DETAINED WITHOUT RELIEF

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INTRODUCTION

The Nigerian immigrant and mother of two young U.S. citizens, Olufolake Olaleye, was placed in removal proceedings after pleading guilty to a minor criminal charge.[1] When Ms. Olaleye attempted to return $14.99 worth of recently-purchased baby items without a store receipt, she was accused of shoplifting by the store manager.[2] Because she did not want the matter to drag out any longer than necessary, and despite the grotesque misunderstanding, she pleaded guilty to the theft charge and received a twelve-month suspended sentence and $360 fine.[3] In 1993, this conviction was not a removable offense and, in fact, was quite inconsequential to Ms. Olaleye and many other noncitizens with similar records.[4] Ms. Olaleye's application for citizenship was approved in early 1996, but she had not yet been sworn as a U.S. citizen.[5] Everything changed a few months later, when Congress enacted a law that redefined Ms. Olaleye's shoplifting offense as an "aggravated felony," which carried grim immigration consequences.[6] And because Congress applied this statute retroactively, Ms. Olaleye's prior conviction became a detainable and removable offense. Her citizenship application was denied, and she was detained pending removal proceedings.[7]

Immigration law in the United States recognizes detention[8] of removable noncitizens as an essential feature of immigration enforcement. In fact, the Supreme Court has recognized that "[d]etention is necessarily a part of [the] deportation procedure."[9] However, because "[d]eportation is not a criminal

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1. *See* THE FRACTIOUS NATION? UNITY AND DIVISION IN CONTEMPORARY AMERICAN LIFE 138 (Jonathan Rieder et al. eds., 2003); *see also* Patrick Smikle, *Rights-Caribbean: Immigrants Facing Deportation For Minor Offences,* INTER PRESS SERVICE (Apr. 29, 1999), http://www.ipsnews.net/1999/04/rights-caribbean-immigrants-facing-deportation-for-minor-offences/.

2. THE FRACTIOUS NATION?, *supra* note 1, at 138.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 35, n.149. Schuck points out that although the term "detention" is often used by immigration officials and academics, the "length of many detentions and the conditions of confinement suggest that the term 'imprisonment' more accurately depicts reality."

9. Carlson v. Landon, 342 U.S. 524, 538 (1952).

proceeding and has never been held to be punishment," detained noncitizens receive weakened constitutional protections from those typically guaranteed in the criminal detention context.[10] The exclusion of constitutional norms from a civil procedure that closely resembles criminal incarceration has raised constitutional challenges that have traditionally been resolved in favor of the government.[11] And this is not surprising in light of courts' adherence to the plenary power doctrine. This doctrine bluntly instructs the courts to yield to Congress when constitutional challenges arise because Congress holds the exclusive power to regulate the immigration field.[12] This includes the power to exclude, detain, and remove noncitizens.

Congress is owed high deference in its operationalization of the detention regime. Congress has plenary power over the statutory and regulatory frameworks that outline who must be detained, availability to bond or other supervisory

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10. *Id.* at 537. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 236 (1896) ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."); *see also* Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention As Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1490 (2012); Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1080 (2007); *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states#_ftnref19 ("Once non-citizens have entered the country, they are theoretically granted protection against deprivation of liberty without due process regardless of their immigration status. Nevertheless, they can receive very different treatment because removal proceedings are considered 'administrative,' which means that people in immigration procedures have fewer due process guarantees than people in criminal proceedings.").

11. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (holding that continued exclusion of noncitizen without a hearing was not unlawful detention).

12. Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893). For a more detailed discussion regarding the extent to which Congress's powers differ from those of the Executive branch, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

conditions, as well as entitlement for relief from detention and removal.[13] Courts will not give searching review even if the statutory framework is ineffective, contradictory, or, worst of all, constitutionally dubious, on the basis that plenary power guarantees that "even with misgivings about the justice or fairness of the action, the courts will not second-guess that judgment of necessity."[14]

The plenary power doctrine yields to serious problems in the detention framework because courts must abdicate their check-and-balance function. Because immigration officials do not have the resources to detain every noncitizen in removal proceedings, Congress has drawn broad distinctions along criminality lines, immigration status, and location of the noncitizen. Thus, two general categories of detention emerged: discretionary and mandatory. Discretionary detention covers individuals with no or trivial criminal history.[15] Mandatory detention typically covers those with more serious criminal records.[16] The former group *may* be detained, and if detained, *may* be released on bond; the latter *must* be detained through the entirety of removal proceedings and cannot be released on bond.[17] This design seeks to address the concerns in the removal process: unless detained, some criminal noncitizens may abscond and evade removal altogether.[18]

Even beyond the detention decision, Congress has made additional distinctions between individuals who fall under the parameters of mandatory detention. Noncitizens with the most egregious criminal histories are not only detained, but also may have few forms of relief from detention and removal. For example, noncitizens who have committed an "aggravated felony" not only are

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13. *See, e.g.*, 8 U.S.C. § 1226 (2012).

14. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 40–41 (2015); *but see infra* Part IV.A and accompanying text (applying constitutional void for vagueness doctrine to invalidate criminal statute incorporated into immigration statute).

15 Miriam Peguero Medrano, *Not Yet Gone, and Not Yet Forgotten: The Reasonableness of Continued Mandatory Detention of Noncitizens Without a Bond Hearing*. 108 J. CRIM. L. & CRIMINOLOGY 597, 634 (2018).

16 Margaret Wong, *Challenges to Mandatory Detention Under U.S. Immigration Law*, FED. B. SOC'Y (Sept. 2010), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-September-2010/Features/Challenges-to-Mandatory-Detention-Under-US-Immigration-Law.aspx?FT=.pdf.

17. Hillel Smith, *Can Aliens in Immigration Proceedings Be Detained Indefinitely? High Court Rules on Statutory, But Not Constitutional Authority*, CONG. RES. SERV. (2018), https://fas.org/sgp/crs/homesec/LSB10112.pdf.

18. The additional concern is that people who have already engaged in serious criminality are more prone to do it again, and will pose a continued danger to public safety unless detained. *See* Part II.

subject to mandatory detention discussed above, but are also ineligible for many forms of relief from removal and detention like cancellation of removal, asylum, adjustment of status, or inadmissibility waivers.[19] In the immigration context, a petition for relief functions much like a defense to a criminal charge or an affirmative defense in civil liability—the noncitizen carries the burden to show why she should not be removed. But without venues for mandatory detainees to effectively challenge removal, detention and removal are certain to occur. In fact, one scholar characterized aggravated felons as subject to "mandatory removal," because their odds for a succesful challenge are narrow.[20] The Supreme Court recognized this certainty in *Sessions v. Dimaya*,[21] where Justice Kagan, penning the majority opinion, wrote that "removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here."[22]

Mandatory detention is girded on the notion that criminal noncitizens are dangerous and should be removed. Because they have already breached the social trust once, immigration officials cannot rely on their cooperation during the proceedings and must detain them pending removal. And as a policy (to expedite matters) the most dangerous individuals should not receive any defenses. Detention should, therefore, effectuate quick removal. Or so the logic goes.

The statutory scheme surely was intended to operationalize these intuitions. But these design preferences have yielded neither a perfect nor efficient detention system. Instead of ensuring that only dangerous noncitizens are detained and quickly removed, the data show that noncitizens can often be detained for trivial crimes (like Ms. Olaleye), and that both the number of people and the length of their detention period have substantially increased in the last three

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19. In some cases, a person convicted of an aggravated felony unrelated to drugs may apply for a § 212(h) waiver, for example, in conjunction with an application for adjustment of status, or to gain admission at the border. *See* KATHERINE BRADY, UPDATE: THE LPR BARS TO § 212(h) – TO WHOM DO THEY APPLY?, IMMIGRANT RESOURCE LEGAL CTR. (2014), https://www.ilrc.org/sites/default/files/resources/212h_matter_of_rodriguez_update_2014.pdf. For these applications the person must prove that she is admissible. *Id.* Conviction of an aggravated felony is not itself a ground of inadmissibility, and so it is not an automatic bar to family-based immigration or admission. *Id.* But in many cases the aggravated felony offense also makes the person inadmissible under other grounds, mainly the moral turpitude or controlled substances grounds. *Id.* If the issue is moral turpitude, the person may be able to cure it with a § 212(h) waiver. *Id.*

20. Erica Steinmiller-Perdomo, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1187 (2014).

21. 138 S. Ct. 1204 (2018).

22 *Id.* at 1210–11.

decades.[23] This Note delves deeper into this phenomenon by arguing that the detention framework currently deployed has led to vast unintended consequences by shifting emphasis and resources away from removal and towards detention. In many ways, the system puts the cart before the horse. Fortunately for advocates of less restrictive immigration detention, periodic developments in immigration law have enabled more mandatory detainees to challenge their detention and removability, despite Congressional efforts to bar these individuals from any relief. The growing body of challenges, however, comes at expense of longer detention periods—which the government must pay for and the noncitizen must endure.[24]

The growing number of detentions, and their increasing lenghts, are at the heart of contemporary detention debate.[25] Indeed, as Justice Breyer points out in *Jennings v. Rodriguez*[26], "detention is often lengthy."[27] For example, as Justice Breyer illustrates, "the Government detained one noncitizen for nearly four years *after* he had finished serving a criminal sentence, and . . . [others] for 608 days, 561 days, 446 days, 438 days, 387 days, and 305 days—all before they won their cases and received relief from removal."[28] The length of detention has serious implications because detention is not designed to serve as punishment—and cannot be punitive without criminal protections. But the proverbial visitor from Mars might look at this system and conclude immigration detention is intended to be mostly penal.

The current detention framework has grievously failed, as evinced by two closely-related fronts. First, more noncitizens are detained for longer periods of time.[29] In 1994, nearly 5,500 noncitizens were detained on any given day, and the

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23. *See infra* Part I and accompanying text.

24. *See infra* III.B and accompanying text. These include developments in case law and changes to well-recognized approaches used by the Supreme Court, such as the expansion of the Sixth Amendment's ineffective assistance of counsel, as well as ways to determine if a crime is a conviction for removal purposes. *See also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 12 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEnd OfYearFY2017.pdf. [hereinafter "ICE 2017 Report"].

25. Garrett Epps, *How the Supreme Court is Expanding the Immigration Detention System*, THE ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224/.

26. 138 S. Ct. 830 (2018).

27. *Id.* at 860 (Breyer, J., dissenting).

28. *Id.* (Breyer, J., dissenting) (emphasis in original).

29. Epps, *supra* note 25.

average lenth was fifty-four days.[30] In 2018, however, that number approached 40,726, with average detentions lasting from 305 to 608 days.[31] Second, despite Congressional intent to the contrary, removal of noncitizens is not quickly effectuated, as many detained noncitizens have found relief from detention or removal only through other unconventional procedures.[32] One unconventional form of relief involves attacking the underlying criminal conviction. By winning at these threshold stages, the noncitizen may be released from detention and have the removability charges dismissed, but at the cost of lengthy detention during the challenge.[33] The increasing incidence and length of detentions demonstrate that detention does not ultimately better effectuate removal of dangerous noncitizens, and thus promote public safety. Instead, detention punishes those who may have meritorious challenges and coerces others to abandon their claims to freedom. As some scholars argue, detention has evolved into a more punitive function despite its civil nature.[34] And political analysts suggest that the detention regime will vastly expand during the Trump Administration.[35]

In 2016, the Immigration and Customs Enforcement ("ICE") removed approximately 240,255 noncitizens.[36] Approximately 201,020, or 83.7 percent, of all removals were considered Priority 1 removals,[37] which is comprised of individuals who pose national security threats, are criminal gang participants, and unauthorized entrants apprehended at the border. More important for the purpose

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30. *Id.*; MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 107 (2002).

31. Epps, *supra* note 25; Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting).

32. I refer to these as "unconventional forms of relief," which often take place outside the immigration procedure, to contrast them with the conventional forms of relief described in Part III.A.

33. ICE 2017 Report, *supra* note 24, at 12.

34. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1452 (2015).

35. *See* Alan Gomez, *Trump Budget Wants Billions More for Border Wall, Immigration Agents and Judges*, USA TODAY (Feb. 12, 2018), https://www.usatoday.com/story/news/politics/2018/02/12/trump-budget-wants-billions-more-border-wall-immigration-agents-and-judges/329766002/.

36. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf [hereinafter "ICE 2016 Report"].

37. *Id.*

of this Note, Priority 1 also includes individuals convicted of serious crimes or aggravated felonies.[38] Of the nearly 65,332 removals of individuals apprehended by ICE officers (*i.e.*, interior removals), 60,318 (92 percent) of noncitizens were previously convicted of a crime.[39] In 2016, individuals convicted of crimes or aggravated felonies consisted of nearly 13 percent of all detentions.[40] Although the number of detentions might seem trivial at first glance, this group comprises the second largest group of detentions, second only to detentions based on border security (*i.e.*, noncitizens apprehended at the border or ports of entry while attempting unlawful entry), which accounted for almost 72 percent of all detentions.[41] Because the number of noncitizens detained for specific criminal convictions, particularly aggravated felonies, is significant, that group will be the focus of this Note.

This Note analyzes the current immigration detention framework and some of the issues surrounding its enforcement, what precipitated such issues, and how they are better addressed by adopting a relief-based framework to detention. Part I addresses the nature and historical background of the current detention regime. Part II explores the development of mandatory detention jurisprudence. Part III.A dissects the machinations within the immigration statutes as they pertain to noncitizens detained on criminal grounds, especially "aggravated felonies." Part III.B analyses some of the unintended consequences of a mandatory detention framework and its effect on procedural backlogs that burden the detainee, taxpayers, and the government.[42] Part III.B also analyzes collateral attacks on the current framework despite its restrictions on formal relief from detention and removal. Part IV argues that the current restrictive detention framework does not effectuate removal, but instead focuses on detention as a way to punish and deter. In Part IV, I propose that a relief-based design more adequately serves the goals of immigration enforcement. Among these solutions are limiting the scope of aggravated felonies, the extension of the doctrines of voluntary departure and

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38. *See id.* at 3.

39. *Id.*

40. *See* OFF. OF IMMIGR. STAT., DHS IMMIGRATION ENFORCEMENT: 2016, at 6 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf [hereinafter "DHS 2016 Enforcement Report"].

41. *Id.*

42. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 143 (2013). *See* Off. of the Att'y Gen., Memorandum for the Executive Office of Immigration Review (Mar. 5, 2017), https://www.justice.gov/opa/press-release/file/1015996/download [hereinafter "EOIR Memo"].

inadmissibility waivers, as well as a categorical exclusion of Lawful Permanent Residents (LPRs) from mandatory detention.

I. FEDERAL IMMIGRATION DETENTION

Detention of noncitizens has become a norm in modern immigration enforcement.[43] Removal proceedings are civil administrative procedures in which the federal government determines whether an individual is removable or inadmissible. Removal proceedings begin when immigration officials serve the noncitizen with a Notice to Appear ("NTA") and file it in immigration court.[44] The NTA gives the noncitizen notice of the charges brought and asserts any inadmissibility and removability grounds. Noncitizens may be removed because they are in the country unlawfully (*e.g.*, entered without being admitted at the border, used fraudulent documents, or overstayed an nonimmigrant visa) or committed an act that makes them removable.[45]

Noncitizens may be detained during and after removal proceedings.[46] Like removal proceedings, immigration detention is civil in nature and is only ancillary to the removal function.[47] The purpose of detention is not to punish the noncitizen

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43. For information regarding 2016 detention statistics and trends, see DHS 2016 Enforcement Report, *supra* note 40, at 6.

44. *See* 8 C.F.R. §239.1(a). In addition, DHS personnel authorized to issue the NTA include U.S. Customs and Border Protection (CBP) officers and U.S. Border Patrol agents (within CBP), asylum and examination officers in U.S. Citizenship and Immigration Services (USCIS), and detention officers and other agents in U.S. Immigration and Customs Enforcement (ICE). *Id.*

45. *See generally* ALISON SISKIN, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS (2015), https://fas.org/sgp/crs/homesec/R43892.pdf.

46. 8 U.S.C. § 1226(a) and (c) (2012); 8 U.S.C. § 1231(a) (2012).

47. *See* Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Thomas, J., dissenting) ("Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish."); *see also* Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. . . . Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person a wrongfully accused; but it is not imprisonment in a legal sense."); *see also* Fong Yue Ting v.United States, 149 U.S. 698, 730 (1893); ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.").

for violating immigration laws but to effectuate a removal, if one is merited.[48] There are two types of detention: discretionary and mandatory.[49]

The controlling discretionary detention statute is 8 U.S.C. § 1226(a), which provides that "an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States."[50] Once detained, the noncitizen may be released from detention after a discretionary bond hearing. However, the Department of Homeland Security ("DHS") can revoke its authorization of release at any time as a matter of discretion.[51] Noncitizens who are eligible for release during removal proceedings include, for example, visa-overstays or those who lack documentation.[52]

For individuals who fall under the mandatory detention regime, 8 U.S.C. § 1226(c) provides that "[t]he Attorney General *shall* take into custody any alien who" is inadmissible or removable under specific statutory grounds.[53] This group is comprised majorly of individuals with certain criminal convictions. These individuals cannot be released on bond and must be detained pending the conclusion of the removal proceedings.

During removal proceedings, the noncitizen can petition for relief from detention or removal. A detained noncitizen can first claim that the charged immigration violation falls under the discretionary detention in § 1226(a), not mandatory detention prescribed in § 1226(c). An immigration judge will make this initial determination during a *Joseph* hearing.[54] The noncitizen "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Government] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention."[55]

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48. *See Zadvydas,* 533 U.S. at 697.

49. 8 U.S.C. § 1226(a); 8 U.S.C. § 1226(c).

50. *See* 8 U.S.C. § 1226 (emphasis added); *see also* Hernández, *supra* note 34, at 1466 ("At the root of civil immigration detention is a single statutory provision, INA section 236, which provides two means through which DHS may detain migrants. One path obligates DHS to detain individuals who meet specified criteria, while the other provides a discretionary route.").

51. 8 U.S.C. § 1226(b).

52. Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 155–56 (2004) (citing 8 U.S.C. § 1226(a)(2)).

53. *See* 8 U.S.C. § 1226(c) (emphasis added).

54. *See In re* Joseph, 22 I. & N. Dec. 799, 800, Int. Dec. 3398 (BIA 1999); *see also* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in* 'Joseph' *Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51 (2006).

55. Demore v. Kim, 538 U.S. 510, 514, n.3 (2003).

Noncitizens properly detained under § 1226(c) must be held in custody through the entirety of the removal proceeding. Detention is compulsory even if the noncitizen applies for relief or has a meritorious contest to removability.[56] Contesting removability, however, only extends the detention period because the individual must remain in detention pending adjudication of the claims.[57] This is problematic in light of the upward trend in the length of detentions. For example, while detention averaged four days in 1981 and increased to fifty-four in 1994, recent estimates suggest that some detentions today last from 305 to 608 days.[58] Part II analyzes the constitutional concerns of this trend; Part III discusses the policy considerations at play in contemporary detention practices.[59]

II. DETENTION JURISPRUDENCE

The Supreme Court has addressed mandatory detention four times since 2001.[60] Although the Court has expressed doubts as to the constitutionality of indefinite detention,[61] it has held that detention is necessary to effectuate the removal procedure[62] and does not violate the detainee's substantive Due Process rights.[63] In *Zadvydas v. Davis*[64] the Court interpreted the mandatory post-order detention statute—8 U.S.C. § 1231(a)—to allow a presumptively reasonable detention period of six months after the noncitizen is ordered removed.[65] After this

56. *See* ICE 2017 Report, *supra* note 24 at 1.

57. *See id.* at 12.

58. Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting); *See* WELCH, *supra* note 30 at 107.

59. *Jennings*, 138 S. Ct. at 859 (Breyer, J., dissenting) ("the majority's interpretation of the [detention] statute would likely render the statute unconstitutional").

60. Zadvydas v. Davis, 533 U.S. 678 (2001); Demore v. Kim, 538 U.S. 510 (2003); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Nielsen v. Preap, 139 S. Ct. 954 (2019)

61. *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

62. Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid . . . but it is not imprisonment in a legal sense.").

63. Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206, 206 (1953); *Zadvydas*, 533 U.S. at 678.

64. 533 U.S. 678 (2001).

65. *See* 8 U.S.C § 1231; *Zadvydas*, 533 U.S. at 701.

period, if the noncitizen can show there is no "significant likelihood of removal in the reasonably foreseeable future," the government must rebut that showing with evidence that continued detention is justified.[66] Continued detention may be necessary if the Attorney General determines the noncitizen, if released, will be "a risk to the community or unlikely to comply with the order of removal" if released.[67] The effect of this ruling was that citizens could challenge their post-order detention if it lasted more than six months. The *Zadvydas* Court avoided the question of whether the Constitution would permit indefinite detention and issued a narrow statutory ruling, ultimately concluding that § 1231(a) could not be read to permit indefinite detention without risking a constitutional violation.[68] To strike a balance between respecting Congressional plenary power and constitutional norms, the Court engaged in what Hiroshi Motomura calls a "phantom constitutional norm" to find a decision that was favorable to the noncitizen while avoiding a fuller inquiry into the constitutionality of indefinite detention.[69]

A few years later, in *Demore v. Kim*[70], the Court held that the Fifth Amendment's substantive due process guarantees do not require an individualized assessment of dangerousness and flight risk when detaining a lawful permanent resident pending removal proceedings under 8 U.S.C. § 1226(c), the statute of focus in this Note.[71] While the Court in *Zadvydas* interpreted the detention statute governing detention of noncitizens who had already been *ordered* removed, the Court in *Demore* interpreted the statute controlling detention of noncitizens in *pending* removal proceedings. This distinction was sufficient to justify the vaslty different outcomes in *Zadvydas* and *Demore*.

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66. *Zadvydas*, 533 U.S. at 701.

67. 8 U.S.C. § 1231(a)(6) (2012); *see also Zadvydas*, 533 U.S. at 682.

68. *Zadvydas*, 533 U.S. at 690 (A "statute permitting indefinite detention of an alien would raise a serious constitutional problem."). *See* HIROSHI MOTOMURA, AMERICANS IN WAITING 112 (2006) ("Though the Court's holding was statutory, its thinking was constitutional. The Court found that the statute was ambiguous and then invoked . . . the canon that courts should interpret ambiguous statutes to avoid deciding serious constitutional issues . . . [and] found that interpreting the immigration statute to authorize indefinite detention might result in unconstitutionally indefinite incarceration.").

69. MOTOMURA, *supra* note 68, at 112–13. *See also* Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

70. 538 U.S. 510 (2003).

71. *Id.*

The Court did not address the detention issue again until *Jennings v. Rodriguez*[72], where it ruled that the lower court has misapplied the canon of constitutional avoidance and improperly rewrote the relevant detention statutes to permit periodic bond hearings at six-month intervals. Thus, the Court disagreed with the Ninth Circuit Court of Appeals that (similar to *Zadvydas*) §§ 1225(b), 1226(a), and 1226(c) could be read to allow for periodic bond hearings during detention.[73] The Court found that the mandatory detention under the statutes at issue had a "definite termination point" and that the "conclusion of removal proceedings . . . marks the end of the Government's detention authority under § 1226(c)."[74] Importantly, the Court emphasized the purpose of detention: Detention during [certain] proceedings gives immigration officials time to determine an alien's status *without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made*.[75] The Court's analysis depended on its understanding that detention should only serve two purposes: to avoid flight risk and enhance public safety. However, the majority opinion nowhere mentioned, much less relied on, the notion in *Zadvydas* that immigration detention should be "nonpunitive in purpose and effect."[76]

Instead of drawing on the purpose and effect of detention on the detainee, the Court in *Jennings* fixated on its purpose in the legislative scheme—to prevent flight risk and preserve public safety.[77] Courts and the academy often turn to these justifications to support a strict construction of the language of the mandatory detention statute, although detention also has the effect of being a deterrent and punitive tool.[78] The Court's attention on the interests of the government, though

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72. Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018) ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to choos[e] between competing plausible interpretations of a statutory text.") (internal quotations omitted).

73. *Id.* at 846.

74. *Id.* (emphasis added).

75. *Jennings*, 138 S. Ct. at 836 (emphasis added). The dissent criticizes this literal reading of the statute. Justice Breyer noted that "[i]t is immaterial that detention here is literally indefinite, because the respondents' removal proceedings must end eventually, they last an indeterminate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention . . . recognized in *Zadvydas*." *Id.* at 868 (Breyer, J., dissenting).

76. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

77. *Jennings*, 138 S. Ct. at 833.

78. Peter Schuck has identified additional reasons for detention: it ensures that noncitizens cooperate with immigration authorities, and that, if unauthorized, they

reasonable, misplaces the role of detention in effectuating removal. An emphasis on detention as a means instead of in removal as the end leads to a myopic understanding of the extraordinary measure of detention and normalizes its use. And although "[d]etention is necessarily a part of [the] deportation procedure," it is not a necessary condition to removal.[79] Instead, detention is only necessary for a narrow and particular subset of individuals, as indicated by the statutory structure, which initially provided for mandatory detention of limited categories of noncitizens.[80] This recognition is apparent in Congressional treatment of other noncitizens who are allowed to go through removal proceedings outside of the detention framework, even though they may eventually be removed. An emphasis on detention as necessary to effectuate the removal is misplaced because, in many cases, removal may be effectuated without detention.[81] Indeed, in many situations the detained individual may win her case and will not be ordered removed at all.[82] Here, methodological leanings take hold: is the power to detain reserved for when detention is indispensable or when it is simply convenient? The Court in *Jennings* and *Demore* seemed to view the power to detain permissible when convenient, and thus, took one step closer to normalizing its use.

III. STATUTORY FRAMEWORK OF MANDATORY DETENTION

A. *Noncitizens' Ineligibility for Relief*

The intricacies of the immigration code are vast, complicated, and fraught with uncertainty. This section analyzes the relevant history and statutory

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will not compete for jobs with authorized noncitizens and citizens. For these reasons, Shuck argues that "detention authority is more than a programmatic resource, ancillary to the power to exclude and deport. Detention is also an awesome power in its own right." *See* SCHUCK, *supra* note 8, at 36.

79. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 538 (1952).

80. *See infra* Part III.A.1 and accompanying text.

81. *See* Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody"*, 48 U. MICH. J. L. REFORM 879, 882 (2015) (discussing less restrictive alternatives to detention).

82. *Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting) (emphasizing that many noncitizens are detained for prolonged periods "before they won their cases and received relief from removal.").

provisions surrounding mandatory detention. It further focuses on the current framework, its restrictive nature, and its shortcomings.[83]

1. Mandatory Detention and the Expansion of Aggravated Felonies

The first mandatory detention statute was implemented in the Anti-Drug Abuse Act of 1988 ("ADAA").[84] This statute created a new deportability ground known as an "aggravated felony."[85] The ADAA also created the infamous mandatory detention framework by providing that the "[t]he Attorney General *shall* take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction."[86] Scholars criticize this statute as a blunt abrogation of executive discretion.[87] Before mandatory detention, the decision to detain an individual—regardless of criminal history—was left to the discretion of immigration officials.[88] In fact, beginning in the 1950s, the Department of Justice amended its detention policy and began to parole

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83. *See* Das, *supra* note 42; s*ee also* MARGARET H. TAYLOR, *Judicial Deference to Congressional Folly: The Story of Demore v. Kim*, *in* IMMIGRATION STORIES (David A. Martin & Peter H. Schuck eds., 2005).

84. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, sec. 7343(a)(4), 102 Stat. 4181, 4470 (amending 8 U.S.C. § 1252(a)(2) to provide for mandatory detention of certain noncitizens with criminal convictions).

85. A crime need not be particularly serious or a felony to be considered an aggravated felony. Some crimes include minor offenses as shoplifting, petty theft, drunk driving, and even low-level drug violations. For example, Olufolake Olaleye faced removal to Nigeria after she pleaded guilty to a shoplifting offense for which she received a twelve-month suspended sentence and twelve-month probation. However, after the passage of IIRIRA, a shoplifting offense that carries a one-year sentence is treated as an aggravated felony. *See* WELCH, *supra* note 30, at 72–73.

86. Sec. 7343(a)(4), 102 Stat at 4470 (emphasis added); *see* WELCH, *supra* note 30, at 75 ("Because of other provisions in the tough 'one-strike-you're-out' immigration law, immigrants convicted of aggravated felonies currently face greater difficulty in maintaining their U.S. residency, because recent provisions have stripped the courts of judicial review. Even if those immigrants can demonstrate that they would not flee and are not a danger to the community, Congress took from immigration judges the discretion to release them while their cases are pending; therefore, they must remain in detention until further determination of their cases is made.") (citation omitted); *see also* TAYLOR, *supra* note 83, at 348–54 (detailing the history and the abuses that precipitated the need for the detention scheme).

87. SCHUCK, *supra* note 8, at 36.

88. *Id.*

noncitizens into the country instead of detaining them.[89] Detention was reserved only for exceptional cases, including if the noncitizen was likely to abscond or posed a threat to national security or public safety.[90] Sentiments against arbitrary detention had grown so deeply that the Supreme Court went so far as to recognize that "[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond."[91] Although these discretionary considerations are still used by immigration enforcement agents in determining whether to release a detained noncitizen under § 1226(a), this discretion no longer exists with detainees who fall under the purview of the broad mandatory detention provisions of § 1226(c).[92]

At the time of the ADAA's enactment, an aggravated felony was narrowly defined to include murder, firearms trafficking, and drug trafficking.[93] It was here that immigration officials were stripped of any discretion to release a mandatory detainee or even conduct a bond hearing.[94] Although detention was mandated, the practice did not raise many constitutional or political concerns because the crimes covered were considerably egregious, detention was brief, and removal quickly effectuated. This held true for some time: the average detention in 1986 was eleven days.[95]

In 1990, Congress passed the Immigration Act of 1990 ("IMMACT").[96] This Act superseded the 1988 ADAA and amended the INA in significant ways. First, it required the Attorney General to release detained Lawful Permanent Residents ("LPRs") on bond if they were not a threat to the community or a flight

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89. *Id.*

90. *Id.*

91. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

92. SCHUCK, *supra* note 8, at 36, 63 (analyzing why attitudes regarding detention of noncitizens changed in the 1980s after an influx of immigrants from Cuba, Haiti, and El Salvador); *see also* David A. Martin, *The Obstacles to Effective Internal Enforcement of the Immigration Laws in the United States*, *in* IMMIGRATION CONTROLS: THE SEARCH FOR WORKABLE POLICIES IN GERMANY AND THE UNITED STATES 13 (Kay Hailbronner, David A. Martin, & Hiroshi Motomura eds., 1998) (pointing to additional factors that lead to an immigration officer's decision to not detain, such as limited availability of bed spaces).

93. MOTOMURA, *supra* note 68, at 55.

94. TAYLOR, *supra* note 83, at 348–54.

95. WELCH, *supra* note 30, at 107.

96. Immigration Act of 1990 § 501(a)(2)-(3), Pub. L. No. 101-649, 104 Stat. 4978, 5048. *See* CRS Report R43892 n.29.

risk.[97] Excluding LPRs from the mandatory detention regime evinced contemporary notions that LPRs hold a heightened noncitizen status, as well as the extraordinary nature of mandatory detention.[98] The amendment also expanded the definition of an aggravated felony to include money laundering, any illicit trafficking in any controlled substance, and some crimes of violence that carried a sentence of imprisonment of five or more years.[99] This combination seemed sensible. Though mandatory detention became available for more crimes, it was limited in scope to cover fewer noncitizens (or at least, not LPRs who committed those crimes).[100]

Then in 1994, Congress passed the Immigration and Nationality Technical Corrections Act of 1994 ("INTCA").[101] This act further expanded the definition of an aggravated felony to include a broad range of serious crimes, such as gun offenses, certain thefts and burglaries, fraud or tax evasion in amounts over $200,000, and certain immigration document fraud.[102]

The most impactful legislation came in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[103] These provisions broadened the types of crimes that constitute "aggravated felonies" and provided that noncitizens convicted of an aggravated felony were "conclusively presumed to be removable."[104] And these amendments applied retroactively. This meant that anyone convicted of a crime that was not considered an aggravated felony at the time of the conviction, and thus did not carry the harsh

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97. *Id. See also* Landon v. Placencia, 459 U.S. 21 (1982).

98. SCHUCK, *supra* note 8.

99. Immigration Act of 1990, *supra* note 95.

100. *Id.*

101. Immigration and Nationality Technical Corrections Act of 1994, Pub. L No. 103–416, Oct. 25, 1994, 108 Stat 4305.

102. James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 GEO. IMMIGR. L.J. 451, 467–68 (1995). Other crimes included use of fire or explosives, kidnapping for ransom, child pornography, certain Racketeer Influenced and Corrupt Organization (RICO) cases, running a prostitution business, espionage, sabotage, treason, alien smuggling, and failure to surrender for a prison sentence of fifteen years or more.

103. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, April 24, 1996, 110 Stat 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104–208, 110 Stat 3009.

104. *Id.*; Michael S. Satow, *A Journey Through the Fog: Due Process Analysis of I.N.A. Section 242(a)(2)*, 5 GEO. IMMIGR. L.J. 677, 679–80 (1991).

immigration consequences, could now be placed in removal proceedings and be subject to mandatory detention.[105] These are the amendments that landed Ms. Olaleye in removal proceedings after her minor shoplifting conviction.[106] These amendments had drastic implications and rattled the immigration system. Although previous immigration laws focused on attracting skilled labor and family reunification, "legislation passed in 1996 was shaped by tendency to criminalize immigrants."[107] As Motomura points out: "[t]oday, other crimes that were only misdemeanors under state law can be aggravated felonies for federal immigration purposes."[108]

2. Mandatory Detention and Restricted Forms of Relief

At first glance, the statutory scheme gives the illusion that detention will be brief and non-punitive.[109] After all, the 1996 amendments were intended to streamline the removal process by foreclosing most conventional forms of relief from removal that usually increased the detention period. However, the expansion of criminal grounds of removal led to an increase in the number of removable noncitizens in the U.S.[110] Dawn Johnson points out that even "[a]s the number of deportable LPRs increased, the number of aliens eligible for relief from

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105. WELCH, *supra* note 30, at 65, 68. These amendments also removed judicial review of deportation orders. Once ordered removed, an individual cannot challenge that order in federal court. Some critics have called this practice unconstitutional: "there are constitutional limits to how far Congress can go, and it cannot bar judicial review altogether when the liberty of an individual is at stake. Deportation orders necessarily involve the rights and liberties of individuals. Therefore, judicial review of those orders is constitutionally required." *Id.*

106. THE FRACTIOUS NATION?, *supra* note 1, at 138.

107. WELCH, *supra* note 30, at 64. Welch additionally analyzes other laws that took away a wide range of federal benefits and services from undocumented and legal immigrants such as food stamps and Supplemental Social Security. *Id.*

108. MOTOMURA, *supra* note 68, at 55. Not only did the grounds of removal expand, but other forms of relief like waivers and cancellation of removal became much harder to get. *See also* Steinmiller-Perdomo, *supra* note 20, at 1187.

109. Demore v. Kim, 538 U.S. 510, 529 (2003) ("Under §1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*.").

110. Dawn M. Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, The; Legislative Reform*, 27 J. OF LEGIS. 477, 483 (2001).

deportation decreased."[111] This meant that more noncitizens could be placed in removal proceedings and detained, but fewer of them could apply for various forms of relief. Four major amendments catalyzed this phenomenon.

First, IIRIRA repealed a form of relief known as the 212(c) waiver.[112] This discretionary waiver of removal was available for LPRs who were domiciled the U.S. for at least seven years and had not served an aggregate of more than five years in prison for an aggravated felony.[113] In its place, Congress enacted a more limited form of relief known as cancellation of removal,[114] which terminates the removal proceedings and allows the LPR to retain permanent resident status.[115] Permanent residents with aggravated felonies, however, can never qualify for relief through cancellation of removal.[116] For nonpermanent residents convicted of aggravated felonies, cancellation of removal is also not available because the aggravated felony precludes them from meeting the "good moral character" requirement for cancellation.[117]

Second, IIRIRA excluded aggravated felons from eligibility for asylum.[118] A noncitizen can apply for asylum to gain admission into the U.S. or as relief from removal.[119] Asylum is reserved for persons who have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[120] Applicants for asylum are ineligible if they are convicted of a "particularly serious crime," which statutorily incorporates

111. *Id.*

112. IIRIRA, *supra* note 103; INS v. St. Cyr, 533 U.S. 289, 294 (2001); Johnson, *supra* note 110, at 483.

113. IIRIRA, *supra* note 103.

114. 8 U.S.C. § 1229b (2012).

115. *Id.*

116. *See* 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . (3) has not been convicted of any aggravated felony."); *see also* MOTOMURA, *supra* note 68, at 55–56.

117. *See* 8 U.S.C. § 1229b(b).

118. IIRIRA, *supra* note 103.

119. 8 U.S.C. § 1158(a) (2012).

120. 8 U.S.C. § 1101(a)(42) (2012); 8 U.S.C. § 1158(b).

aggravated felonies.[121] Arguably, this preference was intended to prevent aggravated felons from making meritless asylum claims in lieu of cancellation of removal, from which they are disqualified.

Third, IIRIRA barred aggravated felons from requesting voluntary departure.[122] If a noncitizen in removal proceedings has no way to lawfully remain in the U.S., voluntary departure permits the noncitizen to depart at his own expense. This operates as a form of relief because the noncitizen is not formally ordered removed from the U.S. and many of the negative immigration consequences do not attach.[123] For example, the inadmissibility grounds related to noncitizens "previously removed" will not apply if the individual attempts a subsequent lawful entry.[124] Not everyone in removal proceedings qualifies for voluntary departure, and noncitizens often first pursue other forms of relief such as cancellation of removal, asylum, withholding of removal, or adjustment of status because those do not often require the noncitizen to leave the U.S. before obtaining the benefit.[125] Because aggravated felons cannot apply for this relief, they must be detained and formally ordered removed. Thus, they will be inadmissible if they attempt to make a future entry because they have been "previously removed."[126]

Lastly, Congress barred admission into the U.S. for removed aggravated felons.[127] More importantly, this inadmissibility cannot be waived under 212(h).[128]

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121. *See* 8 U.S.C. § 1158(b)(2)(B)(i) ("For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.").

122. IIRIRA, *supra* note 103; *See* 8 U.S.C. § 1229c(a)(1) (2012) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title."); *see also* 8 U.S.C. § 1229c(b)(1)(C).

123. 8 U.S.C. § 1229c(a)(1).

124. 8 U.S.C. § 1182(a)(9) (2012) ("Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."); *see also* CRS Report No. R43892.

125. 8 U.S.C. § 1225 (2012).

126. 8 U.S.C. § 1182(a)(9).

127. *Id.*

This amendment foreclosed the possibility that an aggravated felon might return to the U.S., at least lawfully.[129]

These harsh regulations structured a restrictive framework that barred noncitizens subject to mandatory detention from an opportunity for relief, especially those convicted of aggravated felonies. The likely intent of this framework was to incentivize individuals in removal proceedings to abandon meritless defenses and concede removability.[130] After all, seeking relief only extends the detention period.[131] Advocates and detainees today, however, have pursued novel challenges to removal and have shifted their focus to the early phases of the removal proceeding: the criminal conviction. The following Part analyzes this shift and explains why this restrictive framework prevents effective removal by incentivizing more unconventional challenges.[132]

B. *Congressional Folly and the Law of Unintended Consequences*

Without reflection, we go blindly on our way, creating more unintended consequences, and failing to achieve anything useful. — Margaret J. Wheatley

The regulation of exclusion, admission, detention, and removal are "policy questions entrusted exclusively to the political branches of our Government."[133] As such, these policy preferences are subject to the law of unintended consequences, which cautions that there are often additional "consequences which result from behavior initiated for other purposes."[134] Despite Congressional efforts towards a

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128. *See* 8 U.S.C. § 1182(h); *see also* Spacek v. Holder, 688 F.3d 536, 537 (8th Cir. 2012); Martinez v. Mukasey, 519 F.3d 532 (5th Cir. 2008) (holding that this bar did not apply to individuals who had adjusted status because they were never admitted at the border or a border equivalent and merely adjusting statutes did not trigger the bar).

129. 8 U.S.C § 1182(a)(2).

130. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1855, 1866 (2013) ("[I]mmigration detainees frequently lack the time to obtain counsel who can assess whether the detainee might have a basis for contesting removability. In many cases, under the threat of prolonged detention and unable to pay for an attorney, detainees concede removability and accept removal.").

131. *Id.* at 1855.

132. *See* Johnson, *supra* note 110 (identifying the benefits of legal counsel in the removal proceedings).

133. Fiallo v. Bell, 430 U.S. 787, 798 (1977).

134. Frank de Zwart, *Unintended But Not Unanticipated Consequences*, 44 THEORY AND SOC'Y 283, 286 (2015).

design of brief detention and effective removal (owed to the little discretionary relief available),[135] the current design has incentivized more foundational challenges to removal. The following four strategies depict these efforts.

First, ineffective assistance of counsel claims have become a viable tool in the immigration context. In *Padilla v. Kentucky*,[136] the Supreme Court recognized an ineffective assistance of counsel claim under the Sixth Amendment for noncitizens who are ill-advised about the immigration consequences of pleading guilty to a criminal offense.[137] Individuals who have pleaded guilty to a crime that can have perverse immigration consequences are likely to attack the conviction on Sixth Amendment grounds.[138] Successful ineffective assistance claims may lead to post-conviction relief, potentially removing the deportability ground and terminating removal proceedings.[139] Attacking the underlying conviction, of course, extends immigration detention. Not only do these challenges take place outside of immigration courts, but the noncitizen remains in government custody pending those challenges.[140]

Second, other criminal procedures are available, and strategic criminal defense attorneys may attempt to reopen the noncitizen's conviction to change the

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135. *See, e.g.*, Fuller v. Gonzales, No. CIV.A.3:04CV2039SRU, 2005 WL 818614, at *1 (D. Conn. Apr. 8, 2005) ("The abrogation of an alien's right to liberty caused by section [1226(c)] is generally constitutional; when Congress categorically deprives certain aliens of their right to liberty for the brief time necessary to complete removal proceedings, it legitimately furthers the government's interests in securing aliens' presence at immigration proceedings and incapacitating dangerous aliens. A detention as inordinately long as Fuller's, however, is not justified by those government interests.").

136. 559 U.S. 356 (2010).

137. *Id.* at 374.

138. *See* Dorothy A. Harbeck et al., *The Impact of* Padilla v. Kentucky *on the Immigration Courts: Does the Potential for Vacating a Criminal Plea Effect Removal/Deportation Proceedings?*, 1 J. OF INT'L & COMP. L. 47 (2010) (recognizing that although it is "premature to predict the number of possible claims that may arise post-*Padilla*," nonetheless "Immigration Courts will likely see an increase in the number of adjournment requests by aliens in removal/deportation proceedings, *pro se*, or with counsel, who have filed or will be filing petitions for post-conviction relief ("PCR") before the criminal courts.").

139. *Id.* at 69 ("[I]t is likely that an alien can successfully terminate removal/deportation proceedings if his vacatur in criminal court as a result of such PCR is due to a constitutional defect in his prior representation.").

140. *Id.* at 50.

sentence or the nature of the conviction.[141] This may also include seeking gubernatorial pardons or deferred adjudications.[142] In some circumstances, a successful reversal or pardon of conviction will likely be followed by termination of the removal proceeding and release from detention.[143] But even post-conviction relief does not guarantee relief from removal. A conviction that is set aside, reduced, or changed simply to avoid negative immigration consequences, and not because of its merits, may still serve as a conviction for immigration purposes.[144]

Third, mandatory detainees can challenge the nature of the underlying conviction in immigration court. Determining whether a conviction will count as a "conviction" for immigration purposes is vital and complex.[145] For over a century, courts have relied on "categorical" and "modified categorical" approaches to determine whether a noncitizen's conviction falls within the federal definition of an offense that triggers an immigration removability ground.[146] Although the categorical approach has been widely accepted by courts, litigation over its application has increased significantly as the removability grounds have expanded.[147] As Jennifer Lee Koh explains:

> First, the following account of the categorical approach connects its increased use to immigration laws that over the past two decades have expanded the criminal grounds for deportation, contracted the availability of discretionary relief, and foreclosed opportunities for judicial review of cases involving criminal convictions. Because Congress has virtually eliminated discretionary review, immigration attorneys now contest removability and invoke the categorical approach as a defense to deportation with greater vigor. Moreover, the total number of

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141. A discussion of various criminal procedures available is outside the scope of this article. For more detailed discussion, see Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 455 (2012). *See generally* Harbeck, *supra* note 138.

142. Christina Caron, *Jerry Brown Pardons 5 Ex-Convicts Facing Deportation, Provoking Trump*, N.Y. TIMES (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/california-pardon-immigrants.html; *see* Cade, *supra* note 141.

143. Caron, *supra* note 142.

144. Harbeck, *supra* note 138, at 69 n.88. For a thorough discussion of the effect of pardons or deferred adjudication, see Cade, *supra* note 141.

145. *See* 8 U.S.C. § 1101(a)(48) (2012) (added by IIRIRA § 322).

146. Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 267 (2012).

147. *Id.* at 268.

> immigrants charged with the criminal grounds of removal has skyrocketed due to political pressures to remove more "criminal aliens," thereby leading to more categorical approach litigation.[148]

This approach is a valuable defense tool to argue, for example, that a particular state conviction should not be considered an aggravated felony or crime involving moral turpitude, and removal on thiese grounds would not be appropriate.[149]

Lastly, aggravated felons can seek relief by applying for withholding of removal or Convention Against Torture ("CAT") protections.[150] Withholding of removal and CAT only guarantee that an individual will not be returned to a country where he will be persecuted or tortured[151] and may be the only formal relief available to aggravated felons.[152] Although these protections do not provide more permanent benefits like asylum or cancellation of removal (like giving the recipient lawful permanent status),[153] they are significant to individuals with few prospects of alternative relief.[154]

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148. *Id.*

149. *Id.* at 266–67.

150. 8 U.S.C. § 1231(b)(3) (2012); 8 C.F.R. § 208.16 (2019); *see* Kathy Brady, *Practice Advisory: Aggravated Felonies*, IMMIGRANT LEGAL RES. CTR. 1, 2 (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/aggravated_felonies_4_17_final.pdf (noting that "the person [convicted of an aggravated felony] might not be barred from applying for withholding of removal" and that "[c]onviction of an aggravated felony is not a bar to relief under the Convention Against Torture").

151. 8 C.F.R. § 208.16(b)–(c); Ryan J. Moore, Note, *Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for Aggravated Felons in Light of International Law: Extending* Beharry v. Reno, 21 ARIZ. J. INT'L & COMP. L. 535, 561 (2004) ("Mandatory relief from deportation includes relief pursuant to the U.N. Convention Against Torture (CAT) and claims of 'withholding of removal.' Each form of relief requires some showing that the noncitizen fears persecution if returned to his country of origin."); *see also* IMMIGRANT LEGAL RES. CTR., IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDANTS §§ 17.18–17.19 (2018), https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf.

152. Brady, *supra* note 150, at 1–2 (listing these options in demonstrating that "[t]here are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility can be complex").

153. *See* IMMIGRANT LEGAL RES. CTR., *supra* note 151, at § 17.18(a)(2) ("Asylum is preferable, because after one year the person can apply for lawful permanent residence. . . . A person granted withholding receives permission to live and work in the U.S., but it can be revoked if country conditions change and it does not enable the person to apply for permanent residence."); Moore, *supra* note 151, at 561–62 ("Deferral of removal does not confer a right of release from INS custody, and the status

It is important to note that these unconventional challenges offer fewer advantages than conventional forms of relief like cancellation for removal, voluntary departure, asylum, or inadmissibility waivers. These unconventional challenges often take place outside the immigration proceeding,[155] result in less certain outcomes,[156] may lead to inequitable decisions depending on the state of conviction,[157] and are not discretionary.[158] Additionally, they will often unnecessarily extend detention periods.[159] Take, for example, Justice Souter's dissenting opinion in *Demore*: "While it is true that removal proceedings are unlikely to prove 'indefinite and potentially permanent,' they are not formally limited to any period, and often extend beyond the time suggested by the Court . . . ."[160] To press the point further, Justice Souter pointed out some of the incentives to challenge removal charges: "Unlike many illegal entrants and temporary nonimmigrants, LPRs are the aliens most likely to press substantial

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may be terminated at any time. Accordingly, CAT claims are a disfavored remedy sought only as a last resort.").

154. *See* Moore, *supra* note 151 ("Noncitizens convicted of an 'aggravated felony' are generally statutorily ineligible for discretionary relief" but are only "in some cases . . . disqualified from receiving mandatory relief"—i.e., "relief pursuant to the U.N. Convention Against Torture (CAT) and claims of 'withholding of removal.'"); Brady, *supra* note 150, at 1 (noting that these are "key options" for those convicted of an aggravated offense).

155. Brief of American Immigration Council and the American Immigration Lawyers Association as Amici Curiae Supporting Petitioner at 7–8, Guerra v. Shanahan, 831 F.3d 59 (2nd Cir. 2016) (No. 15-504).

156. IMMIGRANT LEGAL RES. CTR., *supra* note 151, at § 17.18(a)(2) ("A person granted withholding receives permission to live and work in the U.S., but it can be revoked if country conditions change . . . .").

157. *See id.*, at §§ 17.18(b), 17.19(a)(4) (explaining adverse consequences of a finding of conviction of a "particularly serious crime" and that "[o]ther than the five-year sentence aggravated felony bar, determining whether an offense is a PSC is done on a case-by-case basis.").

158. *See* Moore, *supra* note 151 ("Discretionary relief requires an affirmative exercise of discretion by the Attorney General, in most cases, acting through an immigration judge, in addition to statutory eligibility. Mandatory relief, or relief which does not involve an exercise of discretion, must be provided upon a finding of statutory eligibility. . . . Mandatory relief from deportation includes relief pursuant to the U.N. Convention Against Torture (CAT) and claims of 'withholding of removal.'").

159. Demore v. Kim, 538 U.S. 510, 567 (2003) (Souter, J., dissenting) (citations omitted).

160. *Id.*

challenges to removability requiring lengthy proceedings."[161] This is because LPRs often have greater ties in the U.S. than their nonimmigrant counterparts and a more powerful incentive to chellange removability. This means that the noncitizens most affected by the current design are those most likely to have meritorious claims either because they have a valid claim to lawful presence or have acquired substantial equities in the U.S. This is true notwithstanding Congressional efforts to strip this broad group of any relief.[162]

Although Congress intended aggravated felons to be "conclusively presumed to be deportable,"[163] and believed detention would serve as a disincentive to assert other forms of relief, the restrictive framework actually encourages more detainees to challenge the criminal proceedings. The harsher the immigration consequences of removal become, the more likely detainees are to challenge removal. These unintended consequences reveal that current institutional choices may impede removal and place an undue emphasis on detention instead. With each additional, complex, and uncertain alternative to challenge detention and removal, the current framework is less desirable than one designed to provide more relief and incentivize compliance with the law. This results in unnecessarily prolonged detention.

IV. ADOPTING A RELIEF-BASED DESIGN

This section analyzes why a relief-based design in which noncitizens have more options for relief from removal and detention, not fewer, is desirable. Four potential solutions are advanced. First, policymakers and courts should redefine "aggravated felony" to include only serious criminal conduct. Second, Congress should extend voluntary departure as an available form of relief for all detainees subject to mandatory detention. Third, Congress and the courts should expand discretionary inadmissibility waivers to remedy more inadmissibility grounds. Lastly, policymakers should exclude LPRs from the purview of mandatory detention.

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161. *Id.* at 567–68.

162. *See id.* at 561 (citations omitted) (disagreeing with the majority's approach, indicating that "the Court says that § 1226(c) 'serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings.' Yes it does . . . [but] the fact that a statute serves its purpose in general fails to justify the detention of an individual in particular. Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal. As to such aliens, . . . the Government has only a weak reason under the immigration laws for detaining them.").

163. 8 U.S.C. § 1228(c) (2012).

A. *Redefining "Aggravated Felony"*

This Note briefly echoes the concerns of an ever-expanding definition of an aggravated felony.[164] A reversion to the original, limited ADAA definition of aggravated felonies would remedy many of the concerns this Note highlights. Not only is the current definition a point of dispute in the courts and the academy, but it has become a catch-all that is not commensurate with its label. After all, the crime committed need neither be a felony nor aggravated.[165] Minor crimes, such as Ms. Olaleye's shoplifting conviction, should not carry such severe immigration consequences. In restricting mandatory detention to criminal grounds like aggravated felony, but then vastly expanding the definition, Congress "alter[ed] the fundamental details of a regulatory scheme in vague terms or ancillary provisions" and "hid[] elephants in mouseholes."[166] The privision in 8 U.S.C. § 1101(a)(43)(F) is certainly an elephant. There is no doubt that the foundational issue here is Congress's judgment about what crimes constitute aggravated felonies, as expressed in the statutory language. Amending the language, thus, is a political imperative.

Courts are not powerless in these efforts, however. The Supreme Court recently recognized this in *Sessions v. Dimaya*, where it struck down a "crime of violence" provision as being unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment.[167] Mr. James Dimaya was convicted for first-degree burglary under California law.[168] Immigration officials concluded that because first-degree burglary carries a substantial risk of the use of force, it constituted a "crime of violence" under 18 U.S.C. § 16(b), which is incorporated as an aggravated felony by 8 U.S.C. § 1101(a)(43)(F).[169] Relying on *Johnson v. U.S.*, the

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164. *See* Steinmiller-Perdomo, *supra* note 20, at 1194 ("To avoid over-punishment, Congress should narrow the classes of crimes that can be reached by the aggravated felony definition, or it should grant immigration judges more discretion to consider which offenses appropriately follow the letter of the law.").

165. *See supra* Part III.A.; *see also* MOTOMURA, *supra* note 68, at 55 ("[t]oday, other crimes that are only misdemeanors under state law can be aggravated felonies for federal immigration purposes.").

166. Whitman v. Am. Trucking Assn's, Inc., 531 U.S. 457, 468 (2001).

167. Sessions v. Dimaya, 138 S. Ct. 1204, 1207 (2018)

168. *Id.* at 1211.

169. *Id.*, 18 U.S.C. § 16(b) (2012); 8 U.S.C. § 1101(a)(43)(F) (2012).

Ninth Circuit held § 16(b) was unconstitutionally vague.[170] The Supreme Court affirmed this holding on the ground that this statute deprived individuals of constitutionally adequate fair notice and conflicted with separation of powers:

> [L]egislators may not "abdicate their responsibilities for setting the standards of the criminal law." . . . [I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,][t]his would, to some extent, substitute the judicial for the legislative department of government.[171]

Without intention the Court redefined, in a narrow way, the reach of aggravated felonies to exclude crimes of violence.

B. *Extending Voluntary Departure*

Extending voluntary departure as an available form of relief to all persons in removal proceedings is imperative to effectuate removal, especially to those who fall under mandatory detention. Voluntary departure is a desirable form of relief because it does not carry many of the immigration penalties that attach to a formal order of removal and allows detainees to avoid prolonged detention.[172] Voluntary departure is most sensible when viewed in light of the primary goal of immigration enforcement—to effectuate removal. If faced with a potential detention period of twelve to eighteen months, like the plaintiffs in *Jennings*,[173] individuals are more likely to ask for voluntary departure than contest a losing case.[174] As rational

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170. *Dimaya*, 138 S. Ct. at 1212 ; Johnson v. U.S., 135 S. Ct. 2551, 2561 (2015) (striking down substantially similar language under the Armed Career Criminal Act because it was void for vagueness).

171. *Dimaya*, 138 S. Ct. at 1227 (2018) (Gorsuch, J., concurring) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974) and Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983) (internal quotation marks omitted)).

172. *See supra* Part III.A and accompanying text.

173. *See supra* INTRODUCTION and accompanying text.

174. *See generally* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) ("Over 97.5% [of eligible noncitizens] apparently agree to voluntary deportation without a formal hearing."); *see also* Koh, *supra* note 130 ("The Court emphasized that the vast majority of noncitizens apprehended by immigration enforcement officials agreed to voluntary departure and therefore did not contest the allegations behind deportation.")

actors, voluntary departure may appeal to those noncitizens who do not have a current valid claim to remain in the U.S. but will have a future claim to admission that would be best served by voluntarily departing.[175] Take Ms. Olaleye as an example.[176] As the mother of two U.S. citizens, she may be entitled to an immediate relative visa when one of her children reaches the age of twenty-one.[177] If she was detained today, Ms. Olaleye may decide to voluntarily depart to Nigeria to avoid a formal order of removal, its readmission consequences, and detention. Under the current regime, however, she must be detained pending removal and be ordered removed because her theft offense constitutes an aggravated felony.[178] Of course, Ms. Olaleye should pursue other forms of relief first. But given the restrictive remedies available to her, voluntary departure may be the best alternative, if available. This incentive scheme also applies to those who may have a pending visa petition and want to be admissible when that visa becomes available. Under this model, the economic burden to effectuate removal is on the noncitizen, not the government.[179] This design is preferred to other forms of administrative or expedited removal[180] because it does not carry the immigration consequences of a formal removal order, thus potentially limiting the lapse of time required to attempt a reentry. And if flight risk is a concern, voluntary departure here can be structured to allow the noncitizen to depart directly from government custody.

A relief-based model will likely also have an impact on reentry levels by deterring repeat violators.[181] Some individuals will be less likely to reenter the

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175. Nicole Abruzzo, *Voluntary Departure Post-IIRIRA: A Struggle Between Equitable Considerations Promoting Clemency Measures, and Statutory Considerations Tending Towards Oppression*, 21 ST. JOHN'S J. LEGAL COMMENT. 881, 887 (2007) (recounting the story of an asylum-seeker who complied with her order of voluntary departure "in hope that the circuit will grant her asylum, allowing her one day, to finally enter the United States lawfully.").

176. THE FRACTIOUS NATION?, *supra* note 1, at 138.

177. *See I am a U.S. Citizen . . . How Do I Help My Relative Become a U.S. Permanent Resident?*, USCIS, https://www.uscis.gov/sites/default/files/USCIS/Resources/A1en.pdf.

178. *See supra* Part III.A and accompanying text.

179. *See generally* David S. Rubenstein, *Restoring the Quid Pro Quo of Voluntary Departure*, 44 HARV. J. ON LEGIS. 1, 2 (2007) (detailing the benefits of voluntary departure to the government and to the noncitizen).

180. Under administrative removal DHS can administratively remove an alien if the alien has been convicted of an aggravated felony and did not have LPR status at the time proceedings under this section commenced. *See* 8 U.S.C. 1228(b) (2012).

181. *See generally* Koh, *supra* note 130, at 1819, 1823.

country illegally if they are allowed to voluntarily depart and can find an alternative way to return lawfully. For example, Ms. Olaleye will be deterred from making the unauthorized reentry if she knows an illegal reentry (or illegal entry)[182] will carry severe immigration and criminal consequences.[183] This deterrent effect also applies to those who may have potential venues to return legally once they have departed. Instead of being detained and ordered removed, a framework that allows individuals to bypass these harsh procedures may ultimately benefit the individual by providing them a second chance to comply with immigration law and will help enforcement efforts through deterrence.[184] Lastly, the government also benefits from voluntary departure because it can avoid litigation and other costs associated with a contested removal, as well as with the removal itself.[185]

C. *Expanding Inadmissibility Waivers*

Voluntary departure alone is not a sufficient institutional design to effectuate removal, however. This is because many noncitizens are likely to attempt to reenter.[186] If a noncitizen is not ordered removed but will be inadmissible on subsequent reentry attempts by virtue of a criminal conviction (or because they were deemed aggravated felons), he may choose to contest removability instead of voluntarily departing, thus making the option for departure practically inoperative. Therefore, inadmissibility waivers must exist as essential auxiliaries to voluntary departure.

Inadmissibility waivers are statutory provisions that remedy the grounds of inadmissibility.[187] These waivers are granted at the discretion of the Attorney General.[188] The United States Citizenship and Immigration Services explains that the purpose of such waivers is, among other things, to "[p]romote family unity and provide humanitarian results; . . . [p]rovide relief to refugees, asylees, victims of

182. *See* Doug Keller, *Re-thinking Illegal Entry and Re-entry,* 44 LOY. U. CHI. L.J. 65, 79 (2012).

183. *See, e.g.*, News Release, U.S. Citizenship & Immigr. Serv., Aggravated Felon Sentenced to Nearly 3 years in Prison for Illegal Re-entry (Jan. 14, 2011), https://www.ice.gov/news/releases/aggravated-felon-sentenced-nearly-3-years-prison-illegal-re-entry.

184. *But see* Keller, *supra* note 182 (arguing that illegal reentry prosecution does not serve a strong deterrent purpose).

185. Rubenstein, *supra* note 179, at 2.

186. Keller, *supra* note 182, at 104.

187. *See, e.g.*, 8 U.S.C. § 1182(h) (2012).

188. *Id.*

human trafficking[; and] . . . [a]dvance the national interest by allowing foreign nationals to be admitted to the United States if such admission could benefit the welfare of the country."[189] Although there is no inadmissibility ground for committing an aggravated felony, such label has serious consequences in the admission process.[190] An individual who has been previously removed and is convicted of an aggravated felony is inadmissible under the "previously removed" ground.[191] If not previously removed (perhaps because of voluntary departure), an LPR convicted of an aggravated felony is ineligible for a waiver if the same criminal conduct that counts as an aggravated felony for purposes of removal would also count as a criminal ground for inadmissibility, like a crime involving moral turpitude or a controlled substance offense.[192]

A framework that places a greater emphasis on the initial stages of the immigration journey (i.e., the admissibility determination) is desirable because of the potential that an individual is more properly incentivized to not violate immigration laws if there is a potential legal remedy on the horizon. In other words, the combination of these two forms of relief ensures that the choice to voluntarily depart is appealing, especially for individuals with criminal convictions, if they know they will not be prevented from reentering the country in the future. Inadmissibility waivers place the burden on the noncitizen to show why entry (or reentry) is merited.[193] These waivers also shift discretionary decisions back to immigration officials; this same discretion was removed at the mandatory detention determination.[194] These waivers are especially functional when the individual seeking to reenter legally had strong ties to the U.S. prior to departure. A model that places a higher emphasis on deterrence at the reentry point rather than deterrence though detention is more efficient because it prevents unjustified

189. U.S. CITIZENSHIP & IMMIGR. SERV., 9 Policy Manual, *Waiver Policies and Procedures, Purpose and Background* (May 2, 2018), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartA-Chapter1.html.

190. *See generally* 8 U.S.C. § 1182.

191. 8 U.S.C. § 1182(a)(9).

192. 8 U.S.C. § 1182(a)(2).

193. *See* 8 U.S.C. §1361 (2012) (providing that the burden is on applicant for admission to prove he or she "is not inadmissible" and "entitled to the nonimmigrant [or] immigrant . . . status claimed"); *see also* 8 U.S.C. §1229a(c)(4)(A) (2012) (in removal proceedings, the applicant for relief has the burden of proving that he or she is statutorily eligible and merits a favorable exercise of discretion); *see also* In re Mendez-Moralez, 21 I&N Dec. 296, 299 (BIA 1996) (holding that applicant for §1182(h)(1)(B) waiver has burden of showing that favorable exercise of discretion is warranted, "[a]s is true for other discretionary forms of relief").

194. *See* Part III.A and accompanying text.

detention when other reasonable alternatives to enforce immigration laws are available.

A design focused on relief from detention also ensures that case backlogs do not lead to unexpected benefits for nondetained noncitizens in removal proceedings.[195] Cases of detained individuals have priority for review over nondetained individuals. But because lots of resources are devoted to the tedious procedures and challenges to removal explained in Part III.B, the claims made by nondetained individuals often linger in immigration courts for years. ICE recognized the magnitude of this problem in 2017:

> The decrease in ICE's overall removal numbers from FY2016 to FY2017 was primarily due to the decline in border apprehensions in 2017. Many fewer aliens were apprehended at the border in FY2017 than in FY2016—possibly reflecting an increased deterrent effect from ICE's stronger interior enforcement efforts. The drop in border apprehensions contributed to a decrease in total ICE-ERO removal numbers, as the majority of aliens arriving at the border are processed under the provisions of expedited removal and are removed quickly, while aliens arrested in the interior are more likely to have protracted immigration proceedings and appeals, which delays the issuance of an executable final order of removal. These cases also frequently require a more complex and lengthy process to obtain travel documents, further delaying the process.[196]

Individuals who do not fall under the mandatory detention statute must often wait years for the resolution of their claims, whether or not those claims are meritorious.[197] Therefore, a noncitizen in removal proceedings who is likely to be removed but does not need to be detained is incentivized to apply for various types of relief (e.g., cancellation of removal or asylum). This policy is known as "catch and release" because individuals who are placed in removal proceedings and are granted discretionary release can live and work in the U.S. for years pending removal.[198] This unanticipated benefit is only possible because immigration courts

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195. *See* EOIR Memo, *supra* note 42.

196. ICE 2017 Report, *supra* note 24, at 12.

197. Salvador Rizzo, *President Trump's Claim That Democrats Created 'Catch and Release' Policies*, THE WASHINGTON POST, (Apr. 4, 2018), https://www.washingtonpost.com /news/fact-checker/wp/2018/04/04/president-trumps-claim-that-democrats-created-catch-and-release-policies/?utm_term=.c42ae5d7ac6a.

198. *Id.*

have over 650,000 removal cases pending as of December 2017, and claims by detained individuals typically get first preference.[199] Broadening the forms of relief available to detainees, instead of forcing individuals to challenge their underlying conviction or endure detention, creates greater certainty that claims to relief will be meritorious.[200] The combination of voluntary departure and inadmissibility waivers is likely to produce a reduction in the detained population and lead to benefits in the other aspects of immigration enforcement, like the more prompt resolution of claims asserted by non-detained individuals.

Here, as in the efforts to limit the scope of aggravated felonies, statutory changes are preferred. But courts can also play a crucial role in the expansion of inadmissibility waivers. In *Martinez v. Mukasey*, the Fifth Circuit held that the bar to the inadmissibility waivers in 8 U.S.C. § 1182(h) ("§212(h) waiver") based on an aggravated felony conviction will only apply to a noncitizen who is admitted at the U.S. border as a lawful permanent resident.[201] The court looked to the language of the statute:

> No waiver shall be granted under this subsection *in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence* if . . . *since the date of such admission* the alien has been convicted of an aggravated felony.[202]

The court found the language unambiguous in its dictate: "for the § 212(h) bar to apply: when the alien is granted permission, after inspection, to enter the United States, he must then be admitted as an LPR."[203] This means that the §212(h)

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199. *See* EOIR Memo, *supra* note 42.

200. Koh, *supra* note 130, at 1807, 1864 ("But efficiency, uniformity, and fairness costs rise when removability challenges become the only means by which individuals with otherwise meritorious claims to membership in the United States can avoid deportation.").

201. Martinez v. Mukasey, 519 F.3d 532, 537 (5th Cir. 2008), *as amended* (June 5, 2008).

202. *Id.* at 543 (emphasis added) (quoting 8 U.S.C. § 1182(h) (2012)).

203. *Id.* at 544. The court also discussed why Congress might have intended this result:

> Congress might rationally have concluded that adjusted-to-LPR-status aliens like [Martinez] are more deserving of being eligible for a waiver of inadmissibility. Martinez entered the United States as a minor, grew up in this country, and developed ties here. He also went through the scrutiny of adjustment, in which his record in the United States was examined. Congress could have concluded rationally that individuals such as Martinez are more deserving, than those who entered as LPRs, of being eligible for the § 212(h)

waiver is still available for individuals who were *not admitted* as LPRs and adjusted status instead. The Ninth and Eleventh Circuits agreed with this interpretation.[204] Through ordinary statutory interpretation, the courts here limited the likely Congressional intent to make removal a virtual certainty for aggravated felons. Despite being a win for many noncitizens, these unconventional challenges must be done while the noncitizen is detained. These are the types of successful challenges Justice Breyer pointed to in *Jennings*.[205] The government will detain these noncitizens even when they eventually win their cases and receive relief from removal.

D. *Excluding LPRs from Mandatory Detention*

Detention affects different types of noncitizens discordantly. In fact, LPRs are more likely to be disproportionately impacted by mandatory detention than other noncitizens because they often have greater family and community ties and substantial equities in the U.S. Take as an example the named plaintiff in *Jennings*, Mr. Alejandro Rodriguez. He was a long-time LPR before he was detained for fifteen months without an opportunity for release.[206] During the lengthy detention, Mr. Rodriguez missed the birth of his daughter and his U.S.-citizen wife was forced onto welfare.[207] This highlights the reality that LPRs are also more likely to face serious financial forfeitures by detention. More importantly, LPRs are "[u]nlike many [undocumented] entrants and temporary nonimmigrants . . . ."[208] As Justice Souter pragmatically points out, LPRs "are the aliens most likely to press substantial challenges to removability requiring lengthy proceedings."[209] Furthermore, many LPRs intend to apply for citizenship, thus further increasing

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> waiver, including likely having more citizen relatives who would be affected adversely by removal.

Martinez v. Mukasey, 519 F.3d 532, 545 (5th Cir. 2008), *as amended* (June 5, 2008).

204. Sum v. Holder, 602 F.3d 1092, 1096 (9th Cir. 2010); Lanier v. U.S. Att'y Gen., 631 F.3d 1363, 1366–67 (11th Cir. 2011).

205. *See supra* INTRODUCTION and accompanying text.

206. Brief for Respondents at 6–7, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6123731.

207. *Id.*

208. Demore v. Kim, 538 U.S. 510, 567 (2003) (Souter, J., dissenting).

209. *Id.* at 567–68.

their incentives to contest removal.[210] Some detained individuals may have *already* applied for citizenship and will use their citizenship as a defense to removal.[211] This was true for Ms. Olaleye, although removal proceedings were initiated before she was sworn as a U.S. citizen.[212] This is why excluding LPRs from the strictures of mandatory detention is sensible. As rational actors, LPRs have powerful incentives to press substantial challenges to removability.[213] And these strong defenses further incentivize them to appear for removal proceedings.[214]

Although there is concern that some noncitizens will be a threat to public safety, their exclusion from the mandatory detention regime does not strip immigration authorities of the power to detain an individual they believe is a danger to public safety or a flight risk. Instead, the detention determination is merely discretionary. An LPR with exceptional criminal history may not be surprised that discretionary detention under § 1226(a) is warranted. This is because the LPR must still show that he will not be a flight risk or a danger to public safety.[215] Adopting a mandatory detention design that excludes LPRs is not a wholly novel concept. In fact, as Part III.A explains, the Immigration Act of 1990 excluded LPRs from mandatory detention and allowed the Attorney General to release LPRs on bond if neither of the two previous concerns were raised.[216] This design was short-lived and Congress, with little legislative explanation, quickly reverted to an all-or-nothing detention system that did not distinguish on an individual's equities or status.

This Note does not shy away from the reality that detention and removal are sometimes necessary to ensure public safety. However, to do so at the risk of an

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210. *See Table 20. Petitions For Naturalization Filed, Persons Naturalized, And Petitions For Naturalization Denied: Fiscal Years 1907 To 2016*, DEP'T. OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook/2016/table20 (detailing the number of naturalizations. In 2016, for example, 972,151 naturalization petitions were filed).

211. *See* Koh, *supra* note 130, at 1892.

212. THE FRACTIOUS NATION?, *supra* note 1, at 138.

213. Brief for Respondents at 15, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204). Some scholars focus on methods that may be more effective to ensure appearance, such as alternative forms or custody and representation by counsel. *See* Torrey, *supra* note 81, at 833; HUM. RIGHTS FIRST, Immigration Court Appearance Rates, http://www.humanrightsfirst.org/sites/default/files/hrf-immigration-court-appearance-rates-fact-sheet-nov2016.pdf.

214. Brief for Respondents at 15, *Jennings*, 138 S. Ct. 830 (No. 15-1204).

215. *See* Part III.A and accompanying text; *see also* Torrey, *supra* note 81, at 893 n.88.

216. *Id.*

over-inclusive design grossly misses the ultimate purpose of detention—removal. To carry out their protective functions, immigration officials must exercise discretion to balance between the equities attached to the LPR status and the need for immigration enforcement. The institutional framework for detention, and the potential to better channel national immigration enforcement priorities, are best served by adopting a relief-based design in which LPRs are properly incentivized to pursue meritorious claims without being subject to prolonged and unjustified detention.

CONCLUSION

In the late Twentieth Century, Congress established a detention framework and foreclosed most major relief options available to many noncitizens subject to mandatory detention under the aggravated felony category.[217] However, unconventional challenges quickly developed. This combination has been responsible for a growing incidence and length of detention and has burdened both the government and noncitizens who are detained with fewer options for relief.[218] Alternatives exist to better effectuate an individual's removal and maintain public safety. A relief-based design that provides the appropriate incentives and opportunities for noncitizens in removal proceedings to voluntarily depart without being permanently barred from reentry is more desirable to the restrictive model that has been in place for almost three decades. Likewise, a system that excludes LPRs from mandatory detention more appropriately balances individual equities and immigration enforcement. A design that centers around more relief options, not less, properly effectuates immigration enforcement priorities without unjustifiably relying on detention. A combination of legislative and judicial efforts described above will ensure that noncitizens are not unnecessarily detained without relief.

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217. *See supra* Part III.A and accompanying text.

218. *See supra* Part III.B and accompanying text.