-d0637db43c9a&forceDialog=0 [https://perma.cc/SAZ4-2BN3]; Léon Digard & Elizabeth Swavola, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1, 1–4 (2019), https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention [https://perma.cc/QN9Q-QSEM]; Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715 (2017).

11. *See* Migration and Refugee Services/United States Conference of Catholic Bishops Center for Migration Studies, *Unlocking Human Dignity: A Plan to Transform the US Immigration Detention System*, 3 J. ON MIGRATION & HUM. SEC. 159, 163–64, 171 (2015).

12. *See* Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 THE LANCET 1721, 1721–22 (2003).

13. Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 10 J. CRIM. L. & CRIMINOLOGY 701, 707 (2018).

14. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON 143 (2019).

15. *See id.*

16. Emily Kassie, *Detained*, MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), https://www.themarshallproject.org/2019/09/24/detained.

17. Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation Through Imprisonment*, 47 HOFSTRA L. REV. 1229, 1229–30, 1234 (2019).

18. *Id.* at 1229–30.

19. Joel Rose & Marisa Peñaloza, *Shadow Immigration System: Migrant Children Detained in Hotels by Private Contractors*, NPR (Aug. 20, 2020, 8:04 AM), https://www.npr.org/2020/08/20/904027735/shadow-immigration-system-migrant-children-detained-in-hotels-by-private-contrac [https://perma.cc/9VRC-3G7R]; *see also* Laila L. Hlass, *The*

women who previously enjoyed a presumption against incarceration were detained at an increased rate of eighty percent.[20]

The COVID-19 pandemic that spread throughout the nation in 2020 and 2021 highlighted how many people were detained despite serious medical issues. For instance, Juan Manual Hernandez is a 46-year-old who suffers from diabetes, hypertension, high cholesterol and has survived a heart attack and experienced smoke inhalation from a house fire.[21] Hernandez could not afford his $2000 bond and spent eight months detained by Immigration and Customs Enforcement (ICE) during the pandemic.[22] Others have tragically lost their lives, likely becoming infected with the disease while in immigration detention.[23] How and why did the immigration detention system ignore medical vulnerabilities and still decide to detain those at-risk?

The preference of detention over release is driven by a number of different factors. Professor Gillman highlights several of them: the immigration detention system's reliance on automatic detention, the overwhelming reliance on monetary bond, and finally the reliance on "risk factors"—a policy described as the "immigration system's adoption of elements from the criminal pretrial system while ignoring lessons learned in the criminal justice setting."[24] Professor Gillman goes on to explain that "[u]njustified reliance on ill-fitting pretrial risk factors from the criminal justice system also leads to flawed custody decisions."[25] One risk factor in particular—the focus on whether a person poses a danger to the community—creates a blind spot towards the harm that detention itself poses. This ignorance flouts a fundamental aspect of due process—that the government's interests must be balanced against an individual's liberty.

The risk factors that Professor Gillman references are the risk of flight and the risk of harm to the community.[26] While the first

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Adultification of Immigrant Children, 34 GEO. IMMIGR. L. J. 119, 202–03 (2020) (describing how the immigration system ignores youth-related vulnerabilities, adultifying immigrant children, who are predominantly children of color).

20. Daniel Gonzalez, *ICE Detention of Pregnant Women Soared 80% after Trump Administration Ended Policy Against It*, AZCENTRAL (Apr. 24, 2020, 7:31 PM), https://www.azcentral.com/story/news/politics/immigration/2020/04/24/ice-detention-pregnant-women-soared-80-after-trump-ended-policy/3017057001 [https://perma.cc/MBW4-TGYM].

21. *COVID-19 Habeas Litigation*, NAT'L IMMIGRANT JUST. CTR. (May 14, 2020), https://immigrantjustice.org/court_cases/covid-19-habeas-litigation [https://perma.cc/PJ4C-RXNK].

22. *Id.*

23. DONALD KERWIN, CTR. FOR MIGRATION STUD., IMMIGRANT DETENTION AND COVID-19: HOW A PANDEMIC EXPLOITED AND SPREAD THROUGH THE US IMMIGRANT DETENTION SYSTEM 1, 3 (2020), https://cmsny.org/wp-content/uploads/2020/08/CMS-Detention-COVID-Report-08-12-2020.pdf [https://perma.cc/4LS7-67LX].

24. Denise L. Gillman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 163 (2016).

25. *Id.*

26. *Id.* at 157.

factor, risk of flight, or the risk of absconding and not appearing at trial, has been a basis for continuing pretrial detention early on in our nation's history, the second risk factor is a relatively new and modern creation that was solidified in 1984 with the Bail and Reform Act of 1984.[27] It is after this adoption and the Supreme Court's condonation of the continuance of detention based on a fear for community safety, that the immigration custody system began to rely on these factors in their own assessment.[28] While there are several reasons why adoption of the risk factors are problematic, this Article focuses on how this adoption blinded the immigration detention system to consider harms of detention. The immigration system's reliance on the idea that the government can have a compelling interest in detention, caused it to ignore the need to balance that interest to the harms inflicted by incarceration.

By turning a blind eye to detention harms, the immigration custodial system categorically subordinates the fundamental liberty interest against confinement to the government's ambiguous interest in crime prevention. Part I of this Article will trace the historical roots of the immigration custodial system with a focus on how early consideration of harms became subsumed in the modern system. Part II will discuss the Bail Reform movements and the rise of preventing danger to the community as a legitimate government interest justifying detention. Part III concludes with a discussion of the immigration system's adoption of "danger to the community" as a government interest, and how it misapprehends key aspects of danger in the criminal pretrial situation. Finally, Part IV concludes with a discussion of how a due process analysis mandates consideration of the injury inflicted by detention in immigration custody decisions.

I. A SHORT HISTORY OF IMMIGRATION CUSTODY AND HARMS

The Supreme Court in 1896 declared that the power to detain was a natural aspect of the power to deport:

> Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.[29]

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27. Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202–03, 98 Stat 1837, 1837 (1984); *see also* Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 3146(b), 3148 80 Stat. 214, 214–16 (1966).

28. Gillman, *supra* note 24, at 178.

29. Wong Wing v. United States, 163 U.S. 228, 235 (1896).

The Court's analogy to criminal pretrial detention began a long history of conflating immigration detention with the criminal process.[30] Even as the Court declared that the power to detain came with the power to deport, it was Congress and administrative agencies that was tasked to create a system to decide who to detain and for how long.[31]

Immigration custody, at least the custody attendant pending a disposition of one's claim to either enter or stay in the United States, has from the beginning existed as two distinct sides to the mirror. The first was the custody applied when the government adjudicates a claim that a person should be allowed into the United States.[32] The second was the custody that occurred when the same government was deciding whether to expel or deport a person who already made an entry into the United States.[33] The procedures and more surprisingly, the factors used in deciding whether to release people pending these two adjudications evolved separately, under different constitutional frameworks and ended up creating different regulatory language.[34] While decisions on whether to release from custody those who were still trying to enter the United States evolved to allow consideration of harm that would be imposed by custody, those factors have remained mostly absent when considering the release of those awaiting a decision on whether they would be forced to depart their home and be separated from their family.[35]

A. Creation of Parole

When people arrive at our borders seeking entry, U.S. officials are tasked with a decision; to either allow them entry into the United States, or deny entry and forced the rejected applicants to return to where they came from. And while this decision often is exercised in the span of minutes, when the process takes longer, a space is created to decide whether or not an applicant should be incarcerated or not.[36] For some applicants, custody may be ordered, in which case they must wait between borders and behind bars until a final decision of admission can be made.[37] These decisions can take months or even years.[38] For others, a U.S. official may decide that custody is not

30. Gillman, *supra* note 24, at 214 (citing *Wong Wing*, 163 U.S. at 235).
31. *See* HERNÁNDEZ, *supra* note 14, at 27.
32. Gillman, *supra* note 24, at 164.
33. *See id.*
34. *See id.* at 171–74.
35. *See infra* notes 38–41 and accompanying text.
36. *See* CONG. RSCH. SERV., IMMIGRATION DETENTION: A LEGAL OVERVIEW 1 (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/876D-BLC4].
37. *Id.*
38. *See, e.g.*, *id.* at 19.

necessary, and thus allow the applicant "temporary entry" whereby they are physically inside the United States even as they are legally still outside of its borders.[39] Parole is when immigration officials decide that custody is unnecessary and temporary entry is allowed.

In 1917, Congress gave the Secretary of Labor the ability to create regulations to allow for the temporary admission of people pending inspection, and the Secretary of Labor did so, creating Rule 3 and Rule 16.[40] Rule 3 allowed for temporary admission and release from custody if hospitalization was necessary, while Rule 16 provided broader language and referred only to "unusual and grave hardship" would result if release and temporary admission was denied.[41] Rule 3 and Rule 16 were mandates by the Secretary of Labor that decisions to incarcerate must be informed by the potential for harm.

Even as Congress later codified the parole power in the 1952 Immigration and Nationality Act, they left discretion to the Agencies in making the decisions on whether to parole applicants for admission while awaiting the final decision on whether they would be allowed admission into the United States.[42] The parole statute, while focused on the temporary entry of applicants, also recognized its implications on custody—that it would necessarily entail release from custody.[43]

Between 1952 and well into the 1980s the use of the parole power to release people from custody was considered commonplace. The ubiquity of parole and release led the United States Supreme Court in *Leng May Ma v. Butler,* to declare "[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly, this policy reflects the humane qualities of an enlightened civilization."[44]

The statute and the regulations that gave the power to parole and thus release from custody those who sought entry into the United States provided little guidance. While Rule 3 and Rule 16 had referenced hospitalization, the new regulations contained no such language and its interpretation of the parole power remained vague and broad.[45]

It took a humanitarian crisis, a change in Presidential administration, and consistent litigation to create more specific guidelines,

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39. AM. IMMIGR. COUNCIL, THE USE OF PAROLE UNDER IMMIGRATION LAW 1 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law.pdf [https://perma.cc/R43D-FBNJ].

40. U.S. DEP'T OF LABOR, IMMIGRATION LAWS AND RULES (4th ed.), r. 3, r. 16 (1917).

41. *Id.*

42. Immigration & Nationality Act of 1952, Pub. L. No. 414-477, § 232, 66 Stat. 138, 163.

43. *Id.* §§ 212(4), 212(d)(5) ("[T]he alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as any other applicant for admission to the United States.").

44. 357 U.S. 185, 190 (1958) (citations omitted).

45. *See, e.g.*, 8 C.F.R. § 212.9 (1958); 8 C.F.R. § 212 (1965); 8 C.F.R. § 212.5 (1974).

and to reverse the presumption of release. Starting in December of 1972, South Florida began to see a large influx of Haitians fleeing poverty by boat.[46]

Until 1981, the Immigration and Naturalization Service (INS) had contracted with a group of churches to help resettle and provide work authorizations for those fleeing Haiti, a reflection of the presumption that detention would be the exception and release the general rule.[47] At the same time, in 1980 the Mariel Boatlifts began, whereby boats left to pick up Cubans in Mariel harbor and bring them back to the United States, a number which exceeded 125,000 people by the mid-1980s.[48] One of the first decisions Ronald Reagan made as president was to alter the Carter Administration's policy of release.[49] After a task force was created and Attorney General French declared to Congress that Haitian and Cuban arrivals had to be deterred through detention, INS began implementing a policy and refusing to release people under its parole power.[50]

Despite the stated goal of increased detention, there was little guidance on what the standards were being used.[51] In *Louis v. Nelson*, District Judge Spellman from the Southern District of Florida wrote, "Defendants [INS] can point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy."[52] The lack of a written policy eventually led to the *Louis* district court ruling that the INS had violated the Administrative Procedures Act and forced the Agency to promulgate new regulations around parole.[53]

The new interim rule and regulations came with a summary statement declaring custody was no longer going to be the exception, and despite the Supreme Court's pronouncement twenty years earlier in *Lee May Ma*, the rule reminded district directors empowered to grant parole that "district directors should be guided by the fact that the statutory rule is one of detention, and that the use of parole authority is an exception to that rule and should be carefully and narrowing exercised."[54] Against this backdrop, the new version of the regulation, 8 C.F.R. § 212.5, took on a completely different look.[55]

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46. *See* Louis v. Nelson, 544 F. Supp. 973, 978 (S.D. Fla. 1982).
47. *See id.*
48. *See id.*
49. *See id.* at 979–80.
50. *See id.*
51. *See id.* at 981.
52. *See Louis*, 544 F. Supp. at 981.
53. *See id.* at 979, 1003–04.
54. Detention and Parole of Inadmissible Aliens, 42 Fed. Reg. 30,045 (July 9, 1982).
55. *See* 8 C.F.R. § 212.5 (1985).

The new regulation identified factors to consider when deciding to grant parole and framed parole as the power to release from custody.[56] The first factor the regulation mandated was consideration for release anyone with "serious medical conditions in which continued detention would not be appropriate," then it identified several other groups—pregnant women, juveniles, those with close family relatives in the United States who have or may file a visa petition, witnesses, or those "whose continued detention is not in the public interest."[57] While declaring that detention would be the presumption, the regulations also made it policy that those who would suffer from detention—people with medical conditions, juveniles and pregnant women—should be considered for release.[58] While most of the identified groups were subject to the requirement that they "present neither a security risk nor a risk of absconding," the group identified with serious medical issues were excluded from that requirement.[59] These classifications remained largely unchanged to the modern era.

The Interim Rules' declaration from the 1980s that reinterpreted parole as extraordinary and exceptionally rare has proven true over the last thirty years.[60] Parole remains an exception, and, during some administrations, even a near impossibility.[61] Nonetheless, the written factors used to decide whether to release someone through parole balances the harm of detention against security or absconding risks.

B. Detention Awaiting Deportation

The Naturalization Act of 1917 created specific rules around deportation, namely the detention and expulsion of those found already inside the United States.[62] The statute invited the Department of Labor to create rules governing the process of deportation.[63] The statute itself did not provide much guidance other than that release from custody pending the deportation case required at least a $500 surety with a condition that the person show up when required for hearings or for deportation if necessary.[64]

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56. *Id.*

57. Detention and Parole of Inadmissible Aliens, 42 Fed. Reg. 30,045 (July 9, 1982).

58. 8 C.F.R. § 212.5 (1985).

59. *Id.*

60. *See* Elliott Young, *The Cruel Detention of Immigrants Didn't Start with Trump—And It Won't End With Him, Either*, JACOBIN MAG. (2021), https://www.jacobinmag.com/2021/01/detention-border-control-us-immigration-trump [https://perma.cc/DD5C-2JY6].

61. *See id.*

62. *See* Immigration Act of 1917, Pub. L. No. 64-301 §§ 19–20, 39 Stat. 874, 889–90 (1917).

63. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896); U.S. DEP'T OF LABOR, IMMIGRATION LAWS AND RULES (4 ed.), r. 21–23 (1917).

64. *See* Immigration Act of 1917 § 20.

The rule created by the Department of Labor was titled "Rule 22 Arrest and Deportation on Warrant" covered the procedural requirements for deportation, and a provision that allowed either those facing deportation to "remain in . . . place" or be placed into custody.[65] A different provision forbade the custody for women and girls in jails or other similar places "unless such incarceration is absolutely unavoidable" and instead directing the custody to "philanthropic . . . society."[66] Rule 22 devoted an entire subdivision to the custody and care of women that had to be detained.[67] As for being released while awaiting detention, the Rules mirrored the statutory language and simply stated, "[t]he amount of any bond under which an arrested alien may be released shall be $500."[68] However, the Rule also states that for those "who are unable to give bail shall be held in jail only in case no other secure place of detention can be found."[69] These Rules remained largely in place, without adding much to the discretionary guidelines of when and who should be granted bail upon release.

The next statutory change didn't come until thirty years later with fears of communism, when Congress wrote the Internal Security Act of 1950.[70] This Act was aimed at Communist members, both citizens and not.[71] The first title was primarily aimed against noncitizens, or newly naturalized citizens.[72] One provision amended the 1917 Act on detention for those facing detention, adding a provision that clarified that the government could decide to continue custody, along with the potential release on $500 bond, or release on conditional parole.[73] A $500 surety was no longer a guarantee of release. The provision did not mandate custody for any specific group—including those who faced deportation based on communist membership.[74]

The passage of this Act, resulted in the re-detention of a number of people previously released on bail and litigation.[75] A group of five petitioners held under this provision and denied the opportunity

65. U.S. DEP'T OF LABOR, IMMIGRATION LAWS & RULES (4th ed.), r. 22 subds. 5–10 (1917).

66. *Id.* at r. 22 subd. 10.

67. *Id.*

68. *Id.* at r. 22 subd. 6.

69. *Id.*

70. Internal Security Act of 1950, Pub. L. No. 81-831 § 2, 64 Stat. 987–89 (1950).

71. *Id.*

72. *Id.* §§ 23, 25.

73. *Id.* § 23, 64; *see also* Immigration Act of 1917, Pub. L. No. 64-301 § 11, 39 Stat. 874, 881–82 (1917). There had been prior court decisions that interpreted the 1917 language as providing for release on bail as a matter of right.

74. *See* Internal Security Act of 1950 § 23, 64.

75. *The Internal Security Act of 1950*, 51 COLUM. L. REV. 624, 636 n.297, 659 (1951).

to post bail, filed for habeas corpus alleging that a denial of bail violated due process and the Eighth Amendment.[76]

Though the five petitioners won on their habeas corpus claim in the appellate court, the government appealed, and in *Carlson v. Landon*, the Supreme Court had to decide the constitutionality of refusing to grant release under the new detention statute.[77] The Court noted that Congress expressly decided to adopt one judicial interpretation of the 1917 statute allowing for detention rather than release and that Congress explicitly made the choice that bail was not a right.[78] The Court ruled that no due process violation took place, noting that many of those previously held were released on bail, and there didn't appear to be any abuse of discretion in those decisions.[79] As for the Eighth Amendment challenge, without explaining why, the Court simply stated, "We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases."[80] These custody provisions later survived in the 1952 Naturalization Act.[81]

From 1952 until 1988, Congress did not revise the custody provision meaningfully and instead allowed the administrative agencies to sort out their own requirements.[82] The regulations however did not provide any specific guidance on how district directors were to exercise their discretion in "continuing custody," releasing on bond or releasing on conditional parole.[83] Instead the Board of Immigration Appeals (BIA) through agency decisions began to provide guidance on the release decisions made under the INA 242 statute.[84]

Just as the Supreme Court in *Leng* had declared that detention as attendant to exclusion was rare in the 1950s, the Board of Immigration Appeals in 1976 through *Matter of Patel* made a similar declaration, ruling that a person "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."[85] Aside

76. Carlson v. Landon, 342 U.S. 524, 528–29, 531 (1952).

77. *See id.* at 526–28.

78. *See id.* at 539–40.

79. *See id.* at 542.

80. *Id.* at 546.

81. *See* Internal Security Act of 1950, Pub. L. No. 81-831 § 23, 64 Stat. 987, 1010–12 (1950); Immigration & Nationality Act of 1952, Pub. L. No. 414-477 § 212(5), 66 Stat. 163, 208–12 (1952).

82. *See* Immigration & Nationality Act of 1952 § 212(5); H.R. 5210, 100th Cong. (1988) (enacted).

83. *See* 8 C.F.R. § 242.2 (1997); 8 C.F.R. § 242.3 (1997); Aliens: Apprehension, Custody and Determination of Deportability, 18 Fed. Reg. 3530 (June 19, 1953).

84. *See In re* Patel 15 I&N Dec. 666, 666–67 (B.I.A. 1976); *In re* San Martin 15 I&N Dec. 167, 168–69 (B.I.A. 1974).

85. *See In re* Patel, 15 I&N Dec. at 666 (internal citations omitted).

from creating the presumption of release, the BIA had also provided the first administrative guidance as to when a person should be released—as long as they are not a poor bail risk or a risk to national security.[86]

In earlier decisions the Board had wrestled with the question of whether felons or those with a criminal history could be held in custody without bond. Decided two years before the *Patel* decision, the Board in *Matter of San Martin* reviewed a case in which an immigration judge refused to grant bond even though the district director in that case had set a bond in the amount of $15,000.[87] The immigration judge's decision to deny bond entirely was "because of the potential threat posed by the respondent to society" based on the man's convictions for possession of cocaine and marijuana.[88] The *San Martin* panel rejected the immigration judge's denial of bond and wrote, "the respondent should be released under bond. We are concerned primarily, with assuring his appearance in the immigration proceedings."[89] In other words, the poor bail risk was the primary concern, not any potential threat to society, and on that basis a bond was appropriate—a high bond, but a bond, nonetheless.

After the *Patel* decision, the release provisions governing parole and those governing people awaiting deportation were remarkably similar. Congressional statutory authority was broad, and the regulatory authority provided little guidance. By the end of the 1990s, release under parole and release awaiting detention no longer was the default or presumed.[90] But there was one key difference. Even as parole authority narrowed, the regulations still contemplated the importance of avoiding detention for those who were vulnerable.[91] Not so for those awaiting deportation.[92] Not only was the detention becoming the default for many if not most, but Agency decisions turned a blind eye to the harms of detention.

Why did immigration authorities begin to treat detention for the purpose of deportation so differently than the power to parole people in the United States? Both statutory authorities, parole and detention awaiting deportation were written in the 1950s, and both allowed broad discretion, and yet one set of regulations interpreted the parole statute to allow consideration for harm of detention, whereas the other regulation and agency guidance on immigration custody

86. *See id.*

87. *See In re* San Martin, 15 I&N Dec. at 167–68.

88. *See id.*

89. *Id.* at 168.

90. *Cf. Analysis of Immigration Detention Policies*, ACLU, https://www.aclu.org/other/analysis-immigration-detention-policies [https://perma.cc/Q4AY-KC27].

91. *See* discussion *supra* Sections I.A–B.

92. *See* discussion *supra* Sections I.A–B.

focused exclusively on community danger and flight risk and ignored harm that was being imposed by detention.[93]

The answer lies in the framing of the purpose of detention and on timing. While parole was an exercise of the nation's power to control migration—after all, it was used to allow temporary admission into the United States—the power to detain while awaiting deportation proceedings became increasingly analogous to pretrial criminal detention. Because the parole regulations were written in 1982 just prior to the Bail Reform Act of 1984,[94] the justification of detention because of community harm had not yet been condoned by Congress or the Supreme Court. While the detention awaiting deportation rules were reformed right after the Bail Reform Act of 1984 and *Salerno* the comparison and analogy to pretrial criminal detention became too strong to resist. Immigration authorities inspired by the criminal pretrial detention reforms focused on "danger to the community" and subsequently began to ignore the harm of incarceration.

II. CRIMINAL BAIL REFORM AND THE RISE OF PREVENTING COMMUNITY HARM AS A GOVERNMENT INTEREST

Reforming pretrial criminal detention, and specifically the criminal bail system, has come in American history through several "waves."[95] These waves have been characterized by differing, and at times opposing, concerns. The system of requiring a monetary bail prior to release from detention after one's arrest, and before the completion of a trial did not exist during the colonial period.[96] Prior to the modern age, bail worked under a surety arrangement, where payment was only expected if a person did not show up to court, and people had to rely on family and friends to agree to the sureties.[97] Once urbanization occurred and communities become less personal, the poor needed another way to access sureties to pay bail, and the modern bail system was created; people had to prepay in order to get released, and an industry developed around lending money for the payment of bonds.[98] By the late 1920s, more people were studying the application of the bail system in the various states, with one such empirical study done by Arthur Beeley in 1927 studying the

93. *See* discussion *supra* Sections I.A–B.

94. Detention and Parole of Inadmissible Aliens, 42 Fed. Reg. 30,045 (July 9, 1982); Bail Reform Act of 1966, Pub. L. No. 89-465 §§ 3146–52 80 Stat. 214, 214–17 (1966).

95. Van Brunt & Bowman, *supra* note 13, at 703, 705, 770.

96. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 530–31 (1983).

97. *Id.* at 519–21.

98. Van Brunt & Bowman, *supra* note 13, at 714–16.

bail system in Cook County Jail, where defendants were held pretrial in Chicago.[99] That study found that bail amounts were set arbitrarily, not with any regard to the ability to pay, used a "standardization" policy that ignored individual concerns, and finally, was often too excessive.[100] This one study launched many more and piqued the interest of scholars, leading to research and bail studies throughout the country.[101] These studies eventually launched the first wave of bail reform in the 1960s.[102]

The 1960s reform movement was ignited by the concern that many poor and indigent people were deliberately being detained for no other reason than they could not afford to pay a bail amount.[103] One study from Philadelphia showed that judges didn't inquire into financial ability to pay and instead decided bail based on the nature of the accused offense.[104] In New York, the Vera Institute launched the Manhattan Bail Project, designed to promote release without paying any bail and which attempted to track what factors determined risk of absconding from trial.[105] These successful efforts to show that release without any bail amount led to very low rates of absconding eventually made their way to Congress.

The Bail Reform Act of 1966[106] was a major progressive reform and the first attempt to modify the federal bail system since the 1789 Judiciary Act.[107] It was specifically designed to ease the financial burden of bail on the poor facing criminal trials.[108] The Act, which could only be used for those facing federal crimes, expanded the use of release on recognizance.[109] The bail system was not eliminated, and a money bail could be required if there was a flight risk, and courts could deny bail if a defendant appeared to be an unacceptable flight risk.[110]

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99. *Id.* at 717.
100. *Id.*
101. *Id.* at 718, 723.
102. *Id.* at 718, 723–24.
103. *Id.* at 723–24.
104. Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1034–35 (1954).
105. Van Brunt & Bowman, *supra* note 13, at 724.
106. Bail Reform Act of 1966, Pub. L. No. 89-465 §§ 3146–52 80 Stat. 214, 214–17 (1966).
107. Van Brunt & Bowman, *supra* note 13, at 725, 725 n.117.
108. *See* Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966* (June 22, 1966), http://www.presidency.ucsb.edu/ws/?pid=27666#axzz2htZwrKnK [http://perma.cc/TFP5-M42H] (saying, "[b]ecause of the bail system, the scales of justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money. But now, because of the Bail Reform Act of 1966, which an understanding and just Congress has enacted and which I will shortly sign, we can begin to insure that defendants are considered as individuals—and not as dollar signs.").
109. Bail Reform Act of 1966 § 3146(a).
110. *Id.* §§ 3146(b), 3148.

This first wave of bail reform became hugely successful in that many states and other criminal justice systems adopted its practices.[111] Release without bail became more commonplace and community programs developed to help ensure court appearances without bail.[112] In form, if not in function, the bail system was no longer supposed to punish the poor.

A. Expansion of Pretrial Criminal Detention

The attention and focus on the bail system began to shift during the War on Drugs and the backlash to progressive criminal reform began to build in the 1970s and 80s.[113] As people began to be released based on the bail reforms,[114] concern began to grow about these same people committing crimes while out on bail.[115] Even before the 1966 Bail Reform Act, states and the courts viewed protection of witnesses from coercion and other interference with the judicial process as a basis to deny release on bail,[116] but the concern was not just the criminal trial process, but crimes in general being committed by people out on bail.[117] At the same time, many state courts were reluctant to use the bail system as a means of "preventive detention," and some even interpreted their own Constitutions as prohibiting the denial of bail to protect the public.[118]

Congress didn't feel as constrained, and it passed the District of Columbia Court Reform and Criminal Procedure Act of 1970.[119] The statute allowed judges to detain people without bail if they found that public safety would be endangered by release, while important limitations were in place, such as that only those charged with "dangerous crime[s]" could be held in such a manner, and other due process practices were employed such as hearings, and time limits.[120] The D.C. Court of Appeals, in *United States v. Edwards*,[121] upheld the

111. *See* Van Brunt & Bowman, *supra* note 13, at 723–30.
112. *See id.*
113. *Id.* at 705, 727–30.
114. State criminal justice reforms took their cues from the federal government, and many adopted the reforms contained in the Bail Reform Act of 1966. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 39–40, 52–53 (3d ed. 2007).
115. Van Brunt & Bowman, *supra* note 13, at 731.
116. *See* Carbo v. United States, 82 S. Ct. 662, 669 (1962); Fernandez v. United States, 81 S. Ct. 642, 643–44 (1961).
117. *See* Van Brunt & Bowman, *supra* note 13, at 731.
118. *In re Underwood*, 508 P.2d 721, 724 n.5 (Cal. 1973).
119. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 473, 475 (1970).
120. *Id.* § 23-1332(a).
121. 430 A.2d 1321 (D.C. Cir. 1981).

statute and ruled that (1) pretrial detention without bail in this context was regulatory and not punitive,[122] (2) that regulatory interest was to prevent crime occurring while people were on bail, and (3) there was no fundamental right to bail in all circumstances.[123]

After the *Edwards* decision, a majority of states began to incorporate dangerousness into consideration of bail. By 1984, thirty-four states had added danger to their consideration of bail and denial of release.[124] Some states had to amend their own Constitutions' bail by right provisions, but nonetheless, by the mid 1980s, concern about crimes committed by those out on bail had risen dramatically.[125] While being poor was not a proper reason for confinement, being dangerous was increasingly seen as an acceptable reason for denying bail.

In the juvenile context, the Supreme Court ruled that a New York statute, which allowed for the detention of juveniles who were being held for dangerousness and who "may before the return date commit an act which if committed by an adult would constitute a crime," was constitutional.[126] This preventative detention of juveniles was not the same as pretrial detention; these juveniles were being held for delinquency proceedings, but more importantly, the Court found that this form of detention was not punishment and was regulatory.[127] The statute at issue in *Schall* had a limit of a seventeen-day maximum that juveniles would be held in "halfway house[s]" and dormitories designed for different ages, and finally, that the entire juvenile system had to consider the "best interests of the juvenile," even in detention decisions.[128] The Supreme Court relied on the notion that preventative detention was a part of the State's *parens patriae* power, its obligation to protect minors, not just from the community, but from themselves.[129] The Court was unconcerned with the notion of predicting future risk, writing, "that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."[130]

Denial of release may not be explicitly predicated on being poor anymore, but different systems from Washington D.C. to juvenile

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122. The regulatory and punitive divide was given a central role by the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520, 537–40 (1979).

123. *Edwards*, 430 A.2d at 1330.

124. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15 (1985).

125. *Id.* at 15, 20.

126. Schall v. Martin, 467 U.S. 253, 255–57 (1984) (quoting New York Jud. Law § 320.5 (McKinney 1983) (Family Court Act)).

127. *Id. at* 256–57, 257 n.4, 270.

128. *Id.* at 264, 266–68, 270–71.

129. *Id.* at 265, 271.

130. *Id.* at 278–79.

court systems began to assert that potential danger to the community was a valid justification to incarcerate. Congress took the next step and reformed the federal bail system.

B. Second Wave of Bail Reform—The Bail Reform Act of 1984

The Supreme Court upheld the juvenile preventative detention statute in June of 1984, and Congress was already at work on the Bail Reform Act of 1984 as part of the larger Comprehensive Crime Bill of 1983.[131] Congress had begun to hold hearings in 1983 and investigate and decry the issue of people committing crimes while out on bail.[132] In October of 1984, Congress passed the Bail Reform Act of 1984 and, like the provision eighteen years earlier, it reflected a major change on bail policy.[133] Congress reacted to the concerns of danger while out on bail, and it passed a number of provisions: (1) release on recognizance was still given a wide preference, though it would be forbidden based on flight risk or if it "will endanger the safety of any other person or the community," (2) conditions could be imposed to increase chance of appearing in court or to decrease any danger to the community, (3) and finally, if "no condition . . . will reasonably assure the appearance of the [defendant] . . . and the safety of . . . the community," the person must be held in detention without bail.[134]

Congress also provided specific factors that were to be considered: information about the charge; the weight of evidence; history and characteristics of the person, including physical, mental, financial and standing in the community; and if during the arrest, the person was already out on parole or bail.[135] Lastly, Congress required an evaluation of the nature and seriousness of the danger posed by a person's release.[136] These factors must be considered by the court, and none could be disregarded or ignored, even if they were given different weight.[137]

The 1984 Bail Reform Act provisions kept the presumption of release and the consideration of factors, such as ability to pay and community ties, in order to evaluate the risk of absconding, but

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131. *Id.* at 253, 281; Van Brunt & Bowman, *supra* note 13, at 732.

132. *See Bail Reform Act: Hearings H.R. 1098, H.R. 3005, and H.R. 3491 Before the H.Comm. on the Judiciary*, 98th Cong. 2 (1983) (statement of Congressman Robert W. Kastenmeier).

133. Van Brunt & Bowman, *supra* note 13, at 732.

134. 18 U.S.C. § 3142(b)–(e).

135. *Id.* § 3142(g).

136. *Id.*

137. *See* United States v. Torres, 929 F.2d 291, 291–92 (7th Cir. 1991); United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991).

Congress also added the additional question of danger[138]—and phrased it in such a way that a person who posed a danger, and who the court could not find any reasonable conditions that would reduce the danger posed by the person, could not be bailed out.

C. Salerno v. United States

The alleged head of the Genovese crime family, Anthony Salerno, and a captain of the same family, Vincent Cafaro, were indicted in March of 1986.[139] After conducting a hearing under the Bail Reform Act under 18 U.S.C. § 1324(e), the District Court denied bail in any amount and ordered custody to be continued.[140] The Second Circuit ruled that the Act's allowance for detention based solely on future danger was facially unconstitutional.[141] The Government filed for certiorari and the Supreme Court decided the case in May of 1987.[142]

The defendants challenged the constitutionality of their detention, arguing that (1) preventative detention prior to trial, regardless of the strength of the government interest, violated the substantive due process clause as it was a punitive detention that would abrogate the innocence standard; (2) the procedures in place, including the vagueness of the danger standard itself, were unfair enough such that the risk of erroneous deprivation was too high to comply with procedural due process; and finally, (3) the statute violated the Excessive Bail Clause of the Eighth Amendment.[143]

The petitioners and several amici argued that preventative detention of competent adults could never be justified by a government interest.[144] In other words, "at the end of that continuum stands a wall erected by the Due Process Clause which no government interest—rational, important, compelling or otherwise—may surmount."[145] The respondents argued that the "regulatory" interest, namely public safety, was merely a runaround of the protections provided for criminal defendants; preventative detention of a competent adult standing trial for a crime was in fact punishing him or her for a crime that he or she was not yet convicted of.[146]

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138. *See* 19 U.S.C. § 3142(b).
139. United States v. Salerno, 794 F.2d 64, 66 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987).
140. *Id.* at 66–67.
141. *Id.* at 64, 74–75.
142. *See* United States v. Salerno, 481 U.S. 739 (1987).
143. *Id.* at 746, 749, 752.
144. Brief for Respondent, United States v. Salerno, 481 U.S. 739 (1987) (No.86-87), 1986 WL 727532, at *16–17.
145. *Id.* at *16.
146. Amici of ACLU, United States v. Salerno, 481 U.S. 739 (1987) (No. 86-87), 1986 WL 727537, at *17–24.

The *Salerno* majority rejected the petitioner's arguments: first by refusing to classify pretrial detention as punitive, writing in a near tautological fashion, "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal."[147] The Court refused to recognize the wall which respondents argued existed between the detention of competent adults and an absence of a criminal conviction.[148] Instead the Court categorized pretrial detention in the same ambit as the government's wartime powers to detain suspected enemies, its power to detain and commit the mentally ill who were dangerous to themselves and others, those who were not competent to stand trial, those facing deportation, dangerous juveniles facing a delinquency proceeding, and those arrested prior to their bail hearing.[149] The Court analyzed the Government's interest in preventing crime for a specific class of arrestees—those accused of serious crimes and those who the Government had probable cause to believe committed the crimes—was substantial enough to overcome the individual liberty interest.[150]

The Court also continually described the procedures involved as extensive. According to the Court, detention was not going to be prolonged as it was constrained by the Speedy Trial Act, the Government bore a clear and convincing standard of proof and burden, and the provisions denying all bail was to be applied only to a subset of people—those charged with especially serious felonies meant that the procedures provided due process.[151] The Court then disposed of the Excessive Bail Clause argument by referencing back to the *Carlson v. Landon* case, noting that the excessive bail clause does not inherently mean bail is allowed in all cases.[152]

There were important limitations to the Court's ruling. The Court had continually flagged the fact that the defendants' challenges were facial, meaning that the bar was extremely high and then wrote in a footnote, that "[w]e intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal."[153] In other words, the procedures and process of detention

147. United States v. Salerno, 481 U.S. 739, 747 (1987) (internal citations omitted).
148. *Id.* at 748.
149. *Id.* at 748–49 (citations omitted).
150. *Id.* at 750–51.
151. *Id.* at 751–52.
152. *Id.* at 752–55 (1987).
153. *Salerno*, 481 U.S. at 747 n.4.

could lead to an unconstitutional application, but that was not the case before the Court then. The facial aspect to the current case was important in one other respect: whereas the government interests—to protect against crimes committed while out on bail—could be considered and weighed, the individual's liberty interest, was not—the Court noted, "we cannot *categorically* state that pretrial detention [offends a fundamental liberty interest]."[154] Because this was a facial challenge, Mr. Salerno's liberty interest and weighing of the harm of detention was not proper.

So how did the *Salerno* decisions leave things? The Court definitely ruled that in *some* circumstances the government's interest in preventing harm to community could outweigh an individual arrestee who was found to have probable cause to have committed a specific subset of dangerous crimes.[155] By not deciding the length of detention's effect on the nature of the detention and leaving a case-by-case analysis open, the Court did not decide that every time danger to the community was implicated it overrode an individual's fundamental liberty interest in being free from incarceration.[156] But what it clearly did was elevate the government's interest in protecting the community as a potential justification to deny bail and thus release.

*D. Post-*Salerno *and Its Impact*

One decision post-*Salerno* verified that the government's interest in community protection does not always outweigh an individual's liberty interest. In *Foucha v. Louisiana*, the Court was confronted with a commitment statute that allowed holding a person after they were acquitted by reason of insanity, and even after they were treated and found to no longer be mentally ill if they were found still dangerous.[157] In striking down the statute, Justice O'Connor wrote in a concurrence:

> Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a nonviolent or relatively minor crime.[158]

154. *Id. at* 750–51 (emphasis added).
155. *See id.* at 754–55.
156. *See id.* at 754.
157. Foucha v. Louisiana, 504 U.S. 71, 73 (1992).
158. *Id.* at 88 (O'Connor, J., concurring).

According to Justice O'Connor, the government's interest on dangerousness is not static, or uniform, and it can vary depending on the individual's situation.[159]

The *Salerno* decision had a far wide-ranging effect and led to increased incarceration across the board—even when defendants were given bail. As Brunt and Bowman explain, even though *Salerno* did not say anything about the use of bonds set at an excessive amount to effectuate preventative detention, that is how many States applied and effected that decision.[160] In Illinois, authors of a study that looked at the bail system found that release on own recognizance was used increasingly sparingly, that up to forty percent were detained throughout the pretrial phase, and the vast majority of those individuals had bail set, but could not afford it.[161] Courts were not having to rely on a finding that *no* conditions could be met to allow release, they could simply set conditions high enough in the name of public safety, knowing that no release would be possible.[162] By naming "danger to the community" as a potential justification for detention, the Supreme Court created a new norm allowing magistrates and courts to engage in risk analysis, often to the detriment of the accused. Because those held in pretrial detention were already accused of a crime and their arrest justified under probable cause, the road to incarceration as the default was built.

III. IMMIGRATION DETENTION'S FOCUS ON DANGER MAKE IT BLIND TO HARM

Requiring the consideration of harm when making custody decisions seems intuitive, and yet immigration detention centers are filled with people who are obviously suffering in detention. These jails are filled with asylum seekers and former refugees who suffered severe past trauma or even torture.[163] ICE regularly detains pregnant women, minors, those who suffer from severe mental illness, and even people who suffer from serious chronic health problems.[164] The detention centers themselves, often county jails, are rife with allegations of abuse and mistreatment.[165] The immigration regulations

159. *See id.*

160. Van Brunt & Bowman, *supra* note 13, at 739.

161. *Id.*

162. *Id.* at 739–42.

163. *See* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 541 (1999).

164. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, IMMIGRATION ENFORCEMENT: ARRESTS, DETENTIONS, AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS (2019).

165. Monsy Alvarado et al., *Deaths in Custody. Sexual Violence. Hunger Strikes. What*

and agency decisions that govern the custody process are utterly lacking in discussion of the harms of detention when deciding custody decisions. How has the agency been able to turn a blind eye to the pain and suffering that detention can inflict even as ICE officers and immigration judges decide thousands of custody decisions every day?

One answer is the "asymmetric incorporation of criminal justice norms" by the immigration system generally and by the detention system specifically.[166] Even as detention attendant to deportation began to closely mirror the criminal pretrial system, it failed to adopt key features of that system.[167] First, the immigration system failed to incorporate any of the procedural protections outlined as crucial in the *Salerno* court, the most prominent being a lack of an individualized hearing in all cases, and the burden of proof being placed on the detainee.[168] This failure to adopt such procedural protections has thus far been of no constitutional merit in the Supreme Court,[169] as the Court has ruled that mandatory detention under 8 U.S.C. § 1226(c) does not offend due process.[170] But more germane to this Article, the immigration custody system has also failed to appreciate how criminal pretrial detention treats the concept of danger to the community.[171] The current immigration custody framework treats the government's interest of protecting against danger as a monolithic interest that automatically trumps an individual's liberty interest regardless of what it may be.[172] If there is any risk that there is danger to the community, then the harm inflicted on the detainee is moot. This formulation cannot be supported, not by common sense nor by a careful understanding of due process protections.

Ordinarily in order to take away a person's freedom, the government's interest must outweigh the *individual's* liberty interest.[173] The current immigration custody system ignores this principle and instead treats the government interests as monolithic and able to trump any individual interest in freedom. Two key mistaken assumptions

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We Uncovered Inside ICE Facilities Across the US, USA TODAY (Dec. 19, 2019), https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002 [https://perma.cc/2USU-ANKF].

166. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 523 (2007).

167. *Id.* at 472.

168. *See id.* at 521, 533–34.

169. Several challenges in lower courts have produced orders for immigration authorities to enforce procedural protections, such as an imposition of a burden of proof on ICE and consideration of the ability to pay. CONG. RSCH. SERV., *supra* note 36, at 13.

170. Demore v. Kim, 538 U.S. 510, 513 (2003).

171. Legomsky, *supra* note 166, at 474, 479.

172. *See id.* at 489–90.

173. *See* Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring).

drive the Agency's faulty interpretation: first, that the question of danger to the community is somehow a binary one rather than a risk assessment, and second, that the specific individual's interest in liberty is static and need not be considered.

A. Considering Danger in Immigration Custody Decisions

Right after the *Salerno* decision, but before Congress changed the custody statute the Board of Immigration Appeals in 1987 used a detainee's criminal history to justify setting a bond in the amount of $10,000, but avoided invoking any potential threat to the community, explaining that:

> We consider the respondent's extensive and recent criminal record to be a very serious matter militating against his release without a significant bond. While we do not consider a criminal record per se a reasonable basis for a high bond amount, we find it a relevant consideration in determining the necessity for or the appropriate amount of bond insofar as it related to a respondent's character.[174]

The Board did not use criminal history to measure potential danger, but instead referred to the history as a reflection of a person's character and therefore respect for the law and likelihood of returning to court.[175] While the Board didn't directly tie criminal history with the need for custody, Congress stepped in and not only made criminal history important but made the link to custody explicit.

In 1988, Congress passed the Anti-Drug and Abuse Act (ADAAA) of 1988.[176] Congress first created a new class of deportees, "aggravated felon[s]," and required immediate custody and a denial of the possibility of release.[177] This draconian turn came about from a confluence of the War on Drugs, the Cuban Marielito Freedom Flotillas and the Haitian influx of the 1970s and '80s.[178]

By 1990, several district courts had struck down the complete denial of bail on due process grounds, and Congress rewrote the provision again in 1990.[179] In IMMACT 90, the provision this time

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174. *In re* Andrade, 19 I&N Dec. 488, 490 (B.I.A. 1987).

175. *See id.*

176. Anti-Drug and Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

177. *Id.* § 7343(a)(2) ("Attorney General shall not release such felons from custody.").

178. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360–69 (2014) (providing a detailed explanation of the intermingling of the immigration concerns with the drug trade and criminality and the legislative responses of the mid-1980s to the mid-1990s).

179. Joe v. INS, No. 90-12313-Z-20, 1990 WL 167457, at *1 (D. Mass. Oct. 26, 1990); Paxton v. INS, 745 F. Supp. 1261, 1266 (E.D. Mich. 1990); Agunobi v. Thornburgh, 745

allowed for the release of aggravated felons who were lawful permanent residents[180] so long as the "Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."[181] The statute walked back its complete denial of discretion to the Attorney General, and for the first time the statute invoked "danger to the community" as a reason to deny release.[182] Up until this point, immigration statutes were silent on reasons to deny release, and as mentioned *supra*, Agency decisions did not see the role of immigration custody as preventing generalized community harm. There is little doubt that the Supreme Court's identification of danger to the community in *Salerno* influenced if not inspired this turn of phrase.

By 1996 Congress went back to a mandatory detention scheme for those with certain types of convictions that qualified as "aggravated felonies" as well as drug and gun offenses.[183] At the same time Congress revived the old general discretion language for those who didn't fall under mandatory custody.[184] Congress discarded any reference to "danger to the community" in the statute.

Congress created two classes of people awaiting deportation decisions: those that could not be released during deportation proceedings regardless of discretion, and those that the Attorney General had broad discretion to detain, release on a bond of at least $1500, or grant conditional parole to.[185] And yet the Agency, when deciding when to release those it had power to release, did not revert back to the practices described in *Matter of Patel*. Instead, the BIA in *Matter of Adeniji* through a bizarre twist reversed the presumption of release

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F. Supp. 533, 537 (N.D. Ill. 1990); Leader v. Blackman, 744 F. Supp. 500, 508 (S.D.N.Y. 1990); Chao Yang v. INS, 3-90-CV-300 (D. Minn. June 27, 1990); Kellman v. INS, 750 F. Supp. 625, 626–27 (S.D.N.Y. 1990). *But see* Davis v. Weiss, 749 F. Supp. 47, 52–53 (D. Conn. 1990); Morrobel v. Thornburgh, 744 F. Supp. 725, 727–28 (E.D. Va. 1990); Eden v. Thornburgh, No. 90-1473-CIV-KEHOE (S.D. Fla. July 23, 1990) (finding the statute was held to be a valid exercise of Congress' broad power to regulate the admission and exclusion of aliens).

180. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No.102-232 § 306, 105 Stat. 1733, 1751 (1991). By December of 1991, Congress revised the statute to allow release for any lawfully admitted person convicted of an aggravated felony and not just a lawful permanent resident.

181. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 504, 104 Stat. 4978, 5050 (1990).

182. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306.

183. Gerard Savaresse, *When Is When?: 8 U.S.C. 1226(C) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285, 297(2013).

184. *See* Immigration & Nationality Act of 1952, Pub. L. No. 414-477 § 212(5), 66 Stat. 163, 208–09 (1952); Immigration & Nationality Act of 1996, Pub. L. No. 104-208 § 236(a), 110 Stat. 1, 585 (1996).

185. *See* 8 C.F.R. § 212(5) (1997); 8 U.S.C. § 1226.

and required detainees to prove by clear and convincing evidence, a lack of danger to people or property and lack of flight risk.[186]

The BIA in *Adeniji* echoing the language from *Salerno* evoked two government interests that justified detention protecting people and property, or was otherwise a flight risk, and made those factors exclusive.[187]

In case after case following *Matter of Adeniji*, the BIA directed immigration courts to frame evidence under the rubric of danger and flight risk.[188] Despite a broad list of potential evidence that an immigration judge could consider,[189] the listed evidence factors by the Board directly tie to the question of (1) is the detainee a danger to people or property?[190] And, if not, then (2) would they pose a flight risk?[191] In no case did the Board mention whether the physical or mental condition of the detainee made them unsuitable for detention.[192]

B. Dangerousness as a Character Trait Rather than Risk Assessment

When considering whether a person would be too dangerous to be released, the Board of Immigration Appeals has described danger to be a binary decision: either a person is dangerous or not.[193] However, whether a person is dangerous is inevitably a prediction of future behavior, and should be a risk assessment rather than a character trait.

Any analysis on whether release from custody would pose danger to people or property requires a prediction, aka a "risk analysis."[194] No

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186. *In re* Adeniji, 22 I&N Dec. 1102, 1116 (B.I.A. 1999). For a more detailed analysis of how the Board twisted a regulation for a different statute to interpret the requirements for release of people not subject to mandatory detention, see Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 90–95 (2016); *see also* Gillman, *supra* note 24, at 175–78.

187. *In re Adeniji*, 22 I&N Dec. at 1113.

188. *See id.* at 1116; *In re* Guerra, 24 I&N Dec. 37, 40 (B.I.A. 2006); *In re* Rolle, No.: AXXX XX# 103-POM, 2011 WL 400445, at *1 (B.I.A. Jan. 25, 2011); In re Siniauskas, 27 I&N Dec. 207, 207 (B.I.A. 2018).

189. *See In re Guerra*, 24 I&N Dec. at 40 (enumerating factors such as (1) fixed address, (2) length of residence, (3) family ties and ability to stay in the U.S. permanently, (4) employment history, (5) history of appearing in court, (6) the criminal record, (7) immigration history, (8) any attempts to flee, and (9) manner of entry. None of the listed factors include consideration of the detainee's health or well-being, or whether even detention may become inhumane or difficult. All of the listed factors continue to be directly related to only questions of danger or risk).

190. *See id.* at 38.

191. *See id.*

192. *See, e.g.*, *id.* (considering danger to people and property and flight risk rather than physical or mental condition and suitability for detention).

193. *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 1, 45–46.

194. *See id.*

assessment can predict with 100% accuracy whether a person would cause future harm: a person could have no past history that indicates a propensity for violence but nevertheless cause serious damage to people or property in the future, whereas, with regard to a person with a long history of violent behavior, they may pose no further danger. Labeling someone as "too dangerous" to be released is a determination that there is a certain amount of risk of harm where the government's interest can outweigh an individual's liberty. A prediction of dangerousness is on a spectrum. Some people may have a past that indicates a stronger likelihood to engage in repeat behavior that could cause a small amount of harm to society (a recalcitrant shoplifter), or a person may exhibit the risk to cause massive harm to people (a person who threatened to bomb a government building). The risk of danger involved in both scenarios lie on a spectrum and the government interests in preventing that harm should not be treated as the same. The Department of Homeland of Security recognizes that danger is a risk analysis, which is what led to the employment of risk assessment software and algorithms.[195]

Despite this consensus, the Board of Immigration Appeals continues to use language that undercuts this understanding and instead treats an assessment of dangerousness less as a risk analysis and more as a character trait. In *Matter of Urena*, an immigration judge granted a $15,000 bond to a detainee who had an arrest history and a conviction, and while doing so noted that the person's release "presents a potential danger to the community."[196] The Board objected to the Immigration Court's use of "'potential' danger" without stating whether the person is dangerous or not, writing, "[d]angerous aliens are properly detained without bond."[197] This rubric is wholly incomparable with the criminal bail system, which actively seeks to answer the question of reducing risk.[198]

Under the Bail Reform Act, the articulation of how to treat the risk of danger is very different. The statute essentially has three different stages of consideration of risk of danger: (1) release on own recognizance or with unsecured bond unless release will *endanger* the safety of any other person or the community;[199] (2) conditions can be ordered to ensure the safety of people or the community;[200] and (3) a hearing can be conducted to prevent release if a person is being charged with certain crimes *and* no conditions can ameliorate

195. *See id.*
196. *Matter of Urena*, 25 I&N Dec. 140, 141 (B.I.A. 2009).
197. *Id.* at 141.
198. *See* 18 U.S.C. § 3142(a)–(g).
199. *Id.* § 3142(b).
200. *Id.* § 3142(c).

the risk of danger.[201] First, under the criminal bond rubric, people enjoy a presumption of release, and therefore a presumption of non-dangerousness.[202] Moreover under § 3143, the question of danger is directed to the release and not to the person.[203] Second, because the statute provides a list of specific conditions that can be ordered to reduce dangerousness, including no contact provisions, ordering treatment, refraining from owning a firearm, curfews and reporting requirement to law agencies, the court is able to lower any assessed risk of danger to people or the community to an acceptable level.[204] It is also one reason why the statute contemplates *conditions* that the courts may impose to reduce such a risk to acceptable levels.[205]

Immigration judges are forced to consider danger on a binary level as they are not given any tools or authority or reduce risk. Although certain conditions can be imposed by the court, it has no inherent power to order the Department of Homeland Security to provide monitoring or the resources to enforce no-contact orders.[206] Immigration judges are federal hearing officers, and their powers are delineated by the INA statute and its regulations.[207] The statute and regulations do not empower the immigration courts to find alternatives to custody or to see conditions to reduce the risk of harm to the community.[208] Without any inherent authority or directive to try and mitigate any risk the immigration judges may find, immigration courts are forced to look at the risk of danger as a binary question and are incentivized to order custody when any risk of danger exists.

C. The Undefined Danger

Not only is danger treated as a character trait, but there is no guidance on how immigration judges are to decide the nature of danger and how to balance the nature of that danger.[209] This has led to widely disparate formulations.[210] For instance, one immigration

201. *Id.* § 3142(f).
202. *See id.* § 3142(b).
203. *Id.* § 3143(a)(1).
204. 18 U.S.C. § 3142(c)(1)(B)(i)–(xiv).
205. *See id.* § 3142(c)(1)(B)(i)–(xiv).
206. *See* 8 C.F.R. § 1003.10 (2021) (describing the power of immigration judges).
207. *Id.*
208. In *Rodriguez v. Robbins*, the district court ordered immigration judges to consider release using electronic monitoring, but it is unclear where the authority came from, whether the immigration judge's or the district court's. Rodriguez v. Robbins, 715 F.3d 1127, 1130–31 (9th Cir. 2013).
209. *See* Gillman, *supra* note 24, at 211.
210. *Compare* C-E-—, AXXX XXX 716 (B.I.A. Aug. 14, 2018) *with* J-A-G-, AXXX XXX 146 (B.I.A. Dec. 17, 2018).

judge found that a single incident of speeding at ninety-seven miles per hour was enough to determine a danger to the community and thus denied bond,[211] while in another case an immigration judge denied bail based on a Facebook picture showing the wearing of alleged gang clothing.[212] In both of these cases, the Board eventually reversed, but the guidance it provided in the final decisions was lacking.[213] In a different case, an immigration judge found that a person with a conviction for urinating on a Walmart display showed sufficient propensity for dangerousness to deny bond, and the Board agreed.[214] The regulations provide no guidance, and the Board's decisions strain to give concrete examples or explanations for their decisions. In a published decision, the Board reversed a grant of bond to a person who had several DUI convictions in the past, yet, in several unpublished decisions afterwards, the Board reversed denials of bond based on DUI convictions and arrests.[215] The confusion and inability to narrow what "danger to people or property" actually means, just creates a system favoring detention and ignoring harm to detainees.

D. The Federal Criminal Bail System and Evaluation of Danger

The criminal bail system at least in form if not in practice (1) treats danger to the community as a risk analysis rather than as a character trait; (2) provides courts and judicial officers with the mandate and power to reduce that risk; and (3) recognizes that danger to the community can vary both in terms of seriousness and by nature.[216] These features indicate that the government's interest in protecting the community from danger may have different weight, and thus needs to be balanced. In some circumstances the risk of danger could be high, conditions may not be available and the type of danger both

211. C-E-—, AXXX XXX 716 (B.I.A. Aug. 14, 2018) (finding respondent was not a danger to the community based solely on his arrest for driving ninety-seven miles per hour where the speed limit was seventy miles per hour).

212. J-A-G-, AXXX XXX 146 (B.I.A.Dec. 17, 2018) (reversing finding that respondent would be a danger to the community and in which the Immigration Judge relied on Facebook photographs of respondent wearing clothing allegedly worn by gang members and an untested cooperating source).

213. *See* C-E-—, AXXX XXX 716 ("We acknowledge the Immigration Judge's concerns. However, on the record, before us we conclude that the respondent has met his burden to establish that he does not pose a danger to the community."); J-A-G-, AXXX XXX 146.

214. *In re* Henry Rolando Ventura-Lada, No.: AXXX XX2 316-BOS, 2008 WL 5477732, at *1 (B.I.A. Dec. 12, 2008).

215. *In re* Siniauskas, 27 I&N Dec. 207, 207 (B.I.A. 2018).

216. *See* U.S.C. § 3142(a)–(c), (f)–(g).

severe and life-threatening would weigh strongly for detention, despite a person's interest in freedom. This recognition of the variability of the government's interest in danger is reflected in both *Salerno* and *Foucha*.[217] In *Salerno*, the Supreme Court noted that the government interest in protecting the community "is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."[218] While Justice O'Connor noted that the government interest may be at its nadir when the nature of the danger is lower,[219] if the weight of the government's interest in protecting the community can vary, then under due process it must be subject to scrutiny and weighed against the individual's liberty interest before it can infringe upon a person's freedom.

Prior to any of the Bail Reform movements, many courts considered the health of the detainee in deciding whether and at what amount to set bond.[220] For example, a California appellate court reversed the denial of bail for a man suffering from epilepsy who appealed his conviction for embezzlement.[221] In another case, the California Supreme Court reversed the denial of bail for a man suffering from severe heart disease who appealed his conviction, finding that "the overwhelming weight of the evidence is that petitioner's condition is serious and that his surroundings are such that not only his health but his life is in danger."[222] But even after the 1984 Bail Reform Act and *Salerno*, consideration of detention harm was considered.[223]

While the Bail Reform of 1966 didn't list any specific factors relating to harm to the defendant, the 1984 version did. The statute provided several "considerations" courts were to use in making their custody decisions and listed them under 18 U.S.C. § 3143(g).[224] These

217. *See* United States v. Salerno, 481 U.S. 739, 742–43 (1987); Foucha v. Louisiana, 504 U.S. 71, 83, 85–86 (1992).

218. *Salerno*, 481 U.S. at 750.

219. *See Foucha*, 504 U.S. at 88.

220. 18 Am. Jur. 2d *Proof of Facts* § 8 (2020) ("A significant factor taken into consideration by the court in fixing bail at a smaller amount than would otherwise be required of an accused charged with a similar offense is the health of the accused—specifically, the fact that that accused's condition is such that further confinement may impair his health or endanger his life.").

221. *Ex parte* Preciado, 158 P. 1063, 1064, 1067 (Cal. Dist. Ct. App. Apr. 29, 1916).

222. *In re* Pantages, 291 P. 831, 833 (Cal. June 6, 1930).

223. *See* United States v. Martin, 447 F. Supp. 3d 399, 402 (D. Md. 2020); United States v. Shaheed, 455 F. Supp. 3d 225, 229 (D. Md. 2020); United States v. Oaks, 793 Fed. Appx. 744, 748 (10th Cir. 2019); *see also* United States v. Fattah, 351 F. Supp. 3d 1133, 1139 (N.D. Ill. 2019).

224. 18 U.S.C. § 3143(g).

factors listed included the "characteristics of the person," and listed, "physical" and "mental condition" as one factor.[225] District courts have weighed whether a defendant's medical issues could impact them harmfully if detained under that ground.[226] One interpretation of the factors in § 3143(g) is that they are all addressing whether conditions could assure appearance and safety of *other* people and the community, and not whether custody is appropriate for the detainee.[227] Several district courts have used a different provision, 18 U.S.C. § 3143(i), to decide whether release is necessary based on harm of detention.[228] This provision lists that a detainee may petition for temporary release and the judicial officer may grant it if the release is necessary to prepare for defense, or "for another compelling reason."[229] Several district courts making pretrial release decisions during the pandemic, analyzed potential exposure to COVID-19 under this provision rather than the § 3143(g) factors.[230] One of the interesting features of a § 3143(i) analysis is that it is untethered to the questions of dangerousness or flight risk.[231] The provision allows for a broader reading of harm that doesn't need to be medical or one that is suffered by the defendant.[232] The existence of the provision does not mean that the temporary release provision is commonly invoked or granted.[233]

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225. *Id.*

226. *See Martin*, 447 F. Supp. 3d at 402; *Shaheed*, 455 F. Supp. 3d at 229 (analyzing detainee's health including past depression and asthma in context of COVID-19); *Oaks*, 793 Fed. Appx. at 748 (weighing the detainee's desire of treatment of a broken nose and sleep issues in his release decision); *see also Fattah*, 351 F. Supp. 3d at 1139 (considering pregnancy as a factor, though only one factor in a release decision).

227. *See* United States v. Holguin, 791 F. Supp. 2d 1082, 1089–90 (D. N.M. 2011) (finding that pregnancy is not a factor unless weighed in terms of flight risk or danger).

228. *See* United States v. Clark, 448 F. Supp. 3d 1152, 1156 (D. Kan. 2020). *See also* United States v. Terrone, 454 F. Supp. 3d 1009, 1018–19 (D. Nev. 2020).

229. 18 U.S.C. § 3142(i)(4).

230. *See Clark*, 448 F. Supp. 3d at 1156 ("The risk of harm *to the defendant* does not usually bear on this analysis. Rather, whether a defendant's particular circumstances warrant release in light of the COVID-19 pandemic ought to more properly considered [sic] on a case-by-case basis under the 'another compelling reason' prong of § 3142(i)"); *see also Terrone*, 454 F. Supp. 3d at 1018–19.

231. 18 U.S.C. § 3143(i).

232. *See* United States v. Lopez, 184 F. Supp. 3d 1139, 1148–49 (D.N.M. 2016) (considering, but ultimately denying, release based on hardship to family, stating "[t]here may be situations, however, that produce unusually severe effects on defendants and their families. When these situations combine with the various other factors listed above, an exceptional circumstance may arise.").

233. *See* United States v. Loera, No. CR 13-1876 JB, 2017 WL 3098257, at *33–34 (D.N.M. June 22, 2017) (denying temporary release in order to have ilestomy procedure, citing to cases where physical conditions needed to be extremely irregular to consider for temporary release).

One of the most illustrative examples of how harm of detention to the defendant can be a grounds for release in pretrial detention involved a case decided in 1993 during the AIDS crisis.[234] In *United States v. Scarpa*,[235] a mafia captain was arrested and charged with conspiracy to commit murder. At a detention hearing he was found to be a danger, but the magistrate judge nonetheless allowed release using conditions that would assure the safety of the community.[236] The magistrate had relied on the defendant's end stage diagnosis of AIDS and concluded that home arrest would be sufficient.[237] However, while under house arrest, he was involved in a gunfight, found to have continued loan sharking and was shot in the face resulting in loss of an eye.[238] After having his bail revoked, he filed another request for bail, this time providing the testimony of his treating physician which opined, among a litany of other findings, that he needed to be treated at a hospital with AIDS specialists.[239]

The *Scarpa* court ordered release of the defendant, but did not resort to either the factors in §§ 3143(g) or in (i).[240] Instead, the court cited to cases in which release of pretrial detention were granted based on the *length* of detention.[241] The Second Circuit had previously listed several considerations that would justify release if pretrial detention became prolonged, and the *Scarpa* court cited to this precedent but added two of its own.[242] These two factors were a person's medical condition and the effect of detention on family members.[243] In using the prolonged detention precedent, the *Scarpa* court recognized that the actual detention length was not significant (less than one month), but nonetheless found that his terminal illness was reason enough to release him for treatment in the hospital under guard.[244] The reliance on prolonged detention precedent was a recognition that an individual's liberty interest can become great enough to overcome the government's interest in protecting against the risk of danger to the community.

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234. 815 F. Supp. 88, 89 (E.D.N.Y. 1993).
235. *Id.*
236. *Id.*
237. *Id.* at 90.
238. *Id.*
239. *Id.*
240. *Scarpa*, 815 F. Supp. at 91–93.
241. *Id.* at 91.
242. *Id.*
243. *Id.* at 91 ("Additional factors not adverted to by the Court of Appeals include: (iv) the defendant's medical condition; (v) the effect on his family while he is incarcerated; and (vi) conditions that can mitigate the dangers supporting detention.").
244. *Id.* at 92.

IV. PROCESS CLAUSE REQUIRES CONSIDERATION OF INDIVIDUAL HARMS OF DETENTION

Potential violations of the Due Process Clause of the Fifth and Fourteenth Amendments are split into two distinct types of claims, substantive due process and procedural due process.[245] In substantive due process claims, there are usually two types of inquiries, the first is whether a person's life, liberty, or property are deprived in an arbitrary manner, such that it "shocks the conscience," and the second is whether a statutory scheme interferes with rights "implicit in the concept of ordered liberty", i.e., a fundamental right.[246] In order to understand if a right is "fundamental" a court is supposed to first carefully describe the right and then examine its historical roots.[247] If a fundamental right is applied, then the government action can only pass constitutional muster if it is narrowly tailored to a compelling government interest.[248]

Aside from these two different tests, when deciding constitutional claims for pretrial detainees, courts have also used the three-part test found in *Bell v. Wolfish*[249] to determine whether the detention has become "punishment" and therefore violative of the right to be free from punishment without an adjudication of guilt.[250] The *Bell v. Wolfish* test is used to make sure that civil detention remains civil and not an end run to criminal punishment.[251] No matter which of the various tests would be imposed, a person's individualized harm must be considered on a non-facial challenge to civil or regulatory custody decisions.

An application of any of the tests could be used to decide whether immigration detention violates due process. For example, a decision by Immigration and Customs Enforcement to detain a four-month-old infant away from his mother could reasonably be viewed as "shocking" the conscience, and the fact that a four-month-old would suffer great harm by that detention would weigh strongly on the question

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245. Jackson v. Gutzmer, 2018 U.S. Dist. LEXIS 221943 at *23–24 (D. Minn. Sept. 28, 2018).

246. The fundamental rights issue comes from Palko v. Connecticut, 302 U.S. 319, 324–26 (1937) and Rochin v. California, 342 U.S. 165, 172 (1952).

247. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

248. *Id.*

249. Bell v. Wolfish, 441 U.S. 520, 535–40 (1979).

250. It is unclear whether the *Bell* test is part of the implicit rights test, or the shocks the conscience test, or even now considered a third formulation, as the Supreme Court in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) did not use either test. *See* Rosalie Berger Levinson, *Kingsley Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 366–69 (2017).

251. *See Wolfish*, 441 U.S. at 535–40.

of whether the government action was arbitrary.[252] Similarly, under an implicit rights claim, the four month old, with the help of counsel, would be able to argue that the government's actions in detaining him would not be sufficiently narrowly tailored when applied to him as an infant, as infants are neither dangerous or flight risks.[253] And finally, under the *Bell v. Wolfish* test, the third prong of the test—whether the confinement could be considered "excessive"—would also be easier to meet with an infant detainee complainant, where detention and separation could be considered "excessive."[254] In all three scenarios, the government interests had to be set against the individual's liberty interest.

Bell v. Wolfish's three-part test to decide whether confinement constitutes punishment is especially illustrative. The Supreme Court in its most recent due process case involving pretrial confinement used this test, and the *Salerno* court relied heavily upon it as well.[255] The test has three components: first, to decide whether the custody or the condition of custody was imposed for the purpose of punishment.[256] It is likely that any specific immigration custody decision would pass this first test, as the custody itself, authorized under the statute has been continually described as a proper nonpunitive form of detention.[257] The second prong is whether there is a legitimate government interest furthered by the detention or condition, and again, given *Wong*, *Carlson*, and *Demore*, courts would likely find that any such custody would pass this test in any given case, precisely because it would invoke either flight risk or danger to the community.[258] It

252. This example is based on government action at the border in the separation of babies from their mothers, including a four month old. *See* Caitlin Dickerson, *The Youngest Child Separated from His Family at the Border was 4 Months Old*, N.Y. TIMES (June 16, 2019), https://www.nytimes.com/2019/06/16/us/baby-constantine-romania-migrants.html [https://perma.cc/253X-URU4]; *see also* ACLU Mem. Support Mot. Prelim. Inj. At 18, *Ms. L. v. ICE*, Case No. 18-cv-00428-DMS-MDD (2019), https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi [https://perma.cc/987L-944H] (the court has described the action as one that "shocks conscience").

253. *See Washington*, 521 U.S. at 720–21.

254. *Bell*, 441 U.S. at 537–38. The author would like to note that the Supreme Court in both *Schall* and *Reno* seemed to consider a minor's right to be free from confinement in a very unintuitive way, declaring that their liberty interest may be lessened as all children are in a "form of custody." Schall v. Martin, 467 U.S. 253, 265 (1984); Reno v. Flores, 507 U.S. 292, 301–02 (1993). It seems very odd to describe a child living with their family as a means of custody.

255. United States v. Salerno, 481 U.S. 739, 746–47 (1987). Because the *Salerno* court had only considered the challenge as a facial one, there was never any consideration to whether a specific pretrial custody could be considered "excessive," it only needed to look at the first two prongs of the *Bell* test. *Id.* at 741, 746–48.

256. *Bell*, 441 U.S. at 535–38.

257. *But see* HERNÁNDEZ, *supra* note 14, at 1351–59 for an argument as to how immigration imprisonment would fail the first prong of the test.

258. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1895); Carlson v. Landon, 342 U.S. 524, 537–38 (1952); Demore v. Kim, 538 U.S. 510, 518 (2003).

is the third and final prong where harm plays a starring role. For the third prong requires an assessment of whether the custody appears "excessive" in relation to the legitimate custodial interest.[259] The issue of excessiveness had until 2015 been unclear whether it uses a subjective assessment or an objective one, but the Supreme Court in *Kingsley v. Hendrickson* ruled that objective evidence could be used, divorced from subjective intent.[260] In order to decide whether custody, despite serving a legitimate purpose, could nonetheless be excessive, the harms it imposes can be a crucial factor. The imprisonment of a terminally ill man, such as in *Scarpa* discussed *supra* can become excessive the closer he is to dying in custody and needing specific health care.[261]

Ever since *Salerno*, the Supreme Court has recognized that what may be nonpunitive to one person in the ordinary administration can become punishment when imposed on another. In *Salerno*, the Court recognized that it was *not* deciding the question of whether regulatory nonpunitive punishment can transform *into* punitive detention if the detention becomes punitive.[262] Most courts have recognized this principle in the criminal context, as this was the basis of *Scarpa*'s decision, the precedent that the Second Circuit found to apply.[263] This principle has continued in the immigration custody context as well.

One illustrative example of how a constitutional framework would mandate consideration of individual harms of detention comes from a scenario where neither Congress nor regulations provide guidance. Starting in 2012, circuit courts began to examine whether prolonged detention under the mandatory detention statute of 1226(c) could become constitutionally suspect after six months or more.[264] Congress had mandated custody without release and did not consider "prolonged" detention, and thus there were no statutes or regulations that contemplated release under these scenarios. The circuit courts used a constitutional avoidance strategy to try and reinterpret

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259. *Bell*, 441 U.S. at 538.

260. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472–73 (2015); *see also* Levinson, *supra* note 250, at 371–77 (discussing how the shift to an objective test could result in a lower burden); Arielle Tolman, *Sex Offender Civil Commitment to Prison Post*-Kingsley, 113 NW. U. L. REV. 155, 187–89 (2018).

261. *See* United States v. Scarpa, 815 F. Supp. 88, 92 (E.D.N.Y. 1993).

262. United States v. Salerno, 481 U.S. 739, 754–55 (1987).

263. *See* Coleman Gay, *Hour Late on Your Bail, Spend the Weekend in Jail: Substantive Due Process and Pretrial Detention*, 60 B.C. L. REV. E. SUPP II. 237, 237–38 (2019) (discussing the recent circuit court splits whereby the 10th Circuit breaks from the majority in finding no punishment or due process violation when a person is held after posting bail for several days).

264. *See, e.g.*, Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013).

the statutes as requiring reasonableness and ordered bond hearings after detention became prolonged.[265] In 2018 the Supreme Court in *Jennings v. Rodriguez* ruled that the use of constitutional avoidance was not appropriate and that Congress had in fact intended detention regardless of length of detention but explicitly did not decide the constitutional question of whether prolonged detention could at some point offend due process.[266]

After *Jennings*, courts had to decide what the constitutional limitations were on prolonged mandatory detention absent any guidance from Congress. Several district courts revisited the prolonged detention question for those held in INA 236(c) mandatory detention and began to hold that as detention becomes prolonged, the regulatory interest diminishes and the individual's liberty interest increases which offends due process.[267] In 2020, the Third Circuit affirmed a district court finding and ruled that these claims are best dealt with as applied challenges as the question as to the detention's reasonableness are factually specific.[268] The court focused on four specific factual inquiries: (1) the length of detention, (2) the likelihood of continued detention, (3) the reasons for the delay, and finally (4) the conditions of confinement.[269] These conditions mirror closely the precedent that the *Scarpa* court relied upon when it added the considerations of health and harm to the detainee's family.[270] Other district courts, from Minnesota to Massachusetts all held that prolonged mandatory detention can offend due process and used a factual factor test and they all listed as one factor the "conditions of confinement" an implicit invitation to examine whether the harm of detention can justify its "regulatory" label.[271]

Once it is recognized that the "reasonableness," or, in other words, the punitive nature of the detention depends on specific factual consideration, such as the conditions of confinement, and whether they

265. *Id.* at 1144; Diop v. ICE, 656 F.3d 221, 231, 235 (3d Cir. 2011); Hamama v. Adducci, 285 F. Supp. 3d 997, 1016–17 (E.D. Mich. 2018).

266. Jennings v. Rodriguez, 138 S. Ct. 830, 836, 842–43 (2018).

267. *See, e.g.*, Portillo v. Hott, 322 F. Supp. 3d 698, 708–10 (E.D. Va. 2018).

268. Santos v. Warden Pike Cnty. Corr. Facility, No. 19-2663, at 8–9 (3d Cir. 2020).

269. *Id.* at 14–15.

270. *Cf.* United States v. Orena, 986 F.2d 628, 630 (2d Cir. 1993) ("To determine whether the length of a pretrial detention violates a defendant's due process rights, we must weigh: (i) the length of detention; (ii) the extent of the prosecution's responsibility for the delay of the trial; and (iii) the strength of the evidence upon which the detention was based, in this case, evidence of Amato's danger to the community.").

271. Muse v. Sessions, 409 F. Supp. 3d 707, 715 (D. Minn. 2018) (recognized that factors still hold post-*Jennings* by *Bolus A. D. v. Sec'y of Homeland Sec.*, 376 F. Supp. 3d 959 (D. Minn. 2019); Reid v. Donelan, 390 F. Supp. 3d 201 (D. Mass. 2019)); *see also* Brito v. Barr, 415 F. Supp. 3d 258 (D. Mass. 2019).

are "excessive," then it becomes easy to see why a consideration of harm to a detainee must be involved in the custody decisions employed by both ICE and by immigration judges.

CONCLUSION

Establishing that harms of detention must be considered in custody decisions is only the first step. The criminal pretrial system and the *Salerno* decision should serve as a cautionary tale. For even as the immigration system failed to incorporate important lessons on the nature of dangerousness allowing it to turn a blind eye to harm, even a cursory examination of the pretrial criminal detention shows the distance between practice and promise.

Despite the attempts in the 1960s to lift the burden of detention from the poor, the cash bail system continues to be a tool to hold the poor in jail.[272] Even though the actual language of *Salerno* was more measured, its impact was not, and it reversed many of the gains from the 1966 Bail Reform Act and resulted in many more people held in custody and with the added stigma of being labeled "too dangerous" to be free. As one commentator writes:

> For decades following the 1980s changes to bail administration, most reform advocates saw only a bleak legal landscape. With its casual and undeveloped yet definitive finding that "preventing danger to the community is a legitimate regulatory goal," Salerno seemed firmly to shut the door to any constitutional argument against the use of pretrial detention to prevent the commission of future crime.[273]

The incorporation of some considerations of the harm of detention is not enough to prevent the default use of imprisonment. Even as pretrial detention undergoes a new reform period, there is no reason that the immigration custody system needs to lag behind.

The same lesson can be seen from the parole power and its regulations. Despite explicit recognition that medical vulnerability and the requirement to consider the harms of incarceration, traumatized people are subjected to needless detention. Creating mechanisms to recognize the harms of incarceration is not enough on its own, especially when weighed against the stigma and label of dangerousness.

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272. Odonnell v. Harris Cnty., 251 F. Supp. 3d 1052 (S.D. Tex. 2017) (concluding that a class action lawsuit that found the Harris County bail system that capitalized the indigency of criminal defendants in 2017, more than thirty years after *Salerno*).

273. Van Brunt & Bowman, *supra* note 13, at 742.

The mechanisms created must mandate a proper weighing of the actual damage of imprisonment with the amorphous and often ill-defined risk of danger to the community.

Using the label of danger to justify detention is an easy tool to ignore the pain and suffering of those held in custody. Declaring a system as preventing harm to the community makes it easy to discount and ignore the pain of those declared to be the threat to the community. Nonetheless, the hope is that a system that properly takes account of the pain inflicted on individuals by incarceration would force a reckoning with how those harms aggregate to devastate the very community that detention is purported to protect.