IT’S JUST LIKE PRISON: IS A CIVIL (NONPUNITIVE) SYSTEM OF IMMIGRATION DETENTION THEORETICALLY POSSIBLE?

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ABSTRACT

This Essay questions a fundamental premise on which the U.S. civil immigration detention system is built: Is a civil—that is, nonpunitive—system of immigration detention even possible? The Supreme Court has not questioned this assumption. Most scholars who critique the state of immigration confinement in the United States assume the possibility of a civil detention system but argue the modern system is too much like punishment to be civil in nature. And, that contention is true: One of us has experienced both punitive incarceration and so-called civil immigration detention and is left with the conclusion that there is little meaningful difference between the two forms of confinement. Civil immigration detention is just like prison, if not worse. But, in an era when the scope of immigration confinement is expanding rapidly—with tens of thousands of people in the custody of federal immigration-enforcement agencies each day under civil legal powers—which question should we be asking ourselves: How do we make civil detention civil? Or, is civil detention just a fallacy?

TABLE OF CONTENTS

INTRODUCTION .................................................................956
I. IMMIGRATION CONFINEMENT, PAST AND PRESENT .................959
II. A FIRSTHAND ACCOUNT OF THE CARCERAL NATURE OF CIVIL IMMIGRATION CONFINEMENT ..............................................963
III. CIVIL IMMIGRATION CONFINEMENT VERSUS CRIMINAL INCARCERATION: CONSTRUCTING, DECONSTRUCTING, AND (PERHAPS) REFRAMING THE NARRATIVE ..................966
   A. Constructing the Narrative .........................................966

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INTRODUCTION

Service processing centers. Family residential centers. Tender age shelters. These terms are among the euphemisms the federal government uses to refer to the spaces in which it confines people whose lives intersect in some way with the nation’s administrative immigration law enforcement system. The use of these terms is deliberate: they mask the carceral nature of the spaces to which they refer and the punitive experiences of the people confined in those spaces. For many, the conditions in, for example, a “service processing center” or “family residential center” run by the U.S. Immigration and Customs Enforcement (ICE) agency are similar to, if not worse than, the conditions in the average state or federal penitentiary built to confine people who have been convicted of criminal offenses.

At the same time, it is accepted nearly universally that the government may detain people for immigration-related reasons pursuant to its civil legal powers—as an exercise of its civil, or nonpunitive, authority.1 The authority governing a noncitizen’s eligibility to enter, reside, work, and eventually naturalize in the United States is found within administrative law, not the criminal code.2 Thus, according to the law, noncitizens held behind the walls of “family residential centers,” “tender age shelters,” “migrant camps,” and “service processing centers” are confined for some purpose other than punishment.3 For more than a century, the legal justification for this form of confinement has included the federal government’s need to facilitate the orderly administration of administrative immigration proceedings and to prevent a putatively

1. For purposes of this Essay, we define immigration detention as the confinement imposed by the federal agencies tasked with enforcing civil immigration provisions, including primarily ICE and Customs and Border Protection. Others have relied on a more expansive definition of immigration detention that includes people who have been charged criminally with an offense or offenses stemming from their migration activity and are in the custody of the U.S. Marshals Service, the Federal Bureau of Prisons, or state authorities. See, e.g., César Cuauhtémoc García Hernández, Abolishing Immigration Prisons, 97 B.U. L. REV. 245, 248 n.8 (2017) (defining “immigration prisons” as “secure facilities in which migrants are confined due to a suspected or confirmed violation of immigration law,” including spaces confining people under both civil and criminal legal powers); id. at 252–53 (discussing the “blurry boundary between civil detention and criminal confinement for migration-related activity” and asserting “whether acting under the authority of civil or criminal law, law enforcement officials at every level of government regularly take into custody people who are thought to have violated immigration laws”).
3. César Cuauhtémoc García Hernández, Immigration Detention as Punishment, 61 UCLA L. REV. 1346, 1352 (2014) (“Immigration imprisonment has, in essence, taken on the same legal character as the immigration process and outcome that justify its existence: It is civil confinement because it is part of a civil proceeding to determine whether a civil sanction will be meted out.”).
dangerous person from harming others in the community. This premise—that a justifiable dichotomy exists between civil detention and criminal incarceration—is the foundation for the legality of this country’s system of noncriminal immigration confinement. Indeed, the Supreme Court has long accepted that civil detention is constitutionally permissible, so long as its stated purpose is nonpunitive. And the government’s chosen terms to describe the facilities where the confinement occurs aid in perpetuating this notion that immigration detention is distinct from punitive incarceration.

Indeed, much of the debate regarding civil immigration confinement starts with this point: constructing a civil detention system is possible, in theory, and such a system is constitutional so long as it is distinct from punitive incarceration. There is a growing body of scholarship examining whether the modern system of immigration confinement lives up to that ideal or, in contrast, whether its conditions have become de facto punitive. Professor César Cuauhtémoc García Hernández, for example, in concluding the latter, has written, “Whatever the actual reason for detention and despite immigration detention’s legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement,” and, “[b]y intertwining immigration detention and penal incarceration, Congress created an immigration detention legal architecture that, in contrast with the prevailing legal characterization [as civil detention], is formally

4. See, e.g., id. at 1353–54 (“The Court’s concern about whether a governmental action is punitive or regulatory reveals the fundamental difference between penal and civil confinement. The former is intended to punish individuals for transgressing social mores embedded in criminal law. In contrast, civil detention is permissible to ensure that an accused appears for legal proceedings (whether they are judicial or, as in the immigration context, administrative) or to promote public safety; it is expressly not intended to punish.”); Mark Noferi, Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm, 27 J. C.R. & ECON. DEV. 533, 543 (2014) (“Immigrant detainees are detained to prevent flight or public safety risk (similar to criminal pretrial detainees).”).

5. Bell v. Wolfish, 441 U.S. 520, 536–37 (1979) (holding the government may detain someone pretrial “to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution”).


7. See, e.g., Cuauhtémoc García Hernández, supra note 3, at 1349–50; Anil Kalhan, Rethinking Immigration Detention, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (“For many noncitizens, detention now represents a deprivation as severe as removal itself. Some commentators even resist the very term ‘detention’ as misplaced, masking circumstances approximating criminal ‘incarceration’ or ‘imprisonment.’ If convergence more generally has given rise to a system of crimmigration law, as observers maintain, then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of immcarceration.”); Noferi, supra note 4, at 539–40; Juliet P. Stumpf, Civil Detention and Other Oxymorons, 40 QUEEN’S L.J. 55, 58 (2014).

punitive.” Building on this theory, other scholars and commentators have proposed features of a detention model that adhere more closely to the features of a model “civil” system of confinement. Common threads of these proposals include more freedom for incarcerated people to move within and outside the facility during certain hours, increased access to social visitation, and more privileges and programming, like access to outdoor recreation. Summarizing her proposal, Whitney Chelgren writes, “On the whole, immigration detention should look more like civil custody and less like jail.” Others, yet, have proposed reducing or eliminating the use of civil immigration detention because it is not the least restrictive means with which to advance the model’s underlying purported goals, at best, and, at worst, is a marginalizing, exploitative, and racist form of state control.

This Essay contributes to the field of crimmigration studies and theories of punishment by challenging the underlying premise of the debate around this country’s rapidly growing modern civil immigration detention regime: Is civil confinement actually possible? Do modern theories of punishment support the notion that, whatever the stated reasons for doing so, a deprivation of a person’s physical liberty may be nonpunitive? Or, is “civil detention” an oxymoron, as Professor Juliet P. Stumpf has argued? That is, is the deprivation of one’s physical liberty inherently punitive? And if so, what does this legal fiction—civil versus punitive detention—mean for the growing system of mass, and in many

9. Id.; see also Cuauhtémoc García Hernández, supra note 1 at 256 (“No matter the security measures taken to confine them, immigration prisoners frequently face conditions reminiscent of the worst failures of penal facilities.”).
11. See, e.g., Chelgren, supra note 10, at 1525 (asserting, “the government should reform the [immigration] detention system so as to create an intelligible distinction between civil custody and penal incarceration,” and advocating for separation of civil detainees from criminal population, staff training “to understand the differences between criminal inmates and civil detainees,” and greater freedom, more lenient visitation procedures, more opportunities for recreation, and limited use of restraints for civil detainees). Even the federal government has attempted, deliberately, to construct a “civil detention” model with the opening of the Karnes County Civil Detention Center in Texas in 2012. Much like the proposals discussed above, the facility provided people confined therein “with freedom of movement within its 29 acres, semi-private bathrooms, initial medical screening upon arrival at a centralized medical center, family visits with meaningful contact, and programs and resources such as a library, computers with Internet, a gym, a soccer pitch, and basketball and volleyball courts.” Noferi, supra note 4, at 535–36.
12. Chelgren, supra note 10, at 1526.
13. See, e.g., Fatima E. Marouf, Alternatives to Immigration Detention, 38 CARDOZO L. Rev. 2141, 2155 (2017) (“ICE has a range of options that it can use in lieu of detention . . . [H]owever, many of these are underutilized.”).
15. CESAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 212 (2015) (explaining “crimmigration” refers to “the intersection of criminal law and procedure with immigration law and procedure”).
realms unaccountable\textsuperscript{17} immigration confinement in the United States today?\textsuperscript{18} Should we, instead, be aiming to implement a system of civil supervision, instead of detention, as some have proposed?\textsuperscript{19} Eliminating immigration-related confinement altogether, in line with abolitionist visions of a world without prisons?\textsuperscript{20}

This Essay proceeds in three parts. Part I provides an overview of the history and current scope of the system of civil immigration-related incarceration in the United States. Part II offers a firsthand account of the conditions in the Aurora Contract Detention Facility in Aurora, Colorado, run by a private, for-profit prison company, the GEO Group, Inc., on behalf of ICE. This Part compares the conditions of the Aurora facility, and the day-to-day lives of the men detained there, to the conditions men face when incarcerated in the same state’s prisons run by the Department of Corrections—a component of the criminal law system. Part III traces the development of the civil detention versus criminal incarceration paradigm and, in light of the account in Part II as well as modern theories of punishment, questions whether constructing a system that differentiates adequately between civil detention and punitive incarceration is even theoretically possible.\textsuperscript{21}

I. IMMIGRATION CONFINEMENT, PAST AND PRESENT

The civil immigration detention apparatus is by far the largest system of formally nonpunitive confinement in the United States\textsuperscript{22} and the fastest growing component of the country’s system of mass incarceration.\textsuperscript{23} On any given day in 2017, for example, nearly 40,500 people were confined

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\item[17.]See, e.g., Danielle C. Jefferis, Constitutionally Unaccountable: Privatized Immigration Detention, 24 Ind. L.J. (forthcoming 2019) (outlining ways in which private immigration prisons evade liability for constitutional torts).
\item[18.]Although immigration confinement represents the largest system of so-called civil confinement in the United States, we recognize that the government employs other forms of putatively nonpunitive confinement: namely, civil commitment for people convicted of certain sex offenses and pretrial detention (though, as Mark Noferi points out, the latter is rarely referred to as “civil” detention). Noferi, supra note 4, at 539.
\item[19.]See e.g., Marouf, supra note 13, at 2155–64.
\item[20.]See, e.g., Cuauhtémoc García Hernández, supra note 1.
\item[21.]While the ordinary usage of the terms may suggest nuanced differences, we use “detention” interchangeably with “incarceration” and “confinement,” and define these terms as the state-sanctioned deprivation of a person’s physical liberty. As Anil Kalhan explains, confinement by nature “imposes serious hardships . . . depriving individuals of the ability to work and earn income, attend school, and maintain relationships.” Kalhan, supra note 7, at 46.
\item[22.]See Stumpf, supra note 7, at 57 (“In the United States, immigration detention stands alone in using physical confinement to enforce a civil regulatory regime.”).
\item[23.]Cuauhtémoc García Hernández, supra note 3, at 1348 (“Clearly, incarceration is a major feature of immigration enforcement today, and immigration imprisonment represents a substantial portion of all modern detention in the United States.”); Kalhan, supra note 7, at 44–45 (“The growth in immigration detention in recent years has been remarkable. In 1994, officials held approximately 6,000 noncitizens in detention on any given day. That daily average had surpassed 20,000 individuals by 2001 and 33,000 by 2008. Over the same period, the overall number of individuals detained each year has swelled from approximately 81,000 to approximately 380,000.”).
pursuant to civil immigration laws—representing exponential growth over the past two decades. By the end of 2018, the daily detention population exceeded 48,000. In early 2019, the number of people detained reached nearly 50,000, and by the middle of 2019, the figure exceeded 52,000—an apparent all-time high. Annually, the federal government incarcерates nearly 400,000 people under this same authority, a figure that has also grown substantially over the last few years, and one that is likely to be surpassed in 2019. Much like the U.S. criminal law system boasts the largest population of prisoners convicted of crimes and sentenced to a period of incarceration, the United States is the titleholder for the largest civil immigration detention system in the world.

This sweeping scope of incarceration is unique to the modern system of immigration confinement. Indeed, the federal government did not always default to detention in the course of enforcing civil immigration laws. The government has confined people pursuant to its civil immigration-enforcement authority since at least 1891—and perhaps

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27. Id.
30. Id. at 221 (“Currently the United States has a prison population of 2.2 million with prison rates at 737 per 100,000 persons.”).
32. CÉSAR CUAUHTEMOC GARCÍA HERNÁNDEZ, supra note 15, at 8 (“[D]etention of migrants facing removal, the form of punishment that most emblematizes criminal law enforcement, was the exception during the century leading up to the 1990s. Indeed, from the 1950s until the 1980s, the INS had a policy of not using detention except in unusual circumstances.”); Dech, supra note 29, at 223–24 (“At [the Ellis Island facility in New York Harbor], detention was used as a tool to facilitate admission into the country and prevent communicable diseases. The majority of immigrants entering New York Harbor were from Europe. Most of the immigrants were held briefly, but some were considered ‘excludable’ and sent back to their country of origin.”); Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigration Detention, 45 HARV. C.R.-C.L. L. REV. 601, 610 (2010) (“Historically, immigrants involved in removal proceedings were not detained unless they were found to be a flight or security risk. Even then they were eligible for release on bond.”); Ana Raquel Minian, America Didn’t Always Lock Up Immigrants, N.Y. TIMES (Dec. 1, 2018), https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html (“But detaining migrants was not always seen as normal. On the contrary, immigration detention has a short-lived and complicated history.”).
33. CUAUHTEMOC GARCÍA HERNÁNDEZ, supra note 15, at 240; Stumpf, supra note 7, at 63 (“In the nineteenth century, it was ordinarily private transportation companies that played the largest role
earlier. However, while many noncitizens seeking authorization to enter or reside in the United States were detained at Ellis and Angel Islands in the late nineteenth century, immigration confinement as we have come to know it today did not begin to emerge until the 1980s. Three developments over the course of the 1980s and 1990s spurred the emergence of the modern system of immigration incarceration: the arrival of thousands of Cuban and Haitian migrants, many of them refugees, in the early 1980s, the evolution of the government’s “detention as deterrence” platform, and the rise of crimmigration law and its mandatory detention provisions.

Due to these developments, the attendant rise of immigration confinement was swift. For the sake of comparison, in 1955 the government held just four people in immigration-related custody; by 2001, more than 200,000 people were being confined each year. And by 2011, that total had nearly doubled—more than 400,000 people were confined in detaining non-citizens. When an immigration inspector denied admission to non-citizens, the vessel that brought them bore the responsibility of returning them. Ships detained the rejected non-citizens on board to await the vessel’s return trip. When it became impossible to conduct all immigration inspections aboard ship, Congress passed laws to permit the ‘temporary removal’ of a non-citizen from a vessel for inspection.

34. Stumpf, supra note 7, at 62 (“The power to detain non-citizens arose in the first year of the nation’s existence. One of Congress’ earliest actions was to empower the President to declare that foreign nationals of enemy countries could be ‘apprehended, restrained, secured and removed as alien enemies.’”) (quoting 50 U.S.C. § 21 (2018)).

35. See, e.g., CUAUHTÉMOC GARCÍA HERNÁNDEZ, supra note 15, at 210 (“The practice of regularly detaining newcomers stretches back to the late nineteenth century. Beginning in 1875, Congress enacted a series of laws that increasingly excluded greater numbers of migrants, with a special emphasis on arriving Chinese. Government officials charged with identifying excludable individuals naturally needed time to do so, and migrants had to go somewhere while officials sorted through the new arrivals—keeping migrants on the ships they came on became infeasible rather quickly. In response, Congress enacted the first statute explicitly authorizing immigration detention in 1891. Two years later Congress returned to immigration detention when it enacted the first mandatory detention statute.”); Dech, supra note 29, at 223 (“The Ellis Island facility in New York Harbor was the first federally operated immigration detention center in the United States.”); Jonathan Simon, Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States, 10 PUB. CULTURE 577, 579 (1998) (“However, until 1981, there had been a hiatus of nearly twenty-seven years of enforcing this policy. Ellis Island and its West Coast sister, Angel Island, are best known as portals of entry for immigrants from Europe and Asia, respectively, but each also served as places of imprisonment for those whose eligibility to enter the country was called into question.”), Stumpf, supra note 7, at 64 (“In 1892, the construction of an immigrant processing facility on Ellis Island in New York enabled the routine detention of non-citizens arriving from Europe considered too ill or poor to proceed to the mainland. In 1910, the construction of a detention facility on Angel Island allowed the routine detention of Asian immigrant labourers. Unlike Ellis Island, where detention was generally brief and a precursor to entry into the United States, detention on Angel Island tended to last longer and was ancillary to deportation. In the late nineteenth century, immigration officials regularly detained Chinese immigrants while the Chinese-American community in the United States fought a legal war against a web of legislation that targeted Chinese labourers for exclusion and deportation.”).

36. Simon, supra note 35, at 579 (“Imprisonment was long a significant, if less visible, side of immigration policy.”); Minian, supra note 32.

37. See, e.g., Jefferis, supra note 17.

38. CUAUHTÉMOC GARCÍA HERNÁNDEZ, supra note 15 (“By 2001, over 200,000 people were being detained each year while they waited to learn whether they would be allowed to remain in the United States.”).
annual. As shown above, yearly figures and daily population averages continue to grow.

As the federal government incarcerates more and more people for longer periods of time, for putatively civil immigration-related reasons, accounts of the dangerous conditions within many of the facilities continue to emerge. Although a full account of the issues people experience in immigration-related confinement is beyond the scope of this Essay, a brief description is warranted. Specifically, deaths due to poor medical care and suicide in immigration confinement are on the rise. ICE has reported more than seventy-four deaths in immigration detention since 2010. The agency reported six deaths in fiscal year 2018, albeit in dubiously incomplete fashion. People refer to many immigration detention facilities as kennels because prisoners are held in chain-link cages and treated like animals by facility staff. Lights are left on in

39. Cuauhtémoc García Hernández, supra note 3, at 1348 (“In fiscal year 2011, for the first time in the nation’s history, more than 400,000 people were confined while they waited to learn whether they would be allowed to remain in the United States.”).
40. CUAUHTÉMOC GARCÍA HERNÁNDEZ, supra note 15 (“The immigration detention population has continued to grow steadily since [2001]. In fiscal year 2011, for example, 429,247 people were detained pending immigration proceedings. Meanwhile, Congress now requires that ICE pay for a minimum of 34,000 beds per night, almost guaranteeing that the historically anomalous annual detention population of recent years will not become a momentary blip.”); see also Werner et al., supra note 26 (“[T]he number of people detained as of Feb. 6 [2019] was 49,057 . . . . On Jan. 30, it was 48,088 — up from 46,492 on Jan. 16.”).
41. See Noferi, supra note 4, at 536 (“U.S. immigration detention facilities have been widely criticized for violating international human rights standards for their treatment of civil detainees with criminal incarceration methods, such as prison uniforms, shackles, strip-searches and solitary confinement, as well as unsanitary conditions, inadequate medical screenings and treatment, and widespread physical, verbal, and sexual abuse, often in response to detainees’ assertion of rights.”).
42. For discussion of the conditions in immigration confinement, see generally Jefferis, supra note 17.
43. HUMAN RIGHTS WATCH, ET AL., CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1 (2018) (“More people died in immigration detention in fiscal year 2017 than any year since 2009, and the most recent detailed information we have about immigration detention deaths shows that they are still linked to dangerously inadequate medical care.”).
44. Id. at 3.
housing units constantly, making sleep difficult for many prisoners. In many facilities, people have no choice but to sleep on the concrete floor. The *Guardian* reported in September 2018, an account of the Martinez family in one immigration detention facility in Texas:

The ‘hieleras’, or iceboxes, asylum-seekers said [describing the facility], were overcrowded, unhygienic, and prone to outbreaks of vomiting, diarrhea, respiratory infections and other communicable diseases. Many complained about the cruelty of guards, who they said would yell at children, taunt detainees with promises of food that never materialized and kick people who did not wake up when they were expected to.

At regular intervals, day and night, the Martinezes, and many others, said guards would come banging on the walls and doors and demand that they present themselves for roll call.

If they talked too loudly, or if children were crying, the guards would threaten to turn the air temperature down further. When the Martinezes gathered with fellow detainees to sing hymns and lift their spirits a little, the guards would taunt them, or ask aggressively: “Why did you bother coming here? Why didn’t you stay in your country?”

II. A FIRSTHAND ACCOUNT OF THE CARCERAL NATURE OF CIVIL IMMIGRATION CONFINEMENT

A nuanced understanding of American prisons is not a prerequisite to grasping the carceral nature of so-called civil immigration confinement. Even a Hollywood-type grasp of the reality of incarceration is sufficient to observe parallels among the account of the Martinezes in Texas, for example, and the general conditions in prisons across the United States. People in immigration detention centers cannot leave the facility; they have little-to-no freedom of movement or choice. Their daily schedules are almost completely regimented, and their privileges are few. Some are forced to labor for free or for no more than a dollar a day. Guards oversee their most intimate moments, and visitations from family and friends are strictly limited in frequency and controlled in quality. As with incarceration in the nation’s prisons, the overtone of these features is a

48. *Id.*
49. *Id.*
50. See, e.g., Menocal v. GEO Grp., Inc., 882 F.3d 905, 911 (10th Cir. 2018).
51. Cuauhtémoc García Hernández, *supra* note 3, at 1349, 1384. (“Whatever the actual reason for detention and despite immigration detention’s legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement. . . . They are represented as a threat to public safety, locked behind barbed wire, often in remote facilities, and subjected to the detailed control emblematic of all secure environments. Often they are held alongside their criminal counterparts. People serving time as a sanction for engaging in criminal activity are housed in the same facilities as people waiting to receive an immigration court’s decision about which country will become their next residence.”).
deprivation of physical liberty. The law may hold that civil immigration confinement and punitive incarceration are distinct but, in the reality of the modern civil immigration detention regime, it is a distinction with no difference.

For one of us, this indistinction is more than theoretical: after being incarcerated for nearly eight years in state prisons due to a criminal conviction, and then confined for ten months in an immigration detention facility pursuant to the government’s civil legal powers, the punitive nature of civil immigration detention is a reality. There is little meaningful difference in the lived experiences of incarceration under a government’s criminal legal powers and its civil legal powers.

The principal consistency of punitive incarceration and civil confinement is the inability to move freely. Whether you are in a state prison or an immigration detention center, you cannot leave that building or compound. You are barely permitted to leave your housing pod. Your daily schedule is highly regimented, and even when you are permitted to move to certain areas of the facility, you are permitted to do so only with the permission and supervision of a staff member.

In terms of where people spend most of their time and where they sleep at night, the conditions, again, are remarkably similar. In both the prisons and the immigration detention center where one of us spent our time, men share cells with several people. The cells are barely bigger than the average bathroom. There is usually a toilet in the cell with a sink attached to it. Prisoners are governed by a strict set of rules that dictate the sorts and quantities of personal property they are allowed to have in their cell at any given time.

The cells are situated around a housing unit or pod, and there is usually a common space in the middle of the pod for people to gather and spend time outside of their cells during the few hours of the day when they are permitted to do so in the common area. Sometimes there are televisions in the pod. In prison, we were permitted to have televisions in our cells. This, however, was not the case in the immigration detention center. The only televisions we were allowed to watch were in the housing pod’s common area.

One of the most memorable features of prison and immigration detention is how cold it is in the facilities. Almost everything is constructed of concrete or steel, from the bunks in the cells to the floors, tables, and chairs in the pods. The temperature inside is so persistently cold that most staff members wear winter coats while they are working in the housing pods. But the prisoners are not permitted similar measures to keep warm. At one point, in the immigration detention center, each prisoner had three blankets. One day, staff members came around the housing unit and confiscated one blanket from each prisoner, leaving us with just two blankets. The temperature in the pod stayed the same.
In some situations, the immigration detention experience is even more punitive than incarceration. Moving outside of the housing pod was more restrictive in the immigration detention center. In most prisons, people are allowed to go to the chow hall to eat meals at certain times of the day. And they are usually permitted to go to outdoor recreation at certain times of the day. This was not true in the immigration detention center. People were not allowed to go outside at all. The only reasons we were allowed to leave the housing pod were to visit the medical unit or to go to a legal or family visit. This meant that our movement was limited to the housing pod for most, if not all, hours of the day—every single day.

In most prisons, and in immigration detention, the staff keep track of the incarcerated people by conducting regular “counts” every few hours. During count, prisoners are locked down in their cells, and they are required to stand as the staff go around to each cell and account for each person. This sort of routine is utterly foreign to most people in immigration detention who have not experienced prison, and accustoming to it is difficult for almost anyone. You feel as though you have no autonomy and that someone is watching over your every move. And, that is usually because they are. Especially for the people who are in civil immigration detention simply because they have fled dangerous conditions in their own countries and are seeking a better, safer life for themselves and their loved ones, this sort of government control feels just like punishment.

Much like physical movement, communication with loved ones is restricted significantly in prison and in immigration detention. Under both forms of confinement, prisoners are not permitted to see or speak to their loved ones when they choose. Typically, the options for communication are phone calls and in-person visits. Phone calls are very expensive, so many prisoners who cannot afford to pay by the minute see their family members only if their families are able to afford to visit them in person. Even then, most prisons require family members to schedule visits weeks in advance and limit their options to certain days of the week and times of the day. Immigration detention is similar. The detention center limited family visits to certain days and times and permitted only four people to visit at a time. For many prisoners in immigration detention, this means they cannot see all of their children at once. Another feature of immigration detention that is worse than prison is that the immigration detention center did not allow contact visits. This meant people met with their families with a clear, glass barrier in between them. Unlike prison, where we were usually allowed contact visits with our families, in immigration detention we were not permitted to touch, let alone hug, our spouses and children.

For the people who are inside many of the immigration detention centers around the country, from the restrictions on our movement to the limitations on our family visits and outdoor recreation, it’s just like prison.
III. CIVIL IMMIGRATION CONFINEMENT VERSUS CRIMINAL INCARCERATION: CONSTRUCTING, DECONSTRUCTING, AND (PERHAPS) REFRAMING THE NARRATIVE

Before examining whether a civil system of detention is theoretically possible, it is necessary to trace the development of the narrative that got us to where we are today: the keyholders of a system of mass confinement that purportedly spans the government’s criminal and regulatory enforcement authority. In this Part, we trace the construction of the narrative underlying the constitutional jurisprudence with respect to the federal government’s civil immigration-detention authority, particularly in comparison to the government’s punitive-detention authority. We then deconstruct that narrative by examining theories of punishment as they relate to the carceral state. Last, we ask whether reconstructing the narrative is needed to better situate civil immigration detention in a space that not only more fairly orients it toward the perspectives of those experiencing it but also positions the debate in a manner that facilitates a fairer and more critical examination. This examination would not necessarily evaluate the conditions of civil immigration detention and ask whether those conditions are properly “civil”; rather, it would assess the government’s authority to construct, grow, and maintain a carceral apparatus that confines in excess of 50,000 people every day under its civil legal powers.52

A. Constructing the Narrative

At the outset of this Essay, we listed several terms the federal government uses to refer to the spaces in which it confines people awaiting an administrative adjudication of their immigration status in this country. In light of the accounts of the conditions of civil immigration confinement that followed, we have labeled these terms euphemisms masking the carceral nature of the detention spaces they reference. But, the government’s use of these terms is no accident; indeed, its agencies insist that the public refrain from referring to immigration detention centers as prisons or jails, thus, resisting a common connotation of the punitive experiences of those within the spaces’ walls.53 This is due to the formalist legal distinction between civil confinement and punitive incarceration,


53. Cuauhtémoc García Hernández, supra note 3, at 1352–53 (“For its part, ICE goes out of its way to encourage use of the civil label to describe its detention apparatus. The facilities it runs tend to avoid the terms ‘prison’ or ‘jail.’ Instead, they adopt the more sanguine ‘detention center,’ ‘processing center,’ or, as in an ICE facility in Karnes, County, Texas announces in large letters next to the main entrance, ‘civil detention center.’ As one newspaper article described ICE’s position concerning the Karnes County facility, ‘Just don’t call it a prison, they insist.’”).
which permits the government to confine tens of thousands of people each
day with little to no procedural protections.  

In the immigration sphere, the Supreme Court has never given
credence to the notion that a truly civil detention system may be a
misnomer. For the Court, the logic flows in this manner: immigration
laws are civil, not criminal, and sanctions for immigration-law violations,
such as deportation, are not forms of punishment but civil enforcement
mechanisms that permit the sovereign to protect its borders; therefore,
generally speaking, any concomitant authority the government requires to
exercise that sovereign power is also civil in nature. This includes the
power to confine people for stated nonpunitive reasons (that is, under civil
law authority).

B. Deconstructing the Narrative

In 2009, the Obama Administration tasked then-head of the Arizona
Department of Corrections, Dr. Dora Schriro, to perform a comprehensive
review of the immigration detention system. For Dr. Schriro, her primary
question was: “How do we make civil detention civil?” Proposals for a
more “civil” detention system advocate universally for fewer features of
the carceral state, including reduced use of restraints, more training to
make staff less like prison guards, greater access to medical care, more
programming and privileges, and increased freedom of movement within
the facility. For advocates of such a confinement model, the less a
detention facility looks like a prison or jail, the closer to being a truly civil
detention system it is. In light of the nature of confinement and theories
of modern punishment, however, perhaps Dr. Schriro should have first
asked: “Is it possible to make detention civil?”

The possibility of civil detention may have been a more appropriate
question for Dr. Schriro because what none of the proposed models of

54. See, e.g., Noferi, supra note 4, at 560 (“Historically, few procedural protections have been
afforded to immigration detainees—although this is changing, through litigation and legislation.”).
55. Cuauhtémoc García Hernández, supra note 3, at 1351 (“The Supreme Court has steadfastly
described the entire immigration process as civil.”).
56. Id. at 1352 (“[D]eportation is considered nothing more than a physical manifestation of the
nation’s sovereign prerogative to dictate the terms by which it admits noncitizens and allows them to
remain within its borders.”).
57. Id. at 1351 (“Determinations of whether someone is to remain in the country, it has said,
are conducted in civil proceedings, and the final outcome, deportation, is likewise civil.”); Stumpf,
supra note 7, at 57 (“The US Supreme Court has classified deportation proceedings (now called
removal proceedings) as civil in nature—not criminal. Reasoning that immigration detention is
necessary to the civil deportation process, the Court classified detention as civil in nature. It formulated
detention as a creature of the administrative immigration law system.”).
58. See generally DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION
OVERVIEW AND RECOMMENDATIONS (2009).
59. See Noferi, supra note 4, at 533.
60. See, e.g., Chelgren, supra note 10, at 1525; Noferi, supra note 4, at 536.
61. See, e.g., Chelgren, supra note 10, at 1526 (“On the whole, immigration detention should
look more like civil custody and less like jail.”).
“more civil” detention examine is the purest, and more elemental, feature of the carceral state: the deprivation of physical liberty. Thus, rather than accept simply that confinement, executed pursuant to civil authority, is necessarily civil confinement (albeit, perhaps in need of reform, depending on whom you ask), let us take a step back to ask what does it mean for a government to confine someone—to prevent or restrict a person’s free movement. And, why does the government exercise such power? To deconstruct this concept of civil detention and analyze whether it is possible for detention to be nonpunitive, we must look first to the purposes of confinement and its relationship to modern punishment.

Punishment has always been about state control of, and power over, the body. One of the foremost thinkers with respect to punishment theory, Michel Foucault, explains, in Western societies’ now-centuries-old era of corporal punishment, the public spectacle of pain was the primary means by which the state punished the condemned.62 Torture in the town square, the stockades, and the chain gang were all features of the “gloomy festival of punishment”63 designed to inflict retribution on the criminal. Often, the means of the torture were tailored to the tortured—formulated to match the heinousness of the crime itself.64

By the beginning of the nineteenth century, however, punishment began to evolve. Foucault theorizes that the punisher—the torturer or executioner—began distancing himself from the punished as the punishment came to be seen as equal to, if not greater than, the severity of the crime itself.65 The public execution became “a hearth in which violence bursts again into flame,” and corporal punishment fell into disfavor.66

If states could not inflict direct punishment on the body itself, control of the spaces within which one’s body could exist, and the ways in which one spent his time within those spaces, became the choice method of punishment. And so, prisons became the primary punitive tool.67 With this reform of the methodology of punishment, carceral power came to define punishment itself.68 Today, the act of punishing is carceral; punishment is

63. Id. at 8.
64. Id.
65. Id. at 9 (“Punishment had gradually ceased to be a spectacle. And whatever theatrical elements it still retained were now downgraded, as if the functions of the penal ceremony were gradually ceasing to be understood, as if this right that ‘concluded the crime’ was suspected of being in some undesirable way linked with it. It was as if the punishment was thought to equal, if not exceed, in savagery the crime itself, to accustom the spectators to a ferocity from which one wished to divert them, to show them the frequency of crime, to make the executioner resemble a criminal. judges murderers, to reverse roles at the last moment, to make the tortured criminal an object of pity or admiration. As early as 1764, Beccaria remarked: ‘The murder that is depicted as a horrible crime is repeated in cold blood, remorselessly.’”).
66. Id.
67. Id. at 115.
68. Id. at 11.
the deprivation of physical liberty and vice versa (i.e., the deprivation of physical liberty being punishment). 69

With the exception of the death penalty, incarceration is the most extreme form of punishment that modern, democratic societies tolerate. Physical confinement is so inextricably intertwined with punitive authority that it has become, for most liberal governments, the definition of punishment. So long as a person is confined within a defined space, and restricted from moving freely to and from that space, she has been deprived of one of her most fundamental rights—one that defines her as an individual capable of exercising most, if not all, other rights. 70 And what is punitive if not the state-sanctioned deprivation of such a fundamental right?

C. Reframing the Narrative?

Given this theoretical foundation, how can immigration-related civil confinement be nonpunitive? What are the nonpunitive features of such a paradigm? As shown above, by definition confinement is a deprivation of liberty. Even the less-restrictive detention environments that some have proposed, which permit detained people more freedom of movement, still involve detention; they still feature a deprivation of liberty for those behind their walls. 71 By featuring a deprivation of liberty—something linked inextricably with punishment—is such a detention model necessarily punitive? And, if so, is the formal distinction between civil

69. Id.
70. Noferi, supra note 4, at 567–68 (“So long as those confined cannot leave, they and their families suffer the same collateral effects—loss of work and resultant economic impacts, loss of personal contact, psychological harm on the individual detained, and less ability to meaningfully participate in legal proceedings, whether instant or parallel proceedings.”).
71. Cuauhtémoc García Hernández, supra note 3, at 1408 (“[S]o long as secured walls exist, the deprivation of liberty and concomitant effects remain the same.” Whether locked up for eight or twenty-four hours a day, the detained individual has been denied “the fundamental nexus of membership [in society]: liberty to participate in society without surveillance or suspicion.” (alteration in original) quoting Mark Noferi, New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?, WWW.CRIMMIGRATION.COM (Aug. 28, 2012, 9:00 AM), http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention; and then quoting Doris Marie Provine, Disappearing Rights: How States Are Eroding Membership in American Society, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 115, 116 (Maria João Guia et al. eds., 2013)); see also Noferi, supra note 4, at 539–40 (“[T]he goal of incapacitation dominates where in tension with the unique needs of a civil population (e.g. family ties, litigating pending proceedings, or treatment). Given this, I argue that less restrictive conditions inside the walls do not meaningfully distinguish civil detention from lower-security criminal incarceration, in terms of the deprivation of liberty imposed on detainees, with its impacts on work, family, mental health, and the ability to attend to proceedings. Indeed, research shows that indefinite detention may cause greater psychological harm than criminal incarceration, even with less restrictive conditions. Nor do less restrictive conditions inside the walls change the expressive message of detention as connoting criminality. Put more simply, Adam Gopnik wrote, ‘[T]he thing about jail is that there are bars on the windows and they won’t let you out. This simple truth governs all the others.’ Removing the bars and barbed wire does not make detention ‘civil.’” (quoting Adam Gopnik, The Caging of America, NEW YORKER (Jan. 30, 2012), https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america).
immigration detention and punitive incarceration a legal fiction? Is “civil detention” an oxymoron, as Professor Stumpf has proposed? A model incapable of execution, even at its most theoretical level because, simply put, there is no way in which detention is “civil”?

If the answers to these questions are yes, this analysis supports the argument some have made before: that we may need to reframe our narrative from attempting to design a truly civil detention system to advocating for a system of civil supervision. Perhaps this strikes a balance between the government’s widely accepted need to execute and enforce the nation’s immigration laws and the inherently punitive nature of confinement. As Mark Noferi has proposed, a system of civil supervision would involve less detention and more alternative models of monitoring to ensure people appear at their proceedings and do not pose a threat to public safety. That paradigm, he argues, would be guided by the Supreme Court’s maxim, “In our society, liberty is the norm, and detention prior to [criminal] trial or without [criminal] trial is the carefully limited exception.” And, the consequences of such a system may require differing due process protections for differing deprivations of liberty.

CONCLUSION

In this Essay, we have asked whether a nonpunitive model of confinement is possible. While we intend to offer our own answers in future work, we urge the reader to consider, in light of theories of punishment, what it means for a government to deprive a person of her physical liberty by restricting that person’s movement under a regime of varying levels of state monitoring. If the reader concludes that the answer to our primary question is no—that confinement is inherently punitive and,
thus, a system of civil detention is not possible—we posit that, as a society, we must take a step back from, or otherwise reorient, the current debate around this nation’s so-called civil immigration detention system.

Relatedly, if the reader concludes there are no theoretical underpinnings to sustain a theory of civil confinement—if nonpunitive detention is an oxymoron—the reader must then examine whether the modern system of civil immigration detention in the United States is constitutional. In early 2019, the federal government is confining an unprecedented number of people for putatively civil purposes every day, and the immigration detention apparatus is projected to continue to grow into the future.78 The Executive branch’s demonstrated preference to detain rather than supervise noncitizens who are in removal proceedings, or are party to some other administrative adjudication within the sphere of civil immigration law enforcement, should push us, as a democratic society, to question the underlying assumption on which this entire system is built: Is it truly possible to deprive a person of her physical liberty for nonpunitive reasons, or is this formal dichotomy between civil detention and punitive confinement a legal fiction? Is it all just a house of cards—scaffolded by locked doors, barbed wire, and guard towers?

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78. See, e.g., Elise Schmelzer, The ICE Detention Center in Aurora Added 432 Beds Last Month. Those Beds Are Expected to Be Filled Almost Immediately, DENV. POST (Feb. 6, 2019, 6:00 AM), https://www.denverpost.com/2019/02/06/aurora-ice-detention-center-additional-beds; Aleaziz, supra note 28.