THE END OF ENTRY FICTION*

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Although "entry fiction" emerged in immigration and constitutional law over a century ago, the doctrine has yet to account for present-day carceral and technological realities. Under entry fiction, "arriving" immigrants stopped at the border are deemed "unentered" and "not here" for constitutional due process purposes, even in detention centers deep within the United States. As a result, the Department of Homeland Security ("DHS") uses its sole discretion to detain tens of thousands of arriving asylum seekers in its facilities without a bond hearing. Despite significant modern changes in immigration statutes and due process jurisprudence, the Supreme Court recently suggested, but did not decide, that individuals subject to entry fiction may continue to lack constitutional due process protections against detention. Both courts and the government have invoked sovereign power as the doctrine's justification, asserting that detention is necessary to effect exclusion (removal) of individuals and that entry fiction appropriately protects the government's power to detain.

While many scholars over the decades have offered trenchant critiques of the doctrine, no recent treatment evaluates entry fiction as legal fiction. This Article fills that gap, tracing entry fiction's origins in law and jurisprudence to consider its operation in the present-day context. I engage in a close rereading of Chinese Exclusion- and McCarthy-era cases to uncover functionalist and humanitarian underpinnings of entry fiction, including an intention to minimize hardship to immigrants. I then reevaluate entry fiction in the present day. In particular, this Article explores DHS's indiscriminate use of immigration detention and its breathtaking expansion of surveillance technology. Today, DHS both operates a mass detention regime and engages in ever-increasing surveillance, including real-time tracking of immigrants that allows deportation without physical detention. These current realities decouple entry fiction from sovereign purpose—rendering detention unnecessary for the sovereign power of exclusion—and

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engender decidedly antihumanitarian practices. I conclude that courts must put entry fiction to rest as a vestige of the past and recognize the constitutional due process rights of all persons who are present and here in U.S. immigration detention centers.

INTRODUCTION

In fictione juris semper subsistit æquitas.
[In fiction of law, there is always equity.]

—William Blackstone, *Commentaries*[1]

The man-made satellite streaking soundlessly across the blackness of outer space. The dark, lustrous eyes of the dog gazing out the tiny window. In the infinite loneliness of space, what could the dog possibly be looking at?

—Haruki Murakami, *Sputnik Sweetheart*[2]

On March 16, 1953—early in the atomic era and four years before the inception of the space age—the U.S. Supreme Court, in *Shaughnessy v. United States ex rel. Mezei*,[3] rejected the constitutional challenge of Mr. Ignatz Mezei, an eastern European immigrant held in indefinite detention on Ellis Island. Out of an alchemy of Cold War suspicion and late nineteenth-century plenary power doctrine emerged the Court's clearest pronouncement of "entry fiction" for detained immigrants: a declaration that a foreigner present in a U.S. detention center is not in fact here—not even a person, for constitutional due

1. 3 WILLIAM BLACKSTONE, COMMENTARIES *43.
2. HARUKI MURAKAMI, SPUTNIK SWEETHEART 8 (Philip Gabriel trans., 2001).
3. 345 U.S. 206 (1953).

process purposes[4]—if first stopped at the border. Plenary power doctrine maintains constitutional exception zones within U.S. immigration facilities, where individuals subject to entry fiction are detained with minimal procedural protections.

In real life, Mr. Mezei was of course a person. He spent a total of nearly three years detained on Ellis Island, part of New York and New Jersey, and was undoubtedly here.[5] But the Court decided it could not intervene in the actual fact of his detention because he remained fictively outside of our borders. The federal government's sovereign authority to exclude immigrants, the Court concluded, required it to look away.[6]

While it was unfortunate the Court turned a blind eye to the plight of Mr. Mezei during the McCarthy era, today's entry fiction has morphed into a legal blind spot of egregious proportions. From 1953 to the present, immigration detention has grown by orders of magnitude. Around the time of *Mezei*, the federal government operated only a handful of immigration detention centers[7]: most prominently the facility on Ellis Island, where Mr. Mezei himself was held. In 2019, the government detained over 500,000 immigrants in facilities throughout the United States, including tens of thousands of "arriving" individuals deemed not to have "entered" our borders.[8] The Department of Homeland Security's ("DHS") use of detention authority, moreover, increasingly exhibits an arbitrary and unchecked exercise of power.

Technological circumstances, too, have changed. At the time the Court pronounced the necessity of entry fiction against Mr. Mezei, its capacity to monitor him outside the walls of a detention center was sorely lacking compared to the present day. In the early Cold War era, surveillance technology was limited and nascent. When the *Mezei* decision came down in 1953, a single object orbited the earth: our solitary moon, 1,738 kilometers in diameter, 384,400 kilometers away, was the planet's only satellite for 4.5 billion years.[9] Four years after *Mezei*, in 1957, that changed with the Soviet Union's launch of

4. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .").

5. Immigration authorities detained Mr. Mezei for nearly two years from 1950 to 1952 before releasing him on bond in May 1952; after the Supreme Court's decision in his case, he was redetained from April 1953 to April 1954. *See* VINCENT J. CANNATO, AMERICAN PASSAGE: THE HISTORY OF ELLIS ISLAND 372–74 (2009).

6. *See Mezei*, 345 U.S. at 215–16.

7. *See* Herbert Brownell, Jr., U.S. Att'y Gen., Address Prepared for Delivery at Naturalization Ceremonies (Nov. 11, 1954), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/12/11-11-1954.pdf [https://perma.cc/EQL5-AZJQ] (noting six extant facilities in the United States in 1954, prior to the government's decision to close all of its federal immigration detention centers that same year).

8. *See infra* Section V.B.

9. *About the Moon: In Depth*, NASA SCI.: EARTH'S MOON, https://moon.nasa.gov/about.cfm [https://perma.cc/B9W8-2NZE].

Sputnik I, the first artificial satellite in human history.[10] A month later, the Soviets launched *Sputnik II*, carrying history's first earthling (a dog named Laika) into space.[11] These events ushered in the space age and revolutionized modern telecommunications and surveillance technology.

Today, over 2,000 artificial satellites orbit the Earth.[12] Sixty percent are communicative: enhancing radio, broadcast, and cellular technology.[13] Twenty-four NASA-owned satellites comprise the Global Position System ("GPS"), which measures the location of communicating devices within one square meter.[14] The GPS tracking of persons—on which DHS spends millions of dollars per year to deploy against tens of thousands of immigrants—provides nearly real-time location details and constant surveillance capability. Other technologies abound, including new biometric identifiers, increasing digital and photographic surveillance dragnets, and sophisticated data mining tools. DHS has shown a limitless appetite for these technologies despite the serious civil liberties concerns they raise.[15]

Yet the Supreme Court has failed to reevaluate entry fiction against this sea change in enforcement technologies or against the spiraling expansion of immigration incarceration. Rather, entry fiction has persisted throughout the years with little to no jurisprudential attention to shifting context. In 2018, the Supreme Court in *Jennings v. Rodriguez*[16] suggested, but did not decide, that a constitutional divide may persist between the rights of individuals in detention who have formally entered versus those who have not.[17] The majority rejected the Ninth Circuit's limiting construction of immigration statutes as requiring a bond hearing for both entered and unentered individuals after six months of detention[18]—but left key constitutional issues unresolved. In 2020, when considering the due process rights that individuals have with regard to their

10. *NASA Space Science Data Coordinated Archive: Sputnik 1*, NASA, https://nssdc.gsfc.nasa.gov/nmc/spacecraftDisplay.do?id=1957-001B [https://perma.cc/64E7-W9VM].

11. Eric Berger, *The First Creature in Space Was a Dog. She Died Miserably 60 Years Ago*, ARS TECHNICA (Nov. 3, 2017, 8:40 AM), https://arstechnica.com/science/2017/11/sixty-years-ago-the-first-creature-went-into-space-a-stray-moscow-dog/ [https://perma.cc/AZR8-QZ5U].

12. *UCS Satellites Database*, UNION CONCERNED SCIENTISTS, https://www.ucsusa.org/nuclear-weapons/space-weapons/satellite-database [https://perma.cc/6SC2-HH58] (Aug. 1, 2020).

13. Malcolm Ritter, *How Many Man-Made Satellites Are Currently Orbiting Earth?*, TALKING POINTS MEMO (Mar. 28, 2014, 9:37 AM), https://talkingpointsmemo.com/idealab/satellites-earth-orbit [https://perma.cc/AZV3-7DU3].

14. *Global Positioning System*, NASA, https://www.nasa.gov/directorates/heo/scan/communications/policy/GPS.html [https://perma.cc/WQY9-P5FQ] (Aug. 7, 2017).

15. *See infra* Part VI.

16. 138 S. Ct. 830 (2018).

17. *Id.* at 851–52 (suggesting that the lower court should revisit class certification because entered class members may not be similarly situated to unentered class members with respect to their constitutional rights, particularly given that the lower court "has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter").

18. *Id.* at 843–44.

removal orders, the Court in *Department of Homeland Security v. Thuraissigiam*[19] extended entry fiction to an individual who traditionally would have been considered entered—although it did so in the unusual factual circumstances of a petitioner apprehended just twenty-five yards north of the U.S.-Mexico border.[20]

Although jurists and scholars over the years and in contemporary times have critiqued entry fiction, none have provided an in-depth assessment of its origins and evolution as a legal fiction. I engage in that in this Article, identifying intertwined reasons for entry fiction's expiration, rooted in both history and the present. The defining attributes of legal fiction reveal the importance of aims and contexts: courts do not tumble down a rabbit hole unless equitable goals and functional necessities demand an inversion of reality.

As I uncover, entry fiction in its early decades served explicitly beneficial ends, rooted in courts' stated desire to minimize the suffering of immigrants. Today, those rationales have been forgotten. Entry fiction now helps enable a massive, inhumane, and unnecessary detention infrastructure. It does so, moreover, in tandem with DHS's deployment of totalizing surveillance technology deep within the United States. As physical imprisonment of immigrants grows in scale and inequity, and as that imprisonment becomes unnecessary to effectuate enforcement ends, shielding detention decisions from constitutional scrutiny becomes increasingly indefensible. This Article examines entry fiction seriously as a legal fiction and concludes that the suffering it now imposes alongside its diminished present-day utility renders it obsolete.

To ground my discussion, I first provide general background information on entry and arriving, followed by an overview of legal fictions and their function in law (Parts I and II). Next, I engage in a close examination of the origins and evolution of entry fiction in law and jurisprudence, including a novel rereading of Chinese Exclusion- and McCarthy-era cases to uncover humanitarian underpinnings of entry fiction (Part III). These underpinnings are, I argue, essential to understanding the origins of entry fiction—and yet completely forgotten in the Supreme Court's recent jurisprudence addressing entry fiction both in the detention context in *Jennings* and in the admissions context in *Thuraissigiam*.

I then examine the contemporary legal landscape of immigration detention, including the Supreme Court's decisions in *Jennings* and related cases (Part IV). In subsequent parts, I document both historical and modern-day immigration detention and surveillance regimes (Parts V and VI). Finally, I build upon these prior discussions to reevaluate entry fiction *as* legal fiction,

19. 140 S. Ct. 1959 (2020).
20. *Id.* at 1961, 1964.

exploring each of the latter's definitional hallmarks of function, equity, and danger (Part VII). My discussion traces new relationships between territory, sovereign power, and immigration enforcement capacities to demonstrate that entry fiction no longer serves its purposes as a legal fiction and should be set aside. Accordingly, the constitutional guarantee of due process should extend to every person present and here in U.S. immigration detention.

I. BACKGROUND: ON "ENTRY," "ARRIVING," AND CRITIQUES OF ENTRY FICTION

In detention centers along the U.S.-Mexico border, DHS officials screen tens of thousands of newly arrived asylum seekers each year.[21] Many will pass this screening, making a threshold showing that they are likely refugees and thus acquire the right to seek asylum in immigration court. This does not, however, ensure their release. Instead, the government chooses to detain many thousands of these individuals while they pursue their cases in immigration court, a process that takes months or even years.[22] Detention imposes heavy costs on health and well-being,[23] while also undermining individuals' ability to find attorneys and prepare their cases.[24] When the process drags on, especially due to appeals, many give up their claims altogether.[25]

Differing detention regimes apply to asylum seekers—and immigrants in general—depending on the technicalities of entry. Under U.S. immigration law, a person effects an entry if they cross into the territory of the United States *either* via inspection and admission by an immigration official *or* by intentionally

21. *See Claims of Fear*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear [https://perma.cc/M7AG-LXFT] (last updated July 17, 2020) (showing 38,399 arriving asylum seekers and 54,690 "apprehended" asylum seekers in fiscal year 2018). Although numbers of cases dropped after the suspension of normal asylum screening operations during the COVID-19 pandemic, over 20,000 asylum seekers nevertheless received credible fear decisions in 2020. *See Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*, U.S CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/reports/Congressional-Semi-Monthly-Report-1-16-19-to-1-31-20.xlsx [https://perma.cc/X8UM-JF6C] (showing 21,774 total credible fear decisions from December 2019 to December 2020).

22. *See* S. POVERTY L. CTR., NO END IN SIGHT: WHY MIGRANTS GIVE UP ON THEIR U.S. IMMIGRATION CASES 5 (2018), https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf [https://perma.cc/SB8J-N33U] ("[Detained immigrants] may be held on civil immigration charges for months, even years, before their cases are resolved.").

23. *See infra* Section V.B.2 (describing hardships and health risks imposed by immigration detention).

24. *See* S. POVERTY L. CTR., *supra* note 22, at 32 (explaining how remote immigration facilities impede detained individuals' access to counsel, including the fact that from 2007 to 2012, "66 percent of people who were not detained had lawyers, but only 14 percent of detained immigrants had counsel").

25. S. POVERTY L. CTR., *supra* note 22, at 5 ("[A]ll too often, detained immigrants, particularly in the Deep South, give up on their cases because their conditions of confinement are too crushing to bear.").

evading inspection while remaining free from restraint.[26] Even individuals who cross between ports of entry and then immediately seek out a border patrol agent are traditionally considered entered without inspection.[27]

Individuals who present at a port of entry or are interdicted at sea, however, are by and large considered unentered if not formally admitted by an immigration officer.[28] In current immigration parlance, unentered individuals are "arriving aliens"[29] and may include some persons with lawful permanent residency[30] or other status—but the majority of arriving noncitizens in detention are asylum seekers.[31] This designation as unentered/arriving[32] continues even if Immigration and Customs Enforcement ("ICE") officials

26. *See* Z-, 20 I. & N. Dec. 707, 707–08 (B.I.A. 1993); Patel, 20 I. & N. Dec. 368, 370 (B.I.A. 1991); *see also* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.").

27. *See* Z-, 20 I. & N. Dec. at 707; *see also* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK, ch. 3, § I(A), at 61 (14th ed. 2015) (explaining in headers and text that "Lawful Admission, not Entry is the Defining Concept," but there remains "Continuing, But Limited Relevance of the Entry Doctrine"); *infra* Section IV.A.

28. *See* Z-, 20 I. & N. Dec. at 708 (showing that an entry requires either admission by an immigration officer or actual and intentional evasion). Individuals who present themselves—and are thus not evading inspection—and who are not admitted have not satisfied either prong and, therefore, have not entered the United States.

29. Regulations define an "arriving alien" as:

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to [8 U.S.C. § 1182(d)(5)], and even after any such parole is terminated or revoked.

8 C.F.R. § 1.2 (2020). Unless quoting direct language, in this Article I use the term "arriving individual" or "arriving noncitizen" in lieu of "arriving alien."

30. Some lawful permanent residents who are arriving noncitizens are exempt from entry fiction, however. *See infra* note 32 and Section III.G.

31. *See* Rodriguez v. Robbins, 804 F.3d 1064, 1083 (9th Cir. 2015) (explaining that following years of discovery, the record established that the overwhelming majority of arriving class members are not lawful permanent residents but rather asylum seekers), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

32. For simplicity, in this Article I often use the terms "unentered" and "arriving" interchangeably. As explained later in this Article, however, a small subset of arriving individuals is not subject to entry fiction. *See infra* Section III.G. Some lawful permanent residents are considered applicants for admission but nevertheless are exempted from entry fiction—and thus considered entered even if presenting at a port of entry. *See infra* Section III.G (describing "double fiction"—the lawful permanent resident exception to entry fiction); 8 U.S.C. § 1101(a)(13)(C) (specifying circumstances in which a lawful permanent resident is considered to be "seeking an admission," and thus arriving, if at a port of entry); *Rodriguez*, 804 F.3d at 1082 (explaining that several categories of lawful permanent residents presenting at ports of entry are considered applicants for admission and thus arriving individuals, but *not* subject to entry fiction). Nevertheless, the vast majority of arriving individuals are likely unentered. Rodriguez v. Robbins, 715 F.3d 1127, 1141 (9th Cir. 2013) (noting that arriving individuals to whom entry fiction applies are "likely the vast majority").

transport them deep into the interior and lock them away in detention centers, even for years. In fact, even upon release from detention (via the statutory mechanism of "parole"),[33] such individuals are still not considered entered or here. This fictive suspension of time and space, a legal freezing of bodies at the threshold of entry, is immigration law's entry fiction. In essence, the border marks these individuals and trails them until their immigration cases are resolved. As Leti Volpp succinctly put it, "[A] noncitizen can be spatially here, but not doctrinally here, in the down the rabbit hole of immigration law."[34]

Recently, in *Thuraissigiam*, a majority of the Supreme Court extended entry fiction—at least with regard to rights to *admission* (not detention)—to an individual who technically entered under prior understandings. Immigration officials encountered and detained Mr. Thuraissigiam not at a port of entry but rather twenty-five yards north of the U.S.-Mexico border on the same day of his crossing.[35] According to a majority of the Court, Mr. Thuraissigiam had not, in these circumstances, "effected an entry,"[36] despite exhibiting the traditional entry factors of a crossing free from restraint.[37] Although the majority decision emphasizes the unique facts of Mr. Thuraissigiam's case[38]—and limits its holding to admissions decisions rather than detention decisions—it nevertheless

33. *See infra* Section IV.A (describing the parole process).

34. Leti Volpp, *Imaginings of Space in Immigration Law*, 9 L. CULTURE & HUMANS. 456, 463 (2012).

35. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020).

36. *Id.* at 1982 (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

37. The Court held that Mr. Thuraissigiam accordingly lacked constitutional due process rights, beyond those provided by statute, with regard to his application for admission. *Id.* at 1982–83. It also rejected his claim that statutory limitations on federal court habeas review on his application for admission violated the Suspension Clause. *Id.* at 1968–69. However, with regard to the latter holding, the Court expressly underscored the difference between (traditionally lacking) habeas rights in the removal context and the far more robust habeas rights in the detention context throughout its decision. *See generally id.* at 1970 (pointing out, for example, that "the historic role of habeas is to secure release from custody"). Although I briefly analyze the ramifications of *Thuraissigiam* for my arguments below, *see infra* notes 146–47, 423–25 and accompanying text, and although many of my arguments would also support the elimination of entry fiction with regard to admissions/removal decisions, in this Article I focus on entry fiction's impact on due process rights in the *detention* context. While a thorough contemporary assessment of entry fiction with regard to admissions procedures and removal orders is outside the scope of this Article, it would be a fruitful avenue for future exploration. *Thuraissigiam* did not deeply explore contextual or historical arguments based on evolving immigration law practices, doctrines, or structures.

38. Subsequent federal court decisions have rightly limited *Thuraissigiam*'s holding in light of the unique facts presented by Mr. Thuraissigiam's manner of entry so close to the border. *See, e.g.*, United States v. Guzman-Hernandez, No. 20-cr-06001, 2020 WL 5585077, at *3 (E.D. Wash. Sept. 17, 2020) ("The Supreme Court did not intend to allow for the parade of horribles that stems from expanding the zone of constitutional inapplicability beyond the 25 yards in *Thuraissigiam*."); *see also* United States v. Ochoa-Quinones, No. 19-CR-57, 2020 WL 5750853, at *2 n.1 (E.D. Wash. Sept. 25, 2020) (declining to extend *Thuraissigiam* to bar collateral attacks on expedited removal orders in the context of criminal charges and noting that Mr. Thuraissigiam "was stopped 25 yards after crossing the border").

exhibits a troubling willingness of the current Court to expand rather than curtail entry fiction.

The constitutional alterity of imprisoned bodies—foreign, and mostly minority—under entry fiction has enormous ramifications for detained immigrants. Statutes, regulations, and governmental policies withhold from such individuals basic procedural protections against detention. Meanwhile, as explained in detail below, the operation of entry fiction has limited their constitutional due process rights against arbitrary detention.[39] In contrast, from the outset of immigration jurisprudence, courts have recognized the due process rights of individuals considered entered and within territory.[40]

As explored in detail in Part III below, entry fiction in immigration law first emerged during the era of Chinese Exclusion and was later extended to cover rights in detention during the early Cold War in *Mezei*. Scholarly critiques of entry fiction have been long running and severe. Writing soon after *Mezei*, Professor Henry Hart found that decision (and a related one, *United States ex rel. Knauff v. Shaughnessy*[41]) so far afield from constitutional principles that he described the Justices as "writ[ing] without authority for the future."[42] He concludes hopefully with an open appeal to principle for lower courts and successors.[43] Decades later, legal scholars responding to mass immigration detention in the 1980s pointed out entry fiction's absurdity and illogic,[44] as well as its incompatibility with 1970s-era constitutional due process jurisprudence in cases such as *Goldberg v. Kelly*[45] and *Bell v. Burson*.[46] Those decisions expanded

39. *See infra* Part IV.

40. For example, in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court squarely held that the Fifth and Sixth Amendments apply to "all persons within the territory of the United States," invalidating a statute (Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25) that imposed hard labor without a jury trial upon Chinese immigrants found to be within the United States without lawful residence. *Id.* at 235–38. As explained later in this Article, however, *Wong Wing* upheld detention in conjunction with deportation (and exclusion) as necessary and permissible. *See infra* Section III.A. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Court rejected the arbitrary detention without a hearing of a noncitizen who entered the United States just days before being detained by immigration authorities. *Id.* at 101. Ms. Yamataya, a Japanese national, landed at the port of Seattle on July 11, 1901—just four days prior to an immigrant inspector's July 15, 1901 start of an investigation around her landing. *Id.* at 87. Rooting its discussion in principles of due process—although ducking the direct applicability of constitutional due process rights to Ms. Yamataya—the Court held the immigration statutes did not authorize arbitrary detention, even for an individual "alleged to be illegally here." *Id.* at 101.

41. 338 U.S. 537 (1950).

42. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953).

43. *Id.*

44. *See, e.g.*, Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925, 970 (1984) ("The Supreme Court must reexamine the doctrines of parole and entry and the doctrines' currently devastating and illogical effects on the vesting of individual rights.").

45. 397 U.S. 254 (1970).

46. 402 U.S. 535 (1971).

the right to procedural due process in the context of civil deprivations.[47] Discussing *Mezei* and *Knauff*, for example, Professor Peter Schuck concludes, "[E]xclusion's extraconstitutional status has encouraged and legitimated some of the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court."[48]

Although scholars disagree on how to allocate due process rights to immigrants, there is growing consensus around the need to put entry fiction to rest. Professor David Martin, for one, proposes eliminating entry fiction in favor of differing due process protections based on the extent of a person's ties to the community.[49] Professor T. Alexander Aleinikoff counters that such an approach would fail to capture the weighty interests of newly arrived asylum seekers—but unequivocally agrees that constitutional jurisprudence must "bring the alien at the border out of the shadows and into the sunlight of the modern world of due process" and thus eliminate entry fiction.[50]

Further evolution of due process case law in the 1990s and 2000s in the context of civil detention engendered new critiques of entry fiction. Examining growing protections in the context of civil commitment and pretrial detention, Professor David Cole argues for greater procedural and substantive due process rights for immigrants in detention, including arriving noncitizens subject to entry fiction.[51] He criticizes *Mezei*, in particular, for conflating the power to exclude (and deport) with the power to detain and concludes that under modern due process case law, the entry distinction cannot stand with regard to detention.[52] The congressional overhaul in 1996, as explained below, shifted immigration law's focus from entry to "admission" in both substance and procedure—and it, too, generated new critiques, particularly around

47. *See generally id.* (holding that procedural due process requires a meaningful procedure on the issue of fault for an accident before a driver's license can be suspended); *Goldberg*, 397 U.S. 254 (holding that procedural due process requires a full evidentiary hearing before welfare benefits can be terminated).

48. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 20 (1984). Professor Schuck observes that a "classical immigration system" rooted in restrictive nationalism is giving way to new communitarian principles rooted in greater recognition of rights. *Id.* at 74. But he cautions, "[This] is not to say that the particular forms that change is taking are inevitable." *Id.*

49. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 192 (1983).

50. T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 259 (1983).

51. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007–08 (2002).

52. *Id.* at 1037 ("Thus, the exception for entering aliens announced in dicta in *Zadvydas* is founded on a false conflation of the issues of entry and detention." (discussing Zadvydas v. Davis, 533 U.S. 678 (2001))); *id.* at 1033 ("Virtually without analysis, the *Mezei* Court extended the right-privilege distinction that governed in *Knauff* [with regard to admission] to the distinct issue of indefinite detention."); *see also* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 156 (2018).

territoriality and rights. Professor Linda Bosniak contends that the shift away from entry in immigration law further undermines the authority of *Mezei* and takes the Supreme Court to task for its failure to fully grasp that change.[53] In later work, Professor Bosniak critiques *ethical territorialism*—which, as propounded by political theorist Michael Walzer and others, recognizes individuals' rights by virtue of their "being here"—by pointing to entry fiction's manipulations of territory.[54] The malleability that allows (among other things) the indefinite detention of immigrants casts doubt upon the very project of ethical territorialism and reveals distinctions between inside and outside to be "chimerical."[55]

Suffice it to say entry fiction has not aged well in scholarly literature. Over a century after its emergence, however, it persists. Yet, although many have called for an end to entry fiction in immigration detention jurisprudence, the doctrine has been underexamined *as* a legal fiction—including little scholarly treatment of entry fiction's origins and evolution. In one notable exception, Professor Ibrahim Wani in 1989 explored "[i]llegitimate [u]ses" of legal fiction in immigration law, including entry fiction, which he concludes served "predominantly baneful purposes" in stripping rights from individuals.[56] Professor Wani's earlier critique, however, predates current immigration detention and surveillance regimes, and no contemporary scholarly work evaluates entry fiction against the defining attributes of a legal fiction. My Article fills this gap as the courts continue to grapple with the viability of entry fiction under our present immigration detention regime.

II. LEGAL FICTIONS: DEFINITIONS, ATTACKS, AND DEFENSES

Legal fictions as a common-law device have a colorful history, generating significant debate among scholars of many eras.[57] The most bitter dispute to date arose in the eighteenth century between Sir William Blackstone and philosopher Jeremy Bentham. Blackstone and Bentham's drastically opposed

53. Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 412 (2002) (critiquing conflations of entry, admission, and presence in the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001), which suggested the continuing viability of entry fiction); *see also* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 386–87 (2002) ("There can be no *Mezei*'s, no place on United States territory where the U.S. government acts free from the restraints of the Constitution.").

54. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 392–96 (2007).

55. *Id.* at 398, 402–03.

56. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 51, 116–17 (1989). Professor Wani identifies sovereignty, as well as the law's failure to recognize immigration detention as incarceration, as other fictions in immigration law. He concludes that those, too, serve baneful purposes. *Id.* at 54, 100, 116.

57. For an illuminating and thorough historical discussion, see generally Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990).

normative views would frame later debates on legal fictions. As Judge Posner observes, their disagreement in fact concerned the whole of English law, with the former painting a rosy and approving picture of the English legal system in his *Commentaries*, and the latter attacking what he viewed as Blackstone's dangerous and regressive complacency.[58]

Blackstone engages in a serious defense of legal fictions. In the pithy characterization quoted at the outset of this Article, Blackstone pronounces that "*[i]n fictione juris semper subsistit æquitas*"[59] (in fiction of law, there is always equity). Elsewhere in his *Commentaries*, he defines equity, "in its true and genuine meaning," as "the soul and spirit of all law: positive law is construed, and rational law is made, by it."[60] He continues, "[E]quity is synonymous to justice; in that, to the true sense and sound interpretation of the rule."[61] Thus, legal fictions—in line with principles of justice—are "highly beneficial and useful" to avoid erroneous outcomes, "mischief," or "inconvenience," and to "prevent[] the circuity and delay of justice."[62] In his view, under the constraints of the common law and the wisdom of judges, "this maxim is ever invariably observed, that no fiction shall extend to work an injury."[63] He concludes with qualified optimism that legal fictions are at most "troublesome, but not dangerous."[64]

Bentham rejects Blackstone's premises and rails against legal fictions in the strongest possible terms. They are, in his view, exemplars of the corrupt nature of the common law writ large. His metaphors abound: Legal fictions are a disease and "cover for rascality."[65] Lawyers, he says, "feed upon untruth, as . . . [if] opium, at first from choice and with their eyes open, afterwards by habit, till at length they lose all shame, avow it for what it is, and swallow it with greediness, not bearing to be without it."[66] Or, "in English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the

58. *See* Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 570–71, 596 (1976). Judge Posner's account mounts a qualified defense of Blackstone against Bentham and many future scholars to follow through the centuries.

59. 3 BLACKSTONE, *supra* note 1, at *43.

60. *Id.* at *429. In this same section of his *Commentaries*, he also seeks to dispel the notion that equity is the sole province of equity courts, arguing against rigid notions that "the one [court of law] judged without equity, and the other [court of equity] was not bound by any law." *Id.*

61. *Id.*

62. *Id.* at *43.

63. *Id.*

64. *Id.* at *267.

65. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1775), *reprinted in* THE WORKS OF JEREMY BENTHAM 391, 511 (J.H. Burns & H.L.A. Hart eds., 1977).

66. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (1928), *reprinted in* THE WORKS OF JEREMY BENTHAM, *supra* note 65, at 1, 59.

principle of rottenness";[67] the "pestilential breath of Fiction poisons the sense of every instrument."[68] He disagrees that they served equitable purposes, pronouncing that "[f]iction is no more necessary to justice, than poison is to sustenance."[69]

Incorporating aspects of both Blackstone's and Bentham's views in the most influential modern treatment of the subject, Professor Lon Fuller acknowledges the activist bent and negative potential of legal fictions, decried so vociferously by Bentham—but expresses a qualified agreement with Blackstone's approval of their use. In *Legal Fictions*, he defines the eponymous phenomenon as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[70] The legal fiction, he posits, generally results from "the law's struggles with new problems,"[71] where existing rules of law fail to allow proper regulation of contemporary aspects of social life. Through legal fictions, judges introduce "new law in the guise of [the] old," essentially masking or tempering change.[72] But he recognizes in them an implicit risk: legal fictions, he believes, become dangerous if jurists lose sight of their origins, and they may be subject to "harmful application."[73]

67. JEREMY BENTHAM, THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW (1821), *reprinted in* 5 THE WORKS OF JEREMY BENTHAM 61, 92 (J. Bowring ed., 1962).

68. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1775), *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 221, 235, n.*s* (J. Bowring ed., 1962).

69. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), *reprinted in* 6 THE WORKS OF JEREMY BENTHAM 189, 582 (J. Bowring ed., 1962). Bentham castigates legal fictions, in particular, for stealing power from the legislature, and he views the courts and the monarchy as partners in such theft. He urges the codification of law by Parliament to cement legislative authority against overreach by the King and courts, while also making law more accessible to the layperson. He was a strong voice against what centuries later might be termed judicial activism by the courts. *Id.* at 552, 582, 826; *see also* Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147, 152 (1917) (commenting on Bentham's "vigorous attack on fictions").

70. LON L. FULLER, LEGAL FICTIONS 9 (1967) [hereinafter FULLER, LEGAL FICTIONS (1967)]. Professor Fuller's 1967 book compiles his earlier articles on the topic, including L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 369 (1930) [hereinafter Fuller, *Legal Fictions* (1930)].

71. FULLER, LEGAL FICTIONS (1967), *supra* note 70, at 94; *see also* Wani, *supra* note 56, at 51.

72. FULLER, LEGAL FICTIONS (1967), *supra* note 70, at 58; *see also* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 25 (1861). Professor Henry Sumner Maine defines legal fiction as "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." *Id.* Although wary of legal fictions due to this obfuscation, Professor Maine has a more charitable view of their historical function than Bentham, whom he chides for pouring "ridicule" upon "legal fictions wherever he meets them." *Id.* at 26. But Professor Maine nevertheless favors the "prun[ing] away" of legal fictions, *id.* at 27, which pose "the greatest of obstacles to symmetrical classification" of law, *id.* at 26.

73. Fuller, *Legal Fictions* (1930), *supra* note 70, at 370; *see also* Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803, 819 (2010) ("When courts so often repeat legal fictions . . . then the factual distortions become institutionalized.").

In line with their functionality, Professor Fuller also describes legal fictions as mortal. Thus, "[a] fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality."[74] He characterizes legal fictions as "scaffolding" that are "useful, almost necessary" for a time but "removed with ease" once the need and use expire.[75]

Drawing from these classic texts, scholars have identified three key qualities of a legal fiction: *falsity*, *function*, and *dangerousness*.[76] Reading with Professor Fuller, recent scholars characterize legal fictions as functional problem-solving devices, allowing the common law to establish new principles and to balance the need for stability with the need for flexibility.[77] Many have also pointed out legal fictions' inherent dangerousness, particularly where, as Professor David Shapiro warns, jurists "coin or adopt metaphors and then forget that they are only metaphors."[78] Considering such downsides, others following Bentham have called for legal fictions' expiration as a general common-law device in favor of clearer legislative rules.[79]

Blackstone's *Commentaries* also reveal a fourth quality: *equity*, which Blackstone defines around justice.[80] Blackstone himself describes and defends one such fiction, by which certain promises exchanged at sea were treated as having taken place inland in order to fall under the jurisdiction of Westminster

74. FULLER, LEGAL FICTIONS (1967), *supra* note 70, at 14.

75. *See id.* at 70.

76. *See, e.g.*, Harmon, *supra* note 57, at 15 (discussing dangerousness); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 5 (2004) ("[T]here are three [classic] qualities of a legal fiction: falsity, utility, and dangerousness.").

77. For example, Professor Maksymilian Del Mar writes, legal fiction is an "instrument via which, incrementally, the law gropes its way towards a principle." Maksymilian Del Mar, *Legal Fictions and Legal Change*, 9 INT'L J.L. CONTEXT 442, 450 (2013). Similarly, Professor Craig Allen Nard describes legal fictions as resolving a tension in the common law between the need for stability and the need for flexibility. Craig Allen Nard, *Legal Fictions and the Role of Information in Patent Law*, 69 VAND. L. REV. 1517, 1522–25 (2016).

78. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 733–34 (1987) (discussing the fiction of corporate personhood). Professor Aviam Soifer also warns that legal fictions can diminish full understanding of the law, "short-circuit[ing] attempts to comprehend the complexity behind the assumptions a legal fiction conveys." Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 877 (1986).

79. *See, e.g.*, Shapiro, *supra* note 78, at 740 ("To begin, I cannot help thinking that there is now less need for these devices, and more awareness of their flimsiness, than in the past."); Jeremiah Smith, *Surviving Fictions II*, 27 YALE L.J. 317, 320–24 (1918) (urging expiration of legal fictions as unnecessary in light of advances of jurisprudential thinking as well as codification of law). As Professor Louise Harmon documents in a fascinating discussion, Roscoe Pound first emphasized danger inherent in legal fiction and called on legislative authority to clear them away—but later came around to its functionality and beneficial uses. *See* Harmon, *supra* note 57, at 11–12. Professor Peter Smith also identifies and critiques several new types of legal fictions, such as fictions based on misreading of empirical reality and fictions necessitated by "the law's general imperviousness to social science and change," among others. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1439 (2007).

80. *See* 3 BLACKSTONE, *supra* note 1, at *429.

Hall.[81] Indeed, achieving justice underpins the traditional use of *territorial* fictions in particular, which have generally expanded the jurisdiction of courts. As Professor John Orth describes, in England, "[f]ictions made available some convenient forms of action; they also unlocked the doors to the common law courts."[82] Professor Orth describes how each of the three medieval courts—Common Pleas, King's Bench, and the Exchequer—employed legal fictions to enlarge their reach.[83] In perhaps the most famous example, in *Mostyn v. Fabrigas*,[84] the King's Bench considered a petitioner living in Minorca, a Mediterranean island then controlled by England, to be a resident of London.[85] That territorial fiction allowed jurisdiction over the petitioner's case of false imprisonment and trespass, and thereby achieved just ends—as the petitioner would otherwise have lacked a venue to challenge unlawful detention by his governor.[86]

Fictions of personhood also expand the reach of law, particularly its remedial powers. Perhaps the most well-known legal fiction—corporate personhood—allows corporations to enter into contracts, hold property, and have resulting rights and liabilities enforced by the courts[87] (including recently, a trend toward robust First Amendment rights).[88] The personality of ships constitutes another such legal fiction. In *The Carlotta*,[89] the Second Circuit conferred personality upon a tugboat so that those responsible for faulty towage could be held liable, despite not owning the ship.[90] And, even apart from fictions of territoriality and personality, examples of legal fictions that extend the reach and remedial powers of courts—generally in furtherance of justice—abound in the common law.[91]

81. *Id.* at *107.

82. John V. Orth, *Fact & Fiction in the Law of Property*, 11 GREEN BAG 2D 65, 66 (2007).

83. *Id.* at 66–68.

84. 98 Eng. Rep. 1021 (K.B. 1774).

85. *Id.* at 1021–22; Orth, *supra* note 82, at 68; Frederick Schauer, *Legal Fictions Revisited*, *in* LEGAL FICTIONS IN THEORY AND PRACTICE 113, 122 (Maksymilian Del Mar & William Twining eds., 2015).

86. Mr. Fabrigas lacked the practical ability to bring suit in Minorca because he needed the approval of the same governor who was his custodian and defendant. *Mostyn*, 98 Eng. Rep. at 1022.

87. *See* Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1129–30 (2011) (explaining and critiquing traditional corporation theory that views the corporation as a "nexus of contracts" or a hub for contractual relationships with resulting rights and responsibilities).

88. *See* Citizens United v. FEC, 558 U.S. 310, 340–42, 365–66 (2010) (holding that First Amendment political speech rights extend to corporations and striking down campaign finance laws limiting expenditures on elections-related communication by corporations).

89. 48 F.2d 110 (2d Cir. 1931).

90. *Id.* at 112.

91. The fictions of "constructive trust" and "constructive fraud" ensure equitable remedies for bad acts that fail to meet the legal requirements of a violated trust or perpetration of fraud, respectively. *See* Orth, *supra* note 82, at 72. Implied contracts treat noncontracts as contracts—again to achieve just ends, for example, by allowing recompense for labor reasonably undertaken in expectation of payment.

In evaluating a legal fiction, context is critical; so, too, is its genealogy in the law. As Professor Aviam Soifer observes, "[L]egal fictions do not hold still"; and as they "are not static, they may grow to influence or even control how we think or refuse to think about basic matters." [92] With these overarching principles in mind, I now turn to examine entry fiction in immigration and constitutional law.

III. ON ENTRY FICTION: EMERGENCE, EXTENSION, AND JUSTIFICATIONS

From the Court's earliest immigration cases onward, the concept of entry has served as a critical hinge in the availability of certain protections. In both statutory law and constitutional jurisprudence, a removal to land for purposes of inspection was considered not to alter an individual's status with regard to immigration—or immigration-related due process. As I explain below, both the statutory and jurisprudential origins of entry fiction had a decidedly functional and humanitarian bent, in line with the expected use of fictions in law. But first, I briefly describe plenary power doctrine, which established the federal government's sovereign immigration powers in darker and more problematic ways.

A. *Plenary Power*

Although locating regulation of immigration squarely within the powers of the federal government is uncontroversial today, the Constitution in fact provides no such enumerated authority. For over 100 years after this nation's establishment, no general immigration laws regulated migration,[93] and the free flow of persons into the United States was recognized as a fundamental right of persons as well as a benefit to the country.[94] In the late 1800s, however, a

Schauer, *supra* note 85, at 123. In property law, the treatment of children as invitees unto land even if they are in fact trespassers achieves the equitable result of greater protection of children. *Id.*

92. Soifer, *supra* note 78, at 877.

93. *But see* An Act Concerning Aliens, ch. 58, § 1, 1 Stat. 570 (expired 1800) (authorizing summary expulsion of noncitizens considered to be dangerous); Sedition Act, ch. 74, 1 Stat. 596 (expired 1801) (acting in conjunction with An Act Concerning Aliens).

94. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987). As Professor Louis Henkin explains, a mid-nineteenth-century act provided as follows:

> [T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and . . . in . . . recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship . . . .

Id. at 855 n.10 (citing An Act concerning the Rights of American Citizens in foreign States, Pub. L. No. 40-249, 15 Stat. 223 (1868) (codified as amended at 22 U.S.C. § 1731)). However, this did not mean that the right to free migration was wholly embraced. Many state jurisdictions attempted to limit migration. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

backlash of xenophobia and racism against Chinese immigrants led to Congress's passage of the first major immigration law in 1882,[95] excluding Chinese nationals.[96] Just prior to that law's passage, a strong anti-Chinese movement in California led to a number of restrictive state and local laws targeting Chinese immigrants, but the Chinese community successfully sued to invalidate them.[97] Californians called insistently upon the federal government to intervene.[98]

As Professor Louis Henkin observes, this backdrop provided a ready impetus for the Supreme Court to source a federal power over immigration from the Constitution.[99] In *Chae Chan Ping v. United States*,[100] the Court in 1889 did precisely that in order to uphold the blatantly discriminatory Chinese Exclusion laws. Justice Field, writing for the Court, pronounced "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution."[101] Accordingly, "the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."[102] Even though Chae Chan Ping lived and worked in the United States for twelve years and secured an advance certificate authorizing his return,[103] the Court ruled that subsequent laws of Congress nullifying permission to return (in violation of treaty agreements) were a lawful exercise of sovereign power.[104] The decision, moreover, both validated and extended racism against the Chinese. Justice Field termed their large-scale immigration as an "Oriental invasion" and "a menace to our civilization," characterizing Chinese Americans as "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country."[105]

95. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 *repealed by* Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, *and* Act of Feb. 5, 1917, ch. 29, § 38, 39 Stat. 874, 897; *see also* Casa de Md., Inc. v. Trump, 971 F.3d 220, 230–31 (4th Cir. 2020) (providing a historical overview of federal immigration law), *reh'g granted en banc*, 981 F.3d 311 (4th Cir. 2020) (mem.).

96. Henkin, *supra* note 94, at 855–56.

97. DANIEL ROGERS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 7 (1988).

98. *Id.*

99. Henkin, *supra* note 94, at 856.

100. 130 U.S. 581 (1889).

101. *Id.* at 609.

102. *Id.*

103. *Id.* at 585.

104. *Id.* at 609–10.

105. *Id.* at 595.

In another decision invoking federal sovereign power as plenary[106] to validate racist laws, the Court in *Fong Yue Ting v. United States*[107] upheld the expulsion from within the territory of Chinese immigrants who could not establish their residency via testimony of "one credible white witness," as required by statute.[108] There, too, the Court deemed such authority an essential aspect of sovereignty. In 1896, the Court in *Wong Wing v. United States*[109] explained that detention authority also rests in the federal government's sovereign power to effect both exclusion and expulsion:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.[110]

But that same Court struck down a law that imposed a punishment of hard labor absent indictment or trial—explaining that whereas detention served purposes related to immigration laws, hard labor did not.[111]

Not coincidentally, plenary power also became a cornerstone of federal law on Native American tribes, as well as for the outlying territories of Guam, the Philippines, Puerto Rico, and Hawaii.[112] In all these circumstances, plenary power doctrine enabled the federal government to strip constitutional and legal protections from those marked undesirable, foreign, and other.[113] Tracing and

106. Plenary power stands for the proposition that "the power of Congress over the admission of aliens to this country is absolute." *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) (quoting 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 22.2(a) (2d ed. 1992)).

107. 149 U.S. 698 (1893).

108. *Id.* at 729. Justice Field, however, dissented. For an in-depth analysis of both *Chae Chang Ping* and *Fong Yue Ting* and Justice Field's varying positions in each, see Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in* Chae Chan Ping *and* Fong Yue Ting, 68 OKLA. L. REV. 165, 167 (2015).

109. 163 U.S. 228 (1896).

110. *Id.* at 235. The case concerned an expulsion, not an exclusion, but the Court equated detention's link to both. *Id.*

111. *Id.* at 237.

112. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7 (2002) (examining inherent powers of sovereignty over Native American tribes, immigrants, and territories in late nineteenth-century jurisprudence); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 26–29 (2003) (examining the troubling legacy of plenary power cases to target and exclude those deemed "Other").

113. *See* Saito, *supra* note 112, at 26–29. Plenary power doctrine invoked in the Native American contexts enabled, among other things, the wholesale theft of land by the federal government from Native Americans in violation of prior treaty agreements. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S.

critiquing its unjust and discriminatory origins, many scholars have called for the end of plenary power doctrine.[114]

Entry fiction, emerging from plenary power doctrine, cannot be divorced from its ignominious roots and for that reason alone merits rejection. But even if jurists shy away from eliminating plenary power over immigration—which remains deeply embedded in juridical and public conceptions of federal authority—entry fiction itself warrants separate scrutiny. Below, I document how entry fiction emerged and expanded in immigration jurisprudence. Its origins and evolution, I argue, have much to tell us about how to apply plenary power doctrine today.

B. *Humanitarian Origins of Entry Fiction in Legislation*

Although the earliest articulations of plenary power doctrine validated and upheld the Chinese Exclusion era's racist immigration laws, entry fiction emerged within that space to serve more humanitarian ends in the same era. In those days, immigrants arrived largely via boat and were ordinarily inspected before disembarking. However, as Professor Charles Weisselberg explains, "By the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels."[115] As a result, Congress enacted legislation allowing immigration officials to order temporary removal of immigrants from the vessel for inspection purposes, but expressly provided that such removal to land did not constitute a "landing."[116] These "'removal' and 'landing' provisions were the

553, 561 (1903). Plenary power doctrine as set forth in the *Insular Cases* stripped persons in external U.S. territories of certain constitutional rights, local self-government, and representation in U.S. government. *See generally* Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57 (2013) (providing an overview of the *Insular Cases* in arguing that Puerto Rico's colonial status pursuant to them violates both the U.S. Constitution and international treaty obligations); *see also infra* Section VII.A (discussing prior context and later Supreme Court treatment of the *Insular Cases*).

114. *See, e.g.*, Chin, *supra* note 106, at 1 (arguing that plenary power doctrine must be reexamined as its foundational cases are unsound); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 212 (2003) (explaining that "liberal theory is more consistent with U.S. constitutional traditions" than the views of plenary power advocates); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260 ("Apart from the weaknesses that they contain, the principle of special judicial abstinence in immigration cases cannot be justified even as a matter of precedent."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) ("[Plenary power] doctrine had long been under heavy fire from many quarters."); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 39 (1996) ("Stated in terms of constitutional law: eliminate the plenary power doctrine and permit challenges to immigration laws that discriminate based on suspect classifications such as race.").

115. 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, 951 (1995).

116. *See* Act of Mar. 3, 1891, Pub. L. No. 51-551, § 8, 26 Stat. 1084, 1085–86, *repealed by* Act of Feb. 5, 1917, ch. 29, § 38, 39 Stat. 874, 897.

beginning of what has come to be called the 'entry fiction.'"[117] An 1891 Act[118] provided

> [t]hat upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. *But such removal shall not be considered a landing during the pendency of such examination*.[119]

The Act further directed that "[d]uring such inspection after temporary removal the superintendent shall cause such aliens to *be properly housed, fed, and cared for*, and also, in his discretion, such as are delayed in proceeding to their destination after inspection."[120] This provision underscores that the impetus for entry fiction was a humanitarian one, as reflected by the mandated provision for proper care and housing and when considered in light of the hellish conditions that it allowed immigrants to avoid. Passenger ships in the nineteenth century were notoriously dangerous, some with such high mortality rates that they earned the moniker "coffin ships."[121] Countless individuals died during the transatlantic journey to America.[122]

A 1908 investigation by the Dillingham Immigration Commission noted the "disgusting and demoralizing conditions" of traditional, non-steamer immigrant ships[123] and concluded:

> Considering this old-type steerage as a whole, it is a congestion so intense, so injurious to health and morals, that there is nothing on land to equal it. That people live in it only temporarily is no justification of its existence. The experience of a single crossing is enough to change bad

117. Weisselberg, *supra* note 115, at 951.

118. *See* Act of Mar. 3, 1891, Pub. L. No. 51-551, 26 Stat. 1084, *repealed by* Act of Feb. 5, 1917, ch. 29, § 38, 39 Stat. 874, 897.

119. § 8, 26 Stat. at 1085 (emphasis added); *see also* Weisselberg, *supra* note 115, at 951.

120. § 8, 26 Stat. at 1085 (emphasis added); *see also* Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903, *repealed by* Act of Feb. 5, 1917, ch. 29, § 38, 39 Stat. 874, 897; Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885, *repealed by* Immigration and Nationality Act of 1952, Pub. L. 82-414, § 403, 66 Stat. 163, 279; Weisselberg, *supra* note 115, at 951 (citing and discussing these laws).

121. Marguérite Corporaal & Christopher Cusack, *Rites of Passage: The Coffin Ship as a Site of Immigrants' Identity Formation in Irish and Irish American Fiction, 1855–85*, 8 ATL. STUD. 343, 343 (2011).

122. Raymond L. Cohn, *Mortality on Immigrant Voyages to New York, 1836–1853*, 44 J. ECON. HIST. 289, 289, 294 (1984).

123. WILLIAM P. DILLINGHAM, U.S. IMMIGR. COMM'N, ABSTRACT OF THE REPORT ON STEERAGE CONDITIONS, S. Doc. No. 61-747, at 295 (3d Sess. 1910).

> standards of living to worse. It is abundant opportunity to weaken the body and implant there germs of disease to develop later. It is more than a physical and moral test; it is a strain.[124]

The Dillingham Immigration Commission additionally described the conditions:

> No sick cans are furnished, and not even large receptacles for waste. The vomitings of the seasick are often permitted to remain a long time before being removed. The floors, when iron, are continually damp, and when of wood they reek with foul odor because they are not washed.
>
> . . . .
>
> When to this very limited space and much filth and stench is added inadequate means of ventilation, the result is almost unendurable. Its harmful effects on health and morals scarcely need be indicated.[125]

First person accounts of the ships underscored their crowdedness and stench. One passenger wrote in 1879, "Words are incapable of conveying anything like a correct notion of the kind of den in which I stood among sixty fellow-passengers. . . . The stench, combined with the heat, was simply intolerable."[126] Another writer who experienced the journey at the turn of the twentieth century lamented that "more than 800,000 [people per year] come in ships whose steerage conditions are unsanitary, unclean, often indecent, and throughout unworthy."[127]

Preventing passengers from landing after such an arduous journey was dangerous. As one historian described, "In the early years, conditions for passengers remaining on board ships and banned from landing within city limits [of Philadelphia] were extremely unhealthy and often aggravated by inadequate food, poor accommodations, and the onset of winter."[128] The passage of laws by

124. *Id.* at 299. The report continued:

> And surely it is not the introduction to American institutions that will tend to make them respected.
>
> The common plea that better accommodations cannot be maintained because they would be beyond the appreciation of the emigrant and because they would leave too small a margin of profit, carries no weight in view of the fact that the desired kind of steerage already exists on some of the lines and is not conducted as a philanthropy or a charity.

Id. The same report provided a description of inadequate sanitary conditions on ships. *Id.*

125. *Id.* at 296–97.

126. *In the Steerage of a Cunard Steamer*, PALL MALL GAZETTE (London), Aug. 9, 1879, at 11–12.

127. Kellogg Durland, *Urgency of Improved Steerage Conditions 1906*, 48 CHAUTAUQUAN, Nov. 1907, at 383–84.

128. MARIANNE S. WOKECK, TRADE IN STRANGERS: THE BEGINNINGS OF MASS MIGRATION TO NORTH AMERICA 149 (1999).

Congress to facilitate inspections off ship via entry fiction thus allowed for a humane alternative to dangerous and potentially lethal conditions on board.

C. *Humanitarian Origins of Entry Fiction in Jurisprudence Versus the Rights of Entrants*

A year after the passage of the 1891 Act, and three years after the Supreme Court issued its decision in *Chae Chan Ping*, the Court considered the case of a Japanese woman who was denied permission to land in the United States to join her husband. In *Nishimura Ekiu v. United States*,[129] the Court rejected Ms. Nishimura's due process claim and reaffirmed that

> [i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[130]

Although she was not subject to the nationality-based Chinese Exclusion laws, immigration officers found Ms. Nishimura—a young bride in possession of only twenty-two dollars—excludable as likely to become a public charge.[131] After she arrived in the port of San Francisco by ship, she was transferred to the custody of the Methodist Episcopal Chinese and Japanese Mission within the city.[132] But this, the Court determined, had no effect on Ms. Nishimura's rights as to landing:

> Putting her in the mission house, *as a more suitable place than the steamship*, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of *habeas corpus*, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.[133]

Thus, the fact of Ms. Nishimura's landing and her transfer to the care of a religious mission did not change her constitutional status with regard to her rights to admission. But the Court in so holding emphasized the *suitability* of the placement in a mission house over the more dangerous setting of the steamship—reflecting entry fiction's original purpose.[134]

129. 142 U.S. 651 (1892).

130. *Id.* at 659.

131. *Id.* at 652.

132. *Id.* at 653.

133. *Id.* at 661 (emphasis added).

134. *Id.* at 659–60; *see also* Kaplan v. Tod, 267 U.S. 228, 229–30 (1925); United States v. Ju Toy, 198 U.S. 253, 263 (1905) ("The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."). In *Kaplan v. Tod*, 267 U.S. 228 (1925), the Court held that Ms. Kaplan, a young

These mission homes were not jails but rather boardinghouses located in dense urban communities that offered residents shelter, food, clothing, transportation, and social services.[135] Professor Cindy Che-Wen Lin describes the Gum Moon Methodist mission home in San Francisco in the late nineteenth century as "show[ing] great humanity" toward resident Chinese immigrant women, and concludes the mission home "lived up to the ideals of Protestant social reform."[136] Photographs of the Gum Moon Methodist mission home near the turn of the twentieth century (in locations before and after the 1906 San Francisco earthquake)[137] depict an overall nonpunitive character.

petitioner released from Ellis Island to the custody of the Hebrew Sheltering and Immigration Aid Society while her immigration status remained uncertain, was "in theory of law at the boundary line and had gained no foothold in the United States" and thus could not derive citizenship via a statute that applied only to children "dwelling in the United States." *Id.* at 229–30. But notable here, too, is the fact that entry fiction allowed Ms. Kaplan to be transferred to the custody of a religious mission, and ultimately released to her father, without altering her immigration status. *Id.* at 229. Although not as clearly articulated as in *Nishimura Ekiu*, the suitability of allowing placement of a minor to her father instead of continued detention may underlie *Kaplan* as well.

135. *See generally* ESTHER CRAIN, THE GILDED AGE IN NEW YORK, 1870–1910 (2016) (describing Christian mission houses in the 1880s as providing lodging, Bible study, clothes, meals, and schooling); *History*, HEBREW IMMIGRANT AID SOC'Y, https://www.hias.org/history [https://perma.cc/X44E-RU22] (describing the Hebrew Immigrant Aid Society's founding in 1881 and the nineteenth-century shelter and aid provided to immigrants, including "dormitory space, a soup kitchen and clothing").

136. Cindy Che-Wen Lin, *The History of the Oriental Home (1888–1942)*, 18 MCMASTER J. THEOLOGY & MINISTRY 3, 23 (2017). The mission homes were complex spaces that sought to inculcate residents with Protestant and Victorian values. Although they urged assimilation of residents in many respects, the missionary women who ran the home also countered nativism and racism against Chinese Americans at the time. PEGGY PASCOE, RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874–1939, at 117–21 (1990).

137. *See Our History*, GUM MOON WOMEN'S RESIDENCE, https://www.gummoon.org/history [https://perma.cc/JH43-RVCX] (explaining the relocation of the Gum Moon Methodist mission home after the 1906 earthquake in San Francisco).

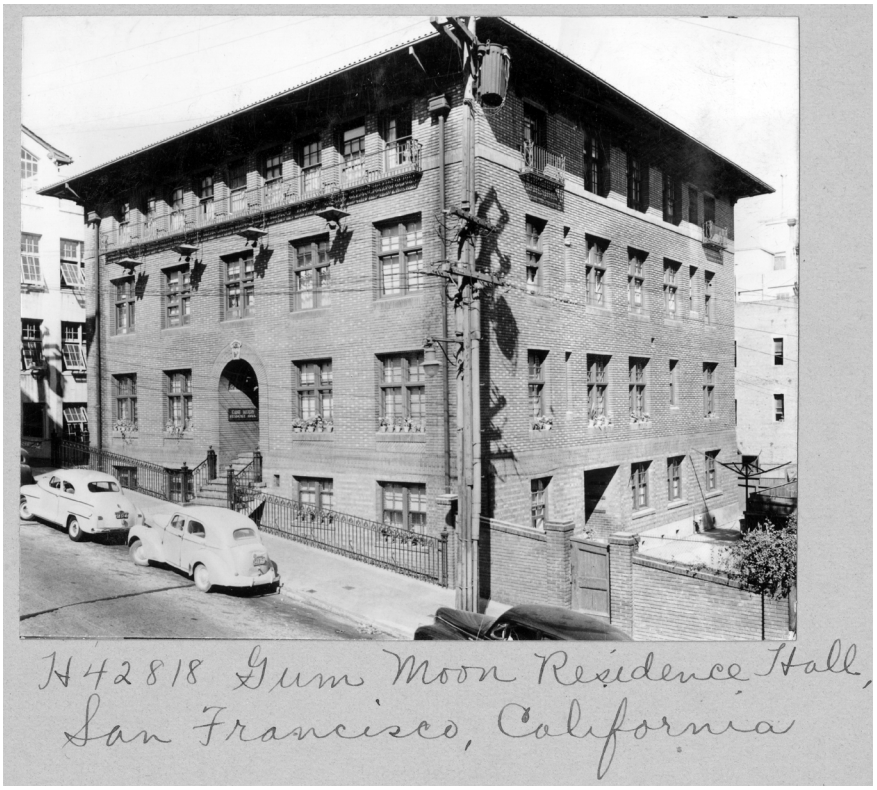
Figure 1: Gum Moon Residence Hall, original location[138]

138. *Chinese M.E. [Methodist Episcopal] Buildings. Girls Home & Church* (photograph), *in UC Berkley Bancroft Library: San Francisco Chinese Community and Earthquake Damage, ca. 1906*, CALISPHERE: U.C., https://calisphere.org/item/ark:/13030/tf3779n9bs/ [https://perma.cc/2VZR-N9UW].

Figure 2: Parlor of Gum Moon Residence Hall[139]

139. *H42816 Gum Moon Residence Hall Parlor, San Francisco, California* (photograph), *in* UMC DIGIT. GALLERIES, http://catalog.gcah.org/omeka/files/original/53c94bb2fdca31f76b660d86cbf123c2.jpg [https://perma.cc/MKN8-3Y7J].

Figure 3: Street View of Gum Moon Residence Hall[140]



140. *H42818 Gum Moon Residence Hall, San Francisco, California* (photograph), *in* UMC DIGIT. GALLERIES, http://catalog.gcah.org/omeka/files/original/65b33f46b04496f55af6529df9a96a2e.jpg [https://perma.cc/WD5Q-JM5E].

Figure 4: Dining Room of Gum Moon Residence Hall[141]

In contrast to the Court's approach in *Nishimura Ekiu*, however, the Court in the 1903 case of *Yamataya v. Fisher*[142] recognized the applicability of due process principles for *entrants*. It rejected arbitrary detention without a hearing for Ms. Yamataya, a Japanese teenager[143] who had entered the United States just days before apprehension by immigration authorities.[144] Rooting its discussion in principles of due process, the Court held the immigration statutes

141. *H42817 Gum Moon Residence Hall, Dining Room, San Francisco, California* (photograph), *in* UMC DIGIT. GALLERIES (1910–1930), http://catalog.gcah.org/omeka/files/original/65b33f46b04496f55af6529df9a96a2e.jpg [https://perma.cc/WD5Q-JM5E].

142. 189 U.S. 86 (1903).

143. Eleanor Boba, *Supreme Court Rules in the Japanese Immigrant Case*, Yamataya v. Fisher, *on April 6, 1903.* (July 3, 2018), https://historylink.org/File/20597 [https://perma.cc/73ET-CWY4].

144. *Id.* at 87. Ms. Yamataya, a Japanese national, landed at the port of Seattle on July 11, 1901—just four days prior to an immigrant inspector's July 15, 1902 start of an investigation around her landing. *Id.*

did not authorize her arbitrary detention, even though she was "alleged to be illegally here."[145]

The Supreme Court's recent jurisprudence on due process and Suspension Clause rights in the admission context relies heavily upon *Nishimura Ekiu*, and raises tensions with *Yamataya*, in extending entry fiction in that context. As mentioned, the *Thuraissigiam* majority considered an applicant for admission subject to the entry fiction with regard to his rights to admission, even though technically he effected a crossing free from restraint. It read into *Nishimura Ekiu*, moreover, an extremely broad view of sovereign power in applying entry fiction to reject Mr. Thuraissigiam's constitutional due process claim.[146] Yet the Court's fixation on the sovereign prerogatives derived from *Nishimura Ekiu* completely ignores the humanitarian origins of entry fiction in that same case. No equity-based arguments, nor desire to acknowledge or prompt humane practices by the government, make their way into the Court's view of entry fiction in *Thuraissigiam*. Entry fiction, rather, is transformed into a border-management tool, used to ensure the "governing [of] admission to this country" by federal authorities and to prevent creating "a perverse incentive to enter at an unlawful rather than lawful location" by individuals.[147] But this view forgets that good *governmental behavior* vis-à-vis individuals—not simply expansive governmental power, nor a desire to prompt certain individual behavior—underlays entry fiction as well. That line of reasoning continued under entry fiction's later cases, explored below.

D. *Undercurrents of Humanitarian Function in Entry Fiction's Cold War Expansion*

A half century later, in a case involving the exclusion of another foreign bride, the Court reaffirmed the applicability of entry fiction in *Knauff*.[148] Ellen Knauff, formerly Ellen Boxhornova, met and married Kurt Knauff, a civilian employee of the U.S. Army and veteran of World War II, in her native land of Germany.[149] The War Brides Act of 1945[150] thus authorized her admission as a foreign spouse. Nevertheless, the Attorney General denied her admission for unspecified security risks.[151] The Court upheld Ms. Knauff's exclusion even absent process or notice of the charges against her, pronouncing that with regard to her admission: "Whatever the procedure authorized by Congress is, it is due

145. *Id.* at 101.

146. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981–83 (2020); *see also id.* at 1977–81 (discussing *Nishimura Ekiu* in the context of the Suspension Clause).

147. *Id.* at 1983.

148. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544–47 (1950).

149. *Id.* at 539; Appellant's Brief at 3–4, *Knauff*, 338 U.S. 537 (No. 54). Ms. Boxhornova changed her last name to Knauff after marrying Kurt Knauff. *See* Appellant's Brief at 4, *supra*.

150. Pub. L. No. 79-271, 59 Stat. 659 (expired 1948).

151. *Knauff*, 338 U.S. at 540, 544.

process as far as an alien denied entry is concerned."[152] The *Knauff* Court did not, however, expressly address Ms. Knauff's detention on Ellis Island, where she was held for nine months. Notably, the Supreme Court permitted her release on bond while the case was pending.[153]

Finally, in its clearest and harshest articulation of entry fiction, the Court in *Mezei* held that Mr. Mezei, an excluded noncitizen from eastern Europe, had no constitutional protections against prolonged, indefinite detention on Ellis Island.[154] Mr. Mezei lived in the United States for over twenty years before leaving the country to visit his ailing mother in Romania. He ended up stuck behind the Iron Curtain for over a year and a half, and upon his stateside return, the Attorney General deemed him a security risk and refused admission.[155] The government kept Mr. Mezei locked away because it did not want to permit him entry but could not effectuate his deportation. Several countries refused the State Department's requests to accept him.[156]

The Court reversed the lower courts' grant of habeas. It reasoned that "an alien on the threshold of initial entry stands on a different footing" than those who have "passed through our gates" and, referencing *Knauff*, concluded Mr. Mezei was entitled only to whatever due process Congress chose to bestow.[157] Because U.S. immigration law provided him with no right to enter and no protections against prolonged detention, it upheld his indefinite detention.[158]

In *Mezei*, however, unlike in *Knauff*, the Court explicitly addressed continued confinement on Ellis Island, framing detention as *minimization* of hardship to Mr. Mezei as follows:

> While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, *resulting hardships to the alien and inconvenience to the carrier* persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore "shall not be considered a landing" nor relieve the vessel of the duty to transport back the alien if ultimately excluded. And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.[159]

152. *Id.* at 544.

153. Ms. Knauff returned to custody on Ellis Island after losing before the Court but was ultimately released after sustained advocacy on her behalf. *See* CANNATO, *supra* note 5, at 365–66.

154. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214–15 (1953).

155. *See id.* at 218–20 (Jackson, J., dissenting) (recounting the facts of Mr. Mezei's case).

156. *Id.*

157. *Id.* at 212 (majority opinion).

158. *Id.* at 215.

159. *Id.* (emphasis added) (citations omitted).

Notable here is the Court's explicit articulation of the social good wrought by its position. In characterizing Mr. Mezei's imprisonment on Ellis Island as an alternative to the far more inconvenient and uncomfortable circumstance of forcing him to stay on a boat, the Court framed his detention as an "act of legislative grace" and generosity.[160] The Court clearly did not wish to trample upon or disincentivize this grace.

A strong dissent by Justice Jackson countered the Court's framing, adopting a far less rosy and more fact-bound view of Mr. Mezei's detention. In sharply worded terms, he took issue with the majority's positive gloss on his three years of indefinite detention, rejecting the government's disingenuous argument that Ellis Island was a "refuge" for Mr. Mezei from which he was "free to take leave in any direction except west."[161] As Justice Jackson noted astutely, "That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority."[162] Justice Jackson explicitly condemned the fictional aspect of these arguments, stating, "It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound."[163] Accordingly, he concluded emphatically that due process protections should extend to Mr. Mezei's deprivation of liberty.[164]

An obvious tension emerges between the majority (and government's) endorsement of entry fiction and Justice Jackson's castigation of the same. Yet, a common thread emerges from their disparate positions. Both insist that their opposing views—permitting a fiction of nonentry for the majority and rejecting the same for Justice Jackson—further a humanitarian end in *limiting* harsh confinement. Whereas Justice Jackson underscores the reality of Mr. Mezei's indefinite detention on Ellis Island and seeks to address it, the majority worries that absent entry fiction, the government would force immigrants to stay aboard ships.

E. *After* Mezei *and* Knauff*: A Humanitarian End of Mass Immigration Detention*

The association of Ellis Island with the Cold War, driven in large part by *Mezei* and *Knauff*, tainted the facility in the eyes of many Americans and became a public relations issue. Newspapers widely condemned both decisions.[165] The Court's treatment of Ms. Knauff, the wife of a U.S. serviceman, drew especially

160. *Id.*
161. *Id.* at 220 (Jackson, J., dissenting).
162. *Id.*
163. *Id.*
164. *Id.* at 227–28.
165. *See* Weisselberg, *supra* note 115, at 958–64, 970–84.

significant public backlash and led to intervention by members of Congress.[166] Both Mr. Mezei and Ms. Knauff were in fact paroled[167] into the country following their adverse court decisions—belying the necessity of the detention that the government so strenuously fought for. Indeed, the Eisenhower Administration took steps to close Ellis Island permanently even as it defended its use of the facility in litigation.[168] Ellis Island finally closed in 1954, shortly after Mr. Mezei's release during the spring of that same year.[169]

On the first official Veteran's Day, November 11, 1954, presiding over the naturalization of 1,600 new Americans at Brooklyn's Ebbet's Field,[170] Attorney General Herbert Brownell publicly announced the closing of Ellis Island and all remaining federal immigration detention facilities. He explained:

> Now, these problems of detention also have been studied intently. As a result, we have formulated a new policy -- a policy which I am pleased to announce today because I believe you will agree it will make a vast improvement in one phase of your Government's relations with individuals. *It is one more step forward toward humane administration of the Immigration laws* under the fine leadership of Commissioner Joseph M. Swing.
>
> In all but a few cases, those aliens whose admissibility or deportation is under study will no longer be detained. Only those deemed likely to abscond or those whose freedom of movement could be adverse to the national security or the public safety will be detained. All others will be released on conditional parole or bond or supervision, with reasonable restrictions to insure their availability when their presence is required by the Immigration and Naturalization Service.[171]

Brownell's announcement was in keeping with the promise of *Mezei*'s own justification for entry fiction—to ensure a more humane operation of immigration law.

166. As a war bride, Ms. Knauff garnered sympathy from a wide range of Americans, including the full House which passed a private bill on her behalf. S. 2979, 81st Cong., 2d Sess. (1950). Although the bill languished before the Senate and was not signed into law, Ms. Knauff eventually won her case for permanent residency before the Board of Immigration Appeals. *See* Weisselberg, *supra* note 115, at 958–64.

167. "Parole" as used here refers to a release from detention without formal admission to the country. *See infra* notes 204–05 and accompanying text (discussing parole statutes and processes).

168. *See* CANNATO, *supra* note 5, at 375.

169. *Id.* This closure also coincided with the imminent start of censure proceedings on the Senate floor against Joseph McCarthy, for "his unwise investigation of alleged Communism in the U.S. Army in the spring of 1954." *Id.*

170. Olivia B. Waxman, *Thousands of People Became American Citizens on the First Official Veterans Day*, YAHOO! FIN. (Nov. 10, 2017), https://finance.yahoo.com/news/thousands-people-became-american-citizens-160055345.html [https://perma.cc/NAR4-9AX3].

171. Brownell, *supra* note 7, at 5 (emphasis added).

F. *The Detention-Avoidance Function of Entry Fiction*

In a case decided a few years later, *Leng May Ma v. Barber*,[172] the Court echoed these themes of generosity and grace in considering whether individuals paroled into the interior of the United States should be considered present for purposes of statutory eligibility under the then "withholding of removal" provision, 8 U.S.C. § 1253(h).[173] Section 1253(h) provided the Attorney General with discretion to decline to return individuals who would face persecution or torture in their home countries but limited that relief to persons "within the United States."[174]

The Court described parole as "simply a device through which needless confinement is avoided . . . [that is] never intended to affect an alien's status."[175] Thus, "to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court."[176] The Court also expressed a functional, utilitarian reason for the nonlegal effect of parole. It observed, "Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond."[177] It continued:

> Certainly this policy reflects the humane qualities of an enlightened civilization. The acceptance of petitioner's position in this case, however, with its inherent suggestion of an altered parole status, would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to the Congress.[178]

Thus, the Court deemed entry fiction's operation with respect to legal status a jurisprudential good: one that prompted fairer and more humane immigration policies by disincentivizing detention. Specifically, entry fiction encouraged the legislative enactment and administrative exercise of parole, which in turn minimized the use of physical detention.

G. *Entry Fiction's Nonfunctions and Double Fictions*

Entry fiction did not, however, generally curtail constitutional rights unrelated to immigration. As Professor Aleinikoff explains, "Outside the immigration process, aliens receive most of the constitutional protections

172. 357 U.S. 185 (1958).

173. *Id.* at 188–89.

174. 8 U.S.C. § 1253(h). Section 1253(h) has since been superseded by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.), which provides for mandatory withholding of removal as well as discretionary asylum relief, incorporating the international law definition of a refugee. *Id.* §§ 201, 207–208, 94 Stat. at 102–05.

175. *Leng May Ma*, 357 U.S. at 190.

176. *Id.*

177. *Id.* at 190.

178. *Id.*

afforded citizens."[179] Along these lines, courts have found that individuals retain due process protections irrespective of immigration or citizenship status for criminal processes,[180] parental rights,[181] and deprivation of property.[182] The courts have also recognized detained immigrants' *substantive* due process rights with regard to conditions of confinement, including fundamental safety and medical needs.[183] Indeed, in spring 2020, district courts ordered the release of many detained immigrants with health issues on substantive due process grounds, finding that the detention of medically vulnerable immigrants amidst the COVID-19 pandemic likely violated their constitutional rights.[184] The

179. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989).

180. *See, e.g.*, United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979), *abrogated by* United States v. Corral-Franco, 848 F.2d 536 (5th Cir. 1988) (discussing the entitlement to Fifth Amendment rights including those under Miranda v. Arizona, 384 U.S. 436 (1966)); Xiao v. Reno, 837 F. Supp. 1506, 1548–50 (N.D. Cal. 1993), *aff'd sub nom.* Wang v. Reno, 81 F.3d 808 (9th Cir. 1996) (concluding that the Fifth Amendment due process right of an immigrant brought to the United States to testify in a criminal case was violated); *id.* at 1549 ("[There is a] basic distinction, between a constitutional claim that implicates the sovereign's authority to control immigration and a claim that implicates no such interests . . . .").

181. Polovchak v. Meese, 774 F.2d 731, 734–35 (7th Cir. 1985) (illustrating how Russian nationals' parental rights were protected by the Fifth Amendment).

182. Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (holding that a foreign corporation was entitled to Fifth Amendment due process rights with regard to property and thus was entitled to just compensation for taking by eminent domain).

183. *See* Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever 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."); Torres v. U.S. Dep't of Homeland Sec., 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019) (determining that the "[p]laintiffs successfully plead a substantive due process claim" with regard to conditions of confinement in an ICE facility operated by Geo Group, a private contractor). *But see* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1147–51 (1995) (explaining how more expansive recognition of substantive due process rights for conditions of confinement in immigration detention in Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987), has given way to an unduly high standard of deliberate cruelty or gross physical abuse in subsequent district court and court of appeals' cases).

184. *See* Thakker v. Doll, 456 F. Supp. 3d 647, 658 (M.D. Pa. 2020) (holding medically vulnerable petitioners are likely to succeed in their claim that ICE violated substantive due process rights in exposing them to heightened risks of COVID-19 and ordering release); Basank v. Decker, 449 F. Supp. 3d 205, 215 (S.D.N.Y. 2020) (same); Castillo v. Barr, 449 F. Supp. 3d 915, 922–23 (C.D. Cal. 2020) (same); Coronel v. Decker, 449 F. Supp. 3d 274, 290 (S.D.N.Y. 2020) (same). *But see* Dawson v. Asher, 447 F. Supp. 3d 1047, 1050–51 (W.D. Wash. 2020) (determining that petitioners are unlikely to succeed in a claim that ICE detention during the COVID-19 pandemic violated substantive due process rights and denying release); Sacal-Micha v. Longoria, 449 F. Supp. 3d 656, 665–66 (S.D. Tex. 2020) ("[T]he fact that ICE may be unable to implement the measures that would be required to fully guarantee [petitioner's] safety does not amount to a violation of his constitutional rights and does not warrant his release."); Coreas v. Bounds, 451 F. Supp. 3d 407, 430 (D. Md. 2020) (holding that in the absence of any confirmed cases of COVID-19 in facilities and given newly instituted screening and transfer procedures, petitioners did not establish a likelihood of success on their claim of ICE's deliberate indifference to health and safety). At least one successful petitioner who secured release was

boundary line of "border" thus does not allow U.S. officials to commit unchecked transgressions against immigrants.

And finally, one of the most important ways the Court tempered the danger inherent in entry fiction was a *double fiction* for lawful permanent residents, whose ties and equities the Court did not wish to ignore. To ameliorate the harshest impacts of entry fiction, it imposed a fiction of *nonexit* for lawful permanent residents who only briefly left U.S. territory. In *Kwong Hai Chew v. Colding*,[185] the Supreme Court held that the Attorney General lacked authority to exclude and detain a lawful permanent resident and seaman returning from a voyage without a hearing.[186] The Court considered Mr. Kwong's constitutional status as "assimilate[d]" to "that of an alien continuously residing and physically present in the United States" despite his short trip abroad.[187] It accordingly construed regulations that would have deprived Mr. Kwong of a hearing as limited to "'excludable' aliens who are not within the protection of the Fifth Amendment" so as to avoid constitutional conflict.[188] In treating Mr. Kwong as if he had never left the United States, the Court thus created a *fictional exception* to entry fiction. A decade later, it extended this double fiction in *Rosenberg v. Fleuti*,[189] holding that a permanent resident's "innocent, casual, and brief excursion" abroad would not be considered a departure that triggers excludability under U.S. immigration law.[190] Further, in *Landon v. Plasencia*,[191] the Court later determined that the question of whether a returning lawful permanent resident made an "entry" could be litigated in exclusion rather than deportation proceedings—but reaffirmed that a permanent resident is entitled to due process even in an exclusion hearing.[192]

These lines of case law demonstrate two things: (1) that entry fiction and its contours were fundamentally concerned with the smooth functioning of the

an arriving immigrant. *See* Complaint at 28, *Thakker*, 451 F. Supp. 3d 358 (No. 20-cv-480) (noting that petitioner "was detained on arrival").

185. 344 U.S. 590 (1953).

186. *See id.* at 600.

187. *Id.* at 596.

188. *Id.* at 600.

189. 374 U.S. 449 (1963).

190. *Id.* at 451–52, 462. The *Fleuti* Court considered whether a return from a brief afternoon trip to Mexico constituted a new entry within the meaning of immigration laws, such that Mr. Fleuti could be held excludable despite having accrued nearly four years of permanent and continuous residence prior to his departure. *Id.* at 451–52. The Court held it did not and that Mr. Fleuti thus was not subject to exclusion on the grounds of his homosexuality—which the agency had deemed a "psychopathic personality." *Id.* at 450–51, 462.

191. 459 U.S. 21 (1982).

192. *Id.* at 32 ("We agree with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country . . . ."). Notably, the petitioner in *Plasencia* was apprehended at the border while attempting to smuggle in unauthorized migrants—and the Court made clear to distinguish her short trip abroad from Mr. Fleuti's in being neither fully "innocent" nor "casual." *Id.* at 30–31.

immigration system, and (2) that the Court was rightly concerned with the potentially harmful consequences of entry fiction and thus willing to bend the "purity" of sovereign control of the border.

IV. NEW IMMIGRATION DETENTION REGIMES AND IMMIGRATION DETENTION JURISPRUDENCE

Until the late 1990s, entry served as a critical distinction regarding statutory rights of individuals in proceedings—both in the form of those proceedings and the substantive availability of immigration protections.[193] In 1996, however, Congress passed a new law, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[194] which significantly altered that status quo. The following sections briefly explain the significance of IIRIRA with respect to the rights of entered versus unentered individuals in detention, then examine post-IIRIRA detention jurisprudence. As I explain below, unentered individuals in detention do not receive a bond hearing before a neutral immigration judge under U.S. immigration law but instead can be released from detention only via the discretionary exercise of 8 U.S.C. § 1182(d)(5) parole by an immigration officer. The constitutional permissibility of this statutory landscape remains contested.

A. *1996: Entry Versus Admission After IIRIRA*

With the passage of IIRIRA, Congress eliminated the prior dual track of exclusion immigration court proceedings for unentered individuals and deportation immigration court hearings for entered individuals. It replaced them with a single removal proceeding in immigration court[195] and a curtailed administrative process called "expedited removal" that mostly bypasses immigration court.[196]

193. Those stopped at the border received less robust exclusion hearings, whereas persons in the interior received more protective deportation hearings. *See id.* at 25–26 (explaining differences between exclusion and deportation hearings); *Fleuti*, 374 U.S. at 451–52.

194. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

195. *See id.* § 304, 110 Stat. at 3009-587 to -597 (codified as amended at 8 U.S.C. § 1229a).

196. *See id.* § 302, 110 Stat. at 3009-580 to -581 (codified as amended at 8 U.S.C. § 1225(b)(1)(A)(i)) ("If an immigration officer determines that an alien [is subject to expedited removal] the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution."). In expedited removal, enforcement agents within DHS can both issue an order of removal and quickly effectuate it, generally without an immigration court hearing. An important safety valve exists, however, for asylum seekers, who must receive a screening for asylum eligibility before being returned. This process, known as a "credible fear" interview, involves a nonadversarial interview with an asylum officer and curtailed review by an immigration judge. 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B); 8 C.F.R. § 1235.6(a)(iii) (2019). Individuals who establish a credible fear are referred for regular removal proceedings in immigration court, where they can pursue their claims for asylum. *See* 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(B)(ii); 8 C.F.R. § 208.30(f) (2019); *id.*

Through these measures, Congress shifted immigration law's prior focus on entry to a new focus on admission, or the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[197] With that change, the formal *act* of entry now matters far less under U.S. immigration law than formal *permission* to enter. Individuals without such permission to enter—those who lack proper paperwork or who attempt to secure admission via fraud—can be subject to expedited removal processes that bypass the immigration courts.[198] Critically, the "applicants for admission" subject to expedited removal include both arriving individuals (deemed not to have effected an entry) and certain individuals who "enter without inspection."[199]

This statutory shift from a focus on entry to admission undermines the persistence of a legal fiction that hinges on the technical fact of entry.[200] Indeed, in *Thuraissigiam*, as explained, the Supreme Court recently deemed an applicant for admission to lack due process rights with regard to admission into the country despite not arriving at a port of entry.[201]

But while entry no longer significantly impacts access to substantive immigration status or the form of immigration adjudication, it continues to serve an important distinction for detention processes. Department of Justice regulations prohibit immigration judges from reviewing custody determinations of arriving individuals stopped at the border and thus considered not to have entered.[202] These individuals, detained under 8 U.S.C.

§ 1235.6(a)(ii)–(iii). Even after that point, however, they are not guaranteed release from detention. *See infra* Section V.B. DHS refuses release to many asylum seekers who establish a credible fear. *See infra* Section V.B.

197. Illegal Immigration Reform and Immigrant Responsibility Act, § 301, 110 Stat. at 3009-575 (codified as amended at 8 U.S.C. § 1101(a)(13)(A)). Notably, individuals who do not make a lawful entry—those who entered without inspection—are considered inadmissible, just the same as individuals stopped at the border without proper documents. 8 U.S.C. § 1182(a)(6)(A)(i).

198. *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii); *id.* § 1182(a)(6)(C), (a)(7). Specifically, § 1225 provides that those without documents establishing admissibility, as well as those that procure or seek to procure admission by fraud, are subject to expedited removal. *Id.* § 1225(a)(1). Section 1225 applies to individuals who are arriving as well as to other individuals as designated by the Attorney General. *Id.*

199. Recent regulations expand expedited removal to individuals anywhere in the United States who enter "without inspection" and have been present for two years or less (in addition to arriving individuals). *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (directing expansion of expedited removal); Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019) (expanding expedited removal). Previously, expedited removal applied only to entered individuals apprehended within 100 miles of a land border and present in the United States for fourteen days or less. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

200. *See supra* notes 51–55 and accompanying text (discussing work of Professors Cole and Bosniak).

201. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020); *see also supra* notes 35–38 and accompanying text (discussing *Thuraissigiam*'s extension of entry fiction in admission context).

202. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2019). But as described, some lawful permanent residents are not subject to entry fiction despite being categorized as arriving. *See supra* Section III.G; *supra* note 32.

§ 1225(b),[203] can seek release only by DHS through the mechanism of 8 U.S.C. § 1182(d)(5) parole in DHS's sole discretion.[204] In contrast, individuals who have entered the United States and are detained under the general immigration detention statute, 8 U.S.C. § 1226(a), receive a bond hearing before an immigration judge.[205]

In 2004 in *In re X-K-*,[206] the Board of Immigration Appeals extended the regulatory right to a bond hearing to asylum seekers who entered without inspection and were subject to expedited removal.[207] However, Attorney General William Barr overruled *In re X-K-* in *In re M-S-*[208] and attempted to deny entered individuals subject to expedited removal a bond hearing,[209] but a federal district court issued a national preliminary injunction against his decision. The court found it likely to violate entered individuals' due process

203. Section 1225(b) contains detention provisions applicable to asylum seekers placed into expedited removal who pass a credible fear, as well as provisions applicable to certain noncitizens presenting at ports of entry who do not establish that they are clearly and beyond a doubt entitled to be admitted. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (providing that individuals who pass a credible fear screening "shall be detained for further consideration of the application for asylum"); *id.* § 1225(b)(1)(B)(iii)(IV) (providing for detention of asylum seekers during credible fear processes, and if found not to establish such fear, until their removal); *id.* § 1225(b)(2)(A) (providing that an "applicant for admission . . . shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled" to admission).

204. *Id.* § 1182(d)(5). That section provides the government with discretion to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A); *see also* 8 C.F.R. § 1235.3(c) (2019) (limiting arriving aliens to release on parole). The statute also specifies that "such parole of such alien shall not be regarded as an admission." 8 U.S.C. § 1182(d)(5)(A).

205. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1) (2019) (providing a general review by an immigration judge of an immigration officer's custody determination for individuals in removal proceedings). However, immigrants subject to certain criminal and security ground for inadmissibility or deportability are subject to mandatory detention without a bond hearing. 8 U.S.C. § 1226(c)(1).

206. 23 I. & N. Dec. 731 (B.I.A. 2005), *overruled by* M-S-, 27 I. & N. Dec. 509 (A.G. 2019).

207. *Id.* at 734–35 (holding that immigration judge has jurisdiction to conduct a bond hearing and order release pursuant to "general custody authority" for individuals who enter without inspection, are placed into expedited removal, have a positive credible fear finding, and are pursuing claims in removal proceedings).

208. 27 I. & N. Dec. 509 (A.G. 2019).

209. *Id.* at 518–19. The Attorney General overruled *X-K-*, holding that the Board of Immigration Appeals in the earlier decision had erroneously deemed individuals who entered without inspection and were subject to expedited removal to be detained under 8 U.S.C. § 1226(a) and subject to the immigration judge's general custody authority. *Id.* He determined instead that such individuals are detained under § 1225(b) and ineligible for a bond hearing. *Id.* The Attorney General's decision altered five decades of prior practice, which had consistently provided entered individuals with a bond hearing since the inception of bond procedures in 1969. *See* Release from Custody by Special Inquiry Officer, 34 Fed. Reg. 8037 (May 22, 1969) (authorizing special inquiry officers to conduct bond proceedings); Immigration Judge, 38 Fed. Reg. 8590 (Apr. 4, 1973) (amending regulation to define "immigration judge" as interchangeable with "special inquiry officer," such that immigration judges as of 1973 would conduct bond hearings).

rights as recognized by the Supreme Court since *Yamataya*.[210] The Ninth Circuit agreed with the district court's analysis and upheld the injunction.[211]

In short, the statutory detention regime as interpreted by the government gives DHS enormous discretion over the detention of unentered/arriving noncitizens, who do not receive a bond hearing and who can be released only via DHS's exercise of § 1158(d)(5) parole authority. These noncitizens face a discretionary, process-stripped regime that the Trump Administration attempted to apply to many entered asylum seekers as well.[212] And as described below, the Court has continued to suggest a divide between the constitutional due process rights of arriving versus entered immigrants in detention.

B. *Post IIRIRA: Entry Fiction's Unresolved Status in Statutory and Constitutional Jurisprudence*

Litigants have brought myriad challenges to immigration detention without a bond hearing—including for both arriving individuals and those subject to criminal and security-based mandatory detention. In these cases, the Supreme Court resolved key statutory issues but left many constitutional ones open, including the scope and viability of entry fiction.

In 2001, in *Zadvydas v. Davis*,[213] the Court considered whether individuals could be indefinitely detained pending removal ordered by an immigration judge. A single statutory provision, 8 U.S.C. § 1231(a)(6), authorizes detention for immigrants with a final removal order[214] and applies both to "inadmissible" immigrants—including individuals who had not formally entered—as well as to

210. Padilla v. U.S. Immigr. & Customs Enf't, 387 F. Supp. 3d. 1219, 1231–32 (W.D. Wash. 2019), *aff'd in part, rev'd in part*, 953 F.3d 1134 (9th Cir. 2020), *vacated*, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021) (mem.); *see supra* Section III.C (discussing *Yamataya*).

211. Padilla v. U.S. Immigr. & Customs Enf't, 953 F.3d 1134, 1143 (9th Cir. 2020) ("[W]e conclude that the district court did not abuse its discretion in applying *Mathews* and concluding that the plaintiffs were likely to succeed on their claim that they are constitutionally entitled to individualized bond hearings before a neutral decisionmaker."), *vacated*, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021) (mem.). The Ninth Circuit, however, vacated a portion of the lower court's injunction that ordered specific procedural requirements and a seven-day timeline for the bond hearings. *Id.* at 1148–49. The Supreme Court vacated the decision and remanded the case to the Ninth Circuit in light of *Thuraissigiam*. Immigr. & Customs v. Padilla, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021) (mem.).

212. In 2017, over 42,000 asylum seekers who entered without inspection were subject to expedited removal despite establishing credible fear. *See* U.S. CITIZENSHIP & IMMIGR. SERV., CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2017 INLAND CASELOAD (2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf [https://perma.cc/L8NZ-39HD].

213. 533 U.S. 678 (2001).

214. 8 U.S.C. § 1231(a)(6). Specifically, § 1231 authorizes detention beyond a customary ninety-day removal period for immigrants with a final removal order, and it applies to both inadmissible immigrants—including individuals who had not formally entered and were instead paroled under § 1182(d)(5) into the country—and "removable" individuals who have effected an entry. *Id.*

"removable" individuals who have effected an entry.[215] The provision is silent, however, on the permissible length of detention. The government interpreted it to authorize years of indefinite detention.[216]

Writing for a 5–4 majority, Justice Breyer applied the constitutional avoidance canon[217] to read an implicit reasonableness limitation into § 1231 with regard to entered individuals. Under the Court's reading, § 1231 authorizes detention only for a presumptive period of six months, after which the government must show that continued detention is warranted by the likelihood of actual removal.[218] Justice Breyer explained, "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[219]

The government relied heavily on *Mezei* in arguing against constitutional due process rights for unentered individuals,[220] whereas petitioners and amicus contended that subsequent due process case law and the 1996 overhaul of immigration laws undermined *Mezei*'s legal authority.[221] The majority noted "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law"[222] to underscore the due process rights of immigrants such as Mr. Zadvydas who had entered—but it sidestepped *Mezei*'s continuing viability for unentered individuals in detention.[223] In dissent, Justice Scalia characterized the Court's failure to neither apply nor overrule *Mezei* as "obscur[ing] it in a legal fog."[224]

215. *Id.*

216. *Zadvydas*, 533 U.S. at 684–85. Mr. Zadvydas, for example, faced prolonged detention because he was effectively stateless. *Id.* at 684. Born to Lithuanian parents in a German displaced persons camp in 1948, Mr. Zadvydas attempted but failed to secure citizenship from Germany and Lithuania, and as a result, neither country would accept his return. *Id.*

217. Under the avoidance canon—a "cardinal principle" of statutory construction—"when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 689 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

218. *Id.* at 701.

219. *Id.* at 690. Justice Breyer rejected the government's contention that its two regulatory goals of "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community" justified indefinite civil detention. *Id.* Rather, he concluded that "[t]here is no sufficiently strong special justification here for indefinite civil detention" because removal was a remote possibility—defeating any "reasonable relation" between detention and the first purpose. *Id.* (alteration in original). As for the second reason, Justice Breyer noted that § 1231 was not limited to particularly dangerous persons. *Id.* at 690–91.

220. *See id.* at 692.

221. *See id.* at 694.

222. *Id.* at 693.

223. *See id.* at 694 ("*Mezei* does not offer the Government significant support, and we need not consider the aliens' claim that subsequent developments have undermined *Mezei*'s legal authority.").

224. *Id.* at 703 (Scalia, J., dissenting). Specifically, Justice Scalia criticized the decision for "offer[ing] no justification why an alien under a valid and final order of removal—which has *totally extinguished* whatever right to presence in this country he possessed—has any greater due process right to be released into the country than an alien at the border seeking entry." *Id.* at 704. As Justice Scalia

As a result of the *Zadvydas* Court's failure to resolve the applicability of *Mezei*, the constitutional status of unentered/arriving noncitizens remained contested. Litigation continued around constitutional and statutory limits to post-order detention of these individuals. The lower courts were split on whether *Zadvydas* applied to them as well and on whether nonentrants have constitutional due process protections against detention.[225] In 2005, the Supreme Court resolved the open statutory question in *Clark v. Martinez*.[226] Justice Scalia, writing for a 7–2 majority, construed § 1231(a)(6) identically for inadmissible individuals, including those who had not effected an entry.[227] He had of course disagreed with the *Zadvydas* interpretation—but in *Clark* he concluded the limiting construction must apply to all individuals subject to § 1231.[228] *Clark*, however, left the *constitutional* status of unentered/arriving individuals in detention unresolved.

C. Jennings*: Continuing Uncertainty and Criticism of Entry Fiction*

In 2018, the Supreme Court heard *Jennings*, presenting yet another chance for the Court to resolve the constitutional status of nonentrants in immigration detention. Unlike *Zadvydas*, which addressed individuals with a final order, *Jennings* concerned the permissibility of prolonged detention without a bond

would have held, *Mezei* does control petitioners' circumstances, considering he found "no constitutional impediment" to indefinite post-order detention. *Id.* at 705.

225. *Compare* Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003) (holding that the six-month presumption of reasonableness in *Zadvydas* was inapplicable to inadmissible noncitizens, as individuals who did not effect an entry do not present the constitutional issue avoided in *Zadvydas*), Sierra v. Romaine, 347 F.3d 559, 576 (3d Cir. 2003), *vacated*, 543 U.S. 1087 (2005) (mem.) (holding that *Zadvydas*'s six-month presumption of reasonableness did not apply to an inadmissible noncitizen who had never been admitted to the United States), Rios v. INS, 324 F.3d 296, 297 (5th Cir. 2003) (holding that petitioner was not entitled to relief under *Zadvydas* because he was an "excludable alien"), Benitez v. Wallis, 337 F.3d 1289, 1301 (11th Cir. 2003) (affirming the denial of Benitez's § 2241 petition because *Zadvydas*'s six-month presumption of reasonableness was inapplicable to inadmissible noncitizens), *rev'd*, 543 U.S. 371 (2005), *and* Hoyte-Mesa v. Ashcroft, 272 F.3d 989, 991 (7th Cir. 2001) (holding that "continued detention does not violate due process"), *with* Rosales-Garcia v. Holland, 322 F.3d 386, 415 (6th Cir. 2003) (holding that *Zadvydas*'s limiting construction applies to Mr. Rosales-Garcia, an excludable Cuban national, who is safeguarded by Fifth and Fourteenth Amendment due process protections and whose indefinite detention accordingly raises constitutional concerns), *and* Xi v. INS, 298 F.3d 832, 839 (9th Cir. 2002) (holding that as a matter of uniform statutory construction, *Zadvydas*'s limitation did apply to an inadmissible individual). Notably, even before *Zadvydas*, the Third Circuit in *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), recognized the due process rights of an excludable Vietnamese national against prolonged detention; however, the court deemed interim parole regulations adequate on their face to afford due process. *Id.* at 396, 398–99. The Tenth Circuit in a 1981 decision construed an earlier detention provision as requiring release of an excludable Cuban national whose detention was prolonged and whose removal was not foreseeable, in order to avoid constitutional concerns. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1390 (10th Cir. 1981).

226. 543 U.S. 371 (2005).

227. *Id.* at 379.

228. *Id.*

hearing during the pendency of removal proceedings.[229] In a 2003 case, *Demore v. Kim*,[230] the Court previously upheld the constitutionality of mandatory detention without a bond hearing for *brief* periods for immigrants with certain security or criminal grounds for removal, but did not address the constitutionality of *prolonged* detention during immigration proceedings.[231] *Demore* did not present an issue around the constitutional status of arriving individuals.

The plaintiffs in *Jennings* brought a class action challenge to detentions of six months or more without a bond hearing for individuals with ongoing immigration proceedings.[232] The class included arriving noncitizens detained under 8 U.S.C. § 1225(b)—including those subject to entry fiction—and noncitizens detained under 8 U.S.C. § 1226(c), which prohibited release of persons with certain criminal and security-related grounds for removal.[233] The Ninth Circuit ruled that prolonged detention without a bond hearing violated both § 1225(b) and § 1226(c), applying the constitutional avoidance canon to read an implicit requirement of bond hearings after six months of detention.[234]

The Supreme Court reversed. Justice Alito, writing for the majority, held that the Ninth Circuit misapplied the avoidance canon.[235] The Court concluded that the § 1225(b) and § 1226(c) could not plausibly be read to require bond

229. Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

230. 538 U.S. 510 (2003).

231. *Id.* at 530–31. *Demore*—post-dating the terrorist attacks of September 11, 2001, unlike *Zadvydas*—specifically concerned the constitutionality of 8 U.S.C. § 1226(c), which imposes detention during removal proceedings without the possibility of bond or release for individuals with certain criminal- and security-related grounds for removability. *Id.* at 513–14. The 5–4 majority decision in *Demore* placed particular emphasis on the short nature of detention during the pendency of removal proceedings, expressly relying on data provided by the Solicitor General showing an average length of detention of forty-seven days. *Id.* at 529. As it later turned out, this calculation was incorrect and severely undercounted the length of detention of individuals who appealed cases—leading to a retraction letter years later from the Solicitor General's office to the Court. *See* Letter from Ian Heath Gershengorn, Acting Solic. Gen., U.S. Dep't of Just., to Hon. Scott S. Harris, Clerk of Sup. Ct. of the U.S. (Aug. 26, 2016), http://lawprofessors.typepad.com/files/demore.pdf [https://perma.cc/XKV5-EN6F]. The *Demore* majority did not address whether *prolonged* detention would be permissible under § 1226 or the Constitution, and Justice Kennedy, a key fifth vote, wrote a separate concurrence to expressly note that unreasonable delay may necessitate an individualized determination on flight risk and danger. *Demore*, 538 U.S. at 532–33 (Kennedy, J., concurring).

232. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1082–83 (9th Cir. 2015).

233. *See id.* at 1082.

234. In so doing, the court relied upon the fact that some arriving individuals are lawful permanent residents not subject to entry fiction. *See id.* at 1082. Because their detention under § 1225(b) is not differentiated from other arriving individuals, the circuit court applied the constitutional avoidance canon to reach a uniform interpretation prohibiting prolonged detention without a bond hearing. *Id.* at 1082–83 ("Because [lawful permanent residents not subject to entry fiction] are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns."); *id.* at 1083 ("The lowest common denominator, as it were, must govern." (quoting Clark v. Martinez, 543 U.S. 371, 380 (2005))).

235. Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).

hearings after six months of detention given that they make no mention of timeframe and that to thus construe them otherwise would impermissibly rewrite them.[236] The Court instead interpreted § 1225(b) and § 1226(c) to have no limits on the length of detention[237] and remanded to the Ninth Circuit to determine whether the statutes (thus construed) violate the Constitution.[238]

Justice Breyer filed a lengthy dissent, joined by Justices Ginsburg and Sotomayor. He traced the historic right to a bail hearing under the Fifth and Eighth Amendments; English common law, including Blackstone's *Commentaries*; and Congressional statutes from the time of the founders onward.[239] He concluded that these sources collectively "point in the same interpretive direction": that denying bail proceedings even where detention becomes prolonged would likely violate the Constitution.[240] In his analysis, he handily rejected the government's contention that arriving noncitizens fall outside the Fifth Amendment's protections. He first pointed out the absurdity of entry fiction as applied to individuals held in immigration detention centers squarely in U.S. territory and questioned, "*Why* should we engage in this legal fiction here?"[241] Answering his own question, he concluded:

> The legal answer to this question is clear. We cannot here engage in this legal fiction. No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? If not, then, whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention. And the reason that is so is simple: Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries.[242]

Justice Breyer concluded that the constitutional avoidance canon can and must be applied to limit detention without a bond hearing to six months, including

236. *See id.* at 836 ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must *interpret* the statute, not rewrite it.").

237. *Id.* at 844–48.

238. *Id.* at 851.

239. *Id.* at 864–66 (Breyer, J., dissenting).

240. *Id.* at 869.

241. *Id.* at 862.

242. *Id.* at 862–63.

for arriving noncitizens.[243] Yet his analysis did not more closely examine entry fiction, either in its origins or present-day operation.

During and since *Jennings*, the government has advanced a broad and sweeping defense of entry fiction in the detention context. Its briefing in *Jennings* cited *Mezei* to buttress its view of entry fiction in over a dozen places and repeatedly linked entry fiction to "sovereign prerogative."[244] The government also equated DHS's use of detention with border control.[245] But while the government has used detention toward (and beyond) these ends, it also has other instruments for enacting border control and enforcement. I examine both detention and surveillance practices below.

V. OLD AND NEW CARCERAL REALITIES

Detention practices have drastically changed in scope and form over the past decades and centuries. Our contemporary mass immigration prison system bears little resemblance to detention and custody practices of the Chinese Exclusion era and vastly exceeds the scale of even very recent past decades. Moreover, its present-day form is rife with abuse and inhumane conditions.

A. *Detention in the Past*

The operation and impacts of entry fiction today differ markedly from the time it first emerged. No longer do a majority of immigrants arrive by passenger ship, and no longer does entry fiction prevent prolonged periods aboard deadly nineteenth-century maritime vessels. Moreover, the earliest articulations of entry fiction involved cases wherein authorities removed individuals from boats to the custody of religious missions. Recall that in *Nishimura Ekiu*, the Court in 1892 declared mission homes a "suitable" alternative to dangerous ships.[246] As described and depicted above, those mission homes were livable places—not

243. *Id.* at 876. During the pendency of *Jennings* before the Supreme Court and after its issuance, several district courts adopted Justice Breyer's dissenting view to hold that due process protections extend to arriving individuals. The lower courts, too, have turned a skeptical eye on the use of entry fiction to deny bond hearings, emphasizing the development of due process case law in the years since *Mezei* and the centrality of bail for civil detention. *See, e.g.*, Ahad v. Lowe, 235 F. Supp. 3d 676, 687 (M.D. Pa. 2017) (noting the "rising sea of case law acknowledg[ing] the historic development of due process jurisprudence" and affording due process right to bond hearing to persons detained under § 1225(b)); Cruz v. Nalls-Castillo, No. 16-1587, 2017 WL 6698709, at *5–6 (D.N.J. Sept. 19, 2017) (ordering hearing on due process grounds).

244. Supplemental Brief for the Petitioners at 4, *Jennings*, 138 S. Ct. 830 (No. 15-1204) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

245. *Id.* at 19 ("Interim detention under Section 1225(b) is integral to protecting our Nation's borders."); *id.* at 17 ("Section 1225(b) codifies the rule that has protected our Nation's borders for a century . . . .").

246. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892); *supra* Section III.C (discussing *Nishimura Ekiu*).

jails.[247] This is not to suggest that immigration detention throughout the Chinese Exclusion era was entirely humane—the Angel Island immigration station in San Francisco Bay, in particular, would later subject Asian immigrants in particular to harsh and prison-like conditions.[248] But the *Nishimura Ekiu* decision, which reflects humanitarian underpinnings of entry fiction, predated the construction of the Angel Island facility, which operated from 1910 to 1940.[249]

Immigration detention in the 1950s, the time of *Mezei*, also differed markedly from today. Mr. Mezei himself was detained at Ellis Island, one of the few federal immigration detention facilities at the time.[250] Although it had famously served as a "gateway" to America and held millions of immigrants from the 1890s onward, Ellis Island had long since ceased to house or process a large number of immigrants.[251] And as described above, the federal government closed not only Ellis Island but all remaining immigration detention centers in 1954, ceasing the practice of mass immigration detention in the aftermath of *Mezei*.[252]

B. *Detention in the Present*

1. Scale

Although immigration detention lay relatively dormant for decades, the 1980s heralded its large-scale return in response to the "Mariel boatlift" of Cubans and Haitian refugees.[253] The 1990s witnessed yet another period of acceleration in tandem with the War on Drugs in the United States.[254]

247. *See supra* Section III.C (discussing and depicting early mission houses).

248. *See* ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 57–58 (2010).

249. *Id.* at 1, 26.

250. *See* Brownell, *supra* note 7, at 5–6.

251. *See Ellis Island History*, STATUE LIBERTY - ELLIS ISLAND FOUND., INC., https://www.libertyellisfoundation.org/ellis-island-history#Laws [https://perma.cc/6ARM-HCGS].

252. *See* CANNATO, *supra* note 5, at 375.

253. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 29 (1984) ("The effect of this influx [of migrants from the Caribbean Basin] upon detention was dramatic and immediate; during 1982, more than one million person-days were spent in INS detention, almost double the figure for 1980." (citing Telephone Interview with Howard Brown, Off. Plan. & Analysis, Immigr. & Naturalization Serv. (May 10, 1983))); Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United State*s, 10 PUB. CULTURE 577, 579 (1998) ("Immigration imprisonment was reinvented in 1981 in response to the massive immigration flow to south Florida in the spring of 1980 that became known as the Mariel boatlift.").

254. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137 (2013) ("The federal government has increased the daily number of individuals in immigration detention from 6,785 in 1994 to over 34,069 in 2012."); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (exploring linkages between the War on Drugs and immigration detention).

Expansion since that time has accelerated. From the 1990s to today, immigration detention has morphed into a sprawling, multibillion-dollar industry driven by both immigration enforcement policies and profit motives. In 1995, then Immigration and Naturalization Service had a daily capacity of less than 7,500 detention beds.[255] ICE now daily detains over 50,000 individuals in its facilities nationwide,[256] or in fiscal year ("FY") 2019, over 500,000 people over the course of a year.[257] As explained, many thousands of these individuals are arriving noncitizens subject to entry fiction and are detained throughout the interior of the United States.

The Trump Administration continued to expand immigration detention relentlessly. In its budget for FY 2020, the White House requested $2.7 billion to increase daily detention capacity to 54,000 beds.[258] The majority of this enormous budget went to private prison companies, which held seventy-three percent of immigrants in detention in 2016.[259]

255. DORA, SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/9AK2-9E75].

256. Hamed Aleaziz, *More than 52,000 People Are Now Being Detained by ICE, an Apparent All-Time High*, BUZZFEED NEWS (May 20, 2019, 6:58 PM), https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border [https://perma.cc/YJ5S-ZGUC].

257. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/8EAQ-Y2XY] (showing 510,854 total "book-ins" to ICE detention in Figure 7). In 2020, the number dropped dramatically to 182,869 people detained. *See* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2020 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 6 (2020), https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf [https://perma.cc/73JG-FAN7]. This drop resulted from restrictions on entry to the United States under COVID-19 policies and from temporary measures to reduce facility populations to allow social distancing during the pandemic—not from any declared long-term change in the use of detention authority. *See* U.S. IMMIGR. & CUSTOMS ENF'T, ICE GUIDANCE ON COVID-19, DETENTION (2021), https://www.ice.gov/coronavirus#detStat [https://perma.cc/99RR-PSH6] (explaining efforts to reduce the number of individuals in detention facilities to seventy percent of capacity or less during the pandemic); Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,061 (Mar. 26, 2020) (invoking public health laws to suspend entry of individuals at land ports of entry and near land borders, with certain exceptions, due to COVID-19).

258. U.S. GOV'T PUBL'G OFF., FISCAL YEAR 2020 BUDGET OF THE U.S. GOVERNMENT 50 (2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf [https://perma.cc/FRN2-PT4M].

259. Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, CTR. FOR AM. PROGRESS (Apr. 20, 2017, 9:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/ [https://perma.cc/F9ZC-42QY]; *see also Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/KB6Y-A7AY]. A number of county jails also contract with ICE to detain immigrants, and they generally profit off these contracts as well. *Immigration Detention 101*, *supra*.

2. Conditions

ICE's prison-like facilities impose numerous hardships on individuals and force many to give up their cases.[260] Detention impedes access to counsel and jeopardizes the due process rights of individuals pursuing legitimate claims in immigration court.[261] Abhorrent conditions in ICE detention centers have also drawn widespread condemnation. Advocates, scholars, and researchers have decried overcrowding, inadequate medical care, uninvestigated sexual violence and assault, spoiled food, forced labor, and a host of other violations.[262] In June 2019, the DHS Office of Inspector General ("OIG") released a report expressing alarm over dangerous and unsanitary conditions in ICE detention centers.[263] OIG based its conclusions on unannounced visits to four facilities throughout the United States, including three owned by the private prison company Geo Group.[264] OIG discovered rampant violations of ICE's own detention standards.[265] Across all facilities, it found food safety issues that endangered detained individuals' health and welfare, such as contamination, spoilage, and expired food.[266] It also discovered persistent misuse of segregation in three facilities,[267] and overuse of restraints and strip searches.[268] In two

260. *See* S. POVERTY L. CTR., *supra* note 22, at 5–6 ("[D]etained immigrants, particularly in the Deep South, give up on their cases because their conditions of confinement are too crushing to bear.").

261. *Id.* at 32–33.

262. *See generally, e.g.*, AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), https://www.amnestyusa.org/wp-content/uploads/2011/03/JailedWithoutJustice.pdf [https://perma.cc/S85V-H67K] (reporting human rights violations in immigrant detention facilities); KAREN TUMLIN, LINTON JOAQUIN & RANJANA NATARAJAN, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf [https://perma.cc/EUC6-APME] (detailing the failures of U.S. immigrant detention facilities); U.S. COMM'N ON CIV. RTS., WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES (2015), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf [https://perma.cc/HKK9-5RK5] (describing the state of civil rights at immigrant detention facilities); Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429 (2011) (describing the current state of immigrant imprisonment in the United States); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010) [hereinafter Kalhan, *Rethinking Immigration Detention*] (detailing the immigrant detention regime in the United States).

263. JOHN V. KELLY, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf [https://perma.cc/A2K6-MN8F].

264. The four facilities were Adelanto ICE Processing Center in California, LaSalle ICE Processing Center in Louisiana, Essex County Correctional Facility in New Jersey, and Aurora ICE Processing Center in Colorado. Geo Group Inc. owns and operates the Adelanto, LaSalle, and Aurora facilities. The Essex County Department of Corrections owns and operates the Essex facility. *See id.* at 2.

265. *See id.* at 2–3.

266. *Id.* at 3–4.

267. *Id.* at 3, 5.

268. *Id.* at 5–6.

facilities, OIG investigators found extreme uncleanliness in the bathrooms and other areas that presented risks of "serious health issues for detainees."[269] Failure to provide basic hygiene items such as shampoo and toothpaste, restrictions on visitation, and lack of recreation time posed further mental and physical health risks to individuals.[270]

Combined with inadequate provision of medical care, these conditions have subjected detained individuals to dangerous and even deadly facilities. Between January 2017 and June 2019, twenty-four immigrants have died in ICE detention.[271] In a leaked memorandum dated December 2018, an ICE supervisor notified the acting deputy director of ICE that "[m]any detainees have encountered preventable harm and death" due to deficient medical care by ICE, describing its health corps as "severely dysfunctional" and its leadership as "not focused on preventing horrible recurrences."[272] ICE's own official death reviews have also indicated that facility violations of ICE medical standards contributed to the deaths of detained persons.[273] In 2020, twenty-one people died in ICE custody, and over one-third had tested positive for COVID-19.[274]

3. Arbitrariness

As explained, DHS claims unfettered authority to detain arriving noncitizens who have not formally entered the United States, arguing that these noncitizens lack constitutional due process rights against detention. Yet DHS

269. *Id.* at 8.

270. *Id.* at 7, 10–11.

271. Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 7:00 AM), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291 [https://perma.cc/EH2W-7LTA].

272. Ken Klippenstein, *ICE Detainee Deaths Were Preventable: Document*, TYT (June 3, 2019), https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/688s1LbTKvQKNCv2E9bu7h [https://perma.cc/V62S-SPSB] (linking a December 3, 2018 email from an ICE supervisor to Matthew Albence, Acting Deputy Director of ICE, with the subject line "Urgent Matter").

273. ACLU, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 3 (2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf [https://perma.cc/WP85-7JET]. This report from the ACLU documented extreme deficiencies in meeting the health care needs of individuals in detention and found that violations of ICE standards contributed to nearly half of the seventeen fatalities reviewed. *Id.* ("In nearly half of the death reviews produced by ICE, the documentation suggests that failure to comply with ICE medical standards contributed to deaths."); *see also US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention [https://perma.cc/WP3D-KCC4].

274. Catherine E. Shoichet, *The Death Toll in ICE Custody Is the Highest It's Been in 15 Years*, CNN, https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html [https://perma.cc/3WL4-DGUD] (last updated Sept. 30, 2020, 8:11 AM); *see also Detainee Death Reporting*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detainee-death-reporting [https://perma.cc/9PYK-2H8R] (last updated Jan. 7, 2021) (click on "FY 2020" tab to expand the list of individuals who died that year in ICE detention).

also asserts that it uses this claimed unreviewable sovereign power justly, providing unentered asylum seekers a meaningful opportunity for release even absent a bond hearing before an immigration judge or fuller judicial scrutiny. In *Jennings*, the government stressed to the Court that "[u]nder agency guidance," arriving asylum seekers who pass their credible fear screening interviews "are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger."[275] DHS has characterized this "possibility of parole," among other measures, as "afford[ing] meaningful protection for aliens arriving at our borders and seeking to enter for the first time."[276]

A 2009 agency directive ("2009 directive") does, indeed, establish this presumption of release for arriving asylum seekers who have passed screening and are pursuing asylum claims in immigration court.[277] But recent court cases demonstrate that DHS does not honor its own 2009 directive. In March 2018, arriving asylum seeker plaintiffs across five ICE field offices—Los Angeles, El Paso, Newark, Philadelphia, and Detroit—brought a class action lawsuit challenging the systemic denial of parole.[278] They documented that in the five field offices, denials of parole had skyrocketed from less than ten percent between 2011 and 2013 to over ninety percent in 2017.[279]

In July 2018, a federal district court agreed that ICE had systematically violated its own 2009 directive by denying class members a meaningful opportunity for release.[280] Moreover, the court found that ICE verged on nonsensical reasoning in attempting to justify some of its decisions—for example, by denying parole due to "flight risk" based on recency of arrival to the United States.[281] As the court pointed out, the 2009 directive applies only to arriving asylum seekers who *categorically* arrive recently.[282] The court issued

275. Brief for the Petitioners at 4, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

276. Supplemental Brief for the Petitioners, *supra* note 244, at 21; *see also* Supplemental Reply Brief for the Petitioners at 7, *Jennings*, 138 S. Ct. 830 (No. 15-1204) (contending that parole determinations consist of "ample procedure on the issue of release during proceedings").

277. U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, DIRECTIVE 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE (Dec. 8, 2009) [hereinafter DIRECTIVE 11002.1], https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf [https://perma.cc/F3T4-MH2B].

278. Complaint ¶¶ 1–3, Damus v. Nielsen, 313 F. Supp. 3d 317 (D.D.C. 2018) (No. 18-578). Although I am co-counsel in *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018), the views and interpretations of *Damus* presented herein are strictly mine alone.

279. *Id.* ¶¶ 38–39.

280. *Damus*, 313 F. Supp. 3d at 335–42 (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266, 268 (1954)) (finding that the plaintiffs established a likelihood of prevailing on the merits that ICE had violated its own parole directive).

281. *See id.* at 341.

282. *See id.* ("'[R]ecent entry' is a categorical characteristic of most, if not all, asylum-seekers."). Of note, the court quoted the deposition of an ICE officer using the term "recent entrant" and was not using the term "entry" in a technical legal sense. *See id.*

a preliminary injunction directing ICE to follow its written parole policy, including by applying a presumption of release. In *Abdi v. Duke*,[283] another federal district court similarly found ICE's Buffalo office denying parole in violation of the 2009 directive and issued a preliminary injunction ordering adherence.[284]

Also troubling is the government's use of parole denials to effectuate family separation. In enjoining the separations in *Ms. L. v. United States Immigration & Customs Enforcement*,[285] a federal district court noted that DHS separated many arriving asylum seeker families presenting at ports of entry, despite its official stance that separation applied only to families who crossed the border illegally.[286] For example, immigration agents separated the named plaintiff, Ms. L., from her six-year-old daughter after they presented together at a port of entry. They sent her young child S.S. thousands of miles away to a facility in Chicago and locked away Ms. L. in an ICE detention center in San Diego.[287] Although Ms. L. was eligible for parole under ICE's 2009 directive, ICE refused to release her. She and her daughter remained apart for almost five months, until after Ms. L. filed suit.[288]

These cases illustrate that, contrary to the government's representations in *Jennings* that arriving asylum seekers are ordinarily released, ICE uses detention authority over arriving asylum seekers in arbitrary and inconsistent ways.[289] In many cases, its denials of release have been illogical or inhumane.

VI. OLD AND NEW TECHNOLOGICAL REALITIES

Immigration detention over the past few decades has grown tremendously, ensnaring more and more individuals who are often arbitrarily denied release. Yet those changes in the detention system, massive though they are, are dwarfed in comparison to the exponential proliferation of surveillance technology. Both sets of changes—to the detention regime and to the surveillance regime—will require reevaluation of entry fiction. I briefly examine the evolution of immigration surveillance technologies below.

283. 280 F. Supp. 3d 373 (W.D.N.Y. 2017), *vacated in part sub nom.* Abdi v. McAleenan, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

284. *Id.* at 381–82.

285. 310 F. Supp. 3d 1133 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019).

286. *See id.* at 1143.

287. Complaint ¶¶ 41–42, 54, *Ms. L.*, 310 F. Supp. 3d 1133 (No. 18-0428).

288. *Ms. L.*, 310 F. Supp. 3d at 1138.

289. Arbitrariness, of course, has also long been a feature of immigration detention. *See, e.g.*, Simon, *supra* note 253, at 600 ("[T]he [1980s–1990s] INS immigration imprisonment campaign invokes the earlier tradition of monarchical use of imprisonment as a site for enforcing undemocratic and unaccountable political orders.").

A. *Surveillance in the Past*

In 1893, the entire Immigration Service, then under the Department of the Treasury, consisted of 180 staff members.[290] Professor Beth Lew-Williams, a historian, describes the early days of the Chinese Exclusion laws as "impossible to enforce" due to the inadequate resources of immigration inspectors.[291] She recounts the experience of one nineteenth-century inspector, Arthur Blake, who wrote in 1883 of encountering five Chinese men likely subject to the exclusion law but having no means by which to actually arrest and detain them.[292] Summarizing his dire situation to his supervisors, he wrote, "[I]t seems to me the Restriction Act is almost worthless."[293] In terms of technological capacity to assist in surveillance, Mr. Blake had the benefit of a horse,[294] but mass electricity had yet to take hold in the country.[295]

By the time of the *Mezei* decision in 1953, public electrical grids of course extended throughout the United States. And in the post-WWII and early Cold War period, the United States had a robust domestic surveillance and intelligence infrastructure. Its operation, however, was dramatically more resource intensive and less advanced than today.[296] Much of this surveillance took place via human intelligence operations, requiring agents to collect information from interrogation, direct observation, mail interception, or archival research.[297] Building background files on individuals entailed manual compilation of evidence and physical storage in shelving or file cabinets.[298]

Although wiretapping technology allowed remote monitoring of phone communications, this, too, required considerable human effort. Agents had to physically trespass onto dwellings or structures to place the wiretaps and then engage in hours of auditory monitoring.[299] Meanwhile, photographic intelligence and terrain mapping, although possible, required pilots to fly

290. USCIS HIST. OFF. & LIBR., OVERVIEW OF INS HISTORY 4 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf [https://perma.cc/PRT5-WWDR].

291. Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 43–44 (2014).

292. *See id.* at 43 ("Blake's inability to arrest the five Chinese men highlights the myriad enforcement problems federal officials faced.").

293. *Id.* at 44.

294. *See id.* at 43 ("[H]is district was too large for one mounted inspector to monitor.").

295. *See* UNIV. OF TEX. AT AUSTIN ENERGY INST., THE HISTORY AND EVOLUTION OF THE U.S. ELECTRICITY INDUSTRY 3–4 (2016), http://sites.utexas.edu/energyinstitute/files/2016/09/UTAustin_FCe_History_2016.pdf [https://perma.cc/HZH9-UGSU] (recounting Thomas Edison's establishment of the first centralized direct current electrical power plant in Manhattan in 1882, which had an extremely limited range).

296. *See* JOHN J. CARTER, THE DEVELOPMENT OF THE AMERICAN SURVEILLANCE STATE 1900-1960, at 143 (2016).

297. *Id.* at 5.

298. *See id.*

299. *See id.* at 144.

physical planes over territory to capture images.[300] Today's real-time tracking of individuals, mass data collection, and machine-driven analysis simply have no comparison in history. Below, I describe key features of DHS's present-day surveillance regime.

B. *Surveillance in the Present*

Government surveillance capacity today vastly outstrips its distant and even recent past. In just a few years' time, the scale and scope of DHS surveillance has accelerated tremendously. Below, I describe a few key technologies that exemplify recent shifts in capacity. I focus first on technological "alternatives" to detention, used directly against individuals released from ICE custody. Then I explore recent programs that more passively and broadly surveil immigrants (and citizens) in the United States.

1. Surveillance Alternatives to Detention

In 2003, Congress began a five-year pilot to provide additional options to enhance "supervision" of persons released from ICE custody through a combination of electronic surveillance and reporting requirements.[301] Called the Intensive Supervision Appearance Program ("ISAP"), the first iteration operated from 2004 to 2009 in ten cities.[302] Congress provided approximately $62 million in appropriations in 2008 for a second version of the program ("ISAP II"), which expanded the pilot nationwide.[303] In 2014, Congress accelerated appropriation to approximately $90 million for ISAP's third iteration ("ISAP III").[304]

Under ISAP III, ICE contracts with BI Incorporated to provide monitoring services.[305] Notably, BI Incorporated is a wholly owned subsidiary of the private prison company Geo Group,[306] which runs several major ICE

300. *Id.* at 137–38.

301. JOHN ROTH, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 3 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf [https://perma.cc/UZP4-URRU].

302. *Id.*

303. *Id.*

304. *Id.*

305. AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7 (2019), https://fas.org/sgp/crs/homesec/R45804.pdf [https://perma.cc/CT2C-ZV4Q].

306. *Company*, BI INC., https://bi.com/company/ [https://perma.cc/6TGH-S59B] ("BI is a wholly-owned subsidiary of The GEO Group, a global leader in the delivery of correctional, detention, and residential treatment services to federal, state, and local government agencies."). Geo Group's 2018 Annual Report lists $2.33 billion in total revenues for the year. GEO GROUP, INC., 2018 ANNUAL REPORT, pt. 2, at 3 (2018), http://www.snl.com/interactive/newlookandfeel/4144107/GEOGroup2018AR.pdf [https://perma.cc/4A4E-VPZS]. From 2017 to 2018, Geo Care, the division containing BI Incorporated, experienced revenue increases of $33.2 million "primarily due to increases

detention centers, including three of the facilities described as alarmingly unsafe in the June 2019 OIG report.[307] Geo Group received over $480 million in federal funding under the Trump Administration for immigration-related contracts.[308]

ISAP is currently available nationwide in over 100 locations, covering individuals in all of ICE's jurisdictions.[309] As of June 2019, ISAP enrolled 101,568 persons in its programs—almost quadruple the 26,625 persons enrolled in FY 2015.[310] In his FY 2020 budget, President Trump requested "$209.9 million for ICE's Alternatives to Detention (ATD) Program, to monitor 120,000 average daily participants."[311] As funding levels and the number of immigrants monitored under ISAP steadily increased, however, detention figures also continued to rise.[312] Thus, despite being framed as an alternative, ISAP has supplemented rather than supplanted detention.

The ATD Program reported ninety-nine percent compliance rates with court appearances, including ninety-five percent rates for individuals' final removal hearing.[313] Moreover, it has resulted in huge savings for the federal government. Compared to detention's cost of $137 per adult per day in FY 2018, ISAP's average cost for participation is only $4.16 per person per day.[314]

ICE employs a range of technologies through the ATD Program. The most common technology tool employed via the ISAP program is the GPS ankle monitor, currently used for forty-six percent of participants—or tens of thousands of immigrants under ICE supervision.[315] The GPS ankle monitoring

in average client and participant counts under our ISAP and electronic monitoring services." *Id.* pt. 2, at 16; *see also* Nicolás Medina Mora, *In America's Broken Immigration System, the Best Business To Be in Is GPS Trackers*, BUZZFEED NEWS (Nov. 24, 2014), https://www.buzzfeednews.com/article/nicolasmedinamora/in-americas-broken-immigration-system-the-best-b [https://perma.cc/9ESB-AKVP] ("How much money the federal government has paid B.I. is unclear; estimates range from about $200 million to $375 million since the late 2000s.").

307. *See supra* Section V.B.2.

308. Stef W. Kight, *How Companies Profit from Immigrant Detention*, AXIOS (June 8, 2019), https://www.axios.com/private-prisons-immigrant-detention-8e5b3317-8ecf-476c-b915-25330852e66f.html [https://perma.cc/5XZM-ZWV6].

309. SINGER, *supra* note 305, at 7 n.47.

310. *Id.* at 7.

311. U.S. DEP'T OF HOMELAND SEC., FY 2020 BUDGET IN BRIEF 4 (2019) [hereinafter DHS, 2020 BUDGET IN BRIEF], https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf [https://perma.cc/WZ2J-2KDV].

312. Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017, 11:00 AM), https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system/ [https://perma.cc/C6K9-XPY2].

313. SINGER, *supra* note 305, at 9 (describing available data from FY 2011 to FY 2013).

314. *Id.* at 15.

315. *Id.* at 8 ("As of June 22, 2019, approximately 42% of active participants in the ISAP III program used telephonic reporting, 46% used GPS monitoring, and 12% used SmartLINK.").

bracelet, which immigrants have termed a *grillete*, or ankle shackle,[316] enables near real-time surveillance of its user. The device tracks location as frequently as every fifteen seconds and retains historical mapping information recorded every minute.[317]

Forty-two percent of ISAP participants are enrolled in telephone reporting through BI's VoiceID system.[318] BI's VoiceID system uses biometric "voice print" verification to verify an individual's identity.[319] It also ensures "location compliance" via "a series of automated outbound calls to the client at various approved locations, including work, appointments, school, or home."[320] In the initial setup period, officers direct clients to create their "voice print"; thereafter, BI's VoiceID system verifies the client's voice against the voice print for subsequent check-ins.[321]

BI's latest surveillance tool, BI SmartLINK, is a cell phone application that combines GPS monitoring with biometric scanning. According to BI, BI SmartLINK "brings traditional analog supervision tools into the digital age by combining them in a secure mobile application."[322] It uses GPS technology to capture location information and biometrics to verify identity during remote check-ins.[323] ICE officers can also use BI SmartLINK to send push notifications and messages to individuals.[324] Additional "modules" within it allow ICE officers to receive documents from applicants, specify supervision terms, and list upcoming appointments, including court dates.[325]

In short, ISAP has grown enormously, saved the public huge amounts of money, and proven effective in ensuring court appearances and removal. And, as described below, ISAP III's technology-based programs have significantly expanded the surveillance capacity of ICE over immigrants released from detention.

316. Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA.ORG (Jan. 6, 2015), https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention [https://perma.cc/232Z-ENC4].

317. BI INC., *BI* LOC8 1 (2015), https://bi.com/wp-content/uploads/pdfs/brochures/loc8.pdf?click=factsheetloc8#page=1&zoom=auto,-16,568/ [https://perma.cc/5MVM-K5MS] ("[BI] LOC8 is a light, compact, one piece, ankle-mounted device that tracks offender location and community movement in near-real time (as frequent as every 15 seconds). In standard operation, LOC8 searches for a location fix multiple times per minute, and records the best point every minute.").

318. BI INC., BI VOICEID (2015), https://bi.com/wp-content/uploads/pdfs/brochures/FS_VoiceID.pdf [https://perma.cc/D6EK-4F7E]; SINGER, *supra* note 305, at 8.

319. BI INC., *supra* note 318.

320. *Id.*

321. *Id.*

322. BI INC., BI SMARTLINK (2015), https://bi.com/wp-content/uploads/pdfs/brochures/smartLINK.pdf?click=factsheetslink [https://perma.cc/UP3G-U7YE].

323. *Id.*

324. *Id.*

325. *Id.*

2. Passive Monitoring and Other Technologies

In addition to active monitoring programs that involve user awareness and direct involvement, DHS has concerningly accelerated its use of passive surveillance over broad swaths of the population. DHS describes its use of technology "*[w]ithin our Nation's border*" as helping it "find and remove bad actors to ensure the safety of the American public"[326]—although, as explained below, the technologies extend to U.S. citizens as well. Below, I recount a few key aspects of its more troubling recent expansions.

a. Facial Recognition and Other Biometric Scanning

Perhaps the most alarming is DHS's significant and ongoing expansion of biometric scanning and surveillance.[327] Each iteration of President Trump's 2017 "travel ban" executive orders contained provisions mandating enhanced collection and use of biometric data.[328]

In 2017, DHS released detailed plans for significantly expanded biometric surveillance via a new Homeland Advanced Recognition Technology System ("HART"). HART will replace the existing Automated Biometric Identification System ("IDENT") in incremental stages by September of 2021,[329] at estimated costs of over $250 million per year from 2017 through 2021.[330] DHS has contracted with the Swedish defense firm Northrop Grumman for HART,[331] which will receive, store, and analyze biometric data

326. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF 1–2 (2018) [hereinafter DHS, 2019 BUDGET IN BRIEF], https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf [https://perma.cc/6DWW-YP69] (emphasis added).

327. For an excellent overview of these technologies through 2014, and in particular the IDENT system, see Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 30–32 (2014) [hereinafter Kalhan, *Immigration Surveillance*].

328. *See* Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 24, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 § 1(b) (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

329. *See DHS Reveals Details of RFP for HART*, PLANET BIOMETRICS (Mar. 9, 2017, 5:18 PM), http://www.planetbiometrics.com/article-details/i/5614/desc/dhs-reveals-details-of-rfp-for-hart/ [https://perma.cc/7GVT-75H2]; PATRICK NEMETH, IDENTITY APPLICATIONS FOR HOMELAND SECURITY (Sept. 12, 2017), https://www.eff.org/files/2018/06/06/a1_12sep_1435_01_panel-dhs-identity_applications.pdf [https://perma.cc/8PER-YAPM]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-346SP, HOMELAND SECURITY ACQUISITIONS 74 (2017), https://www.gao.gov/assets/690/683977.pdf [https://perma.cc/2WWL-QG87].

330. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 329, at 73 (showing estimated costs of over $250 million per year from 2017 to 2021 and projected funding of over $200 million per year from 2017 to 2021).

331. In September 2017, DHS awarded the HART contract in the amount of $95 million to Northup Grumman. Cal Biesecker, *Leidos Protests DHS Biometric Database Award to Northrop Grumman*, DEF. DAILY (Oct. 17, 2017), http://www.defensedaily.com/leidos-protests-dhs-biometric-database-award-northrop-grumman-2/ [https://perma.cc/T2H8-DZZJ]; Glyn Moody, *DHS Expanding National Biometrics Database To Hold Details on over 500 Million People, Including Many US Citizens*, PRIV. NEWS ONLINE (Oct. 31, 2017), https://www.privateinternetaccess.com/blog/2017/10/dhs-expanding-

on individuals and enable interagency sharing of information.[332] Whereas IDENT tracked only fingerprints and passport photographs, HART will include those markers in addition to facial recognition; iris scanning technology; DNA collection; and "additional biometric modalities," such as scars, tattoos, and palm prints.[333] HART will also engage in "analysis of relationship patterns among individuals and organizations that are indicative of violations of the customs and immigration laws."[334] It will have the capacity to store at least 500 million identities in its database.[335]

In FY 2020, the Trump Administration requested $269 million for its Office of Biometric Identity Management,[336] an increase from FY 2019's figure of $253 million.[337] This growth will build upon an already enormous capacity. In FY 2017, the Office of Biometric Identity Management reported processing over "180 million biometric transactions on 108 million unique identities," resulting in the addition of 15.6 million unique individuals to its database in just one year.[338] DHS has explicitly stated that it uses biometric information in its database to identify not only individuals perceived to be terrorist threats but also more general "visa applicants, foreign visitors, immigration benefit applicants, detainees, and . . . immigration violators."[339] Federal agencies beyond DHS, including the Department of Defense and Federal Bureau of Investigation, can also access the HART database.[340]

DHS has also spurred and facilitated the use of these technologies by other actors. As of 2014, DHS created a "Multi-State Facial Recognition Community" to provide participating states and localities with joint access to biometric information.[341] The Multi-State Facial Recognition Community

national-biometrics-database-hold-details-500-million-people-including-many-us-citizens/ [https://perma.cc/9MNW-Z6GY].

332. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 329.

333. NEMETH, *supra* note 329, at 8; *see also* Adrienne LaFrance, *Biometric Checkpoints in Trump's America*, ATLANTIC (Feb. 14, 2017), https://www.theatlantic.com/technology/archive/2017/02/biometric-checkpoints-in-trumps-america/516597 [https://perma.cc/9EKF-8WY5].

334. DHS Notice of a New System of Records, 83 Fed. Reg. 17,829, 17,833 (Apr. 24, 2018). From 2013 to 2016, CBP implemented a pilot, the Southwest Border Pedestrian Exit Field Test, which used facial recognition and iris scanning to identify individuals at the Otay Mesa land port of entry. JOHN V. KELLY, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., PROGRESS MADE, BUT CBP FACES CHALLENGES IMPLEMENTING A BIOMETRIC CAPABILITY TO TRACK AIR PASSENGER DEPARTURES NATIONWIDE 3 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-80-Sep18.pdf [https://perma.cc/AY2A-4MK3].

335. Moody, *supra* note 331.

336. DHS, 2020 BUDGET IN BRIEF, *supra* note 311, at 12.

337. DHS, 2019 BUDGET IN BRIEF, *supra* note 326, at 60.

338. *Id.* at 57–58.

339. *Id.* at 58.

340. Moody, *supra* note 331.

341. Lee Fang & Ali Winston, *Trump's Homeland Security Team Likely To Emphasize Facial Recognition and Biometric Surveillance*, INTERCEPT (Jan. 19, 2017, 10:44 AM), https://theintercept.com/2017/01/19/trump-dhs-surveillance/ [https://perma.cc/2XA5-6CER].

allowed users from "18 current participating states and fusion centers with the single click of a mouse" to access biometric search tools.[342] Moreover, its capture of biometric data extended beyond immigrants to all U.S. travelers, including citizens—and to nontraveling citizens as well. In July 2019, the *Washington Post* reported that ICE accessed millions of Americans' photos in state driver's license databases without their knowledge or consent for its facial recognition programs, drawing swift condemnation from members of Congress and civil liberties groups.[343]

Undeterred by these and other criticisms of its dragnet, DHS issued a proposed rule in September 2020 to vastly expand biometric data collection.[344] The proposed rule provides that "every individual requesting a benefit before *or encountered by DHS* is subject to the biometrics requirement unless DHS waives or exempts it."[345] It authorizes collecting biometrics of children of any age—removing prior age limits on such collection for children under age fourteen—and sweeps in U.S. citizens who sponsor family members for immigration benefits.[346] And the proposed rule provides a far more expansive definition of biometrics than used previously, which referred only to fingerprints and photographs. The proposed rule's updated list also expressly includes DNA results, voice prints, and iris scans, among other identifiers, and it specifies that photographs will include "facial images specifically for facial recognition."[347]

DHS's appetite for data has been limitless and brazen. The proposed rule, if enacted, would greatly expand both the types of biometric data routinely collected as well as the number of individuals subject to such collection, including very young children.

b. Automated License Plate Readers and Surveillance Drones

DHS has disbursed tens of millions of dollars in grants to fund localities' use of license plate readers. These readers, comprised of high-speed cameras, take photographs of each passing license plate. The reader systems capture and amass huge amounts of data, storing the photographs, plate number, date, time, and location of each passing vehicle.[348]

342. *Id.* (quoting 2014 DHS budget documents).

343. *See* Owen Daugherty, *FBI, ICE Using State Driver's License Photos Without Consent for Facial Recognition Searches: Report*, HILL (July 7, 2019, 5:12 PM), https://thehill.com/policy/technology/451913-fbi-ice-using-state-drivers-license-photos-without-consent-to-create-facial [https://perma.cc/F7QG-GTL8].

344. 85 Fed. Reg. 56,338 (proposed Sept. 11, 2020).

345. *Id.* at 56,340 (emphasis added).

346. *Id.* at 56,342.

347. *Id.* at 56,341.

348. ACLU, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS' MOVEMENTS 2 (July 2013) [hereinafter ACLU, YOU ARE BEING

As early as 2012, DHS had distributed over $50 million in grants to fund localities' acquisition of license plate readers.[349] According to the website of Leonardo Company, which manufactures license plate readers, DHS has distributed "billions of dollars in grants" through its Infrastructure Protection and Homeland Security Grant Programs.[350]

In a 2017 privacy impact report, DHS Customs and Border Protection ("CBP") revealed extensive use of both traditional, stationary license plate readers, as well as mobile readers mounted on CBP vehicles and covert plate readers.[351] In addition, the report revealed CBP's partnership with the Drug Enforcement Administration ("DEA") to "leverage each other's strategically located LPR [License Plate Reader] systems."[352]

DHS also maintains a significant fleet of monitoring and surveillance drones with satellite and camera technology.[353] Although DHS often describes its drones as used at land and maritime borders,[354] in May 2020 it deployed a Predator B drone to monitor protests in Minneapolis over the death of George Floyd.[355] CBP confirmed in a statement that drone missions occur not only in border regions but nationwide.[356] The *New York Times* reported later that summer that DHS used a combination of surveillance drones, aircraft, and helicopters to record at least 270 hours of footage of Black Lives Matter protests in fifteen U.S. cities.[357]

TRACKED], http://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf [https://perma.cc/25NY-4XV5].

349. *Id.* at 25 (reporting that from 2007 to 2012, DHS issued $50 million in grants to fund local jurisdictions' acquisition of license plate readers).

350. *Id.* (quoting *Grant Guide*, LEONARDO CO., https://www.leonardocompany-us.com/lpr/how-to-buy/law-enforcement-grants-guide [https://perma.cc/UHB5-K9BM]).

351. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR CBP LICENSE PLATE READER TECHNOLOGY 5 (2017), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp049-cbplprtechnology-december2017.pdf [https://perma.cc/D24S-79B6].

352. *Id.* at 3–4.

353. *See Science and Technology: Unmanned Aerial Systems*, U.S. DEP'T HOMELAND SEC., https://www.dhs.gov/science-and-technology/unmanned-aerial-systems [https://perma.cc/QS7L-H3PN].

354. U.S. DEP'T OF HOMELAND SEC., DHS SCIENCE AND TECHNOLOGY DIRECTORATE: ENABLING UNMANNED AIRCRAFT SYSTEMS (2017), https://www.dhs.gov/sites/default/files/publications/Enabling%20UAS.%20Factsheet.pdf [https://perma.cc/S349-NE9X].

355. Ryan Pickrell, *Customs and Border Protection Flew a Predator B Drone over Minneapolis as Protests Rocked the City*, BUS. INSIDER (May 29, 2020, 6:29 PM), https://www.businessinsider.com/cbp-flew-a-predator-b-drone-over-minneapolis-amid-protests-2020-5 [https://perma.cc/7VXQ-CW9W].

356. *See id.*

357. Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html [https://perma.cc/T66X-8LFT (dark archive)].

c. Surveillance by Social Media

Around 2010, DHS started monitoring social media somewhat modestly to enhance situational awareness of major security-related events.[358] Under a pilot program, officers scanned Twitter, Facebook, and blogs to identify and report on unfolding events and disasters, including the Haiti earthquake, Deep Water Horizon oil spill, and 2010 Winter Olympics.[359]

By at least 2012, official use had expanded to operational functions including "investigating an individual in a criminal, civil, or administrative context [and] making a benefit determination about a person."[360] In 2015, U.S. Citizenship and Immigration Services ("USCIS") launched a pilot program for systematic screening of the social media accounts of immigrant visa applicants via an "automated search tool."[361] USCIS tested a second and third automated search tool in 2016.[362] That same year, ICE and the State Department began a pilot program to surveil social media accounts of tourists and business visitors, screening them during the initial visa application phase and beyond,[363] and CBP began asking travelers from certain countries to disclose their social media handles.[364]

Since 2017, these programs have quickly accelerated. As mentioned, President Trump made "extreme vetting" a central part of his 2017 travel ban and refugee suspension executive orders, which centrally included social media scanning.[365] Later that same year, DHS issued a notice regarding its intent to

358. *See* Sophia Cope & Adam Schwartz, *DHS Should Stop the Social Media Surveillance of Immigrants*, ELEC. FRONTIER FOUND. (Oct. 3, 2017), https://www.eff.org/deeplinks/2017/10/dhs-should-stop-social-media-surveillance-immigrants [https://perma.cc/5WXD-W7N2] ("DHS began monitoring social media at least as early as 2010.").

359. *See id.*; *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intel. of the H. Comm. on Homeland Sec.*, 112th Cong. 17–18 (Feb. 16, 2012) (statement of Mary Ellen Callahan, Chief Priv. Officer, U.S. Dep't of Homeland Sec.), https://www.govinfo.gov/content/pkg/CHRG-112hhrg76514/html/CHRG-112hhrg76514.htm [https://perma.cc/HQ3V-838A].

360. U.S. DEP'T OF HOMELAND SEC., INSTRUCTION NO. 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA 3 (2012), https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media_0.pdf [https://perma.cc/F29X-YFTD].

361. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS 1–2 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf [https://perma.cc/8RWV-HB6H].

362. *Id.*

363. *Id.* at 3.

364. Tony Romm, *U.S. Government Begins Asking Foreign Travelers About Social Media*, POLITICO (Dec. 22, 2016, 5:23 PM), https://www.politico.com/story/2016/12/foreign-travelers-social-media-232930 [https://perma.cc/776G-D9VJ].

365. *See* Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 24, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 § 1(b) (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 § 5(a) (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see also* HARSHA PANDURANGA,

modify "A-files"—noncitizens' official governmental immigration file[366]—to include social media handles, search results, and associated information.[367] Meanwhile, CBP airport searches of cell phones, laptops, and other electronic devices increased nearly sixty percent in 2017, resulting in searches of 30,200 devices.[368] In 2019, DHS began requiring all applicants for a nonimmigrant visa to disclose all of their social media handles,[369] and CBP announced a new social media tracking program to monitor unfolding events.[370]

DHS stores and analyzes social media information via a massive database called the FALCON Search & Analysis System ("FALCON").[371] FALCON, constructed by the technology firm Palantir, allows ICE personnel to identify patterns and trends in social media data as well as to discern connections between groups, individuals, events, and activities.[372] Multiple data collection systems across ICE and CBP feed into FALCON.[373]

d. Additional Data Mining and Analytics

The aforementioned dragnet and database systems do not even capture the full picture. ICE owns over 900 unique databases and manages over 10 billion biographic records.[374] It also contracts for other data mining and analytic services. In 2018, ICE entered into a $2.4 million contract with Pen-Link, which sells software that allows law enforcement agencies to collect and analyze

FAIZA PATEL & MICHAEL W. PRICE, BRENNAN CTR. FOR JUST., EXTREME VETTING AND THE MUSLIM BAN 2, 16–17 (2017), https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf [https://perma.cc/YRU7-5SV7].

366. These files, officially termed "alien files" and referred to as "A-files," have served as the official file of immigration transactions and records for individual noncitizens since 1944. Notice of Modified Privacy Act System of Records, 82 Fed. Reg. 43,556 (Sept. 18, 2017).

367. *Id.*

368. Ron Nixon, *Cellphone and Computer Searches at U.S. Border Rise Under Trump*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/us/politics/trump-border-search-cellphone-computer.html [https://perma.cc/4P2E-JCDP (dark archive)].

369. *See* OFF. OF MGMT. & BUDGET, NOTICE OF ACTION: ONLINE APPLICATION FOR NONIMMIGRANT VISA (2019); FAIZA PATEL, RACHEL LEVINSON-WALDMAN, SOPHIA DENUYL & RAYA KOREH, BRENNAN CTR. FOR JUST., SOCIAL MEDIA MONITORING: HOW THE DEPARTMENT OF HOMELAND SECURITY USES DIGITAL DATA IN THE NAME OF NATIONAL SECURITY 11 (2019), https://www.brennancenter.org/sites/default/files/publications/2019_DHS-SocialMediaMonitoring_FINAL.pdf [https://perma.cc/F7HF-UA23].

370. Adam Mazmanian, *CBP Announces Social Media Tracking Program*, FED. COMPUT. WK. (Mar. 27, 2019), https://fcw.com/articles/2019/03/27/cbp-social-media-watching.aspx [https://perma.cc/C5MN-UZTL].

371. PATEL ET AL., *supra* note 369, at 27.

372. *Id.* at 23–24, 29, 40.

373. *Id.* at 28.

374. Jennifer Lynch, *HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' "Non-Obvious Relationships*," ELEC. FRONTIER FOUND. (June 7, 2018), https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and [https://perma.cc/QG6D-CXNU].

massive volumes of social media data and other internet information.[375] In 2017, ICE signed a $20 million contract with West Publishing for access to its CLEAR system, which combines large volumes of public and proprietary data and offers a variety of analytic and mapping tools.[376] The CLEAR system includes social network information as well as data from phone companies, credit bureaus, utilities, motor vehicle registration in forty-four states, other DMV records, real property records, records of persons, criminal and court records, business data, and healthcare provider content.[377] An internal ICE document describes the CLEAR system as necessary "to uphold and enforce U.S. customs and immigration laws *at and beyond our nation's borders*."[378]

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The most apt metonym for our present state of affairs comes from Bentham (again), or more specifically, his Panopticon as taken up by philosopher Michel Foucault.[379] Bentham's 1787 plans—which back then might have spared many prisoners from literal dungeons—conceived of an airy, light, open building that would minimize physical restraints and cell walls via architectural design.[380] Prison guards from a central watch tower could see inmates throughout but remain unseen. Although actual, live watching of all inmates at all times would be impossible, the *possibility* of being watched at any time would normalize prisoners' conduct. Foucault's 1975 intervention rereads Panopticon as an "indefinitely generalizable mechanism" that extended past closed institutions to state apparatuses and throughout society by the end of the eighteenth century.[381] Panopticism, or the "vigilance of intersecting gazes,"[382] allows disciplinary power to shape docile bodies through "tiny, everyday, physical mechanisms"[383] (such as surveillance, cataloguing, training, and timetables), which sustain and enlarge an asymmetry of power.

375. PATEL ET AL., *supra* note 369, at 23.

376. *Id.* at 24; *see also* THOMSON REUTERS CLEAR, THE SMARTER WAY TO GET YOUR INVESTIGATIVE FACTS STRAIGHT. 2, 6 (2015), https://www.thomsonreuters.com/content/dam/openweb/documents/pdf/legal/fact-sheet/clear-brochure.pdf [https://perma.cc/HWQ2-MT6F].

377. THOMSON REUTERS CLEAR, *supra* note 376, at 2, 4–5.

378. PATEL ET AL., *supra* note 369, at 24; DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, LIMITED SOURCE JUSTIFICATION: CONSOLIDATED LEAD EVALUATION AND REPORTING (CLEAR) 2 (emphasis added), https://www.mediafire.com/file/y2e3vk65z6v3k6x/LSJ_Final.pdf [https://perma.cc/2B7G-95R4 (staff-uploaded archive)].

379. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 200–02 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (analyzing Bentham's Panopticon).

380. *See generally* JEREMY BENTHAM, PANOPTICON; OR, THE INSPECTION-HOUSE (1787) (describing the Panopticon building and individual cells). Bentham also discussed the application of Panopticon to hospitals, "mad-houses," schools, factories, "poor-houses," and schools. *See id.* at 4, 32.

381. FOUCAULT, *supra* note 379, at 216.

382. *Id.* at 217.

383. *Id.* at 222.

Today, the virtual eyes of human and machine "guards" are everywhere, and their intersecting gazes can and do watch over broad masses in real time. Over a decade ago, Professor Jack Balkin drew upon Foucault's conceptions of knowledge and power to observe that we were already living in a "National Surveillance State," wherein the government "uses surveillance, data collection, collation, and analysis to identify problems, to head off potential threats, to govern populations, and to deliver valuable social services."[384] Writing in the aftermath of 9/11, sociologist David Lyon identified surveillance regimes' roving "phenetic fix": a trend toward "captur[ing] personal data triggered by human bodies and [using] these abstractions to place people in new social classes of income, attributes, habits, preferences, or offences, in order to influence, manage, or control them."[385]

The evolution of capacity in recent years "has not been incremental, but abrupt," as scholar Alex Abdo notes.[386] Whereas previously, "the government had to rely on human agents or informants to spy, today it spies through a proliferating network of unsleeping sensors."[387] Professor Erin Murphy similarly identifies an "explosion in technologies" that enables regulation of populations absent physical control.[388] These technologies lower the cost of ubiquitous surveillance so much so that, as Professor Elizabeth Joh predicts, it will soon "be feasible and affordable for the government to record, store, and analyze nearly everything people do."[389]

The federal government has been a primary driver for these technologies; within it, DHS's footprint is enormous. As Professor Kalhan observed in 2014, adapting Professor Balkin's terminology, a new immigration surveillance state has enacted a "sea change in the underlying nature of immigration regulation itself."[390] DHS has done so, moreover, largely without oversight or restraint.[391] In just a few short years since Professor Kalhan's lucid exploration, immigration surveillance has proliferated even more drastically.

Unsurprisingly, DHS's spiraling surveillance dragnet has drawn condemnation from defenders of civil liberties. Advocates have expressed

384. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008).

385. David Lyon, *Surveillance Studies: Understanding Visibility, Mobility and the Phenetic Fix*, 1 SURVEILLANCE & SOC'Y. 1, 3 (2002).

386. Alex Abdo, *Why Rely on the Fourth Amendment To Do the Work of the First?*, 127 YALE L.J.F. 444, 446 (2017), https://www.yalelawjournal.org/forum/why-rely-on-the-fourth-amendment-to-do-the-work-of-the-first [https://perma.cc/8YUT-LGL5].

387. *Id.*

388. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1325 (2008).

389. Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 15–16 (2016).

390. Kalhan, *Immigration Surveillance*, *supra* note 327, at 5.

391. *See id.* at 75–76.

fitting alarm over its use against noncitizens and citizens,[392] particularly Muslim Americans.[393] Among the more troubling aspects of DHS surveillance is its apparent trampling of First Amendment rights. Leaked documents from March 2019 revealed that DHS was tracking fifty-nine journalists, photographers, and advocates—including forty U.S. citizens—who worked with or reported on the migrant caravan in Mexico.[394] CBP officers have flagged pastors, attorneys, and activists on the list for "secondary inspection" when returning from Mexico.[395] Several such individuals reported threats, detention, interrogation, and deportation by U.S. or Mexican immigration authorities at border ports of entry.[396] ICE, meanwhile, has been criticized for surveilling protests, unmoored from any apparent immigration function. A leaked ICE spreadsheet revealed its tracking of protests in New York City in July and August 2018, containing the names of sponsors, the political goals of the protest, and the numbers of people signing up to attend on Facebook.[397] And, as mentioned, DHS in summer 2020 deployed surveillance aircraft, including drones, to monitor and record Black Lives Matter protests in over a dozen U.S. cities.[398]

Continuous, pervasive, and intrusive forms of monitoring raise a host of constitutional concerns, including unwarranted search, discriminatory targeting on the basis of race and religion, and chilling effects on speech and association.[399] The proliferation of electronic surveillance technology in the criminal justice system has garnered trenchant criticism for advancing racialized

392. *See, e.g.*, ACLU, YOU ARE BEING TRACKED, *supra* note 348, at 2; Abdo, *supra* note 386, at 446–47.

393. *See* PANDURANGA ET AL., *supra* note 365, at 16–18.

394. Tom Jones, Mari Payton & Bill Feather, *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, NBC SAN DIEGO, https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html [https://perma.cc/SK5S-QTHW] (Jan. 10, 2020, 11:43 AM); *Photos: Leaked Documents Show Government Tracking Journalists, Immigration Advocates*, NBC SAN DIEGO, https://www.nbcsandiego.com/news/local/photos-leaked-documents-to-nbc-7-investigates-11-3/126760/ [https://perma.cc/BUY3-2HWT] (June 15, 2020, 8:44 AM).

395. Tom Jones, Mari Payton, Bill Feather & Paul Krueger, *Human Rights Organization Calls for End to Controversial Border Surveillance*, NBC SAN DIEGO, https://www.nbcsandiego.com/news/local/International-Human-Rights-Organization-Demands-Immediate-End-to-Controversial-US-Government-Border-Surveillance-Tactics-512098411.html [https://perma.cc/W2FQ-AST5] (July 3, 2019, 11:35 AM).

396. *Id.*

397. Jimmy Tobias, *Exclusive: ICE Has Kept Tabs on 'Anti-Trump' Protests in New York City*, NATION (Mar. 6, 2019), https://www.thenation.com/article/ice-immigration-protest-spreadsheet-tracking/ [https://perma.cc/Y7D3-PFZ7].

398. Kanno-Youngs, *supra* note 357.

399. *See generally* ACLU, YOU ARE BEING TRACKED, *supra* note 348 (identifying the various constitutional concerns arising out of the use of license plate readers).

"e-carceration" in lieu of decarceration.[400] Although delving into the First, Fourth, and Fifth Amendment implications of DHS surveillance is beyond the scope of this Article, I share many of these concerns. Yet despite seemingly limitless expansion of these technologies and their overuse, DHS has continued to insist to courts that detention shielded from due process scrutiny must persist as a necessary part of its sovereign exclusion power. Courts have largely accepted this contention, be it from risk aversion, inertia, or complacency. But the reality of DHS's spiraling surveillance—considering both the technologies' actual use and their varying availability—has significant implications for the present-day operation of entry fiction, as explored below.

VII. FICTION, FUNCTION, BORDER, AND TERRITORY

The border, of course, is a fiction: an imaginary line drawn upon a unitary landmass to connote sovereign control over territory. Territory, too, is fiction: a false constant atop shifting geological markers, as unstable as sedimentation itself. The fiction of sovereignty, meanwhile, grounds liberal democracy: that governing power emerges from the consent of the people, whether or not they consent.[401] In the United States, courts have sourced the nature and scope of that power from a largely silent Constitution.[402]

Given these fictions enmeshed in fictions, scholars and social theorists have long shown that border, territory, and sovereignty defy any fixed configuration.[403] Entry fiction itself, of course, destabilizes fixed notions of

400. *See* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 644–45 (2019); Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html [https://perma.cc/PTV8-M88T (dark archive)]. But scholars have also argued that the properly limited use of electronic monitoring should replace pretrial detention of individuals who cannot post bail. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 894–95 (discussing electronic monitoring in lieu of detention to address flight risk); Samuel R. Wiseman, *Pretrial Detention and the Right To Be Monitored*, 123 YALE L.J. 1344, 1403 (2014) (arguing that courts should adapt Eighth Amendment jurisprudence to enact a shift from pretrial detention to electronic monitoring).

401. *See, e.g.*, Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 63 (2011) (discussing the "compact-based approach" to domestic rights and noting its long pedigree in Western political thought); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 921 (1991) (discussing social contract tradition of Thomas Hobbes, Samuel von Pufendorf, and John Locke, under which "individual obligation to obey must be grounded in individual consent, either actual or justly presumed").

402. *See supra* Section III.A.

403. Professor Saskia Sassen, for example, traces how nation-states have been "deterritorialized" in contemporary systems and the resulting logics, such as through global flows of capital and new regional political systems. SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 13–15 (2006). Anthropologists Aihwa Ong and Stephen Collier propose using "assemblage" as a conceptual tool for studying new global configurations, including the deterrorialization and reterritorialization of nation-states in situated contexts. Stephen J. Collier &

space, rendering physical presence on U.S. soil a "*nullity*," as Professor Volpp describes.[404] It in fact operationalizes "the border" within U.S. territory, creating constitutional exception zones within U.S. detention centers—but its continued maintenance of these spaces has avoided necessary scrutiny vis-à-vis technological and carceral changes. Contemporary legal scholars note that technological surveillance of immigrants enacts a fundamental *qualitative* shift in the relationship between sovereignty, borders, and noncitizens. Professor Kalhan identifies a "migration border . . . decoupled from the territorial border and rendered 'virtual.'"[405] Professor Ayelet Shachar similarly unpacks a "shifting border," in which the where and how of immigration enforcement "depart[s] radically from the territorial-centered conception of the static border, carved under the Westphalian image," including via new technological initiatives.[406] As explained below, the constitutional borderline has recently shifted outward as well—to nonsovereign territory—under the Supreme Court's more recent Suspension Clause jurisprudence.[407]

Yet, entry fiction continues unabated despite stark changes in immigration capacities and practices as well as the evolution of constitutional case law. First articulated by the Court in the Chinese Exclusion era and further extended during the early Cold War, entry fiction operates today in a context likely unimaginable to the jurists of both eras. Given the definitional hallmarks of legal fiction, this blindness to context—to contemporary versus historical realities—is inexcusable. Below, I examine entry fiction in relation to legal fictions' defining attributes of *function*, *equity*, and *danger*, as distilled from my discussion of Professor Fuller's, Blackstone's, and Bentham's works.[408] As I show below, each of these attributes favors entry fiction's expiration.[409] I also evaluate counterarguments for entry fiction's survival.

A. *Function*

Entry fiction is tied to the sovereign power to exclude: the power to determine who comes in and who stays out, which the Court deems "inherent

Aibwa Ong, *Global Assemblages, Anthropological Problems*, *in* GLOBAL ASSEMBLAGES 14–15 (Aibwa Ong & Stephen J. Collier eds., 2005).

404. Volpp, *supra* note 34, at 457.

405. Kalhan, *Immigration Surveillance*, *supra* note 327, at 9.

406. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J.C.R. & C.L. 165, 189 (2007). Professor Shachar documents both an inward shift, via new regimes and practices (like expedited removal and immigration enforcement by local authorities), as well an outward shift beyond U.S. territory via preclearance screening technology in foreign airports and bilateral agreements. *Id.* at 175, 192. My thanks to Professor Chimène Keitner for insightful discussions around Professor Shachar's work.

407. U.S. CONST. art. I, § 9, cl. 2; *see infra* Section VII.A (discussing recent case law).

408. *See supra* Part II.

409. I omit analysis of *falsity*, as the fictional nonpresence of persons in U.S. territory detention remains untrue from the time of entry fiction's emergence to the present day.

in sovereignty" and "essential to self-preservation."[410] The government broadly asserts—and the Court has thus far agreed—that detention enables this authority, rendering it part and parcel of entry fiction.[411] Detention serves the need, they say, to control our borders and protect our territory; entry fiction protects the government's power to detain. But, in fact, both contemporary technology and recent case law extending habeas rights to Guantanamo Bay, Cuba—through a territorial fiction, no less—reveal that any such need has expired.

Previously, detention may have served as a useful proxy for refusing physical entry into territory, ensuring that individuals denied formal admission did not simply disappear into the interior and thus stymie removal. Certainly, in the era of Chinese Exclusion, there was no reliable substitute. It is hard to imagine Mr. Blake, the immigration inspector in the 1880s,[412] having any practical or technological means to easily locate individuals released from detention and intent on absconding. Even authorities seeking to keep tabs on Mr. Mezei in 1953 would have had to expend significant resources to continually ensure his whereabouts if released. True, he might have been subject to house arrest or instructed not to leave the jurisdiction. But as described, it would have taken personnel-intensive monitoring to enforce constant compliance with those terms.

Today, ICE has a number of tools at its disposal that effectively ensures removal of individuals who lose their immigration cases, even without locking them away. Described above,[413] these tracking technologies enable ICE to keep close, real-time watch on individuals' whereabouts even after release from detention. Programs employing these technological alternatives, moreover, have proven effective in ensuring that individuals show up to their court hearings—and have saved hundreds of millions of dollars from leaving public coffers.

Although GPS tracking technologies raise serious First and Fourth Amendment concerns,[414] ICE already uses them for tens of thousands of immigrants released from its custody. And even beyond direct tracking and supervision mechanisms, DHS's surveillance architecture grows ever pervasive. Data mining and passive collection of identity markers render anonymity and escape of known individuals unlikely. As described, ICE currently contracts for analytics software that combines information from DMV locations, utility companies, phone companies, credit bureaus, and other sources. It has mined DMV database photos for facial recognition. And it has spent tens of millions

410. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).
411. *See* Wong Wing v. United States 163 U.S. 228, 237 (1896); *supra* Sections IV.B, V.B.
412. *See supra* Section VI.A.
413. *See supra* Section VI.B.
414. *See supra* notes 392–400 and accompanying text.

of dollars to install license plate readers all over the country. As DHS's reach into the interior and everyday lives and transactions of individuals grows, the likelihood of individuals in its system "disappearing" grows dim.

In failing to account for the actual *tools* of sovereign exclusion—which, unlike earlier eras, are no longer tied to the physical sequestration of persons—entry fiction is now untenably unmoored from its asserted sovereign function. This inside-territory constitutional exception is especially jarring given the Court's functional turn on sovereignty and outside territory. In *Boumediene v. Bush*,[415] the Court in 2008 recognized the constitutional right of habeas corpus for individuals detained in Guantanamo Bay, eschewing a bright-line territorial rule and softening more rigid interpretations of its earlier decisions in the *Insular Cases*.[416] Although the Court agreed there was no question "that Cuba, not the United States, maintains sovereignty,"[417] it deemed functional *control* over territory sufficient (with other factors) to extend the right of habeas corpus.[418] The Court distinguished its *Mezei*-era decision in *Johnson v. Eisentrager*[419]—which refused habeas corpus to enemy combatants in Landsberg,

415. 553 U.S. 723 (2008).

416. The *Insular Cases* arose during the turn of the twentieth century, following the United States' acquisition of Guam, Puerto Rico, and the Philippines after the Spanish-American War, as well as the United States' annexation of Hawaii. The Court deemed the U.S. Constitution to apply in full to incorporated territories, but only in part to unincorporated territories. *Id.* at 756–57 (listing the *Insular Cases* as De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904)). *Boumediene* adopted a functional view of these cases as well, hinging their outcomes not on a bright-line territorial rule, but rather on the practical difficulties of transforming the civil law system of the former Spanish colonies into an Anglo-American system. *Id.* at 757; Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 984 (2009) (concluding "the *Boumediene* Court got it right" in rejecting the standard view of the *Insular Cases* as limiting the extraterritorial application of the Constitution to only its most fundamental rights). Notably, scholars and jurists have criticized and/or noted the inherent limitations of *Boumediene*'s functional test. *See id.* at 978 (arguing that such concerns should not guide the applicability of constitutional guarantees, but rather how to enforce guarantees that do apply); Keitner, *supra* note 401, at 79 (discussing lower court cases that "illustrate[] the subjectivity involved in applying the 'practical obstacles' test"); Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1669 (2013) ("*Boumediene*'s functional test focuses too narrowly on practical factors . . . [and, in so doing,] ignores the substantive-due process/fundamental-norms jurisprudence articulated in the precedents on which the decision relies."); *see also* Keitner, *supra* note 401, at 73–75 (citing Reid v. Covert, 354 U.S. 1, 74–75, 77 (1957) (Harlan, J., concurring)) (discussing the dispute between Justices Black and Harlan over the "impracticable and anomalous" test employed in *Reid v. Covert*, 345 U.S. 1 (1957), which was later adopted in *Boumediene*).

417. *Boumediene*, 553 U.S. at 754.

418. *Id.* at 771. The Court identified "at least three factors" as relevant to the Suspension Clause's reach: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766.

419. 339 U.S. 763 (1950).

Germany, during the Allied occupation, emphasizing the "practical barriers"[420] and "practical obstacles"[421] of that earlier time. But the practicalities that prevented habeas rights from extending to Landsberg Prison are not present in today's Guantanamo Bay facility. As a result, the Court held that the Constitution could, and thus must, functionally extend habeas rights to Guantanamo detainees.[422]

The Supreme Court in *Thuraissigiam* declined to read *Boumediene* broadly to extend greater habeas protections to immigrants subject (in its view) to entry fiction with regard to governmental admissions decisions.[423] The Court did so despite the obvious tension between extending habeas rights to individuals detained at Guantanamo Bay based on practicability and ignoring the self-evident practicability of greater habeas rights for individuals in ICE detention. But *Thuraissigiam* was emphatically rooted in the Court's view of robust habeas protections in the detention context, drawing a stark and explicit contrast between detention and admissions decisions. Relying on the respondent's agreement that the Court could base its decision on the scope of the Suspension Clause in 1789, the Court's analysis of habeas rights centered on understandings at that time.[424] After conducting an extensive historical analysis, it concluded that Mr. Thuraissigiam's claim failed precisely because the record lacked any evidence that "the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter

420. *Boumediene*, 553 U.S. at 763.

421. *Id.* at 766.

422. *Id.* at 769–71.

423. The Supreme Court's decision resolved a former circuit split on whether applicants for admission (including but not limited to unentered individuals) have constitutional habeas rights with regard to issuance of a removal order. In *Castro v. United States Department of Homeland Security*, 835 F.3d 422 (3d Cir. 2016), the Third Circuit ruled that the immigration statutes stripped the courts of their ability to review expedited removal orders except in extremely limited circumstances—and that the statutes did *not* violate the Suspension Clause as applied to asylum seeker families in expedited removal. *Id.* at 450; *see also* 8 U.S.C. § 1252(e). Its conclusion that petitioners could not invoke the Suspension Clause hinged largely on the Supreme Court's entry fiction and plenary power due process cases. *Castro*, 835 F.3d at 446–48. The Ninth Circuit recently agreed with the Third Circuit's statutory interpretation but reached the opposite conclusion on the constitutional issue. Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1116–19 (9th Cir. 2019), *rev'd*, 140 S. Ct. 1959 (2020). It held that the jurisdiction-stripping statutes *did* violate the Suspension Clause as applied to an asylum seeker in expedited removal. *Id.* at 1119. The Ninth Circuit disagreed with the Third Circuit's reliance on due process case law to determine the reach of the Suspension Clause, but it expressly declined to address "what right or rights Thuraissigiam may vindicate via use of the writ." *Id.* at 1119 (first citing *Boumediene*, 553 U.S. at 798; then citing INS v. St. Cyr, 533 U.S. 289, 299–300 (2001)); *see also id.* at 1115 (discussing the Supreme Court's "finality era" decisions on the writ in the immigration context). Although in my view the Ninth Circuit's decision offers greater analytical precision on the reach of the Suspension Clause, the Supreme Court of course validated the Third Circuit's conclusion.

424. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1969 (2020) ("[T]he Clause, at a minimum, 'protects the writ as it existed in 1789' . . . . And in this case, respondent agrees that 'there is no reason' to consider whether the Clause extends any further. We therefore proceed on that basis." (citation omitted)).

or remain in the country"; rather "[t]he writ simply provided a means of contesting *the lawfulness of restraint and securing release*." [425] Although *Thuraissigiam* adopts an expansive view of entry fiction for admissions decisions, and limits immigrants' constitutional habeas and due process rights in that context, it also provides support for more robust and searching constitutional protections against detention.

The *truth* of Guantanamo's existence outside the United States does not preclude constitutional habeas protections for enemy combatants abroad, where practicality permits. Yet, a *fiction* that denies immigrants' presence in detention centers within our borders jarringly continues to stymie constitutional due process rights, absent any practical barriers whatsoever. Although habeas and due process rights are not coextensive,[426] the contrast nevertheless highlights that entry fiction's blindness to function is untenable.

B. *Danger*

The danger inherent in entry fiction is fully realized today: its function has expired, and it furthers inequity. Moreover, the danger and harm that Professor Fuller and others warned of, and that Bentham railed against, have come to pass[427]: the government and Court seem to have forgotten the original justifications of entry fiction, allowing it to mutate into a fiction for its own sake.

There is an additional danger lurking, too, in impermissible—and untenably shielded—uses of civil immigration detention authority. As mentioned, the Court in *Wong Wing* early declared arrest and detention permissible "in order to make effectual" exclusion or expulsion.[428] But it struck down as unconstitutional statutory provisions imposing hard labor, which did not similarly facilitate removal and therefore amounted to punishment

425. *Id.* at 1969 (emphasis added).

426. The right to due process and the right to habeas corpus are often interconnected but not coextensive. As many scholars have noted, their precise relationship remains ambiguous. *See, e.g.*, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2503 (1998) ("This is not to say that the Suspension Clause and the Due Process Clause are redundant. . . . The two principles work in tandem to require judicial review of the legality of all executive detentions."); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1364 (2010) ("[T]he relationship between the Suspension and Due Process Clauses remains completely unsettled."); Mary Van Houten, Note, *The Post-*Boumediene *Paradox: Habeas Corpus or Due Process?*, 67 STAN. L. REV. ONLINE 9, 10–11 (2014) (remarking that the Court has left "the content of the writ and the contours of the habeas-due process relationship undefined"). It is well settled that unentered individuals in immigration detention can challenge their detention via habeas corpus. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 839–41 (2018).

427. *See supra* Part II (discussing Fuller and Bentham's views on legal fictions); *see also* Soifer, *supra* note 78, at 877 (observing that legal fictions may dangerously bend and control legal thought).

428. Wong Wing v. United States, 163 U.S. 228, 237 (1896).

requiring a jury trial. Reading with and against *Wong Wing*, scholars trace myriad ways that immigration detention has now crossed into punishment. These include the severity of conditions and restrictions on liberty,[429] the expanding nexus between criminal and immigration processes,[430] the design and experience of immigration detention centers,[431] and the punitive design of detention laws by Congress.[432]

Under policies of the outgoing Trump Administration, the aims of detention and removal grew more punitive by executive design as well. President Trump described individuals in migrant caravans as an "invasion"[433] and immigrants from Mexico as "bad 'hombres.'"[434] In a January 2017 executive order titled "Enhancing Public Safety in the Interior of the United States," he directed the creation of ICE's Victims of Immigration Crime Engagement Office ("VOICE").[435] VOICE explicitly blurred the lines between civil and criminal enforcement, explaining its "singular, straightforward mission" as "ensur[ing] victims and their families have access to releasable information

429. *See, e.g.*, Kalhan, *Rethinking Immigration Detention*, *supra* note 262, at 50; Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533, 552–56 (2014) (documenting similarities between civil immigration detention and criminal incarceration in the United States); *see also* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2–3 (2009) ("ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control.").

430. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–78 (2006) (exploring the convergence of criminal and immigration law). Individuals also of course experience both detention and deportation as punishment. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1929 (2000) ("[T]he fiction that deportation is not punishment is especially hard to maintain when a person is incarcerated for a long period of time as part of the process.").

431. *See* Simon, *supra* note 253, at 587 (describing "physical design of Krome" detention center in the early 1990s and its disciplinary practices as becoming punitive).

432. García Hernández, *supra* note 254, at 1349. Professor García Hernández locates the punitive nature of immigration detention in legislative intent, tracing the launching of our current system of immigration detention in the 1980s and 1990s along with the War on Drugs as a result of design rather than coincidence. *Id.* He concludes the intertwinement of immigration detention with penal incarceration amounts to a "legal architecture that, in contrast with the prevailing legal characterization, is formally punitive." *Id.*

433. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 10:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 [https://perma.cc/HM93-9H7J] ("Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border. Please go back, you will not be admitted into the United States unless you go through the legal process. This is an invasion of our Country and our Military is waiting for you!").

434. *See* Donald J. Trump (@realDonaldTrump), TWITTER (May 17, 2019, 6:44 AM), https://twitter.com/realDonaldTrump/status/1129336982319050752 [https://perma.cc/KN4T-MJ7Y] ("Border Patrol is apprehending record numbers of people at the Southern Border. The bad 'hombres,' of which there are many, are being detained & will be sent home. Those which we release under the ridiculous Catch & Telease [sic] loophole, are being registered and will be removed later!").

435. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (originally referring to office as the Office for Victims of Crimes Committed by Removable Aliens).

about a perpetrator and to offer assistance explaining the immigration removal process."[436] It also oversaw a national "Victim Information and Notification Exchange" system that automatically notifies victims and witnesses "about changes to custody status" of "criminal aliens charged or convicted of a crime," pulling immigrant "detainee location data" from ICE's systems.[437] Yet immigrants who commit crimes end up in ICE detention only after serving out whatever criminal sentence (or portion thereof) the state deems as adequate punishment or rehabilitation. To cast immigration detention as additional retribution against "perpetrators" further erases its civil nature.

In the same January 2017 executive order, President Trump essentially eliminated prosecutorial discretion in immigration cases.[438] Whereas President Obama previously directed ICE officers to use prosecutorial discretion in detention and removal decisions, focusing resources on priority removals and considering equities such as family and community ties,[439] President Trump's ICE acting director described President Trump as "taking the handcuffs off" his officers.[440] With immigration actions veering closer to punitive intent from the highest levels, combined with virtually unrestricted enforcement authority by lower officials, the constitutional vacuum created by entry fiction grows more concerning.

The new Biden Administration has already rescinded the January 2017 executive order in a new executive order titled "Revision of Civil Immigration Enforcement Policies and Priorities."[441] This order appeared among several immigration-related executive orders and proclamations undoing the Trump Administration's immigration policies that President Biden signed on his first day in office.[442] Notwithstanding the large shift in approach to immigration by the Biden Administration, the fundamentally punitive nature of immigration detention persists. Its design, character, and experience as punishment both

436. *Victims of Immigration Crime Engagement (VOICE) Office*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/voice [https://perma.cc/QF45-QSYY].

437. *Id.*

438. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see also* Memorandum Regarding Enforcement of the Immigration Laws To Serve the National Interest from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Leadership of U.S. Dep't of Homeland Sec. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/25VQ-QEPN].

439. Memorandum Regarding Civil Immigration Enforcement: Priorities for Apprehension, Detention, and Removal of Aliens from John Morton, Assistant Sec'y, U.S. Dep't of Homeland Sec., to All ICE Employees (June 30, 2010), https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf [https://perma.cc/BU3U-DLDE].

440. Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/ [https://perma.cc/658J-WZEG (dark archive)].

441. Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

442. *See Briefing Room: Presidential Actions*, WHITE HOUSE, https://www.whitehouse.gov/briefing-room/presidential-actions/ [https://perma.cc/Y49A-ZVV4].

predate and continue beyond the outgoing Trump Administration. [443] Moreover, even with the likely lesser use of detention (and potential steps toward deprivatization) by the current Biden Administration, failing to afford detained individuals more robust constitutional due process rights would leave them vulnerable to changes in policy under a different administration, or changes in law by a different Congress.[444]

C. *Counterarguments*

The government may likely continue to defend entry fiction, and judges will of course consider downsides to its elimination. Below I evaluate and respond to existing and likely future arguments in its defense.

1. Dangerous Individuals or Immigration Absconders on Our Streets

Judges may be reluctant to eliminate entry fiction should they perceive it as all that prevents a flood of dangerous individuals or absconders on our streets. The government has often invoked security risks and threats in defending entry fiction.[445] Fortunately, this scenario would not come to pass in entry fiction's absence.

A modicum of due process rights against detention for nonentrants would neither bind the hands of government officials nor result in mass release of individuals who pose a serious risk of danger or flight. Indeed, courts need not fear that due process rights conferred to nonentrants would result in the immediate release of *any* particular individuals. Rather, DHS would continue to have authority to detain such individuals—it simply would have to articulate a permissible civil purpose to do so and demonstrate this need at a procedurally adequate hearing. Considering the procedural due process factors under *Mathews v. Eldridge*,[446] the form of hearing would likely be a bond hearing before an immigration judge.[447]

443. *See supra* notes 441–44 and accompanying text.

444. Notably, although President Biden sent a proposed immigration bill, the U.S. Citizenship Act of 2021, to Congress on January 20, 2021, the White House's official fact sheet of the bill makes no mention of detention provision changes. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment To Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/LD92-XL7H]. The actual text of the bill, which has yet to be introduced in either chamber of Congress, is not publicly available as of the date this Article went to press. A new executive order directs the Department of Justice not to renew contracts with private prison companies for criminal detention facilities but contains no such direction for immigration detention. Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 29, 2021).

445. *See, e.g.*, *supra* note 245 and accompanying text.

446. 424 U.S. 319 (1976).

447. The Court described the balancing test for assessing adequacy of process for procedural due process as follows:

Notably, this is precisely the scheme we have under the general immigration detention statute,[448] which broadly authorizes discretionary detention for immigrants in removal proceedings.[449] As mentioned, these individuals already get the benefit of a bond hearing before an immigration judge. Within these constraints, the government can—and does—still detain hundreds of thousands of these immigrants each year, as immigration judges often side with the government's views. According to the Transaction Records Access Clearing House, only between eighteen percent and thirty percent of immigrants in the past few years were released on bond after a bond hearing before an immigration judge.[450] The basic procedural check of a bond hearing, and the requirement that the government provide some substantive rationale for detention, simply places some reasonable and minimal protections on deprivations of liberty. It still fully—indeed, too easily—allows the government to detain individuals who pose a risk of danger or flight.

2. Managing the Border

President Trump relentlessly asserted a need to close down the U.S.-Mexico border, declaring a national emergency for wall funding and announcing on Twitter: "Our Country is FULL!"[451] Entry fiction does, to an extent, make detention of some asylum seekers at our southern border easier, allowing ICE to flout its own policies and deny individuals release more easily. But entry fiction only applies to a smaller subset of asylum seekers in our system: those

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; *see also* Padilla v. U.S. Immigr. & Customs Enf't, 387 F. Supp. 3d. 1219, 1230 (W.D. Wash. 2019) (applying *Mathews* factors and concluding "[t]he 'value of the procedural safeguard' of a bond hearing is self-evident" (citation omitted)), *aff'd in part, rev'd in part*, 953 F.3d 1134 (9th Cir. 2020), *vacated*, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021) (mem.). The Ninth Circuit upheld the portion of a district court's injunction ordering bond hearings before immigration judges for asylum seekers who effected an entry. *See* Padilla v. Immigr. & Customs Enf't, 953 F.3d 1134, 1142–43 (9th Cir. 2020), *vacated*, No. 20-234, 2021 WL 78039 (U.S. Jan. 11, 2021) (mem.); *see also supra* notes 210–11 (describing the development of due process rights of entered asylum seekers as demonstrated in *Padilla*, 953 F.3d 1134).

448. 8 U.S.C. § 1226(a).

449. *Id.*

450. *Three-Fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGR. (July 2, 2018), https://trac.syr.edu/immigration/reports/519/ [https://perma.cc/Y792-ZC5N] ("So far [in 2018], [the] success rate has been 30.5 percent, up from 18.4 percent during FY 2014.").

451. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 7, 2019, 9:03 PM), https://twitter.com/realDonaldTrump/status/1115057524770844672 [https://perma.cc/BS8P-XJ7W].

who orderly present at a port of entry. Greater numbers are apprehended after crossing the border and thus are not subject to entry fiction.[452]

The government has significant control over persons who arrive at or near its border ports of entry. DHS has returned tens of thousands of asylum seekers processed at the southern border to wait in Mexico while their U.S. immigration court cases are pending.[453] It does so despite the significant risk of violence that migrants face in Mexico.[454] The individuals subject to these so-called "Migrant Protection Protocols" are both entered and arriving, and mostly from Central America.

Even apart from these postprocessing returns, DHS has engaged in "metering" to slow down or refuse initial processing of asylum seekers at U.S. ports of entry. It has placed tens of thousands of individuals on a waitlist, where people remain for weeks or even months.[455] This metering has forced many asylum seekers who face danger or instability in Mexico to cross the border illegally to seek U.S. asylum (after which they are often, per the above, returned to Mexico). And in spring 2020, the Trump Administration took the extraordinary step of prohibiting entry of all individuals arriving at land ports of entry or near land borders other than excepted groups (such as lawful permanent residents, citizens, and limited others)—invoking public health laws and the COVID-19 pandemic.[456]

To the extent that entry fiction makes detention of arriving individuals easier, this does not provide a border management rationale under current DHS policy. The majority of arriving individuals in ICE detention are asylum seekers

452. *See Claims of Fear*, *supra* note 21 (showing 38,269 arriving asylum seekers and 54,690 "apprehended," or in other words, entered, asylum seekers in FY 2018).

453. *See* Memorandum Regarding Policy Guidance for Implementation of the Migrant Protection Protocols from Kirstjen Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Kevin McAleenan & Ronald Vitiello (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/5SQD-SW6G]; *see also* 8 U.S.C. § 1225(b)(2)(C); Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html [https://perma.cc/9KV9-PAFG (dark archive)] (reporting almost 32,000 individuals subject to return to Mexico under the policy as of August 2019). In fall 2020, the Supreme Court granted certiorari in a case involving a challenge to the Migrant Protection Protocols. Wolf v. Innovation L. Lab, 141 S. Ct. 617 (2020) (mem.).

454. *See generally* HUMAN RTS. WATCH, "WE CAN'T HELP YOU HERE": US RETURNS OF ASYLUM SEEKERS TO MEXICO (July 2, 2019), https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico [https://perma.cc/WX9N-RHLZ] (documenting the risks of serious crimes asylum seekers face, including sexual assault and kidnapping).

455. *See id.*; Ava C. Benach, *The Border How We Got Here*, CRIM. JUST., Summer 2019, at 27, 29 (noting that between 8,000 and 10,000 individuals were waiting in Tijuana for a chance to apply for asylum in the United States as of March 2019).

456. *See* Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,061 (Mar. 20, 2020) (invoking authority under 42 U.S.C. §§ 265, 268 to suspend entry of individuals at land ports of entry and near the U.S.-Mexico and U.S.-Canada borders).

who warrant release under DHS's own directives.[457] As explained, once asylum seekers pass their initial asylum screening interviews, DHS policy instructs officers to release them "in the public interest," so long as they are not a flight risk or danger, while they pursue their asylum claims in immigration proceedings.[458]

Finally, even if the government changes its parole policy, studies have shown that the prospect of detention in the United States does not meaningfully alter the migration decisions of individuals fleeing violence and persecution.[459] Moreover, at least one court has enjoined ICE from using detention against asylum seekers in order to deter future migration, holding that deterrence rationales are impermissible for civil detention.[460] In short, detention pursuant to entry fiction does not permissibly, coherently, or practicably manage an influx of asylum seekers at the border.

3. Exclusion Defeated by Allowing Individuals Out of Detention Pending Proceedings

The government may also argue that detaining arriving individuals while their court cases are pending serves the sovereign purposes of exclusion in a more total sense—not just ultimate exclusion from the country but also interim exclusion by preventing release into communities, even absent security or flight risk. In *Jennings*, for example, the government argued that disruption of labor markets was an additional reason for detention without a bond hearing for arriving noncitizens.[461]

As an initial matter, this position is extreme. Depriving broad populations from liberty and community ties simply because the government deems them categorically "unpresent" is morally suspect. When considering the harsh conditions of immigration detention, it grows even more concerning. Moreover, the Court has never deemed isolation of individuals in detention *for its own sake* as a worthy or necessary goal of sovereign exclusion. To the contrary, as explained above, entry fiction's emergence in the Chinese Exclusion era rested explicitly on the Court deeming immigrants' release to city mission homes preferable to their continued confinement on disease-ridden

457. *See supra* notes 277–79 and accompanying text.

458. DIRECTIVE 11002.1, *supra* note 277.

459. Jonathan T. Hiskey, Abby Córdova, Mary Fran Malone & Diana M. Orcés, *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 LATIN AM. RES. REV. 429, 442 (2018) (finding that awareness of harsher U.S. enforcement practices did not impact Central Americans' migration intentions).

460. *See* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015) (finding deterrence an impermissible rationale for civil detention and enjoining the government's policy of using immigration detention to deter future asylum seekers).

461. Brief for the Petitioners, *supra* note 275, at 23.

ships.[462] As described and depicted above, mission homes were boardinghouses integrated into dense urban neighborhoods, not jails set apart from society.[463] Even in *Mezei*, the Court emphasized throughout the Attorney General's finding that Mr. Mezei posed a national security risk.[464] Neither the government nor the Court marked him as undesirable solely for being unentered.

Nor has Congress provided any indication of adopting such a broad and total vision of sovereign exclusion. To the contrary, it has specified—without distinguishing between arriving and entered asylum seekers—that work authorization "may be provided under regulation" 180 days after individuals file an asylum application.[465] Congress would not have authorized arriving individuals' employment in the United States while their asylum cases were pending had it wanted them completely sealed off from society during that time. Congress also, of course, authorized arriving individuals' release via § 1182(d)(5) parole. In short, entry fiction was never intended to ensure immigrants' categorical social isolation pending resolution of their cases.

4. The Dangers of Expanding Surveillance

As mentioned, DHS's surveillance dragnet raises serious First, Fourth, and Fifth Amendment concerns. In describing this massive technological system actually in place, I neither endorse these practices nor support their expansion. My argument, rather, is that the very *availability* of these technologies—putting aside their use—renders the entry fiction functionally unnecessary to effectuate sovereign exclusion powers. This argument would hold even with a significant and appropriate scale back of DHS's current surveillance dragnet. Even absent passive technologies and mass data collection, the targeted and individualized use of GPS monitoring via ankle bracelets or cell phone check-ins would serve as an adequate alternative to detention for individuals who present a particular risk of flight. Those who do not present such risks should simply be released.

Moreover, these technologies can and should be subject to greater oversight and due process protections. Appropriate and limited use of surveillance alternatives still favor the end of entry fiction—and entry fiction's demise should not, and need not, give rise to unnecessary or unrestricted expansion of monitoring. But, at minimum, for as long as DHS continues in its ongoing project of mass surveillance, entry fiction must assuredly expire.

462. *See supra* Section III.C (discussing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

463. *See supra* notes 133–41 and accompanying text (describing services and environment of mission houses).

464. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208, 213–14, 216 (1953).

465. 8 U.S.C. § 1158(d)(2).

CONCLUSION

"[T]his maxim is ever invariably observed, that no fiction shall extend to work an injury."

—William Blackstone, *Commentaries*[466]

As a legal fiction, entry fiction should serve some equitable end, driven by a functional necessity that justifies a subversion of reality. Entry fiction today furthers neither equity nor functionality in law or practice. Rather, DHS now operates a mass detention system that imposes human suffering on an enormous scale. It does so, moreover, while deploying unprecedented surveillance technologies throughout the United States that render mass, indiscriminate, unchecked use of detention authority unnecessary.

Entry fiction did once encapsulate the hallmarks of legal fiction. In the late nineteenth century, entry fiction served as useful "scaffolding" for law—a way for courts to grapple with the new legal problem of immigration enforcement. The exclusion laws were only a few years old, the immigration bureau was tiny, and the "how" of effectuating exclusion was in tension with the desire to spare immigrants from dangerous conditions onboard their ships. Under *Mezei*, the beneficial purposes of the scaffolding were less clear—but the Court nevertheless insisted that the impetus for entry fiction was a humane one, intended to avoid unnecessary hardship.

In recent doctrinal shifts, the Court appears to have simply forgotten entry fiction's equitable ends. Previously, in the Chinese Exclusion era through the Cold War era, the Court reiterated rationales for entry fiction rooted in humane treatment of immigrants, for example, allowing disembarkation from pestilent ships, or incentivizing the minimal use of detention. But today the Court simply ignores this explicit aspect of its jurisprudence and allows entry fiction to devolve into a constitutional absence for its own sake.

The Court also ignores vital differences in context, essential to the continuing assessment of legal fictions. The dissimilarities between an early twentieth-century religious boardinghouse and present-day ICE jails fail to register in the Court's contemporary decisions. So, too, do the sea changes in immigration enforcement technologies from the 1880s, to the 1950s, to the present.

The sovereign power to exclude today does not require detention to take place outside normal constitutional scrutiny. As ICE's surveillance of immigrants grows ever pervasive, the need for detention to effectuate sovereign exclusion disappears—and with it, the need for a fiction that shields detention from due process. And far from minimizing the suffering of immigrants, entry

466. 3 BLACKSTONE, *supra* note 1, at *43.

fiction today ensnares them in the black box of an increasingly pervasive and oppressive carceral regime.

This blindness to history and context, equity and function, fiction and rationale cannot stand. Legal fictions are mortal, carrying within them the seeds of their own demise. When a fiction ceases to serve its functions and advances inhumanity rather than equity, the scaffolding must come down, and the doctrine must expire. For entry fiction, that time is now.