Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine

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Introduction

Jenny Flores was a teenager when she was detained by the Immigration and Naturalization Service ("INS"). Flores and other unaccompanied minors awaiting deportation proceedings were "held in detention by the INS for as long as two years in highly inappropriate conditions."[1] There were few opportunities for recreation and no educational programs.[2] The children were subjected to routine strip searches.[3] Some were forced to share sleeping quarters and bathrooms with unrelated adults of both sexes.[4]

The INS confined Godwin Imasuen for several months in local jails and municipal lock-ups not suited for long-term detention. Imasuen was transferred among as many as five such facilities each

1. Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting), *vacated*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd sub nom.*, Reno v. Flores, 113 S. Ct. 1439 (1993).

2. *Id.*

3. The strip search policy was declared unconstitutional in Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988).

4. *Flores*, 934 F.2d at 1014 (Fletcher, J., dissenting); *see also* AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 67-75 (1992) [hereinafter BRUTALITY UNCHECKED]; AMERICAN CIVIL LIBERTIES UNION, DETENTION OF UNDOCUMENTED ALIENS 56-60 (1990) [hereinafter ACLU DETENTION REPORT] (describing the prevailing detention conditions for juvenile alien detainees). In 1987, the INS entered into a consent decree obligating it to transfer all juveniles detained more than 72 hours following arrest to "shelter care" facilities that meet certain minimum standards. Memorandum of Understanding re: Compromise of Class Action: Conditions of Detention, *Flores* (No. 85-4544-RJK) (on file with author). In later litigation, the Supreme Court refused to entertain arguments that the detention conditions for juveniles were not in compliance with this decree. *Flores*, 113 S. Ct. at 1446-47. *But see* Brief for Southwest Refugee Project, Immigrant Legal Resource Center, and the Mexican American Legal Defense and Educational Fund, As Amici Curiae in Support of Respondents, *Flores* (No. 91-905) (citing evidence of noncompliance).

week; his family and attorney were not kept informed of his whereabouts. One local holding cell was called *un vaso de agua* by INS detainees because a glass of water was all they were served for dinner.[5]

Manuel Valdés, a former Cuban diplomat seeking asylum in the United States, was confined by the INS at a detention facility run by Esmor Correctional Services Corporation in Elizabeth, New Jersey.[6] Reports of unfit detention conditions and mistreatment of detainees at Esmor were largely ignored until a riot erupted in June 1995.[7] An INS investigation, concluded after the riot, painted a shocking picture of private detention run amok at the Esmor facility, where untrained guards routinely abused detainees without oversight or intervention from INS officials.[8]

Flores, Imasuen, and Valdés are among the thousands of persons detained by the INS each year. The detention of aliens[9] has sparked litigation and controversy for over a decade. Our shifting policies to-

5. These allegations appear in the complaint filed in a class-action lawsuit challenging detention conditions for aliens held in the Chicago area. Imasuen v. Moyer, No. 91-C-5425, 1991 U.S. Dist. LEXIS 1449 (N.D. Ill. Aug. 27, 1991); *see also* Lizette Alvarez & Lisa Getter, *Detention: The Failed Deterrent*, MIAMI HERALD, Dec. 16, 1993, at 1A [hereinafter Alvarez & Gutter, *Detention: The Failed Deterrent*] (noting in Chicago the "INS kept detainees in barren holding cells, where they got no exercise and, at times, no food"). See *infra* notes 177-180 and accompanying text for additional discussion of the *Imasuen* litigation.

6. Robert Hanley, *Refugees Fled Woes of the World to Find Themselves Locked up in Elizabeth*, N.Y. TIMES, June 21, 1995, at A15; *see also* John Sullivan & Matthew Purdy, *In Corrections Business, Shrewdness Pays*, N.Y. TIMES, July 23, 1995, at A1; John Sullivan, *Violence at Immigration Jail Exposes Troubled Company*, N.Y. TIMES, June 20, 1995, at A1 (describing history of Esmor Correctional Services Corporation and the Elizabeth, N.J. immigration detention facility).

7. *See* Maureen Castellano, *INS to Probe Conditions at Private Jail for Aliens*, N.J. L.J., June 12, 1995, at 5 (reporting claims of inhumane treatment prompted the INS to investigate the conditions at Esmor; the investigation commenced one week before the riot); Elizabeth Llorente, *Shackled in the Land of Hope: Asylum Seekers Held for Months*, BERGEN REC., Mar. 12, 1995, at A1 (noting complaints about abuse, inedible food, and shackling of detainees).

8. *See* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, INTERIM REPORT: THE ELIZABETH, NEW JERSEY CONTRACT DETENTION FACILITY OPERATED BY ESMOR INC. (1995) [hereinafter INS ESMOR REPORT] (on file with author). The conditions at the Esmor facility, and the results of the INS investigation, are summarized *infra* notes 155-165 and accompanying text.

9. I use the term "alien" with some reluctance because of the pejorative connotations that this word sometimes carries. *See* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, UTAH L. REV. 279, 281 n.5 (1991); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303. Nevertheless, this is the term used in immigration law to describe "any person not a citizen or national of the United States." Immigration and Nationality Act of 1952 [hereinafter INA], Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163, 166, 8 U.S.C. § 1101(a)(3) (1994).

ward Haitians and Cubans seeking refuge in the United States have been at the center of this debate.[10] Most of the lawsuits filed on behalf of INS detainees have sought to secure their release or parole into the United States. Behind this first-order desire for release, however, lurks another important concern: the conditions of confinement at the detention facilities and jails where the INS detains aliens.

Alien detainees are not protected by the Eighth Amendment's prohibition against cruel and unusual punishment, as this provision applies only to prisoners incarcerated for criminal convictions.[11] Instead, aliens confined by the INS, like pretrial detainees awaiting criminal trials, must challenge the conditions of their confinement under the Due Process Clause of the Fifth Amendment.[12] Due process protection against inhumane conditions ought to be "at least as great as the Eighth Amendment protections available to a convicted prisoner."[13] For aliens seeking to enter the United States, however, any due process claim is fraught with uncertainty under the century-old "plenary power" doctrine that purports to place them "largely outside the mantle of the Due Process Clause of the Fifth Amendment."[14]

10. In the early 1980s, over 125,000 Cubans and several thousand Haitians seeking entry into the United States traveled in makeshift boats to Florida. Thousands were detained by the INS. *See infra* notes 70-71, 270 and accompanying text. The United States Coast Guard then began interdicting Haitians before they reached the United States shore. Haitian interdictees were, at various times, either returned to their country or held at "safe haven" camps at Guantanamo Naval Base in Cuba. *See generally* Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994) (describing litigation challenging the United States rapidly changing policy towards Haitians fleeing by boat). Cubans, on the other hand, were generally admitted to the United States until the summer of 1994, when they too were detained at Guantanamo. *See A Slow-Motion Mariel: Cubans (and Haitians) Take to Sea*, 71 INTERPRETER RELEASES 1091, 1091-92 (1994) (summarizing events leading to the recreation of detention camps on Guantanamo for Haitian and Cuban refugees).

11. Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977); Paul W. Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 321 (1987).

12. In *Bell v. Wolfish*, the Supreme Court concluded that pretrial detainees must pursue conditions claims under the Due Process Clause. 441 U.S. 520, 535 n.16 (1979). The Supreme Court has never considered the conditions claims of alien detainees, but lower courts have assumed that these claims are governed by the Due Process Clause. *See* Schmidt, *supra* note 11, at 321.

13. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983).

14. Garcia-Mir v. Meese, 788 F.2d 1446, 1450 (11th Cir.), *cert. denied sub nom.*, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986).

To someone uninitiated to the "constitutional oddity"[15] of immigration law, it may seem astonishing to suggest that aliens confined by the INS have no due process rights. Yet this suggestion has been raised time and again in leading immigration cases. The Supreme Court has staked out a role of extreme deference to the political branches' "plenary power" over immigration. This "hands off" approach dictated by the plenary power doctrine "smothers the entire field of immigration law so completely"[16] that it is unusual to find immigration cases that seriously consider constitutional claims asserted by aliens. Among the Court's most notorious plenary power decisions are those asserting that the Due Process Clause does not protect aliens seeking entry, even when they are detained within the United States.[17]

From its inception, however, the plenary power doctrine has existed alongside cases that provide constitutional protection to aliens when their claims do not relate to immigration matters. Outside of immigration law, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[18] Thus, aliens enjoy a full panoply of constitutional rights in criminal proceedings[19] and generally are protected from invidious discrimination by state and local authorities.[20]

This "aliens' rights" tradition contrasts sharply with the plenary power doctrine. The competing traditions are typically explained as operating in two completely separate realms. The plenary power doctrine controls "immigration law," usually defined as "the body of law governing the admission and expulsion of aliens."[21] The aliens' rights

15. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 [hereinafter Legomsky, *Immigration Law and Plenary Power*].

16. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 574 (1990) [hereinafter Motomura, *Phantom Norms*].

17. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); *see infra* notes 212-228.

18. Plyler v. Doe, 457 U.S. 202, 210 (1982).

19. Wong Wing v. United States, 163 U.S. 228, 238 (1896); United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (discussed *infra* notes 245-252 and accompanying text).

20. Graham v. Richardson, 403 U.S. 365, 371 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *But see infra* note 235 (discussing the "political function" exemption to this principle).

21. Motomura, *Phantom Norms*, *supra* note 16, at 547 (citing Legomsky, *Immigration Law and Plenary Power*, *supra* note 15, at 256).

tradition is said to operate outside of the realm of immigration law, when aliens bring claims that do not impinge on the "plenary" immigration power.[22] There are some notable cases withholding constitutional protection from aliens even when their claims fall outside of the immigration context.[23] Nevertheless, the aliens' rights tradition generally marks a domain where courts "t[ake] th[e] constitutional claims [of aliens] seriously, in contrast to the cavalier treatment of constitutional claims in immigration law."[24]

Only a handful of reported cases have decided the due process challenges to conditions of confinement suffered by alien detainees.[25] These cases reflect confusion over which of the two competing lines of cases—the plenary power doctrine or the aliens' rights tradition—should govern conditions claims. In *Lynch v. Cannatella*, for example, the Fifth Circuit correctly held that all alien detainees, regardless of

22. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) [hereinafter Aleinikoff, *Federal Regulation*] ("Outside the immigration process, aliens receive most of the constitutional protections afforded citizens."); *see also* Motomura, *Phantom Norms*, *supra* note 16, at 565; Legomsky, *Immigration Law and Plenary Power*, *supra* note 15, at 256. For a critique of this "inside/outside" immigration law dichotomy, see Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059-65 (1994).

23. *See Verdugo-Urquidez*, 494 U.S. at 274-75 (holding Fourth Amendment does not apply to a search by American officials of the Mexican residence of a Mexican citizen detained within the United States); Mathews v. Diaz, 426 U.S. 67, 83-84 (1976) (upholding federal law denying Medicare benefits to certain noncitizens); Flemming v. Nestor, 363 U.S. 603, 621 (1960) (upholding provision of the Social Security Act cutting off benefits to aliens deported for past membership in the Communist party). These cases are discussed *infra* notes 245-263 and accompanying text.

24. Motomura, *Phantom Norms*, *supra* note 16, at 566.

25. *See* Adras v. Nelson, 917 F.2d 1552, 1558 (11th Cir. 1990); Medina v. O'Neill, 838 F.2d 800 (5th Cir. 1988), *rev'g* 589 F. Supp. 1028 (S.D. Tex. 1984); Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987); Ortega v. Rowe, 796 F.2d 765 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated per settlement agreement). In several other cases, courts have alluded to conditions problems at alien detention facilities, or have addressed conditions claims only tangentially in the midst of litigation challenging other aspects of INS detention. *See, e.g.*, Orantes-Hernandez v. Smith, 541 F. Supp. 351, 363-64 (C.D. Cal. 1982) (conditions of confinement discussed in conjunction with litigation seeking to end coerced departure of Salvadoran detainees); Vigile v. Sava, 535 F. Supp. 1002, 1007 (S.D.N.Y.) and Bertrand v. Sava, 535 F. Supp. 1020, 1030-31 (S.D.N.Y.) (companion cases) (noting Haitian detainees were incarcerated in "substandard" and "inadequate" facilities that constituted a "harsh environment"), *rev'd*, 684 F.2d 204, 207 n.6 (2d Cir. 1982) (characterizing district court's comments about conditions of confinement as "unsubstantiated conclusory statements made in passing"). In addition, several suits brought by alien detainees challenging conditions of confinement have settled without reported opinion. *See, e.g.*, Reno v. Flores, 113 S. Ct. 1439, 1446-47 (1993) (refusing to consider arguments that conditions were oppressive for juvenile alien detainees because similar claims had previously been settled by consent decree); Stipulation of Agreement, Lam v. Smith, No. CV-79-0795 (E.D.N.Y. filed Dec. 24, 1981).

their status under immigration law, can claim due process protection to challenge mistreatment at the hands of their captors.[26] The *Lynch* court rejected the defendants' plenary power argument that aliens on the threshold of entry "possess no constitutional rights," and instead relied upon cases from the aliens' rights tradition.[27]

Later cases, however, have suggested alien detainees who have not been formally admitted into the country have only a limited constitutional right to be free from "malicious infliction of cruel treatment" or "gross physical abuse."[28] Ironically, this standard is derived from language in *Lynch*,[29] but it is inconsistent with *Lynch*'s promise of full constitutional protection for aliens challenging conditions of confinement. No other government detainees—not even incarcerated criminals—must show "malicious infliction of cruel treatment" or "gross physical abuse" to state a constitutional violation.[30] This higher constitutional hurdle sometimes imposed on alien detainees reflects the silent influence of the plenary power doctrine on cases that should be governed by the aliens' rights tradition.

Part I of this Article provides an overview of immigration detention. Part II documents serious conditions problems at the detention facilities and state and local jails where aliens are incarcerated. Part III explains how recent litigation over the due process rights of Haitian and Cuban detainees helped to define a boundary for the plenary power doctrine, which was used by the *Lynch* court to uphold aliens' due process right to challenge the conditions of their confinement. Part IV shows how *Lynch* has been undermined by later cases that implicitly deny full due process protection to some alien detainees seeking to challenge the conditions of their confinement, much as the plenary power doctrine defeats the constitutional claims of aliens within the immigration law realm. In Part V, I conclude that courts must guard against the infiltration of the plenary power doctrine into the aliens' rights tradition, even though such vigilance might some-

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26. *Lynch*, 810 F.2d at 1374.

27. *Id.* at 1372-73. *Accord Haitian Ctrs. Council*, 823 F. Supp at 1042.

28. Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988); Adras v. Nelson, 917 F.2d 1552, 1559-60 (11th Cir. 1990); *see also* Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1442, *amended on other grounds*, 997 F.2d 1122 (5th Cir. 1993); Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990); Xiao v. Reno, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993) (dicta reiterating the "malicious infliction of cruel treatment" or "gross physical abuse" standard).

29. *Lynch*, 810 F.2d at 1374.

30. *See* Wilson v. Seiter, 501 U.S. 294, 305-06 (1991); Hudson v. McMillian, 112 S. Ct. 995, 999-1001 (1992) (rejecting similar standards as too stringent for Eighth Amendment claims); *infra* notes 330-340 and accompanying text.

times reinforce the isolation of immigration law from constitutional values.

The analysis in this Article is animated by two overarching goals. First, I want to focus attention on the conditions of confinement imposed upon alien detainees. The INS has an appalling history of detaining aliens in substandard and sometimes inhumane conditions. Despite recent efforts to improve conditions at some facilities, the INS continues to use detention to deter large influxes of potential refugees, a practice that has repeatedly created serious conditions problems. Moreover, as the recent investigation of the Esmor facility has shown, the INS also confines aliens in state and local jails and private facilities without adequate oversight. It is not surprising, then, that the agency remains embroiled in litigation over conditions of confinement.[31]

Second, I use conditions cases as a lens to examine the relationship between the plenary power doctrine and the aliens' rights tradition. Many leading commentators have argued that the plenary power doctrine should be discarded;[32] some have suggested that the doctrine is already in a state of decline.[33] But they typically have examined the impact of the plenary power doctrine only within the realm of immigration law, when aliens press claims to enter or remain in the United States.[34] From this narrow perspective, the aliens' rights tradition, to

31. Two class action lawsuits now pending in California challenge the conditions of confinement suffered by alien detainees. Central Am. Refugee Ctr. v. Reno, No. CV 93-4162-MRP (C.D. Cal. June 23, 1995) (order certifying class of aliens detained in the INS Los Angeles district); Kattola v. Reno, No. CV 94-4859-KN (C.D. Cal. filed May 3, 1995) (nationwide class of aliens confined by the INS in facilities across the country).

32. *See, e.g.*, Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 972 [hereinafter, Scaperlanda, *Polishing the Tarnished Golden Door*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627-28 (1992) [hereinafter Motomura, *Procedural Surrogates*]; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 863 (1987).

33. For a reassessment of the current state of the plenary power doctrine, see Stephen T. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) [hereinafter Legomsky, *Ten More Years*]; *see also* Motomura, *Phantom Norms*, *supra* note 16, at 549; Legomsky, *Immigration Law and Plenary Power*, *supra* note 15, at 306-07; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 90 (1984) [hereinafter Schuck, *Transformation of Immigration Law*].

34. *See, e.g.*, Legomsky, *Immigration Law and Plenary Power*, *supra* note 15, at 256 (stating that immigration law "is the sphere in which the plenary power doctrine has operated"). *But see* Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 32, at 994-97 (arguing the plenary power doctrine has expanded beyond immigration claims to government benefits and search and seizure decisions); Bosniak, *supra* note 22, at 1065 (sug-

the extent that it is considered at all, is seen as a destabilizing force, a source of constitutional protection for aliens that may contribute to the eventual demise of the plenary power doctrine.[35] This analysis suggests that the boundary separating the plenary power doctrine from the aliens' rights tradition is slowly eroding, but only to allow the one-way migration of constitutional values into immigration law.

I contend, however, that the border between the plenary power doctrine and the aliens' rights tradition is in fact porous in both directions. And unfortunately the spillover across this porous border does not necessarily weaken the plenary power doctrine. Cases adjudicating alien detainees' challenges to conditions of confinement demonstrate how the plenary power doctrine infects decisions outside the realm of immigration law, and works to undermine the aliens' rights tradition.

I. Overview of Immigration Detention

A. Statutory Framework

The INS enjoys broad authority to detain aliens seeking entry into or awaiting expulsion from the United States. The statutory framework for detention, as does all of immigration law, distinguishes between "excludable" and "deportable" aliens. "Excludable aliens" are those seeking to enter the United States.[36] First-time applicants for admission and resident aliens seeking to re-enter the country after a trip abroad fall into this category.[37]

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gesting the traditional analysis "tends to seriously overstate the status of aliens on the so-called 'outside'").

35. Hiroshi Motomura, for example, has argued that the aliens' rights tradition has influenced the development of immigration law by "provid[ing] the normative foundation for results at odds with strict application of the plenary power doctrine." Motomura, *Phantom Norms*, *supra* note 16, at 566-67. Alex Aleinikoff has made a similar argument, asserting that "cases recognizing constitutional protection for aliens outside the immigration context provide critical purchase for reorienting" immigration law. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 19 (1990) [hereinafter Aleinikoff, *Membership and the Constitution*].

36. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 23 (4th ed. 1994); DAVID A. MARTIN, FEDERAL JUDICIARY CTR., MAJOR ISSUES IN IMMIGRATION LAW 9-11 (1987).

37. The Immigration and Nationality Act defines an "entry" as "*any* coming of an alien into the United States, from a foreign port or place or from an outlying possession." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994) (emphasis added). Under this definition, aliens lawfully residing within the United States who are returning from a trip abroad are subject to exclusion proceedings. *See* Landon v. Plasencia, 459 U.S. 21, 27-32 (1982). Lawful permanent residents, however, returning from a trip that was "innocent, casual, and brief" and not meant to be "meaningfully interruptive" of their status are deemed not to

The Immigration and Nationality Act ("INA") provides that "every alien" seeking entry "who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land *shall be detained* for further inquiry."[38] This provision appears to make detention mandatory for all aliens subject to exclusion proceedings. But a different section of the INA modifies this language by granting the Attorney General discretion to "parole" rather than detain any alien applying for admission "for emergent reasons or reasons deemed strictly in the public interest."[39] Parole allows aliens the freedom to live inside the United States while they await a final determination of their application to enter.[40]

Neither parole nor detention within the United States counts as an "entry" under immigration law.[41] Instead, under a legal fiction sometimes known as the "entry doctrine," excludable aliens are "treated as if stopped at the border," even when they are paroled or confined within the United States.[42]

The INA also provides for the detention of "deportable aliens" who, unlike excludable aliens, have already entered the United States.[43] Aliens lawfully admitted into the country can be deported for the reasons delineated in INA section 241(a).[44] Aliens who evade inspection or surreptitiously cross the border are also subject to deportation proceedings.[45] Deportable aliens may be confined pending an administrative hearing to determine their right to remain in the

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have made a new "entry," and thus can escape application of the exclusion grounds. Rosenberg v. Fleuti, 374 U.S. 449, 461-62 (1963); *see* KURZBAN, *supra* note 36, at 25-27.

38. INA § 235(b), 8 U.S.C. § 1225(b) (1994) (emphasis added). The "further inquiry" refers to exclusion proceedings before a "special inquiry officer," now known as an immigration judge, to determine whether an alien will be admitted to the United States. *Id.*; 8 C.F.R. § 235.6 (1994). Excludable aliens can be refused permission to enter for the reasons listed in INA § 212(a), 8 U.S.C. § 1182(a) (1994).

39. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1994). The regulations governing the exercise of this parole power, codified at 8 C.F.R. § 212.5 (1994), are discussed *infra* notes 74-75.

40. *See* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 64.01[1] (Rev. ed. 1995).

41. *See* INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1994) (parole "shall not be regarded as admission"); Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (neither detention for over a year in the United States nor release on parole constitutes an "entry").

42. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

43. *See* KURZBAN, *supra* note 36, at 23.

44. 8 U.S.C. § 1251(a) (1994).

45. *See generally* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 474-86 (3d ed. 1995) [hereinafter ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY]; *In re* Phelisna, 551 F. Supp. 960, 962-63 (E.D.N.Y. 1982).

country,[46] or after a final deportation order has been issued while arrangements are being made for their departure.[47]

Excludable aliens generally have fewer statutory and constitutional rights than deportable aliens.[48] This pattern holds true for aliens in detention. Deportable aliens usually are not detained unless they await expulsion for criminal conduct.[49] Aliens who are confined by the INS pending a deportation hearing are entitled to petition an immigration judge for a redetermination of their custody status.[50] Those who are subject to a final order of deportation can be held no longer than six months.[51] Additionally, aliens in deportation proceedings are entitled to claim procedural due process protection.[52] This has enabled detained deportable aliens to challenge INS practices that may impinge upon their constitutional right to fair proceedings.[53]

Excludable alien detainees do not enjoy the same protections. Detained excludable aliens, unlike deportable aliens, are not entitled

46. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (1994).

47. INA § 242(c), 8 U.S.C. § 1252(c) (1994).

48. *See* ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 475-76 (delineating differences between deportation and exclusion proceedings).

49. *See* 3 GORDON ET AL., *supra* note 40, § 72.03[4][c][iii] (during the pendency of deportation proceedings, aliens are detained only when found to be a threat to national security or a poor bail risk); *id.* § 72.08[1][b][ii] (power to order detention after final order of deportation is rarely used). The detention of aliens convicted of crimes, in order to expedite their deportation, is now a top priority for the INS. *See infra* notes 82-94 and accompanying text.

50. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (1994); 8 C.F.R. §§ 3.19, 242.2(d) (1994); *see* 3 GORDON ET AL., *supra* note 40, § 72.03 [4][c][iii]; Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347 (1987).

51. INA § 242(c), 8 U.S.C. § 1252(c) (1994); KURZBAN, *supra* note 36, at 136-37. Courts have allowed the INS to detain aliens subject to a final order of deportation for longer than six months when the alien is deemed responsible for the delay. *See* Balogun v. INS, 9 F.3d 347, 351 (5th Cir. 1993) (delay allegedly caused because alien hampered INS attempts to obtain necessary travel documents); Doherty v. Thornburgh, 943 F.2d 204, 211-12 (2d Cir. 1991) (delay caused by detainee-initiated litigation).

52. Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 100-01 (1903). *See* Motomura, *Procedural Surrogates*, *supra* note 32, at 1628 (arguing this procedural due process "exception" to the plenary power doctrine often serves as a surrogate for substantive judicial review).

53. *See* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 385-87 (C.D. Cal. 1982) (preliminary injunction issued on behalf of Salvadorans detained pending deportation proceedings, providing inter alia that the INS must inform class members of their right to apply for asylum and end various practices that limited detainees' access to their attorneys); Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1511-14 (C.D. Cal. 1988), *aff'd sub nom.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (permanent injunction to same effect); Nunez v. Boldin, 537 F. Supp. 578, 587 (S.D. Tex. 1982), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982) (similar injunction); *see also* Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001 (1987) [hereinafter *INS Transfer Policy*].

to petition an immigration judge for release.[54] Instead, the decision to parole excludable aliens is delegated exclusively to INS officials,[55] and courts are very reluctant to overturn a denial of parole.[56] Moreover, the INA does not impose any time limit on the detention of excludable aliens; several courts have held that they can be detained indefinitely.[57] Indeed, as will be discussed below, excludable aliens are sometimes said to have "virtually no constitutional rights," even when they are detained within the United States.[58]

Excludable and deportable alien detainees are alike, however, in one important respect: they are not being incarcerated as punishment for a crime. Instead, they are held in civil confinement pending the outcome of administrative proceedings.[59] Alien detainees generally can secure their own release if they are willing to waive their right to a hearing and to abandon any claim to enter into or remain in the country. Deportable aliens can, in most circumstances, cut short their detention stay through a procedure known as "voluntary departure."[60] Excludable aliens are sometimes permitted to withdraw their applica-

54. *See* 2 GORDON ET AL., *supra* note 40, § 63.05[3], at 63-36.

55. The Attorney General's authority to grant parole is delegated to the INS district director in charge of the port of entry. *See id.* § 64.01[3]; 8 C.F.R. § 212.5 (1994).

56. *See* Amanullah v. Nelson, 811 F.2d 1, 9-11 (1st Cir. 1987) (district director's decision to deny parole must be upheld whenever supported by a "facially legitimate and bona fide reason"); Garcia-Mir v. Smith, 766 F.2d 1478, 1485 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986) (applying same standard); Bertrand v. Sava, 684 F.2d 204, 211-13 (2d Cir. 1982) (exercise of broad discretionary power to deny parole must be viewed as "presumptively legitimate and bona fide in the absence of strong proof to the contrary").

57. *E.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1445 (9th Cir. 1995); Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441-43, *amended*, 997 F.2d 1122 (5th Cir. 1993); Fernandez-Roque v. Smith, 734 F.2d 576, 582 (11th Cir. 1984). *Contra* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981).

58. Garcia-Mir v. Meese, 788 F.2d 1446, 1449 (11th Cir. 1986); *see infra* notes 212-228 (discussing *Knauff* and *Mezei* decisions).

59. Schmidt, *supra* note 11, at 305 (noting "the INS stands alone in its authority to incarcerate individuals who neither have been charged with, nor have been convicted of, crimes").

60. INA §§ 242(b), 244(e), 8 U.S.C. §§ 1252(b), 1254(e) (1994); *see also* 8 C.F.R. § 242.5 (1994); ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 640-43. To be eligible for voluntary departure after the commencement of deportation proceedings, aliens must be persons of "good moral character" as defined in INA § 101(f), 8 U.S.C. § 1101(4) (1994); *see* KURZBAN, *supra* note 36, at 552-53.

tions to enter.[61] Aliens who elect these options are released from custody on the condition they leave the United States.[62]

B. The Expanded INS Detention Mission

Voluntary departure helps to allocate scarce detention resources.[63] Historically, voluntary departure operated to limit most immigration detention to short-term confinement. Most alien detainees were residents of Mexico who waived their right to a hearing and were held only a few days until transportation to the border could be arranged.[64]

Over the past two decades, however, immigration detention has been radically transformed. The average length of confinement for alien detainees has increased dramatically.[65] For many aliens, immigration detention is no longer a brief stop on the way to the border. Instead, alien detainees from all over the world[66] are now held for months, or even years, waiting for a determination of their immigra-

61. The INA does not explicitly provide an equivalent to voluntary departure for excludable aliens. But excludable aliens may be allowed to withdraw their application to enter if they agree to depart from the United States. Once exclusion proceedings have commenced, an immigration judge will not grant permission to withdraw unless the INS consents. *See* KURZBAN, *supra* note 36, at 67-68, 72.

62. The term "voluntary departure" is sometimes a misnomer. The desire to escape detention can be a powerful incentive to waive even valid claims; some detainees have been coerced to accept this option. *See* Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1494-97, 1505-06 (C.D. Cal. 1988), *aff'd sub nom.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (enjoining a widespread practice of coercing detainees from El Salvador to accept voluntary departure). In addition, many aliens who elect this option do not depart, and those who leave may quickly return across the border. *See* ALEINIKOFF ET AL, IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 640-43; Lizette Alvarez & Lisa Getter, *Inability to deport has fueled the influx*, MIAMI HERALD, Dec. 14, 1993, at 1A.

63. ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 640.

64. In 1975, for example, 92% of alien detainees were residents of Mexico. Eighty-four percent of detained aliens elected voluntary departure. INS detainees spent an average of 3.2 days in confinement. IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, FEDERAL DETENTION PLAN 1993-1997 15 (1992) [hereinafter FIVE-YEAR DETENTION PLAN].

65. Aliens confined at major INS detention facilities were being detained an average of 54 days in 1991. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/GGD-92-85, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 26 (1992) [hereinafter GAO DETENTION REPORT] (field study of immigration detention). The INS reported alien detainees from countries other than Mexico ("OTMs" in INS parlance) averaged 41 days in detention in fiscal year 1991. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 16.

66. The GAO field study found 73% of aliens confined in INS detention facilities were from countries other than Mexico. Alien detainees came from 92 different countries. GAO DETENTION REPORT, supra, note 65, at 24. INS statistics for the fiscal year 1991 concluded that OTMs comprised 48% of the total immigration detention population, as compared to less than 8% in 1975. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 16.

tion status.[67] This transformation has been fueled by unprecedented world events and a significant expansion of the INS detention mission.

The first major shift in immigration detention policy was a controversial decision to detain virtually all excludable aliens who arrive without valid entry documents.[68] From 1954 until 1981, the vast majority of excludable aliens were paroled pending a final determination of their immigration status.[69] This policy was abandoned, however, in response to an unprecedented influx of Cubans and Haitians seeking refuge in the United States. The sudden arrival of over 125,000 Cubans in the Mariel boatlift of 1980,[70] coupled with a smaller contingent of Haitians fleeing the Duvalier regime,[71] put enormous strain on a fledgling system created to allow persons fleeing persecution in their home countries to apply for asylum within the United States.[72] Re-

67. *See* ACLU DETENTION REPORT, *supra* note 4, at 6-7 (at the end of 1984, 1053 aliens had been held in INS detention for over 30 days; 407 had been confined for three months or more); GAO DETENTION REPORT, supra note 65, at 29 (170 excludable aliens had been in detention over 90 days, some for almost two years); Alisa Solomon, *The Prison on Varick Street*, N.Y. TIMES, June 11, 1994, at A21 (Ethiopian Jew who claimed well-founded fear of persecution in his home country had been detained by the INS for over four years).

68. I use the term "entry documents" to refer to the visas aliens receive while still abroad and present upon initial inspection to enter the United States. Technically, however, a visa does not convey the right to enter the country. *See* INA § 221(h), 8 U.S.C. § 1201(h) (1994). Aliens with valid visas may still be excluded if they fall within the grounds listed in INA § 212(a), 8 U.S.C. § 1182(a) (1994).

69. *See* Leng May Ma v. Barber, 357 U.S. 185, 190 (1958); Louis v. Nelson, 544 F. Supp. 973, 980 n.18 (S.D. Fla. 1982), *aff'd in part and rev'd in part sub nom.*, Jean v. Nelson, 711 F.2d 1455 (11th Cir.), *vacated*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985); *see also* 1 GORDON ET AL., *supra* note 40, § 8.09[1], at 8-18.

70. *See* Mariel Cuban Parole Determinations, 52 Fed. Reg. 48, 799-802 (1987); *Louis*, 544 F. Supp. at 978-81.

71. *See* ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 446-47; GAO DETENTION REPORT, *supra* note 65, at 36 (noting while few Haitians attempted to enter the United States in the 1970s, 15,093 Haitian migrants arrived in 1980).

72. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, formally codified the United States' historical practice of resettling refugees, with some significant changes. First, INA § 243(h), which had granted the Attorney General *discretion* to withhold deportation for persons who would face physical persecution upon return to their home country, was transformed into a *mandatory* obligation, consistent with the international law principle of *nonrefoulement.* 8 U.S.C. § 1253(h) (1994). Second, the 1980 Act for the first time created a discretionary "asylum" status for persons already in the United States who could show they were unable or unwilling to return to their home country due to "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA §§ 101(a)(42)(A), 208(a), 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1994). Within weeks after the Refugee Act was signed by President Carter, the Mariel boatlift had begun. Schuck, *Transformation of Immigration Law*, *supra* note 33, at 40. For an influential critique of the asylum adjudication system, which also explains the background of the Refugee Act of 1980, see David A. Martin,

sponding to a perception that America had "lost control of [its] borders," the Attorney General in July 1981 renounced the practice of parole and announced a new policy of detaining undocumented excludable aliens.[73]

That policy is now codified in regulations declaring that detention is the rule for aliens seeking entry who arrive without a valid visa.[74] The "parole exception" is reserved for a few narrow categories, including aliens with serious medical conditions, pregnant women, and juveniles who can be released to specific adult relatives.[75] Critics contend these regulations unfairly penalize refugees fleeing persecution in their home country, and are inconsistent with the right to apply for asylum created by the Refugee Act.[76] But the INS defends the detention of undocumented excludable aliens as a necessary deterrent to stem the flow of "illegal" immigration into the United States.[77]

The detention policy has been implemented, however, in the midst of an unanticipated volume of asylum seekers that has completely overwhelmed the asylum adjudication system. Civil war and strife in Central America, political unrest and violence in Haiti, and similar crises across the globe have sparked an enormous demand for asylum.[78] Unfortunately, the system is also clogged with frivolous

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Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 PA. L. REV. 1247, 1257-66 (1990).

73. *Administration's Proposals on Immigration and Refugee Policy: Joint Hearing Before the House Subcomm. on Immigration, Refugees, and International Law and the Senate Subcomm. on Immigration and Refugee Policy*, 97th Cong., 1st Sess. 6 (1981), *quoted in Louis*, 544 F. Supp. at 980; *see also* Amanullah v. Nelson, 811 F.2d 1, 4-8 (1st Cir. 1987); Arthur C. Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 356-60 (1987).

74. 8 C.F.R. § 235.3(b) (1994). The regulations distinguish between two categories of aliens seeking entry. Excludable aliens who appear with fraudulent documents or no documents, or who arrive "at a place other than a designated port of entry, *shall* be detained." *Id.* (emphasis added). In contrast, aliens who arrive at a proper place with facially valid documents but who appear inadmissible for other reasons may be detained or paroled, depending on whether they are a security risk or appear likely to abscond. 8 C.F.R. § 235.3(c); *see* 1 GORDON ET AL., *supra* note 40, § 8.09[1].

75. 8 C.F.R. § 212(5)(a) (1994); *see* KURZBAN, *supra* note 36, at 61-62.

76. *See* Helton, *supra* note 73, at 367-81; Deborah M. Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297, 316-28 (1983); Maurice A. Roberts, *Some Thoughts on the Wanton Detention of Aliens*, 5 GEO. IMMIGR. L.J. 225, 235 (1991).

77. This justification was repeatedly expressed when the new detention policy was adopted. *See Louis*, 544 F. Supp. at 979-80. The INS still contends the detention of undocumented excludable aliens is a deterrent to "illegal" entry, although the policy has been applied inconsistently and often toward persons with colorable asylum claims. *See* GAO DETENTION REPORT, *supra* note 65, at 35-37; *infra* note 110.

78. During the 1970s, the INS received asylum applications at a rate of between 1900 and 5800 per year. ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 767. The number of applications skyrocketed in the 1980s. In fiscal year 1981, 61,568

claims.[79] By December 1994, asylum officers faced a staggering backlog of over 425,000 asylum applications awaiting adjudication.[80] The long wait for asylum processing has contributed to the trend toward longer detention stays for alien detainees.[81]

The second component of the expanded INS detention mission is a new emphasis on detaining "criminal aliens." The INS uses this term to describe aliens who are subject to exclusion or deportation proceedings because they have been convicted of a crime.[82] The

asylum cases were filed with the INS. The number of affirmative applications jumped to 101,679 in fiscal year 1989. SARAH IGNATIUS, HARVARD LAW SCH., AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 31-32 (1993) [hereinafter NATIONAL ASYLUM STUDY PROJECT FINAL REPORT] (tabulating INS statistics) (on file with author). In fiscal year 1994, 147,605 asylum applications were filed with the INS. *INS Finalizes Asylum Reform Regulations*, 71 INTERPRETER RELEASES 1577, 1578 (1994) [hereinafter *INS Finalizes Regulations*].

79. The INS has been receiving an increasing number of "boilerplate" applications—forms with minimal information virtually identical to hundreds of others. Some of these are prepared by unscrupulous "immigration consultants" who take advantage of unsuspecting aliens. Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 LOY. L.A. INT'L & COMP. L.J. 43, 70 (1994); *see also INS Finalizes Regulations*, *supra* note 78, at 1578 (INS official estimates that 25% of new asylum applications may be "abusive"); Lizette Alvarez & Lisa Getter, *U.S. ill-equipped to weed out opportunists*, MIAMI HERALD, Dec. 15, 1993, at 1A, 22A. *But see* NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, supra note 78, at 70 (INS erroneously returning unique applications as "boilerplate"). In the past, asylum applicants could obtain a work permit upon filing their application, so long as their claim was not "frivolous." 8 C.F.R. § 208.7 (1994). The vast majority of requests for work authorization filed with asylum claims were approved. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, supra note 78, at 67 (91% approved in fiscal year 1992; 83% in fiscal year 1993). The INS recently promulgated new regulations providing asylum applicants will not be eligible to apply for work authorization until 150 days after their applications are filed. 59 Fed. Reg. 62,284, 62,299 (1994) (to be codified at 8 C.F.R. § 208.7)

80. *INS Finalizes Regulations*, *supra* note 78; *see also* NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 78, at 35-36 (318,800 pending cases after 11 months of fiscal year 1993). The new asylum regulations are intended to reduce this backlog by streamlining the asylum adjudication process. *INS Finalizes Regulations*, *supra* note 78, at 1579. *But see* Deborah Anker, *The Mischaracterized Asylum Crisis: Realities Behind Proposed Reforms*, 9 LOY. L.A. INT'L COMP. L.J. 29 (1994) (arguing misperceptions about the asylum adjudication system have fueled these procedural reforms.) The INS also plans to add more asylum officers and immigration judges to speed claims processing. Steven Greenhouse, *U.S. Moves to Halt Abuse in Political Asylum Program*, N.Y. TIMES, Dec. 3, 1994, at A8.

81. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 15-17; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, PUB. NO. I-92-18, INSPECTION OF DETENTION FACILITIES IN THE IMMIGRATION AND NATURALIZATION SERVICE 12-14 (1993) [hereinafter INSPECTOR GENERAL DETENTION REPORT].

82. The criminal grounds for exclusion, listed in INA § 212(a)(2), include crimes "involving moral turpitude," drug offenses, and multiple criminal convictions for which the alien was sentenced to five or more years confinement. 8 U.S.C. § 1182(a)(2) (1994). Aliens who have already entered the United States can also be deported for criminal of-

"criminal alien" label has gained widespread usage but can be somewhat misleading. Some "criminal aliens" have been convicted of relatively minor offenses, and would shed the "criminal" classification upon completion of their prison term if not for their alien status. Others are lawful permanent residents who have lived in the United States for years.[83]

Aliens who are incarcerated for criminal offenses generally cannot be deported until after they are released from prison.[84] Nevertheless, the INS can initiate exclusion or deportation proceedings while criminal aliens are still imprisoned. Recent amendments to the INA require the INS to "begin any deportation proceedings as expeditiously as possible after the date of the conviction."[85] The INS is au-

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fenses; the deportation grounds are similar but not identical to the criminal exclusion grounds. *See* INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1994). In addition, entry without inspection is a separate ground for deportation. INA § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B) (1994). Thus, alien offenders who have entered illegally can be deported even if their offense is not included among the specific criminal grounds for deportation.

83. IMMIGRANTS' RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, JUSTICE DETAINED: CONDITIONS AT THE VARICK STREET IMMIGRATION DETENTION CENTER 4 (1993) [hereinafter VARICK STREET REPORT]; *see also* Deborah Sontag, *Porous Deportation System Gives Criminals Little to Fear*, N.Y. TIMES, Sept. 13, 1994, at A1; Alisa Solomon, *Yearning to Breathe Free*, VILLAGE VOICE, Aug. 8, 1995 at 25.

84. INA § 242(h), 8 U.S.C. § 1252(h) (1994). The United States has treaties with 34 countries providing for the voluntary transfer of alien prisoners to their home countries. But very few transfers are accomplished under these treaties. From 1987 to February 1991, only 1385 federal prisoners were returned to their home countries. *Criminal Aliens: Hearings on H.R. 723, H.R. 1067, H.R. 1279, H.R. 1459, H.R. 1496, H.R. 2041, H.R. 2438, H.R. 2730, H.R. 2993, H.R. 3302, H.R. 3320 (Tit. IV), H.R. 3860 (Tits. II, V, VI), H.R. 3812, and H. Con. Res. 47 Before the Subcomm. on International Law, Immigration, and Refugees of the House Judiciary Comm.*, 103d Cong., 1st Sess. 169 (1994) (testimony of Kathleen M. Hawk, Director, Federal Bureau of Prisons); *see also* Danielle Starkey, *Deporting illegal aliens convicted of felonies*, CAL. J., Oct. 1, 1993 (only seven California prisoners transferred to Mexico from 1988-1993); U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 161-62 (1994) (1994 report to Congress) (recommending increased use of treaty transfer provisions). The INS and the State of Florida have instituted a pilot program under which imprisoned deportable aliens "receive[ ] clemency from prison terms in their homelands in exchange for agreeing to be deported and never to return, and to waive any pending legal challenge." *24 Criminal Aliens in Florida Deported to Free Prison Space*, N.Y. TIMES, June 30, 1994, at A20.

85. INA § 242(i), 8 U.S.C. §1252(i) (1994). The INS created its Institutional Hearing Program ("IHP") to fulfill this statutory mandate. Under this program, some deportation hearings are conducted on-site at prisons, while aliens are incarcerated. Other alien prisoners are sent to the Oakdale, La. detention facility during the last six months of their prison term for expedited deportation hearings. *See generally Removal of Criminal and Illegal Aliens: Oversight Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.* (Mar. 25, 1995), *available in* LEXIS, Legis Library, Cngtst File [hereinafter *Criminal Aliens Oversight Hearing*, Mar. 25, 1995] (testimony of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) (explaining IHP program); IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, IMMIGRA-

thorized to file a detainer to inform prison officials when an incarcerated alien is under investigation for possible deportation. Aliens subject to a detainer are taken directly into INS custody after completing their prison term.[86]

Until recently, the INS seldom deported criminal aliens immediately after their release from prison. Indeed, the agency had no way to identify aliens who had been convicted of a crime.[87] Those criminal aliens who were subject to deportation proceedings frequently were not detained, and many failed to appear for their hearings.[88]

Members of Congress, expressing outrage at this failure to deport criminal aliens, have recently catapulted this issue to the top of the agency's agenda.[89] Congress has passed several amendments to the

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TION ACT OF 1990 REPORT ON CRIMINAL ALIENS 6-7 (1992) [hereinafter INS CRIMINAL ALIENS REPORT] (report to Congress). There are mixed reports on whether the IHP proceedings provide adequate due process protection to deportable aliens. *Compare* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/GGD-90-79, CRIMINAL ALIENS: PRISON DEPORTATION HEARINGS INCLUDE OPPORTUNITIES TO CONTEST DEPORTATION 9 (1990) (concluding immigration judges at IHP hearings took necessary steps to inform aliens of their rights provided by law) *with* Jessica Ladd, *Deported to Oakdale: A Due Process Analysis of Hearings for Criminal Aliens*, IMMIGR. NEWSL. (National Immigration Project of the Nat'l Lawyers Guild, Boston, Mass.), Spring 1990, at 1 (noting serious deficiencies in deportation proceedings at Oakdale, La., aggravated by the fact that Oakdale's remote location makes it virtually impossible for detainees to obtain legal representation).

86. 8 C.F.R. § 242.2(a) (1994); *see* KURZBAN, supra note 36, at 142-144; Orozco v. INS, 911 F.2d 539, 541 n.2 (11th Cir. 1990).

87. *See* INS CRIMINAL ALIENS REPORT, *supra* note 85, at 4, 7 (noting difficulties the INS has faced in identifying criminal aliens for deportation, and conceding that "many criminal aliens are unknown to the INS, even though convicted and incarcerated"); U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/IMTEC-90-75, INFORMATION MANAGEMENT: IMMIGRATION AND NATURALIZATION SERVICE LACKS READY ACCESS TO ESSENTIAL DATA 4 (1990) (concluding incomplete and inaccurate information has hindered criminal alien deportation); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-3, CRIMINAL ALIENS: INS' ENFORCEMENT ACTIVITIES 17-30 (1987) (stating "[n]o one knows how many deportable criminal aliens exist").

88. *See generally* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 48, 104th Cong., 1st Sess. 2, 23-24 (1995) [hereinafter SENATE CRIMINAL ALIENS REPORT] (through 1992, nearly 11,000 criminal aliens convicted of aggravated felonies failed to appear for deportation hearings); *see also* Lisa Getter & Lizette Alvarez, *Kicking out criminals*, MIAMI HERALD, Dec. 12, 1993, at 19A; Sontag, *supra* note 83, at A1.

89. The Immigration Act of 1990 required the INS to file a report with Congress documenting its efforts to increase deportation of criminal aliens. Pub. L. No. 101-649, § 510, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1251 (1994)); *see* INS CRIMINAL ALIENS REPORT, *supra* note 85. Since then, the INS criminal alien strategy has been the subject of numerous congressional oversight hearings. *See, e.g.*, *Criminal Aliens Oversight Hearing*, Mar. 25, 1995, *supra* note 85; *Criminal Alien Legislation: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Judiciary Comm.* (Feb. 23, 1994), *available in* LEXIS, Legis Library, Cngtst File; *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov-*

INA designed to ensure more criminal aliens are deported.[90] Among these is a requirement that the INS take all excludable and deportable aliens who have been convicted of an "aggravated felony" into custody immediately upon their release from prison.[91] Excludable aliens who have committed aggravated felonies can be paroled from immigration detention only when their home country will not accept their return and the Attorney General has determined they are not dangerous.[92] Deportable aggravated felons can be released only if they are "lawfully admitted aliens" who can demonstrate they are not a threat to the community and are likely to appear before any scheduled hearing.[93] The population of criminal aliens in immigration detention has swelled under these provisions.[94]

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ernmental Affairs, 103d Cong., 1st Sess. 147 (1993). Congress generally has been critical of the INS criminal alien initiatives. *See* SENATE CRIMINAL ALIENS REPORT, *supra* note 88 (contending INS system of identifying and deporting criminal aliens is in disarray, despite recent reforms); *see also* Ronald J. Ostrow, *INS Assailed for Not Deporting Immigrant Criminals*, L.A. TIMES, Nov. 10, 1993, at A13.

90. For a summary of the recent "piecemeal" amendments to the INA impacting criminal aliens, see SENATE CRIMINAL ALIENS REPORT, *supra* note 88, at 10-12. Additional reforms are now pending before Congress, as part of antiterrorism and immigration reform legislation. *See generally House Republicans Introduce Bill to Rewrite Immigration Policy*, 72 INTERPRETER RELEASES 829 (1995) [hereinafter *Republicans Introduce Bill]*; *Senate Approves Anti-Terrorism Legislation, House Likely to Follow*, 72 INTERPRETER RELEASES 834 (1995).

91. INA § 236(e)(1), 8 U.S.C. § 1227(e)(1) (1994); INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (1994). An "aggravated felony" includes, inter alia, murder, drug and firearms trafficking offenses, money laundering, and any crime of violence or theft offense for which the term of imprisonment imposed is at least five years. INA § 101(43), 8 U.S.C. § 1101(43) (1994). The category of crimes that constitutes an "aggravated felony" is rapidly expanding as Congress continues to add new crimes to the statutory definition of this term. *See* Kenneth H. Stern, *The Noose Tightens: Trends and Developments in the Immigration Consequences of Criminal Convictions*, *in* 2 1995-96 Immigration and Nationality Law Handbook 305, 308 (R. Patrick Murphy et al. eds., 1995) (noting "[i]t is almost impossible to keep track of the rapidly expanding list of aggravated felonies").

92. INA §§ 236(e)(2), 243(g), 8 U.S.C. §§ 1227(e)(2), 1253(g) (1994).

93. INA § 242(a)(2)(A)-(B), 8 U.S.C. § 1252(a)(2)(A)-(B) (1994). This provision has been interpreted to establish a rebuttable presumption *against* release of lawfully admitted deportable aggravated felons. *See* 3 GORDON ET AL., *supra* note 40, § 72.03[4][c][ii]. These recent amendments have created a new category of INS detainees, "non-releasable aggravated felons," who, like the Marielito Cubans discussed *infra* notes 270-273 and accompanying text, face indefinite detention because their home country refuses to accept their return. While the number of "lifers" confined by the INS under these provisions is relatively small, a growing number of countries have refused to allow the return of their nationals who have been convicted of serious crimes within the United States. *See* Dianne Klein, *INS "Lifers" Locked Up in Limbo*, L.A. TIMES, Feb. 6, 1994, at A1.

94. GAO DETENTION REPORT, *supra* note 65, at 17.

C. Mission Impossible: Actual Detention Operations

The INS cannot, however, confine all aliens who have been convicted of a crime (or even all who have been convicted of an aggravated felony) pending deportation or exclusion proceedings.[95] The same is true for undocumented excludable aliens, who receive parole far more frequently than the governing regulations seem to contemplate.[96] In reality, the INS has the capacity to confine only a very small fraction of the aliens targeted for "mandatory" detention.

The INS now operates nine immigration detention facilities, euphemistically known as "Service Processing Centers (SPCs)."[97] An additional detention center run jointly by the INS and the Bureau of Prisons is used primarily to confine criminal aliens.[98] The INS also makes extensive use of "contract" facilities operated by private, for-profit corporations.[99] In addition, the INS obtains about twenty-five percent of its total detention capacity through ad hoc arrangements with state and local jails.[100]

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95. SENATE CRIMINAL ALIENS REPORT, *supra* note 88, at 2, 23-24; *see also* GAO DETENTION REPORT; *supra* note 65, at 41; Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5, at 1A.

96. *See* Susan Freinkel, *INS May Loosen Detention Policies*, TEX. LAWYER, Feb. 17, 1992 at 4 (INS representative Duke Austin concedes the INS "can't do what the policy is—to detain exclusion cases"); *MacNeil Lehrer NewsHour* (PBS television broadcast, June 7, 1993), *available in* NEXIS, News Library, Script File (INS district director in New York explaining in June 1993, only 3-4% of inadmissible aliens arriving at Kennedy airport were detained).

97. INS Service Processing Centers are located in Aguadilla, P.R.; Boston, Mass.; El Centro, Cal.; El Paso, Tex.; Florence, Ariz.; Miami, Fla.; New York, N.Y.; Los Fresnos, Tex.; and San Pedro, Cal. The nine SPCs have a combined rated capacity of 2549 detention beds. *Containing Costs of Incarceration of Federal Prisoners and Detainees: Hearing Before the House Appropriations Comm.* (Apr. 6, 1995), *available in* LEXIS, Legis Library, Cngtst File [hereinafter *Hearing on Containing Costs*] (testimony of James A. Puleo, Executive Associate Commissioner, Immigration and Naturalization Service); *see also* IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, DETENTION AND DEPORTATION PROGRAM 3 (June 29, 1994) [hereinafter INS DETENTION BRIEFING PAPER] (citing a rated capacity of 2238 beds) (on file with author).

98. The INS uses approximately half of the one thousand beds at the joint INS/BOP (Bureau of Prisons) facility in Oakdale, La. to house criminal aliens. INS DETENTION BRIEFING PAPER, *supra* note 97, at 3.

99. In April 1995, the INS relied on five contract facilities with a total capacity of 1095 beds. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo). An additional contract facility in Eloy, Ariz. contains 500 beds devoted to criminal aliens. *Id.*

100. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 15, 22-23. As of March 31, 1995, about 1700 beds were being used in state and local jails. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo).

On average, the INS detains between five and six thousand excludable and deportable aliens on any given day.[101] This reflects a significant increase in detention capacity over the last two decades.[102] The agency plans to expand even more aggressively in coming years; it has proposed a forty-eight percent increase in detention bedspace for fiscal year 1996.[103]

Nevertheless, despite this rapid expansion of detention capacity, the INS reports it has been detaining significantly *fewer* aliens in recent years.[104] This anomaly is largely the result of the trend toward longer detention stays.[105] While the INS has more detention space, it now incarcerates fewer aliens because those already confined are held for much longer periods.[106]

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101. The Detention and Deportation Division's daily population count of alien detainees fluctuated between five and six thousand for most of fiscal year 1994. Letter from Joan C. Higgins, Assistant Commissioner, Detention and Deportation Division, Immigration and Naturalization Service, to Margaret H. Taylor, Wake Forest University School of Law (n.d.), at Attachment 2 (Detention Space Status Report-FY 94) (on file with author). The daily population count rose slightly in September and October of 1994. *Id.* On October 3, 1994, for example, the INS detained 4794 aliens in its SPCs and contract facilities, and 1842 in state and local jails, for a total of 6636 detainees. *Id.* at Attachment 1 (Daily Population Report, Oct. 3, 1994); *see also* FIVE-YEAR DETENTION PLAN, *supra* note 64, at 16 (citing detention capacity of 6600 beds for fiscal year 1990); GAO DETENTION REPORT, *supra* note 65, at 37 (6259 beds for fiscal year 1992). These figures do not include all of the Marielito Cubans in INS custody, many of whom are confined in state and local jails and Bureau of Prison facilities. *See infra* notes 270-273 and accompanying text. Nor do they count the Haitian and Cuban migrants (at times as many as 40,000) who were detained in "safe haven" camps run by the U.S. military at Guantanamo Bay, Cuba in 1994. *See infra* note 142.

102. The INS has more than tripled its detention capacity since 1975 by building five SPCs and opening its contract facilities. *See* FIVE-YEAR DETENTION PLAN, *supra* note 64, at 15 (noting in 1975 the INS operated four SPCs with a total capacity of 1382 beds).

103. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo) (noting funds requested for fiscal year 1996 will provide an additional 1636 detention beds in state, local, and contract facilities, as well as 976 beds in two new INS SPCs). Some bills now pending before Congress would also authorize the INS to use closed military bases to detain aliens awaiting exclusion or deportation proceedings. *See, e.g., Republicans Introduce Bill*, *supra* note 90, at 830.

104. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 15. In fiscal year 1982, the INS detained 229,135 aliens, representing approximately 24% of total apprehensions. Although the number of apprehensions increased over the next several years, both the real number and percentage of apprehended aliens who were detained dropped dramatically. In fiscal year 1991, for example, seven percent (approximately 84,000) of the 1,200,000 aliens apprehended by the INS were detained. *Id.* In fiscal year 1994 (most recent figures available), the INS detained a total of 81,707 aliens. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo).

105. *See supra* note 65.

106. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 15-16. In fiscal year 1982, 92% of the aliens apprehended by the INS were from Mexico. Mexican detainees averaged less than two days in detention, while detainees from other countries were held an average of

Ironically, the new "mandates" to detain virtually all undocumented excludable aliens and aggravated felons may actually reinforce this trend. These mandates, by prohibiting the release of many detained aliens, help to create a population of long-term detainees who languish in confinement.[107] Moreover, the governing statutes and regulations do not allocate scarce detention resources in a sensible manner. While the INS purports to have a "uniform detention policy nationwide," field officers must exercise discretion to choose among competing detention priorities.[108] The result is a detention system "so random, so illogical, so arbitrary that it fails in [many] crucial missions."[109]

The controversial practice of detaining asylum seekers provides one illustration. Until recently, the INS had no guidelines to focus its detention resources on what would seem to be the logical targets: those who abuse the asylum system by filing frivolous applications. Instead, the agency sometimes used detention as a deterrent, singling out applicants from a particular country or region, such as Haiti or Central America, who often presented credible asylum claims.[110] For

19 days. *Id.* at 15. In fiscal year 1991, 48% of detained aliens were from countries other than Mexico; their average detention stay was 41 days. *Id.* at 16. The INS reports this increase in the average length of stay "has, of necessity, had a major adverse impact on INS detention operations." *Id.*

107. *See* Klein, *supra* note 93, at A1 (noting potential growth of the "non-releasable aggravated felon" population).

108. In July 1993, the Acting Commissioner of the INS issued a memorandum to field officers setting detention priorities, stating "[i]t is our policy to have a uniform detention policy nationwide." The memorandum noted "statutory requirements mandat[e] compulsory INS detention for some types of cases," but at the same time instructed District Directors and Chief Border Patrol Agents to "*ensure that appropriate discretion is exercised* in making custody determinations." The memorandum also explicitly conceded that "we can only apply these detention guidelines within available INS resources." Memorandum from Chris Sale, Acting Commissioner, Immigration and Naturalization Service to District Directors, et al. (July 23, 1993) (emphasis added) (on file with author). A recent investigative report on INS detention concluded "in reality, there is no [single] detention policy. There are as many policies as there are INS bosses." Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5, at 24A; *see also* Solomon, *supra* note 83, at 25.

109. Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5, at 1A.

110. *See* GAO DETENTION REPORT, supra note 65, at 35-37 (discussing "three efforts to reduce the flow of aliens entering illegally," which targeted aliens from Haiti, Central America, and China for detention); *see also* Louis v. Nelson, 544 F. Supp. 973, 979-84 (S.D. Fla. 1982) (describing new policy of detaining undocumented excludable aliens, which was intended to "regain control" of our borders and had a disproportionate impact on Haitians); Roberto Suro, *U.S. Is Renewing Border Detentions*, N.Y. TIMES, Feb. 8, 1990, at A22 (describing detention efforts in Texas to deter asylum applicants from Central America); Roberto Suro, *Despite U.S. Pledge, Detainees Languish*, WASH. POST, Dec. 20, 1994, at A3 (detention of Chinese intended to deter alien smuggling). These ad hoc detention efforts have been controversial because they have targeted aliens fleeing countries in turmoil, who

those not subject to these targeted detention efforts, only pure luck, the availability of local detention space, and the unchecked discretion of low-level officials would separate those asylum seekers who received parole from those who suffered in long-term detention.[111]

In 1992, the INS finally began interviewing detained asylum seekers to identify those with potentially valid claims for possible parole.[112] But this policy has faltered from a lack of commitment and resources.[113] Even under the current asylum pre-screening program, some applicants with a well-founded fear of persecution in their home country remain incarcerated, while others who have abused the sys-

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often had good reason to seek protection in the United States, even if they did not fulfill the statutory definition of a refugee. *See generally* Helton, *supra* note 73, at 373-76. The use of detention as an ad hoc deterrent has also raised the specter of national origin discrimination. A panel of the Eleventh Circuit concluded that Haitians were detained because of invidious discrimination. But this decision was vacated by the en banc court on the ground that the Haitians, as excludable aliens, could not claim equal protection under the Constitution. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *vacated*, 727 F.2d 957 (11th Cir. 1984).

111. *See* Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5, at 1A (describing several instances where excludable aliens were caught by seemingly arbitrary detention decisions); Diego Ribadeneira, *35 Haitians Detained in Texas*, BOSTON GLOBE, Oct. 1, 1994, at 28 (Haitians detained in Miami, where detention space was short, received parole; others similarly situated, who had previously been transferred to less-crowded facilities in Texas, would not be released); Letter from Lory Rosenberg, Director, American Immigration Law Foundation, to Dennis DeLeon, Human Rights Commissioner, City of New York 2 (Aug. 31, 1993) (citing statement by INS official in New York that aliens arriving at Kennedy Airport were confined on a "first come, first detained" basis; those arriving after spaces were filled for the day received parole) (on file with author).

112. Memorandum from Gene McNary, Commissioner, Immigration and Naturalization Service to All Regional Administrators, et al. (Apr. 20, 1992), *reprinted in* 69 INTERPRETER RELEASES 526 (1992).

113. *See generally* LAWYERS COMM. FOR HUMAN RIGHTS, DETENTION OF REFUGEES: PROBLEMS IN IMPLEMENTATION OF THE ASYLUM PRE-SCREENING OFFICER PROGRAM (1994) [hereinafter LAWYERS COMMITTEE REPORT ON APSO PROGRAM]. This study, constituting the first comprehensive assessment of the so-called "APSO" program, concluded:

> [t]he program has achieved a principal objective by identifying at least some detained asylum applicants for whom detention is not warranted [,] thereby increasing the INS's ability to use its detention capability in a rational manner. However, over two years since the APSO program went into [e]ffect, there remain serious problems with its enforcement.

Id. at 9-10. Among these problems are district directors who have disregarded APSO officer recommendations to parole detained aliens and some evidence of national origin discrimination in parole decisions. *Id.* at 10-12. The report recommended the APSO program be codified in regulations. *Id.* at 18.

The INS has not issued a formal evaluation of the APSO program, but noted in its report on the Esmor detention facility in New Jersey that "a stronger APSO program" would "help the INS to make wise use of detention space while addressing humanitarian concerns raised by extended detention of credible asylum seekers." INS ESMOR REPORT, *supra* note 8, at 54. The INS Esmor report also concluded "[a] stronger APSO program will require an additional dedication of resources." *Id.*

tem (along with some aliens who have committed serious crimes) go free.[114]

There is little hope the INS can outgrow these problems by continuing to expand its detention capacity, although the agency now seems to be pursuing this rather dubious course.[115] Many critics of immigration detention have noted the grave humanitarian concerns raised by the "wanton detention of aliens," even apart from the serious problems with conditions of confinement.[116] The current program of aggressive expansion ignores these pressing issues, and still will not provide sufficient capacity to meet the "mandatory" detention requirements of the existing legal framework.[117] Moreover, some immigration reform proposals now pending before Congress would, if enacted, only increase the strain on the immigration detention system by adding additional unrealistic mandates.[118]

In the meantime, the INS remains overwhelmed by its impossible detention mission. And thousands of aliens face long-term confinement in the custody of an agency stretched beyond its capacity.

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114. *See generally* Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5, at 1A; LAWYERS COMMITTEE REPORT ON APSO PROGRAM, *supra* note 113, at 12, 14; SENATE CRIMINAL ALIENS REPORT, *supra* note 88, at 2, 23-24.

115. *See supra* note 103 (noting INS plans to expand its detention capacity by 48% in fiscal year 1996).

116. The phrase is borrowed from Maurice Roberts, *supra* note 76; *see also* Helton, *supra* note 73; Schuck, *Transformation of Immigration Law*, *supra* note 33, at 68-69 (noting "[t]he prolonged incarceration of thousands of aliens, most of them innocent victims of severe economic deprivation, indiscriminate armed conflict, or intense political persecution has seared the judicial conscience as few events since the civil rights struggle of the 1950s and 1960s have done"). Professor Schuck's assessment of the judicial response to the claims of detained aliens was written before initial court victories were vacated, reversed, or undermined by later decisions. More recently, most INS detention practices (including the refusal to grant parole to excludable aliens who present pressing humanitarian concerns) have been upheld by courts employing a very deferential standard of review. *See supra* note 57; *infra* note 284.

117. Available estimates suggest, for example, approximately 20% of the federal and state prison population—about 120,000 prisoners—are deportable aliens. These figures do not take into account the increasing flow of alien offenders into the prison system. GAO DETENTION REPORT, *supra* note 65, at 38 (estimating over 72,000 aliens will be arrested yearly on felony drug charges). Even taking into account various reforms, such as the IHP and APSO programs, the GAO investigation of immigration detention concluded "[w]e do not believe that it is feasible to expand the INS detention capabilities sufficiently to solve the [agency's enforcement] problems." *Id.* at 43.

118. *Efforts to Control Illegal Immigration: Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.* (June 29, 1995), *available in* LEXIS, Legis Library, Cngtst File (testimony of T. Alexander Aleinikoff, Executive Associate Commissioner, Immigration and Naturalization Service) (noting provisions in pending legislation requiring even more immigration detention would tie up INS detention space and could prevent the INS from detaining criminal aliens).

II. Conditions of Confinement at Immigration Detention Facilities

The rapid expansion of immigration detention predictably has resulted in serious problems with conditions of confinement. Although alien detainees are held in civil confinement, they sometimes are incarcerated "under conditions as severe as we apply to our worst criminals."[119] INS detention facilities, like prisons and jails across the country, too frequently do not meet minimum requirements for humane detention.

Some alien detainees also face unusually harsh conditions stemming from practices unique to immigration detention. First, deplorable conditions of confinement have resulted whenever the United States has detained large groups of potential refugees for prolonged periods to deter their fellow countrymen from seeking asylum in the United States.[120] Second, the INS confines aliens in state and local jails or private facilities without adequate oversight. Some detainees confined in these "non-Service" facilities have been subjected to abuse or inhumane detention conditions because the INS has looked the other way or has failed to make even the most basic arrangements for their care.

This section summarizes the disturbing INS record of confining aliens in substandard detention facilities,[121] focusing on conditions of

119. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981) (describing prevailing conditions for the Marielitos detained in overcrowded prisons in the early 1980s).

120. As was the case with the Marielito Cubans, a brief period of detention may be necessary to screen and process a large, and sometimes unexpected, volume of aliens seeking entry. But the confinement conditions suffered by Haitians, Central Americans, and the most recent wave of Cubans—groups held for much longer periods, in part to deter other asylum seekers from their home countries—demonstrate the need to develop a more humane response to so-called "immigration emergencies." *See infra* note 197 and accompanying text; *see also* U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 84, at 162-74.

121. Unfortunately, the personal stories of would-be immigrants detained by the INS cannot be captured in this overview of conditions problems. Justice Brennan reminds us "it is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary [persons] suffer" when they are confined in facilities that do not meet constitutional standards. Rhodes v. Chapman, 452 U.S. 337, 354 n.3 (Brennan, J., concurring) (quoting Ruiz v. Estelle, 503 F. Supp 1265, 1391 (S.D. Tex. 1980)). Several advocacy organizations (and most recently the INS itself) have issued reports that together provide a comprehensive picture of the poignant plight of INS detainees. *See* INS ESMOR REPORT, *supra* note 8; WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, A CRY FOR HELP: CHINESE WOMEN IN INS DETENTION (1995) [hereinafter CHINESE WOMEN IN DETENTION]; VARICK STREET REPORT, *supra* note 83; BRUTALITY UNCHECKED, *supra* note 4, at 54-66; MINNESOTA LAWYERS INT'L HUMAN RIGHTS & PHYSICIANS FOR HUMAN RIGHTS, HIDDEN FROM VIEW: HUMAN RIGHTS CONDITIONS IN THE KROME DETENTION

confinement and physical abuse suffered by both excludable and deportable aliens.[122] I do not contend that every example in this section unquestionably violates the Constitution, but rather that many colorable due process claims arise from the conditions of immigration detention.[123] A survey of the available evidence demonstrates serious conditions problems are endemic at alien detention facilities.[124]

CENTER (1991) [hereinafter KROME REPORT]; ACLU DETENTION REPORT, *supra* note 4; COORDINATING COMM. ON IMMIGRATION LAW, LIVES ON THE LINE: SEEKING ASYLUM IN SOUTH TEXAS 10-13 (1989) [hereinafter LIVES ON THE LINE]; LAWYERS COMM. FOR HUMAN RIGHTS, THE DETENTION OF ASYLUM SEEKERS IN THE UNITED STATES: A CRUEL AND QUESTIONABLE POLICY 22-28 (1989) [hereinafter DETENTION OF ASYLUM SEEKERS]; Lynn Marcus, *Detention Conditions in INS and Contract Facilities in the Southwest*, IMMIGR. NEWSL. (National Immigration Project of the Nat'l Lawyers Guild, Boston, Mass.), Winter 1989, at 1. For first-person stories of individual INS detainees, see LAWYERS COMM. FOR HUMAN RIGHTS & HELSINKI WATCH, MOTHER OF EXILES (1986) [hereinafter MOTHER OF EXILES]; *see also* Solomon, *supra* note 83, at 25.

122. For the most part, excludable and deportable aliens are confined together, and thus subject to the same conditions of confinement. *See* Schmidt, *supra* note 11, at 321. Mariel Cubans, however, usually are not detained in INS SPCs or contract facilities, but instead are confined in prisons or jails. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 18-19. In addition, Haitians and Cubans who were interdicted and detained at "safe haven" camps at Guantanamo Naval Base inhabited a legal limbo. The government successfully argued that they could not claim even the limited statutory and constitutional protections afforded to "excludable" aliens because they were held outside the territory of the United States. *See* Cuban Am. Bar Assoc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995). *But see* Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1041-45, (E.D.N.Y. 1993) (Haitians detained at Guantanamo can claim due process protection) (vacated per settlement agreement).

123. Under the Due Process Clause, noncriminal detainees are protected from any condition or practice amounting to "punishment" of the detainees. Bell v. Wolfish, 441 U.S. 520, 535 (1979). But allegations of mere negligence do not state a due process violation. Davidson v. Cannon, 474 U.S. 327 (1985). Courts are divided over how to apply the *Bell v. Wolfish* test, and in particular over its relationship to Eighth Amendment precedent. The Fifth Circuit, for example, has recently granted rehearing en banc for two cases raising this issue. *See infra* note 308. In general, "deliberate indifference" has become the touchstone used by many courts to assess due process claims of inadequate medical care or inhumane conditions of confinement. 1 MICHAEL MUSHLIN, RIGHTS OF PRISONERS, § 3.01, at 132 (2d ed. 1993).

This article does not undertake the task of sorting out the complex law governing due process conditions claims. Instead, I invoke the general pronouncements of *Bell,* which (with two notable exceptions discussed *infra* note 308) are still cited consistently as controlling precedent. I also draw comparisons to Eighth Amendment standards, in part because the Eighth Amendment has received considerably more attention in the Supreme Court. *See infra* notes 330-339. These well-settled touchstones are used to ascertain whether alien detainees have received a full measure of constitutional protection when challenging the conditions of their confinement. I conclude that sometimes they have not. *See infra* notes 303-328, 341-343 and accompanying text.

124. The conditions problems documented in this section are exacerbated by a related, but no less important, concern: detainees' lack of access to legal counsel. Most INS detention facilities are located in remote areas, where there is little legal help available. *See* GAO DETENTION REPORT, *supra* note 65, at 46-47; Roshan v. Smith, 615 F. Supp. 901

A. Overview of Conditions at INS Detention Facilities

The confinement conditions at INS detention facilities vary, both over time and among facilities.[125] The overall picture, however, is one of harsh detention conditions similar to—and sometimes worse than—the prevailing conditions for criminal incarceration.[126]

Severe overcrowding is a recurring source of many conditions problems. Overcrowding persisted at INS detention facilities through-

(D.D.C. 1985) (dismissing complaint seeking to enjoin construction of remote facility in Oakdale, La.). Moreover, various INS practices—from frequent transfers to restrictive visiting hours—have hampered detainees' ability to obtain legal representation. *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp 1488, 1509-11 (C.D. Cal. 1988); Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982); *INS Transfer Policy*, *supra* note 53. I will consider detained aliens' procedural due process challenges to these practices (as opposed to their substantive due process challenges to conditions of confinement) in a forthcoming article.

125. This section discusses detention conditions at facilities run by the INS, including the nine Service Processing Centers and the joint INS/BOP facility at Oakdale, La. I also refer on occasion to conditions at the "safe haven" camps at Guantanamo Naval Base, Cuba, which were used to hold Haitians and Cubans interdicted at sea. These camps were run by the United States military, not the INS. Nevertheless, the Guantanamo camps provide the most recent example of the deplorable conditions that have resulted whenever the United States undertakes a massive detention effort in order to deter an influx of asylum seekers. In essence, the Guantanamo camps exported offshore (and farther from public and judicial scrutiny) the same conditions problems which prevailed at detention facilities within the United States used to confine Haitians and Central Americans in the 1980s. *See infra* note 142 and accompanying text.

126. Numerous courts and scholars have compared the conditions of immigration detention to criminal imprisonment. *See, e.g.*, Rodriguez-Fernandez v. Williams, 654 F.2d 1382, 1385 (10th Cir. 1981) (Marielito Cubans confined in federal penitentiary); Helton, *supra* note 73, at 364 (conditions of immigration detention are "generally similar to prison conditions"); Schuck, *Transformation of Immigration Law*, *supra* note 33, at 28 n.149 ("Although the INS and the courts routinely employ the term 'detention' to describe the practice of holding aliens . . . the length of many detentions and the conditions of confinement suggest that the term 'imprisonment' more accurately depicts reality"). Others have used the analogy of concentration camps to describe immigration detention. Michael A. Olivas, *"Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 821-22 (1991) [hereinafter Olivas, *Breaking the Law*] (comparing the "shacks, tents, and makeshift housing" used to confine alien children to the Japanese concentration camps during World War II); Puerto Rico v. Muskie, 507 F. Supp. 1035, 1043 (D.P.R.), *vacated per consent agreement sub nom.*, Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981) ("In other times and circumstances the so-called refugee facility would be referred to as a concentration camp."). Several recent reports have noted that convicted criminals sometimes fare better than civil immigration detainees. *See* VARICK STREET REPORT, supra note 83, at 29 ("Detainees who have served time for criminal offenses uniformly report that conditions at Varick Street are significantly worse than in city or state prisons where their sentences were served."); Alisa Solomon, *supra* note 83; David Stout, *Detention Jail Called Worse than Prison*, N.Y. TIMES, June 19, 1995, at B5; *Prison vs. INS Detention: Convicts have More Perks*, MIAMI HERALD, Dec. 16, 1993, at 25A [hereinafter *Prison vs. INS*]; Willa Appel, *They Did No Crime, But They're Doing Time*, NEWSDAY, Dec. 6, 1993, at 39.

out the 1980s.[127] The INS contends this problem has abated recently, in part because of funding shortfalls.[128] Nevertheless, some detention facilities at times still operate above their rated capacities.[129] Overcrowding also arises as a serious concern whenever the INS undertakes a massive ad hoc detention effort.

Soon after the new policy of detaining undocumented excludable aliens was announced in 1981, for example, the Krome detention center in Florida was filled more than three times beyond its stated capacity.[130] Over a thousand detainees (mostly Haitians) were crowded into makeshift shelters without adequate sanitation or medical care.[131] Conditions at Krome were abhorrent during this period. Untreated sewage threatened to contaminate the drinking water.[132] The Florida Health Department cited Krome for numerous health and safety violations,[133] and the state sued to close the facility because of the severe overcrowding.[134]

Similar conditions prevailed when the INS announced a sudden crackdown to detain asylum applicants at facilities in South Texas in

127. *See, e.g.*, Letter from Greg Leo to Sharon Hase (n.d.), *in Bureau of Prisons and the U.S. Parole Commission: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 99th Cong., 1st Sess. 148 (1995) (noting on May 31, 1984, three out of six SPCs had detainee populations exceeding stated capacity); Laurie Becklund, *Conditions Assailed: Salvadoran Men Languish in INS Center in Desert*, L.A. TIMES, Feb. 20, 1985, at B1 (El Centro, Cal. overcrowded); Liz Balmaseda, *"New" Krome a Sign of Growth in Alien Detention*, MIAMI HERALD, Mar. 12, 1985, at 4D (Krome is often "packed beyond its capacity"); Helton, *supra* note 73, at 364 ("[o]vercrowding is a recurrent problem" at SPCs); Nunez v. Boldin, 537 F. Supp. 578, 583 (S.D. Tex. 1982) (noting "crowded conditions" at Los Fresnos, Tex. facility).

128. FIVE-YEAR DETENTION PLAN, supra note 64, at 17; INSPECTOR GENERAL DETENTION REPORT, *supra* note 81, at 4.

129. *See* INSPECTOR GENERAL DETENTION REPORT, *supra* note 81, at 6 (San Pedro SPC ran "far above" its established capacity from September 1991 to April 1992); VARICK STREET REPORT, *supra* note 83, at 30 (detainees regularly sleep in library so that Varick SPC can operate at its "maximum" capacity).

130. ACLU DETENTION REPORT, *supra* note 4, at 19 (1206 Haitians detained at Krome in July 1981 when the center had a capacity of 524).

131. *Id.*

132. *Id.*

133. *See* Colon v. Carter, 507 F. Supp. 1026, 1028 (D.P.R. 1980).

134. Graham v. Smith, No. 81-1487-Civ-JE (S.D. Fla. 1981), *cited in* Louis v. Nelson, 544 F. Supp 973, 983 n.27 (S.D. Fla. 1982). This lawsuit was apparently rendered moot when Congress, in an appropriations bill, directed the Attorney General to "exercise his best efforts" to ensure no more than 525 detainees were held at Krome after March 1, 1982. *See* Pub. L. No. 97-92, § 128, 95 Stat. 1198-99 (1981). A report prepared by a human rights monitoring group in 1991, however, found Krome's population still periodically exceeded 525. KROME REPORT, *supra* note 121, at 41.

1989 and 1990.[135] This detention policy was intended to stem the flow of potential refugees from Central America.[136] The Los Fresnos SPC, designed to hold 425 detainees, was crowded with an additional 2000 aliens.[137] Predictably, deplorable conditions resulted. Detainees confined at Los Fresnos were packed into tents without access to showers or clean clothes.[138] Other detainees, including children, were confined in hastily conceived, substandard temporary facilities.[139]

Both Krome and Los Fresnos braced for a similar situation in 1994, when thousands of Haitians and Cubans again fled by boat to the United States. Krome began operating well above its stated capacity.[140] Meanwhile, Los Fresnos again prepared to house thousands of detainees. Prior experience with the Central American detention effort prompted the governor of Texas to warn federal officials that "[a]ny plans to hold detainees in tents, without adequate infrastruc-

135. Suro, *U.S. Is Renewing Border Detentions*, *supra* note 110, at A22; Richard L. Berke, *Immigration Official Warns Aliens May be Held in Jail*, N.Y. TIMES, Mar. 11, 1989, at A9; Roberto Suro, *U.S. Set to Detain Refugees in Tents Beginning Today*, N.Y. TIMES, Feb. 21, 1989, at A1 [hereinafter Suro, *U.S. Set to Detain Refugees*].

136. The INS Commissioner stated "he hoped to send a message to people seeking asylum that they face certain detention under conditions that 'won't be like the Ritz Carlton.'" Suro, *U.S. Is Renewing Border Detentions*, *supra*, note 110. The South Texas detention effort broke with the usual practice of the INS in that both excludable aliens who arrived without documents and deportable aliens who had already entered the United States were detained when they applied for asylum. *See* Suro, *U.S. Set to Detain Refugees*, *supra* note 135. Noncriminal deportable aliens usually are not subject to detention unless they present an unusual risk of absconding. *See supra* note 49.

137. BRUTALITY UNCHECKED, *supra* note 4, at 58-59; *see also* Berke, *supra* note 135, at A9. The detention effort peaked at about 3600 detainees in the spring of 1989, and was suddenly renewed again in early 1990. Suro, *U.S. Is Renewing Border Detentions*, *supra* note 110, at A22.

138. BRUTALITY UNCHECKED, *supra* note 4, at 58-59; *see also* Robert E. Koulish, *Systemic Deterrence Against Prospective Asylum Seekers: A Study of the South Texas Immigration Project*, 19 N.Y.U. REV. L. & SOC. CHANGE 529, 539-43 (1992) (noting serious problems with conditions of confinement and "a pattern of physical mistreatment against detainees").

139. *See* LIVES ON THE LINE, *supra* note 121, at 11 (describing conditions at various temporary facilities in South Texas, including a Red Cross shelter where "quarters were very crowded and strongly ressembled [sic] the conditions in refugee camps abroad"); Olivas, *Breaking the Law*, *supra* note 126, at 821-22 (children held in "shacks, tents, and makeshift housing" had "virtually no access to health care or personal counseling").

140. In August 1994, Krome confined over 600 Cubans, including 107 minors who were detained despite INS guidelines stating juveniles should be released or transferred to a juvenile shelter within 72 hours. *Attorneys Sue to Free Children*, FT. LAUDERDALE SUN-SENTINEL, Aug. 31, 1994, at 8A. The INS began paroling children from Krome on humanitarian grounds in September 1994. Lisa Ocker & Berta Delgado, *37 Cubans Win Release From Krome*, FT. LAUDERDALE SUN-SENTINEL, Sept. 16, 1994, at 1A. On October 3, 1994, the INS Daily Population Report stated Krome had a rated capacity of 200 and held 445 detainees. Letter from Joan C. Higgins, *supra* note 101, at Attachment 1.

ture, security, health, or other fundamental services would be unacceptable."[141] The Haitians and Cubans soon were interdicted at sea and sent to Guantanamo Naval Base in Cuba to face similar conditions.[142]

Even when immigration detention facilities are not overcrowded, they frequently are understaffed.[143] A chronic shortage of INS detention officers, together with the routine use of poorly trained temporary employees and contract security guards, contributes to conditions problems.[144] At the El Centro SPC, for example, detainees were forced to spend fourteen hours a day outside in the desert sun, where

141. *See* James Pinkerton, *S. Texas Detention Camp Ready for Influx of Cubans*, HOUSTON CHRON., Aug. 26, 1994, at A12 (quoting letter from Texas Governor Ann Richards to INS Commissioner Doris Meissner, sent by Governor Richards in response to reports that Los Fresnos had contingency plans to house up to 3500 Cuban detainees). On October 3, 1994, the Los Fresnos facility, with a rated capacity of 350, held 674 detainees. Letter from Joan C. Higgins, *supra* note 101, at Attachment 1.

142. Conditions of confinement were a constant concern, and a source of unrest, when some 40,000 Haitians and Cubans were detained at "safe haven" camps at Guantanamo during 1994. When the camps were set up, no infrastructure was in place to provide for the basic human needs of thousands of detainees. *See, e.g.*, Mireya Navarro, *Resources Strained at Guantanamo Bay*, N.Y. TIMES, Sept. 4, at A12; Patrick J. Sloyan, *Guantanamo Alert: U.S. Fears Refugees Overtaxing Navy Base*, NEWSDAY, Aug. 25, 1994, at A5; Art Pine, *Expanding Refugee Housing Poses Risks*, L.A. TIMES, Aug. 26, 1994, at A17; Joseph B. Treaster, *Guantanamo: Refugee Camps Fill With Fury*, N.Y. TIMES, Aug. 30, 1994, at A1; *Some Haitians Flee Refugee-Camp Conditions*, SAN DIEGO TRIB., July 12, 1994, at A10. Even as the military worked to improve conditions, observers reported serious deficiencies in sanitation, food distribution, and medical care. *See* Armando Valladares, *Castro Outfoxes Clinton—and Guantanamo's Detainees Pay*, WALL ST. J., Jan. 27, 1995 at A11 (human rights organization reported "lice- and mange-ridden children . . . . insufficient water and milk for infants and . . . chronic medical conditions left untreated"); Navarro, *supra* (reporting problems with food distribution); Gordon Edes, *Canseco Makes A Huge Hit To Those Left on Cuban Base*, FT. LAUDERDALE SUN-SENTINEL, Oct. 10, 1994, at 1C (noting malnutrition and "woeful sanitary conditions"); *see also* Letter from Harold Hongju Koh, Director, The Orville H. Schell, Jr. Center for International Human Rights at Yale Law School, to T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service (July 19, 1994) (recommending numerous changes needed to improve conditions for Haitians at Guantanamo) (on file with author).

143. *See* James LeMoyne, *Florida Center Holding Aliens Is Under Inquiry*, N.Y. TIMES, May 16, 1990, at A16 (INS officials concede Krome operates "with only half the guards who are needed"); KROME REPORT, *supra* note 121, at 49; FIVE-YEAR DETENTION PLAN, *supra* note 64, at 17 ("an insufficient number of personnel" caused the INS to "underutilize" its SPCs).

144. The Varick Street facility has repeatedly been criticized for using contract guards who "time and again . . . have displayed an inability or unwillingness to perform their duties in a manner that will meet even minimal standards." VARICK STREET REPORT, *supra* note 83, at 13 (quoting internal report prepared by the New York INS district). Currently, about 40% of the detention officer staff at INS SPCs are contract employees. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo); *see also* KROME REPORT, *supra* note 121, at 49 (half of the Krome detention officers are temporary employees who do not undergo full INS training).

temperatures regularly exceeded one hundred degrees, simply because there were not enough security guards to supervise the air-conditioned barracks during the day.[145] And at the San Pedro SPC, the INS assigned male guards to the bathrooms and dorms of female detainees due to a shortage of female detention officers.[146]

Access to medical care is another frequently cited problem at alien detention facilities. The clinic facilities at most Service Processing Centers are generally deemed sufficient.[147] But adequate medical care is not always provided, particularly for pregnant women and detainees with psychiatric or chronic health problems.[148] Again, the problem is especially acute during ad hoc detention efforts. In 1993, a federal court condemned the deliberate refusal by the INS to provide appropriate treatment for HIV-positive Haitians detained at Guantanamo as "outrageous, callous, and reprehensible."[149]

145. Judith Cummings, *Aliens Staging Hunger Strike at Detention Camp*, N.Y. TIMES, June 4, 1985, at A12. This practice was discontinued in July 1985 after the INS hired additional contract guards. Detainees at El Centro are now allowed inside during parts of the day. ACLU DETENTION REPORT, *supra* note 4, at 99; BRUTALITY UNCHECKED, *supra* note 4, at 58 n.187. Other facilities in extremely hot climates, however, have also confined detainees outdoors during most of the day. ACLU DETENTION REPORT, *supra* note 4, at 107-08 (facilities in El Paso and Port Isabel, Tex.).

146. *Prison vs. INS Detention*, *supra* note 126, at 25A.

147. KROME REPORT, *supra* note 121, at 44-48 (Krome Public Health Service Clinic "is quite adequate and meets contemporary standards"); VARICK STREET REPORT, *supra* note 83, at 44 n.138 (independent consultant was "generally impressed" with the medical unit, but was unable to evaluate quality of treatment because site observers were not permitted to speak to obtain consent to review detainees' medical records). Five INS SPCs are medically accredited by the National Commission on Correctional Health Care. INS DETENTION BRIEFING PAPER, *supra* note 97, at 3.

148. *See* VARICK STREET REPORT, *supra* note 83, at 44-46 (detailing complaints about medical care); BRUTALITY UNCHECKED, *supra* note 4, at 59-60 (adequate care not provided for those with serious medical conditions; at most SPCs there are no psychiatric facilities); ACLU DETENTION REPORT, *supra* note 4, at 19 (pregnant women at Krome did not receive adequate nutrition). *See also* Solomon, *supra* note 83 (reporting HIV-positive detainee was unable to get prescription medicine, and detainee denied access to a walker was forced to drag himself across the floor); *Fleeing persecution, couple found new anguish*, MIAMI HERALD, Dec. 16, 1993, at 24A (San Pedro detainee did not receive adequate nutrition or medical care when she was pregnant; baby died after being born three months premature); Louis Dubose, *The Last Refuge: Asian Immigrants in Texas Jails*, TEX. OBSERVER, Apr. 24, 1992, at 1, 10 (Bayview doctors failed to diagnose AIDS-related opportunistic infection). Complaints about inadequate medical care at INS detention facilities have been raised in two class action lawsuits now pending in California. *See supra* note 31.

149. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1038 (E.D.N.Y. 1993) (vacated per settlement agreement). The INS conceded medical facilities at Guantanamo were not sufficient to provide treatment for AIDS patients, yet refused to consider the recommendations of camp doctors that certain HIV-positive detainees be medically evacuated to the United States. *Id.* at 1044.

The conditions at INS detention facilities are exacerbated by the increasingly longer detention stays for alien detainees. The INS Service Processing Centers were not designed for long-term confinement.[150] At the Varick Street SPC, for example, aliens are incarcerated for months or even years in crowded "dorm" rooms designed for detention of less than one week, with no opportunity to go outdoors.[151] Programmed activities routinely provided to prison inmates under generally accepted standards for long-term detention are not available to many INS detainees.[152] The "excruciating boredom"[153] and harsh conditions of immigration detention have triggered hunger strikes and riots by detainees attempting to call attention to their plight.[154]

B. Detention Conditions at "Non-Service" Facilities

One such uprising recently succeeded in bringing both INS and public scrutiny to the conditions of confinement at "contract" detention facilities. In June 1995, violence erupted at the alien detention facility run by Esmor Correctional Services Corporation in Elizabeth, New Jersey.[155] The riot was preceded by reports of abuse and inhu-

150. KROME REPORT, *supra* note 121, at 14; VARICK STREET REPORT, *supra* note 83, at 6; BRUTALITY UNCHECKED, *supra* note 4, at 57; DETENTION OF ASYLUM SEEKERS, *supra* note 121, at 22; *Prison vs. INS Detention*, *supra* note 126, at 25A.

151. VARICK STREET REPORT, supra note 83, at 11, 32-33. The lack of outdoor exercise has long been a source of tension at Varick Street. Both New York City and the State of New York correctional standards require outdoor exercise for their detention facilities. *See id.* at 33; *see also* Solomon, *supra* note 67, at A21 (detainee at Varick Street denied access to the outdoors for over four years).

152. When an independent consultant visited the Varick Street facility, for example, the exercise room was of "poor quality," lacking equipment the INS previously agreed to provide under a settlement decree. There were no educational programs and limited work opportunities. VARICK STREET REPORT, *supra* note 83, at 34-36. The consultant concluded Varick Street failed to comply with standards for detention articulated by the American Correctional Association and INS standards for the operation of detention facilities. *Id.* at 7. *But see* KROME REPORT, *supra* note 121, at 39 (Krome recreational facilities deemed "quite adequate" in 1991).

153. VARICK STREET REPORT, *supra* note 83, at 34 (detainees commonly mentioned "sleep" as their primary activity, and their chief complaint was "nothing to do").

154. *See, e.g.*, Larry Rohter, *"Processing" for Haitians Is Time in a Rural Prison*, N.Y. TIMES, June 21, 1992, at D18 (hunger strike at Krome); James Bennet, *Illegal Aliens and Guards Hurt in Melee*, N.Y. TIMES, Dec. 30, 1991, at B9 (at least four hunger strikes in six years to protest conditions at the Varick Street SPC); Cummings, *supra* note 145, at A12 (Central American detainees stage hunger strike to protest conditions at El Centro SPC); *Haitians at 2 Detention Sites Refusing to Eat and to Talk*, N.Y. TIMES, Dec. 25, 1981, at A8.

155. Richard Perez-Pena, *Aliens' Melee Closes Center in New Jersey*, N.Y. TIMES, June 19, 1995, at A1; Elizabeth Llorente et al., *Tinderbox Explodes in Elizabeth*, BERGEN REC., June 19, 1995, at A1.

mane treatment of detainees at the Esmor facility.[156] In response to this criticism, the INS had commenced an investigation of conditions at Esmor the week before the detainee disturbance; its investigation was expanded to include inquiry into the riot.[157] The INS cancelled its New Jersey contract with Esmor after completing its investigation.[158]

In the aftermath of the riot, both the press and INS issued reports highly critical of Esmor's New Jersey facility. The INS found the low-paid Esmor guards did not receive effective supervision or even the minimal training specified in its contract.[159] Detainees were frequently subject to harassment and physical abuse as "part of a systematic methodology . . . to control the general detainee population."[160] Theft of detainee property was widespread.[161] Unfortunately, Esmor supervisors and INS personnel—both on site and at the INS District Office—turned a blind eye and ignored repeated well-founded complaints about mistreatment of alien detainees.[162]

156. Most notable were claims of widespread physical abuse by guards and unnecessary shackling of detainees. *See* Llorente, *supra* note 7, at A1.

157. INS ESMOR REPORT, *supra* note 8, at 1.

158. Ashley Dunn, *U.S. Inquiry Finds Detention Center Was Poorly Run*, N.Y. TIMES, July 22, 1995, at A1. Esmor still operates an alien detention facility in Seattle, Wash. *Id.*

159. The INS report noted Esmor recruited guards at the salary level of "[t]he typical warehouse guard," instead of offering the competitive wage for guards "who [are] also responsible for the welfare and security of persons." INS ESMOR REPORT, supra note 8, at 16. When the contract was awarded, the INS had ignored warnings that the salary proposed by Esmor was "unrealistic" and created a high risk Esmor could not meet the requirements of the contract. Sullivan & Purdy, *supra* note 6, at A1. Esmor indeed had trouble hiring guards and was so short-staffed that many of its employees were forced to work two consecutive eight-hour shifts. This practice was permitted since the INS contract failed to specify the number of security personnel needed to staff the facility adequately, and instead left this decision (along with many other vital matters) to the discretion of the for-profit corporation running the facility. INS ESMOR REPORT, *supra* note 8, at 14, 33. The INS report also found Esmor put guards on duty without obtaining the requisite security clearance or providing any training. *Id.* at 16-20. This was particularly problematic since Esmor guards routinely operated without supervision from INS or Esmor personnel. *Id.* at 7, 12-13.

160. INS ESMOR REPORT, *supra* note 8, at 5.

161. *Id.* at 9. The INS report noted many Esmor detainees on the brink of deportation refused to board their outgoing flights without their funds and valuables, which had been confiscated by Esmor guards. *Id.*

162. The INS concluded its on-site personnel did not provide adequate oversight, in part because of inexperience and frequent turnover. *Id.* at 35-37. The INS claimed it was "kept in the dark" about changes in the operations at Esmor, but at the same time noted its district office did not respond to repeated complaints. *Id.* at 13, 38-39 (citing three unanswered letters from pro bono attorneys). The INS report recommended 24-hour oversight by INS personnel at contract detention facilities, noting such round-the-clock supervision "is not the current INS policy nationally for these types of contracts." *Id.* at 35.

The operation of the Esmor facility raises fundamental questions about the wisdom of delegating responsibility for detainee welfare to private, for-profit corporations.[163] The INS report traced many of the problems at Esmor to its method of contracting for private detention and to inadequate oversight at the facility.[164] Still, the agency contends Esmor was an isolated situation.[165] Yet similar problems have emerged at other private facilities. Two less-publicized disturbances at the Eloy, Arizona contract facility, for example, were linked to low pay and minimal training for contract guards, along with "shortages of food, soap, toilet paper, and other essentials."[166]

Questions of oversight also loom large when aliens are confined in state and local jails. [167] Too frequently, the INS has contracted with jails that do not provide humane conditions and adequate care for alien detainees. During the late 1970s and early 1980s, INS officials in Lubbock, Texas confined over 7000 aliens in local jails pursuant to informal, oral agreements.[168] The jails were not inspected or adequately maintained.[169] Detainees were crowded into "squalid" cells

163. These questions have repeatedly been raised by critics of prison privatization. *See* Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 325 (1986), *reprinted in* 40 VAND. L. REV. 813 (1987); James T. Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353 (1986); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1986); *see also* Maureen Castellano, *Incarceration Incorporated*, N.J. L.J., July 10, 1995, at 1.

164. One prevailing criticism was that the INS statement of work, used nationwide to solicit bids for contract detention facilities, sets performance-based specifications leaving far too much discretion with the for-profit contracting entity. INS ESMOR REPORT, *supra* note 8, at 33, 60 ("a flaw in the original statement of work did not place a requirement on the contractor . . . to increase staffing proportionate to detainee levels").

165. In the wake of the Esmor disturbance, INS Commissioner Doris Meissner directed each INS District Director with jurisdiction over an SPC or contract facility to conduct a special site visit to ensure each facility was providing proper care and treatment for alien detainees. *See* Elizabeth Llorente, *Immigration Chief Orders Detention Center Visits*, BERGEN REC., June 23, 1995, at N9. She later conceded the Esmor situation "does raise for us broader issues of whether we're doing everything we can do in privatization," but stated she thought the problems at Esmor were an exception to the usual operation of contract facilities. Dunn, *supra* note 158.

166. Miriam Davidson, *Workers: Shortages Sparked Prison Riots*, ARIZ. REPUBLIC, Dec. 27, 1994, at B1.

167. About 25% of the bedspace for immigration detention is obtained through per diem contracts with local law enforcement agencies. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 16. As of March 31, 1995, the INS was using about 1700 beds in state and local jails to confine aliens. *Hearing on Containing Costs*, *supra* note 97 (testimony of James A. Puleo).

168. Ortega v. Rowe, 796 F.2d 765, 766 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

169. *Id.*

filled with trash. Jail officials did not provide mattresses or blankets, and detainees were forced to sleep on cardboard boxes or on the floor.[170] There was no regular supervision of aliens in detention.[171] The Fifth Circuit found that INS and local jail officials had "blindly assum[ed] away" the obligation to care for the detainees.[172]

The INS has since adopted a jail inspection program to monitor the conditions at non-Service detention facilities.[173] But this program still does not ensure minimally adequate conditions of confinement. First, state and local jails must meet only four mandatory criteria to be certified for INS use: twenty-four hour supervision; compliance with safety and emergency codes; food service; and availability of emergency medical care.[174] The mandatory criteria do not address impor-

170. *Id.*

171. The district court found the supervision of alien detainees to be adequate, despite the fact that no one regularly checked on detainees at any facility. In Lubbock, aliens were confined in a city jail that was closed for routine operations, with no jailer on duty. *Ortega*, No. CA-5-81-198 (N.D. Tex. July 23, 1985), *reprinted in* Appendix B to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Apr. 20, 1987) (No. 86-1143). "Supervision" was provided by police officers in another part of the building who were "within hearing range of the detention cells." *Id.* at 18a. At the City of Slaton jail, "supervision" was provided by a female dispatch officer within earshot who was not authorized to go back into the detention area, but was instructed to call a male officer if she heard a disturbance. *Id.* at 19a. At the Haskell jail, "supervision" was provided by the sheriff who lived upstairs. "[I]f prisoners or detainees in the jail needed help or any service they were instructed to hit a pipe which ran through the cells into the sheriff's bedroom." *Id.* at 21a.

172. *Ortega*, 796 F.2d at 768-69. The Fifth Circuit nevertheless held the "lamentable conditions" in the Lubbock area jails resulted from mere negligence that did not rise to the level of a due process violation. *Id.* The court was surely wrong in concluding "[b]lindly assuming away one's responsibilities . . . can be seen as unreasonable—nothing more" when the "responsibility" at issue is the obligation to provide adequate care for detainees in government custody. *Id.* at 769. In a case decided after *Ortega*, the Supreme Court explained "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney v. Department of Social Serv., 489 U.S. 189, 199-200 (1989). For a related critique of the *Ortega* court's analysis, see *infra* note 308.

173. The INS drafted guidelines for jail inspections in December 1992, and formally initiated an inspection program in early 1983. *Ortega*, No. CA-5-81-198 (N.D. Tex. July 23, 1985); *see also* Memorandum from J. F. Salgado, Associate Commissioner of Enforcement to Regional Commissioners (Dec. 23, 1982) (on file with author). The INS issues a quarterly report on its jail inspection program, primarily noting the number of inspections completed and the number of jails yet to be inspected for each region. Under "Significant Findings," the report notes the total number of discontinued jails since February 1983. On September 30, 1994, 240 jails had been disqualified under the INS jail inspection program. Immigration and Naturalization Serv., U.S. Dep't of Justice, Non-Service Detention, Jail Inspections Report # 41 (quarter ending Sept. 30, 1994) (on file with author).

174. *See* 8 C.F.R. § 235.3(f) (1994). Despite this regulation, not all non-Service facilities used by the INS meet even these minimal standards. *See infra* note 179 (INS knowingly confined aliens at a local jail that did not feed the detainees).

tant concerns such as sanitation, adequate nutrition, and overcrowding. Second, the INS does not always execute written contracts setting minimum standards for detention conditions in the local jail.[175] As a result, serious conditions problems persist because the INS continues to "assume away" the responsibility to provide adequate care for detainees confined at non-Service facilities. [176]

In the Chicago area, for example, the INS secured detention space through informal arrangements with local jails and municipal lock-ups on a "space available" basis. As a result, some alien detainees spent months on end in a bizarre detention rotation system, where they were transferred daily among various facilities not designed for long-term confinement. The detainees often lacked toothbrushes and clean underwear; they were seldom allowed to exercise or shower. At one municipal lock-up, they were not even fed.[177]

175. *See* Ortega v. Rowe, 796 F.2d 765, 767 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). The INS Chicago district office did not execute written contracts with local jails, specifying the services to be provided to alien detainees until the filing of *Imasuen v. Moyer*, No. 91-C-5425, 1991 U.S. Dist. LEXIS 1449 (N.D. Ill. Aug. 27, 1991).

176. A recent report by the Women's Commission for Refugee Women and Children confirms the continuing conditions problems at some local jails used to confine INS detainees. CHINESE WOMEN IN DETENTION, supra note 121. A delegation of the Commission visited Chinese women held in the New Orleans Parish Prison and the Hancock County Justice Facility in Mississippi. The delegation was not allowed inside the New Orleans Parish Prison to view the detainees' living quarters, despite repeated requests. *Id.* at 10. Interviews with the women held there painted a grim picture of long-term detention in unsuitable facilities. The women had no access to reading materials, were not allowed to keep any personal belongings, and "reported that they lie on their beds all day staring at the ceiling." *Id.* at 9.

177. This account is based on the pleadings filed in *Imasuen*, including the uncontested affidavits of INS detainees and the sworn statements of various INS officials. *See* Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgement at 9-16 (describing detention rotation system), 21-32 (food service inadequate, and not available at one facility), 34-40 (cell conditions inadequate for long-term detention), 41-49, 50-55, 64-69 (municipal lock-ups were not required to provide personal hygiene items, clean clothing, showers, or out-of-cell recreation), *Imasuen* (No. 91-C-5425); *see also* Alvarez & Getter, *Detention: The Failed Deterrent*, *supra* note 5 (reporting on the Chicago detention rotation system while noting INS detainees were not fed at one holding facility).

As this article was going to press, the district court denied the plaintiffs' motion for summary judgment, and granted summary judgment for the INS on most of these claims. Memorandum Opinion and Order, Imasuen v. Moyer, No. 91-C-5425, 1995 U.S. Dist. LEXIS 12176 (N.D. Ill. Aug. 22, 1995). Much of the court's description of the "undisputed" facts forming the basis for its grant of summary judgment incorporated changes made by municipal facilities and the INS *after* the lawsuit was filed. *See id.* at *1 (noting settlement agreements resolving conditions claims were reached with the municipal defendants); *id.* at *10 (prior to 1992, detainees fed microwaved meals, but since 1992 they received hot lunches ordered from restaurants); *id.* at *13 (detainees provided outdoor recreation since 1992). As a result, the court overlooked some of the plaintiffs' key allegations, including the fact detainees were not fed at the Maybrook facility. *See id.* at *9-*12

Each of these local jails had passed INS inspection—demonstrating the remarkable shortcomings of the current minimum standards for non-Service detention and the jail inspection program. INS jail inspectors in Chicago assumed their supervisors would investigate problem reports and discontinue the use of local jails not in compliance with minimum standards. Yet various supervisors disclaimed any responsibility for deciding which jails to use, and stated that they reviewed inspection reports only to ensure the forms were filled out completely.[178] The INS continued to use substandard jails even when its own inspection reports noted serious deficiencies.[179] It was not until 1991, when a class action lawsuit was filed, that some of these problems abated.[180]

The problem of inadequate INS oversight has been particularly acute for stowaways.[181] Until recently, the INS required commercial carriers to take custody of stowaways who pressed claims for asylum pending final adjudication of their applications.[182] Some stowaways in

(discussion of plaintiffs' complaints about food did not mention Maybrook). The court's summary judgment also was premised on finding detainees whose hearing dates were more than one month away were transferred to appropriate long-term facilities, when the plaintiffs' factual allegations contradicted this assertion. *Compare id.* at *3 (stating long-term detainees were sent to long-term facilities) *with* Plaintiffs' Statement of Material Facts, at 10 (Plaintiff Obi was confined by the INS for five months, Plaintiff Imasuen for four months, and for much of this time they were shuttled between various short-term holding cells), *Imasuen* (No. 91-C-5425).

178. Plaintiffs' Statement of Material Facts at 16-20, *Imasuen* (No. 91-C-5425) (summarizing affidavits and deposition testimony of INS officials).

179. *Id.* at 24 (two inspection reports noted INS detainees were not being fed at one facility; additional reports noted insufficient food service at other facilities). The district court opinion granting summary judgment did not discuss these facts or consider the jail inspection program.

180. *See supra* note 177.

181. Stowaways, a "disfavored" class under the INA, are subject to immediate expulsion upon arrival. *See* INA §§ 237(a)(1), 273(d), 8 U.S.C. §§ 1227(a)(1), 1323(d) (1994), *explained in* Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1259 (3d Cir. 1994). Stowaways who file an asylum claim, however, are entitled to a limited administrative hearing. Yui Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983).

182. Carriers have been fighting this policy, with some success, in court and in Congress. In *Dia Navigation*, the Third Circuit concluded the INS carrier detention policy was a legislative rule, invalid because it should have been promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act. 34 F.3d at 1256. A contemporaneous district court decision struck down the INS policy as inconsistent with recent amendments to the INA, which assess a "user fee" on carriers to fund, inter alia, INS detention of excludable aliens. Linea Area Nacional de Chile v. Sale, 865 F. Supp. 971 (E.D.N.Y. 1994). Despite these litigation losses, the INS was planning to promulgate regulations reiterating its rule of carrier detention when Congress interceded, passing an amendment to the INA shifting this responsibility back to the INS. *See* Michael S. Lelyveld, *INS Plans to Bypass Court, Formalize Rule on Carrier Detention of Stowaways*, J. COM., July 21, 1991, at A1; William L. Roberts, *Congress Hastily Passes Bills on Stowaways*,

private custody were shackled around the clock in run-down hotels; others were physically abused.[183] Yet the INS disclaimed *any* responsibility for monitoring the treatment of stowaways, explaining "[w]e leave [detention conditions] totally up to the carrier."[184]

Perhaps the most poignant stories, however, belong to the children confined by the INS, most often in non-Service facilities. Thousands of unaccompanied minors have been held pending deportation or exclusion proceedings, often under "highly inappropriate detention conditions."[185] It took years of litigation to win victories for these children, including an end to routine strip searches[186] and a consent decree that requires the INS to release unaccompanied minors or transfer them to a licensed juvenile care facility.[187] Still, the INS at times has ignored its obligation to detain children in appropriate and

J. COM., Oct. 12, 1994, at A1. This legislative victory for carriers may be short lived, as some pending immigration reform bills would again allow the INS to require carriers to take custody of stowaways. *See* Michael S. Lelyveld, *Bill Would Put Stowaways in Lines' Care*, J. COM., June 7, 1995, at B8.

183. *See* Clifford Levy, *Stowaways, Seeking Liberty, Are Caught in Limbo of Law*, N.Y. TIMES, May 17, 1994, at A2; Michael S. Lelyveld, *Shipping Firm Keeps Stowaways in Shackles*, BERGEN REC., May 12, 1994, at A1; *see also* Lynch v. Cannatella, 810 F.2d 1363, 1367 (5th Cir. 1987) (stowaways suffered "gross physical abuse" at hands of harbor police officials); Medina v. O'Neill, 589 F. Supp. 1030, 1031-32 (S.D. Tex. 1984), *rev'd*, 838 F.2d 800 (5th Cir. 1988) (stowaways detained under inappropriate conditions at private security firm).

184. Lelyveld, *supra* note 183. The Third Circuit similarly noted "our attention has been directed to no set of standards, in the form of regulations or otherwise, concerning the conditions under which such aliens are detained." *Dia Navigation*, 34 F.3d at 1257.

185. Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting), *vacated*, 942 F.2d 1352 (9th Cir. 1991) (en banc). For several years, the western region of the INS refused to release unaccompanied minors, except to a parent or lawful guardian. Other adult relatives and volunteer service agencies were not allowed to take custody of alien children. Instead, unaccompanied minors were confined "for indeterminate periods, deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause." *Id.* The INS settled that part of the *Flores* litigation challenging confinement conditions. *See infra* note 187. The Supreme Court ultimately upheld a modified version of the INS juvenile detention policy, which permitted release to the custody of other adult relatives. Reno v. Flores, 113 S. Ct. 1439, 1444-45 (1993).

186. The strip search policy was declared unconstitutional in Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988).

187. The consent decree requires the INS to act within 72 hours to release unaccompanied minors to an adult relative or to transfer them to an appropriate juvenile care facility. *See* Memorandum of Understanding re: Compromise of Class Action: Conditions of Detention, *Flores* (No. 85-4544-RJK). In 1991, INS Commissioner Gene McNary issued national guidelines that embody similar standards. Memorandum from Office of Commissioner to Regional Operations Liaison Officers et al. (Dec. 13, 1992), *reprinted in* 69 INTERPRETER RELEASES 205 (1992).

humane facilities,[188] especially in the midst of massive detention efforts. Michael Olivas has described the plight of thousands of Central American children who were traumatized by the coercive conditions of INS detention.[189] More recently, a hundred Haitian and Cuban children were confined at the overcrowded Krome SPC, in violation of INS policy,[190] while many more were held in detention camps at Guantanamo Bay.[191] The Cuban children were belatedly paroled into the United States. Some unaccompanied Haitian minors, after being detained at Guantanamo for almost a year, were forcibly repatriated back to Haiti.[192]

C. The INS Response to Conditions Problems

The INS has been slow to correct the serious problems with confinement conditions suffered by alien detainees. Too frequently, only litigation spurs the agency to action. Even then, conditions problems persist. The deplorable conditions in the Chicago area jails, for example, mirror the very problems that surfaced ten years earlier in Lubbock, Texas. And court orders and consent decrees requiring the INS to improve its treatment of alien detainees have sometimes been met with a pattern of noncompliance.[193]

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188. *See* Brief for Southwest Refugee Project, Immigrant Legal Resource Center, and the Mexican American Legal Defense and Educational Fund, As Amici Curiae in Support of Respondents, *Flores* (No. 91-905) (citing evidence of noncompliance with *Flores* consent decree.) Troubling allegations about the detention of minors continue to emerge. In the aftermath of the Esmor disturbance, the INS discovered four juveniles who had been confined at Esmor, in violation of INS policy and the *Flores* decree. Its investigation revealed "several lapses" in the Newark district's policy of interviewing and finding placements for unaccompanied minors. INS ESMOR REPORT, *supra* note 8, at 41. In Los Angeles, the INS confined an 11-year-old girl in an office for two nights with four unknown, unrelated adult males. Central Am. Refugee Ctr. v. Reno, No. CV 93-4162-KN (C.D. Cal. June 23, 1995) (order granting motion for class certification).

189. Olivas, *Breaking the Law*, *supra* note 126, at 821-24.

190. Joanne Cavanaugh, *Young, Homeless, and "Hyper": Facilities Planned for Krome Kids*, MIAMI HERALD, Aug. 27, 1994, at 22A (reporting 107 children were detained at Krome despite INS policy to parole children into the community).

191. Edes, *supra* note 142, at 1C (reporting 3071 Cuban children held at Guantanamo Bay).

192. *See* David Beard, *Haitian Children Headed Out of Guantanamo*, FT. LAUDERDALE SUN-SENTINEL, June 26, 1995, at 4A; Bob Herbert, *Suffering the Children*, N.Y. TIMES, May 27, 1995, at A19 (reporting on forced repatriation of some unaccompanied Haitian children); Diego Ribadeneira, *U.S. to Ease Restrictions for Cuban Children*, BOSTON GLOBE, Dec. 3, 1994, at 2; Joanne Cavanaugh, *Children, Mothers Leaving Krome*, MIAMI HERALD, Sept. 16, 1994, at 1A (Cuban children receive humanitarian parole into the United States).

193. Orantes-Hernandez v. Meese, 685 F.2d 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990). In *Orantes-Hernandez*, the district court issued a permanent injunction against the INS after documenting numerous instances where the INS had failed to comply

To its credit, however, the INS has recently taken some steps to improve conditions of confinement at alien detention facilities. The INS has sought voluntary accreditation for its Service Processing Centers and contract facilities, a process requiring these facilities to conform to generally accepted guidelines for long-term detention.[194] The INS has also renovated and expanded some of its SPCs.[195] Moreover, in the wake of the Esmor riot, the INS Commissioner ordered inspections of INS detention facilities to ensure they were providing adequate conditions and humane treatment for alien detainees.[196]

These efforts, while laudable, do not correct the root causes of the conditions problems at immigration detention facilities. More fundamental reforms are needed. The United States must find a more humane response to the large-scale migration of persons seeking refuge in the United States, in order to avoid the severe overcrowding and deplorable conditions inevitably resulting from massive detention efforts.[197] And as the Esmor situation has painfully illustrated, the

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with the dictates of a preliminary injunction, requiring, inter alia, some changes in the operation of INS detention facilities. In some cases, this noncompliance was due to a "standard pattern of officially sanctioned behavior" and bad faith on the part of the INS. *Id.* at 1498, 1504. Government counsel also conceded "the agency is powerless to completely control its employees." Orantes-Hernandez v. Smith, 541 F. Supp. 351, 373 (C.D. Cal. 1982) (preliminary injunction in same litigation); *see also* Brief for Southwest Refugee Project, Immigrant Legal Resource Center, and the Mexican American Legal Defense and Educational Fund, As Amici Curiae in Support of Respondents, *Flores* (No. 91-905) (citing evidence of noncompliance with *Flores* consent decree). *Cf.* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Privacy over Immigration*, 71 N.C. L. REV. 413, 447 (1993) (documenting the INS pattern of "overemphasizing enforcement at the expense of immigrants' rights").

194. Telephone Interview with Joan Higgins, Assistant Commissioner, Detention and Deportation, Immigration and Naturalization Service (August 2, 1994). Currently, five immigration detention facilities are medically accredited by the National Commission on Correctional Health Care. Three contract facilities and two Service Processing Centers have American Correctional Association (ACA) accreditation; the INS expected an additional facility to receive ACA accreditation in 1994. INS DETENTION BRIEFING PAPER, *supra* note 97, at 3. ACA accreditation, however, does not ensure a facility provides humane treatment to its detainees. The Esmor contract facility provides a stark example. While Esmor was accredited by ACA, the INS investigation revealed several instances where the physical plant fell short of ACA standards. INS ESMOR REPORT, *supra* note 8, at 25-26. There is also some question whether ACA standards, primarily used to judge the adequacy of prisons designed to punish criminals, are the appropriate guidelines for the civil detention of aliens awaiting deportation proceedings.

195. INS DETENTION BRIEFING PAPER, *supra* note 97, at 3.

196. Llorente, *supra* note 165, at N9.

197. *See, e.g.*, T. Alexander Aleinikoff, *From "Refugee Law" to the Law of "Coerced Migration,"* 9 LOY. L.A. INT'L & COMP. L.J. 25 (1994); Grover J. Rees, *Refugee Policy in an Age of Migration*, 9 AM. U.J. INT'L L. & POL'Y 249, 259-62 (1994); Bill Frelick, *Needed: A Comprehensive Solution for Cuban Refugees*, 72 INTERPRETER RELEASES 121 (1995); Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration*

INS must provide sustained oversight, and higher minimum standards, for the non-Service facilities used to confine aliens.

Even if these reforms were adopted, however, it is likely that serious conditions problems would still persist at alien detention facilities. Immigration detention, like criminal incarceration, is marked by a lack of adequate resources, public apathy toward conditions of confinement, and a "voteless, politically unpopular, and socially threatening" population of detainees.[198] Under these circumstances, "judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed."[199]

III. "Only the Most Perverse Reading of the Constitution": Due Process Protection to Challenge Conditions of Confinement

Unfortunately, courts have not always interceded when alien detainees allege unconstitutional confinement conditions. The main obstacle to these claims is the so-called "plenary power doctrine," a century of precedent mandating extreme judicial deference to Congress and the executive branch in matters involving immigration. This deference comes at the expense of aliens' constitutional rights. In short, the plenary power doctrine carves out a unique space in American public law: a realm where the Constitution does not always apply.

The rest of this Article explores the impact of the plenary power doctrine on the conditions claims of alien detainees. It would seem that "[o]nly the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement."[200] Under the plenary power doctrine, however, perverse readings of the Constitution frequently prevail. I contend that the plenary power doctrine has silently and improperly infiltrated some cases adjudicating the conditions claims of aliens in immigration detention.

Emergencies, 71 INTERPRETER RELEASES 1637 (1994). The U.S. Commission on Immigration Reform, in its 1994 report to Congress, recommended that "policy approaches for handling immigration emergencies are needed to provide more effective and humane responses to such recurrent phenomena." U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 84, at 174.

198. Justice Brennan identified these factors as contributing to the "pervasive neglect" of our nation's prisons in *Rhodes v. Chapman*, 452 U.S. 337, 357-58 (1981) (Brennan, J., concurring).

199. *Id.* at 354 (Brennan, J., concurring).

200. Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting).

A. The Plenary Power Doctrine

1. Foundation Cases

At the heart of the plenary power doctrine lies the belief that Congress and the executive branch must have unfettered authority to admit, exclude, or deport aliens. The doctrine has its roots in the late nineteenth century, when the Supreme Court upheld various provisions of the Chinese Exclusion Act, which embodied Congress's increasingly draconian restrictions on Chinese immigration. In the *Chinese Exclusion Case*, the Supreme Court rejected the constitutional claim of a Chinese immigrant who was excluded upon returning from a trip abroad.[201] The petitioner, a lawful permanent resident of twelve years, had obtained a certificate before he left that entitled him to re-enter the United States under then-existing law.[202] But he was stranded outside the United States when Congress, without notice, amended the Chinese Exclusion Act, declaring such certificates "void and of no effect."[203]

The Court upheld this provision, suggesting there could be no limit on congressional power to exclude aliens from the United States.[204] The Court reasoned the "power of exclusion of foreigners [is] an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution."[205] As such, any constitutional challenges to Congress's exercise of the exclusion power "are not questions for judicial determination."[206]

The Court soon extended this rule of judicial deference to allow Congress plenary authority to deport resident aliens from the United

201. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

202. *Id.* at 582.

203. *Id.* at 599.

204. This is the traditional interpretation of the *Chinese Exclusion Case*, bolstered by later cases that reiterate in similar terms this principle of plenary power. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating the power over admission and exclusion "belongs to the political departments of the government"); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (noting "[o]ver no conceivable subject is the legislative power of Congress more complete"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (concluding "it is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien"). Stephen Legomsky has argued, however, that the plenary power doctrine is premised on a misreading of the *Chinese Exclusion Case*, and that the Court "never intended to preclude judicial review of all Congressional exercises of the exclusion power." STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 193 (1987).

205. The Chinese Exclusion Case, 130 U.S. at 609.

206. *Id.*

States. In *Fong Yue Ting v. United States*,[207] the Court refused to intercede on behalf of Chinese immigrants who were to be deported because they had failed to obtain certificates of residence, as required under additional amendments to the Chinese Exclusion Act. Aliens caught without such certificates were subject to deportation unless they could show by the testimony of "at least one credible white witness" that they were lawful residents of the United States.[208] The *Fong Yue Ting* Court upheld this provision.[209] As in the *Chinese Exclusion Case*, the Supreme Court concluded it was beyond the competence of the courts to review immigration legislation.[210]

The *Chinese Exclusion Case* and *Fong Yue Ting* seem antiquated in a modern constitutional setting. The Supreme Court's analysis was tainted by the racist backlash against Chinese laborers that motivated Congress to pass these provisions.[211] Moreover, the past one hundred years have seen a remarkable expansion of constitutional rights, which would seem to call into question many of the Supreme Court's nineteenth century pronouncements on immigration. Yet the plenary power doctrine has flourished for over a century, isolating immigration law from this constitutional revolution. Indeed, more recent Supreme Court cases embrace the plenary power doctrine in decisions with startling implications for detained aliens seeking to challenge the conditions of their confinement under the Constitution.

2. *Knauff and Mezei: Denying Due Process to Excludable Alien Detainees*

During the Cold War, the Supreme Court reaffirmed the plenary power doctrine in two cases that "come close to saying that even though the Fifth Amendment due process protection applies to all 'persons,' we simply do not regard excludable aliens as falling within

207. 149 U.S. 698 (1893).

208. *Id.* at 704.

209. *Id.* at 732.

210. *Id.* at 731.

211. In the *Chinese Exclusion Case*, the Supreme Court spoke approvingly of Congress's motives in passing the Chinese Exclusion Act. The Court compared Chinese immigration to a foreign invasion, concluding that "[i]t matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us." The Chinese Exclusion Case, 130 U.S. at 606. In both the *Chinese Exclusion Case* and *Fong Yue Ting*, the Court suggested that Congress had reason to require corroboration of the testimony of Chinese immigrants because of the "loose notions entertained by [Chinese] witnesses of the obligation of an oath." *Id.* at 598; *Fong Yue Ting*, 149 U.S. at 730.

that category."[212] In *United States ex rel. Knauff v. Shaughnessy*,[213] the Court upheld the Attorney General's authority to exclude, without a hearing, the wife of a United States citizen. Ellen Knauff had served as a civilian employee of the United States War Department in Germany and sought to immigrate under the War Brides Act of 1945.[214] She was excluded when the Attorney General concluded, without any explanation, that her admission "would be prejudicial to the interests of the United States."[215]

Knauff had been confined on Ellis Island for over a year without being informed of the charges against her.[216] Nevertheless, the Supreme Court denied her habeas corpus petition. Relying on nineteenth century plenary power cases, the Court concluded "it is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien."[217] The Court's analysis was distilled in the statement "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[218]

Three years after this decision, the Court "accomplished the improbable feat of rendering the *Knauff* outcome even more severe"[219] in *Shaughnessy v. United States ex rel. Mezei*.[220] Here the Court determined that Ignatz Mezei, the husband of a United States citizen who had lawfully resided in the United States for twenty-five years, could

212. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983) [hereinafter Martin, *Due Process and Membership*].

213. 338 U.S. 537 (1950).

214. *See id.* at 539-40.

215. *Id.*

216. *Id.*

217. *Id.* at 543.

218. *Id.* at 544. Charles Weisselberg recently has delved into the history of Ellen Knauff, and concludes her full story reveals the folly of such extreme judicial deference to the Attorney General's decision to exclude her summarily. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) [hereinafter Weisselberg, *Lessons from Knauff and Mezei*]. After much public outcry, several rounds of habeas corpus litigation, and congressional hearings focused on her plight, Knauff was paroled from Ellis Island and allowed to contest the Attorney General's decision at an exclusion hearing. The hearing board upheld her exclusion, but their decision was reversed by the Board of Immigration Appeals. When she was finally afforded a hearing, Knauff was able to refute conclusively uncorroborated hearsay testimony suggesting she had passed classified information gleaned from her employment to Czech authorities. The Board of Immigration Appeals held there was no substantial evidence to support Knauff's exclusion. *See id.* at 958-64; *see also* ELLEN KNAUFF, THE ELLEN KNAUFF STORY (1952).

219. ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, supra note 45, at 385.

220. 345 U.S. 206 (1953).

be excluded and detained without a hearing upon returning from a nineteen month sojourn abroad.[221] Mezei had "seem[ed] to have led a life of unrelieved insignificance"[222] until the Attorney General, deciding Mezei was a threat to national security, excluded him on the basis of confidential information.[223] He had been confined on Ellis Island for almost two years when a district court ordered his release.[224] Nevertheless, the Supreme Court, reversing the lower court's grant of habeas corpus, concluded Mezei should be "treated as if stopped at the border" for purposes of his due process claim.[225]

The majority opinion assiduously avoided any frank description of Mezei's imprisonment on Ellis Island, instead referring to his "temporary harborage" as "an act of legislative grace."[226] But the dissenting justices emphasized that upon his return to Ellis Island, Mezei could be "detained indefinitely, perhaps for life, for a cause known only to the Attorney General."[227] Still, the Supreme Court found no due process violation, repeating "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[228]

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221. Mezei had sailed for Europe in May 1948 to visit his dying mother in Rumania. *Id.* at 208. After being refused permission to enter Rumania, he was stranded in Hungary for 19 months because of difficulties in securing an exit visa, probably due to the "disturbed conditions of Eastern Europe" at that time. *Id* at 208; *id.* at 219 (Jackson, J., dissenting).

222. *Id.* at 219 (Jackson, J., dissenting).

223. The Attorney General refused even to divulge in camera the reasons for Mezei's exclusion. *Id.* at 209.

224. *Id.* at 220 (Jackson, J., dissenting).

225. *See Mezei*, 345 U.S. at 215. The Court concluded Mezei's detention on Ellis Island "bestow[ed] no additional rights," relying on long-standing precedent that detention does not constitute an "entry" in the United States. *Id.* at 213, 215 (citing Kaplan v. Tod, 267 U.S. 228, 230 (1925); Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)). The Court also held Mezei's long-term residence in the United States did not confer due process protection. *Id.* at 213-14. This part of the *Mezei* Court's holding was later modified in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), in which the Court reasoned a lawful permanent resident who had been "absent from the country only a few days" was entitled to invoke procedural due process protection in exclusion proceedings. The *Plasencia* Court declined to reconsider *Mezei*, instead distinguishing the earlier opinion on its facts, emphasizing Mezei's absence from the United States had been "extended." *Id.* at 33-34.

226. *Mezei*, 345 U.S. at 215.

227. *Id.* at 220 (Jackson, J., dissenting); *see also id.* at 217 (Black, J., dissenting). Mezei had tried to no avail to find another country of refuge; at least 14 other nations had also refused to accept him. *See id.* at 219-20 (Jackson, J., dissenting).

228. *Mezei*, 345 U.S. at 212 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)). Mezei, like Ellen Knauff, was ultimately afforded a hearing after the Supreme Court upheld his summary exclusion. He was charged with being a member of the Communist party, based on his participation in the Hungarian Working Sick Benefit and Education Society (later a Hungarian lodge of the International Workers Order). Mezei denied that he was a member of the Communist party, but these charges were up-

This chilling statement denies due process protection to excludable aliens even when they are detained within the United States. It also marks an important distinction between aliens in exclusion and deportation proceedings, because deportable aliens can claim procedural due process protection.[229] Since "the INS intermingles deportable and excludable aliens without any distinction as to the conditions of confinement,"[230] this distinction probably does not influence the day-to-day treatment of alien detainees. But it has surfaced in some cases when *excludable* aliens bring due process challenges to their confinement conditions. *Knauff* and *Mezei* have been interposed inappropriately in litigation over detention conditions. The sweeping language in these cases has opened the door for government officials to argue that excludable aliens in their custody "possess no constitutional rights" to challenge abusive treatment or inhumane detention conditions.[231]

No court has explicitly adopted this "perverse reading" of the Constitution. In fact, some judges, in dicta or dissenting opinions, have used hypothetical examples of severe mistreatment or cruelty toward alien detainees to argue against a broad application of the plenary power doctrine.[232] These arguments find support in the aliens'

held by the hearing board and the Board of Immigration Appeals, based largely on the testimony of a professional witness who had testified (sometimes falsely) in several notorious loyalty cases during the Cold War. The Board of Immigration Appeals, however, also made an off-the-record recommendation that Mezei be released from Ellis Island. Four years after he was ordered excluded, Mezei was paroled into the United States. Except for an interim parole won after a fleeting victory in the lower courts, Mezei had spent much of these four years confined in the "Communist ward" on Ellis Island. Weisselberg, *Lessons From Knauff and Mezei*, *supra* note 218, at 970-84.

229. Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86 (1903); *see supra* note 52.

230. Schmidt, *supra* note 11, at 321; *see supra* 122.

231. Lynch v. Cannatella, 810 F.2d 1363, 1372 (5th Cir. 1987); *accord* Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1341 (2d Cir. 1992) (rejecting government's argument that Haitians detained on Guantanamo could not claim "any protections under the due process clause . . . even if they had been subjected to physical abuse").

232. As early as 1893, a dissenting opinion in *Fong Yue Ting v. United States* rejected the majority's conclusion that Chinese immigrants were not protected by the Due Process Clause because this analysis "might have sanctioned toward [Chinese] laborers the most shocking brutality conceivable." 149 U.S. 698, 756 (1893) (Field, J., dissenting). In *Jean v. Nelson*, Justice Marshall rejected as "irrational" the notion that an excludable alien "could not invoke the Constitution to challenge the conditions of his detention." 472 U.S. 846, 874 (1985) (Marshall, J., dissenting). Justice Marshall also argued *Knauff* and *Mezei* must be read narrowly because some of the Court's language, if taken literally, would seem to allow the Attorney General to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens." *Id.*; *see also* Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987) ("the mere fact that one is an excludable alien would not permit a police officer savagely to beat him"); Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1042 (E.D.N.Y.

rights tradition, a line of cases granting constitutional protection to aliens in an ill-defined realm "outside" of immigration law.

B. The Aliens' Rights Tradition: Defining a Border for the Plenary Power Doctrine

1. Foundation Cases

Like the plenary power doctrine, the aliens' rights tradition grew out of restrictive legislation against Chinese immigrants in the late nineteenth century. In *Yick Wo v. Hopkins*, decided in 1886, the Supreme Court concluded Chinese immigrants could claim equal protection to challenge the discriminatory enforcement of a municipal ordinance regulating laundries.[233] The Court held that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . [its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[234] *Yick Wo* spawned a line of cases, central to the aliens' rights tradition, protecting aliens from invidious discrimination by state and local officials.[235]

Ten years after *Yick Wo*, in *Wong Wing v. United States*,[236] the Supreme Court extended constitutional protection to Chinese immigrants held in immigration detention, striking down a provision of the Chinese Exclusion Act requiring detainees to be "imprisoned at hard labor" for up to one year prior to deportation.[237] The *Wong Wing* Court reaffirmed in the strongest possible terms that Congress and the

1993) ("[i]f the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention").

233. 118 U.S. 356, 373-74 (1886).

234. *Id.* at 369.

235. Generally, alienage classifications made by state or local governments restricting aliens' access to government benefits are subject to a heightened level of scrutiny. *See* Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state statute denying welfare benefits to resident aliens). States also cannot bar aliens from ordinary trades and professions and many civil service jobs. *See* Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating statutory prohibition against employment of aliens in state competitive civil service); *In re* Griffiths, 413 U.S. 717 (1973) (invalidating state statute prohibiting resident aliens from practicing law). The Court, however, has carved out an exception to these cases, allowing state and local governments to exclude aliens from governmental positions when the restriction primarily serves a "political function." *See* Cabell v. Chavez-Salido, 454 U.S. 432, 445-46 (1982) (upholding state statute barring aliens from employment as probation officers); Foley v. Connelie, 435 U.S. 291 (1978) (police officers); Ambach v. Norwick, 441 U.S. 68 (1979) (public school teachers); *see also* Bosniak, *supra* note 22, at 1110-15 (critiquing this "political function" exception).

236. 163 U.S. 228 (1896).

237. *Id.* at 233.

executive branch enjoy plenary power to exclude and deport aliens from the country, without interference from the judiciary.[238] The Court concluded, however, that "imprisonment at hard labor" prior to deportation moved beyond the realm of immigration regulation and into the realm of criminal law, where aliens are protected by the Constitution.[239] Other cases in the *Wong Wing* tradition extend Fifth and Sixth Amendment protection to aliens subject to criminal proceedings.[240]

Yick Wo, *Wong Wing*, and their progeny suggest the plenary power doctrine extends only to exercises of the sovereign power to admit, exclude, or deport aliens from the United States.[241] Later decisions support this interpretation.[242] These cases stand in stark contrast to the shocking denial of constitutional protection in immigration law. This "aliens' rights" tradition, however, has "never fully coalesced into a coherent and comprehensive body of doctrine . . . [and has] never offered a fully textured alternative to the plenary power

238. The Court asserted "[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Id.* at 233.

239. The Court explained "even aliens" were protected by the Fifth and Sixth Amendments, and thus "shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law." *Id.* at 238. Thus, the Court concluded the statute before it "present[ed] a different question" from the challenges to the exclusion and deportation power raised in the *Chinese Exclusion Case* and *Fong Yue Ting*. *Id.* at 233.

240. *See* United States v. Casimiro-Benitez, 533 F.2d 1121 (9th Cir.), *cert. denied*, 429 U.S. 926 (1976); United States v. Henry, 604 F.2d 908 (5th Cir. 1979) (aliens in custodial interrogation entitled to Miranda warnings). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); *infra* notes 245-252 and accompanying text.

241. Stated somewhat differently, the plenary power doctrine is confined to the realm of "immigration law," which is defined as "the body of law governing the admission and expulsion of aliens." Motomura, *Phantom Norms*, *supra* note 16, at 547 (citing Legomsky, *Immigration Law and Plenary Power*, *supra* note 15, at 256).

242. In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931), for example, the Supreme Court held aliens present in the United States are entitled to just compensation under the Takings Clause of the Fifth Amendment when the government confiscates their property. More recently the Court has stated in dicta that "an alien seeking initial admission to the United States . . . has no constitutional rights *regarding his application*." Landon v. Plasencia, 459 U.S. 21, 32 (1982) (emphasis added). This quotation has been interpreted to mean "it is only in the admissions process that [applicants'] status as excludable aliens limits their Constitutional rights." Singh v. Nelson, 623 F. Supp. 545, 558 (S.D.N.Y. 1985); *see also* Deborah Levy, *supra* note 76, at 299 n.9 (stating "the Court in *Plasencia* acknowledged the generally accepted wisdom that an alien seeking entry lacks constitutional rights concerning his *application to enter* only. Such an appropriately limited rule leaves open the issue of constitutional rights regarding matters other than the entry application"); *see infra* notes 277-283 and accompanying text for a further explanation of this analysis.

doctrine."[243] In fact, the boundary between the plenary power doctrine and aliens' rights tradition is not easily marked, and has not always been respected even when aliens "outside" of immigration law press constitutional claims.[244]

2. *Deviations from the Aliens' Rights Tradition*

Several notable decisions belie the promise of *Yick Wo* and *Wong Wing*, withholding constitutional protection from aliens even when the governmental conduct at issue is not an exercise of the federal immigration power. In *United States v. Verdugo-Urquidez*, for example, the Supreme Court refused to extend Fourth Amendment protection to a nonresident alien awaiting criminal prosecution in the United States.[245] Verdugo-Urquidez sought to exclude from his criminal trial evidence obtained when federal officials searched his property in Mexico without a warrant. But the Court held the Fourth Amendment did not cover such a search, even though it was conducted while Verdugo-Urquidez was incarcerated in a United States jail.[246]

Verdugo-Urquidez relied in part on cases from the aliens' rights tradition to support his claim for constitutional protection.[247] The Supreme Court, however, adopted a very narrow reading of *Yick Wo*, *Wong Wing*, and their progeny, stating "[t]hese cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[248] The Court concluded that because Verdugo-Urquidez was "an alien who has had no previous significant

243. Motomura, *Phantom Norms*, *supra* note 16, at 566.

244. Rosberg, *supra* note 9, at 337. In a recent article focusing on discrimination against aliens, Linda Bosniak suggests the contrast between the plenary power doctrine and aliens' rights tradition is not so stark. She argues that distinguishing between cases falling "inside" and "outside" immigration law "can easily lead to misunderstanding because it suggests a greater uniformity on both sides of the line than is warranted." Bosniak, *supra* note 22, at 1063. I agree with this observation, and in particular with her assessment that "focusing on the difference between 'inside' and 'outside' [immigration law] tends to seriously overstate the status of aliens on the so-called 'outside.'" *Id.* Professor Bosniak's recent analysis comports with my description of a "porous border" between the plenary power doctrine and the aliens' rights tradition. *See infra* notes 341-355 and accompanying text.

245. 494 U.S. 259 (1990).

246. *Id.* at 261-62.

247. *Id.* at 270-71 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

248. *Id.* at 271.

voluntary connection with the United States," the aliens' rights tradition "avail[s] him not."[249]

Verdugo-Urquidez is a significant departure from *Wong Wing* and its progeny, which extended constitutional protection to aliens in criminal proceedings. Indeed, the Court's suggestion that the Constitution protects only persons who have developed "significant voluntary connections" to the "national community" reflects a recurring theme of immigration law. The plenary power doctrine is premised in part on the notion that Congress must have unfettered power to determine who will become part of our national community.[250] And one of the principle exceptions to the plenary power doctrine, which grants procedural due process protection to deportable aliens and lawful permanent residents in exclusion proceedings, reflects an understanding that persons who have developed significant ties to the United States gain constitutional rights by virtue of their connections to our community.[251] Thus, both the result and rhetoric of *Verdugo-Urquidez* echoed in immigration law, even though the alien claimant was seek-

249. *Id.* The *Verdugo-Urquidez* Court employed similar language when analyzing the text of the Fourth Amendment, asserting that "the people" protected by this provision are only those "who are part of [our] national community or who have otherwise developed sufficient connection with this country." 494 U.S. at 265. This analysis was criticized in Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 984-87 (1991), and Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do they Survive* United States v. Verdugo-Urquidez?, 56 MO. L. REV. 213, 240-42 (1991).

250. In the *Chinese Exclusion Case*, for example, the Supreme Court stated if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary." 130 U.S. 581, 606 (1889). This rationale—that the authority to define our national community must rest with Congress—has caused some to use the "domain of membership" as shorthand to describe cases applying the plenary power doctrine. *See* Bosniak, *supra* note 22, at 1057.

251. Three dissenting justices in *Fong Yue Ting v. United States* suggested because resident aliens have developed significant ties to the United States, they should be entitled to some measure of constitutional protection. 149 U.S. 698, 737-38 (Brewer, J., dissenting), 746 (Field, J., dissenting), 762 (Fuller, J., dissenting) (1893). Their views took hold in the *Japanese Immigrant Case*, which extended procedural due process protection to aliens in deportation proceedings. 189 U.S. 86, 100-01 (1903). This analysis reached fruition in *Landon v. Plasencia*, in which the Supreme Court carved out an exception to *Shaugnessy v. United States ex rel. Mezei*, allowing a lawful permanent resident who had been "absent from the country only a few days" to claim procedural due process protection in exclusion proceedings. 459 U.S. 21, 34 (1952); *see supra* note 242. Several commentators have explored the theory that an alien's "membership" or "ties" to the national community limit the application of the plenary power doctrine. *See, e.g.*, Martin, *Due Process and Membership*, *supra* note 212; T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983) [hereinafter Aleinikoff, *"Community Ties"*].

ing Fourth Amendment protection to exclude evidence from his criminal trial.[252]

A similar echo appears in the cases allowing the federal government to discriminate against aliens when administering government benefits. In *Flemming v. Nestor*, the Supreme Court upheld a provision of the Social Security Act cutting off benefits to aliens who had contributed into the Social Security system but were then deported for past membership in the Communist party.[253] The *Flemming* Court employed a highly deferential standard of scrutiny, unique to equal protection analysis, stating that the disabilities imposed on certain deported aliens would be unconstitutional "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."[254] The dissenting justices argued the Court should not have been swayed by the challenged statute's ostensible connection to "Congress's power to regulate immigration."[255]

The Supreme Court reached a similar result in *Mathews v. Diaz*, upholding a statute denying Medicare benefits to aliens unless they had been admitted for permanent residence and had lived in the United States for at least five years.[256] The plaintiffs, aliens who were not eligible for benefits under this provision, argued in the *Yick Wo*

252. *Cf.* Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 32, at 1000 (arguing *Verdugo-Urquidez* marks an expansion of the plenary power doctrine into the criminal rights arena).

253. 363 U.S. 603 (1960). Ephram Nestor was a lawful permanent resident of 43 years. He was deported in 1956 because he had been a member of the Communist party from 1933 to 1939. *Id.* at 605. He had a statutory right to receive Social Security benefits, in an amount determined by his contributions into the system, until Congress amended the Social Security Act to cut off benefits for those deported for membership in the Communist party. *See id.* at 608 (noting "[p]ayments under the Act are based upon the wage earner's record of earnings").

254. *Id.* at 611. Stephen Legomsky has argued that the standard applied in *Nestor* is more deferential than even the most toothless "rational basis" test, and that the Social Security Act's classification against aliens would not withstand scrutiny under traditional equal protection analysis. Stephen H. Legomsky, *Suspending the Social Security Benefits of Deported Aliens: The Insult and the Injury*, 13 SUFFOLK U. L. REV. 1235, 1248-53 (1979) [hereinafter Legomsky, *Suspending Benefits*].

255. *Flemming*, 363 U.S. at 636 (Brennan, J., dissenting). In addition to rejecting Nestor's equal protection claim, the Court concluded the provision cutting off benefits to certain deported aliens did not impose "punishment" in violation of the Constitution. The Court relied in part on the fact that "deportation has been held to be not punishment, but an exercise of the plenary power of Congress to fix the conditions under which aliens are to be permitted to enter and remain in this country." *Id.* at 616 (citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)). The dissenting justices pointedly noted the plenary power to control immigration was not implicated by Nestor's suit seeking reinstatement of Social Security benefits. *Id.* at 636 (Brennan, J., dissenting).

256. 426 U.S. 67, 69 (1976).

tradition that the federal government could not discriminate based on alienage when setting eligibility requirements for welfare programs.

The *Mathews* Court began its analysis with a resounding endorsement of the aliens' rights tradition, concluding every alien, "even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to . . . constitutional protection under the Fifth and Fourteenth Amendments."[257] But the Court soon shifted to the language of plenary power, repeatedly stressing that the judiciary must defer to the political branches "broad power over naturalization and immigration."[258] Ultimately the plenary power approach prevailed: the *Mathews* Court concluded that alienage restrictions on federal benefits were a legitimate part of "the business of the political branches of the Federal Government . . . to regulate the conditions of entry and residence of aliens."[259]

The conflicting language in *Mathews* has led to discordant interpretations of the opinion. Some commentators focus on the Supreme Court's initial reaffirmation of the aliens' rights tradition, and emphasize that *Mathews*' language can serve as a stepping stone toward eventual integration of aliens into the constitutional tradition.[260] Others stress that the alien plaintiffs lost after the *Mathews* Court expressly invoked the plenary power doctrine, and argue that the Supreme Court improperly transformed a case about eligibility for government benefits into an issue of immigration regulation.[261]

The *Mathews* decision illustrates just how difficult it can be to define the boundary that separates the aliens' rights tradition from the plenary power doctrine.[262] In the *Yick Wo-Wong Wing* line of cases,

257. *Id.* at 77 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1893)).

258. *Id.* at 79-80.

259. *Id.* at 84.

260. A recent commentary by Hiroshi Motomura expresses this view. Professor Motomura concludes that even though the alien plaintiffs in *Mathews* did not prevail, "the contrast with the total judicial deference in the plenary power cases is striking." Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 210 (1995). He suggests the rhetoric in *Mathews* may be more important than its result, noting language from the decision provided a "key building block" for later decisions expanding the aliens' rights tradition. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)). At the same time, however, the plenary power rhetoric that also pervades the *Mathews* opinion has played a key role in recent immigration decisions reaffirming the plenary power doctrine. *See* Fiallo v. Bell, 430 U.S. 787 (1977) (citing *Mathews*, 426 U.S. at 80-82 to uphold discriminatory admission criteria against equal protection challenge).

261. *See* Bosniak, *supra* note 22, at 1065-67; Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 32, at 995-96.

262. *Cf.* Bosniak, *supra* note 22, at 1066-67 (noting "the line separating 'inside' from 'outside' [immigration law] is not pre-ordained but rather is subject to dispute").

the Court emphasized that not all claims pressed by aliens are governed by the plenary power doctrine. But cases like *Verdugo-Urquidez, Flemming*, and *Mathews* send a contradictory message. Several commentators have noted these latter decisions suggest *any* federal action against aliens is inextricably linked to the power to control immigration, and thus must be reviewed with extreme judicial deference.[263]

The Supreme Court has not explicitly acknowledged its occasional departures from the aliens' rights tradition. Nor has it provided consistent guidance on how to determine when aliens are entitled to protection under the Constitution. Thus, the lower courts have been saddled with the task of adjudicating the constitutional claims of aliens on inconsistent precedent, most recently in decisions adjudicating the due process claims of Haitians and Cubans seeking parole from immigration detention. These claims have forced courts to consider anew the scope of the *Knauff* and *Mezei* decisions. While the *holdings* of recent lower court cases continue to deny due process protection to excludable aliens, their *reasoning* helps to mark the sometimes elusive boundary between the plenary power doctrine and the aliens' rights tradition.

C. The 1980s Detention Litigation: Revisiting the Due Process Rights of Excludable Alien Detainees

As the Cold War subsided, there was little occasion for courts to reconsider the holdings of *Knauff* and *Mezei*. Indeed, soon after *Mezei* was decided, summary exclusion fell into disfavor.[264] The detention of excludable aliens also became rare; the government closed Ellis Island and began paroling virtually all applicants for entry while

263. *See* Aleinikoff, *Federal Regulation*, *supra* note 22, at 869 ("courts have wrongly assumed that every federal regulation based on *alienage* is necessarily sustainable as an exercise of the *immigration* power") (emphasis added); Legomsky, *Suspending Benefits*, *supra* note 254, at 1264 ("Whatever merit there might be to the view that immigration regulation should generate unusual judicial restraint, no reason is readily perceivable for requiring a similar result with respect to all federal regulation of aliens."); Rosberg, *supra* note 9, at 325 ("the government's legitimate interest in flexibility [to fashion immigration policy] does not require immunity from careful judicial scrutiny for every piece of federal legislation that has some bearing on aliens or immigration"); *see also* Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 32, at 994-1000 (arguing that *Mathews* and *Verdugo-Urquidez* mark an expansion of the plenary power doctrine to cases outside of the immigration context).

264. Although now codified in statute, the summary exclusion proceedings of *Knauff* and *Mezei* are invoked far less frequently today than in the Cold War era. *See* INA § 235(c), 8 U.S.C. § 1225(c) (1994); ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 402.

they awaited an administrative hearing.[265] The Supreme Court continued to cite *Knauff* and *Mezei* for the general proposition that the judiciary cannot intercede in immigration decisions,[266] and the two cases spawned a cottage industry of academic criticism.[267] But the broad assertion that excludable aliens have no due process rights, and the suggestion they might be detained indefinitely, were seldom at issue for almost three decades.

Beginning in 1980, however, the due process rights of excludable aliens in detention became a critical concern on two litigation fronts. Thousands of Haitians seeking asylum were confined under the new policy, announced in 1981, targeting undocumented excludable aliens for immigration detention.[268] Haitian detainees claimed their incarceration was the result of national origin discrimination, in violation of the equal protection component of the Due Process Clause.[269]

In addition, while most of the Cubans arriving in the Mariel boatlift of 1980 were paroled into the United States, a small percentage with criminal records were excluded. When Cuba refused to accept their return, they were confined by the INS.[270] To their ranks were soon added excludable Marielitos whose initial parole was revoked when they committed crimes within the United States.[271] The INS

265. *See* Leng May Ma v. Barber, 357 U.S. 185, 190 (1958); Louis v. Nelson, 544 F. Supp. 973, 980 n.18 (S.D. Fla. 1982), *aff'd in part and rev'd in part sub nom.*, Jean v. Nelson, 711 F.2d 144 (11th Cir. 1983), *vacated*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985).

266. *E.g.*, Landon v. Plasencia, 459 U.S. 21, 34 (1981); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 n.6 (1972).

267. *See, e.g.*, Aleinikoff, *"Community Ties," supra* note 251, at 237-39; Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953); Martin, *Due Process and Membership*, *supra* note 212, at 173-80; Schuck, *Transformation of Immigration Law*, *supra* note 33, at 20-21.

268. *Louis*, 544 F. Supp. at 1000.

269. There was in fact significant evidence of discriminatory enforcement of the policy of detention for undocumented excludable aliens. Government memoranda deliberating on the new detention policy were captioned "Haitian Program." *Jean*, 711 F.2d at 1468. A memorandum sent by the Attorney General to the President acknowledged "[d]etention could create an appearance of 'concentration camps' filled largely by blacks." *Louis*, 544 F. Supp. at 980 n.19. A panel of the Eleventh Circuit, in an opinion ultimately vacated by the en banc court, found "ample unrebutted evidence that [the detained Haitians] were denied equal protection of the laws." *Jean*, 711 F.2d at 1509.

270. *See* James LeMoyne, *Most Who Left Mariel Sailed to New Life, a Few to Limbo*, N.Y. TIMES, Apr. 15, 1990, at A1; *What Happened to the Marielitos?*, N.Y. TIMES, Nov. 25, 1987, at B6 (flow chart summarizing the status of Marielitos, stating 103,000 were released immediately and 22,000 were initially detained); Paul L. Montgomery, *1774 People Without a Country: Cuban Refugees Sit in U.S. Jails*, N.Y. TIMES, Dec. 7, 1980, at A1 (1774 of those initially detained were still confined by the INS in December 1980).

271. LeMoyne, *supra* note 143; Ronald Smothers, *Their Crimes Vary, but Most Cubans Are Serving Sentences of Frustration*, N.Y. TIMES, Nov. 30, 1987, at B11.

continues to confine thousands of Marielitos with criminal records.[272] Many face uncertainty as to whether they will ever be released.[273] Like Ignatz Mezei, they have argued the Due Process Clause does not countenance indefinite detention by executive fiat, even for aliens who technically have not yet "entered" the United States.

The due process claims of Marielito Cubans and Haitians triggered a fresh examination of *Knauff* and *Mezei*. The issues were starkly presented: Can Marielito Cubans who have committed crimes be incarcerated indefinitely? Can Haitians who claim invidious discrimination be confined without recourse to the Constitution? Initially, the Marielito and Haitian detainees met with some success in litigation seeking parole.[274] But most appellate courts have since concluded *Knauff* and *Mezei* preclude even these poignant due process claims.[275] The linchpin of these decisions is a determination that parole from immigration detention is intimately linked to the admissions process, and hence to broader immigration policy. As such, most

272. Generally, the INS revokes the parole of Marielitos who have been convicted of crimes in the United States, issues detainers while they are serving out their criminal sentence, and then takes them into custody at the end of their prison term. Most are then ordered excluded after a hearing before an immigration judge. The INS reported 2151 Marielitos in custody as of May 1, 1992. Detainers had been placed on another 2300 Marielitos serving prison sentences. FIVE-YEAR DETENTION PLAN, *supra* note 64, at 18. Because of a history of riots by Marielito detainees, protesting the resumption of flights returning them to Cuba, Marielitos are usually confined in Bureau of Prison facilities. *Id.* at 19.

273. The prospects for the eventual return of excluded incarcerated Marielitos to Cuba are "dependent on the uncertainties of diplomacy between two feuding and mutually suspicious nations." ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 447. Cuba has only sporadically agreed to accept the return of some Marielitos. The INS reviews annually the files of detained Marielitos to determine if they are eligible for supervised parole. The current procedures for this review are set out in the Cuban Review Plan, codified at 8 C.F.R. § 212.12-.13 (1994). This review provides a personal interview for detainees who are not recommended for parole, but does not include procedures for a more formal adversarial hearing. *Id.* § 212.12(d)(4)(ii); *see generally* ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 445-52, 465-73 (detailing litigation and policy developments for Marielito Cuban detainees); Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (refusing to order release for excluded Marielito Cuban with criminal record who had been detained since 1985).

274. *See* Louis v. Nelson, 544 F. Supp. 973, 993-97, 1002-04 (S.D. Fla. 1982) (concluding the INS promulgation of the new policy of detention for undocumented excludable aliens violated the Administrative Procedure Act, and ordering Haitians released on parole), *aff'd in part and rev'd in part sub nom.*, Jean v. Nelson, 711 F.2d 144 (11th Cir. 1983), *vacated*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (concluding the INA does not authorize the indefinite detention of excludable aliens, and ordering release of Marielito Cuban who was confined in federal prison).

275. *See infra* note 284.

courts have reasoned that the plenary power doctrine must govern these claims.

Jean v. Nelson, the Haitian class action litigation, provides the most prominent example of this analysis.[276] Initially, a panel of the Eleventh Circuit emphasized that the Haitian plaintiffs did not claim a constitutional right to be admitted to the United States. Rather, at issue was "a right to be considered for parole in a nondiscriminatory fashion."[277] The panel therefore concluded the Haitians' claims did not relate to the political branches' authority over immigration, and should be governed by the aliens' rights tradition.[278] Finding strong evidence of "selective and discriminatory enforcement" of the new detention policy, the court determined the Haitian detainees should be paroled.[279]

Sitting en banc, the Eleventh Circuit vacated the panel opinion. The full court adopted the same framework for analysis: "whether the grant or denial of parole is an integral part of the admissions process."[280] Unlike the panel, the en banc court concluded the plenary power doctrine defeated the Haitians' equal protection claim.[281] The court reasoned special deference was warranted because a judicial order to parole excludable alien detainees "would ultimately result in our losing control over our borders."[282] As such, the plenary power doctrine must govern these claims. Applying *Mezei*, the court held "the Haitian plaintiffs in this case *cannot claim equal protection rights under the Fifth Amendment*, even with regard to challenging the Executive's exercise of its parole discretion."[283]

Jean v. Nelson marked an unfortunate turning point in the continuing litigation over the due process rights of excludable aliens. For the most part, later cases have adopted the analysis of the *Jean* en

276. In *Jean*, the Supreme Court granted certiorari to decide the pressing question of whether excludable Haitian detainees could raise an equal protection challenge, via the Due Process Clause, to the allegedly discriminatory denial of their parole applications. 472 U.S. at 849. The Court decided the case by interpreting the governing regulations to preclude national origin discrimination in parole decisions. *Id.* at 857. The Court therefore refused to reach the constitutional question on prudential grounds. *See id.* at 854. Nevertheless, the opinions below remain an influential analysis of the due process rights of excludable alien detainees. *See also supra* notes 69-70 and accompanying text (background of *Jean*).

277. *Jean*, 711 F.2d at 1484.

278. *Id.* at 1483-1505, 1509.

279. *Id.*

280. *Jean*, 727 F.2d at 971.

281. *Id.* at 975.

282. *Id.*

283. *Id.* at 970 (emphasis added).

banc court, and continue to deny due process protection to excludable alien detainees seeking parole.[284] These cases have reinvigorated the *Knauff* and *Mezei* decisions in the post-Cold War era. Their impact is felt most keenly by Marielito criminals whose parole has been revoked by the INS. Many have been incarcerated long past the end of their criminal sentence, and face continued indefinite confinement.[285]

Nevertheless, while the *Jean* en banc court applied *Knauff* and *Mezei* to deny due process protection to excludable alien detainees seeking parole, it also recognized an important limitation to the plenary power doctrine. The court summarized its opinion as a "simple and straightforward" holding that excludable aliens cannot claim equal protection to "challenge the decisions of executive officials *with regard to their applications for admission, asylum, or parole.*"[286] At the same time, the court explicitly recognized "aliens can raise constitutional challenges . . . outside the context of entry or admission, when the plenary authority of the political branches is not implicated."[287] Thus, because its analysis centered on the *Yick Wo-Wong Wing* boundary of the plenary power doctrine, *Jean* was also a reaffirmation of the aliens' rights tradition.

D. *Lynch v. Cannatella*: Due Process Protection to Challenge Conditions of Confinement

Some cases have recognized that this boundary should protect even excludable alien detainees from the incursion of the plenary power doctrine when they seek due process protection to challenge the conditions of their confinement. In *Haitian Centers Council v. Sale*, for example, the court held the conditions of confinement at segregated camps used to confine HIV-positive Haitians violated due

284. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995); Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1441-43 (5th Cir. 1993); Alvarez-Mendez v. Stock, 941 F.2d 956, 962-63 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 127 (1992); Amanullah v. Nelson, 811 F.2d 1, 8-9 (1st Cir. 1987); Fernandez-Roque v. Smith, 734 F.2d 576, 582 (11th Cir. 1984). For a summary of the "consensus view" that "excludable aliens are outside the Constitution's mantle, possessing no constitutional rights with respect to their detention," see Cruz-Elias v. United States Attorney Gen., 870 F. Supp. 692 (E.D. Va. 1994). The *Cruz-Elias* case collects both the academic commentary and cases discussing the constitutional rights of excludable aliens detained by the INS. *Id.* at 693-98.

285. *See, e.g.*, Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994) (granting writ of habeas corpus for Marielito) (concluding "[t]he practice of administratively imprisoning persons indefinitely is not a process tolerable in use against any person in any corner of our country"), *vacated*, 44 F.3d 1441 (9th Cir. 1995) (en banc) (holding continued detention "is constitutional under *Mezei*").

286. *Jean*, 727 F.2d at 984 (emphasis added).

287. *Id.* at 972.

process, condemning the "squalid and prison-like" camps and the government's deliberate refusal to provide adequate medical care.[288] In dicta, the court rejected the argument that the Haitians confined at Guantanamo could not claim any protection under the Constitution to challenge even the most egregious mistreatment by their captors.[289]

The same analysis was the explicit holding of the Fifth Circuit in *Lynch v. Cannatella*.[290] The *Lynch* plaintiffs were stowaways who claimed they were severely mistreated while in the custody of the New Orleans harbor police.[291] The harbor police officers, sued for damages in their individual capacities, asserted qualified immunity against these charges.[292]

Government officials claiming qualified immunity must show "their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known."[293] In *Lynch*, the stowaways' captors relied on the plenary power doctrine to establish their qualified immunity defense.[294] They argued that since *Jean v. Nelson* and its progeny had stated excludable aliens were not entitled to due process protection, the stowaways did not have a "clearly established" constitutional right—or indeed *any* constitu-

288. 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993) (vacated per settlement agreement).

289. *Id.* (stating "[i]f the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, [or] to deprive them of medical attention"). Similar dicta appeared in a Second Circuit opinion earlier in this litigation. Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1341-42 (2d. Cir. 1992) (affirming district court's grant of a preliminary injunction in the face of assertions by government attorneys that the detained Haitians would not be protected by the Due Process Clause "even if they had been subjected to physical abuse").

290. 810 F.2d 1363 (5th Cir. 1987).

291. Fourteen stowaways were transferred from the barge they had boarded directly into the custody of the New Orleans harbor police. Two others jumped ship, were retrieved by the Coast Guard, and spent two days in INS custody before they were delivered to the harbor police. *Lynch*, 810 F.2d at 1367. The stowaways claimed during 10 days of detention they were denied minimal physical comforts such as heat, adequate toilet facilities, and proper bedding; were hosed down with a fire hose when they refused to take cold showers; and in some cases were beaten by harbor police officers. They further alleged they were drugged and locked in a steel container lashed insecurely to the deck of a barge for the return trip to Jamaica, until the barge was intercepted by federal officials. *Id.* at 1367-68.

292. *Id.* at 1372, 1374.

293. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

294. Surprisingly, the *Lynch* court never used the term "plenary power doctrine." Nevertheless, the *Lynch* court framed its analysis as an inquiry into whether the limited constitutional protection afforded to excludable aliens within immigration law also precluded challenges to their treatment while in custody. 810 F.2d at 1373-74.

tional right—to be protected from abuse or mistreatment while in custody.[295]

In response to this argument, the Fifth Circuit conceded that excludable aliens' "right to be free from purposeful physical abuse . . . has never been explicitly examined by the courts."[296] The court recognized excludable aliens had limited constitutional rights "with regard to immigration and deportation proceedings," but ultimately concluded this precedent "does not limit the right of excludable aliens detained within United States territory to humane treatment."[297] The *Lynch* court also focused on the underlying justification for the plenary power doctrine: "the overriding concern that the United States, as a sovereign, maintain its right to self-determination."[298] The court emphasized the sovereignty of the United States would not be undermined if the stowaways were entitled to challenge the conditions of their confinement, explaining "we cannot conceive of any national interests that would justify the *malicious infliction of cruel treatment* on a person in United States territory simply because that person is an excludable alien."[299] Thus, the court held "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the Due Process Clauses of the Fifth and Fourteenth Amendments to be free of *gross physical abuse* at the hands of state or federal officials."[300]

IV. The Porous Border of the Plenary Power Doctrine

Lynch invoked the boundary of the plenary power doctrine—first articulated in *Yick Wo* and *Wong Wing* and reinvigorated by the Eleventh Circuit in *Jean v. Nelson*—to conclude alien detainees' claims of

295. *Lynch*, 810 F.2d at 1372. The defendants relied on Garcia-Mir v. Meese, 788 F.2d. 1446 (11th Cir. 1986), which held that Marielito Cubans seeking parole could not claim due process protection, to argue that excludable aliens "have virtually no constitutional rights." *Lynch*, 810 F.2d at 1372 (quoting *Garcia-Mir*, 788 F.2d at 1449).

296. *Id.* at 1372.

297. *Id.* at 1373 (citing Jean v. Nelson, 727 F.2d 957, 969 (11th Cir. 1984 (en banc)).

298. *Id.*

299. *Id.* at 1374 (emphasis added).

300. *Id.* (emphasis added). The court then remanded to allow the plaintiffs further opportunity to develop their claims. *Id.* at 1377. The *Lynch* court accepted the plaintiffs' allegations as true when reviewing the district court's refusal to grant summary judgment on the individual defendants' qualified immunity defense. Nevertheless, the court found some of the allegations in the complaint were "patently inadequate to state a claim of constitutional dimension." *Id.* at 1376. On remand, the plaintiffs' attorney failed to comply with instructions to file an amended complaint. The district court then dismissed all remaining claims with prejudice. Lynch v. Cannatella, 122 F.R.D. 195 (E.D. La.), *aff'd*, 860 F.2d 651 (5th Cir. 1988).

mistreatment should be adjudicated under the aliens' rights tradition.[301] Standing alone, *Lynch* proclaims that regardless of their status under immigration law, excludable aliens can claim due process protection to challenge the conditions of their confinement.[302] But later

301. The *Lynch* court did not consider an additional argument that is sometimes invoked to dilute, or even circumvent, the plenary power doctrine. Some courts and commentators have suggested the plenary power doctrine applies with most force to *congressional* action, and should not insulate executive conduct from judicial review. *See, e.g.*, Louis v. Nelson, 544 F. Supp. 973, 998 (S.D. Fla. 1982) ("[i]t is important to note that the actions challenged herein are not congressional"). *Cf.* Johnson, *supra* note 193, at 497 (arguing "the INS' long record of heavy-handed enforcement tactics" should weigh against employing the usual rules of judicial deference to agency action.); Legomsky, *Immigration Law and Plenary Power, supra* note 15, at 255 (leading article considering principle of plenary *congressional* power).

But what initially appears to be a fairly simple distinction between congressional and executive action raises a host of issues, beyond the scope of this article, yet to be fully explored. The argument that only Congress should be accorded deference in immigration matters is undermined by leading plenary power cases upholding executive branch action. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (when the executive refuses to waive an exclusion ground "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion"). Moreover, it is not always easy to separate congressional and executive authority. For example, one of the most infamous articulations of the principle of plenary power comes from the Supreme Court's decision in *United States ex rel. Knauff v. Shaughnessy*, where the Court concluded "[w]hatever the procedure authorized by *Congress* is, it is due process as far as an alien denied entry is concerned." 338 U.S. 537, 544 (1950) (emphasis added). But Ellen Knauff was challenging the Attorney General's decision to exclude her without a hearing, a decision made under regulations promulgated pursuant to a presidential proclamation, which in turn was authorized by a war time statute permitting the President to "impose additional restrictions and prohibitions on the entry into and departure of persons from the United States" during an (already declared) national emergency. Only in the loosest sense did the challenged conduct "flow" from *Congress*'s exercise of the federal immigration power. *Id.* at 540. Finally, the executive branch acts in a myriad of ways to enforce our immigration laws, and proponents of the executive/congressional distinction have not yet sorted out what acts and which actors should be insulated from plenary power deference. *Compare* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 365 (C.D. Cal. 1982) ("[a]lthough the Court recognizes the great deference owed to Congress and the President in the immigration field, the deference owed to the INS is more circumscribed") *with* Jean v. Nelson, 727 F.2d 957, 970 (11th Cir. 1984) (en banc) (excludable aliens cannot claim equal protection to challenge discretionary parole decisions made by INS officials) *and* Pena v. Kissenger, 409 F.2d 1182 (S.D.N.Y. 1976) (stating well-settled rule that denials of visa applications by consular officials overseas are insulated from judicial review).

My own view is that the source of the challenged action—whether an act of Congress, a regulation issued by the INS, or a discretionary decision by an official in the field—can be a relevant factor when deciding whether, and with how much force, plenary power deference should apply. The congressional/executive distinction, however, is sometimes employed as a rather inexact surrogate for the inquiry that properly occupied center stage in *Lynch*: whether the challenged action is an exercise of the power to control immigration.

302. Other commentators have similarly suggested that *Lynch* is a vindication of the aliens' rights tradition. *See* Motomura, *Phantom Norms, supra* note 16, at 586 n.215 (placing *Lynch* among those cases "in the spirit of" *Wong Wing* and *Yick Wo*); ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY, *supra* note 45, at 465 (contrasting *Lynch* with

cases, focusing only on *Lynch*'s memorable language, have suggested that excludable aliens *must* show "malicious infliction of cruel treatment" or "gross physical abuse" to state a viable due process claim.

A. "Malicious Infliction of Cruel Treatment" or "Gross Physical Abuse": Betraying the Promise of *Lynch v. Cannatella*

Medina v. O'Neill marked the first step away from the holding of *Lynch*.[303] In *Medina*, sixteen stowaways in the custody of a private security firm were detained together twenty-four hours a day in a single cell designed to hold six people. After two days of detention, the aliens attempted to escape.[304] One alien was killed and another wounded during this attempt when a shotgun being used by a guard to prod the detainees accidentally discharged.[305]

The stowaways sued INS officials, seeking both injunctive relief and damages.[306] The Fifth Circuit reversed a district court ruling in their favor on several grounds. The court held, contrary to the lower court's analysis, that the INS did not have a statutory duty to arrange for the detention of stowaways in appropriate facilities.[307] The Fifth Circuit also concluded the allegations against INS officials were no more than claims of negligence, insufficient to state a due process violation.[308]

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cases rejecting excludable aliens' due process claims seeking parole from immigration detention).

303. 838 F.2d 800 (5th Cir. 1988), *rev'g* 589 F. Supp. 1028 (S.D. Tex. 1984).

304. *Medina*, 589 F. Supp. at 1031 n.7.

305. *Medina*, 838 F.2d at 801.

306. *Medina*, 589 F. Supp. at 1034.

307. *Medina*, 838 F.2d at 802.

308. *Id.* at 803. The *Medina* court, following *Ortega v. Rowe*, 796 F.2d 765, 767-69 (5th Cir. 1986), held that the district court incorrectly relied upon *Bell v. Wolfish*, 441 U.S. 520 (1979), the leading Supreme Court decision delineating the analysis to be used when pretrial detainees bring due process challenges to the conditions of their confinement. *Id.* Under *Bell*, pretrial detainees are protected from any mistreatment "amount[ing] to punishment of the detainee." *Bell*, 441 U.S. at 535. Both *Medina* and *Ortega* concluded the *Bell* "punishment" standard was significantly undermined by later Supreme Court cases holding simple negligence did not amount to a due process violation. *Medina*, 838 F.2d at 803 (concluding "the Supreme Court has shifted ground since *Bell*"); *Ortega*, 796 F.2d at 767-69 (asserting the later Supreme Court decisions "render much of *Bell*'s language surplusage"). But *Medina* and *Ortega* appear to stand alone in explicitly questioning the continued vitality of *Bell*. The Fifth Circuit, while currently embroiled in disagreement over scope of due process protection afforded to pretrial detainees, continues to cite *Bell* consistently as the controlling precedent for due process conditions claims. *See* Grawbowski v. Jackson County Pub. Defenders Office, 47 F.3d 1386, 1395 (5th Cir. 1995), *reh'g en banc granted*, 1995 U.S. App. LEXIS 5999 (5th Cir. Mar. 14, 1995); Hare v. City of Corinth, 36 F.3d 412, 415 (5th Cir. 1994), *reh'g en banc granted*, 1994 U.S. App. LEXIS 34475 (5th Cir. Dec. 8, 1994). *Medina* and *Ortega*'s rejection of *Bell* apparently has not spread to other

In addition, the *Medina* court invoked *Lynch* to consider "the substantive due process rights of excludable aliens."[309] After quoting *Lynch*'s statements that no national interest would justify "malicious infliction of cruel treatment" and that excludable aliens were surely entitled to be free from "gross physical abuse," the *Medina* court concluded: "[t]he stowaways [in this case] alleged neither that cruel treatment was maliciously inflicted upon them nor that they suffered gross physical abuse. They stated no claim for violation of due process rights."[310]

This brief analysis seems to convert the factual allegations in *Lynch* into a threshold standard for all excludable alien detainees, blurring the distinction between specific allegations of misconduct found sufficient to defeat qualified immunity and the full scope of due process protection. The court did not rest its decision solely on this ground.[311] Still, instead of considering *Lynch*'s careful explanation of the proper scope of the plenary power doctrine, the *Medina* court suggested "malicious infliction of cruel treatment" or "gross physical abuse" were prerequisites for excludable aliens to state a due process violation.

A similar misreading of *Lynch* appears in *Adras v. Nelson*, an Eleventh Circuit decision adjudicating residual claims left unresolved in the *Jean v. Nelson* litigation.[312] In addition to asserting various damage claims for alleged unlawful detention,[313] the Haitian plaintiffs in *Adras* also challenged the conditions of confinement at the Krome SPC where they were confined in the early 1980s.[314] The *Adras* court readily rejected the bulk of the plaintiffs claims as precluded by the plenary power doctrine and discretionary function exception to the Federal Tort Claims Act.[315] The court also concluded INS officials were protected by qualified immunity, even against the plaintiffs' alle-

cases. *See also supra* note 172 (critiquing *Ortega* court's application of the negligence bar to due process liability).

309. *Medina*, 838 F.2d at 803.

310. *Id.* Because the *Medina* court concluded the plaintiffs' allegations did not state a due process violation, it found it unnecessary to consider the defendants' qualified immunity argument. *Id.* at 802.

311. *See supra* notes 307-308.

312. 917 F.2d 1552 (11th Cir. 1990).

313. The damage claims for unlawful detention were primarily asserted under the Federal Torts Claims Act ("FTCA"). *See id.* at 1555. The plaintiffs also sought damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Id.* at 1557.

314. Krome was severely overcrowded, with numerous attendant conditions problems, during this time period. *See supra* notes 130-134 and accompanying text.

315. *Adras*, 917 F.2d at 1556-59. The court relied on *Jean v. Nelson* to conclude the detention of the Haitian plaintiffs was not unlawful, and also held that the defendants were

gations of unconstitutional conditions of confinement.[316] The *Adras* court found no conflict between its ruling and *Lynch*'s refusal to grant qualified immunity because "[t]here is no allegation [by the *Adras* plaintiffs] of 'gross physical abuse' and malicious infliction of harm by INS agents."[317]

Adras appears to be unique in its grant of qualified immunity to government officials in the face of a complaint stating the plaintiffs suffered "severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care."[318] The Fifth Circuit, rejecting a qualified immunity defense asserted by local jail officials who failed to provide reasonable medical treatment to a pretrial detainee, has pointedly noted that "[a] constitutional right to minimally adequate care and treatment is not a novel proposition."[319] Yet the *Adras* court granted qualified immunity even for claims of severe overcrowding and inadequate medical care because the court "f[ou]nd no complaint here approaching the 'gross' physical abuse outlined in *Lynch*."[320]

Thus *Adras*, like *Medina*, extracted language from *Lynch* to set an unusually high threshold for excludable aliens seeking to challenge the conditions of their confinement. It appears that the *Lynch* court selected the phrases "malicious infliction of cruel treatment" and "gross physical abuse" to emphasize the audacity of the argument that

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shielded from liability under the "discretionary function" exception of the FTCA. *See id.* at 1557.

The *Adras* plaintiffs apparently also pursued the challenge to the conditions of their confinement as an FTCA claim. *Id.* at 1559. The FTCA seldom provides an adequate remedy for federal detainees challenging conditions of confinement. Detainees in federal custody can recover damages under the FTCA only for claims (such as negligence in providing medical care) stating a cause of action recognized under state tort law. 28 U.S.C. § 1346(b) (1994). The FTCA does not provide relief for all deprivations of constitutional rights. *See* Muniz v. United States, 374 U.S. 150 (1962); Carlson v. Green, 446 U.S. 14 (1980). Also, because the FTCA reaches only the negligence of "employee[s] of the Government," and does not impose liability on any "contractor with the United States," federal detainees held in local jails or contract facilities cannot bring FTCA claims to challenge their treatment in these facilities. *See* 28 U.S.C. §§ 1346(b), 2761 (1994); Logue v. United States, 412 U.S. 521 (1972).

316. *Adras*, 917 F.2d at 1557-59.

317. *Id.* at 1559 (quoting Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)).

318. *Id.* (quoting Plaintiffs' Second Amended Complaint).

319. Colle v. Brazos, 981 F.2d 237, 246 (5th Cir. 1993); *see also* Thompson v. City of Los Angeles, 885 F.2d 1439, 1448 (9th Cir. 1989) (reversing summary judgment in favor of the defendant county jail on claim that the failure to provide pretrial detainee with bed or mattress violated due process); Lyons v. Powell, 838 F.2d 28, 31 (1st Cir. 1988) (due process claim may be stated when detainee was confined with a cellmate for 22-23 hours per day and forced to sleep on a floor mattress).

320. *Adras*, 917 F.2d at 1559.

excludable alien detainees do not have a "clearly established" constitutional right to be free from such serious mistreatment.[321] In contrast, *Medina* and *Adras* suggest excludable aliens seeking to challenge the conditions of their confinement *must* allege abuse of at least this severity to state a viable due process claim.[322]

The *Medina* and *Adras* courts did not seem to be conscious of this marked shift from *Lynch*'s original analysis. Instead, the "malicious infliction of cruel treatment" or "gross physical abuse" standard evolved silently, largely within the context of adjudicating individual defendants' assertions of qualified immunity.[323] As such, it might be seen as a by-product of the many limitations on damage claims against governmental entities and government officials, which would not impact claims for injunctive relief.[324]

There are hints, however, that "malicious infliction of cruel treatment" or "gross physical abuse" may take root in a broader array of cases as a prerequisite for excludable aliens to establish a constitutional violation. Indeed, dicta in later opinions suggests that this interpretation has already overtaken the *Lynch* court's original analysis. In *Gisbert v. United States Attorney General*, for example, the Fifth Circuit rejected an argument by Marielito Cuban detainees that *Lynch* supported their claim of substantive due process protection to challenge their indefinite confinement. The court cautioned its holding in *Lynch* should be read very narrowly, explaining that *Lynch* created a "gross physical abuse exception" to the general principle that excluda-

321. *See* Lynch, 810 F.2d at 1374. The court was incredulous the defendants would claim qualified immunity in the face of allegations that they had denied the stowaways proper shelter and access to toilets, and had hosed them down with fire hoses, slamming the detainees against their cell walls. *Id.* at 1367. The court noted, for example, "[i]f the arguments advanced by the harbor police defendants were sound, the Constitution would not have protected the stowaways from torture or summary execution." *Id.* at 1375.

322. Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988); *Adras*, 917 F.2d at 1559-60.

323. In *Lynch*, *Medina*, and *Adras*, the plaintiffs sought both injunctive relief and damages from government officials sued in their individual capacities. The *Medina* court did not reach the qualified immunity issue, concluding that because the plaintiffs had "alleged neither that cruel treatment was inflicted upon them nor that they suffered gross physical abuse" they had failed to state a due process claim. 838 F.2d at 803. In *Lynch* and *Adras*, however, the phrases "malicious infliction of cruel treatment" and "gross physical abuse" played a critical (albeit dramatically different) role in the courts' qualified immunity analysis. *Lynch*, 810 F.2d at 1374; *Adras*, 917 F.2d at 1559-60.

324. Qualified immunity is but one of a host of doctrines that limit the damage liability of governments and their employees. *See generally* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 203-07 (1983) (summarizing various "complex and to some degree unsettled" liability and immunity doctrines).

ble aliens have no due process rights in immigration proceedings.[325] Similarly, the Second Circuit, citing *Lynch*, has asserted that excludable aliens enjoy "little or no" due process protection "[o]ther than protection against gross physical abuse."[326] And a federal district court has read *Lynch*, as "narrow[ed]" by *Gisbert*, to hold that "an alien's substantive due process right to humane treatment while in INS detention is *limited* to the right to be free from 'gross physical abuse.'"[327]

Thus it appears the central lesson of *Lynch*—that excludable aliens can claim full due process protection to challenge their treatment while in custody—may be supplanted by a requirement that they must allege deliberate cruelty or severe physical abuse to overcome a qualified immunity defense, or even to state a viable claim. This requirement has not been imposed on pretrial detainees.[328] The "malicious infliction of cruel treatment" and "gross physical abuse" of *Medina* and *Adras* is also notable for its departure from the analysis used by the Supreme Court to adjudicate the conditions claims of convicted prisoners.

B. A Comparison to Eighth Amendment Standards

Pretrial detainees, and others in civil confinement, ought to enjoy due process protection against inhumane detention conditions "at least as great as the Eighth Amendment protection available to a convicted prisoner."[329] *Medina* and *Adras*, however, do not provide this

325. 988 F.2d 1437, 1442 (5th Cir.), *amended on other grounds*, 997 F.2d 1122 (5th Cir. 1993).

326. Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990). *Correa* has been cited in later decisions reiterating the "other than protection against gross physical abuse" language. *See* Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1349 (2d Cir. 1992) (Mahoney, J., dissenting) (rejecting grant of due process protection to excludable aliens); Mejia-Ruiz v. INS, 871 F. Supp. 159, 164 (E.D.N.Y. 1994).

327. Xiao v. Reno, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993) (emphasis added).

328. *See supra* note 319. A search of computer databases reveals that *Lynch*, *Medina*, *Adras*, and the later cases explicitly citing to these decisions are the only federal court cases containing either the phrase "malicious infliction of cruel treatment" or "gross physical abuse." The only exception is *Swenson v. Stidham*, where the Supreme Court used the phrase "gross physical abuse" when describing a criminal defendant's claim he had been coerced by police to confess to a crime. 409 U.S. 224, 225 (1972).

329. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979)). Pretrial detainees are protected against any condition or practice that amounts to "punishment," while incarcerated criminals must show "cruel or unusual punishment" to establish that the conditions of their confinement violate the Constitution. *Bell*, 441 U.S. at 535 n.16. Thus, conditions constituting "cruel and unusual" punishment under the Eighth Amendment a fortiori should also amount to a due process violation. Hare v. City of Corinth, 36 F.2d 412, 415-16 (5th Cir. 1994), *reh'g en*

heightened protection to excludable alien detainees. To the contrary, the "malicious infliction of cruel treatment" or "gross physical abuse" standard echoes requirements that the Supreme Court has rejected as too stringent even for convicted prisoners challenging detention conditions under the Eighth Amendment.

In *Wilson v. Seiter*, for example, the Supreme Court held prisoners must prove a "culpable state of mind" on the part of prison officials in order to establish an Eighth Amendment violation.[330] This subjective component of the Eighth Amendment must be satisfied even when prisoners allege widespread, systemic problems with conditions of confinement. Yet the *Wilson* Court concluded that prisoners challenging overall detention conditions do not have to prove government officials acted "maliciously and sadistically for the very purpose of causing harm," thus rejecting a standard that mirrors the "malicious infliction of cruel treatment" language in *Medina* and *Adras*.[331] The *Wilson* Court explicitly stated this "very high state of mind . . . does not apply to prison conditions cases."[332] Instead, "deliberate indifference"—a term meaning "something less than acts or omissions for the very purpose of causing harm"—is the appropriate subjective standard for most conditions claims.[333]

The Eighth Amendment also has an objective component. In *Hudson v. McMillian*, the Supreme Court rejected the Fifth Circuit's attempt to transform this component into a standard requiring a threshold showing of a "significant injury" to state an Eighth Amendment claim.[334] Instead, the Court reiterated that the objective component of the Eighth Amendment is a contextual standard drawing its meaning from "the evolving standards of decency that mark the pro-

banc granted, 1994 U.S. App. LEXIS 34475 (5th Cir. 1994); Matzker v. Herr, 748 F.2d 1142, 1146 (7th Cir. 1984). *But see* 1 MUSHLIN, *supra* note 123, § 3.01, at 132 (arguing "[i]t is doubtful whether there is a practical difference between the application of these two standards").

330. 501 U.S. 294 (1991).

331. *Wilson*, 501 U.S. at 302 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cited in* Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The Court had previously adopted this heightened subjective standard for emergency situations involving prison disturbances. *Whitley*, 475 U.S. at 320-21.

332. *Wilson*, 501 U.S. at 302-03.

333. Farmer v. Brennan, 114 S. Ct. 1970 (1994); *Wilson*, 501 U.S. at 302-03.

334. 503 U.S. 1, 5 (1992). In *Hudson*, an inmate who had been beaten by prison guards suffered bruises and swelling on his face, mouth, and lip. The blows also loosened the prisoner's teeth and cracked his dental plate. The Fifth Circuit concluded the guards' use of force was "clearly excessive and occasioned unnecessary and wanton infliction of pain," but held the prisoner could not prevail on his Eighth Amendment claim because he had suffered only "minor" injuries. *Id.* at 4-5.

gress of a maturing society."[335] The *Hudson* Court concluded that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated . . . whether or not significant injury is evident."[336]

The *Medina* and *Adras* courts' emphasis on "*gross*" physical abuse seems inconsistent with *Hudson*'s holding that the use of excessive force raises a colorable Eighth Amendment claim, even when it does not cause a particularly serious or lasting physical injury. Moreover, other Supreme Court cases make clear that many types of harm—including inadequate medical care,[337] serious overcrowding,[338] and even prolonged exposure to unreasonably high levels of environmental tobacco smoke[339]—can constitute "cruel and unusual punishment." Yet dicta in the immigration detention context suggests "an alien's substantive due process right to humane treatment while in INS detention is *limited* to the right to be free from 'gross physical abuse.'"[340] This standard would leave alien detainees without protection from many types of inhumane treatment that are prohibited by the Eighth Amendment.

C. The Silent Influence of the Plenary Power Doctrine

It appears, therefore, that excludable aliens challenging the conditions of their confinement have been cut off from the usual framework for analyzing conditions claims under the Constitution. The Supreme Court has held that neither malicious treatment for the very purpose of causing harm nor physical abuse resulting in significant injury are necessary to show "cruel and unusual punishment" under the Eighth Amendment. But the conditions claims of excludable aliens have on occasion been dismissed outright or rejected on qualified immunity grounds for failing to allege "malicious infliction of cruel treatment" or "gross physical abuse." This standard has developed in

335. *Id.* at 8-9 (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

336. *Id.* at 9.

337. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

338. *See* Rhodes v. Chapman, 452 U.S. 337, 356 (1981) (Brennan, J., concurring) (discussing numerous lower court rulings where overcrowding was held unconstitutional).

339. Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993).

340. Xiao v. Reno, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993) (quoting Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987), as explained in Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1442 (5th Cir. 1993)) (emphasis added); *see also* Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (dicta suggesting excludable aliens enjoy "little or no" due process protection "[o]ther than protection against gross physical abuse").

isolation; it has been imposed only upon excludable alien detainees.[341] And it is all the more unusual since it has been applied to due process claims, where civil detainees are supposed to receive greater constitutional protection than the Eighth Amendment affords convicted prisoners. In short, excludable aliens seeking to challenge the conditions of their confinement have at times been granted significantly less than a full measure of due process rights.

Under the Eleventh Circuit's analysis in *Jean v. Nelson*, however, conditions claims should fall beyond the reach of the plenary power doctrine. Indeed, *Lynch v. Cannatella*—the source of the "malicious infliction of cruel treatment" or "gross physical abuse" language—recognized that *Jean* "does not limit the right of excludable aliens detained within United States territory to humane treatment."[342] *Medina* and *Adras* misconstrued the holding in *Lynch*, and instead allowed plenary power analysis to infect their adjudication of conditions claims. In this respect, they resemble *United States v. Verdugo-Urquidez*, *Flemming v. Nestor*, and *Mathews v. Diaz*—cases where the Supreme Court applied plenary power deference reflexively to any constitutional challenge pressed by aliens, even when their claims were not linked to the federal government's power to control immigration.[343]

What is striking about *Lynch* and its progeny, however, is the *unconscious* evolution of the "malicious infliction of cruel treatment" or "gross physical abuse" standard. *Verdugo-Urquidez, Mathews,* and to a lesser extent *Flemming* all reflect a deliberate choice between the plenary power doctrine and the aliens' rights tradition.[344] In contrast,

341. *See supra* notes 319, 328.

342. 810 F.2d at 1373.

343. *See supra* notes 245-263 and accompanying text.

344. In *Verdugo-Urquidez*, the Supreme Court explicitly rejected the alien respondent's arguments from *Yick Wo-Wong Wing* line of cases in the aliens' rights tradition, concluding "[r]espondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not." 494 U.S. at 271; *see supra* notes 245-252 and accompanying text. In *Mathews v. Diaz*, the Court at first invoked the language of the aliens' rights tradition but ultimately was swayed by the plenary power argument that Congress's denial of Medicaid benefits to aliens was an exercise of its "broad power over naturalization and immigration." 426 U.S. at 77, 79-80; *see supra* notes 256-262 and accompanying text. The competition between the plenary power doctrine and the aliens' right tradition was less overt in *Flemming v. Nestor*, where the alien plaintiffs' "most insistently pressed constitutional objections" centered on whether the termination of Social Security benefits constituted legislative "punishment" without judicial trial. 363 U.S. 602, 612-13 (1960). Still, the Court relied in part on plenary power cases stating deportation is not "punishment" under the Constitution, a move that was challenged by the dissenting justices who argued "the Court cannot rest [its] decision . . . on Congress' power to regu-

the *Medina* court simply seized on language in *Lynch* and incorrectly assumed that protection from "malicious infliction of cruel treatment" or "gross physical abuse" was all that the Constitution provided excludable aliens. Similarly, the *Adras* court overlooked the distinction between the Haitian plaintiffs' claims of unlawful detention, which under *Jean* should be governed by the plenary power doctrine, and their challenges to the conditions of confinement. Instead, the court allowed the plenary power doctrine to pervade its entire opinion. These analytical errors have since spread, at least in dicta, to other cases.[345] In short order, *Lynch*'s careful analysis, which was protective of the due process rights of excludable alien detainees outside of the immigration context, has silently evolved into a standard limiting their due process rights even to challenge the conditions of their confinement.

This silent spread of the plenary power doctrine might be seen as the mirror image of a similarly subtle flow of constitutional values *into* the immigration law realm. Hiroshi Motomura has convincingly argued that "phantom constitutional norms" sometimes spill across the boundary isolating immigration law from the rest of public law, and thus contribute to the gradual erosion of the plenary power doctrine.[346] These "phantom norms," which are derived from the aliens' rights tradition, influence the interpretation of immigration statutes, "produc[ing] results that are much more sympathetic to aliens" than a plenary power analysis would suggest.[347] In essence, Professor Motomura argues that the process of statutory interpretation can serve as a vehicle to smuggle constitutional protection for aliens into the immigration law realm. He and others suggest only a crumbling and soon-to-be defunct barrier separates aliens from full integration into "the people" protected by the Constitution.[348]

But this focus on an eroding plenary power doctrine, which until recently has dominated immigration law scholarship, overlooks the polluting effect of the plenary power doctrine *outside* the immigration

late immigration." *Id.* at 616; *id.* at 636 (Brennan, J., dissenting); *see supra* note 255; *see also* Legomsky, *Suspending Benefits*, *supra* note 254, at 1264.

345. *See supra* notes 325-327 and accompanying text.

346. Motomura, *Phantom Norms*, *supra* note 16, at 547-50, 564-75.

347. *Id.* at 564.

348. *Id.* at 549 (citing a "widely accepted view . . . that the doctrine is in some state of decline"); Schuck, *supra* note 33, at 90. Stephen Legomsky's essay for this symposium issue, which argues the current trend seems to point toward the emergence of a "restricted plenary power doctrine—a new 'PPD-lite,'" is in a similar vein. Legomsky, *Ten More Years*, *supra* note 33, at 936-37.

law realm.[349] The traditional analysis of the relationship between the plenary power doctrine and the aliens' rights tradition depicts only a one-way flow of constitutional norms into the immigration law realm. In fact, the border is porous in both directions. The cases adjudicating the conditions claims of excludable alien detainees illustrate a second silent migration: the influence of the plenary power doctrine also spills out beyond the boundary of immigration law.

V. Conclusion: Policing the Porous Border

To stop this leaching, courts must police the porous border between the plenary power doctrine and the aliens' rights tradition. Such vigilance, however, may come with a price: it can reinforce the barrier separating aliens from the Constitution whenever they press immigration law claims. A strong boundary between the plenary power doctrine and the aliens' rights tradition may, in some cases, be used to defeat aliens' constitutional claims.

Jean v. Nelson illustrates this point. The Eleventh Circuit framed its analysis of the due process rights of Haitian detainees seeking parole as a choice between the plenary power doctrine and the aliens' rights tradition. The court distilled a standard for making this choice: "whether the grant or denial of parole is an integral part of the admissions process."[350] *Jean* clarified the scope of the plenary power doctrine and the aliens' rights tradition, but ultimately concluded excludable aliens seeking parole could not claim due process protection.

While many have criticized this result, *Jean* at least asked the correct question: whether granting aliens constitutional protection will impinge on the political branches' authority to control immigration.[351] This same analysis enabled the *Lynch* court to decide what others had

349. *Cf.* Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 32, at 994-1000; Bosniak, *supra* note 22, at 1059-68.

350. *Jean v. Nelson*, 727 F.2d 957, 971 (11th Cir. 1984) (en banc), *vacating* 711 F.2d 1455 (11th Cir. 1983).

351. *Jean*'s ruling that excludable Haitian detainees seeking parole cannot claim equal protection rights under the Fifth Amendment, even in the face of strong evidence of national origin discrimination, is not the inevitable result of this analysis. The panel opinion, vacated by the en banc court, applied the same test but concluded that the Haitian plaintiffs' claim of "a right to be considered for parole in a nondiscriminatory fashion" did not implicate the political branches plenary power over immigration, and thus should be governed by the aliens' rights tradition. 711 F.2d at 1484. The panel went on to find "ample unrebutted evidence that the plaintiffs were denied equal protection." *Id.* at 1509; *see supra* notes 276-287 and accompanying text (discussing the *Jean* panel and en banc opinions).

only suggested in dicta: despite the sweeping language of *Knauff* and *Mezei*, the plenary power doctrine does not reach the due process conditions claims of alien detainees.

The different results in *Jean* and *Lynch* show that the porous border between the plenary power doctrine and aliens' rights tradition lies in neutral territory. Insisting that courts respect this boundary does not automatically advantage either of the two competing traditions. The outcome depends on whether the challenged governmental conduct is inextricably linked to an exercise of the immigration power.

But emphasizing the border between the plenary power doctrine and the aliens' rights tradition does cause a subtle shift in analysis. A common pattern in immigration cases is to consider first whether alien claimants "deserve" constitutional protection—based on whether they have "entered" the country or have developed significant ties to the United States.[352] When courts make an explicit choice between the plenary power doctrine and the aliens' rights tradition, however, the focus shifts to the nature of the governmental power at issue. Courts are then deciding whether there is a reason to stand back and allow the government especially wide latitude to treat aliens differently under the Constitution. I believe that if courts routinely considered the constitutional claims of aliens from this perspective, instead of reflexively (or unconsciously) invoking plenary power precedent, it could weaken the plenary power doctrine.

Nevertheless, some might argue that fortifying the border between the plenary power doctrine and the aliens' rights tradition will only impede the flow of constitutional values into the immigration law realm. It hardly seems advantageous to aliens to reinforce the very barrier isolating them "in the backwaters of constitutional jurisprudence."[353] But even as norms derived from the aliens' rights tradition occasionally seep into the realm of immigration law, I suspect that there is at least as much spillover in the opposite direction. *Medina* and *Adras* illustrate the unsettling stealth and ease with which the plenary power doctrine can overshadow the aliens' rights tradition.

Moreover, the plenary power doctrine is the stronger of these competing traditions, more firmly entrenched in the body of law governing the constitutional rights of aliens. Despite a wealth of academic criticism and litigation aimed at reform, the plenary power doctrine remains the central tenet of immigration law. The aliens'

352. *See supra* notes 242, 251.

353. Aleinikoff, *Membership and the Constitution*, *supra* note 35, at 9.

rights tradition has not developed into a doctrine of equal stature.[354] I conclude that so long as the plenary power doctrine "smothers the entire field of immigration law,"[355] courts must be vigilant in policing its porous border. Otherwise, the "perverse readings of the Constitution" that mark immigration law will continue to seep out to infect claims—like the conditions claims of alien detainees—where aliens should be granted full constitutional protection.

354. *See* Bosniak, *supra* note 22, at 1004 (noting "wholly apart from questions of admission, expulsion, and naturalization, the law continues to treat alienage as the rightful basis for less favorable treatment of persons in a variety of contexts, notwithstanding the *Yick Wo* tradition").

355. Motomura, *Phantom Norms*, *supra* note 16, at 574.