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ARTICLE

THE DETENTION OF ALIENS: THEORIES, RULES, AND DISCRETION

STEPHEN H. LEGOMSKY*

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I. INTRODUCTION

Should the United States detain noncitizens, either while they are waiting for their removal hearings or while the Immigration and Naturalization Service (INS) prepares to execute final removal orders? If so, should the law mandate detention for specified categories of noncitizens, or permit case-by-case detention decisions?

These questions are topical. Recent legislation, discussed below, mandates the detention of several broad groups of potentially removable noncitizens. The questions are also politically charged since public debate is dominated by a tension between two concerns. Detention proponents focus on deterring illegal immigration and removing noncitizens who commit crimes. They consider detention vital to these enforcement goals.[1] Opponents emphasize the liberty interests at stake, the

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1. *See generally* Peter A. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667 (1997).

cruelty of long-term detention, and the huge and often wasteful expense.[2]

Until 1988, the INS had a limited statutory discretion whether to detain a noncitizen pending either a deportation hearing[3] or execution of a final deportation order.[4] The Anti-Drug Abuse Act of 1988 created the concept of the "aggravated felony," defining it narrowly to include murder, drug trafficking, and firearms trafficking, and also made conviction of an aggravated felony a ground for deportation and *mandated* detention for any aggravated felon awaiting his or her deportation hearing.[5] Most courts held this mandatory detention provision unconstitutional.[6] They reasoned that procedural due process requires a hearing on the issue of whether the individual is likely to abscond or otherwise threaten the community, at least if the person is a lawful permanent resident of the United States.[7]

Two comprehensive statutes enacted in 1996—the Antiterrorism and Effective Death Penalty Act[8] and the Illegal Immigration Reform and Immigrant Responsibility Act[9] (IIRIRA)—extended mandatory detention to an additional five major categories. First, mandatory detention now applies to almost all noncitizens who are inadmissible or deportable on crime-related grounds—not just to those convicted of aggravated felonies.[10] Second, noncitizens who are either inadmissible or deportable on terrorist grounds must be detained.[11] Third,

2. *See, e.g.*, Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 1433 (Oct. 19, 1998); Stanley Mailman & Stephen Yale-Loehr, *INS Detention Policies Criticized*, 3 BENDER'S IMMIGR. BULL. 1079 (Nov. 1, 1998).

3. *See* Immigration and Nationality Act § 242(a) (pre-1988), 8 U.S.C. § 1252(a) (1988) [hereinafter INA]; 8 C.F.R. § 287.3 (1988). *See generally* Paul W. Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 307-10 (1987).

4. *See* INA § 242(c)-(d) (pre-1988), 8 U.S.C. § 1252(c)-(d) (1988); 8 C.F.R. §§ 243.3(a), 212.5(a) (1988).

5. Pub. L. No. 100-690, §§ 7341, 7343(a), 7344, 102 Stat. 4181, 4469-71 (Nov. 18, 1988). *See also* 8 U.S.C. § 1252(a) (1988).

6. For some of the cases, see Kerwin & Wheeler, *supra* note 2, at 1435 nn.17-18; STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 87-89 (2d ed. 1997).

7. *See* sources cited *supra* note 6.

8. Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

9. Pub. L. No. 104-208, 110 Stat. 3009, Div. C (Sept. 30, 1996).

10. *See* INA § 236(c)(1)(A)-(C), 8 U.S.C. § 1226(c)(1)(A)-(C). A narrow exception protects potential government witnesses. *See* INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).

11. *See* INA § 236(c)(1)(D), 8 U.S.C. § 1226(c)(1)(D). The potential government witness exception also applies to this category. *See* INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).

subject to some narrow exceptions, arriving passengers whom immigration inspectors find inadmissible must be detained pending a full removal hearing.[12] Fourth, under a special new procedure known as "expedited removal," certain arriving passengers may be removed without a hearing if the immigration inspector suspects either fraud or insufficient documentation.[13] This procedure applies even to asylum claimants if they lack the required documents, unless they can establish a "credible fear" of persecution.[14] The expedited removal process triggers mandatory detention of asylum claimants at least until "credible fear" has been found and perhaps afterwards as well.[15] Fifth, a noncitizen who has been ordered removed must be detained until the removal order is executed, at least if it is executed within ninety days.[16]

Recognizing that so radical an expansion of mandatory detention would require the INS to scramble for both additional detention space and additional personnel, Congress authorized the Attorney General to defer the implementation of these new provisions for up to two years.[17] The Attorney General exercised that authority for the two-year maximum.[18] During that period

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12. *See* INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A). The narrow exceptions are found in INA § 235(b)(2)(B)-(C), 8 U.S.C. § 1225(b)(2)(B)-(C).

13. *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

14. *See* INA §§ 235(b)(1)(A)(ii), (b)(1)(B)(ii)-(iii), 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii)-(iii).

15. *See* INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Surprisingly, INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii), appears to mandate detention pending a full hearing even if the asylum officer finds a credible fear. Yet, § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), implies otherwise. Perhaps detention is not mandatory if the asylum officer finds no credible fear but an immigration judge reverses that decision and orders a full hearing under INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Clarification is needed.

16. *See* INA § 241(a)(1)-(3), 8 U.S.C. § 1251(a)(1)-(3). Note, however, the odd wording of § 241(a)(2). After saying that the Attorney General "shall" detain the person during the removal period, it goes on to say that "[u]nder no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible . . . or deportable under [certain criminal and national security grounds]." *Id.* Does the second sentence imply that there are circumstances under which individuals who have been found inadmissible or deportable on other grounds may be released? If so, how can that result be reconciled with the first sentence? If not, then what is the point of the second sentence?

17. *See* IIRIRA, *supra* note 9, at § 303(b)(2)-(3).

18. *See INS Commissioner Invokes Detention Transition Rules for Another Year*, 74 INTERPRETER RELEASES 1552 (Oct. 10, 1997); *INS State Dept. Begin Implementing New Law, Congress Passes Corrections Bill*, 73 INTERPRETER RELEASES 1418-19 (Oct. 11, 1996).

detention was governed by statutory "transition period custody rules," which gave the Attorney General the discretion to waive detention in certain specified cases.[19] With the expiration of the transition period on October 9, 1998,[20] the permanent new mandatory detention provisions are now in effect. Within weeks a federal district court in Colorado held mandatory detention hearings for persons awaiting removal on crime-related grounds.[21]

This article will not address the constitutionality of mandatory detention. That subject has been examined elsewhere.[22] Nor will it examine the important issues concerning the conditions of confinement in INS facilities. Others have thoughtfully explored that subject.[23] The range of difficult management issues that confront the INS is likewise beyond the scope of this article, but an excellent, comprehensive account has recently appeared.[24]

Rather, this article will consider how detention decisions should be made. The issue is a familiar one to lawyers—fixed rules versus administrative discretion.[25] Should the criteria be predetermined, as they are now, by fixed rules which make detention mandatory in specified categories of cases? Or should the relevant government officials make individualized, case-by-case determinations, after the person has had a fair opportunity to be heard? This article argues for the latter.

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19. *See* IIRIRA, *supra* note 9, at § 303(b)(3)(B).

20. *See* Memorandum of INS Associate Executive Commissioner Michael Pearson (Oct. 7, 1998), *reprinted in* 3 BENDER'S IMMIGR. BULL. 1114 (Nov. 1, 1998).

21. On December 14, 1998, the court held that procedural due process entails the right to a hearing at which the individual can attempt to prove he or she was not likely to abscond or pose a threat to the community. *See* Karen Abbott, *Immigration Ruling Has Quick Impact*, ROCKY MOUNTAIN NEWS (Denver), Dec. 28, 1998. As a result of the decision, Justice Department officials in Colorado have begun providing bond hearings to affected noncitizens. *See id.*

22. *See*, LEGOMSKY, *supra* note 6, at 87-89.

23. *See, e.g.*, Kerwin & Wheeler, *supra* note 2; Mailman & Yale-Loehr, *supra* note 2; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Borders of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

24. *See* Schuck, *supra* note 1. *See also* VERA INSTITUTE OF JUSTICE, THE APPEARANCE ASSISTANCE PROGRAM: ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION (1998) [hereinafter VERA].

25. *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formation of Energy Policy Through an Exception Process*, 1984 DUKE L.J. 163 (1984).

Part II assesses the theories for, or purposes of, detaining noncitizens in connection with removal proceedings. Part III examines the social, economic, and personal costs of detention. Part IV uses the conclusions reached in Parts II and III to compare the relative merits of mandatory detention and case-by-case adjudication.

II. THEORIES OF DETENTION

What, exactly, is the point of detaining someone pending either a determination of removability or the execution of a final removal order? Several theories are worth considering.

Unlike the incarceration imposed as part of a criminal sentence, the detention of noncitizens in connection with removal proceedings is not meant as punishment.[26] Nor, to my knowledge, has any scholar sought to justify such detention on punishment grounds. There is good reason not to advance such an argument. The imposition of punishment would trigger the full range of procedural safeguards that the Constitution provides for criminal proceedings—"the Fifth Amendment bar on double jeopardy, the Sixth Amendment rights to a speedy, public jury trial and to counsel, the Eighth Amendment prohibitions on excessive bail and on cruel and unusual punishment, the ex post facto clause, and other provisions."[27] In any event, punishment would not explain *pre*-hearing detention, because in those cases there has not yet been any finding of wrongdoing.

Rather, the detention of noncitizens in connection with removal proceedings has been grounded on three other theories. Two of these theories—preventing individuals from absconding and isolating those who pose a danger to the community—correspond to the traditional justifications for pretrial detention in criminal cases.[28] A third possible theory is that the detention of noncitizens might deter certain types of immigration violations in the first place. The discussion that follows examines the strength and applicability of these various theories.

26. Nor is removal itself. *See, e.g., Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

27. LEGOMSKY, *supra* note 6, at 44.

28. *See United States v. Salerno*, 481 U.S. 739 (1987). There are limitations to the criminal analogy, as Peter Schuck has noted. *See* Schuck, *supra* note 1, at 671, 680.

A. Preventing People from Absconding

The most obvious theory for detaining noncitizens in connection with removal proceedings is to prevent them from absconding before the INS can remove them. This problem is real. Of those who are not detained, approximately one-third fail to appear for their removal hearings.[29] Before mandatory detention, about ninety percent of non-detained persons who were ordered removed failed to surrender themselves for removal.[30]

The reasons are varied. Some people did not receive notice of their court dates; others misunderstood the process; still others believe the INS lacks the practical capacity to punish them.[31] In addition, if someone wishes to enter the United States and the INS alleges that he or she is inadmissible, or if someone wishes to remain in the United States and the INS alleges that he or she is deportable, the person might conclude there is little to lose by absconding.[32] As Peter Schuck has noted, many noncitizens in removal proceedings might also believe that absconding will buy them additional time in the United States and that, if apprehended, they will incur no sanctions beyond the removal that otherwise awaited them.[33]

A concern about absconding might partly explain why Congress selected the particular mandatory detention categories that it did. Possibly, for example, arriving aliens are more likely to abscond than deportable noncitizens are. In criminal proceedings, strong community ties increase the chance that a released defendant will appear in court.[34] Whether the same pattern carries over to removal proceedings is not yet known. More likely, Congress's decision to detain arriving (versus deportable) noncitizens reflects its (limited) recognition that

29. *See* VERA, *supra* note 24, at 6.

30. *See id.*

31. *See id.*

32. One qualification is that the failure to appear at a removal hearing can render a person ineligible for certain remedies for ten years. *See* LEGOMSKY, *supra* note 6, at 464.

33. *See* Schuck, *supra* note 1, at 671-72. Schuck acknowledges that in such cases the immigration laws now authorize additional sanctions, including criminal and civil penalties and the loss of future immigration benefits. *See id.* He suggests, however, that in the typical case these sanctions will not be of concern because they are unlikely to be imposed. *See id.*

34. *See* VERA, *supra* note 24, at 7.

people who have already settled in the United States and lain down roots typically have greater liberty interests at stake than do people arriving at a United States port of entry for the first time.[35]

The singling out of asylum claimants is especially difficult to justify. Either the claimant truly fears persecution or he or she does not. If the fear is genuine, there might indeed be an additional incentive to abscond—the possibility of an erroneous denial and subsequent return. But the detention of genuine asylum seekers would seem hard to reconcile with humanitarian values. And if the fear is not genuine, then there is no apparent reason to think that the person is any more likely to abscond than is a deportable noncitizen or, for that matter, anyone who is subject to expedited removal but who is not seeking asylum.

Applicants found to have established "credible" fears of persecution admittedly are a harder case. The finding of a credible fear surely increases the probability that the fear in fact is genuine, but it does not increase the probability to one hundred percent. I concede, therefore, that the detention of a person who credibly fears persecution but who has not yet finally established refugee status, while in my view both inhumane and unwise, cannot be dismissed as irrational.

Similarly, one might ask whether noncitizens who are deportable on either criminal or terrorist grounds are, as a class, any more likely to abscond than are those noncitizens who are deportable on any other grounds. Of course, *any* noncitizen who wants to remain in the United States but who faces the risk of removal has some incentive to abscond. Does the probability rise when the removal ground relates to crime or terrorism? One possibility is that a person who has been convicted of a qualifying crime or is suspected of terrorism is more likely to be generally prone to furtive conduct. Another possibility is that, because people deportable on either criminal or terrorist grounds are less likely to qualify for discretionary relief from removal,[36] Congress considered them more likely to fear removal if apprehended. I can find no evidence, however, that either of these possibilities influenced Congress's decision to select the criminal or terrorist

35. As Peter Schuck observed in reviewing an earlier draft of this article, the higher stakes typically possessed by deportable noncitizens if anything give them greater, not lesser, incentive to abscond.

36. *See* LEGOMSKY, *supra* note 6, at 464.

categories for mandatory detention. More probably, mandatory detention for criminals and terrorists is premised instead on public safety grounds, discussed below.

Perhaps the most justifiable mandatory detention category is noncitizens to whom final removal orders have already been issued. Because the final order effectively eliminates one's hope for a favorable legal outcome, absconding will be an attractive option in many cases.[37]

B. *Protecting the Safety of the Public*

At first glance, protecting the public from individuals who have violated our immigration laws seems unobjectionable. But this rationale is actually quite limited. It has no apparent application to several of the present mandatory detention categories. Arriving passengers found inadmissible, asylum seekers in expedited removal proceedings, and those people whose removal orders have been finalized do not pose any systematically greater threat to the public safety than does anyone else who is suspected of failing to meet our immigration criteria.

Even if the ground for inadmissibility or deportability is a criminal conviction, *mandatory* detention seems questionable. There is no reason to believe that a noncitizen who has completed his or her criminal sentence poses a greater danger to the community than does a United States citizen who has committed the same offense.[38] Moreover, if Congress or a state legislature feels that those who commit particular crimes remain dangerous to the community even after completion of their sentences, then the more logical remedy is to lengthen the maximum criminal sentences for those offenses, for citizens and noncitizens alike.

Of the various categories of aliens subject to mandatory detention, the terrorist category is the one to which the public safety rationale seems most applicable. By definition, a person

37. *See, supra,* note 34 and accompanying text.

38. The immediate response might be that there is nothing wrong with treating noncitizens less favorably than citizens. Here, however, I am not suggesting that the *deportation* of alien criminal offenders is never justified. I am suggesting merely that there is no systemic reason to believe that noncitizens who have fully served their criminal sentences pose any special danger to the public safety such that *detention* is required.

whom the government regards as affirmatively desirous of violence and harm presumably poses a higher than usual threat to the public safety.

C. Deterring Immigration Violations

The deterrence rationale for detention is also quite limited. It has no convincing application to those who are removable on either criminal or terrorist grounds. In theory the prospect of being detained pending the removal hearing could discourage someone from committing a serious crime. In practice, however, far greater deterrents—the criminal penalties that attach to the kinds of crimes Congress deems serious enough to trigger removal, combined with the removal itself—dwarf any additional detention connected to the removal proceeding. Similarly, it is hard to imagine that a person who is willing to risk removal from the United States would shy away from deportable behavior merely to avoid being detained from the time of the final removal order to the time of actual removal.

Rather, the deterrence rationale seems more realistically applicable to the other mandatory detention categories—arriving passengers believed to be inadmissible, and asylum claimants in expedited removal proceedings. The prospect of lengthy detention might be thought to dissuade inadmissible noncitizens from traveling to the United States. It might also be thought useful as a device for discouraging unfounded asylum claims. In each case, there are two possible subvariants of this deterrence theory. Under the first subvariant, the unpleasantness of the detention itself might deter the person from seeking entry. Under the second subvariant, the detention defeats any incentive to travel to the United States in the hope of remaining at large pending the hearing and then going underground.

D. Different Theories for Different Categories

As the above discussion suggests, no one theory explains all of the present mandatory detention categories. Each category is arguably justified by one or more theories. As Part IV demonstrates, however, it is essential to distinguish the potential benefits of mandatory detention from the more tailored benefits of discretionary, case-by-case, detention decisions.

Thus, as illustrated above, the detention theory most pertinent to arriving passengers generally and to asylum claimants in expedited removal proceedings is deterrence. For me, none of the three detention theories persuasively explains the singling out of noncitizens convicted of, and punished for crimes, though the public safety theory comes closest. The public safety theory is the principal rationale for the detention of terrorists. As for noncitizens subject to final removal orders, the central theory is the prevention of absconding.

III. COSTS OF DETENTION

A. *Private Sector Costs*

Probably the most self-evident cost of detention is the human cost. By definition, detention is a deprivation of liberty. Detainees cannot work, cannot go to school, cannot meaningfully socialize, cannot travel beyond the bounds of their facilities, and are cut off from family and friends. Of course, the deprivation is mutual. Family members and friends similarly lose the benefits of the detainee's companionship. If the detainee is an asylum claimant, all these deprivations are magnified by the trauma that impelled the person to flee in the first place. For precisely that reason, many commentators oppose the routine detention of asylum claimants.[39] The Office of the United Nations High Commissioner for Refugees also strongly opposes the detention of asylum seekers, in the absence of exceptional circumstances found after individualized determinations.[40]

Because detention also prevents employment, those detainees who would otherwise have been able to work—e.g. lawful permanent residents who are removable on crime-related grounds—suffer economic loss as well. The same can be said of their dependents, who might also be lawful permanent residents

39. *See, e.g.*, Kerwin & Wheeler, *supra* note 2, at 1440 (arguing against detainment at least until Congress appropriates enough funds to assure decent confinement conditions); Mailman & Yale-Loehr, *supra* note 2, at 1082 (expressing the authors' own opinions and that of Amnesty International).

40. *See* United Nations High Commissioner for Refugees, Press Release, *UNHCR Guidelines Relating to the Detention of Asylum-Seekers* (Feb. 1999) *available at* <http://www.unhcr.ch> [hereinafter UNHCR Guidelines].

or United States citizens, and of all others who would benefit from their productivity.

Finally, detention impairs the person's ability to prepare his or her case. Once detained, a person ordinarily experiences diminished access to counsel, interpreters, and documentary evidence.[41]

B. *Public Costs*

The public also incurs large economic costs. Detention itself costs the public approximately $66 per person, per day, and sometimes more.[42] In the case of a detainee who would otherwise have been gainfully employed, the federal and state governments lose the income tax revenues that the person would have provided and might even incur the affirmative costs of public assistance.

The significance of all these losses is greatest when the person is being detained pending a hearing or an appeal and the person ultimately prevails on the merits. In such instances, hindsight permits a conclusion that the liberty and economic losses that the government has inflicted were not only unnecessary but also unjust.[43] In criminal cases, the limitations on pretrial detention reflect the presumed innocence of the detainees. An analogous observation is possible here. The detainee might well be found not to be inadmissible or deportable, or might be granted discretionary relief.[44]

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41. *See* VERA, *supra* note 24, at 6.

42. *See* Schuck, *supra* note 1, at 672. In fiscal year 1998, the INS spent $733 million to detain and remove aliens. *See* Kerwin & Wheeler, *supra* note 2, at 1436.

43. This argument is inapplicable to those who have already received all of the hearings and appeals to which they are entitled and are now being detained only pending execution of their removal orders.

44. Another example of unnecessary detention, of course, is that in which the person in fact would not have absconded or posed a threat to the public. The INS will never know precisely which persons were unnecessarily detained in that sense. This consideration goes to the issue of mandatory detention versus discretionary case-by-case assessment of risk and is discussed in Part IV *infra*.

IV. MANDATORY DETENTION VERSUS CASE-BY-CASE DETERMINATIONS

The preceding discussion illustrates that detention in connection with removal proceedings entails both benefits and costs. Do the benefits outweigh the costs? The answer, surely, is that in some cases they do and in some cases they do not.

The question, then, is how best to identify those cases in which the benefits of detention outweigh the costs. The IIRIRA approach described in the Introduction is to create fixed rules that make detention mandatory in certain designated categories of cases. The opposite approach, generally in force before IIRIRA,[45] is case-by-case adjudication in which the presiding officer makes findings concerning the likelihood that the person will either abscond or pose a threat to the public safety.[46]

All the theories of mandatory detention necessarily assume that certain cases have enough in common to make rough generalizations possible. As discussed in the Introduction, the present law lumps together: 1) most non-expedited removal cases involving arriving passengers; 2) expedited removal cases involving asylum claimants, criminal cases, terrorist cases; and 3) cases in which final removal orders have already been issued.

This Part of the article compares the merits of categorical, mandatory detention with the merits of individualized, case-by-case determinations of the person's likelihood of absconding or threatening the public safety. It begins by identifying and evaluating three theories for making detention mandatory in selected categories. It then considers the merits of case-by-case adjudication.

45. *See supra* text accompanying notes 3-4.

46. For a superb study of the exercise of discretion by immigration judges in bond redetermination hearings, see Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347 (1987).

A. *Theories of Mandatory Detention*

1. Saving Money

The most obvious advantage of mandatory detention is that it avoids the expense of individual hearings. With scarce resources, that advantage cannot be dismissed casually. Still, the financial argument has several limitations.[47]

First, out of deference to the liberty interests at stake, we willingly accept the cost of pretrial hearings before we detain people suspected of crimes. Why should we be any less willing to provide hearings before detaining people suspected to be removable?

To some, the inherent differences between citizens and noncitizens might be enough of an answer. Citizens, being widely regarded as possessing greater membership rights than noncitizens,[48] might be assumed entitled to greater procedural safeguards before being detained. As relevant as the distinction is to one's interest in entering or remaining in the United States, however, fundamental liberty interests like freedom from pretrial detention should not hinge on one's citizenship status. Even in the criminal context, the law of pretrial detention does not distinguish based on the citizenship status of the suspect. Moreover, certain noncitizens—including lawfully admitted permanent residents and asylum claimants—have special interests at stake. Finally, as noted earlier,[49] the detention of noncitizens can affect the family members and others as well, both economically and emotionally. These other affected individuals might well be United States citizens.

Others might seek to reconcile our conflicting pretrial detention policies by invoking factors specific to the removal

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47. In addition to the issues raised in this subsection, there is an empirical question of whether mandatory detention actually does save money. Possibly it is *more* expensive than a system of individual hearings.

48. Many scholars, far too numerous to cite, have provided thoughtful commentary on the degrees of membership, and the corresponding rights of, citizens and aliens. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENTARY 9 (1990); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983).

49. *See* discussion *supra* Part III.A.

process. Peter Schuck offers at least two arguments for questioning the analogy to the criminal context. First, he suggests the noncitizen who is at large pending a removal hearing has less incentive to show up and to refrain from misconduct than does his or her counterpart in criminal proceedings. The latter, Schuck observes, needs to worry about loss of parole, a harsher sentence, and reputation in his or her permanent community.[50] As Schuck acknowledges, however, the enactment of IIRIRA gives analogous incentives to noncitizens in removal hearings, who may now be subjected to criminal punishment, civil fines, and a loss of future immigration benefits if they fail to appear.[51] Second, he observes, criminal enforcement authorities typically have more information about a suspect's character, community ties, and other personal information than immigration authorities have in removal cases.[52] Arguably, however, that observation begs the question. If individual hearings were required before noncitizens could be detained during removal proceedings, the authorities who preside over those hearings would receive the relevant information from the opposing sides. The questions are whether such a hearing ought to be required and what level of resources should be invested to attain the desired level of reliability.

2. Avoiding False Negatives

No matter how thorough a case-by-case detention determination process is, and how talented and diligent the hearing officer is, errors are possible. Predictions about the likelihood that a given person will abscond or pose a threat to the public safety are inherently perilous. Not all the material evidence will always be discovered or presented. Not all the findings of primary fact will be accurate. Even if all the raw information is complete and accurate, not all predictions of future events will pan out. One theory of mandatory detention, therefore, is that it avoids what I shall call false negatives—i.e., cases in which the hearing officer predicts that the person will neither abscond nor threaten the public and consequently

50. *See* Schuck, *supra* note 1, at 671-72.

51. *See id.* The weight that this point commands of course depends on noncitizens' perceptions of the likelihood that such consequences will actually occur.

52. *See id.* at 672.

releases the person on bond, and the prediction proves wrong. Mandatory detention eliminates that risk.

That benefit, of course, comes at a price—a certain number of false positives. This problem is discussed below.[53] Moreover, the question remains why false negatives are tolerated in the criminal context but not in the removal context. The opposing positions on this issue seem the same as those in the preceding analogous discussion of the fiscal impact of mandatory detention.

3. Deterring Immigration Violations

Earlier discussion highlighted one of the most commonly invoked arguments for detention—deterring immigration violations in the first place.[54] Arguably, making the detention mandatory makes the deterrent stronger. The theory would be that the prospect of lengthy detention will discourage people from attempting surreptitious entries or traveling to the United States to file unfounded asylum claims.

Again, there are corresponding costs, and they are all discussed in subsection (B) below. As the earlier discussion demonstrated, these benefits are most applicable to the two categories of mandatory detention just mentioned—not, for example, to the mandatory detention of persons deportable solely on criminal or terrorist grounds or persons already ordered removed.[55]

B. Theories of Individualized Adjudication

1. Avoiding False Positives

Mandatory detention inevitably generates a certain number of false positives—i.e., those people who are detained because they fall within one of the statutorily prescribed categories but who in fact would not have absconded or caused any harm to the community if released. In each of these cases, all the costs associated with detention are needlessly incurred. Those costs,

53. *See* discussion *supra* Part IV.B.1.
54. *See* discussion *supra* Part II.C.
55. *See id.*

discussed in Part III, include the deprivation of individual liberty, the inability to work, socialize, or travel, the isolation from friends, family, and community, the reciprocal losses of those from whom the detainees are cut off, the economic losses for those detainees who would otherwise have been permitted to work, and the increased public costs of providing detention, paying public assistance to the detainee's dependents in some cases, and foregoing the income tax revenue that the detained person's employment would have generated. These losses add up to great waste of both human and financial resources.

Conversely, many persons who do not fall within any of the categories predesignated for mandatory detention might well present real risks of absconding or real dangers to the public safety. Every time the INS is required to use a detention bed for a person who in fact poses no threat at all, it has one fewer bed available for a person who poses a threat and whom the INS would have had the discretion to detain. This factor is significant. On any given day, there are approximately 125,000 persons in removal proceedings, but the INS has only 14,000 detention beds.[56] To the extent that mandatory detention is intended to minimize false negatives, therefore, the strategy might even be counterproductive.

2. Cutting Corners on Humane Treatment

Stanley Mailman and Stephen Yale-Loehr make another strong argument against mandatory detention. By exacerbating the pressure on the INS to find adequate bed space, mandatory detention forces the INS to rely increasingly heavily on contracts with privately run facilities where some of the least humane conditions prevail.[57]

3. Deterring Enforcement of the Immigration Laws

Ironically, mandatory detention might have the effect of discouraging immigration officials from zealously enforcing the immigration laws. One INS district director, commenting on the space crunch at the local INS detention facility, stated he "would

56. *See* VERA, *supra* note 24, at 6.
57. *See* Mailman & Yale-Loehr, *supra* note 2, at 1081.

strongly consider not starting deportation proceedings against felons—especially if their offenses were minor or committed years ago."[58]

4. Avoiding Detention Costs

As discussed earlier, one of the assumed benefits of mandatory detention is to avoid the fiscal costs that individual bond hearings would entail. There are, however, countervailing financial considerations.

First, a certain proportion of those who receive individual bond hearings will prevail. The detention costs are saved in those cases.

Second, of those who are set free after bond hearings, any who end up absconding will forfeit their bonds. As acknowledged earlier, these "false negatives" are clearly a disadvantage of case-by-case adjudication. For purposes of assessing the total fiscal impact, however, the revenue from the forfeited bonds must also be counted. Thus, the fiscal impact of the individual hearing approach approximately equals the cost of the hearings, minus the cost of the detentions that the hearings avoid, minus any forfeited bonds. Because of these latter factors, one cannot assume that dispensing with hearings saves money. It is equally possible that hearings would generate a net financial gain. Empirical study would be needed to calculate the net impact of mandatory detention for each of the statutory categories to which it applies.

Moreover, middle ground exists. In September 1996, the INS asked the Vera Institute of Justice, a private nonprofit organization, to develop a supervised release program to replace detention in appropriate cases.[59] Its initial findings look promising. As of December 31, 1997, about eighty percent of all those in its "Appearance Assistance Program" showed up for their removal hearings.[60]

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58. *See* Abbott, *supra* note 21 (quoting Joseph Greene, INS District Director, Denver).

59. *See* VERA, *supra* note 24, at 5.

60. *See id.* at 15-16 (but data are preliminary). *Accord*, UNHCR Guidelines, *supra* note 40, at Guideline 4 (advocating alternatives to detention).

V. CONCLUSION

Public concern about illegal immigration is real and legitimate. So, too, is the public concern about those immigrants who commit crimes. The detention of aliens pending either removal hearings or the execution of removal orders is, and undoubtedly always will be, one vital tool in addressing those concerns. While detained, one cannot abscond or endanger the public. In addition, the mere prospect of detention might well deter some of the worst violations of United States immigration law. For all those reasons, detention serves a useful enforcement function—*in certain cases.*

And there lies the rub. Detention also entails huge costs—for the detained person, for his or her family and friends, and for the public. The question, therefore, is how to select those cases in which the benefits of detention outweigh the costs. One method, now in place in the removal context as a result of recent legislation, relies on fixed rules. This approach mandates detention in specified categories of cases. Another method, long employed in the context of pretrial detention in criminal cases, and until recently in immigration cases as well, is to hold individual hearings to determine whether the person can safely be released on bond.

Part IV of this paper outlined the relative benefits of these competing approaches. I there acknowledged the advantages of the mandatory approach but argued that they are quite limited. In contrast, mandatory detention poses great dangers that case-by-case adjudication would avoid at minimal social and economic cost. When the liberty interests are as great as they inherently are in the detention context, a hearing seems a small price to pay for security with honor.