Prisons Without Convicts: Why Similar Protections As Those Offered To Prison Inmates By the Constitution Should Be Extended To Immigrant Detainees

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The civil prosecution, enforcement and detention of noncitizen immigration law violators is virtually unchecked by any judicial or Constitutional protections. The void left has led to countless human rights violations. Most of these human rights violations could be avoided if Constitution-like protections, or Constitutional protections themselves, were applied to the immigration enforcement context. This paper gives an introduction into the current status of immigration law. It then discusses the lack of Constitutional protections for immigration detainees. Finally, this paper compares the experience of immigrant detainees, in particular the allegations of human rights violations, with the rights of prisoners similarly situated.
I. INTRODUCTION

In the early to mid 1900’s, the Supreme Court applied a “hands-off doctrine” to the issue of prisoners’ rights. The Court did not necessarily believe that prisoners had no rights, but felt that they had no duty or power to define and enforce those rights. The Court, therefore, determined not to adjudicate prisoners’ Constitutional claims. It was not until the 1960s and 1970s that United States courts generally accepted the notion that prisoners have rights that the courts are bound to protect. Today, there is a new breed of prisoner that the Court has chosen to ignore. These prisoners are immigrant detainees. They are not citizens. They are not protected. They are invisible.

The Fourth Amendment does not apply to the enforcement procedures employed against immigration law violators because it only protects citizens. Likewise, there is no judicial remedy to be utilized against abuses of power committed by Immigration and Customs Enforcement (ICE) agents. Once in official custody, noncitizen detainees do not have a judicial remedy that is effective to protect them from inhumane conditions, nor are the Eighth and Fourteenth Amendments available to temper the intensity of detention, the actions of detention officers or the consequences of detention on the noncitizen. As a result, countless numbers of human rights abuses occur in detention facilities.

Immigration enforcement is an administrative remedy, but shares substantial similarities to criminal enforcement, especially the means of enforcement and the
consequences of enforcement, and so should share at least some of the Constitutional protections imposed upon criminal enforcement officers.

II. THE POWERS OF IMMIGRATION AND CUSTOMS ENFORCEMENT

A. Historical Overview

Immigration law has been the law of exclusion from the United States as far back as 1875 when the first federal law prohibited noncitizens from entering the United States if convicted of prostitution or other crimes.ii

In 1882, Congress expanded the list of excludable classes to include lunatics, idiots and “anyone unable to take care of herself ... without becoming a public charge.” The Chinese Exclusion Act of 1882 barred Chinese nationals from entering or remaining in the United States.iii

In 1891, Congress expanded the list of excludable aliens again to include insane people, polygamists and “persons suffering from a loathsome or a dangerous contagious disease.”iv The 1891 Act also excluded noncitizens convicted of a crime of “moral turpitude,” an exclusionary ground that is still in existence to this day.v

The current form of immigration law came to be in the Immigration and Nationality Act (INA) of 1952. The INA makes a distinction between noncitizens who have been legally admitted into the United States and must then be removed (deported), and those who are arriving at the border and must be excluded.vi Any person who has not been legally admitted into the United States falls under the purview of those who are inadmissible and must be excluded, as opposed to being removed, as if they are still at the border trying to gain entry.vii Both deportation and exclusion proceedings are generally
referred to as “removal proceedings,” although being “excludable” tends to expose the noncitizen to more expedient removal proceedings. Generally, however, grounds for removal relate to the following categories: Physical and mental health-related grounds, procedural violations including documentation violations, criminal grounds including infractions involving moral turpitude, national security concerns, and the potential for the noncitizen to become a public charge. Over the years, the government not only increased these grounds but also tightened restrictions on a noncitizen's access to the courts, release from detention, and eligibility for relief from removal.

For example, the 1996 immigration laws created a new definition for the term “aggravated felony” which has been interpreted to include activities that are neither a felony nor violent. The term extends to lawful permanent residents and also applies retroactively.

By making the aggravated felony term retroactive, individuals can be charged as an aggravated felon for conduct that occurred several years ago, even if such activity was not classifiable as an aggravated felony or even a deportable offense at the time it took place. The consequences of an aggravated felony are significant and include mandatory detention without bond, mandatory deportation, and ineligibility for most forms of immigration relief.

Changes were made to the immigration agency after the attacks of September 11, 2001. The Immigration and Naturalization Service was abolished and the various chapters of the act reorganized older agencies into a new department: the Department of Homeland Security (DHS).

In January 2003, President George Bush used his statutory authority to reorganize the “Bureau of Border Security” by renaming it “Immigration Customs Enforcement” and by combining various border related functions (among them,
The Agricultural Quarantine Inspection program, INS inspection services, Border Patrol and the Customs Service) into a new “Customs and Border Protection.”

The most obvious, and most controversial, example of the new immigration enforcement procedures carried out by ICE was a series of dragnet-style worksite raids carried out between 2006 and 2008; the most well known of these being the Swift Co. raids on December 12, 2006. The ICE website boasts that more than 1,297 illegal aliens were arrested in six different states. ICE claims that workers, including legal residents and citizens, were never prevented from leaving their work areas during the interviewing process.

The workers, however, tell a much different story. At one plant, for example, workers describe that early in the morning several buses arrived with dozens of heavily armed federal agents accompanied by local police dressed in riot gear. While some ICE agents blocked all the entrances and exits and surrounded the factory, others entered the factory and gathered the entire workforce. Some workers who tried to run were wrestled to the ground. Some workers even assert that ICE agents responded with chemical sprays to subdue workers who did not understand the agents’ commands.

The Swift raids have spawned litigation and are not alone. Many ICE enforcement procedures like the Swift raids have been accused of all types of Constitutional violations. For example, an ICE strategy called “Operation Endgame” seeks to deport all illegal aliens by the year 2012.

These “raids” or “sweeps” are carried out as coordinated efforts with massive law enforcement presence. In both instances, ICE arrests persons without warrants and based on the most insubstantial of evidence about illegal status. Many times, this evidence is nothing more than the result of racial profiling, where ICE will arrest anybody who “looks” like an illegal immigrant.

In spite of its critics, ICE continued to increase its size and budget, adding more officers and stepping up its enforcement procedures. “According to a senior ICE official,
ICE experienced a six fold increase in new officers dedicated to worksite enforcement raids from fiscal year 2003 through fiscal year 2007."

Many ICE apprehensions result in detention. In 2006 alone, DHS detained over 230,000 noncitizens. These detainees are held in various types of facilities such as service processing centers, federal prisons, county jails and for-profit prisons. Allegations of substandard detention conditions persist.

B. Powers of ICE Generally

According to the Department of Homeland Security, the Department “leverages resources within federal, state, and local governments, coordinating the transition of multiple agencies and programs into a single, integrated agency focused on protecting the American people and their homeland.” ICE is the subdivision within the Department of Homeland Security responsible for investigating and enforcing immigration laws by “identifying and shutting down vulnerabilities in the nation’s border, economic, transportation and infrastructure security.” The Secretary of Homeland Security (the Attorney General) has the authority to form agreements with States in order to implement the administration and enforcement of federal immigration laws. Among these agreements is the power of the Attorney General to deputize local law enforcement for the purposes of enforcing immigration laws at the state and local levels, and also to provide incentive funding to states to construct and rehabilitate space for detention and confinement.
The current focus of Homeland Security enforcement agencies is deterring illegal entries, locating and removing non-citizens who have committed crimes, penalizing employers who hire non-citizens without work authorization, stopping fraud schemes, and stopping terrorism.\textsuperscript{xxxv} In order to further these goals, ICE uses roving patrols inside the U.S. to identify and detain suspected illegal entrants, audits and searches businesses alleged to unlawfully employ non-citizens,\textsuperscript{xxxvi} and deputizes other law enforcement agencies to identify criminal non-citizens.\textsuperscript{xxxvii}

\textit{C. Prosecutorial Discretion}

ICE is a law enforcement agency, and as such it exercises a significant amount of prosecutorial discretion. INA Sec. 242(g), which was added by the IIRIRA dictates that ICE decisions to “commence proceedings, adjudicate cases, or execute removal orders” are not reviewable by courts.\textsuperscript{xxxviii} ICE has the freedom to use most of its resources as it sees fit, and INA 242(g) protects ICE official’s discretion to “proceed with a deportation notwithstanding certain humanitarian reasons that could have provided grounds to defer deportation proceedings.”\textsuperscript{xxxix}

In \textit{Reno v. American-Arab Anti-Discrimination Committee}, the Supreme Court construed INA 242(g) to protect immigration authorities from judicial review of virtually all of their decisions to pursue removal orders. In \textit{Reno}, a group of non-citizens claimed that they had been singled out for removal because of their membership in a politically unpopular group.\textsuperscript{xl} After this decision was issued, a list of factors was published by the Secretary General as a guideline to what warranted a favorable exercise of discretion. These factors include, but are not limited to, length of residence in the U.S., criminal
history, likelihood of ultimately removing the alien, honorable U.S. military service, and the type of community attention the case or issue is receiving. Of course, the commissioner made careful to note that “no precise formula existed” to control prosecutorial discretion, and that these guidelines did not produce any legal right to discretion.

D. Investigatory Stops

The discretion conferred upon ICE extends beyond prosecutorial decisions. INA Sec. 287 allows any immigration officer to, without a warrant, “interrogate any alien or person believed to be an alien as to his or her right to be or remain in the United States, and may arrest any alien if the officer has reason to believe the alien is in the United States in violation of any law and is likely to escape if not arrested.” An officer may also board and search any vehicle to look for illegal aliens within a “reasonable distance” from the United States border, which the Code of Federal Regulations defines as being “100 air miles from any external boundary of the United States.”

Despite the broad discretionary power implied by the these regulations, the Supreme Court has held that this power is limited by the Fourth Amendment when exercised away from the border, and when in the context of criminal prosecutions. In Almeida-Sanchez, the Court invalidated a warrantless search of an automobile by a roving patrol because probable cause did not exist and the driver never consented. This holding has only marginally limited ICE's discretionary powers, however.

In its Fourth Amendment jurisprudence, the Court seeks to balance the government's interest in law enforcement against the intrusion into the
individual’s privacy. In the immigration context, the Court has consistently found that the government has a strong interest in preventing the illegal entry of non-citizens and that such entries cannot be entirely halted at the border. It has also found the intrusion caused by a brief investigatory stop to be modest. *United States v. Brignoni-Ponce* (Sup.Ct.1975). Hence, it has held that a roving patrol stopping a vehicle and questioning the occupants about their citizenship and immigration status does not violate the Fourth Amendment so long as the officer has a reasonable suspicion, based on the “totality of circumstances,” that the particular vehicle may contain non-citizens who entered the U.S. illegally. *United States v. Arvizu* (Sup.Ct. 2002).  

The totality of circumstances makes for a reasonable search even if the person’s individual actions are innocent when analyzed separately.\(^1\) In *Brignoni-Ponce*, the Court held that ethnic appearance alone could not give rise to reasonable suspicion.\(^2\) Unfortunately, in dicta the Court noted that the defendant’s Mexican ancestry was a relevant factor.\(^3\) This has never been overturned.

**E. Detention and Arrest**

After investigatory stops and detentions, ICE may proceed to arrest any noncitizen, without a warrant, “if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulations and is likely to escape before a warrant can be obtained for his arrest.”\(^4\) The plain language of the statute appears to give officers a large amount of discretion and a low threshold to meet when deciding whether to arrest an individual. Several administrative procedures are in place apparently to mitigate this discretion.

Once arrested, the non-citizen is taken before a different immigration officer for questioning unless no other officer is readily available. 8 C.F.R. § 287.3. If the examining officer determines that a prima facie case exists for removing the non-citizen, he or she refers the case to an immigration judge, orders the individual’s expedited removal, or takes other applicable action. 8 C.F.R. § 287.3.\(^5\)
Only after the decision is made to remove the non-citizen, the arresting officer must give the non-citizen a Miranda-style warning. The arresting officers must then advise the non-citizen of the reasons for their arrest and their right to representation at no cost to the government. The officer must also provide a list of available free legal services that are located within the district of the removal hearing. Within forty-eight hours, ICE must inform the non-citizen whether an actual warrant will issue for their arrest and if the non-citizen will be receiving any Notices to Appear, unless there is some emergency or extraordinary circumstances which allow for a reasonably prolonged amount of time.

F. Deputization

Some provisions of the INA allow local law enforcement agencies to participate in immigration enforcement. The Secretary of Homeland Security can delegate necessary immigration powers to local law enforcement if there is a "mass influx of aliens," and can enter into cooperative agreements with state and local agencies for the purpose of enforcing immigration laws. One further delegation authority afforded to the Secretary of Homeland Security has become known as 287(g) agreements. These agreements stem from the Secretary’s authority to enter into written agreements with state and local officers or employees to perform the functions of immigration officers.

III. CONGRESS’S PLENARY POWER AND THE JUDICIAL BORDER EXCEPTION

This section will discuss generally the way in which the Fourth Amendment Constitutional protections apply to immigrant detainees. First will be discussed how there
is a lack of Fourth Amendment protections for noncitizen detainees. Next will be discussed the relevance of this in the immigration context followed by a brief history of the development of immigration law as a civil enforcement remedy. From this basis, section IV will show that privacy protections are not, and most likely would not be, of any remedy to abuses in the immigration law context. Then it will be shown that the Court applies such a relaxed standard of exclusionary protections in the immigration law context that there are virtually no protections at all, and also that search and seizure activities in the immigration law context are almost universally found to not be searches or seizures to the extent as to eliminate any protections in this regard. Finally, section V will discuss the relation of Eighth Amendment protections to the immigration law context, and then transition into a discussion of human rights violations at detention facilities and the need for Constitution-like protections for noncitizen detainees.

A. Congress's Plenary Power and the Judicial Border Exception

Fourth Amendment protections do not apply to noncitizens the same way that they apply to citizens. Noncitizens are given virtually no Fourth amendment protections. The connection to immigration law enforcement is that the broad powers of discretion given to ICE are left unchecked by Constitutional safeguards- the safeguards that citizens rely upon to protect them against unwanted government intrusion and abuses of power. In fact, the Court gives deference to ICE discretion. In the immigration context, the Court considers Fourth Amendment protections in light of the “border exception” created for border customs enforcement cases at U.S. International borders. This so-called “border exception” refers to the court’s long-standing acquiescence in suspicionless searches and
seizures of individuals and property at places or in circumstances equivalent to border
searchers as per se reasonable, and therefore exempt from the Fourth Amendment's
warrant and probable cause requirements.\textsuperscript{xix}

In these respects, the Court’s recognition of the strength of the
government’s sovereign interest in regulating the border is closely related to its
recognition of the federal government’s broad power over immigration and
naturalization, a judicially created principle known as the “plenary power”
doctrine. [FN215] The plenary power doctrine purports to limit constitutional and
judicial constraints on the substantive decisions of Congress in the exercise of its
power to regulate immigration. Though not enumerated in the Constitution, the
federal government’s power to regulate immigration has been recognized by the
Court as deriving from the inherent sovereignty of the United States under
international law and several specific constitutional provisions. [FN216] In
discussing the border exception, the Court has explicitly invoked and tied the
exception to the federal government’s immigration power. [FN217] On at least
one occasion, the Court even has referred to the federal government’s authority to
conduct routine, suspicionless searches and seizures of individuals at the border as
“plenary.”[FN218]\textsuperscript{xii}

This is a deferential approach and strips immigration enforcement actions of
virtually all Fourth Amendment protections. These protections are not utterly abolished.
“‘In Ramsey, for example, the Court noted explicitly that the border exception was
‘subject to substantive limitations imposed by the Constitution,’ and left open the
possibility that it might hold a search or seizure at the border ‘unreasonable’ if it were
carried out in a ‘particularly offensive manner.’”\textsuperscript{xiii} Although the Court has not explicitly
defined what one of these searches might entail, it is likely to be a very high standard to
meet, and appears to be a catch-all ruling designed to give the Court breathing room in
future cases just in case the Court feels the need to rule against any particular search. The
connection here between border enforcement and ICE actions in the interior of the
country is that any alien not legally permitted into the United States is still in an
\textit{inadmissible} status and so falls within the purview of the border exception. This means
that they have virtually no Constitutional protections, and the actions taken by ICE agents to investigate and detain these persons are interpreted in light of this relaxed Constitutional standard.

**B. Civil Enforcement**

The prevailing view of removal proceedings is that they are civil in nature, not criminal. In the 1893 case *Fong Yue Ting*, the Court held that the Constitutional protections for criminal proceedings “securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application” to noncitizen immigrants. The court noted that removal was distinct from criminal punishment. Punishment is only for people who have been tried and convicted. Civil detention, on the other hand, is assumed to be nonpunitive in purpose and effect.

Of course, deportation can have severe consequences, especially for noncitizens that are detained in prison facilities or leave family, property, employment, or social networks behind. In addition, immigration laws often have dual personalities; subjecting noncitizen violators to both civil and criminal prosecution. “Since the mid-1980s, Congress has attached increasingly severe criminal consequences to a growing number of immigration offenses that previously would have exclusively resulted in civil immigration consequences, both by expanding the number of immigration-related crimes and increasing the available penalties for those offenses.”
The Court noted in *Zadvydas v. Davis* that detainees must be given criminal procedural protections or else they must be held under special, nonpunitive circumstances.\textsuperscript{lxix} However, *Zadvydas* was not addressing detention facilities specifically in the immigration context, and there are “no Supreme Court cases and few federal cases [that] have directly examined the Constitutionality of the conditions of immigration detention facilities.”\textsuperscript{lxx} Also, immigration enforcement authorities not only administer civil justice, but also play an increasingly large part in investigating and enforcing criminal offenses.\textsuperscript{lxxi} The number of individuals prosecuted for immigration related offenses increased from approximately 6600 to over 15,600 between 1996 and 2000.\textsuperscript{lxxii}

**IV. FOURTH AMENDMENT PROTECTIONS FOR NONCITIZENS**

**A. Privacy Protections**

When first defining the scope of the Fourth Amendment's privacy protections, the Court decide in *Olmstead v. United States*, that “searches” only intruded upon "material things--the person, the house, his papers, or his effects."\textsuperscript{lxxiii} Later in *Katz*, the court expanded privacy protections to people and not just places.\textsuperscript{lxxiv}

Conceptually, *Katz*'s reconfiguration of the Fourth Amendment's scope to encompass the protection of privacy expectations, both tangible and intangible, constituted a landmark shift carrying great potential to expand the Amendment's ambit. However, as many observers have noted, the Court's decisions applying *Katz* have instead greatly limited the scope of the Fourth Amendment's protections. In part, the erosion of the Fourth Amendment's protections since *Katz* resulted from the Court's narrow conception of privacy as complete secrecy. In *Katz*, the Court stated that individuals have no protected expectation of privacy from the government in what they have "knowingly expose[d] to the public."\textsuperscript{lxxv}
The court has interpreted immigration searches of this kind as if occurring at the functional equivalent of the actual border (border exception discussed above). The Court has treated this kind of information as "nonprivate" even where the relationship itself would make a person’s expectation of privacy reasonable. Since an individual’s citizenship or immigration status is never completely secret, a person probably cannot have a reasonable expectation of privacy protection about their immigration status. The government or some other third party is inevitably aware of that status. Citizenship information is conveyed when one enters the United States at every checkpoint, and is a requirement for legal admission into the country.

Critics argue that the Court fails to realize people’s reasonable expectations of privacy when sharing information in certain relationships. A lay conception of privacy certainly would not include the expectation that information exchanged within a relationship of confidentiality would become available to the world at large. This is especially true because disclosure of personal information is becoming involuntary in many contexts, such as where a person must give information to a financial institution or a medical provider. It is “simply [a] condition of living and participating in modern society,” but the Court in Hiibel declared that a state law requiring individuals to identify themselves during police investigations did not violate the Constitution. The Court weighed the level of intrusiveness by the government’s actions against the government’s interests in performing the search and found that a demand for identification is “likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.” Constitutional privacy protections,
therefore, are unlikely to provide any kind of protection even if applied to noncitizen detainees.

B. Exclusionary Protections

In order to effectuate Constitutional protections against law enforcement misconduct, the court uses the exclusionary rule. "The exclusionary rule is a judicially created evidentiary doctrine designed to deter Fourth Amendment violations by prohibiting the admission of illegally obtained evidence at trial." In the immigration context, the Supreme Court has held that the exclusionary rule does not apply, because it was not likely to provide a high enough level of deterrence to outweigh the benefits of allowing evidence into deportation proceedings. Using a balancing test, the Court decided that the likely costs of excluding unlawfully obtained evidence outweigh the likely social benefits.

The Court measured this minimal deterrence value against suppression's "unusual and significant" social costs in the immigration context. First, the majority noted that prohibiting probative evidence "would require the courts to close their eyes to ongoing violations of the law"--an outcome that the Court "had never before accepted." Second, apparently contradicting its earlier statement that immigration officers received sufficient investigatory training, the Court stated that officers' and attorneys' lack of familiarity with the "intricacies of Fourth Amendment law" would complicate the "streamlined" nature of deportation hearings, divert attention from the "main issues" to be resolved, and "result in the suppression of" lawfully obtained evidence. Lastly, enforcement officers were simply too busy scooping up large numbers of illegal aliens to be expected to compile detailed reports of every encounter or to testify that they complied with the Fourth Amendment. Finding that these costs outweighed any deterrence the rule provided, the majority concluded that "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."
Of course, the judicial impetus behind creating the exclusionary rule was that, by
design, it had a deterrent affect on enforcement officers to keep them from violating
Fourth Amendment protections. In the exclusion arena, the court refers back to the
noncriminal nature of immigration enforcement. The court has precluded the Fourth
Amendment's exclusionary remedy, except within the narrow “egregious violations”
extinction.\textsuperscript{lxxxvi} This lower standard of Constitutional protection necessarily leads to a
decreased deterrent affect.

\textit{C. Consent to Search}

In conjunction with the Court's relaxed standard of protection in the immigration
context, the Court has applied a stringent consent doctrine “under the most coercive
circumstances increasingly [defying] the fictional premise that reasonable people feel free
to walk away from law enforcement encounters.”\textsuperscript{lxxxvii} Fourth Amendment doctrine
assumes the reasonable person is free to refuse questions by enforcement officers.\textsuperscript{lxxxviii}
However, the cases that have come down in this vein have been unsympathetic to the
perspectives of individuals against whom immigration enforcement has been enacted. For
example, in \textit{INS v. Delgado}, immigration enforcement officials conducted an
unannounced raid with armed agents, “some of whom questioned workers while others
guarded the exits.”\textsuperscript{lxxxix} In another example, officers executed an administrative warrant in
a person’s home who was then handcuffed for over two hours.\textsuperscript{xc} “The result has been that
the Fourth Amendment offers little or no protection either because the exclusionary rule
has no application in removal proceedings, or even in the small amount of cases where it
does apply, most of those encounters are simply deemed nonseizures and nonsearches.”\textsuperscript{xci}
D. Importance of the Pre-Detention Process

It is important to consider all of the aspects of immigration enforcement leading up to the actual detention of noncitizens because one must see that there are virtually no protections of any kind against abusive use of ICE discretion to search or seize any person suspected of immigration violations. The entire process previous to detainment is unchecked to any significant degree by the courts. Noncitizens are not entitled to most Constitutional protections like their citizen counterparts. There is also virtually no judicial recourse for noncitizens that have been apprehended by ICE due to the civil nature of immigration enforcement and the internal administrative mechanisms established by the Department of Homeland Security. Whatever umbrage someone might take with ICE’s enforcement procedures is not addressed here. Rather, the anti-immigrant procedures are noted as the foundation for a process that incarcerates noncriminal individuals for indefinite periods of time in unsupervised, oftentimes poor conditions, without affording them even the same considerations of health, well-being, and humanity as is given to this nation’s most ruthless and abhorred criminals.

E. Lack of Eighth Amendment Protections

For example, perhaps the staunchest deterrent to inhumane treatment of prisoners is the Eighth Amendment prohibition of cruel and unusual punishment. In order to establish an Eighth Amendment claim, a prisoner must show both that he or she suffered a deprivation of a basic human need, due to deliberate indifference. For Eighth Amendment mental or medical health care claims, the prisoner must show a “deliberate indifference to serious medical needs.” An Eighth Amendment violation arises when
prison officials “maliciously and sadistically use force to cause harm,”\textsuperscript{xcv} even if the prisoner does not sustain any serious injuries. As a Constitutional remedy, history seems to have borne out as satisfactory Eighth Amendment protections for inmates against abuse by prison officials. This is always open to conjecture, but what most scholars would agree on is the necessity of these protections for incarcerated individuals.

Immigrant detainees are also incarcerated individuals, but they do not enjoy the Eighth Amendment safety net cast upon convicted prisoners. The Eighth Amendment is made applicable to the States through the Fourteenth Amendment, which, as discussed above, does not apply to any relevant degree to noncitizens. Plus, immigration detainees are not criminally convicted; rather they are civil detainees in violation of civil immigration laws. The importance of this distinction will continue to be discussed below, but it has severe consequences in the immigration context.

The Eighth Amendment prohibits the imposition of a criminal punishment that is grossly disproportionate to the severity of the crime including excessive bail and fines, barbaric punishments and, in a very limited sense, sentences of incarceration that are disproportionate to the crimes committed.\textsuperscript{xcvi} It is unclear whether application of the Eighth Amendment to immigrant detainees would provide any protection (assuming, of course, that these protections could be extended to noncitizen detainees). However, immigrant detainees face potentially lengthy periods of incarceration, forfeit property and financial well-being, and, more often than not, leave family and friends behind as they are whisked away by deportation proceedings. The point, of course, is that despite the contention that immigration enforcement is a civil remedy, not a criminal form of punishment, the noncitizen detainee faces harsh consequences for nonviolent, victimless
noncriminal laws. The most violent of citizen offenders receives at least a modicum of protection against the consequences faced by immigration enforcement procedures. The only protection afforded to immigrant detainees, then, does not come from the Fourth, Fourteenth or Eighth Amendments, but rather arises out of the Fifth Amendment, which protects any person in United States custody from conditions that amount to punishment without due process of law.\textsuperscript{xcvii}

V. FIFTH AMENDMENT PROTECTIONS FOR NONCITIZENS

The Fifth Amendment to the United States Constitution states that no person shall be deprived of life, liberty, or property, without due process of law. The important textual distinction between the Fifth and Fourteenth Amendments is the Fifth Amendment’s use of the word “person” without any textual reference to “citizens” as is apparent in the Fourteenth Amendment. As such, the Supreme Court has held that civil detainees have the right to challenge their confinement under the Fifth Amendment Due Process Clause, which applies to all persons within the territorial jurisdiction of the United States.\textsuperscript{xcviii} The Supreme Court even noted that “[a]liens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth … Amendment[].”\textsuperscript{xci} At a minimum, civil detainees have a general right to be free from unsafe conditions and bodily restraint.\textsuperscript{c} The Court has also indicated the possibility of rights such as the right to basic human necessities and adequate food, clothing, shelter and medical care.\textsuperscript{ci}

In a civil detention facility, the interest of the detainee is weighed against the government’s legitimate interest in maintaining order and security within the facility.\textsuperscript{cii}
These interests of order and security are "valid objectives[s] that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." Similar to the way the court views ICE search and seizure actions, deference is given to detention officials, whose decisions are entitled to a presumption of correctness. The Court did note that involuntary civil detainees are entitled to better treatment and conditions of confinement than convicted criminals because they are not designed to be punishment, but the Court has expressly stated that it will not interfere unless there is substantial evidence that officials have overstepped their Constitutional boundaries.

The Court of Appeals for the Ninth Circuit has even held that the conditions of confinement for civil detainees must be superior to convicted prisoners and pre-trial criminal detainees. According to the Ninth Circuit, conditions of civil detention are presumptively punitive and unconstitutional if they are identical to, more restrictive than or even similar to the conditions of pre-trial criminal detainees or convicted inmates. There has been very little case law outside of the Ninth Circuit that weighs in on this issue, but the Ninth Circuit approach most nearly reflects both International Human Rights Laws and the spirit of Fifth Amendment protections in American jurisprudence.

VI. HUMAN RIGHTS VIOLATIONS UNDETERRED BY CONSTITUTIONAL PROTECTIONS

A. International Human Rights Laws Generally

The way that noncitizen detainees are treated implicates international human rights laws. The United Nations has produced a number of standards that are supposed to
govern this treatment. They include generally: Protection from being punished for complaining, nondiscriminatory practices while in custody, no restrictions on movement than are needed to keep safe custody of detainees, prompt medical care, ability to keep good hygiene and sanitary conditions and health care that meets national and community standards.\textsuperscript{cx} However, the ACLU has found serious violations.

The growth in detention has resulted in often horrible conditions of confinement, such as grossly inadequate health care, physical and sexual abuse, overcrowding, discrimination, and racism. NGOs frequently receive widespread complaints from detainees and their loved ones regarding problems such as lack of access to necessary medications for persons with chronic illnesses; shackling; use of segregation or tasers for disciplinary purposes; inability to visit with family members and problems with access to telephones.\textsuperscript{cxi}

The immigration enforcement system as well as the criminal justice system uses a variety of jails. ICE uses primarily four types. These include Service Processing Centers owned directly by ICE, which usually use private company personnel as guards; Contract Detention Facilities, which are privately owned and contracted out by the DHS; Intergovernmental Service Agreement facilities, which are state and local jails under contract with the DHS; and federal Bureau of Prisons prison facilities.\textsuperscript{cxii} All of these facilities can, and often do, house convicts alongside immigration detainees. As recently as 2005, government estimates stated that one-half to three-fourths of all immigrant detainees were held at state and local county jails.

The problems inherent in immigration enforcement extend to the detention process. Detention centers are rife with accusations of abuse by enforcement officials against detainees. The many other articulated problems with immigration enforcement are only exasperated in detention centers. As a chilling example, the New York Times
reported sixty-two detainee deaths in ICE custody between 2004 and 2007, as opposed to only twenty reported deaths previously in the same time period.\textsuperscript{cxiii}

B. \textit{Ineffective Oversight}

Despite frequent allegations of inhumane conditions of confinement, DHS detention centers have no outside supervision of their conditions. Since 2002, the DHS has annually reviewed their facilities and has determined that facilities around the country routinely fail to comply with significant Detention Standards set by international law. However, even for the facilities that do pass these inspections, there are several factors that call into question the reliability of these annual reviews. First, the DHS has no written guidelines for how to rate a particular facility “with respect to a particular Detention Standard or with respect to overall compliance with the Standards.” Second, facilities are still used even after problems with detainee’s access to telephones, legal materials, visitation, law libraries and mail. (all above from Id at 2).

The review process itself is flawed because these reviews are made upon a 30-day notice to the facility, and the annual reviews do not require interviews with detainees. Even when interviews are done with detainees, the DHS does not provide translators, and those conducting the reviews do not need to be proficient in any secondary, non-english language. The Annual reviews are not analyzed nor implemented in any policy decisions. Finally, there are no penalties for noncompliance.
C. Access to Legal Materials

ICE has detention standards for access to legal materials. Facilities housing ICE detainees are required “to maintain law libraries with specific immigration and legal materials, provide supplies, computers, and/or typewriters to facilitate legal research and drafting” and are supposed to be of reasonable access to detainees. (Id 2-3). Immigration law is known for its difficultness and complexity, but unrepresented detainees, especially those with valid asylum claims, have no hope of navigating the vast system of immigration law without access to legal materials. In some cases, facilities did not have any legal materials available for detainees. Even in facilities where legal materials were available, some had inadequate materials for immigration law, or detainees had no idea that legal resources existed because ICE officials failed to outline library times, policies or procedures in the detainee handbooks. In other instances, where adequate legal materials existed, detainees “lacked staff assistance to help them understand the library’s collection or to make use of English-only materials.” (Id at 3).

Even worse violations occurred at facilities that imposed unduly restrictive library access policies. Facilities were known to require detainees to forego recreation time in order to use the library, or allowed less than the required five hours of weekly library access. In some places detainees were not allowed to receive research and writing assistance from their peers. Lack of physical space was also cited as prohibiting more than one detainee from using library materials at a time, or access to essential materials such as computers, typewriters or pens and paper was not furnished.

Convicted citizen prisoners have the right to counsel and the right to assistance from a jailhouse lawyer or to some other “reasonable alternative” for assistance under the
Sixth Amendment. The Supreme Court stated that "recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often ‘totally or functionally illiterate,’ were unable to articulate their complaints to the courts." The right to legal materials is not properly served if the prisoner cannot make any actual use of these materials. The same is true in the case of immigrant detainees who speak English as a second language or not at all. Immigrant detainees do have the right to counsel at no cost to the government, but because of the expedient nature of deportation proceedings and because many detainees do not have financial resources available to them, paying counsel may not be an option. If the detainee is not able to utilize legal materials for any of the above reasons, the practical effect is that detainees, even ones with meritorious claims to asylum or legal permanent residence, have no remedy but to be processed by the system with no voice at all.

D. Access to Telephones

Detainees are expected to have “reasonable and equitable” telephone access according to ICE standards. Without the ability to communicate via telephone, many detainees will not be able to prepare for their hearings and lose meritorious cases, not to mention the inability to communicate with one’s family. The standard is simple: facilities must provide telephone access rules in writing to each detainee, post those rules, provide at least one telephone per 25 detainees held, and maintain telephones in proper working order. Further, “[d]etainees must be allowed to make direct, cost-free calls to the immigration court and the BIA, to federal and state courts, to consular officials, to legal
service providers, to certain government offices, in a personal or family emergency, or when the detainee can otherwise demonstrate a compelling need.” Violations articulated in annual reviews include failure to post telephone policies, telephone policies in English only despite non-English speaking populations, phones in disrepair and phone-to-detainee ratios well below the required minimum. (Id at 3- “At some facilities, telephones were provided in a ratio as high as 1 per 40 detainees, well beyond the 1:25 ratio required by the Standard.). At some facilities, detainees did not have enough privacy to protect the confidentiality of attorney-client relationships. Assistance was not available in some facilities for those trying to place confidential phone calls, or were outright restricted from contacting family members in other facilities. Detainees held in administrative segregation were not afforded the same phone privileges as those in general custody.

E. Medical Care

The ACLU reports that some of the most common complaints from detainees in the United States is “severe and widespread problems” with access to medical care. One recurring problem is long delays in response to medical requests. Response times by medical staff, if they respond at all, can be days or weeks after requested medical treatment. Further, “[c]ommon problems include the unavailability of sick call forms, failure to respond to requests for medical attention and the resulting delay in detection or treatment of medical conditions.” The process for medical treatment at immigration detention facilities is at least partly to blame for these delays. All nonemergency decisions regarding detainee medical procedures must be approved by reviewing medical personnel in Washington D.C. before being administered. There is a twenty-four hour emergency care procedure for immediate medical care, but reports suggest that virtually
all medical care is classified as non-emergency. Mental health care is also absent in detention centers. Of particular concern in the mental health context is that prison officials sometimes change prescription psychotropic medications to generic forms or to different medications altogether. In some facilities, mental health care is patently denied to detainees and can adversely affect the mental stability of the detainee and the institution, and can inhibit effective legal representation. This is especially concerning considering that many detainees are survivors of torture or trauma in their home countries who are susceptible to being “re-traumatized” and there are consistent reports of overuse and misuse of suicide prevention segregation.

The Eighth Amendment generally governs medical care of citizen convicts. A “deliberate indifference to serious medical needs of [a] prisoner[] constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.” This applies to both the actions of medical personnel and prison officials. What constitutes a “serious medical need” was not defined by the Supreme Court, but some lower court interpretations have offered liberal standards that include bruising and lacerations that were left unattended for six days and psychiatric or psychological problems that are serious but curable or that can be substantially alleviated. Even a cursory analysis of these standards show that the medical care of immigrant detainees could be greatly improved if they were to receive protection of this kind.

F. Overcrowding and Transfers

The DHS has no standards governing overcrowding, beds and mattresses or minimum allowable living space. In some facilities, detainees complain that three
people may be housed in cells designed for only two or detainees are housed in
gymnasiums or common areas with only mats on the floor, sometimes increasing the
population to well over fifty percent the design capacity.\textsuperscript{cxxx} Detainees can also be
transferred for any reason. The NDS allow transfers, but “requires officers to do so
without providing detainees, their attorneys or their families with advanced notice.”\textsuperscript{cxxxii}

Convicted citizens do not have a protected Due Process liberty interest that would
prevent their transfer from one institution to another, more adverse institution.\textsuperscript{cxxxiii} A
liberty interest can arise from state policies or regulations.\textsuperscript{cxxxiv} Either way, the lack of
protections against unregulated transfer of prisoners weighs heavily against the notion
that immigrant detainees require some type of protection from arbitrary transfers. This is
especially true because the NDS governing detainee transfers does not create any
expectation that the detainee will be free from transferring at the whim of detention
officials. Here, however, there is a very important distinction that must be drawn beyond
the pervasive criminal-convict-versus-noncriminal-detainee dichotomy. One of the main
criticisms of the immigration enforcement process is that detainees are arrested without
any notice given to their families, friends or attorneys and taken or swiftly transferred to
remote detention facilities that can be several states away from where the detainee was
arrested. The result of this modus operandi is that detainees are difficult, if not impossible
to locate.

This is troublesome because an immigrant detention boom has created a gold
mine for private prison industries.\textsuperscript{cxxxv} High per diem dollar amounts are paid to facilities
for every bed filled with a detainee body. This has created a perverse incentive to
maintain high detainee populations with as little outside interference as possible.
Shuffling detainees around the country to different detention facilities ensures that beds will remain full of bodies. So even though criminal convicts do not enjoy a protected liberty interest against transfer amongst institutions unless a state policy or regulation creates one, this is one of the rare occasions when the detainee requires a much higher threshold of protection than their criminal counterparts.

G. Punitive Measures

Allegations abound for misuse of the prison disciplinary procedure of segregation. The overall disciplinary process has been plagued with problems, with some detainees being placed in segregation for extended periods of time only to be found not guilty of the alleged infraction, or having never even been written up. Even more problematic are the numerous complaints of physical, sexual and verbal abuse that detainees claim to have endured at the hands of prison officials. The problem is exacerbated by inadequate access to grievance procedures and allegations of written and oral complaints going unanswered or being ignored.

Convicted citizens are at least entitled to a “written statement by the fact finders as to the evidence relied on and reasons” for the disciplinary action taken against them as well as notice twenty-four hours in advance of an appearance in front of the corrections committee overseeing the action. The inmate may also present evidence and call witnesses in his or her defense so long as “permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.” This protection flows out of the Fourteenth Amendment’s Due Process Clause, and as such does not protect immigrant detainees. If civil detainees are indeed entitled to better conditions of
confinement than criminally convicted inmates, then immigrant detainees deserve, at the very least, to have strictly defined procedures that prison officials must follow when applying punitive measures. This issue is merely a byproduct of the lack of oversight of detention facilities. The simple procedure of providing a written statement by the fact finders concerning the evidence relied upon to initiate disciplinary actions would force detention officials to maintain adequate records, as well as providing documentation about the time frame in which the disciplinary measures took place.

VII. CONCLUSION

Professor Wayne R. LaFave discusses the theories of punishment in American jurisprudence in his article *Purposes Of The Criminal Law- Theories Of Punishment*. One of the prevailing theories, he opines, is termed “prevention” or “intimidation” which is defined by the ability of criminal punishment to specifically deter criminals from ever committing future crimes because of the unpleasant experience he or she had to endure while in incarceration. A sister theory to intimidation is “general deterrence” where the general public are warded off from criminal activity by witnessing the suffering of convicted criminals. Both of these theories are disputed because of the high recidivism rates in the United States, but both of these theories have found their way into civil immigration enforcement; the same civil enforcement that serves a dual role as criminal enforcement through deputization agreements and mandatory criminal violations for immigration violations. The civil prosecution, enforcement and detention of noncitizen immigration law violators is virtually unchecked by any judicial or Constitutional protections. The void left instead of protections has created countless
human rights violations. Most of these human rights violations could be avoided if Constitution-like protections, or Constitutional protections themselves, were applied to the immigration enforcement context. The United States judicial system does not need to extend the entire weight of the Constitution to protect noncitizens detained within its borders. But it is a shameful display of American jurisprudence for the Court to enter into another era defined by a “hands off” approach to a vast and physically identifiable prison population. Right now, there is a human being in jail, prison or somewhere behind bars and thick glass within the borders of the United States. This person is being abused and being denied the basic necessities that even this nation’s most vile criminals receive. But this person is not a criminal. This person has never been convicted of any crime and yet is in a system of confinement that has less protection and oversight than this nation’s criminal prison system. There is a whole prison system without any convicts. They are noncitizens. They are not protected. They are invisible. The justice system must be the awakening eyes of this nation’s perception.


Id at 858.

Id.

Id.

INA Sec. 235(a).

INA sec. 235(b)(1). This section allows for a procedure called “expedited removal” which allows an immigration officer to order the noncitizen to be removed without further hearing or review unless they intend to apply for asylum and have a credible fear of persecution.

I.N.A. § 212(a)(1)

I.N.A. § 212(a)(5-8)

I.N.A. § 212(a)(2)

I.N.A. § 212(a)(3)

I.N.A. § 212(a)(4)

For an enlightening discussion on these changes please see Shoba Wadhia, The Policy and Politics of Immigrant Rights where she discusses Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). ‘While the stated goals of these bills were to deter illegal immigration, prevent terrorism, and provide for an effective death penalty, the consequences were much broader. A number of measures contained in this legislation make it more difficult for immigrants to see a judge prior to deportation, impose excessive punishment for immigrants who fit under “tough-sounding” labels, increase the number of immigrants who can be detained by the government without an opportunity to ask for bond, and remove the ability of judges and immigration officers to consider an individual's equities, circumstances, and other factors when determining if he should be deported.” Shoba Sivaprasad Wadhia, The Policy and Politics of Immigrant Rights, 16 TMPPCRLR 387, 387 (2007).

I.N.A. § 237(a)(2)(A)(iii)

I.N.A. § 101(a)(43)

16 TMPPCRLR 387 at 395.


38 U. Mem. L. Rev. 853 at 861.
The ICE website archives press releases recounting numerous ICE activities carried out as raids upon worksites.


Id at 1092-93.


Laura Rotolo, ACLU of Massachusetts, prepared for the Briefing Coordinators of the Special Rapporteur on Migration visit to U.S. (April 17, 2007).

Wadhia, 38 U. Mem. L. Rev. 853 at 866.


There are countless accounts of poor conditions of confinement including inadequate health care, physical and sexual abuse, overcrowding, and discrimination. (See generally Overview of U.S. Immigration Detention and International Human Rights Law on the use of Detention in the US, Briefing materials from Lutheran Refugee Immigration Services, in partnership with Detention Watch Network, submitted to the U.N. Special Rapporteur on the Rights of Migrants.) Especially concerning are the abuses alleged by female detainees. In some cases pregnant women could not receive proper health care or nutrition. In other cases, sexual assaults are alleged to have occurred and the female detainees were threatened with being separated from their children if they reported the assaults. (See generally Briefing Paper from National Immigrant Justice Center, The Situation of Immigrant Women Detained in the United States, submitted to the United Nations Special Rapporteur on the Rights of Migrants (April 16, 2007)). (For a discussion on the complications and abuses alleged by children see briefing paper from Lutheran Immigration and Refugee Service, Florence Immigrant and Refugee Rights Project, Center for Social Justice, and Seton Hall Law School, Detention and Deportation of Unaccompanied Children in the United States, submitted to the United Nations Special Rapporteur on the Human Rights of Migrants).

http://www.dhs.gov/xabout/structure/

Id.

I.N.A. § 103(a).

Id.

http://www.ice.gov/about/index.htm

xxxvii http://www.ice.gov/pi/news/factsheets/section287_g.htm

xxxviii I.N.A. § 242(g)


xli Id.


xliii Id.

xliv I.N.A. § 287(a)(1-2)

xlv I.N.A. § 287(a)(3)

xlvi 8 C.F.R § 287.1(a)(2).


xlviii Id at 273.


li Id at 886-87.

lii I.N.A. § 287(a)(2)


lv Id.

lvi 8 C.F.R. Sec. 287.3

lvii I.N.A. § 103(a)(8)

lviii I.N.A. § 103©

lix I.N.A. § 287(g)(1)


Id at 1192-1193.

Anil Kalhan, 41 UC Davis L. Rev 1137 at 1195.

Fong Yue Ting, 149 U.S. 698, 730 (1893).

See Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach To Understanding The Nature Of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 302 (2008) (discussing how the Court decided without citing authority that expulsion from the country was distinct from the criminal punishment of transportation, which was the expulsion from a country as punishment for a crime).


Zadvydas, 533 U.S. at 690.

40 McGeorge L. Rev. at 266.

Anil Kalhan, 41 U.C. Dav. L. Rev. 1137 at 1201.

Id at 1202.


Anil Kalhan, 41 U.C. Dav. L. Rev. 1137 at 1170.

Id at 1196.

Id at 1171.

Id at 1173.

Id at 1174.


Id at 191.


lxxxiv Id at 1046.
lxxxv Matthew S Mulqueen, 82 St. John’s L. Rev. 1157 at 1168-69.
lxxxvi Lopez-Mendoza at 1050.
lxxxviii Id at 1085.
lxxxix Id at 1085.
x Id.
x Id at 1086.
xci Id at 1086.
xcvii See Wong Wing v. United States, 163 U.S. 228, 237 (1896).
xc Id. at 315.
xcl Id. at 320.
xcii Youngberg, 457 U.S. at 324.
xciv 40 McGeorge L. Rev. at 267.
xcvi Bell v. Wolfish, 441 U.S. at 540 n.23.
xcvii Id. at 934.
Although international human rights laws are not discussed at length here, they are heavily implicated in the immigration detention issues raised in this paper. In 2007, the ACLU Foundation of Southern California and the National Immigration Law Center produced a series of papers to be submitted to the United Nations Special Rapporteur on the Human Rights of Migrants. These documents outlined a series of alleged violations of international law on the rights of immigrants and asylum seekers, many of which are discussed in this paper for different purposes. For further study, please see U.S. Immigration Detention System: Sub-Standard Conditions of Confinement and Ineffective Oversight, prepared for the United Nations Special Rapporteur on the Human Rights of Migrants, May 3, 2007 by ACLU Foundation of Southern California and the National Immigration Law Center.


Wolff, at 579.

INA § 240(b)(4).


Id. at 6.

Id.

40 McGeorge L. Rev. at 280.

Id.


Id.

Id.

Id.

Id.


Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977).

40 McGeorge L. Rev. at 282.


40 McGeorge L. Rev. at 282.


Id. at 10.

See U.S. Immigration Detention System: Sub-Standard Conditions of Confinement and Ineffective Oversight at 10 discussing, among other things, the repeated use of words like “faggots”, motherf---ers”, “spicks”, “cockroaches”, and “monkeys” in reference to various ethnic groups.

Id. at 12.

Wolff, 418 U.S. at 564. (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).

Id.

Id.