Civilizing Civil Detention

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César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. (forthcoming 2014), available at SSRN.

When the news came out that nearly half a million noncitizens now find themselves in immigration detention, it struck me that this may be the most invisible civil-rights issue of our era. *Immigration Detention as Punishment,* by César Cuauhtémoc García Hernández, offers a compass through this tricky and contested terrain.

Formally, immigration detention is a civil status, an administrative adjunct to deportation. Detained noncitizens have lesser procedural protections against unnecessary or excessive detention than the criminal justice system provides to pre-trial detainees. Yet, immigration detention functions to deprive noncitizens of social and physical liberty in the same way as criminal incarceration. The government detains noncitizens in the same jails and prisons as criminal defendants and the convicted. The lives of noncitizens in detention are regulated in the same way as the lives of those whose confinement results from the criminal justice system.

That's okay, said the Supreme Court in *Demore v. Kim*, because detention is an avenue to deportation, and as long as immigration detention is not used to punish, it is classified as civil and Due Process sets the procedural standard. The constitutional protections give way a bit, giving Congress some leeway to withhold individualized bond hearings. That raises two questions: *Is* immigration detention punishment? And if it is, can we inoculate immigration detention from illegitimacy with more robust criminal-type procedural protections?

The title of García's elegantly written article might clue you in to his answer to the first question. The article takes an unexpected turn, however, when addressing the second. If immigration detention is civil, it argues, criminal procedural protections are not the solution.

I loved this piece because I love legal history, especially when it reveals new insights into the more peculiar structures of modern law, and because I love scholarship that delves deeply into one corner of law to ask questions about the whole room. Until I read this piece, I assumed that the profligation of immigration detention stemmed from the major expansion of deportation grounds in the 1990s. That's consistent with the idea that detention is merely an airlock to deportation.

Immigration Detention as Punishment led me farther back in time to the beginning of the "war on drugs." 1986 was the birth year of modern "immcarceration" (hat tip to Anil Kalhan for that evocative term), when Congress ordered the Defense Department to make detention facilities available to the Attorney General for "illegal alien felons and major narcotics traffickers," and authorized police to request immigration "detainers" from federal immigration officials. Most importantly, Congress channeled funding to state and local governments, the Bureau of Prisons, and the immigration agency for detention connected with "illegal alien" involvement in drug trafficking and crimes of violence. Later, Congress specified that jails and prisons and other comparable facilities were appropriate, even

desirable, for detaining noncitizens.

Locating the birth of modern immigration detention within the war on drugs allows García to connect the rise of detention with the contemporaneously swelling penal prison population. He shows how the mandatory minimum sentences and sentencing guidelines that came into vogue in criminal law in the '80s and '90s, limiting judicial discretion and expanding prosecutorial power, appeared in refracted form in immigration provisions that introduced mandatory detention provisions and constrained judicial power to avert deportation. Seen through this historical lens, immigration detention "became an integral part of the punitive consequences" of the war on drugs. García's meticulous unfolding of the legislative history of immigration detention constructs a persuasive argument that Congress intended immigration detention to perform a punitive function.

Entangling immigration detention with criminal punishment would seem to support an argument for importing criminal procedural protections into immigration detention. García acknowledges that raising procedural barriers to immigration detention would make it slower and costlier for the government to impose detention. But he notes that the criminal justice system, with its panoply of constitutional procedural protections, neither won the war on drugs nor prevented the mass incarceration of drug-crime defendants.

It is this examination of the contradictions of immigration detention that leads García to call for "a wholesale reexamination of the efficacy of confinement as a tool of social control." Here García makes an Escher-like move, shifting the readers' perspective from criminal analogues to the formally civil status of detention and asking us to take it seriously. The article advocates creating the "truly civil detention system" that the Immigration and Customs Enforcement agency states that it aspires to.

Imagining a civil detention system may invoke for some the picture of unauthorized aliens sunbathing at leisure at taxpayer expense. Taking civil detention seriously, though, requires a rigorous evaluation of how to calibrate deprivations of liberty and individual circumstances with immigration policy goals. So as not to be a spoiler, I will leave you to the pleasure of that garden pathway with García as your guide.

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