ARTICLE

Preventive Detention in American Theory and Practice

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Introduction

It is something of an article of faith in public and academic discourse that preventive detention runs counter to American values and law. This meme has become standard fare among human rights groups[1] and in a great deal of legal scholarship.[2] It treats the past nine years of extra-criminal

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[1] *See, e.g.*, David Fathi, Op-Ed, *Dangers of a preventive detention law*, BOSTON GLOBE, Jan. 1, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/01/01/dangers_of_a_preventive_detention_law/ (criticizing proposals for terrorist preventive detention statute and characterizing sex offender commitment laws as a "narrow exception" to the "rule" espoused by the Court in United States v. Salerno, 481 U.S. 739, 755 (1987), which held that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

[2] *See, e.g.*, Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 77 (2005) (arguing it is more "consistent with our jurisprudence" to retain "threat of punishment," rather than "indefinite" preventive detention, "as a device for controlling behavior" with respect to persons who are able "to control [their]

detention of terrorism suspects as an extraordinary aberration from a strong American constitutional norm, under which government locks up citizens pursuant only to criminal punishment, not because of mere fear of their future acts. This argument further asserts that any statutory counterterrorism administrative detention regime would be a radical departure from this norm, an institutionalization of the aberration that the detention practices of the Bush and Obama years have represented.

The more careful commentators acknowledge that the rule has exceptions — sometimes even many of them.[3] But they describe these exceptions as narrow and limited, deviations from a generally strong rule that the American system tolerates to accommodate exceptional circumstances.

The trouble with such civic mythology is that it is, ultimately, an inaccurate description of past practice, and thus a misleading indicator of the theory on which such practice rested.[4] Our purpose in this paper is to describe just how mythological this particular civic myth is — indeed, to show that nearly every aspect of it is false: Preventive detention is not prohibited by U.S. law or especially frowned upon in tradition or practice. The circumstances in which it arises are not isolated exceptions to a strong rule against it; rather, they are relatively frequent. The federal government and all 50 states together possess a wide range of statutory preventive detention regimes that are frequently used, many of which provoke little social or legal controversy.[5]

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behavior"); Daphne Eviatar, *Debate Intensifies Over Preventive Detention*, WASH. INDEP., July 2, 2009, http://washingtonindependent.com/49457/left-leaning-lawyers-urge-caution-on-detention-policy (quoting New York University School of Law Professor David Golove, who argues that "[o]ne of the core features of liberal democracy is precisely that preventive detention is not allowed . . . The struggle for constitutional liberty is in many ways a struggle against preventive detention").

[3] *See, e.g.*, David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 700 (2009) (noting existing statutory authorities for preventive detention, including, inter alia, pretrial detention and immigration detention).

[4] *Cf.* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002) ("[I]nsofar as the argument assumes that indefinite confinement of one not convicted of a crime is *per se* unconstitutional, that assumption is simply wrong." (citing cases upholding preventive detentions)).

[5] This is not in itself an argument in favor of the preventive detention of terrorists. Both opponents and supporters of counterterrorism preventive detention will find support in the historical and legal legacy described below. Nonetheless, the authors believe arguments both in support of and in opposition to counterterrorism preventive detention authorities

The diverse statutes and regimes authorizing the preventive detention of individuals not convicted of a crime to prevent harms caused by that person range widely in purpose and subject matter:

- Wartime detention powers cover not merely prisoners of war and unlawful enemy combatants but also the nationals of countries against which the United States finds itself in a state of armed conflict;
- The Constitution's Suspension Clause specifically contemplates that Congress might in crises suspend normal constitutional presumptions limiting detention — a power which has been invoked several times in American history;
- Detention authorities ancillary to the criminal justice system include both pretrial detention and the detention of material witnesses not even facing criminal charges;
- The immigration law permits the detention of aliens facing deportation and "arriving aliens" denied entry to the United States;
- State and federal laws permit the detention of the seriously mentally ill, when they pose a danger to themselves or to the public at large, as well as the detention of sex offenders even after they have completed their criminal sentences;
- State and federal statutes provide broad authority to quarantine people who have communicable diseases; and
- States and localities have a variety of protective custody powers, permitting the noncriminal detention — often for their own protection — of, among others, the intoxicated, alcoholics, drug addicts, the homeless, and pregnant drug users.

The best way to understand preventive detention under American law and practice, we submit, is not that some broad principle prohibits it. It is, rather, that American law eschews it *except* where legislatures and courts deem it necessary to prevent grave public harms. The law then tends to unapologetically countenance detention, but only to the extent necessary to prevent those harms.

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should, to the extent that they rely on generalizations about the prevalence and history of preventive detention in American law, rely on an accurate accounting, rather than an idealized civic mythology.

It is also wrong to describe preventive detention powers in American law as narrowly crafted exceptions to a broad constitutional rule. Rather, as we shall show, many of these powers evolved from common law detention powers significantly *broader* than the form that they now take. This point bears emphasis. America's preventive detention powers did not evolve as regrettable, and therefore narrow, byways diverging from a main road of criminal justice detentions. Many of them, rather, predate the Bill of Rights and have coexisted with it for the entirety of the life of the country. Many have narrowed over time in response to abuses — including both individual injustices and discrimination against socially disfavored groups — and concerns that the powers in question authorize more detention than is strictly necessary. Nonetheless, the evolution of the scope of preventive detention powers is not unidirectional. Detention powers may expand or contract as public sentiment evolves concerning how much detention a given problem truly requires. America today, for example, sees dramatically less quarantine and mental illness detention than in decades past. The detention of sexual predators is on the rise, however, as is immigration detention, and the post-September 11 period saw a significant (and controversial) spike in the detention of material witnesses.

In practice, the breadth of preventive detention authorities, we argue, expands and contracts with the actual and perceived need for those authorities. And most legislative and judicial reform and refinement of these statutes over time has sought to develop sorting mechanisms to focus detention powers more clearly on those situations in which detention offers the *only* means of avoiding some great public or private harm. To this end, two recurring structural features have developed in many preventive detention laws.

The first is a kind of multi-pronged trigger for detention. Many detention laws require more than an assertion or proof of dangerousness on the part of a prospective subject. They also require some other specifically prescribed criterion — sometimes more than one. For example, to detain a seriously mentally ill person, the government must prove *both* that the subject has a diagnosable mental illness *and* that he poses a danger to himself or others. In addition, many preventive detention regimes have ongoing oversight mechanisms, elaborated due process systems designed to ensure accuracy and provide detainees significant opportunity to defend themselves. In short, American law evinces little opposition in principle to

preventive detention but a general insistence that laws not authorize more than they need to.

This paper proceeds in four parts. In Part I, we offer a working definition of preventive detention and survey the most commonly discussed preventive authorities in the post-September 11 era: those pertaining to the president's wartime power to confront the enemy. This section intentionally omits discussion of the United States' post-9/11 detention of *terrorist* combatants, since the very purpose of this paper is to theorize a background conceptual framework with which counterterrorism detention can be compared. The implications of our model for terrorist detention are considered in the Conclusion. In Part I, we examine the crisis powers given to the political branches in the Suspension Clause, powers that have not been invoked in America's confrontation with al Qaeda. In Part II, we discuss the authorities that are ancillary to the criminal justice system, arguing that some of these are more overtly preventive in nature than many advocates of the exclusive use of the criminal justice apparatus in counterterrorism acknowledge. In Part III, we describe the sweeping detention powers in American immigration law. In Part IV, we look at health authorities, including the powers of quarantine and the power to lock up the mentally ill. Part IV also considers the related, but (in the national security context) less discussed area of protective custody detentions.

In our Conclusion, we attempt to draw together the common threads of these various authorities and describe in general terms what American law tolerates in the way of non-criminal preventive detention. We also look briefly at the current debate over terrorism detentions in light of this landscape. In the end, what emerges is a relatively simple test for Congress to consider — and the courts to review — in contemplating counterterrorism detention. Does America really need to do it, and if so, how can it do it in a fashion that minimizes erroneous incarcerations? If such detention is necessary and tailored to encompass only the truly dangerous, we argue, it fits relatively comfortably in conceptual terms alongside the many powers state and federal legislatures have given governments to detain citizens and non-citizens alike.[6]

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[6] This is true particularly if the use of this type of counterterrorism detention is confined to noncitizens. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional

I. Wartime and Emergency Detention Powers

It is useful to begin with a working definition of preventive detention, a term that rings ominous to the American ear but which is, in fact, usefully descriptive. Preventive detention, for present purposes, includes any detention of a person by state or federal authorities that is *(1) not pursuant to conviction of a crime and (2) undertaken in order to prevent some future harm*. Preventive detention may occur within the criminal justice system or outside of it, and the harms it seeks to avoid include harm to individuals, to the state, or even to the subject of detention himself. In other words, we include under the rubric of preventive detention any situation in which government locks up an unconvicted person (or a person who has completed his or her criminal sentence) to prevent some future harm either to a person or to some important governmental interest. The wartime powers of the military offer some of the most vivid — though far from the only — examples of preventive detention authorized in American law.

A. The Enemy Combatant

Despite the post-September 11 controversies over counterterrorism detentions, the power to capture and hold enemy combatants has not traditionally been a subject of dispute. The Supreme Court has made this clear: "by universal agreement and practice, [these powers] are important incident[s] of war."[7] As the power to detain the enemy derives from and inheres in the larger power to wage war, it exists even in the absence of an explicit statutory authorization to detain.[8] However, what was once a plenary power over a captured adversary, in modern American practice, is meaningfully constrained by international law, domestic regulation, and — to a lesser but growing degree — judicial decisions.

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tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, §9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.").

[7] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942) (internal quotation marks omitted)).

[8] *See id.* at 521 ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict . . .").

Philosophically, the Supreme Court has explained, the power to detain derives from, and is limited by, the assumption that:

> [t]he alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.[9]

The soldier, it is thus presumed, will continue to engage in armed hostilities against the United States as long as a state of war makes it his duty to do so. The natural corollary is that once the sovereign to which he owes his allegiance ceases to be at war with the United States, his duty to make war ceases and the preventive rationale for detention evaporates.

1. Requirements for Detainability

In brief, the required conditions for detention of the combatant are twofold: First, that a state of armed conflict exists;[10] and second, that a member of the enemy forces is captured and identified as such.[11] Prisoners

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[9] Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950).

[10] All of the limitations placed on combatant detention authorities by the Third Geneva Convention apply in an international armed conflict between signatories. Common Article 3 applies even in a non-international armed conflict on the territory of a signatory.

[11] In the case of uniformed members of an organized armed force, this identification is usually trivial. Soldiers in regular forces, after all, wear uniforms and identify themselves and their affiliations. In the case of fighters who do not comply with the relevant requirements of the Third Geneva Convention, the identification process has proven extremely tricky. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (requiring members of "militias" and other irregular forces to meet several requirements, including having "a fixed distinctive sign recognizable at a distance," in order to receive the protections the Convention grants to those eligible for prisoner of war status). The Convention requires that states vest the decision to treat a detainee as an unlawful combatant in a "competent tribunal." *Id.* art. 5. But it does not specify standards of evidence or any details of the review process that such tribunals should employ.

of war[12] may be detained for the duration of hostilities but, in the absence of allegations of war crimes, are immune from criminal process for their acts of combat.[13] Unprivileged belligerents — i.e., persons who have committed a belligerent act but do not meet the conditions for prisoner of war status[14] — may similarly be detained for the duration of hostilities but may also face trial for their unprivileged belligerent acts (for example, the killing of soldiers) and for violations of the law of war.[15] The authority to detain the prisoner of war ends upon the cessation of hostilities,[16] though *punitive* detention beyond the cessation of hostilities is permitted where the detainee has been tried and convicted of unprivileged belligerent acts or violations of the law of war.[17]

2. Historical Evolution of Enemy Combatant Detention

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[12] *See id.* art. 4 (defining classes of persons eligible for prisoner of war status).

[13] *See id.* arts. 21, 118 (permitting POW internment but requiring repatriation of prisoners of war "after the cessation of active hostilities"); *see also In re* Yamashita, 327 U.S. 1, 11 (1946) ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war."); *Ex parte* Quirin, 317 U.S. 1, 26 (1942) (noting that President, as commander in chief, is vested with power to carry into effect laws passed by Congress defining and punishing violations of the law of nations).

[14] *See supra* note 11 (noting Article 5's requirement that this determination be vested in a "competent tribunal").

[15] *See* INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 384 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) ("[O]nly combatants have the right to participate directly in hostilities. . . . Upon capture, combatants entitled to prisoner-of-war status may neither be tried for their participation in the hostilities nor for acts that do not violate international humanitarian law. This is a long-standing rule of customary international humanitarian law."); *see also* George P. Fletcher, *On the Crimes Subject to Prosecution in Military Commissions*, 5 J. INT'L CRIM. JUST. 39, 41–44 (2007) (arguing, in the context of the Military Commissions Act of 2006, that "[i]f an unprivileged combatant kills someone," it should be regarded as a simple murder and not as "a violation of the law of war," but expressing no such objection to unprivileged combatants' prosecution for the "classic war crime[s]" of pillaging, employing poison, and perfidy).

[16] Third Geneva Convention, *supra* note 11, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").

[17] *Id.* art. 119 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence"); *See also* Johnson v. Eisentrager, 339 U.S. 763 (1950) (upholding punitive imprisonment of Germans convicted of providing surreptitious military assistance to Japanese forces in China after the unconditional surrender of the German government).

a. Development of the International Law of Combatant Detention

Enemy combatant detention is as old as warfare — and wartime detention illustrates pointedly the tendency of detention authorities to narrow over time. In premodern times, the victor's power over the captured enemy was plenary. Male prisoners were killed, while captured women and children could be adopted as full members of the victorious tribe.[18] Once the development of settled agricultural settlements and the concomitant need for manpower made slaves a valuable commodity, captives in warfare (including civilians) were enslaved and became the chattel of the victor,[19] though the prisoners could still be killed at the whim or convenience of their masters.[20] The maxim *inter arma silent leges* suggests that the Romans did not consider their wartime conduct subject to law.[21] According to Grotius, "[t]he right of putting prisoners of war to death, was so generally received a maxim, that the Roman Satirist has founded an adage upon it, and said, 'that when you can sell a prisoner for a slave, it would be absurd to kill him.'"[22]

By medieval times, the code of chivalry required feudal knights to respect the lives of captured adversaries, but only those of noble status. As such, one scholar writes, "the 'artillerymen' of that time such as archers and crossbowmen [were] regarded with contempt by the aristocracy, and were sometimes subjected to wholesale massacres."[23] Nor did civilians qualify for any protection under the feudal code until the emergence of royal

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[18] *See* ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 44 (1976).
[19] INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 4 (Jean Pictet ed. 1960).
[20] *See* ROSAS, *supra* note 18, at 44; *see also* PAUL J. SPRINGER, AMERICA'S CAPTIVES: TREATMENT OF POWS FROM THE REVOLUTIONARY WAR TO THE WAR ON TERROR 8 (2010).
[21] *See* GEOFFREY BEST, WAR AND LAW SINCE 1945 3 (1994); *see also* SPRINGER, *supra* note 20, at 9 (noting Romans "used prisoners for labor, in rowing galleys, or in gladiatorial contests").
[22] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 328 (A.C. Campbell trans., 1901) (1625).
[23] ROSAS, *supra* note 18, at 45.

regulations of the conduct of war in the fourteenth century,[24] though enslavement of *Christian* prisoners was forbidden in 1179 by the Third Lateran Council.[25] Instead, captors derived economic value from prisoners of war by demanding a ransom for their release, especially prisoners of high birth. Interestingly, prisoners for whom ransom was sought were not always detained; they could be "released on parole forbidding them to take part in hostilities against the captor until ransom was paid."[26] Ransom, which occurs in the *Iliad* as a feature of Greek wartime practice,[27] was still common in the seventeenth century; Grotius notes that the right to detain prisoners for ransom was sometimes "allowed to the individuals, who took them, except where the prisoners were personages of extraordinary rank," in which case they were considered prisoners of the state.[28]

In the first half of the seventeenth century, treaties first began to provide for the ransom-free release of all prisoners at the cessation of hostilities, a practice that came to predominate by the eighteenth century.[29] For example, in Article 24 of the 1785 Treaty of Amity and Commerce between Prussia and the United States, the parties pledged to "prevent the destruction of prisoners of war" by forgoing such practices as "sending them into distant and inclement countries," "crouding them into close and noxious places," confining them in "dungeons, prison-ships, [or] prisons," or putting them in irons or other physical restraints. It also required that they be "lodged in barracks as roomly and good as are provided by the party in whose power they are for their own troops," be allowed to receive packages and send mail, and that a "commissary of prisoners" be granted access to the soldiers to ensure their well-being.[30] In the provisions of this

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[24] *Id.* at 46.

[25] *Id.* at 47. During the Crusades, there were periodic prisoner exchange agreements between Crusaders and Muslims. Grotius noted that "[i]t has long been a maxim, universally received among the powers of Christendom, that prisoners of war cannot be made slaves." GROTIUS, *supra* note 22, at 346. He also noted that Muslims, in their internecine wars, observed the same practice. *Id.*

[26] *Id.*

[27] *See* HOMER, THE ILIAD 17 (Julie Nord ed., Samuel Butler trans., Dover Publications 1999) ("Would you have yet more gold, which some Trojan is to give you as a ransom for his son, when I or another Achaean has taken him prisoner?").

[28] GROTIUS, *supra* note 22, at 347.

[29] *See* ROSAS, *supra* note 18, at 53–54. See *id.* at 56 for other examples of such treaties.

[30] Treaty of Amity and Commerce, art. 24, U.S.-Prussia, July 9-Sept. 10 1785, 8 Stat. 84. Interestingly, this treaty's provisions governed American detention of captured German soldiers (and vice versa) as late as World War I, since the Hague Conventions were not legally binding on the belligerents. SPRINGER, *supra* note 20, at 135. The treaty threatened

treaty, one can see the outlines of the later requirements of the Third Geneva Convention.

In the second half of the nineteenth century, countries began passing national legislation on the treatment of prisoners. By far the most famous and influential was the American "Lieber Code," issued to United States armies in the field by order of the Secretary of War on April 24, 1863, as General Order No. 100. The Lieber Code, drafted by German immigrant, former soldier, and Columbia law professor Francis Lieber, was copied by Prussia, France, and Great Britain and strongly influenced the subsequent Hague and Geneva Conventions.[31] Lieber's code "was the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."[32] For present purposes, the Code is significant because it defined the classes of combatants entitled to prisoner of war status[33] and provided that "[p]risoners of war are subject to confinement or imprisonment such as may be deemed necessary

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to impose a significant strain on U.S. logistical capacity, since it provided "that prisoners in any future conflict would be held in the United States or Prussia, not a third country," including the European countries on whose soil the war on the Western Front was fought. *Id.* However, the war ended before plans to send the German prisoners to the U.S. could actually be implemented. *Id.* at 136, 140.

[31] *See* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 1 (1983).

[32] *Id.* at 1–2.

[33] The Code provided the following definition:

> A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.
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> All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

Francis Lieber, Instructions for the Government of Armies of the United States in the Field art. 49 (Gov't Printing Office 1898) (1863) (officially published as U.S. War Dep't, General Orders No. 100 (Apr. 24, 1863) [hereinafter General Orders No. 100].

on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety."[34] The Code's requirements thus incorporate the core limitation that, as noted above, is characteristic of modern preventive detention regimes in American law: that detention is only permissible to the extent necessary to *prevent* future harms. The Lieber Code also required that prisoners be provided with "plain and wholesome food" and "treated with humanity,"[35] and that the Union Army provide captured wounded enemies with medical treatment.[36] However, the Code did allow that "[a]ll prisoners of war are liable to the infliction of retaliatory measures" and entitled "a commander . . . to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners."[37]

The first major set of international conventions codifying these detention powers were the Hague Conventions of 1899 and 1907. These required that prisoners of war "be humanely treated" and could "only be confined as an indispensable measure of safety."[38] It set forth detailed requirements for the upkeep[39] and conditions of confinement of prisoners of war. Finally, it required that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible."[40] After World War I, the Hague regime was augmented by the adoption of the Geneva Convention of July 27, 1929 Relative to the Treatment of Prisoners of War. Article 3 of the Convention provided, in general terms, that "[p]risoners of war have the right to have their person and their honor respected," foreshadowing Common Article 3 of the Geneva Conventions of 1949. It listed the rights and obligations of POWs in great detail and for

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[34] *Id.* art. 75.
[35] *Id.* art. 76.
[36] *Id.* art. 79.
[37] *Id.* arts. 59, 60.
[38] Hague Convention With Respect to the Laws and Customs of War on Land, arts. 4, 5, July 29, 1899, 32 Stat. 1803. However, the Convention of 1907, which superseded the 1899 Convention, differed in one relevant respect: It "would apply 'only if all the belligerents are parties to the Convention.'" SPRINGER, *supra* note 20, at 122.
[39] In contrast to the 1785 Treaty of Amity between the U.S. and Prussia, the 1899 Hague Convention required the captor state to maintain its prisoners of war out of its own resources. *See* Hague Convention, *supra* note 38, art. 7.
[40] Hague Convention, *supra* note 38, art. 20.

the first time prohibited reprisals against them,[41] which was an important innovation.[42]

Despite these interwar international legal developments, the Second World War proved to be a nadir for humanitarian law of all varieties, and the regulations governing the treatment of prisoners of war was no exception. Germany and Japan committed grotesque violations of their international obligations with regard to captured enemy combatants as a matter of official policy, as amply documented by the postwar tribunals. On the basis of this wartime experience, it was determined that an upgraded convention on the treatment of prisoners of war was needed. The result was the Geneva Conventions of 1949.

b. Combatant Detention in American Wars

This wartime power to detain the enemy is not merely hypothetical. Rather, its development has been driven by a long history of actual American practice, featuring the detention of vast numbers of enemy personnel dating back to the founding.[43] In the Revolutionary War, "the Continental Army, various state militias, and naval forces captured more than 14,000" British and Hessian soldiers and sailors.[44] While the exact number is unclear, thousands more were taken in the War of 1812, though more prisoners were taken by the British than the Americans.[45] Vast numbers of Union and Confederate prisoners were held prisoner by the other side during the Civil War, and thousands died in squalid and neglected prison camps. Union forces took 220,000 Confederate prisoners, of whom more than 26,000 died in captivity; Confederate forces took 211,400 Union prisoners, of whom more than

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41 Convention Relative to the Treatment of Prisoners of War, art. 2, July 27, 1929, 47 Stat. 2021. *Cf.* General Orders No. 100, *supra* note 33, art. 59 ("[P]risoners of war are liable to the infliction of retaliatory measures.")

42 *See* ROSAS, *supra* note 18, at 77 (highlighting important innovations of the Convention of 1929).

43 *See* SPRINGER, *supra* note 20; for more on this history, see generally ROBERT C. DOYLE, THE ENEMY IN OUR HANDS: AMERICA'S TREATMENT OF ENEMY PRISONERS OF WAR FROM THE REVOLUTION TO THE WAR ON TERROR (2010).

44 DOYLE, *supra* note 43, at 12.

45 *Id.* at 67.

30,000 died in captivity.[46] Of the tens of thousands of Union prisoners who died in Confederate hands, more than 12,000 died in the infamous Andersonville, Georgia prison camp, over only nine months that that facility was in operation.[47] During the Spanish-American War, U.S. forces in Cuba captured more than 23,000 Spanish soldiers at the surrender of Santiago.[48] They were then shipped back to Spain at American expense, in accordance with the terms of surrender, as were the 14,000 Spaniards taken prisoner after the surrender of the Spanish garrison at Manila.[49]

During World War I the United States initially served as a "Protecting Power," trusted by both sides to inspect camps and distribute supplies to prisoners.[50] Once it entered the war, General Pershing's American Expeditionary Force began to take large numbers of German POWs, capturing 62,952 during 1917-18.[51] By the signing of the November 11, 1918 armistice, the United States held 48,280 Germans in makeshift prisons, with the balance turned over to the British or French.[52] The number of Germans captured in World War II was far vaster. Between 3 and 5 million Germans were taken prisoner by U.S. forces during the war,[53] of whom more than 425,000 were sent to the United States.[54] Because of the general unwillingness of Japanese soldiers to surrender, among other factors, U.S. forces took fewer than 20,000 Japanese prisoners in the Pacific theater and sent only 5,000 to the United States for confinement there.[55]

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[46] *Id.* at 90.
[47] SPRINGER, *supra* note 20, at 96.
[48] *Id.* at 127. According to Robert Doyle, in total U.S. forces captured "[n]early 26,000 Spaniards" as prisoners of war in Cuba during the war. DOYLE, *supra* note 43, at 142.
[49] SPRINGER, *supra* note 20, at 127–28.
[50] *Id.* at 134.
[51] DOYLE, *supra* note 43, at 366.
[52] *Id.* at 166.
[53] SPRINGER, *supra* note 20, at 146. The exact number is unclear because "many German prisoners were captured, disarmed, and immediately released at the end of the war rather than processed into POW camps." *Id.* "The peak number of prisoners *in U.S. custody* was reached in June 1945, when almost 3 million POWs were in captivity in Europe." *Id.* at 146–47 (emphasis added).
[54] DOYLE, *supra* note 43, at 179. The number of Italian prisoners taken by the U.S. was far lower, around 50,000. SPRINGER, *supra* note 20, at 147.
[55] SPRINGER, *supra* note 20, at 148. Highlighting "the paucity of Japanese prisoners taken during World War II" is the fact that the Allies collectively captured only 38,666 Japanese

More than 150,000 North Korean and Chinese soldiers were taken prisoner by UN forces in the Korean War.[56] During the Vietnam War, "American commanders abdicated responsibility for POW treatment by turning virtually all captives over to the care of the South Vietnamese government . . . ."[57] By the end of U.S. involvement, the South Vietnamese army "held 37,540 POWs, including 9,971 [North Vietnamese Army] and 26,928 Vietcong."[58] In the 1991 Gulf War, coalition forces took 69,822 Iraqi POWs; 60,000 of these were captured by the United States, the largest number of POWs taken by any nation's combat forces since World War II.[59] Iraqi prisoners were eventually turned over to Saudi Arabia for detention.[60] More than 80,000 Iraqi soldiers were captured during the initial invasion phase of Operation Iraqi Freedom in March-April of 2003.[61] Together, these figures illustrate the prodigious use the U.S. government has made of this power over the generations.

3. Conclusion

The legal power to detain the enemy combatant neatly illustrates several of the general currents running through preventive detention in American practice. First, as this overview shows, the power is not so much an exception to a broad constitutional norm as a track that runs parallel to the criminal justice system, operating according to its own distinctive rules, which evolved without reference to criminal justice norms. Importantly, these rules have not functioned as a slippery slope by which narrow detention powers have grown in scope and menace to

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prisoners, compared to more than 1.5 million Japanese military dead (including suicides as well as deaths by enemy action). DOYLE, *supra* note 43, at 209.

[56] SPRINGER, *supra* note 20, at 168; *cf.* DOYLE, *supra* note 43, at 250 ("more than 130,000"). Responsibility for the maintenance of the prisoners was handed to the United States in September 1950. SPRINGER, *supra* note 20, at 168.

[57] SPRINGER, *supra* note 20, at 180.

[58] *Id.* at 189; *see also* DOYLE, *supra* note 43, at 272 (stating South Vietnam held 35,665 enemy prisoners of war at the end of 1971, of whom 13,365 had been captured by U.S. forces).

[59] DOYLE, *supra* note 43, at 296–97; SPRINGER, *supra* note 20, at 193.

[60] DOYLE, *supra* note 43, at 297.

[61] SPRINGER, *supra* note 20, at 197.

liberty over time. Rather, to the contrary, broad authorities to capture, kill, and ransom prisoners have narrowed over centuries of refinement and now focus on detaining under humane and respectful conditions only those people whom it is necessary to detain, and only for as long as detention remains necessary.

B. The Enemy Alien

American law does not stop at permitting the long-term detention of the enemy fighter. A lesser known authority, still in force, also authorizes the detention of the nationals of countries with which the United States finds itself at war. This power, like the power to detain enemy combatants, is overtly preventive in nature and not especially discriminating. And like the power to detain the combatant, it evolved from far broader powers to hold prisoners in wartime.

1. Requirements for Detainability

The President's wartime authority for dealing with alien citizens of enemy powers is set out in Chapter 3 of Title 50 of the U.S. Code, colloquially known as the Alien Enemies Act (or the Enemy Aliens Act). Specifically, 50 U.S.C. § 21 authorizes the President to detain an alien under the following circumstances: First, a state of war or threatened hostilities must exist, and not just any such state will do. The powers are triggered only in case of "a declared war between the United States and any foreign nation or government, or [an] invasion or predatory incursion . . . attempted, or threatened against the territory of the United States by any foreign nation or government . . . ."[62] By the statute's terms, they could not be invoked in a conflict with a non-state actor. Nor could the Act's powers be activated in a conflict with a state that has not attacked or threatened attack on the United States, absent a formal declaration of war.[63] In practice, the law has been invoked in circumstances of declared war only. Second, the subjects must be "natives, citizens, denizens, or subjects of the

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[62] 50 U.S.C. § 21 (2006).

[63] One scholar argues that "The formality of declaring war, with its accompanying high transaction costs, provides what may be the only significant safeguard in the Alien Enemy Act for protecting individual liberty, for . . . the limited judicial review available under the Act does not extend to claims that the President abused his discretion." J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1405–06 (1992). No case has yet addressed "whether a court would review the President's determination that a particular hostile act constituted an 'invasion or predatory incursion' triggering the" Act. *Id.* at 1410.

hostile nation or government, being of the age of fourteen years and upward . . . ."[64]

The statute on its own requires no individualized determination of dangerousness or threat. The government may subject even qualifying aliens who demonstrate no active hostility to measures instituted pursuant to the law. Merely by being from a particular country, people are "liable to be apprehended, restrained, secured, and removed as alien enemies."[65] The statute authorizes the President to determine "the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."[66] Under the statute, the President must make a public proclamation to trigger these authorities.[67] Sections 22 to 24 discuss ancillary procedures tasking federal judges and marshals to assist with implementing measures under the Act, but they do not constrain the President's discretion under § 21.[68] Judicial review has historically been limited to assessing whether the conditions for detainability listed above have been met, and whether the detention complies with the terms of the presidential proclamation triggering the Act.[69]

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[64] 50 U.S.C. § 21.

[65] *Id.*

[66] *Id.*

[67] Such proclamations were issued in the War of 1812, World War I, and World War II**.** *See infra* notes 74 (War of 1812), 76 (World War I), 90 (World War II).

[68] Federal judges are charged with issuing, upon complaint that the liberty of an enemy alien within the jurisdiction is "to the danger of the public peace or safety," a warrant for the appearance of the alien. 50 U.S.C. § 23. The statute then provides for "a full examination and hearing on such complaint"; and, "sufficient cause appearing, [the] alien [is] to be removed out of the territory of the United States," ordered to give sureties or "otherwise . . . restrained . . . . " Aliens "not chargeable with actual hostility" are to be given time to deal with their "goods and effects" and depart voluntarily, "as may be consistent with the public safety." *Id.* § 22.

[69] *See supra* note 63 (describing two statutory conditions for presidential invocation of powers under the Act); see also United States *ex rel.* Jaegeler v. Carusi, 342 U.S. 347, 348 (holding that since "statutory power [under the Act] ended when Congress terminated the war with Germany" in 1951, German enemy aliens could no longer be removed pursuant to a presidential proclamation issued under the Act); *infra* note 74 (discussing Neuman and

2. Historical Roots and Evolution of Alien Enemy Detention

As noted above, the President's power to detain alien enemies during wartime rests on explicit statutory authority — not, in contrast to combatant detention, as an incident to the political branches' constitutional war powers.[70] This section first describes the history of that statute, the Alien Enemies Act of 1798. It then considers the historical roots of the power to detain enemy aliens during wartime and the permissibility of this practice under modern international law.

a. The History of the Alien Enemies Act

The alien enemies authorities have a rather disreputable origin. They were originally enacted in 1798 along with three other statutes, known collectively as the Alien and Sedition Acts.[71] Only the alien enemies provision has endured, and largely intact. Other than a 1918 amendment striking out language restricting the section's application to males only,[72] there have been no significant revisions.

The Act has also seen a great deal of use over the decades and survived repeated judicial challenges. James Madison detained British citizens under the Alien Enemies Act during the War of 1812. On February 23, 1813, his State Department issued an order by which "enemy aliens, residing or being within forty miles of tide water, were required . . . to retire to such places, beyond that distance from the tide water" to a place

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Hobson's account of *United States v. Thomas Williams*, in which a British enemy alien was freed on grounds that his detention did not comport with the terms of President Madison's proclamation).

[70] *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion) ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

[71] The other acts, the Sedition Act and acts concerning naturalization and the deportation of alien citizens or subjects of friendly nations, expired in 1800. The Alien Act, which had granted the President the unreviewable discretion to deport friendly aliens, had never been enforced, and President Jefferson upon taking office pardoned all those convicted under the Sedition Act. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 91 (2003). The Alien and Sedition Acts are to this day one of the great historical stains on the administration of John Adams.

[72] An Act to Amend Section Four Thousand and Sixty-Seven of the Revised Statutes by Extending its Scope to Include Women, Pub. L. No. 131, 40 Stat. 531 (1918).

designated by federal Marshals.[73] Marshals were authorized to arrest enemy aliens who did not comply with the order.[74]

In World War I, thousands of enemy aliens were interned under the Act. (Many others were detained and deported under immigration authorities.) On April 6, 1917, President Wilson issued a proclamation invoking the Alien Enemies statute with regard to German citizens in the United States.[75] The proclamation established rules restricting the conduct of German aliens[76] and provided that an enemy alien who violated any regulation, "or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President" was "subject to summary arrest . . . and confinement . . . ."[77] Subsequent regulations extended the restrictions to citizens of Austria-Hungary[78] and required alien enemies to register and carry on their persons at all times

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[73] Proclamation of Feb. 23, 1813, quoted in Lockington's Case (1813), *in* REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA 271 (Frederick Charles Brightly ed., 1851) [hereinafter Brightly]. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2d 39, 40–41 nn.10–11 (2005) for an explanation of the background, reporting, and procedural posture of Lockington's Case.

[74] Brightly, *supra* note 73, at 271. In *Lockington's Case*, a Pennsylvania three-judge panel divided on the question of whether an enemy alien was "entitled to a determination of the lawfulness of their detention"; two "concluded that Lockington," a British subject residing in Philadelphia, was "lawfully detained" while the third did not believe that habeas was available to persons detained by the executive under the statute. Neuman & Hobson, *supra* note 73, at 41. Neuman and Hobson describe another alien enemy case from the War of 1812, *United States v. Thomas Williams*, in which Chief Justice Marshall (riding circuit in Virginia) ordered Thomas Williams, a British alien enemy detained by the Marshal of Virginia, freed on the ground that Williams' detention was not authorized by the terms of Madison's proclamation. Specifically, the Marshal had not assigned him a place to which he was to report, but had simply arrested him as an enemy alien. The court compared the Marshal's actions with the terms of the presidential Proclamation, but did not consider the constitutionality of the Act itself. As Neuman and Hobson note, "the writ [of habeas corpus] protected the individual's liberty against a subordinate official's action in excess of delegated authority [under the Act], not a constitutional or statutory violation." *Id.* at 43.

[75] 40 Stat. 1651–52 (1917).

[76] They were prohibited from possessing arms or radio transmission equipment; approaching or being in the vicinity of U.S. military installations; writing or publishing attacks on the United States; abetting hostile acts against the U.S. or giving aid and comfort to the enemy; entering or departing the United States without permission. *Id.*

[77] *Id.* at 1652.

[78] *Id.* at 1729–31.

their registration cards.[79] After the statute was amended in 1918 to apply to women as well as men, Wilson issued another proclamation requiring female enemy aliens to comply with the regulations.[80] In total, "fewer than 6,000 of [the] enemy alien population, which included 480,000 Germans, and [over 3.5 million] Austro-Hungarians," were interned, of whom more than half were released on parole.[81] David Cole puts the number of enemy aliens arrested during WWI at 6,300 and says that of those, 2,300 were held in internment camps.[82]

In one poignant case underscoring the harsh nature of detention authority under the act, a federal district judge in Mississippi denied a writ of habeas corpus to one Willis Fronklin, a 19 year-old man who had immigrated to the United States from Hamburg when he was 4.[83] The judge wrote that "[u]nder [the Alien Enemies Act] the discretion is vested in the President to determine the manner and degree of restraint to which alien enemies will be subjected." He "excluded all evidence of any acts or utterances with reference to the loyalty of petitioner," reasoning that "the only question for determination on this hearing is whether he is a citizen of the United States or is a German alien enemy. Despite the fact that Fronklin had lived in Mississippi for 15 years and had no memory of Germany, the judge pronounced him "a German alien enemy," concluding that he did not believe that "this action of the President, exercised in the manner provided by law, is subject to review by the courts."[84]

Following the Japanese attack on Pearl Harbor, the Roosevelt administration immediately invoked the act once again. On December 8, 1941, Roosevelt issued proclamations as required under the statute, regarding German, Japanese, and Italian enemy aliens.[85] The proclamations vested "the power of arrest, detention and internment of alien enemies in the Canal Zone," Hawaii, and the Philippines in the military commanders of those territories, and provided that "in the continental United States, Alaska, Puerto Rico and the Virgin Islands"

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[79] *Id.* at 1718.
[80] 40 Stat. 1772–73 (1918).
[81] Robert R. Wilson, *Treatment of Civilian Alien Enemies*, 37 AM. J. INT'L L. 30, 42 (1943).
[82] COLE, *supra* note 71, at 92.
[83] *Ex parte* Fronklin, 253 F. 984, 985 (1918). Presumably out of desperation, Fronklin told the court that he had invented the story of his childhood immigration to "conceal his obscure parentage" and that he was in fact born in the U.S. to gypsy parents.
[84] *Id.*
[85] 6. Fed. Reg. 6321–25 (Dec. 10, 1941).

"[a]lien enemies deemed dangerous to the public peace or safety of the United States by the Attorney General or the Secretary of War . . . are subject to summary apprehension."[86] Aliens arrested under this authority were "subject to confinement in such place of detention as may be directed by the officers responsible. . . ."[87] The proclamations also provided extensive restrictions on the conduct and movement of enemy aliens. A subsequent proclamation in January 1942 transferred authority over alien enemies in the continental United States from the Attorney General to the Secretary of War.[88]

The FBI had prepared a "custodial detention list" of "potentially dangerous" Germans, Italians and Japanese citizens in the United States, and on the night of December 7 immediately arrested "the most dangerous" of them.[89] More than 9,000 such persons were detained over the next few months.[90] Roosevelt initially considered interning all German nationals in the United States, but was dissuaded by Attorney General Francis Biddle.[91] Biddle established more than 100 Enemy Alien Hearing Boards to conduct individualized determinations concerning each enemy alien taken into custody.[92] Of the 9,121 detainees, the Boards determined that 4,132 should be interned, 3,716 paroled, and 1,273 released.[93] As the war progressed, the number of enemy aliens interned gradually decreased, as larger numbers were paroled or released altogether.[94] These figures do not include the 40,000 Japanese citizens and 70,000 U.S. citizens of Japanese ancestry living in the western United States who were forced into internment camps

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[86] *Id.* at 6322–23.
[87] *Id.*
[88] 7 Fed. Reg. 55 (Jan. 3, 1942).
[89] GEOFFREY STONE, WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT 65 (2007).
[90] *Id.* More than 5,000 were Japanese nationals, 3,250 were German nationals, and 650 were Italian nationals. Stone notes that this equated to 1 of every 923 Italian aliens in the U.S., 1 of every 80 Germans, and 1 of every 8 Japanese.
[91] *Id.* at 65.
[92] *Id.* at 65–66; Sidak, *supra* note 63, at 1417.
[93] Sidak, *supra* note 63, at 1417. Another 700 were released over the next year. The number interned fell to 2,525 by June 1944. *Id.*
[94] *Id.*

during the war.[95] Those detentions were not conducted pursuant to the statutory enemy alien authorities discussed here. Rather, they took place under Executive Order 9066,[96] which authorized the creation of military exclusion districts at the discretion of the Secretary of War and military commanders.[97]

The World War II era also saw direct Supreme Court consideration of the constitutionality of detention under the Act, in the 1948 case of *Ludecke v. Watkins*.[98] In *Ludecke*, the Court, in an opinion by Justice Frankfurter, authorized the removal pursuant to a proclamation[99] issued under the Act of a German citizen,[100] even though the action took place after the cessation of hostilities. The Court held that the Act precluded judicial review of the President's actions within the broad discretionary realm granted him by the statute.[101] It also rejected the claim that the power expired with active hostilities, noting that "power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops."[102] And the Court upheld the constitutionality of the Act against a due process challenge: "The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."[103]

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95 COLE, *supra* note 71, at 99. Cole writes that Rehnquist, in his book *All the Laws but One*, implied that internment would have been constitutionally justified had it been limited to noncitizens, a proposition with which Cole disagrees. He also notes that Congress eventually paid reparations to citizens and resident alien Japanese nationals who were interned.

96 Executive Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

97 *See also* Korematsu v. United States, 323 U. S. 214 (1944) (explaining legal basis for Korematsu's arrest). Even though Japanese internment was not carried out under the Alien Enemies Act, it is nonetheless interesting that Congress did not repeal or modify the Act given the subsequent repudiation of internment and revulsion at its having been perpetuated under color of law.

98 335 U.S. 160 (1948).

99 Proclamation No. 2655, 10 Fed. Reg. 8947 (July 18, 1945).

100 Ludecke was a disgruntled Nazi who was sent to a concentration camp because of internal Party dissension. After escaping, he published a book entitled, *I Knew Hitler: The Story of a Nazi Who Escaped the Blood Purge*, which he dedicated to Ernst Roehm (late head of the SA). In 1939, he applied for naturalization as a U.S. citizen (the application was denied). *See Ludecke*, 335 U.S. at 162–63 n.3.

101 *Id.* at 167–69.

102 *Id.* at 167.

103 *Id.* at 171.

Despite *Ludecke*'s blow to judicial review of presidential actions within the authority granted by the Act, other cases from the era support the proposition that "habeas will lie to challenge the detainee's status as an enemy alien," in addition to the conformity of lower officials' actions with the President's proclamations (as in *Lockington's Case*).[104] In 1952, for example, the Court rejected the removal under a proclamation of President Truman's, which had authorized removal of interned alien enemies, of a German national who had, at that point, been interned for a decade.[105] The court held that "[t]he statutory power of the Attorney General to remove petitioner as an enemy alien" had ended with the 1951 joint resolution terminating the state of war with Germany.[106]

Finally, it is worth noting that the *length* of detention under the Act could be very substantial. According to J. Gregory Sidak, "for the ten Alien Enemy Act cases from World War II that are reported in the *United States Reports*, *Federal Reports*, or *Federal Supplement*, and for which the published decisions contain discussion of the relevant dates . . . the average length of time between the alien's arrest and the issuance of the highest court order concerning his petition for a writ of habeas corpus was 2,095 days, with actual times ranging from a low of 1,065 days to a high of 3,702 days."[107]

b. Historical Evolution of the Power to Detain Alien Enemies in Wartime

Again, the Enemy Aliens Act is best understood as a narrowed variant of an age-old wartime power: to detain the civilian nationals of belligerent states. Under Roman law, "civilians of enemy nationality living in the territory of belligerent states" were "treated as slaves."[108] In the

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[104] Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 994 (1998) (citing cases reviewing "whether war has been declared, whether the detainee is an alien," and other elements of detainability under the Act).
[105] United States *ex rel.* Jaegeler v. Carusi, 342 U.S. 347 (1952).
[106] *Id.* at 348. The Court consequently directed the District Court to direct his release from custody. *Id.* at 349.
[107] Sidak, *supra* note 63, at 1422–23.
[108] INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 232 (Jean Pictet ed. 1958) [hereinafter GENEVA CONVENTIONS COMMENTARY].

seventeenth century, they were "regarded as prisoners of war."[109] By the eighteenth and nineteenth centuries, states had begun signing treaties to protect civilians abroad in the event of war. For example, the aforementioned 1785 treaty between the United States and Prussia provided, in case of war, for the free and unmolested departure of merchants with their property and for the unmolested continuance "in their respective employments" of "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen unarmed . . . ."[110] Article 26 of Jay's Treaty, concluded in 1794 by the United States and Great Britain, provided that "[i]f at any Time a Rupture should take place (which God forbid) between His Majesty and the United States," merchants and other citizens of each country residing in the other's territory were to be allowed to remain and continue their trade unmolested. "[I]n case their Conduct should render them suspected," they could be removed, but were to be allowed twelve months to depart, unless they had violated the law.[111]

By 1914, the "liberal concept," that resident citizens of hostile belligerents "were not to be interned" unless necessary, was sufficiently well established by general and consistent practice that, according to the Commentary to the 1949 Convention, the authors of the Hague Regulations of 1907 felt no need to explicitly endorse it.[112] Nonetheless, as one contemporary commentator noted — anticipating states' practices during both World War I and World War II — "[n]otwithstanding the general practice of civilized nations to allow alien enemies an option of remaining in the belligerent's territory during good behavior, or of withdrawing within a specified period, neither the detention nor the expulsion of such persons would be a breach of international law."[113] In the 1930s, the International Committee of the Red Cross prepared a Draft Convention on the rights of such persons in wartime and the conditions under which they could be interned,[114] but its entry into force was

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[109] *Id.*

[110] Quoted in Wilson, *supra* note 81, at 33.

[111] Jay's Treaty (Treaty of Amity, Commerce, and Navigation of Nov. 19, 1794), *in* 12 Treaties and Other International Agreements of the United States of America, 1776–1949 13, 29 (Charles Bevans ed., 1968).

[112] GENEVA CONVENTIONS COMMENTARY, *supra* note 108, at 232.

[113] ARTHUR PAGE, WAR AND ALIEN ENEMIES 11 (1914).

[114] INT'L COMM. OF THE RED CROSS, DRAFT INTERNATIONAL CONVENTION ON THE CONDITION AND PROTECTION OF CIVILIANS OF ENEMY NATIONALITY WHO ARE ON

prevented by the outbreak of World War II in 1939.[115] And World War II, of course, proved a major setback for the humane and enlightened treatment of such persons, as countries interned widely, often under appalling conditions.

Today, it is international law, more than American constitutional law, that constrains the detention of enemy aliens. The Fourth Geneva Convention[116] provides various legal rights for "protected persons," which under Article 4 of the Convention generally includes persons of foreign nationality (or stateless persons) in the territory of a belligerent power.[117] The Convention provides that protected persons have the right to "leave the territory at the outset of, or during, a conflict, *unless their departure is contrary to the national interests of the State.*"[118] The Convention makes clear that:

> Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it *may not have recourse to any other measure of control more severe than that of assigned residence or internment* . . . .[119]

And it insists as well that "[t]he internment or placing in assigned residence of protected persons may be ordered *only if the security of the*

TERRITORY BELONGING TO OR OCCUPIED BY A BELLIGERENT (1934), *available at* http://www.icrc.org/IHL.NSF/INTRO/320?OpenDocument.

[115] GENEVA CONVENTIONS COMMENTARY, *supra* note 108, at 233.

[116] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[117] *Id.* art. 4. Exceptions include nationals of a state not party to the Convention; nationals of a neutral or co-belligerent state, as long as their country has diplomatic representation in the host country's territory; and persons who enjoy protection under one of the other three Geneva Conventions (i.e., sick and wounded members of armed forces on land or at sea, prisoners of war). Individual protected persons who are "definitely suspected of or engaged in activities hostile to the security of the State" are not entitled to claim rights under the Convention, though such persons are entitled to a "fair and regular trial." *Id.* art. 5.

[118] *Id.* art. 35 (emphasis added). This is fairly broad. *See* Walter L. Williams, Jr., *The Freedom of Civilians of Enemy Nationality to Depart from Territory Controlled by a Hostile Belligerent*, 23 MIL. L. REV. 135 (1984).

[119] Geneva Convention IV, *supra* note 116, art. 41.

Detaining Power makes it absolutely necessary."[120] According to the authoritative Commentary,

> the mere fact that a person is a subject of an enemy power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualification, represents a real threat to its present or future security.[121]

While the above provisions concern enemy aliens on a hostile power's own territory, the Convention also provides for the detention of civilian protected persons in occupied territory — a power of which the United States has made prodigious use in Iraq.[122] Internment is permitted: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[123]

3. Conclusion

In short, like the power to detain enemy soldiers, the power to detain enemy civilians was not carved out as an exception to criminal justice norms, but evolved parallel to them from a far broader authority. That

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[120] *Id.* art. 42.

[121] GENEVA CONVENTIONS COMMENTARY, *supra* note 108, at 258. Of course, this conflicts directly with the Alien Enemies Act. No U.S. court has had occasion to interpret presidential powers under the Act in light of these treaty obligations. The purpose of stressing "the exceptional character" of these measures and "making their application subject to strict conditions . . . is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward, only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and then only if state security cannot be safeguarded by other, less severe means." *Id.*

[122] *See* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. (forthcoming 2011) (manuscript at 13) (on file with authors) (noting Coalition Provisional Authority's reliance on GC IV in creating initial security internment regime). Chesney notes that the security internment detention regime in Iraq later shifted its legal basis to the UN Security Council resolutions authorizing the continued coalition forces presence in Iraq after the restoration of Iraqi sovereignty, though the form of the detention continued to parallel GC IV. *Id.* at 67.

[123] Geneva Convention IV, *supra* note 116, art. 78.

authority remains broad in American statutory and constitutional law, but has narrowed considerably over time in international law to focus only on those aliens whose detention security genuinely requires. Importantly, this power has evolved to include a limiting mechanism for determining which aliens the state needs to, and thus may, detain. This multi-pronged trigger includes both objective characteristics and individualized judgments of dangerousness and threat on the part of the detainee. That is, statutory law requires that the subject be a national of a state at war with the United States, while international law requires an individualized judgment that the threat posed by the person makes detention absolutely necessary.

C. Suspension of Habeas Corpus

The Constitution does not merely coexist with centuries-old international law authorities to detain enemy soldiers and citizens. It also contains its own express contemplation of wartime suspension of the constitutional mechanisms that otherwise limit executive detention. The Suspension Clause, Article I, § 9, cl. 2, provides that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[124] The provision is framed in terms of its negative content: It prohibits Congress, under virtually all circumstances, from removing the protection of the writ. Its location in Article I Section 9 also provides structural evidence of its negative purpose.[125] But the Clause also contains what Justice Scalia has called a "safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'"[126] In providing for the authority to suspend the writ in cases of "rebellion or invasion," it foresees

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[124] U.S. CONST. art. I, § 9, cl. 2.

[125] *See Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1264 n.1 (1970) [hereinafter *Developments in the Law*] ("The limiting nature of the clause is suggested both by its wording and by its location in article I, § 9, which otherwise consists of an enumeration of limitations.").

[126] Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)).

and makes possible (though not necessarily *legal*)[127] detentions that it would not otherwise tolerate.[128]

1. The Import and Mechanics of Suspension

Whether suspension in itself *creates* any specific detention authority, or merely removes the habeas vehicle that enables judicial policing of executive detention not pursuant to law, has been a subject of some debate.[129] Thus, it may not be accurate to call suspension a legal authority for preventive detention. But suspension at a minimum creates a *state* in which executive detentions that a habeas court would otherwise terminate may continue unimpeded. Moreover, permitting such detentions to occur is the presumptive intent of a legislature that suspends (or an executive who purports to suspend) habeas corpus. Thus, it is probably safer to speak of an *implied* provision made for emergency executive detention by the Suspension Clause, rather than the Suspension Clause as a legal *authority* for preventive detention.

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[127] *See infra* note 129 and accompanying text.

[128] *See* Hamdi, 542 U.S. at 554 (Scalia, J., dissenting) (noting that the Clause "allows Congress to relax the usual protections temporarily").

[129] *Compare Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 115 (1867) ("The suspension of the writ does not authorize the arrest of anyone, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.") *with id.* at 135 (Chase, C.J., concurring) (arguing that "when the writ is suspended, the executive is authorized to arrest, as well as detain"). This debate can be generalized to the question of whether the Constitution can, paradoxically, provide for a "state of illegality," or whether the Constitution's paving the way for the commission, under certain circumstances, of an otherwise illegal act inherently confers upon it the mantle of legal authorization. *Cf.* R.J. SHARPE, THE LAW OF HABEAS CORPUS 95 (1989) ("On its face, a suspension act gave no general power to arrest and detain people simply because they were thought to be dangerous, although the effect was to deprive a suspected traitor of the opportunity to have guilt or innocence determined.").

Lincoln apparently believed (or at least maintained), that suspension also affirmatively authorized the President to arrest and detain persons in circumstances where it would otherwise be illegal. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1135 n.18 (2006).

The debate over whether suspension conveys substantive detention power, or merely shuts off judicial review of otherwise illegal detention, remains a live one in the academic community. *Compare* Trevor Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007) (arguing suspension does *not* legalize otherwise illegal detention) *with* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 662–63 (2009) [hereinafter Tyler, *Emergency Power*] (arguing "suspension has always been understood in the United States as a means by which the executive is freed from the legal constraints that govern his power to arrest and detain in the absence of a suspension").

Scholars generally accept that the power to invoke the Suspension Clause lies with Congress.[130] The clause's location in Article I strongly suggests this reading, and the Framers had as a model the English system, "in which exclusive suspension powers resided in Parliament."[131] An open question is whether Congress's determination that a rebellion or invasion exists, and that the public safety requires suspension, is judicially reviewable. Justice Story wrote that "[i]t would seem, as the power is given to Congress

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[130] *See* Daniel Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 (2006) ("[T]he arguments that the power to authorize suspension is vested exclusively in the legislature are powerful, and, for me, convincing."); *Developments in the Law*, *supra* note 125, at 1263 ("The power to suspend the privilege of habeas corpus evidently belongs to Congress.").

President Lincoln disputed this. In his 1861 message to Congress, he argued that:

> [i]t was not believed that any law was violated. The provision of the Constitution that 'The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it,' is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.

Abraham Lincoln, Message to Congress in Special Session (July 4, 1861). *But see Ex parte* Merryman, 17 F.Cas. 144 (C.C. Md. 1861) (disputing Lincoln's view). For further discussion of the case and the circumstances surrounding it, see *infra* notes 153–155 and accompanying text. *Cf.* Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding* Ex Parte Merryman, 34 U. BALT. L. REV. 11, 12 (2004–2005) ("[T]he power to suspend habeas corpus has resided in what Justice Robert Jackson referred to as the 'zone of twilight': an area where the distribution of power between Congress and the President is uncertain."); Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 109–10 (1958) (drawing on records of Constitutional Convention to suggest that framers may not have intended to vest suspension power exclusively in Congress).

[131] *Developments in the Law*, *supra* note 125, at 1264.

to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body."[132] Yet several modern scholars argue that one or both of the predicate requirements for suspension do not constitute political questions committed by the Constitution to the Congress.[133]

2. Historical Origins and Evolution of the Suspension Power

a. Historical and Conceptual Roots

The habeas guarantee in Anglo-American law emerged out of the "constitutional struggles of the seventeenth century as a remedy against political arrests by the King's council and ministers."[134] In 1640, in response to the abuses of Charles I, the Habeas Corpus Act of 1640 abolished "conciliar courts," including the infamous Star Chamber,

> and specifically provided that anyone imprisoned by order of the King of Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The judges were required to pronounce upon the legality of the detention . . . and bail, discharge or remand the prisoner accordingly.[135]

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[132] JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (Boston, Little, Brown & Co. 1873) (1833); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting) ("[W]hether the attacks of September 11, 2001 constitute an 'invasion,' and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court.") (citing STORY, *supra* note 132, § 1342).

[133] *See, e.g.,* Amanda Tyler, *Is Suspension A Political Question?*, 59 STAN. L. REV. 333, 367 (2006) [hereinafter Tyler, *Political Question*] ("[A] parsing of the Clause's language suggests that the matter of suspension is 'textually committed' to the legislature only in cases of 'Rebellion or Invasion.'"). Tyler notes that the existence of a predicate "Rebellion or Invasion" "is the kind of bright-line limitation on political authority that seems to invite judicial enforcement," while whether the public safety requires suspension "may be a true political question, as it is phrased in discretionary terms . . . ." *Id.*; *see also* Shapiro, *supra* note 130, at 80 (noting while "there may be some room for [judicial review]" of existence of Rebellion or Invasion, one must still give "substantial deference to the legislature's judgment"). Of course, giving substantial deference to legislative judgments is quite different, conceptually and practically, from finding a question nonjusticiable.

[134] Neuman, *supra* note 104, at 971.

[135] SHARPE, *supra* note 129, at 15–16.

"The struggle between subject and crown" in that century "culminated in the Habeas Corpus Act of 1679, described by Blackstone as a 'second *magna carta*, and stable bulwark of our liberties.'"[136] The Act prescribed various procedures for asserting one's right to habeas corpus[137] in order "to ensure that prisoners entitled to relief would not be thwarted by procedural inadequacy."[138]

The English system, the model for the framers of the U.S. Constitution, "accommodated [times of national emergency] by allowing legislative suspension of the writ of habeas corpus for brief periods."[139] Justice Scalia, dissenting in *Hamdi*, quotes Blackstone:

> And yet sometimes, when the state is in real danger, even this [i.e., executive detention] may be a necessary measure. But the happiness of our constitution is that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it[s] liberty for a while, in order to preserve it for ever.[140]

This quotation from Blackstone describes with striking accuracy the incidents of U.S. historical practice that followed, suggesting how little the core elements of this power have changed over the centuries.[141] Perhaps this is attributable to the fact that the Clause is by its terms a nonspecific remedy reserved for periods of extreme national necessity, a

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136 Hamdi v. Rumsfeld, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (citation omitted).
137 *Id.*
138 SHARPE, *supra* note 129, at 19.
139 *Hamdi*, 542 U.S. at 561 (Scalia, J., dissenting).
140 *Id.* at 561–62. Justice Scalia then lists five political crises during which Parliament suspended the writ during the 100-year period from the Glorious Revolution to the American Revolution, before discussing American precedents. *Id.* at 562.
141 *See* SHARPE, *supra* note 129, at 20 (noting that "[t]he practice on habeas corpus has changed throughout the years, but the substance of its guarantee remains the same").

condition that exists (when it does exist) without reference to particular social conditions or mores. This distinguishes the suspension power from other, more specific preventive detention authorities, which are tailored to the particular public policy challenges of the era in which they are crafted and face obsolescence as those conditions change.

b. Suspension in American Historical Experience

In some sense, the Suspension Clause can be said to follow the larger pattern we describe in this article: It is a narrow detention mechanism that represents the linear descendant of a traditionally broader one. Executive detention under suspension of habeas corpus, after all, is the modern descendant of a theoretically plenary royal authority to detain subjects as necessary to maintain the peace of the realm.[142] American law has banished that power almost entirely — but not quite. It reserved, in the Suspension Clause, that portion that the Framers deemed necessary: a carve-out from the usual rules, to be invoked only in the worst of times. And throughout American history, political authorities have invoked it more or less in that spirit.

This history began even before the Constitution was written. In 1786, the outbreak of Shays' Rebellion in western Massachusetts prompted the legislature to pass an "Act for Suspending the Privilege of Habeas Corpus."[143] The Act authorized the Governor to order law enforcement

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[142] *See* THOMAS HOBBES, LEVIATHAN, ch. XVIII, ¶ 4 (A. R. Waller ed., 1904) (1651) ("[I]t followes, that whatsoever [the Sovereign] doth, it can be no injury to any of his Subjects; nor ought he to be by any of them accused of Injustice."); *id.* ¶ 6 ("And because the End of this Institution, is the Peace and Defence of them all . . . it belongeth of Right, to . . . the Soveraignty, to be Judge both of the meanes of Peace and Defence . . . and to do whatsoever he shall think necessary to be done, both before hand, for the preserving of Peace and Security, by prevention of Discord at home, and Hostility from abroad; and, when Peace and Security are lost, for the recovery of the same.").

In England the right not to be arbitrarily detained not pursuant to law has a pedigree dating back at least to Magna Carta, if not before. *See* Magna Carta, ch. XXIX ("No free man shall be taken, or imprisoned, or disseised of his freehold, or liberties, or free customs, or exiled, or any otherwise destroyed . . . but by lawful judgment of his Peers, or by the Law of the Land."). Nonetheless, the use of *lettres de cachet* was common, if detested, in France almost until the 19th Century, and arbitrary executive detention is common in political systems lacking developed institutions to protect individual rights.

[143] An Act for Suspending the Privilege of Habeas Corpus, Acts and Resolves passed by the General Court, Ch. 41 (Mass. 1786). The Massachusetts Constitution of 1780, "which

officers to apprehend and detain "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires shall be restrained of their personal liberty . . . any Law, Usage or Custom to the contrary notwithstanding."[144]

Two decades later, the Aaron Burr conspiracy prompted President Jefferson to seek in 1807 suspension of the writ in order to suppress the plot.[145] This suspension, the first attempted under the federal Constitution, was far narrower than that enacted by Massachusetts in response to Shays' Rebellion. The proposed bill "was limited to persons' charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States."[146] The suspension would have been temporally limited to three months, "and no longer."[147] The Senate passed the bill, but the measure aroused great skepticism in the House of Representatives,[148] and was rejected 113 to 19.[149]

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provided the most direct model for the federal Suspension Clause, provided: 'The privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth . . . and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months." Neuman, *supra* note 104, at 972.

[144] *Id.* It further provided that the executive detention should continue "without Bail or Mainprize, until [the prisoner] should be discharged therefrom by order of the Governor, or of the General Court." *Id.* The General Court was, and remains, the legislature of the Commonwealth of Massachusetts.

[145] Justice Story noted the irony that Jefferson, who had opposed making constitutional provision for *any* derogation from the right to habeas corpus, was the first to seek suspension under the Clause. *See* STORY, *supra* note 132, § 1342 n.2.

[146] Neuman, *supra* note, 104, at 977.

[147] A Bill suspending the writ of Habeas Corpus for three months, in certain cases, 16 ANNALS OF CONG. 402 (1807).

[148] One Member argued that "[t]he President, in his message of the 22d, says 'on the whole the fugitives from Ohio and their associates from Cumberland, or other places in that quarter, cannot threaten serious danger to the city of New Orleans.' If that be the case, upon what ground shall we suspend the writ of habeas corpus? Can any person imagine the United States are in danger, after this declaration of the President, who unquestionably possesses more correct information than any other person can be supposed to have." *Id.* Another asked, "Shall we, sir, suspend the chartered rights of the community for the suppression of a few desperadoes; of a small banditti already surrounded by your troops; pressed from above by your militia; met below by your regulars, and without a chance of escape, but by abandoning their boats, and seeking safety in the woods? I consider the means at present in operation amply sufficient . . . . " *Id.* at 410–11.

[149] *Id.* at 424.

The first true suspension of the writ under the federal Constitution took place during the Civil War. At the outset of the war, President Lincoln initially "purported to suspend habeas corpus without congressional authorization."[150] In April 1861, with Baltimore in a state of civil disorder, Lincoln issued orders to General Winfield Scott for the pacification of Maryland. The orders instructed that should Union forces "find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally, or through an officer in command at the point where the resistance occurs, are authorized to suspend the writ."[151] This order was not made public. And Chief Justice Taney complained upon hearing of it that "[n]o official notice has been given to the courts of justice or to the public by proclamation or otherwise that the President claimed this power."[152]

The arrest of John Merryman brought the issue to a head in the courts. Merryman was a convinced secessionist who "spoke out vigorously against the Union and in favor of the South," and "followed this by recruiting a company of soldiers to serve in the Confederate Army."[153] In response to Merryman's petition for a writ of habeas corpus, Chief Justice Taney (sitting as a circuit judge) ordered Union General George Cadwalader to produce Merryman in federal court in Maryland. When Cadwalader defied the order, arguing that he had been "duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety," Taney expressed surprise that the President even claimed the power to suspend habeas: "I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress."[154] Taney eventually declared Merryman's detention unlawful and transmitted his opinion to Lincoln, who more or less ignored it, though Merryman was shortly thereafter released.[155]

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[150] Hamdi v. Rumsfeld, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting).
[151] MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 8 (1991). For more on Lincoln's defense of the legality of the suspension, *see supra* note 120.
[152] NEELY, *supra* note 151, at 9.
[153] Halbert, *supra* note 130, at 99.
[154] *Ex parte* Merryman, 17 F.Cas. 144 (C.C. Md. 1861) (No. 9487).
[155] Halbert, *supra* note 130, at 101–02.

Lincoln also issued multiple orders authorizing suspension along various critical rail lines in 1861.[156] During a two year period of Lincoln's unilateral suspension of the writ, Congress "actively debated . . . whether formally to authorize the President to suspend the writ."[157] While it considered the matter, Union officers acting under the President's orders "arrested thousands of prisoners, many on nothing more than suspicion of disloyalty."[158]

In 1863, "to the relief of Republicans of a more theoretical bent than Lincoln," Congress finally passed legislation authorizing the suspension of habeas.[159] The Act authorized the President to suspend the writ "whenever, in his judgment, the public safety may require it . . . in any case throughout the United States."[160] The Act, however, did strictly qualify the authority with regard to persons arrested in areas where civilian courts were operating.[161] Finally, it "made compliance with any presidential order a defense" against suits alleging wrongful searches, seizures, arrests or imprisonment.[162] Lincoln subsequently issued a proclamation under the statute, declaring that:

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[156] *Id.* at 104. In May of that year, he issued a public proclamation suspending habeas, this time not in a border state, but in fortified islands off the coast of Florida. NEELY, *supra* note 151, at 9. As Florida had already seceded, this order was not particularly controversial.
[157] Tyler, *Emergency Power*, *supra* note 129, at 638.
[158] *Id.*
[159] NEELY, *supra* note 151, at 202.
[160] An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, 12 Stat. 755, 755 (1863).
[161] *Id.* § 2. Tyler argues that § 2's elaborate procedural safeguards for "political prisoners" in areas where the civilian courts are operating demonstrates "that the 1863 Congress viewed suspension as vesting a broad power in the executive to arrest and detain preventively," noting that "the section's procedural safeguards (release upon failure to indict) arguably would have been superfluous if Congress had interpreted section 1 to authorize only traditional arrests." Tyler, *Emergency Power*, *supra* note 129, at 640. Finally, she argues that by limiting the applicability of this release requirement to political prisoners who took an oath of loyalty to the Union, Congress was authorizing "*preventive detention of disloyal citizens*." *Id.* (emphasis in original).
[162] David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1161 (2006). Currie sees this as, *de facto*, retroactively authorizing the many detentions that had occurred pursuant to presidential "suspension" from 1861 to 1863. *Id.*

> in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military . . . officers of the Union . . . hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy . . . .[163]

Lincoln was not entirely sanguine about the numerous extralegal detentions occurring under his orders. In a May 17, 1863 memo, he said, "Unless the *necessity* for these arbitrary arrests is *manifest*, and *urgent*, I should prefer they cease."[164]

In the wake of the Civil War, during Reconstruction, Congress again authorized the President to suspend the writ in the South. The Ku Klux Klan had initiated a reign of terror, using "murders, whipping attacks, and rapes" to intimidate its opponents and undermine federal authority.[165] President Grant requested legislation authorizing suspension in order to "break[] through the secretive veil that protected the organization's structure and composition."[166]

In March 1871, Congress passed the so-called Ku Klux Klan Act,[167] Section 4 of which provided:

> [W]henever in any State . . . unlawful combinations . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to overthrow or set at defiance the constituted authorities of such state, and of the United States within such State . . . and whenever . . . the conviction of such offenders and the preservation of the public safety shall become in such district impracticable . . . such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under

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[163] Proclamation No. 7, 13 Stat. 734 (1863).
[164] DANIEL FARBER, LINCOLN'S CONSTITUTION 159 (2003).
[165] Tyler, *Emergency Power*, *supra* note 129, at 656.
[166] *Id.* at 656–57.
[167] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, 17 Stat. 13, 14–15 (1871).

> the sway thereof, such limits to be prescribed by proclamation, *it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of habeas corpus*, to the end that such rebellion may be overthrown (emphasis added).

President Grant employed the new authorities in a vigorous campaign to root out the Klan in "a key . . . stronghold — the South Carolina upcountry."[168] Federal troops rounded up suspected Klan members in massive sweeps, based solely "on their presumed membership in the Klan."[169] Few were actually prosecuted; many were detained for intelligence gathering purposes — that is, to elicit information of value to the campaign to restore order.[170]

Congress next authorized the suspension of the writ in 1902, in the law establishing a temporary civil government for the Philippines. The law contained a provision modeled on the Suspension Clause[171] and was invoked in 1905, when the Governor, with the approval of the Philippine Commission (as required by the statute) suspended the writ[172] in response to "organized bands of ladrones . . . terrifying the law-abiding and inoffensive people of" the provinces of Cavite and Batangas.[173] Nine months later, in October 1905, Philippine Governor Luke Wright revoked the suspension in the affected provinces, noting that "the ladrone bands . . . have been practically destroyed and the members thereof killed or captured . . . so that the necessity for the continuance of the suspension of the writ of *habeas corpus* in the aforesaid provinces . . . no longer exists."[174]

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[168] Tyler, *Emergency Power*, *supra* note 129, at 659.
[169] *Id.* at 660.
[170] *Id.* at 661.
[171] An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes, 32 Stat. 691, 692 (1902). Section 5 of the Act provided that: "[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."
[172] Hamdi v. Rumsfeld, 542 U.S. 507, 563 (2004) (Scalia, J., dissenting).
[173] Fisher v. Baker, 203 U.S. 174, 179 (1906).
[174] *Id.* at 180–81.

Similarly, "the Hawaiian Organic Act of 1900 . . . provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof)."[175] Interestingly, the Act did *not* require the approval of any Commission or consultative body in the case of a gubernatorial suspension, as the Philippine Act did. It did, however, provide that the Governor's power to suspend habeas or place the territory under martial law existed only "until communication can be had with the President and his decision thereon made known."[176] This suggests that the gubernatorial suspension provision was intended as a mere interim measure necessitated by Hawaii's distance from the mainland United States, rather than indicating specific intent to vest broad power in the Governor.[177] In any event, the provision was invoked, and the writ suspended, by the Governor on December 7, 1941, immediately after the Japanese attack on Pearl Harbor.[178] The President then approved the action on December 9th.[179]

On a number of recent occasions, particularly in the context of post-September 11 counterterrorism, Congress has sought to limit the availability of federal habeas corpus. These legislative efforts have targeted post-conviction habeas,[180] particularly in the capital context, and in immigration cases.[181] They have also included two enactments designed to eliminate federal habeas jurisdiction over detentions at Guantánamo Bay, Cuba.[182] In some instances, the courts have tolerated these measures; in others, they have not. We do not treat such efforts here, as Congress did not invoke its acknowledged suspension power in these cases, and the government rested the underlying detention on some other source of legal authority.

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[175] *Hamdi*, 542 U.S. at 563 (Scalia, J., dissenting).
[176] An Act To Provide a Government for the Territory of Hawaii, 31 Stat. 141, 153 (1900).
[177] It appears that greater solicitude was shown for the civil liberties of the inhabitants of Hawaii than the Philippines.
[178] Duncan v. Kahanamoku, 327 U.S. 304, 307 (1946).
[179] *Id.* at 308.
[180] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, 1219.
[181] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546, 610–12.
[182] Detainee Treatment Act of 2005, P.L 109–148, 119 Stat. 2739, 2741–42; Military Commissions Act of 2006, Pub. L. No. 109–-366, 120 Stat. 2600, 2636.

3. Conclusion

In short, while the Suspension Clause is not itself a preventive detention authority, it is a permission within the Constitution itself under certain circumstances — circumstances narrower than they traditionally were — to create a state in which preventive executive detentions may occur without habeas review. It has been used at several points in American history to accomplish just that, albeit always on a temporary basis in periods of genuine emergency.

II. Criminal Justice Authorities

Not all preventive detention authorities are extrinsic to the criminal justice system. At least two major ones are embedded within it. Opponents of preventive detention are often tempted to ignore both pretrial detention and the holding of material witnesses as somehow not counting because they take place within the four corners of the larger criminal justice system, which represents the hallmark of legitimacy — but this is a mistake. These powers involve the authority to lock up people who, even when indicted, benefit from a presumption of innocence. They take place for overtly preventive, non-punitive reasons — either to protect the community or to prevent flight of people either accused of a crime or whose testimony is required for either a trial of some other person or for consideration by a grand jury. And they take place in the face of a textual (though cryptic) constitutional prohibition against excessive bail. Notwithstanding the constitutional promise of speedy trial, pretrial detention can sometimes persist for surprisingly long periods of time.[183]

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[183] *See*, *e.g.*, United States v. Stanford, 2010 WL 3448524 at *2–3 (5th Cir.) (upholding pretrial detention of sixteen months); United States v. Jarvis, 2008 WL 4889961 (10th Cir.) (thirty-nine months); United States v. Cos, 2006 WL 2821376, at *4–5 (10th Cir.) (fourteen months); United States v. El-Hage, 213 F.3d 74, 78 (2d Cir. 2000) (thirty-one to thirty-three months); United States v. Millan, 4 F.3d 1038, 1044 (2d Cir. 1993) (thirty to thirty-one months).

A. Pretrial Detention

The modern federal pretrial detention framework was created by the Bail Reform Act of 1984,[184] codified at 18 U.S.C. §§ 3142-56. It replaced a prior system implemented by the Bail Reform Act of 1966. For present purposes, the most notable feature of the 1984 Act was its creation of a preventive detention option based on danger to "any other person or the community" — something that had not existed previously.

1. Requirements for Detainability

In its current form, the Bail Reform Act authorizes a federal judicial officer to order the extended pretrial detention of an "arrested person . . . pending judicial proceedings,"[185] in a variety of circumstances. Under § 3142(e)–(f), the government or the judicial officer may seek a detention hearing in a case that involves "a serious risk that such person will flee" or "a serious risk that such person will obstruct . . . justice" or attempt to intimidate witnesses or jurors.[186] The government may also move for a detention hearing based on the nature of the offense charged, specifically in a case involving a crime of violence or specified act of terrorism, an offense with a maximum sentence of life imprisonment or death, a drug offense carrying a maximum sentence of ten years or more, any felony, if the person is a qualifying repeat offender, or an offense that is not otherwise a crime of violence but involved a minor victim or the use of a firearm or a "deadly weapon."[187] The government may also seek detention if a person released subject to conditions, as authorized under the Act, does not adhere to them.[188]

Following a detention hearing,[189] the judicial officer may order pretrial detention if he or she "finds that no condition or combination of conditions"[190] will reasonably assure both the appearance of the person as

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184 Pub. L. No 98-473, 98 Stat.1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2006)).
185 18 U.S.C. § 3141 (2006).
186 *Id.* § 3142(f)(2).
187 *Id.* § 3142(f)(1).
188 *Id.* § 3418.
189 Procedural limitations applicable to the hearing are set forth in § 3142(f). The arrestee has the right to counsel, including court appointed counsel if necessary.
190 Conditional release, including possible conditions, is discussed at length in § 3142(c).

required *and* the safety of any other person and the community. A rebuttable presumption that no combination of conditions will suffice arises if the person has in the past five years committed one of the five types of serious offenses described above while on pretrial release, or if the charged offense is a major drug offense or a qualifying firearms or terrorism offense. In deciding whether detention is authorized under the statute, the judicial officer must consider a variety of factors: the nature of the offense, including whether it is a crime of violence; the weight of the evidence against the defendant; the history and characteristics of the person, including community ties, mental illness, financial resources, record of appearance at criminal proceedings, and whether he was on probation or parole at the time of the offense; and the nature and seriousness of the danger to any person, or to the community at large, that would be posed by the person's release.[191]

The federal pretrial detention regime, as this summary illustrates, involves a complex multi-pronged trigger to make sure that detention is truly necessary. The current regime also incorporates several procedural safeguards designed to ensure that detention is truly needed. If the judicial officer decides to order detention, he or she must issue written findings of fact stating the reasons for the detention. The person may then appeal the detention order pursuant to 18 U.S.C. § 3145. Moreover, the law precludes the judicial officer from imposing "a financial condition that results in the pretrial detention of the person"[192] — a restriction designed to prevent the setting of the amount bail itself from functioning as a duplicate, *sub rosa* preventive regime.

The states too permit pretrial detention in certain circumstances. Some states have laws or constitutional provisions allowing pretrial detention along the lines of the federal statute.[193] Other state constitutions and statutes contain a right to bail, except in capital cases or a specified subset of very serious non-bailable felonies. For example, New York has no

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[191] *Id.* § 3142(g).
[192] *Id.* § 3145(c)(2).
[193] *See*, *e.g.*, VT. CONST. § 40(2). Vermont's legislature amended the state constitution in 1994 to allow detention based on dangerousness after the Vermont Supreme Court had ruled such detention unconstitutional under the previous iteration of the Vermont Constitution's bail clause. *See* State v. Sauve, 621 A.2d 1296 (1993).

explicit preventive detention provision allowing detention based on dangerousness.[194] Some offenses are inherently bailable, some are not, and some are left to the court's discretion, guided not by dangerousness but by the degree of control necessary to secure the defendant's appearance in court.[195] In practice, the various statutory factors that state courts take into account when setting bail and deciding whether bail is appropriate in a given case may serve as a proxy for "dangerousness."[196] By contrast, Nebraska,[197] Texas,[198] and Michigan[199] do not simply leave determinations of "dangerousness" to judges but rather categorically permit the denial of bail to certain classes of offenders beyond capital offenders alone.

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[194] *See* LAWRENCE K. MARKS ET AL., 7 N.Y. PRAC., SERIES, N.Y. PRETRIAL CRIM. PROC. § 4:5 (West 2010). The drafters of NY's 1970 revised bail statute expressly deleted such a provision from the bill. *Id.*

[195] N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2010).

[196] *See, e.g.*, *id.* Under § 510.30(2)(a), "the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required." The statutory factors are:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent . . .

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(viii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

[197] NEB. CONST. art. I, § 9 (stating "[a]ll persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

[198] TEX. CONST. art. I § 11(a) (stating that certain repeat offenders may be denied bail, including those indicted for a noncapital felony allegedly committed while on bail for a prior felony and those accused of a violent or sexual offense while on parole for a prior felony).

[199] MICH. CONST. art. I. § 15, (stating "[a]ll persons shall, before conviction, be bailable by sufficient sureties unless the proof is evident or the presumption great," that the person is in one of the following categories: prior repeat offenders; those indicted for murder or treason; those indicted for sex crimes, armed robbery, or kidnapping, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or endanger another; and anyone indicted for a violent felony allegedly committed while he or she was on bail, probation or parole for a prior violent felony charge).

Wisconsin's constitution authorizes the legislature to make categorical prohibitions *and* to vest discretion in state courts.[200]

2. Historical Origins and Evolution

On its face, pretrial detention appears at least in tension with both the Excessive Bail Clause of the Eighth Amendment and the presumption of innocence. The text of the Excessive Bail Clause derives from the English Bill of Rights of 1689.[201] While the text of the Clause has been interpreted to not convey a right to bail,[202] some scholars argue that the English Bill of Rights language was enacted in view of the existing Petition of Right of 1628, which already contained a non-discretionary right to bail (though only for a predetermined list of bailable offenses).[203] Together with the Habeas Corpus Act of 1679, the right to bail and the excessive bail clause served as a "three-legged stool" preventing "abusive pretrial imprisonment . . . during the formative era of English law."[204] Thus, the omission of such a right in the Eighth Amendment may have been an oversight of the drafters, one that presupposed the legal background against which the right against excessive bail originated.[205] The Judiciary Act of 1789 did create a statutory right to bail in all noncapital cases, echoing language in the Massachusetts Body of Liberties of 1641.[206] Early state constitutions did not emulate the enigmatic Eighth Amendment but, rather, explicitly made all noncapital offenses bailable.[207]

Until the enactment of the 1966 Bail Reform Act, the Judiciary Act's right to bail in noncapital cases remained the substantive federal law standard. But this fact is a bit misleading, as no guarantee existed that a given defendant could meet the bail fixed in his or her case. And while in *Stack v. Boyle* the Supreme Court held that bail set for a purpose other than

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200 WIS. CONST. art. I, § 8(3).
201 Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 339 (1982).
202 *See* United States v. Salerno, 481 U.S. 739, 753 (1987).
203 Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 968 (1965).
204 *Id.*
205 *Id.*
206 "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death. . . ." Judiciary Act of 1789, ch. 20, § 33, 1 STAT. 73, 91.
207 Foote, *supra* note 203, at 969 (citing N.C. CONST. of 1776 and PA. CONST. of 1790).

to "insure the presence of the defendant" at trial violates the Eighth Amendment, [208] in practice a vast number of defendants ended up detained because they could not afford the bail set.[209]

This provided much of the impetus for the 1966 reform of the federal bail provisions. The bail reforms of this era responded to the horrendous overcrowding and conditions in city jails,[210] backlogs in the criminal justice system resulting in extended detentions, and the sense that thousands of these defendants were being detained pretrial solely because of their poverty. Hence, a main focus of these reforms, including the 1966 Bail Reform Act, was increasing release on recognizance "based on information about defendants' community ties"[211] and using conditional release rather than money bail to ensure attendance in court.

The 1966 Act "required the courts to release any defendant charged with a noncapital offense on his or her own recognizance or on an unsecured appearance bond unless the court determined that the defendant would fail to appear for trial under such minimal supervision."[212] Under the 1966 regime, a court could not deny bail "on the grounds of dangerousness." It could, however, order detained defendants who had threatened witnesses[213] and defendants who "appear likely to flee regardless of what release conditions are imposed."[214] Further, "there [was] a

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[208] 342 U.S. 1, 3 (1951).

[209] Despite subsequent federal and state bail reforms, described in brief below, this remains true today. *See* Jarrett Murphy, *How Bail Punishes the Poor*, CITY LIMITS, Oct. 22, 2007, http://www.citylimits.org/news/articles/3424/-i-city-limits-investigates-i/1 ("[F]or tens of thousands of defendants in New York City, unaffordable bail gets them locked up before they are convicted of anything."); HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 20–30 (2010), *available at* http://www.hrw.org/en/reports/2010/12/02/price-freedom (noting prevalence of detention of poor defendants who cannot meet bail even with respect to those charged with misdemeanors).

[210] Inmates rioted in New York City's infamous "Tombs" jail complex in 1970 to protest conditions of confinement and the length of pretrial detention. *See* Ted Storey, *When Intervention Works: Judge Morris E. Lasker and New York City Jails*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION 143 (John J. Dilulio, Jr. ed., 1992).

[211] John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 3 (1985).

[212] *See* GREGORY BRUCE ENGLISH, A FEDERAL PROSECUTOR'S GUIDE TO BOND AND SENTENCING ISSUES 5–7 (1984) (quoting the legislative history of the Bail Reform Act of 1966).

[213] See *id.* at 10 n.17 for various cases upholding this proposition.

[214] *Id.*

widespread practice of detaining particularly dangerous defendants by the setting of high money bonds to assure appearance."[215] Judges could in practice effectuate a preventive detention by means of their power to set bail.

By the mid-1970s, the pendulum was swinging back the other way, and protection of the public in a high-crime era had risen to the forefront as a rationale of bail system design. Whereas securing the attendance of the accused at court had traditionally been considered the sole permissible objective of the bail decision, with public safety concerns being addressed by judges *sub rosa* in setting bail amounts, this began to change.[216] By 1984, one scholar reports, "[34] states in addition to the District of Columbia [and the federal government] had laws addressing defendant danger as an aspect of bail or pretrial detention decisionmaking."[217] The Bail Reform Act of 1984 epitomized this new emphasis. The 1984 Act attempted "to eliminate the use of *sub rosa* detention" of defendants by the setting of high bail that they would be unable to meet.[218] But its primary purpose, as described by the Senate, was preventive: to give prosecutors and courts tools to protect the community from that "small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[219]

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[215] ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 51–52 (1981) (quoted in ENGLISH, supra note 212, at 8 n.15). *See also The Implementation of the Bail Reform Act of 1984 (Public Law 98-473): Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 101st Cong. 157 (1989) (statement of Anton R. Valukas, U.S. Att'y, N.D. Ill.). Valukas noted the previous practice of setting impossibly high monetary bail amounts, determinations which could not be challenged by defendants, and praised the 1984 regime for offering defendants the opportunity to have a "full [adversarial] hearing on the issue of dangerousness." *See also id.* at 159 (referring to "high money bonds" as a "means of *sub rosa* detention for dangerousness") and at 148 (calling the previous practice a "dishonest system" and arguing that "[t]his system is more honest").

[216] Goldkamp, *supra* note 211, at 15.

[217] *Id.* This does not mean that 34 states actually had enacted pretrial *detention* statutes based on dangerousness.

[218] *The Implementation of the Bail Reform Act of 1984 (Public Law 98-473): Hearing before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 101st Cong. 175 (1989) (prepared statement of Arnold P. Jones, Dir., Admin. of Justice Issues).

[219] S. REP. NO. 98-225, at 6–7 (1983) (quoted in Goldkamp, *supra* note 211, at 2).

Civil liberties groups, including the American Civil Liberties Union, opposed the 1984 reform as violative of the presumption of innocence and as unconstitutionally imposing punishment without conviction.[220] The Supreme Court, however, upheld its constitutionality in *United States v. Salerno*, holding that the law comports with both the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.[221] In doing so, it rejected the Second Circuit's holding below that the statute's "authorization of pretrial detention [on the ground of future dangerousness] is repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes."[222]

In an important opinion, the Court asserted the principle that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[223] It cited other instances of preventive restraint of liberty justified by important "regulatory interests," including the detention of enemy aliens, potentially dangerous aliens facing deportation proceedings (a subject we treat below), the dangerous mentally ill, dangerous criminal defendants found incompetent to stand trial, post-arrest juveniles who present a danger to the community, and persons arrested pending a probable cause hearing.[224] It also held that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail,"[225] noting that "the right to bail . . . in the Eighth Amendment is not absolute"[226] and "reject[ing] the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests [besides safeguarding the judicial process] through regulation of pretrial release."[227] The Court read the Bail Clause narrowly, holding that "the only arguable substantive limitation of the Bail Clause is that the Government's proposed

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220 *See The Implementation of the Bail Reform Act of 1984 (Public Law 98-473): Hearing before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 101st Cong. 245–46 (1989) (statement of John A. Powell, Legal Director, ACLU).
221 481 U.S. 739 (1987).
222 *Id.* at 745 (quoting United States v. Salerno, 794 F.2d 64, 71–72 (2d Cir. 1986)).
223 *Id.* at 748.
224 *Id.* at 748–49.
225 *Id.* at 754–55.
226 *Id.*; *see also* Carlson v. Landon, 342 U.S. 524, 545–46 (1952) (no absolute right to bail under Eighth Amendment; Congress may define class of bailable offenses).
227 *Salerno,* 481 U.S. at 753.

conditions of release or detention not be 'excessive' in light of the perceived evil."[228] This constitutional proportionality requirement for pretrial detention meshes nicely with the general limitation on preventive detention authorities in American law we identify in this article: that preventive detention is permitted, but not beyond the extent truly necessary to prevent the harm at issue.

The Supreme Court has also specifically upheld pretrial preventive detention of juveniles. In the 1984 case of *Schall v. Martin*, the justices upheld a New York statute authorizing such detentions.[229] The statute at issue in *Schall* authorizes pretrial detention of a juvenile if (most controversially) there was a "serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime."[230] This statute, § 320.5 of the New York Family Court Act, permits detention of a juvenile only when "available alternatives to detention, including conditional release, would not be appropriate,"[231] and requires a finding of either the risk-of-crime factor described above or "a substantial probability that he or she will not appear in court on the return date."[232] As in *Salerno*, the Court overturned a ruling by the Second Circuit that the statute violated the Due Process Clause, and held that the preventive detention provision comported with both the substantive and procedural requirements of the Due Process Clause (in this case, of the Fourteenth Amendment). The Court noted both the "legitimate and compelling state interest" in protecting the community from crime and the "qualified" liberty interest of juveniles, who are, unlike adults, "always in some form of custody." It also noted the State's *parens patriae* interest in "protecting the juvenile from his own folly."[233]

Preventive detention under the Bail Reform Act today is extraordinarily pervasive. According to the Bureau of Justice Statistics (BJS), in 2001, 38.5 percent of the more than 68,000 defendants charged with a federal offense were ordered detained pending adjudication of the charges,

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[228] *Id.* at 754.
[229] 467 U.S. 253 (1984).
[230] *Id.* at 257.
[231] N.Y. FAMILY COURT ACT § 320.5 (McKinney 2010).
[232] *Id.*
[233] *Schall*, 467 U.S. at 265 (quoting People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 688–89 (N.Y.1976)).

which represents more than 73 percent of all defendants for whom a detention hearing was held. [234]

A 2008 BJS report on pretrial detention in the largest urban areas in the United States reveals just how prevalent *state* pretrial detention is:[235] Forty-three percent of those charged with felony offenses, and 88 percent of those charged with murder, were detained until case disposition. These statistics do not convey whether the defendants were held under preventive detention provisions or simply failed to make bail. Because bail amounts tend to rise with the seriousness of the offense charged, this distinction is less categorical than it may appear. A BJS report tracking state case processing between 1990 and 2004 notes that only 62 percent of felony defendants in the 75 largest urban counties were released pending trial.[236]

3. Conclusion

In one critical respect, the Bail Reform Act tends to defy the general pattern of American preventive detention statutes we identify in this article: It does not clearly represent a narrowing of a traditionally broad power. Current law — at least insofar as it now formally permits pretrial detention based on an assessment of future dangerousness — is now arguably broader than the corresponding authority at common law. In this sense, pretrial detention does track with what we have described as the "civic mythology" of American preventive detention. That is to say that the current regime could be described as a departure from the Anglo-American tradition of requiring bail for bailable offenses. However, an important caveat is that (as described above) under the traditional system, much *sub rosa* pretrial detention was taking place, primarily through the bail-setting mechanism.[237] And in a broader sense, the Bail Reform Act detentions track the larger

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[234] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 416 (2003), *available at* http://www.albany.edu/sourcebook/pdf/t514.pdf.

[235] TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 2 (Catherine Bird ed., 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf.

[236] THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (Tina Dorsey ed., 2007), *available at* http://www.pretrial.org/Docs/Documents/prfdsc.pdf. Of the remaining 38 percent, only 1 out of 6 was denied bail, whereas 5 out of 6 were not able to meet the financial conditions required for release.

[237] *See supra* text accompanying notes 215–217.

pattern: The act requires bail save where detention is necessary to prevent significant harms.

B. Material Witness Detention

The power to detain material witnesses is the most purely preventive detention authority within the criminal justice system. Unlike pretrial detention, it involves subjects who are not merely unconvicted but who are *unindicted* and who may never be indicted. The duration of permissible detention is not clearly specified in federal law, and the law's purpose does not even implicate public safety. It is purely the prevention of a harm to the state: the fleeing of a witness before he or she has given testimony at trial or to a grand jury.

1. Requirements for Detainability

The contours of the current material witness law are a textbook example of the use of multi-pronged triggers in detention statutes to ensure that detention is really necessary. Section 3144 of Title 18 of the United States Code provides that if

> the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.[238]

Section 3142, which also applies to the pretrial detention regime described above, authorizes detention only when the judicial officer "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required."[239] Section 3144 further restricts material witness detention authority by providing that a material witness may not be "detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of

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[238] 18 U.S.C. § 3144 (2006).
[239] *Id.* § 3142(e).

justice."[240] Detention of the material witness is temporally limited to "a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."[241] Finally, Federal Rule of Criminal Procedure 15 provides that

> A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.[242]

The Supreme Court has never directly considered the constitutionality of detention under the federal material witness statute, but lower courts have. In the 1971 case of *Bacon v. United States*, the Ninth Circuit held that the relevant federal statute and Federal Rule of Criminal Procedure 46(b) implied the power to detain a material witness who could or would not meet court-imposed conditions of release.[243] Although the relevant statute has been updated (and now contains an express grant of authority), the case is still widely cited for the proposition that federal material witness detention authority extends to detention to secure grand jury testimony.[244] The court also held that such detention requires that the judicial officer approving the detention find probable cause to believe both that the testimony is material and that it cannot be secured other than by detention.[245]

Similarly, in 2003, the Second Circuit in *United States v. Awadallah* affirmed that the statute properly extended to grand jury testimony.[246] The court noted the expansiveness of the term "criminal proceeding" and pointed to legislative history strongly suggesting that Congress intended this term to encompass grand jury testimony when it enacted § 3144 as part of the Bail Reform Act of 1984.[247] Tellingly, it also rejected the District

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[240] *Id.* § 3144.
[241] *Id.*
[242] *Id.*
[243] 449 F.2d 933, 937, 939 (9th Cir. 1971).
[244] *Id.* at 939–40.
[245] *Id.* at 943.
[246] 349 F.3d 42 (2d Cir. 2003).
[247] *Id.* at 54. The legislative history illustrated the Senate's intent that the authority apply to grand jury testimony, as well as trial. *Id.* at 55. *See* S. REP. 98-225 n.88 (1983), ("[A] grand jury investigation is a 'criminal proceeding' within the meaning of [§3144].."). The court

Court's view that constitutional avoidance was implicated, brushing aside the suggestion "that serious concerns about the statute's constitutionality" would arise if the statute were interpreted to apply to grand jury witnesses.[248]

Most recently, in *Al-Kidd v. Ashcroft* the Ninth Circuit held that the government's arrest and lengthy detention as a material witness of a U.S. citizen and Muslim convert named Abdullah al-Kidd in order to investigate *him* on suspicion of criminal conduct violated the Fourth Amendment and the material witness statute.[249] While the court thus curtailed the use of the statute to interrogate and detain a criminal suspect, its holding did "nothing to curb the use of the material witness statute for its stated purpose" (i.e., to secure testimony in criminal proceedings).[250]

Numerous states have also enacted material witness detention statutes.[251] Various state and federal cases have upheld these statutes as not *per se* unconstitutional. [252]

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also rejected the notion that *only* a U.S. Attorney could assess and vouch for the materiality of a witness's testimony, holding that the affidavit of an FBI agent was sufficient for a judicial officer to issue a material witness warrant. *Awadallah*, 349 F.3d at 66.

[248] *Id.* at 55.

[249] Al-Kidd v. Ashcroft, 580 F.3d 949, 969–70 (9th Cir. 2009), *rehearing en banc denied* 598 F.3d 1129 (9th Cir. 2010).

[250] *Id.* at 970.

[251] *See* Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L.Q. 1, 43–51 (1980) (detailing material witness provisions in 45 states).

[252] *E.g.,* Stein v. New York, 346 U.S. 156, 184 (1953) ("The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive."); New York v. O'Neill, 359 U.S. 1, 7 (1959) ("Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State."); *see also* Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 617–18 (1929) (listing authorities supporting the "validity of Acts of Congress authorizing courts to exercise the power" to issue warrants for the detention of material witnesses).

2. Historical Origins and Modern Use of Material Witness Detention

Material witness detention follows all of the major patterns we have identified in American preventive detention law. It is, for starters, old. English subjects were considered to "owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[253] And while, in American law, the obligation to testify is owed to the courts, rather than the sovereign, it has existed since the beginning of our constitutional system. Witness detention was provided for in the Judiciary Act of 1789, which stated that "the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment."[254]

The material witness provision was amended in 1846 to give "any federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested" the power to "have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge."[255] In 1929, the Supreme Court noted in *Barry v. United States ex rel. Cunningham* that "the constitutionality of [the amended material witness authorities] apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question."[256]

Material witness detention "was expressly provided for by statute until 1948," when Congress repealed the 1846 statute.[257] However, similar language had already been incorporated into Rule 46(b) of the Federal Rules of Criminal Procedure.[258] These rules, importantly, did *not* convey the

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[253] Blair v. United States, 250 U.S. 273, 279–80 (1919) (quoting the Countess of Shrewsbury's Case of 1612).
[254] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73.
[255] Ricardo Bascuas, *The Unconstitutionality of "Hold Until Cleared",* 58 VAND. L. REV 677, 715 (2005) (quoting Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 616–17 (1929)). 28 U.S.C. § 659 reflects an 1846 amendment to the Judiciary Act, which was codified at those sections of the U.S. Code in 1925.
[256] 279 U.S. 597, 616 (1929).
[257] Bacon v. United States, 449 F.2d 933, 938 (9th Cir. 1971).
[258] *See* Bascuas, *supra* note 255, at 705 n.145.

express authority to detain the witness, though later interpretations of the Rules inferred it.[259]

The scope of federal material witness detention has also narrowed over time. In accordance with the general spirit of the Bail Reform Act of 1966, the material witness provision in that law focused on setting conditions of release that would ensure the testimony of the witness as required, rather than on detention *per se*. The relevant provision did not grant the government the explicit power to detain a material witness.[260] In *Bacon v. United States*, however, the Ninth Circuit later held that under the Act the witness could be detained if he or she could or would not comply with the conditions of release.[261] The provision at issue in that case was

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[259] *See Bacon*, 449 F.2d at 937 (citing legislative history to support proposition that Congress intended arrest authority as a necessary concomitant to 46(b)).

[260] Prior to 1984, the relevant provision was 18 U.S.C. § 3149, which provided:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3149 (1980) (current version at 18 U.S.C. § 3144 (2006)).

[261] *Bacon*, 449 F.2d at 937 (quoting FED. R. CRIM. PROC. 46(b)). Rule 46(b) provides:

> (b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

superseded by the Bail Reform Act of 1984. Like federal pretrial detention authority for criminal defendants, the current authority to detain a material witness is codified in Chapter 207 of Title 18 of the U.S. Code and was enacted in 1984 as part of the Bail Reform Act.

Material witness detention took place without substantial controversy prior to September 11. Authorities most commonly used the material witness warrant to secure the testimony of illegal aliens against their smugglers.[262] In 2000, "94 percent of the 4,168 federal material witness arrests were made by the INS, and less than 2 percent were citizens."[263] Human Rights Watch asserts that pre-9/11 courts were much less deferential than post-9/11 courts when considering whether to approve detention of a material witness under § 3144, requiring some showing that the defendant had "demonstrated through his conduct that securing his testimony absent an arrest would be unlikely."[264]

The material witness statute has also found use in high profile criminal and terrorist cases. Two days after the Oklahoma City bombing, a federal District Court in Oklahoma issued a material witness warrant for the arrest of Terry Lynn Nichols, based on the probability of Nichols' flight from testimony.[265] Two weeks later, once Nichols' involvement in the bombing had become apparent to investigators, an arrest warrant based on a criminal complaint was issued.[266] The Tenth Circuit later held that the propriety of the material witness warrant had become moot, since Nichols' ongoing detention was at that point pursuant to criminal charges, rather than to the material witness arrest warrant.[267]

Some scholars argue that Bacon's holding — that the relevant statues necessarily authorized by implication detention of material witnesses — was erroneous, and contend that such detention is, even though authorized by statute, in conflict with the Fourth Amendment and thus unconstitutional. *See* Bascuas, *supra* note 255, at 702–05. It is of course possible to hold in contempt (and detain) a witness who refuses to comply with a subpoena. However, as this detention is based on a predicate noncompliance, it is not expressly preventive and thus seems to fall outside the aegis of this project.

[262] This practice was upheld in Aguilar-Ayala v. Ruiz, 973 F.2d 411 (5th Cir. 1992).

[263] HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 14 (2005) [hereinafter HUMAN RIGHTS WATCH, WITNESS TO ABUSE].

[264] *Id.*

[265] *In re* Material Witness Warrant Nichols, 77 F.3d 1277, 1278 (10th Cir. 1996).

[266] *Id.* at 1279.

[267] *Id.*

In the post-9/11 Pentagon/Twin Towers Bombing (PENTTBOM) investigation, the FBI used material witness warrants to detain dozens of persons suspected of connections to the hijackers.[268] FBI agents submitted affidavits attesting that the persons detained had information material to the grand jury's investigations into the attacks in order to obtain material witness warrants authorizing the arrest and detention of persons of interest. The FBI acknowledges that its material witness arrests increased by 80 percent from 2000 to 2002, but has not acknowledged a specific number. Human Rights Watch asserts that the material witness statute was used to detain about 70 people in the PENTTBOM investigation, seven of whom were eventually charged with a terrorism-related crime.[269] Notable persons initially arrested on material witness warrants include Zacarias Moussaoui, Jose Padilla, and Ali Saleh Kahlah al-Marri.[270]

Human Rights Watch argues that the government has misused the authorities in § 3144 by "[improperly using] the material witness law for other ends [than to obtain the testimony of witnesses], such as the detention of persons suspected of criminal activity for which probable cause has not

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[268] *See* Bascuas, *supra* note 255, at 683. The majority of the post-9/11 arrests and detentions occurred under immigration enforcement authorities. *Id.* at 682.

[269] *See* HUMAN RIGHTS WATCH, WITNESS TO ABUSE, *supra* note 263, at 5 ("Forty-two of the seventy material witnesses identified during the research for this report were ultimately released without any charges filed against them. Seven were charged with providing material support to terrorist organizations; as of May 2005, four had been convicted, and the other three were awaiting trial. Another twenty witnesses were charged with non-terrorist-related crimes, such as bank or credit card fraud or making false statements to the FBI. Twenty-four were deported. Two of the seventy [Padilla and al-Marri] were designated "enemy combatants"; they were removed from the criminal justice system . . . .").

[270] *See also* Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, http://www.nytimes.com/2004/08/19/us/threats-responses-detainees-for-post-9-11-material-witness-it-terror-different.html. In 2004, after the March 11 terrorist attacks in Madrid, the FBI arrested an Oregon lawyer named Brandon Mayfield on a material witness warrant after an erroneous fingerprint analysis tied him to a bomb detonator used by the attackers. Mayfield was held for two weeks before the mistake was discovered; the federal government eventually settled his ensuing lawsuit for $2 million. Dan Eggen, *U.S. Settles Suit Filed by Ore. Lawyer; $2 Million Will Be Paid For Wrongful Arrest After Madrid Attack*, WASH. POST, Nov. 30, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901179.html.

yet been established."[271] It notes that before 9/11, the warrant was not used to hold those suspected of criminal activity, whereas after 9/11 material witness warrants were used to detain persons who themselves were suspected of being a "co-conspirator in a terrorism-related crime."[272] More specifically, "[i]n a number of these cases, the government has sought the witness's testimony in a grand jury proceeding it initiated solely to investigate the witness himself."[273] The Ninth Circuit's *Al-Kidd* decision tends to support this allegation. By contrast, the Justice Department's Office of Professional Responsibility conducted an inquiry into the Department's use of material witness warrants after 9/11 and "concluded that the material witness statute was not misused in any of the cases it reviewed."[274]

3. Conclusion

There are, in short, extant questions about the proper scope of preventive detention under the material witness statute. There seems to be little question, however, that *some* detention under material witness laws is appropriate in American criminal justice and has the non-punitive purpose of preventing people who owe the state their testimony from absconding without giving it. To that end, the scope of the authority has narrowed over time and now relies on a multi-pronged trigger to ensure that it does not take place when unnecessary to secure a witness's testimony. Yet despite this conceptual narrowing, the actual *use* of material witness detention surged in the immediate aftermath of 9/11, in response to a perception that its use was urgently necessary to prevent grave public harms.

III. Immigration Authorities

No preventive detention regime in U.S. law sees more use or affects as many people as does the immigration detention system. On an average day "roughly 33,400 detainees are housed under [Immigration and Customs Enforcement] authority at as many as 350 detention facilities

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[271] HUMAN RIGHTS WATCH, WITNESS TO ABUSE, *supra* note 263, at 19 (quoting United States v. Awadallah, 349 F.3d 42, 59 (2d Cir. 2003)).
[272] *Id.* at 20.
[273] *Id.*
[274] OFFICE OF THE INSPECTOR GENERAL, DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (2007), *available at* http://www.usdoj.gov/oig/special/s0703/.

nationwide."[275] These people are not serving time for criminal convictions, but are, rather, detained for preventive purposes: to prevent them from entering the United States, to prevent them from committing crimes in the United States, or to prevent them from fleeing deportation proceedings. Immigration detention has risen dramatically in recent years. The current number of detainees is up from 22,812 in 2004 and 6,875 in 1994.[276]

A. Requirements for Detainability

Preventive detention under the Immigration and Nationality Act (INA) is multi-faceted and has several distinct purposes. The first broad category of detainable aliens includes those deemed inadmissible on arrival. Generally speaking, arriving aliens,[277] including aliens present in the United States or who arrive in the United States but have not been legally admitted to the country, are to be detained pending deportation proceedings, unless they are "clearly and beyond a doubt entitled to be admitted."[278] Arriving aliens who indicate an intention to apply for asylum must be detained "pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."[279] Aliens who may be inadmissible

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[275] *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (May 6, 2009) (statement of Janet Napolitano, Secretary of Homeland Security), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3803&wit_id=7873.

[276] ALISON SISKIN, CONG. RESEARCH SERV., IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* http://www.fpc.state.gov/documents/organization/33169.pdf. The dramatic increase after 1994 is attributable to the mandatory detention provisions, discussed *infra* at text accompanying notes 288–290, added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009-546; *see also infra* notes 315–316 (discussing further these provisions of IIRIRA).

[277] *See* Immigration and Naturalization Act (INA) § 235(a)(1), § 101(13)(A), 8 U.S.C. § 1225(a)(1), § 1101(a)(13)(A) (2006). This includes the Mariel Cubans at issue in *Clark v. Martinez* and others paroled into the United States.

[278] *Id.* § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A). Lawful permanent resident aliens arriving at a U.S. border are only treated as aliens "seeking admission" and thus subject to this section if they have been absent from the United States for at least 180 days, have engaged in illegal activity after leaving the country, or have committed one of the many offenses rendering an alien inadmissible. *Id.* § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(c). For the list of offenses rendering aliens inadmissible, see *id.* § 212(a)(2), 8 U.S.C. §1182(a)(2).

[279] *Id.* § 235 (b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

because of criminality or terrorism[280] must be detained pending proceedings to adjudicate their admissibility.[281] Moreover, aliens arriving at U.S. ports may be detained "for a sufficient time to enable the immigration officers and medical officers to" determine whether they are inadmissible for medical or mental health reasons.[282]

This general rule that arriving aliens are subject to detention is subject to certain humanitarian exceptions. The most important is that aliens detained under this section may be paroled into the United States "on a [discretionary] case-by-case basis for urgent humanitarian reasons or significant public benefit."[283] This exception includes, but is not limited to, aliens who are seriously ill or pregnant, juveniles, or witnesses in judicial, administrative, or legislative proceedings.[284] The result is that large numbers of people may be residing in the United States at any given time who have never been legally granted admission.

The second broad category involves aliens awaiting removal proceedings. Generally, aliens in the United States may, upon issuance of a warrant, "be arrested and detained pending" deportation proceedings.[285] The alien may then be released on bail of at least $1,500 or on conditional parole, or may be detained until the completion of the proceeding.[286] While an immigration judge can order someone released from custody, reduce his or her bond, or order his or her conditional release, the agency can appeal these rulings, and release may be stayed until the appeal is decided.[287] In other words, anyone facing deportation proceedings may find himself or herself in custody for their pendency. Moreover, the statute makes detention

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[280] *See id.* § 212(a)(2), 8 U.S.C. 1182(a)(2) (making inadmissible aliens who have committed "acts which constitute the essential elements of" a "crime involving moral turpitude" or any controlled substance law; aliens with multiple criminal convictions; "controlled substance traffickers"; those involved in "prostitution and commercialized vice"; human traffickers; and other categories). *See also id.* § 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B) (making inadmissible those involved or believed to be involved in terrorist activities).

[281] *Id.* § 236(c)(1), 8 U.S.C. §1226(c)(1). The AG may release a criminal alien only under limited circumstances where it will further law enforcement purposes. *Id.* § 236(c)(2), 8 U.S.C. §1226(c)(2).

[282] *Id.* § 232(a), 8 U.S.C. § 1222(a).

[283] *Id.* § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

[284] *See* 8 CFR § 212.5(b)(1)–(5).

[285] INA § 236(a), 8 U.S.C. § 1226(a).

[286] *Id.* § 236(a)(1)–(2), 8 U.S.C. § 1226(a)(1)–(2).

[287] T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1099 (6th ed. 2008).

mandatory with respect to criminal aliens and those suspected of terrorism. Any alien who is deportable by reason of certain acts of criminality must be taken into custody, pending deportation, upon completion of his criminal sentence.[288] This includes those who have multiple convictions, convictions of an aggravated felony, convictions of drug offenses, firearms offenses, crimes of moral turpitude with a sentence of more than one year, convictions of involvement with terrorism, and convictions on other miscellaneous crimes.[289]

Similarly, when there exist reasonable grounds to believe that an alien — even a permanent resident alien — is involved in terrorism, sabotage, or subversion, he must be detained until removal from the United States can be effectuated or until he is determined not to be removable.[290] Under this particular authority, proceedings must be initiated no later than seven days after the commencement of detention, or the alien must be released. This provision, passed as part of the 2001 USA PATRIOT Act, explicitly contemplates the indefinite detention of alien terrorists: An alien detained under this authority

> who has not been removed and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.[291]

This requires a certification, which must be renewed every six months, by the Attorney General or Deputy Attorney General. While the power in this section sparked special controversy during the debate over the PATRIOT Act, it has not been used since its passage.[292] The other immigration detention authorities are themselves so robust that it apparently has not been necessary.

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[288] INA § 236(c)(1)(B)–(D), 8 U.S.C. § 1226(c)(1)(B)–(D).
[289] *Id.* This mandatory detention authority was upheld by the Supreme Court in Demore v. Kim, 538 U.S. 510 (2003).
[290] INA § 236A(a)(1)–(3), 8 U.S.C. § 1226a(a)(1)–(3).
[291] *Id.* § 236A(a)(6), 8 U.S.C. § 1226a(a)(6).
[292] ALEINIKOFF ET AL., *supra* note 287, at 1100.

The third category involves noncitizens for whom a final removal (i.e., deportation) order has issued but who have not yet been deported. Current law requires, with some qualification, that an alien ordered removed be detained during the 90-day removal period in which the deportation must be effectuated.[293] Aliens not removed within this period are generally to be released under supervision.[294] However, aliens ordered deported who are either deemed inadmissible or deportable for immigration status violations, criminal activity, posing a national security risk or otherwise posing a threat to the community "may be detained beyond the removal period . . . ."[295]

The final category involves the special Alien Terrorist Removal Court (ATRC), created in 1996, which has procedures designed to protect classified information during deportation hearings for aliens eligible for deportation based on links to terrorism.[296] While this court has — like the PATRIOT Act provisions — never been used, the Attorney General is authorized by statute, upon filing of an application to proceed before the ATRC, to take into custody and detain any alien with respect to whom an application has been filed.[297] The alien is entitled to a release hearing and may petition for release, but must demonstrate that he is a lawful permanent resident, will not flee, and will not endanger national security or the safety of any person or the community if released.[298] An alien for whom the order to proceed under the ATRC was *denied* may nonetheless be detained pending the Attorney General's appeal, if the judge finds no sufficient combination of conditions, using the framework of the Bail Reform Act pretrial detention standards, discussed above.[299] If the ATRC judge finds that the alien should be removed, and the order is affirmed, the Attorney General is directed to keep the alien in custody until removal.[300] Since it has never been used, the constitutionality of this provision has never been tested in court.

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[293] *See* INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found [inadmissible or deportable under criminal or national security grounds].").
[294] *Id.* § 241(a)(3), 8 U.S.C. § 1231(a)(3).
[295] *Id.* § 241(a)(6), 8 U.S.C. § 1231(a)(6); *see also infra* notes 328–335 (discussing recent Supreme Court case law reading implied limitations into this statutory provision).
[296] *Id.* § 504(e)(3), 8 U.S.C. § 1534(e)(3).
[297] *Id.* § 506(a)(1), 8 U.S.C. § 1536(a)(1).
[298] *Id.* § 506(a)(2)(A), 8 U.S.C. § 1536(a)(2)(A).
[299] *Id.* § 506(a)(3)(b)(2), 8 U.S.C. § 1536(a)(3), (b)(2).
[300] *Id.* § 506(b)(1), 8 U.S.C. § 1537(b)(1).

B. Historical Evolution of Immigration Detention Authorities

Like many American preventive detention authorities, the immigration detention system has its origins in a conceptually expansive power that has narrowed over the years. But in contrast to the general trend we describe, this broad conceptual power did not actually give rise to much detention in practice. Rather, the raw statutory power to detain aliens has grown over the life of the nation, and its use has mushroomed in recent years.

This apparent paradox is a function of the fact that the power of the political branches over the borders is traditionally regarded as virtually plenary, giving Congress potentially sweeping powers to authorize the expulsion, exclusion, and detention of foreigners. But these powers were for many years not used to their full extent. Indeed, the United States operated for much of its early history without immigration restrictions, quotas, or provisions for internal enforcement at all — the exception being the two-year period from 1798 to 1800 when the Alien Act of 1798 was in force. At the same time, the liberalism of American policy masked an unbridled government power: "the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission."[301]

Between 1800 and 1875, immigration legislation focused primarily on the conditions of passengers traveling to the United States and preventing exploitation of immigrant workers by those who had paid for their passage. In 1875, Congress passed the first legislation providing for exclusion of certain classes of immigrants: convicts and prostitutes.[302] Subsequent legislation in 1882 added "lunatics" and "idiots," while laws in 1885 and 1887 excluded and took action against the importation of contract

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[301] Kiyemba v. Obama, 555 F.3d 1022, 1025 (D.C. Cir. 2009), *vacated and remanded by* No. 08-1234, slip op. at 1 (U.S. Sup. Ct. Mar. 1, 2010), *reinstated as modified by* No. 08-5424, slip op. at 2 (D.C. Cir. May 28, 2010); *see also id.* at 1025 ("Ever since the [1889] decision in the *Chinese Exclusion Case*, the Court has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms.").

[302] WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 5 (1932).

laborers.[303] The Act of 1891 added to the excludable classes those suffering from infections diseases, those who had *previously* been convicted of felonies or crimes of moral turpitude, paupers, and polygamists. More importantly for present purposes, it authorized immigration officers to detain arriving aliens pending their inspection.[304] Subsequent legislation in 1893 and 1903 created administrative procedures for applying the immigration laws and added anarchists and other political radicals to the list of excludable persons,[305] the latter presumably in response to President McKinley's assassination by an anarchist in 1901.

The 1903 Act, also for the first time, applied the immigration law's provisions to domiciled aliens returning from overseas, as opposed merely to alien immigrants, and it marked the first instance of "the policy of expelling because of facts or conditions occurring or developing subsequent to the alien's entry."[306] Significantly, it also for the first time supplied an expulsion procedure involving detention: "The offending alien was to be 'taken into custody and returned to [the place from which] he came.'"[307]

In 1910, the Immigration Station on Angel Island, California began operation. Many Chinese immigrants were detained there for months or even years pending adjudication and appeal of their admissibility under the Chinese Exclusion Acts.[308] In 1917, Congress greatly expanded the executive's expulsion powers by removing the time limit for deportation of persons deemed inadmissible because, among other undesirable behaviors, they had advocated the overthrow of the U.S. government.[309] This had the effect of significantly increasing the set of aliens residing in the United States who might be subject to arrest, detention, and deportation. The 1924 Act provided for the expulsion of "[a]ny alien found to have entered the country without complying with [the Act's] terms," with no time limit.[310] These and

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[303] *Id.* at 6.
[304] *Id.* at 7–8.
[305] *Id.* at 8–9.
[306] *Id.* at 9.
[307] *Id.* at 10 (quoting Pub. L. No. 57-162, §21, 32 Stat. 1213, 1218 (1903)).
[308] *Life on Angel Island*, ANGEL ISLAND IMMIGRATION STATION FOUNDATION, http://www.aiisf.org/index.php/history/life-on-angel-island (last visited Apr. 1, 2010). The Acts had been passed in 1882, 1884, and 1888, and prohibited entry of Chinese laborers, while permitting the immigration of members of the educated classes.
[309] VAN VLECK, *supra* note 302, at 13.
[310] *Id.* at 18.

other changes resulted in a sharp increase in expulsion between 1924 and 1930.

All of these exclusion and expulsion proceedings required some detention. Arriving aliens not from Mexico or Canada were detained pending adjudication of their admissibility and appeals.[311] The applicable statutes did not provide for bail, though "temporary admission under bond" was available in cases of "great hardship and long delay."[312] Aliens arrested under deportation warrants could secure their release on bond, though "[i]n some cases where bail cannot be furnished, the aliens [were] confined in the detention quarters at the local immigrant stations" or held in the local jails.[313] The 1952 McCarran-Walter Act codified the various immigration statutes into the Immigration and Nationality Act (INA).[314]

The landmark event in the development of modern immigration detention was the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[315] passed in response to a perceived surge in illegal immigration from Latin America. IIRIRA toughened many provisions of the INA. Most significantly, it created the mandatory detention categories under the INA for asylum seekers and criminal aliens that are discussed above, which together account for the majority of immigration detainees in custody today. The subsequent Anti-Terrorism and Effective Death Penalty Act of 1996[316] created the special provision for alien terrorist removal and expanded the criminal alien category. Finally, the USA PATRIOT Act added INA § 236A, which provides for mandatory detention of noncitizens who are suspected terrorists.

Like certain other preventive detention authorities, the immigration detention system saw extensive use in the wake of the September 11 attacks. Indeed, it became the detention system of choice for people within the

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311 *Id.* at 49–50.
312 *Id.* at 74–75.
313 *Id.* at 97.
314 *The McCarran-Walter Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCR (last visited Nov. 14, 2010).
315 Pub. L. No. 104-208, 110 Stat. 3009 (1996).
316 Pub. L. No. 104-132, 110 Stat. 1214 (1996).

United States. The INS detained some 762 foreign nationals as a result of the post-9/11 PENTTBOM investigation, of whom 738 were arrested during that investigation and 24 were already in INS custody.[317] New York Joint Terrorism Task Force teams "would arrest any alien encountered in the course of investigating a JTTF or PENTTBOM lead who was found to be in the country illegally."[318] Some were designated persons of interest in the investigation. The level of FBI interest in the detainee ("high interest," "of interest," or "no interest") determined the location and restrictiveness of detention, as well as its length. A "hold until cleared" policy meant that immigration detainees arrested in the course of the investigation were to be denied bond and detained until they were cleared with the FBI and the CIA.

The then-Immigration and Naturalization Service (INS) (whose internal enforcement role is now performed by Immigration and Customs Enforcement (ICE) in the Department of Homeland Security) delayed detainees' removals or voluntary departures, and generally managed to avoid "addressing the substantive legal issues raised in the *habeas corpus* lawsuits by obtaining FBI Headquarters' clearance for an individual detainee who had filed a legal action before a formal response was needed on the merits."[319] Eventually the policy was changed to allow removal before FBI clearance, with the FBI having notice and an opportunity to object if a detainee scheduled to be removed was of interest.

Subsequent legislative changes further expanded the list of terrorist ties that could render an alien deportable, to include increasingly tangential linkages, and they permitted deportation "when an immigration officer has 'reason to believe' that the alien is likely to engage in terrorist activity in the future."[320] This expansion of the terrorist support ground for inadmissibility led to some absurd and undesired results, including the disqualification from

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[317] OFFICE OF THE INSPECTOR GENERAL, DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (2003) [hereinafter SEPTEMBER 11 DETAINEES]. Civil claims in *Turkmen v. Ashcroft*, No. 02 CV 2307(JG), 2006 WL 1662663, (E.D.N.Y. June 14, 2006), based on the length of detention were dismissed by Judge Gleeson of the Eastern District of New York, though claims based on the conditions of confinement were allowed to go forward.

[318] SEPTEMBER 11 DETAINEES, *supra* note 317, at 14.

[319] *Id.* at 100.

[320] *See* David Martin, *Refining Immigration Law's Role in Counterterrorism*, *in* LEGISLATING THE WAR ON TERROR 180, 193 (Benjamin Wittes ed. 2009).

asylum of refugees for having provided "material support," in the form of ransom payments, to the very organizations whose persecution they had fled.[321]

The dramatic broadening in statute and in practice of immigration detention has coincided with the application to them of stricter due process norms. As late as the 1950s, the Supreme Court showed little anxiety about indefinite immigration detention without substantial legal process. In 1952, for example, the Court upheld the indefinite detention without bail, at the sole discretion of the Attorney General,[322] of aliens believed to be members of the Communist Party whose deportation proceedings had dragged on for years and whose removal to another country might be impossible.[323] The following year, the Court upheld the indefinite detention at Ellis Island of an arriving alien immigrant who was found to be excludable,[324] yet whom no country would take back. The court, approving the detention, held that "an alien on the threshold of initial entry stands on a different footing [from someone already here]: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"[325] Interestingly, the majority emphatically characterized the detainee's predicament as "exclusion" rather than detention, comparing it to turning an inadmissible alien back at a land border or preventing inadmissible aliens

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[321] *Id.* at 194–95.

[322] "Section 23 of the Internal Security Act, 64 Stat. 987, 1011, 8 U.S.C. § 156, provide[d] that 'Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole.'" Carlson v. Landon, 342 U.S. 524, 553 (1952) (Black, J., dissenting).

[323] *Id.* at 541–42.

[324] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). Mezei was found excludable under special regulations issued pursuant to the Passport Act of 1918, which authorized the President to, by public proclamation, make unlawful the entry into the United States of categories of aliens whose entry would be prejudicial to U.S. interests. *See id.*, 345 U.S. at 211 n.7. Mezei, "born in Gibraltar of Hungarian or Romanian parents," had "without authorization or reentry papers, simply left the United States and remained behind the Iron Curtain for 19 months." *Id.* at 209, 214.

[325] *Id.*, 345 U.S. at 212 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

on board a ship from landing in the United States.[326] The detention was merely a feature of the exclusion.[327]

More recently, however, the Court has taken a stricter view. In a pair of cases in 2001 and 2005, *Zadvydas v. Davis* and *Clark v. Martinez*,[328] it read narrowly the authority in INA § 241(a)(6) to detain removable aliens whose removal cannot be effectuated within the ninety day period, to no longer authorize detention "once removal is no longer reasonably foreseeable."[329] It "further held that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is 'no significant likelihood of removal in the reasonably foreseeable future.'"[330] While the Court's decisions were interpretations of the statute, not the Constitution, they were explicitly informed by the concern that a broader construction of the statute would raise due process questions of precisely the type the justices had rejected five decades earlier. Congress responded to the 2001 case with the USA PATRIOT Act language establishing a process for long-term detention of suspected alien terrorists who cannot be deported — provisions that have yet to face judicial test.

But while the Court has begun reading time limits into immigration detention statutes, it has remained solicitous of the propriety of detention itself. In the 2003 case of a Korean national and lawful permanent resident facing deportation because of multiple criminal convictions, for example, the Court upheld the requirement that criminal aliens be held without bail

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[326] *See id.*, 354 U.S. at 215–16 ("Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.").

[327] Justice Jackson responded in dissent: "Is respondent deprived of liberty? The Government answers that he was 'transferred to Ellis Island on August 1, 1950 for safekeeping,' and 'is not being detained in the usual sense, but is in custody solely to prevent him from gaining entry into the United States in violation of law. He is free to depart from the United States to any country of his choice.' Government counsel ingeniously argued that Ellis Island is his 'refuge' whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound. . . . We must regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law." *Id.* at 220–21 (Jackson J., dissenting).

[328] Zadvydas v. Davis, 533 U.S. 678 (2001); Clark v. Martinez, 543 U.S. 371 (2005).

[329] *Zadvydas*, 533 U.S. at 699.

[330] *Clark*, 543 U.S. at 378 (quoting *Zadvydas*, 533 U.S at 701).

pending removal proceedings.[331] The majority distinguished *Zadvydas* based on the duration of the detention and the fact that, unlike in *Zadvydas*, deportation had not become "'no longer practically attainable'" to the extent that "detention did not serve its purported immigration purpose."[332]

Before *Zadvydas*, the then-INS estimated it had in custody 5,000 "lifers" — unremovable detainees whom it could or would not release.[333] In response to *Zadvydas*, the Attorney General issued regulations providing for the determination of the likelihood of removal and allowing for the continued detention of detainees falling within one of four special categories of dangerousness: aliens with contagious diseases, aliens whose release would harm U.S. foreign policy, aliens detained on security or terrorism grounds, or aliens who are determined to be specifically dangerous.[334] Today, 80 percent of those ordered deported are removed or released within 90 days; the remaining 20 percent are eligible for conditional release unless they fall within one of the special statutory categories. Virtually all of those ordered removed are released or removed after 180 days.[335]

C. Conclusion

In short, preventive immigration detention remains viable as long as it is not permanent and it is reasonably tied to the purpose of the underlying proceedings: removal of those people from the country who are not entitled to live in it. It may also remain viable for much longer-term detention in the context of terrorist aliens under either of the two special regimes Congress has created to handle such cases, though both of these systems remain untested. Immigration detention follows the general pattern of preventive detention authorities in that it has evolved from a conceptually broad common law power onto which courts and legislatures have, over time, added certain limits. It is unusual in that over the past century, Congress has relentlessly *increased* the statutory breadth of a power that had once been largely theoretical. Yet this expansion follows the general rule of the historic ebb and flow of preventive detention authorities, whose breadth, we argue,

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[331] Demore v. Kim, 538 U.S. 510, 27–28 (2003).
[332] *Id.* at 527 (quoting *Zadvydas*, 533 U.S. at 690).
[333] SISKIN, *supra* note 276, at 8.
[334] *See id.* at 9 (citing 8 C.F.R.§§ 241.4, 241.13 and 241.14 (2004)).
[335] *See* ALEINIKOFF ET AL., *supra* note 287, at 1136.

rises and falls with the perceived and actual need for them. While conceptually narrower than it was in the past, today's immigration detention system is, quantitatively speaking, the behemoth of American preventive detention. It involves an enormous number of people detained not merely without criminal conviction but often without even a suggestion of criminal misconduct.

IV. Health Authorities

State health authorities present in some respects the paradigmatic case of preventive detention under American law. They permit the detention of people in the absence of criminal charges and even, in certain instances, following the *completion* of a sentence for a criminal conviction. They evolved from broader common law authorities as the public perception of the necessity of such detention narrowed, and courts and legislatures have invested them with increasing procedural protections over time in response to abuses. Many statutes, particularly in the mental health arena, involve carefully crafted multi-pronged triggers to restrict detention to situations of true necessity. In general, mental health authorities have evolved further in this direction than has the power of quarantine — both because the latter has seen so little use in the modern era and also because the diagnostic conditions associated with communicable disease and the danger of contagion are more easily and less speculatively established. But the broad pattern is similar and looks little like the mythological pattern in which, as David Golove puts it, "exceptions" to a firm rule against preventive detention are "carved out . . . based on very specific rationales."[336] To the contrary, like military detention authorities, broad mental health and quarantine detention powers coexisted from the beginning with the criminal justice system, but then narrowed over time as society needed them less and grew more anxious about their capacity for abuse.

A. Civil Commitment of the Mentally Ill

State authority to detain the mentally ill derives from two reserves of state power: the police power and the *parens patriae* power. As the Supreme Court has noted:

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[336] Eviatar, *supra* note 2 (quoting David Golove).

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.[337]

The power is thus both overtly preventive and paternalistic.

1. Requirements for Detainability

States may not commit a person merely because he or she is mentally ill.[338] Detention requires a finding of mental illness *and* a finding that the person presents a danger — either an imminent danger or, depending on the jurisdiction, one in the foreseeable future — to himself or to others.[339] In some jurisdictions, in lieu of that dangerousness finding, a court can authorize detention where a person requires treatment and is incapable of caring for him or herself.[340] In case of a commitment based on danger to the public, confinement is authorized only so long as the required mental illness and dangerousness persist, with the continued necessity of the detention subject to periodic review.[341] Many states require that authorities consider less-restrictive alternatives before seeking involuntary commitment, but this requirement does not necessarily vest in the person to be committed an absolute right to the least restrictive alternative.

Persons charged with crimes and found not guilty by reason of insanity or incompetent to stand trial may also be committed. A finding of not guilty by reason of insanity is in itself sufficient ground for commitment, as it establishes both conduct constituting a criminal act and mental illness.[342] There is thus no need to carry out the additional procedures in order to obtain a civil commitment. The acquitted may be held until he ceases to satisfy one of the two prongs: mental illness and dangerousness.

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[337] Addington v. Texas, 441 U.S. 418, 426 (1979).
[338] O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).
[339] FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 109 (3d ed. 2005).
[340] *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2010).
[341] Jones v. United States, 463 U.S. 354, 368 (1983).
[342] *Id.* at 366.

Even holding such a person beyond the length of the maximum allowable prison term for the offense does not violate the Constitution.[343] Defendants found incompetent to stand trial by reason of mental illness may generally be remitted to the custody of a psychiatric hospital for treatment that may help them regain competency. If they regain competency, charges may be refiled.[344] They may also be committed by following a state's normal civil commitment procedures. The state may not hold a criminal defendant indefinitely without recourse to its standard commitment procedures and their accompanying procedural safeguards.[345]

New York's civil commitment law offers a useful example of the general principles of civil commitment in practice. It authorizes emergency involuntary admission for a person who is mentally ill and conducting himself "in a manner which is likely to result in serious harm to himself or others" for up to 15 days for observation, care, and treatment.[346] Retention beyond 15 days requires compliance with the (more stringent) procedure for involuntary admission. The substantive standard here does not differ, but the procedures are more elaborate and protective.[347] A commitment order, if issued after a hearing, authorizes the retention of the patient for up to one year. Subsequent orders may be issued under the same procedures to extend

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[343] *Id.*

[344] *See, e.g.*, WASH. REV. CODE § 10.77.084 (2010).

[345] Jackson v. Indiana, 406 U.S. 715, 720 (1972).

[346] Serious harm means:

> 1. substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or
> 2. a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

N.Y. MENTAL HYG. LAW §§ 9.39, 9.41 (Consol. 2010).

[347] *Id.* § 9.27. An application must be filed 10 days before the involuntary admission. The application requires the certification of two examining physicians. It can be filed by a family member, cohabitant, guardian, treating psychiatrist, or various state officials. The examining physicians must consider whether alternative forms of care would suffice. Once the application and examinations are completed, peace officers may be requested to execute the involuntary admission. The hospital must then file an application to retain the patient within 60 days. The patient or his designees may also request a hearing first. If no objection is made on behalf of the patient, an order to retain him for up to six months is entered. If the patient does request a hearing, the court determines whether to enter the order.

retention for up to two years each.[348] The law requires that the court "shall order the release of the patient" if it is determined at any point "that the patient is not mentally ill or in need of retention."[349]

In 1999, New York enacted "Kendra's Law" after a schizophrenic man pushed 33-year-old Kendra Webdale in front of a subway train. The law's primary provision allows individuals to apply for court orders to force mentally ill persons to accept outpatient treatment, if necessary. If the individual does not comply, he may be transported to a hospital and held for up to 72 hours, within which time the hospital may choose to initiate commitment proceedings.[350]

Texas's statutes offer an interesting comparison. Like New York's, Texas permits emergency detention by application to a judge where the subject evidences mental illness, where there is a substantial risk of serious harm to himself or others, where that risk is imminent unless the person is immediately restrained, and where the necessary restraint cannot be accomplished without detention.[351] Unlike New York, however, Texas permits emergency detention only for 24 hours before a judicial hearing. Upon application from a qualifying person, a judge may then order involuntary inpatient care for an initial period for up to 90 days,

> if the judge or jury finds, from clear and convincing evidence, that: (1) the proposed patient is mentally ill; and (2) as a result of that mental illness the proposed patient: (A) is likely to cause serious harm to himself; (B) is likely to cause serious harm to others; or (C) is: (i) suffering severe and abnormal mental, emotional, or physical distress; (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently,

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[348] *Id.* § 9.33. The patient or someone acting on his behalf may within 30 days of any such order demand a rehearing on the questions of mental illness and the need for retention before a jury.

[349] *Id.* § 9.31. However, the court is authorized to deny the application for release "if it be determined that the patient is in need of retention." *Id.*

[350] *See An Explanation of Kendra's Law*, NEW YORK STATE OFFICE OF MENTAL HEALTH, http://www.omh.state.ny.us/omhweb/Kendra_web/Ksummary.htm (last updated May 2006).

[351] TEX. HEALTH & SAFETY CODE ANN. § 573.012 (West 2010).

> which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.[352]

This detention can later be extended in increments of 12 months upon rehearing.

Federal criminal law also provides for the commitment of mentally ill persons, in three circumstances.[353] First, it provides for the commitment of a federal defendant found "mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[354] It also provides for the commitment of federal defendants found "not guilty only by reason of insanity at the time of the offense charged."[355] And it provides for the commitment of a federal prisoner whose sentence is expiring when a court finds, in a mandated hearing, "by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."[356]

2. Historical Origins and Evolution

The core of the power to detain the mentally ill, like the military detention authorities, is very old. An English law of 1714 provided justices of the peace with authority to "Restrain and Confine" persons "of little or no Estates, who, by Lunacy . . . are furiously Mad, and dangerous to be permitted to go Abroad."[357] (Madmen of means were to be provided for and maintained in an appropriate accommodation by their families; those who belonged to a parish and needed restraint were expected to be

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[352] TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2010).
[353] Excluding the Adam Walsh Act, 18 U.S.C. 4248, which authorizes the post-sentence detention of sexually violent predators, discussed in Part IV.B, *infra*.
[354] 18 U.S.C. § 4241(d) (2006).
[355] *Id.* § 4243(a).
[356] *Id.* § 4246(d).
[357] Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part I: The English Experience*, 43 U. CIN. L. REV. 1, 46 (1974).

maintained by their communities.[358]) In the American colonies, the nondangerous mentally ill were treated like other "undesirable strangers" — nonresident insane were excluded, while resident insane were an "expensive burden to be borne" by their families or the town.[359] Though "there were no statutory provisions respecting commitment of the mentally ill, the common law which the colonies inherited from [England] recognized the state's power to deprive insane persons of their liberty.[360] The King, "as father of the country, was responsible for the care and custody of 'all persons who had lost their intellects and become . . . incompetent to take care of themselves.'"[361] The confinement of dangerous or violent insane persons was recognized as one to be dealt with under the police powers. A "'furiously insane' person or one deemed dangerous to be permitted at large'" could be confined until his dangerous condition subsided. If necessary, it was permissible to "confine, bind and beat" him.[362] In 1788, New York enacted a law providing for the detention of the insane. Under the statute, "persons who by lunacy or otherwise are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad," could be "apprehended and kept safely locked up in some secure place, and . . . if necessary, to be there chained."[363] A Massachusetts statute dealing with "Rogues, Vagabonds, Common Beggars and other idle, disorderly and lewd Persons" made similar provisions.[364]

The first significant safeguards on commitment did not arise until the first quarter of the nineteenth century. New York in 1827 forbade the

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[358] *Id.* at 34 (describing commitment of the insane Edmund Francklin to the custody of Dr. Crooke, governor of London's Bethlehem Hospital, commonly known as "Bedlam," with support for his private accommodation in the Doctor's home and two servants paid by Francklin's estate).

[359] Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law — Part II: The American Experience*, 43 U. CIN. L. REV. 781, 786 (1974).

[360] ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 419 (1949).

[361] *Developments in the Law: Civil Commitment*, 87 HARV. L. REV. 1190, 1208 (1974) (quoting *In re* Barker, 2 Johns. Ch. 232, 236 (N.Y. 1816)).

[362] DEUTSCH, *supra* note 360, at 420.

[363] *Id.* This act also described a class of "disorderly persons," including jugglers, prostitutes, fortune tellers and "all persons wandering abroad . . . and not giving a good account of themselves," and then authorized their confinement for up to six months and whipping. Dershowitz, *supra* note 359, at 788.

[364] DEUTSCH, *supra* note 360, at 420.

detention of the mentally ill in houses of correction, requiring that they instead be sent to the Bloomingdale Asylum, located on the site of what is now Columbia University.[365] Virginia in 1806, by contrast, provided for the confinement of "idiots or lunatics" in county jails; however, the law forbade authorities to forcibly remove a "lunatic" from the custody of his relatives if they could provide for him in a suitable manner.[366]

By the middle of the nineteenth century, increasingly urbanized and transient patterns of settlement in the industrializing economy had led to the building of more numerous public mental hospitals and other institutions of confinement.[367] This shift also coincided with a rising belief in the curability of mental illness by confinement in an appropriate asylum, supported by the publication of bogus "recovery" statistics.[368] The ensuing conclusion that confinement in newly constructed asylums would be a salutary policy benefiting the mentally ill was propagated by, among others, the humanitarian campaigner Dorothea Dix.[369] New York's 1842 commitment statute reflected this shift in emphasis from custodial incapacitation to essential treatment. It *required* detention in the new state asylum at Utica "in *every* case of lunacy," for a minimum of six months.[370] The majority of commitments under the New York statute were begun by family members, "a figure which changed little over time."[371] Despite the existence of statutory legal processes, commitment was more often an "informal process that involved human decisions rather than legal ones."[372]

Matter of Josiah Oakes, a watershed case for commitment law decided in 1845, offers a good example of this pattern.[373] Josiah Oakes was committed by his family to an asylum in Belmont, Massachusetts over his objections and with no prior judicial review. The Supreme Judicial Court, reviewing his detention on a writ of habeas corpus, denied his petition even

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[365] *Id.* at 421.
[366] *Id.*
[367] GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL 23–24 (1994).
[368] *See* Dershowitz, *supra* note 359, at 805.
[369] *Id.* at 807.
[370] *Id.* at 808. It permitted release of those who had completely recovered and of those nondangerous admittees who were unlikely to improve with further treatment and could be maintained by their relatives.
[371] GROB, *supra* note 367, at 80.
[372] *Id.*
[373] 8 L. Rep. 122 (Mass. 1845).

though the Massachusetts statute, in the case of a nondangerous person charged with mental illness, provided for judicial process, including a jury of six men.[374] In an opinion by Chief Justice Lemuel Shaw, the Court justified the power to "restrain an insane person" *in the absence of statutory authority* with reference to:

> the great law of humanity which makes it necessary to confine those who, going at large, would be dangerous to themselves or others. And the necessity which creates the law creates the limitations of the law. . . . The question must then arise. . . whether a patient's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation.[375]

Oakes is notable as "the first time that the therapeutic justification for restraint was explicitly stated in a decision handed down by an American court."[376] It is also commonly cited for the proposition that the *parens patriae* power authorizes the involuntary detention of a patient committed for his own protection.[377] Significantly, *Oakes* provided a legal basis for the new practice of compulsory institutionalization of nondangerous mentally ill persons.[378]

Another illustrative landmark in the evolution of civil commitment law was the 1864 case of *Packard v. Packard*, in which an Illinois woman, Elizabeth Packard, challenged her commitment by her husband under an Illinois law permitting husbands to commit their wives to the state "*without* the evidence of insanity required in other cases."[379] The Court found Mrs.

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[374] Dershowitz, *supra* note 359, at 813.
[375] *Oakes*, 8 L.Rep. at 124-25 (emphasis added).
[376] DEUTSCH, *supra* note 360, at 423.
[377] ROBERT G. MEYER & CHRISTOPHER M. WEAVER, LAW AND MENTAL HEALTH: A CASE BASED APPROACH 128 (2005).
[378] *But see* ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 438 (1838) (criticizing contemporary practice of confining nondangerous mentally ill and noting potential for abuse absent procedural safeguards).
[379] DEUTSCH, *supra* note 360, at 424 (citation omitted).

Packard to be sane and ordered her released, though it did not consider any constitutional implications. Mrs. Packard, whose case had become a *cause célèbre*, then launched a crusade for reform which resulted in passage by the Illinois and Iowa legislatures of bills requiring jury trials in every civil commitment proceeding. Packard's attempt to secure *substantive* changes to the commitment criteria by precluding the finding of anyone to be insane based merely on his expression of opinions that seemed "absurd" to others failed, however, as did her attempt to limit commitment of the nondangerous to those who were "so lost to reason as to render [them] an unaccountable moral agent."[380] Instead, in 1893 Illinois enacted a law containing both a) a "temporary detention" provision pending a judicial determination of eligibility for longer-term commitment to the asylum, and b) a "voluntary admission" provision. Both are widely echoed in modern commitment laws.[381]

Despite criticism of asylum conditions and practices, commitment law shifted little in the ensuing half century. The inpatient population of mental hospitals in the United States grew from 187,000 in 1910 to 425,000 in 1940, demonstrating the "pervasive . . . faith in an institutional policy" of mental illness control.[382] World War II, however, proved to be a catalyst for change, and the postwar years witnessed a shift from an institutionalization-focused policy to community-based treatment. In the mid- to late 1940s, various journalists published exposes describing and depicting the horrifying conditions in U.S. psychiatric hospitals in a series of exposes.[383] These revelations shocked the public and undermined confidence in asylums. The passage of the 1963 federal Community Mental Health Centers Act, which funded outpatient treatment, the deinstitutionalization movement, and the development of psychotropic medications all reduced the inpatient population in mental hospitals and shifted public policy away from confining those who could be safely treated in freedom.[384] California's Lanterman-Petris-Short (LPS) Act, enacted in 1972, was the first modernized commitment statute explicitly focused on protecting the

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[380] Dershowitz, *supra* note 359, at 837 (citation omitted).
[381] *Id.* at 843.
[382] GROB, *supra* note 367, at 167.
[383] *E.g.*, Albert Q. Maisel, *Bedlam 1946*, LIFE MAGAZINE, May 6, 1946 (describing appalling state of American mental hospitals), *available at* http://www.pbs.org/wgbh/americanexperience/features/primary-resources/lobotomist-bedlam-1946/.
[384] DONALD H.J. HERMANN, MENTAL HEALTH AND DISABILITY LAW IN A NUTSHELL 144 (1997).

mentally ill from abuse and inappropriate detention and ensuring the provision of adequate treatment.[385]

But legal change came slowly. As late as 1960, the Iowa Supreme Court held that involuntary commitment was "[n]ot such [a] loss of liberty . . . as is within the meaning of the [Due Process Clause]."[386] A 1961 study found that in six states, the civil commitment statutes "provided no criteria for [involuntary] hospitalization, presumably leaving judges to decide for themselves," while Massachusetts' law still included "social nonconformity" among the permissible grounds for detention.[387] Several states did not even involve courts in detention decisions; "[a]dministrators or doctors alone could order hospitalization."[388] As many as half of the states did not even require that the mentally ill person be notified of an application seeking his or her commitment, while only seventeen required the appointment of counsel.[389]

Judicial decisions finally began to reshape the legal landscape in the late 1960s as the heyday of civil rights litigation began and influential works (including Michel Foucault's *Madness and Civilization* and Thomas Szasz's *The Myth of Mental Illness*) challenged prevailing perceptions of the mentally ill, their place in society, and the utility and humanity of institutionalization. In 1966, the Supreme Court held that a criminal offender was deprived of equal protection "by his civil commitment to an institution . . . beyond the expiration of his prison term without [the same] judicial determination that he is dangerously mentally ill . . . afforded to all so committed."[390] In 1972's *Jackson v. Indiana*, the Court further held that the state could not, consistent with the Due Process Clause, "commit [a criminal defendant] for an indefinite period simply on account of his incompetency to stand trial on the charges filed against him" and that its failure to apply the (more

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385 CAL. WELF. & INST. CODE, §§ 5000–5120 (West 2010).
386 *Developments in the Law: Civil Commitment*, *supra* note 361, at 1190.
387 Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1289 (1966).
388 *Id.*
389 *Id.*
390 Baxstrom v. Herold, 383 U.S. 107, 110 (1966).

procedurally generous) statutory civil commitment procedure deprived him of equal protection of the laws.[391]

Three years later, in *O'Connor v. Donaldson*, the Court articulated the basic principle that forms the modern constitutional minimum for civil commitment: that involuntary civil commitment is impermissible without a finding of *both* mental illness and dangerousness to oneself or others.[392] Specifically, the Court held that a

> finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, *there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom*. . . . In short, a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.[393]

The Court also rejected the idea that improving the quality of life of a nondangerous mentally ill person who can successfully live in freedom is in itself a sufficient state interest to justify detention.[394] Nor may the State "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different."[395]

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[391] 406 U.S. 715, 720 (1972). *But cf.* Jones v. United States, 463 U.S. 354 (1983) (holding involuntary commitment of criminal defendant found not guilty by reason of insanity (NGRI) for petty larceny, for a term exceeding the maximum possible punishment for the crime, comported with Due Process). Jones is most notable for the proposition that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society." *Id.* at 366. An NGRI acquittal is sufficient (i.e., no separate civil commitment procedure is required) to establish both mental illness and dangerousness (as it establishes that the defendant committed an act that constitutes a criminal offense), even in the absence of violence. *Id.* at 363–66.

[392] 422 U.S. 563 (1975).

[393] *Id.* at 575 (emphasis added).

[394] *Id.*

[395] *Id.*

The Court would later adduce stricter procedural requirements to *Donaldson*'s substantive constitutional limits on civil commitment. In *Addington v. Texas*, the Court held that the required standard of proof in a civil commitment proceeding is clear and convincing evidence.[396] The Court noted the difficulty, given the fallibility of psychiatric diagnosis, of proving both mental illness and dangerousness beyond a reasonable doubt, and balanced this evidentiary concern against the significance of the liberty interest at issue in the proceeding.[397]

Most recently, in 1992's *Foucha v. Louisiana*, the Court held unconstitutional a Louisiana scheme that permitted the continued detention of a criminal defendant, initially found not guilty by reason of insanity, even after he was no longer mentally ill, based on a state court's finding of continued dangerousness.[398] The state had sought to continue his detention based on his antisocial personality, which lower courts had found not to be a "mental illness."[399] Writing for the plurality, Justice White argued that a doctor's unwillingness to certify that Foucha "would not be a danger to himself or to other people," without a finding of mental illness, was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."[400] The Court also distinguished the Louisiana statute from the (constitutionally permissible) federal pretrial detention regime, based on the available procedural protections, limits on duration and the strength of the governmental interest in detention.[401]

3. Conclusion

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[396] 441 U.S. 418, 425–33 (1979). The holding of *Addington* does not apply to defendants found not guilty by reason of insanity (NGRI). *See supra* note 391 (describing constitutional requirements for commitment of criminal defendants found NGRI). The Court has upheld the use of a lower standard of proof for the civil commitment of the mentally retarded than for the mentally ill, based on the greater risk of error in mental illness diagnoses than mental retardation diagnoses. Heller v. Doe, 509 U.S. 312 (1993).

[397] *Addington*, 441 U.S. at 429.

[398] 504 U.S. 71, 78 (1992).

[399] *Id.*

[400] *Id.* at 82.

[401] *Id.*

In mental illness commitment, in short, we see all of the major themes at work in American preventive detention. First, the power to detain the mentally ill derives from a broad power that developed not as an exception to the norms of criminal justice but parallel to it. We also see a narrowing over the centuries of that power as abuses gave rise both to judicial imposition of due process standards and to legislative reforms. Finally, a multi-pronged test, periodic review, and attention to less-restrictive alternatives all serve to limit detention to situations of genuine necessity.

B. Sexually Violent Predators

An important variant of the civil commitment of the mentally ill involves commitment statutes aimed at violent sexual predators — that is, prisoners who have been convicted of committing a serious sex crime. These statutes authorize civil commitment beginning *after* the offenders have completed sometimes lengthy prison sentences, a unique feature that has made them one of the most controversial modern preventive detention authorities.

1. Requirements for Detainability

The constitutional minimum for the civil commitment of sex offenders under modern sexually violent predator statutes is that the person must be dangerous to others *and* suffer from a mental illness or "mental abnormality."[402] The Supreme Court's 2002 decision in *Kansas v. Crane* held that a subsidiary requirement is that the offender have "serious difficulty" controlling his behavior, though total inability to do so is not required for detention.[403] In addition, many state statutes require evidence of multiple instances of sexual misconduct.[404]

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[402] Kansas v. Hendricks, 521 U.S. 346, 360 (1997).
[403] 534 U.S. 407, 413 (2002).
[404] For example, the District of Columbia requires "repeated misconduct in sexual matters." D.C. CODE § 22-3803 (2010). Massachusetts requires "repetitive or compulsive sexual misconduct." MASS. GEN. LAWS ch. 123A, § 1 (2010). Illinois requires "criminal propensities to the commission of sex offenses." 725 ILL. COMP. STAT. 205 / 101.1 (2010). However, this does not necessarily mean that multiple *convictions* are required; a pattern of prior offending may be demonstrated at the commitment proceeding.

Post-sentence civil commitment under New York's statute offers a typical example. To deal with "recidivistic sex offenders," it requires review of the files of "detained sex offenders" coming up for release, including a report from a psychiatrist as to whether each person suffers from a "mental abnormality."[405] The law also applies to those found not guilty by reason of insanity or incompetent to stand trial. If the administrative review team recommends "civil management" for the sex offender, the Attorney General may then petition a court for retention of the sex offender, pending a trial, which it may order upon a finding of probable cause that the person is a sex offender requiring civil management. If the jury at the subsequent commitment proceeding

> finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a dangerous sex offender requiring confinement. In such case, the respondent shall be committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement.[406]

The sex offender has an annual right to petition the court for discharge and is entitled to a review of his mental condition annually by a psychiatrist. If it is determined that the offender "no longer is a dangerous sex offender requiring confinement," the court is to discharge the offender subject to a regime of "strict and intensive supervision."[407]

Federal law too permits civil commitment of violent sexual predators. In 2006, Congress passed the Adam Walsh Child Protection and

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[405] N.Y. MENTAL HYG. § 10.05 (Consol. 2010).
[406] *Id.* § 10.07; *see also* Mental Hygiene Legal Serv. v. Spitzer, 2007 U.S. Dist. LEXIS 85163 (S.D.N.Y. Nov. 16, 2007) (requiring, for civil commitment of offender found incompetent to stand trial for sex offense, proof beyond a reasonable doubt that underlying conduct actually occurred), *aff'd* 2009 U.S. App. LEXIS 4942 (2d Cir. 2009).
[407] N.Y. MENTAL HYG. § 10.09 (Consol. 2010).

Safety Act.[408] The commitment authorities created by that bill are now enshrined in Chapter 318 of Title 18 of the U.S. Code, which also includes the federal civil commitment authorities for the mentally ill. Section 4248 of Title 18 of the U.S. Code creates a federal civil commitment regime for inmates in the Bureau of Prisons — or persons charged with federal crimes who are found to lack capacity to stand trial — who may be "sexually dangerous persons."[409] The statute defines a "sexually dangerous person" as a person who 1) "has engaged or attempted to engage in sexually violent conduct or child molestation," 2) "is sexually dangerous to others," and 3) "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."[410] If an offender is found to be a "sexually dangerous person" in a hearing conducted according to procedures specified in the statute, he is committed to the custody of the Attorney General, who must then attempt to remit him to the custody of the state where he was tried or domiciled.[411] If that is not possible, the Attorney General must "place the person for treatment in a suitable facility" until a state will assume custody of him, or until he no longer meets the requirements for detention.[412] In May 2010, the Supreme Court affirmed that § 4248's sex offender commitment provisions constitute a permissible exercise of Congress's power under the Necessary and Proper Clause.[413]

2. History and Evolution

Commitment statutes specifically targeting "sexual psychopaths" were first passed in the 1930s, an era in which pedophilia was considered a mental disorder rendering offenders unable to control their deviant impulses. As a result, "indeterminate commitment to a mental health facility was seen as more appropriate than a sentence served in a correctional facility."[414] By 1960, 26 states and the District of Columbia had enacted such statutes, but more than half of these were subsequently repealed.[415] These statutes fell out of favor in the 1970s and 1980s, as policymakers increasingly focused on retribution through criminal punishment.

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[408] Pub. L. No. 109-248, 120 Stat. 587.
[409] 18 U.S.C. § 4248(a) (2006).
[410] *Id.* § 4247(a)(6) (2006).
[411] *Id.* § 4248(d) (2006).
[412] *Id.*
[413] United States v. Comstock, 130 S. Ct. 1949 (2010).
[414] 51 AM. JUR. 3d *Proof of Facts* 299 (2010).
[415] *Id.*

In 1990, in response to two high-profile violent sex-crimes, Washington initiated the modern era of sexually violent predator laws by passing the first modern such statute, the Community Protection Act.[416] The act provides for civil commitment of "sexually violent predators" upon the end of their criminal sentences. It required that a judge or jury find beyond a reasonable doubt that an inmate is a sexually violent predator,[417] defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."[418] The statute was later upheld by the Washington Supreme Court.[419] Many other states followed suit; Kansas, Minnesota, Wisconsin, and California were among the first.

After *Foucha v. Louisiana* in 1992, reviewing courts split on the constitutionality of sexually violent predator statutes. Some found that statutory requirements of mere "mental abnormality" or "personality disorder," like the antisocial personality disorder relied upon in *Foucha*, "merely restated the pattern of criminal conduct that generated the charges or convictions that preceded and supported the commitment petitions," while others found that such statutory requirements in fact amounted to a mental illness requirement, and thus satisfied *Foucha*.[420]

In 1997, in *Kansas v. Hendricks*, the Supreme Court took the latter view, holding that the Kansas Sexually Violent Predator statute's requirement of a "mental abnormality" and dangerousness sufficed under the Due Process Clause.[421] The Court rejected Hendricks' contention that psychiatric nomenclature or classifications had any constitutional stature and that "mental abnormality," a term coined by the Kansas legislature, was insufficient to satisfy the mental illness prong required for detention of

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[416] *Civil Commitment of Sexually Violent Predators*, WASH. STATE DEP'T OF CORRECTIONS, *available at* http://www.doc.wa.gov/community/sexoffenders/civilcommitment.asp (last visited Nov. 19, 2010).
[417] WASH. REV. CODE § 71.09.060 (2010).
[418] *Id.* § 71.09.020.
[419] *In re* Young, 857 P.2d 989 (Wash. 1993).
[420] ROBERT P. SCHOPP, COMPETENCE, CONDEMNATION AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW 25 (2001).
[421] 521 U.S. 346, 360 (1997).

the mentally ill.[422] Justice Thomas' opinion emphasized that the Court has repeatedly recognized that detention for the protection of the community is not necessarily punitive.[423] He also rejected the assertion that the lack of effective treatment prospects for sex offenders rendered the detention unconstitutional, reiterating that "under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law."[424] Several years later, in *Kansas v. Crane*, an as applied challenge to the Kansas law, the Court clarified that the Due Process Clause requires "proof of serious difficulty in controlling behavior . . . sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case," though not necessarily a finding of a total or complete of lack of control.[425]

Most recently, in *Comstock*, the Court upheld the federal sex offender commitment regime contained in 18 U.S.C. § 4248.[426] Justice Breyer's opinion for the Court noted that:

> Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. . . . The Federal Government is the custodian of its prisoners [and, as such] . . . has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose.[427]

As of 2008, 20 states had similar laws on the books[428] and at least 2,700 convicted sex offenders were being held under civil commitment

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[422] *Id.*
[423] *Id.* at 363 (citing United States v. Salerno, 471 U.S. 739 (1987)).
[424] *Hendricks*, 521 U.S. at 365–66.
[425] 534 U.S. 407, 411–13 (2002).
[426] United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).
[427] *Id.* at 1961.
[428] Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36. J. PSYCHIATRY & L. 439, 441 (2008).

authorities in the United States.[429] This is out of a total of 3,000 who had been committed nationwide since the Washington law was passed in 1990,[430] indicating a very low rate of release from commitment. This is probably attributable to the ineffectiveness of psychiatric treatment of sex offenders and the obvious political disincentives for governments to allow the release of sex offenders back into the community.[431]

3. Conclusion

Sex offender commitment statutes offer an interesting contrast with other commitment statutes. As a practical matter, their evidentiary threshold is higher, since the criminal conviction predicate operates to ensure that people are not detained without proof beyond a reasonable doubt of underlying criminal conduct. On the other hand, the detentions are theoretically quite indefinite — and judging from the numbers, seem to be so in practice much of the time. Moreover, insofar as the detentions in question follow the *completion* of a criminal sentence, they clash with the common intuition that a criminal offender who has served his sentence has paid his debt to society and is entitled to go free.

The history of sex offender detention also departs, to some degree, from the common model of modern preventive detention authorities evolving from conceptually broader common law antecedents. Still, the emergence of sex offender statutes since the 1990s does follow the larger trend of preventive detention authorities' waxing and waning with the public's perception of their necessity. And their requirements for detainability (predicate sex offense and mental illness or abnormality) are a paradigmatic example of the type of multipronged triggers that we find associated with most American preventive detention powers.

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[429] Monica Davey & Abbey Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, http://www.nytimes.com/2007/03/04/us/04civil.html; *see also* DEMING, *supra* note 428, at 441 (noting that as of 2006 an additional 1,019 persons were "civilly detained" (i.e., awaiting civil commitment trial) pursuant to sexually violent predator statutes).

[430] DAVEY & GOODNOUGH, *supra note* 429.

[431] For more on the treatment of committed sex offenders, see Monica Davey & Abbey Goodnough, *For Sex Offenders, a Dispute over Therapy's Benefits*, N.Y. TIMES, Mar. 6, 2007, http://www.nytimes.com/2007/03/06/us/06civil.html.

C. The Power of Isolation and Quarantine

The power of quarantine and isolation does not see much use today. It is, however, one of the most powerful rebuttals to the notion that American law does not condone detention without extensive due process protections or even imputation of wrongdoing. Broad powers to lock up people for the simple reason that they may be sick and potentially contagious have coexisted comfortably with the criminal justice system since long before the dawn of the American Republic. These authorities remain broad. Perhaps because their use has declined over the years, their sweep has remained potent, and they have seen only modest abridgment as a result of the due process revolution that has cabined other preventive authorities. These authorities represent an almost pure case of necessity's driving the scope of detention powers: The case law, in fact, says quite directly that in this area, the necessary bounds the lawful.

1. Requirements for Detainability

States' powers of quarantine and isolation derive from their inherent police power to protect public health and safety. In *Gibbons v. Ogden*, the Supreme Court specifically identified "quarantine laws" and "health laws of every description" as clearly within the reserved police powers of the states and not precluded by the Commerce Clause.[432] These powers are extraordinarily broad. The general rule as to the limits on their exercise was described by the Supreme Court of Illinois in mid-century:

> While the legislature through its police powers can delegate to boards of health and municipalities authority to regulate and control all matters which tend to preserve the public health, such regulations cannot be arbitrary, oppressive and unreasonable.[433]

Indeed, the overriding principle articulated in the case law is that isolation and quarantine to the detriment of an individual's personal liberty are authorized to the extent that they are reasonably necessary to preserve public health and safety. As the U.S. Supreme Court stated in the seminal 1905 case of *Jacobson v. Massachusetts*, "upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an

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[432] 22 U.S. (9 Wheat.) 1, 203 (1824).
[433] People *ex rel.* Baker v. Strautz, 54 N.E.2d 441, 445 (Ill. 1944).

epidemic of disease which threatens the safety of its members."[434] "The possession and enjoyment of all rights," it noted, "are subject to such reasonable conditions as may be deemed by the governing authority . . . essential to the . . . health . . . of the community."[435] The Court in *Jacobson* described, using the following hypothetical, the extraordinary breadth of the power of quarantine and isolation:

> An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will . . . until it be ascertained . . . that the danger of the spread of the disease among the community at large has disappeared.[436]

State courts were equally deferential in their review, even of debilitating quarantine measures. For example, in 1822 the Illinois Supreme Court upheld an order requiring Jenny Barmore, who operated a boardinghouse in Chicago, to remain indefinitely in her home after she was found to be a carrier of typhoid bacilli, even though she did not exhibit any symptoms of the disease.[437] An Illinois court, in upholding the order, emphasized the State's power to enact public health measures "except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable."[438] As there was no known means of eliminating the microbes from her body, the confinement was effectively indefinite. Barmore's case resembled the story of the infamous "Typhoid Mary," a New York City cook named Mary Mallon. Mallon, an asymptomatic typhoid carrier, infected almost fifty people with typhoid before being confined to isolation by New York health authorities for 23 years, until her death in 1938.[439]

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[434] 197 U.S. 11, 27 (1905).
[435] *Id.* at 26–27
[436] *Id.* at 29.
[437] People *ex rel.* Barmore v. Robertson, 134 N.E. 815, 816–21 (Ill. 1922).
[438] *Id.* at 817.
[439] ALAN M. KRAUT, SILENT TRAVELERS: GERMS, GENES AND THE "IMMIGRANT" MENACE, 98–103 (1994).

Federal and state courts did impose some limited constraints. For example, in 1895 the Brooklyn health commissioner ordered two men confined to their homes after they refused smallpox vaccination during an outbreak in that city.[440] The men insisted "that they had been exposed to no contagion, and were not afflicted with any disease." A New York state judge held that the power granted by statute to quarantine those exposed to contagious diseases during health emergencies did not extend to the power to compel vaccination, and that the commissioner did not have the power to isolate the men absent facts showing that they were exposed to contagious disease.[441]

Similarly, in the turn-of-the-century case of *Jew Ho v. Williamson*, a federal district judge enjoined a quarantine by the San Francisco Board of Health of that city's Chinatown in response to reported cases of bubonic plague there.[442] The city had sealed off San Francisco's Chinatown with barbed wire while police enforced the quarantine. Jew Ho, a small businessman who lived just inside the quarantined area, challenged the Board's action, arguing that it was both illegal and enforced only against Chinese residents. The court agreed, holding that the quarantine was not medically justified and thus not a reasonable regulation authorized by the police power, and that its racially discriminatory enforcement violated of the Equal Protection Clause of the Fourteenth Amendment.[443]

The most commonly used isolation laws today are tuberculosis control statutes that authorize the detention of recalcitrant TB carriers whose refusal to comply with mandated courses of treatment can spread the disease and create drug-resistant strains. Most states have TB control statutes specifically authorizing public health authorities to isolate carriers in their homes or in hospitals under such circumstances. The authority to restrain continues until it is determined that the person is no longer infectious or otherwise ceases to be a danger to the public health — for example, by voluntarily complying with his or her treatment regime.

For example, California's statute empowers a public health officer to order detention "in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2)

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[440] *In re* Smith, 40 N.E. 497 (N.Y. 1895).
[441] *Id.* at 498–99.
[442] 103 F. 10, 23, 26 (N.D. Cal. 1900).
[443] *Id.* at 24.

there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions . . . ."[444] Such detention is subject to various procedural safeguards. Ohio's TB law similarly authorizes detention of TB carriers who have "refused to enter or have absented [themselves] from a tuberculosis hospital against medical advice" and are a "menace to public health."[445] This detention may continue, subject to periodic judicial hearings, until "the patient no longer has communicable TB, and thus is not a menace to public health."[446]

And like the courts a century ago, the courts today are tolerating such detentions — limiting them largely by insisting that authorities demonstrate their necessity. In *City of Newark v. J.S.*,[447] a New Jersey court held that in addition to finding the presence of illness, a court "must find that the risk of infliction of serious bodily injury upon another is probable in the reasonably foreseeable future" if it is to sustain a detention. (It found that such dangerousness was present in the instant case.) It also required procedural safeguards analogous to those in a civil commitment proceeding.[448] Similarly, in *Greene v. Edwards*, the West Virginia Supreme Court, finding similarities between involuntary isolation for TB carriers and civil commitment of the mentally ill, grafted the procedural requirements for the latter onto the state's TB control statute.[449] Many states have followed *Greene* and now have various procedural requirements for such detentions.[450] The detentions themselves, however, remain substantively unproblematic.

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[444] CAL. HEALTH & SAFETY CODE § 121365 (West 2009).
[445] Paula Mindes, *Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States*, 10 J.L. & HEALTH 403, 420 (1995–96).
[446] *Id.* at 421.
[447] 652 A.2d 265 (N.J. Super. Ct. Law Div. 1993); *see also In re* Halko, 246 Cal.App.2d 553 (1966) (upholding health officer's authority to consecutively renew quarantine order for recalcitrant contagious TB carrier as long as he is infected with TB and reasonable grounds exist to believe that he is dangerous to the public health) and Moore v. Armstrong, 149 So. 2d 36 (Fla. 1963) (upholding involuntary isolation of a recalcitrant patient with contagious TB who would not voluntarily remain in the hospital).
[448] *Id.* at 271–72.
[449] 263 S.E.2d 661, 662–63 (W. Va. 1980).
[450] Mindes, *supra* note 445, at 409.

Some states have analogous statutes authorizing the preventive isolation of recalcitrant HIV-infected persons. For example, Illinois permits the involuntary isolation of persons who know or should know they are infected with HIV and who are nonetheless engaging in conduct that places others at risk of exposure to HIV infection (including blood donation, sexual activities likely to transmit the virus, sharing intravenous drug needles, or making statements of intent to engage in such actions).[451] The authority to restrain is limited to the period in which the person refuses to cease engaging in the dangerous behaviors, and the statutes usually also require that less restrictive means be exhausted before involuntary isolation is used.[452] Civil detention of HIV-positive persons whose behavior poses a risk of transmitting the virus is far more controversial than TB isolation, largely because HIV is so much more difficult to transmit. These statutes have been seldom used; one survey found only ten instances nationwide in a nine-year period.[453]

The federal government's quarantine powers derive from its power to regulate interstate and foreign commerce. The expansion of federal domestic quarantine authorities in the modern era parallels the expansion of all federal powers under the Commerce Clause. Section 361 of the Public Health Service Act grants the Secretary of Health and Human Services the authority "to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other state or possession."[454] This authority extends to a list of communicable diseases specified by Executive Order 13295.[455] Federal law also provides for the "apprehension and examination of persons" when the following factors are present: 1) The person is "reasonably believed to be infected" with a communicable disease in a communicable or precommunicable stage, and 2) the person is moving between states or is a probable source of infection to persons likely to move

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[451] ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL 264 (1996).
[452] *Id.*
[453] DAVID M. WEBER, AIDS AND THE LAW 2–23 (2010).
[454] 42 U.S.C. § 264 (2006).
[455] *Questions and Answers on the Executive Order Adding Potentially Pandemic Influenza Viruses to the List of Quarantinable Diseases*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/quarantine/qa-executive-order-pandemic-list-quarantinable-diseases.html (last modified Feb. 3, 2010).

between states — a condition that in practice refers to just about anyone.[456] If a person detained and examined under this section is found to be infected, he or she may be detained and isolated "for such time and in such manner as may be *reasonably necessary*."[457] The only person detained under this authority since 1963 was Andrew Speaker, the Atlanta lawyer who traveled with drug-resistant TB in 2007. Speaker was involuntarily isolated by the CDC upon his return to the United States.[458]

While these federal authorities have been largely moribund for decades, the federal government is prepared to act aggressively to control an outbreak, whether of pandemic influenza or a disease agent weaponized by terrorists. And isolation is a part of federal planning. The Department of Health and Human Services' Pandemic Influenza Plan anticipates the implementation of "isolation and quarantine, as needed." [459] The National Strategy for Pandemic Influenza Implementation Plan, released by the Homeland Security Council in 2006, notes that "the value of isolating patients with pandemic influenza and quarantining their contacts is clearly supported by recent modeling efforts."[460]

2. *Historical Origins and Evolution of Isolation and Quarantine Powers*

Human societies have isolated and ostracized diseased individuals since the dawn of communal life. Lepers were subject to isolation in

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[456] 42 U.S.C. § 264(d). Regulations authorizing such isolation are found in 42 C.F.R. § 70.6 (2003) for "interstate" quarantines and 42 C.F.R. § 71.3 (2003) for foreign travelers arriving at U.S. ports.

[457] *Id.*

[458] *Understand Quarantine and Isolation*, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at http://emergency.cdc.gov/preparedness/quarantine/facts.asp (last modified Sept. 4, 2007)

[459] *HHS Pandemic Influenza Plan — Part I: Strategic Plan*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, http://www.hhs.gov/pandemicflu/plan/part1.html (last visited Nov. 19. 2010); CENTERS FOR DISEASE CONTROL AND PREVENTION, LEGAL AUTHORITIES FOR ISOLATION AND QUARANTINE (2009), *available at* http://www.cdc.gov/quarantine/pdfs/legal-authorities-isolation-quarantine.pdf.

[460] HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN 109 (2006), *available at* http://hosted.ap.org/specials/interactives/wdc/documents/pandemicinfluenza.pdf.

medieval Europe,[461] while the first large-scale quarantines in modern times occurred in response to the bubonic plague in the 14th century.[462] The term "quarantine" derives from the medieval Venetian practice of sequestering arriving ships for forty days to screen for signs of disease.[463]

The first statute to regulate the practice of quarantine in Anglo-American law was King James's Act, passed by Parliament in 1604, likely in response to a severe plague outbreak the prior year.[464] As Logan Atkinson recounts, the act vested local officials with the power to enforce quarantine in any locality where plague manifested itself.[465] The authorities under King James's Act were draconian by modern standards: Any person infected, residing in an infected house, or even being present in one could be "shut-up" in that house until the authorities chose to lift the quarantine.[466] This act remained in force for over 100 years and British domestic law of quarantine did not change significantly until nearly 1800. Other acts of Parliament later codified governmental authorities to quarantine incoming ships, including their cargoes, crews, and passengers.

Massachusetts enacted the first quarantine law in the American colonies in 1647, and by the early 18th century had passed a law allowing town selectmen to confine ill people to separate houses.[467] Smallpox was especially feared; quarantines against it occurred in the colonies as early as 1622.[468] After independence, coastal states commonly passed quarantine laws barring the disembarkation of ship crews and passengers until a

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[461] Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85, 100 (2003).
[462] *See generally* DAN ROSEN, A HISTORY OF PUBLIC HEALTH (1958).
[463] Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 62 (2007); BLACK'S LAW DICTIONARY (9th ed. 2009).
[464] Logan Atkinson, *Extending La Longue Duree: Commercial Impact in the Reform and Use of the Law of Quarantine*, *in* LAW, REGULATION, AND GOVERNANCE 288, 293 (Michael MacNeil et al. eds., 2002).
[465] *Id.* at 293–94. The Act did not provide for exceptions, rights of appeal, or any other protection for individual liberties or the prevention of unnecessary quarantines. It also empowered "Searchers, Watchmen, Examiners, Keepers and Buriers" to compel compliance with the quarantine (with violence if necessary) and it immunized them from civil liability for injuries to violators. As breaching quarantine and, if one turned out to be sick, making contact with healthy persons was a felony, the punishment was death.
[466] *Id.*
[467] Batlan, *supra* note 463, at 63. For more on the colonies' various quarantine laws, *see generally* John Duffy, THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH (1990).
[468] Parmet, *supra* note 461, at 100.

sufficient number of days had passed for disease to be detected. Louisiana passed a law in 1855, authorizing a board of health to establish a quarantine station 75 miles downriver from New Orleans, inspect incoming ships there, and quarantine incoming passengers there as necessary.[469] Epidemics were a fact of life in crowded, unsanitary 19th century American cities, and states instituted numerous quarantines in response to smallpox, typhoid, cholera, plague, yellow fever, diphtheria, and other diseases.

New York, which had a particularly bad record among American cities of death from epidemics, subjected immigrants at its entry stations (Castle Garden and later Ellis Island) to health inspections and sent those suspected of carrying contagious diseases to quarantine or isolation.[470] The year 1892 is particularly illustrative. That year, the City quarantined, under unsanitary conditions and with no judicial review, 1200 Russian Jewish and Italian immigrants (1,150 of them initially asymptomatic) in an effort to stop the outbreak.[471] Many died (presumably as a result of infection acquired *during* the quarantine). Later that summer, panic broke out in the city over fears that Asiatic cholera, then present in European ports, would reach the city by sea. After three ships arrived from Hamburg reporting deaths at sea from cholera, the city began quarantining all incoming steerage passengers on harbor islands; cabin passengers were quarantined on their ships.[472] In total, thousands of people were quarantined. Though upper class passengers protested their detention in the media and sought relief from politicians, no lawsuits were filed by quarantined passengers. In fact, no constitutional challenge was brought against any New York quarantine confinement until 1895. Quarantines were also used in response to the 1918 influenza epidemic, but closures of schools and other public facilities were more prominent and more controversial. Persons stricken with the 1918 flu were not generally ambulatory or desirous of preserving their freedom of movement once they became symptomatic.

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[469] Morgan's Louisiana & T. R. & S. S. Co. v. Bd. of Health of State of La., 118 U.S. 455, 459 (1886).

[470] *See generally* HIVES OF SICKNESS: PUBLIC HEALTH AND EPIDEMICS IN NEW YORK CITY (David Rosner ed., 1995).

[471] Batlan, *supra* note 463, at 74–79.

[472] Rosner, *supra* note 470, at 160; Batlan, *supra* note 463, at 82–83.

3. Conclusion

The use of widespread quarantines has declined in the 20th Century, as improved sanitation, vaccination, and modernized public health practice have reduced the incidence and lethality of contagious diseases in the United States. Other interventions, such as exclusion from school and voluntary isolation, have been found to be more effective than large-scale quarantines. In the SARS epidemic in Ontario, a recent outbreak analogous to the mass epidemics of the 19th century, "snow days" (asking people to stay home during an outbreak to slow transmission), "shelter in place," and other voluntary measures proved effective at containing the disease.[473] Because of this shift, "courts and legislatures have not been required to modernize the law of quarantine. . . . [E]xisting precedent does not reflect significant contemporary developments in constitutional and public health law."[474]

However, "the law of quarantine still represents a reservoir of power on which public health officers may draw when necessary."[475] Compulsory hospitalization and detention are still available should voluntary measures not suffice.[476]

D. Protective Custody Authorities

A final, little-discussed category of health detention authority involves situations in which the state acts to protect the detained individual from his or her own behavior. These authorities can be characterized as deriving from the state's power as *parens patriae* to protect citizens who are "unable to protect or care for themselves."[477] The exercise of this power is subject to two limitations: the individual's incapacity to make rational decisions, and the power's exercise in the best interests of the individual. Some of these powers are best understood as a subset of the health authorities described above. Others, however, are also distinct in an important respect: their purpose is not merely to protect the larger society from the consequences of the detainee's physical or mental illness but to

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[473] Marty Cetron, Remarks at the Concurrent Session of the 3d Annual Partnership Conference on Public Health Law, *Quarantine: Voluntary or Not?*, 32 J.L. MED. & ETHICS 83, 84 (2004).
[474] Mindes, *supra* note 445, at 413 (quoting Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 54 (1985)).
[475] FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 96 (2005).
[476] *Id.*
[477] HERMANN, *supra* note 384, at 146–47.

ensure that the detainee receives care he or she might not otherwise receive. These authorities are scattered throughout state law, and the following survey is not intended to be comprehensive. It gives, however, a sense of the range of these powers.

1. Drug and Alcohol Abuse

Several states authorize mandatory treatment for substance abuse and permit some measure of civil commitment to facilitate that treatment. The federal Public Health Service established narcotics treatment "farms" as far back as the 1930s, but the first modern commitment program for addicts was California's Civil Addict Program, passed in 1961.[478] In its initial form, the program "permitted institutionalization of narcotics addicts for up to seven years without a requirement that the individual be convicted of a crime."[479] Reviews of the program in its early, more comprehensive, form "reported significant success in reducing daily heroin use by participants," though other programs, including New York's 1960s addict commitment program, were less successful.[480]

Current California law permits the civil commitment of addicts, even if they are not convicted of a crime.[481] Any person who "is addicted to the use of narcotics or by reason of the repeated use of narcotics is in imminent danger of becoming addicted to their use" may be civilly committed and confined in a "narcotic detention, treatment and rehabilitation facility," upon petition by the district attorney.[482] Hospitals may detain suspected addicts for up to 72 hours in order to conduct an "examination . . . to determine whether the person is addicted to the use of narcotics"; if the person is addicted, the hospital may submit an affidavit to the district attorney, who may petition a court to have the person civilly

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[478] David F. Chavkin, *"For Their Own Good": Civil Commitment Of Alcohol And Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 236 (1992).
[479] *Id.* at 23.
[480] *Id.* at 24–48.
[481] Mandatory drug treatment for persons convicted of crimes is pursuant to criminal punishment and is beyond the scope of this paper.
[482] CAL. WELF. & INST. CODE § 3100 (West 2010). Under this procedure, the court must order the person examined by two court-appointed physicians before commitment can occur. *Id.* §§ 3102, 3103.5.

committed.[483] The person may be detained pending the hearing on the petition upon an affidavit from a physician who has examined the person no more than 72 hours before the filing of petition and who "conclude[s] that, unless confined, such person is likely to injure himself or herself, or others, or become a menace to the public."[484]

The prospective detainee receives significant pre-commitment procedural protections. The person is entitled to counsel to present a defense to the district attorney's petition, to produce and cross-examine witnesses, and to demand a jury trial on the "question of his addiction or imminent danger of addiction."[485] Persons committed under these provisions must be discharged within twelve months of commitment, including any time spent on supervised outpatient status.[486]

In practice, local officials rely on the 72-hour short-term hold authority to deal with inebriated persons. The authorization to have inebriated persons detained at a "drunk tank" or treatment facility for up to 72 hours provides an alternative to holding them in a jail or charging them with a crime.[487]

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[483] *Id.* § 3100.6. The affidavit of the examining physician suffices to support commitment under this procedure.
[484] *Id.* § 3102.
[485] *Id.* § 3104. The alleged addict may also compel testimony by having subpoenas issued to facilitate his or her defense. *Id.* §§ 3105, 3108. Three-quarters of the jury must find addiction or imminent danger thereof to sustain the commitment.
[486] *Id.* § 3201(b). Persons committed may be also released on supervised outpatient status, which is revoked if the conditions of release are violated. *Id.* §§ 3150–58.
[487] Email from Suzi Rupp, Public Information Officer, California Dep't of Alcohol and Drug Programs, to authors (Aug. 9, 2010) (on file with authors). Several California cities also have Serial Inebriate Programs (SIPs) designed to force serial public inebriates into longer-term treatment. *See* Memorandum from Neal Coonerty, Supervisor, Third Dist., to Santa Cruz County Board of Supervisors 1 (Apr. 6, 2010), available at http://sccounty01.co.santa-cruz.ca.us/bds/Govstream/BDSvData/non_legacy/agendas/2010/20100413/PDF/028.pdf ("[S]erial inebriates were given the choice of going into treatment or going to jail."); *How the Serial Inebriate Program Works*, CITY OF SAN DIEGO, http://www.sandiego.gov/sip/howsipworks.htm ("The SIP strategy consists of identifying individuals who have been sent to 4-hour sobering services more than four times in a 12-month period. Those individuals are arrested for public intoxication (section 647(f) of the California Penal Code). When a guilty verdict is rendered and mandatory custody time imposed, clients are offered alcohol and drug treatment instead of incarceration.").

The Supreme Court has never confronted one of these statutes directly; it has, however, strongly suggested that they pass constitutional muster. In *Robinson v. California*, the Court held unconstitutional a California law that criminalized "be[ing] addicted to the use of narcotics."[488] The majority specifically noted, however, that "a State might establish a program of compulsory treatment for those addicted to narcotics [which] might require periods of involuntary confinement."[489] Justice Douglas, concurring, argued that criminal prosecution, "as a means of protecting society," could not be justified "where a civil commitment would do as well."[490]

Many states similarly permit the involuntary commitment of alcoholics, as well as drug addicts. For example, Washington includes both alcoholism and drugs in its definition of "chemical dependency."[491] Thus, alcoholism can also be a ground for involuntary commitment after proceedings initiated by petition of a "chemical dependency specialist," though only if accompanied by a concomitant showing of actual risk of serious injury to oneself or others.[492] Mississippi similarly permits detention of drug addicts and alcoholics under the same provisions of its code. Its emergency involuntary commitment statute permits emergency detention (limited to five days), subject to various procedural requirements, of an "alcoholic or drug addict who has lost the power of self-control with respect to the use of alcoholic beverages or habit-forming drugs and [who,] unless immediately committed [] is likely to inflict physical harm upon himself or others."[493] A separate chapter of the code authorizes longer-term commitment for up to 90 days.[494]

Other states subsume drug or alcohol addiction under the general category of "mental illness." For example, Nebraska defines, for purposes of

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[488] Robinson v. California, 370 U.S. 660, 660 (1962).
[489] *Id.* at 665.
[490] *Id.* at 677 (Douglas, J., concurring).
[491] WASH REV. CODE § 70.96A.020(4)(a) (West 2002).
[492] *Id.* § 70.96A.140(1) (West 2002); Mays v. State, 68 P.3d 1114, 1120 (Wash. Ct. App. 2003) *see also* Butler v. Kato, 154 P.3d 259, 264 (Wash. Ct. App. 2007) ("RCW 70.96A.120 authorizes compulsory alcohol treatment of someone who presents an immediate danger to himself or others or is gravely disabled or incapacitated by alcohol or drugs.").
[493] MISS. CODE ANN. § 41-30-27 (West 2010).
[494] *Id.* § 41-31.

its civil commitment statute, "[m]entally ill and dangerous person" as "a person who is mentally ill or substance dependent and because of such mental illness or substance dependence presents . . . a substantial risk of serious harm to another person or persons [or him or herself] within the near future."[495] The statute permits the state to take such persons into "emergency protective custody" for up to 36 hours pending evaluation by a mental health professional[496] and subsequently involuntarily commit them for inpatient treatment, if no less restrictive alternatives are available.[497]

One interesting subset of alcohol statutes permits officers to civilly commit, on a temporary emergency basis, intoxicated persons they encounter in the course of their duties — in essence, providing them with "drying out time" before sending them back into society.[498] Such statutes may reflect a preference for preventive, civil detention, rather than criminal prosecution. For example, the Colorado Alcoholism and Intoxication Treatment Act states that "[i]t is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages . . . and that public intoxication and alcoholism are health problems which should be handled by public health rather than criminal procedures."[499] A further provision bars any political subdivision of the State from "adopt[ing] or enforc[ing] a local law, ordinance, resolution, or rule having the force of law that [criminalizes] drinking, being a common drunkard, or being found in an intoxicated condition."[500] Colorado law authorizes law enforcement or emergency services personnel to commit, on an emergency basis, "a person [who] is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself, herself, or others."[501] If no "approved treatment facility" is available, detention may occur in an "emergency medical facility or jail . . . but . . . *only for so long as may be necessary to prevent injury to himself, herself, or others or to prevent a breach of the peace*."[502] As with so many other

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[495] NEB. REV. STAT. § 71-908 (2010).
[496] *Id.* § 71-919.
[497] *Id.* § 71-925(4).
[498] *E.g.*, COLO. REV. STAT. § 27-81-111 (2010).
[499] *Id.* § 27-81-101.
[500] *Id.* § 27-81-117.
[501] *Id.* § 27-81-111.
[502] *Id.* (emphasis added); *see also* People v. Herrera, 1 P.3d 234, 237 (Colo. App. 1999) ("After approaching and questioning defendant, the officers concluded that he was intoxicated and concluded that they should take him into civil protective custody because he appeared to be a threat to the safety of himself or others. . . . The officers then decided

preventive detention authorities, the dual requirement of intoxication *and* ongoing dangerousness serves to limit detainability to cases where confinement is truly necessary to protect public safety.

This preference for preventive civil detention as a more liberal alternative to criminal prosecution also turns the tables on one of the most prevalent tropes about the preventive detention of suspected terrorists — namely, that criminal prosecution and the concomitant lengthy prison sentences it often imposes, even for vaguely defined or inchoate offenses, better respects the human and civil rights of terrorism suspects. In fact, in some areas of American law, preventive detention is actively *favored* as the more humane and just manner for society to achieve its harm-prevention objections.

2. Pregnant Women

Several states have noncriminal statutes that specifically permit the civil commitment of pregnant women whose alcohol or drug use endangers the life or health of the unborn child. For example, under Wisconsin law, an expectant mother may be taken into custody upon a showing that:

> due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the adult expectant mother is taken into custody and that the adult expectant mother is refusing or has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her.[503]

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to transport defendant to a detoxification center."). The court then considered whether Fourth Amendment protections apply to police-drunk interactions under the Act. *Id.* at 237–38.

[503] WIS. STAT. § 48.193(b) (2009). The same criteria apply for continuing to hold the expectant mother in custody beyond the initial intake. *Id.* § 48.205(1m). The current Wisconsin statute was enacted in 1998, after a 1997 case held that the legislature had not

> The woman may, after a hearing, be kept in custody and confined to the home of an adult friend or relative, a "licensed community-based residential facility," a hospital, or an "approved public treatment facility."[504]

Minnesota subsumes under its statutory definition of "chemically dependent person"

> a pregnant woman who has engaged during the pregnancy in habitual or excessive use, for a nonmedical purpose, of any of the following substances or their derivatives: opium, cocaine, heroin, phencyclidine, methamphetamine, amphetamine, tetrahydrocannabinol, or alcohol.[505]

A court may, after examining less restrictive alternatives and finding them insufficient, involuntarily commit a "chemically dependent" person (including a pregnant drug or alcohol abuser) to an inpatient facility for an initial period of up to six months.[506]

South Dakota's commitment statute similarly provides that "an intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs may . . . be committed to an approved treatment facility for emergency treatment."[507] Emergency detention may last for five days, excluding weekends and legal holidays. Filing a petition for involuntary commitment can extend emergency detention up to ten days.[508] Upon the filing of a petition for involuntary commitment alleging that "that the person is an alcoholic or drug abuser who habitually lacks self-control as to the use of alcoholic beverages or other drugs and . . . is pregnant and abusing alcohol

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intended for the previous Wisconsin child emergency protective custody statute, which did not include an explicit reference to unborn children, to permit the civil commitment of an expectant mother who used drugs. 1997 Wis. Sess. Laws 292; State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 740 (Wis. 1997).

[504] WIS. STAT. § 48.207(1m); *see also* Erin N. Linder, Note, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Using Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV., 882 (2005) ("Wisconsin's civil commitment laws, in particular, have sparked a great deal of controversy. . . . Wisconsin's statutory scheme is a far more draconian approach to protecting fetal rights than previous legislation targeting the use of illegal substances.").

[505] MINN STAT. § 253.B.02(2) (2009).

[506] *Id.* § 253.B.09.

[507] S.D. CODIFIED LAWS § 34-20A-63 (2010).

[508] *Id.* § 34-20A-69.

or drugs,"[509] and after a hearing, the woman may be involuntarily committed for up to 90 days, at which point "the administrator or an authorized designee of the facility to which the patient is committed" has the option of seeking a recommitment.[510] If at any time during the commitment the likelihood of the physical harm sought to be prevented no longer exists, the person must be discharged.[511]

Whether one imagines such statutes as *parens patriae* or as a feature of the larger mental health law's concern for protecting the public at large depends on whether one attributes legal personhood to the fetus. Some argue that fetal protection in the civil commitment context is an outgrowth of the larger effort to establish fetal personhood in law motivated by the abortion debate.[512]

3. Homeless

Not all of these authorities have even a component of concern for the larger protection of society. Some reflect simple paternalism. When the weather drops below 32 degrees Fahrenheit, the New York City Department of Homeless Services will "arrange for involuntary transport" of at-risk homeless persons to shelters.[513] In Philadelphia, officials may use "Court-Ordered Transportation to Shelter" (COTS) or emergency involuntary commitment proceedings under state law[514] "to move [homeless] individuals who are resistant and whose lives are in danger"

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[509] *Id.* § 34-20A-70.
[510] *Id.* § 34-20A-81.
[511] *Id.* § 34-20A-80.
[512] *See* Linder, *supra* note 504, at 873–74 ("[N]ew laws aimed at protecting unborn children from the effects of alcohol threaten to rob pregnant women of their fundamental rights [under *Roe* and *Casey*]. The fetus, on the other hand, is increasingly protected as an independent legal entity, often with interests adverse to a pregnant woman's autonomy. . . . Fetal protectionism has gone so far . . . that pregnant women are now being punished for legal behavior that may injure a fetus.").
[513] Press Release, N.Y.C. Dep't of Homeless Services, DHS Institutes 24-Hour Cold Weather Emergency Procedure, *available at* http://www.nyc.gov/html/dhs/html/press/pr012607.shtml (last visited Oct. 24, 2010).
[514] A so-called "302 commitment" under Pennsylvania law refers to an "involuntary emergency examination and treatment authorized by a physician." 50 PA. CONS. STAT. § 7302 (2010).

from extreme cold weather.[515] These laws are designed simply to protect the individuals in question — whether they want that protection or not.

Conclusion: The Common Threads

The civic mythology of preventive detention contends that American law abhors the practice, or tolerates it only as an exception, in extreme situations, to an otherwise strong norm. The pattern that emerges in preventive detention across the various fields described here is not consistent with that mythology. The actual place of preventive detention in American law is far more prosaic than that. Congress and state legislatures create preventive detention authorities without apology where they deem them necessary, and the courts uphold them where judges find that the statutes, or their application, allow only so much detention as is actually necessary to address a pressing public danger. The test of necessity, stripping away the doctrinal specificity that surrounds each individual area, is relatively simple: First, how dire and certain are the potential consequences of a failure to detain, and second, is the detention structured in a fashion that minimizes the possibility of erroneous or excessive incarceration?

This basic model of American preventive detention describes essentially all of the authorities we have surveyed. In traditional enemy combatant detention, for example, detention is the minimum force needed to prevent the enemy from returning to the fight during hostilities. As a consequence, the detention power is plenary for this period. Since soldiers in traditional armies wear uniforms to authoritatively identify themselves as enemy combatants, the due process requirements to ensure accuracy are minimal. Because the need for detention expires with the end of the war, POWs must be released at the cessation of hostilities.

In the criminal justice arena, overtly preventive detention authorities are necessitated by the possibility of suspect or witness flight and danger to the community at large. Here, however, the greater possibility of error has triggered the development of much more elaborate procedural protections. The same holds true for immigration detention and several of the diverse array of health authorities. By contrast, other health authorities — those that involve communicable diseases, for example — have maintained

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[515] Press Release, City of Philadelphia, City of Philadelphia Prepares to Weather Cold and Snow — Code Blue in Effect (Jan. 14, 2005), *available at* https://ework.phila.gov/philagov/news/prelease.asp?id=93.

relatively primitive due process protections, the fact of exposure to infection and the risk of contagion being all that legislatures and the courts really needed to know to perceive a threat justifying detention.

The unifying theme is that the law unsentimentally permits preventive detention where necessary but insists upon adequate means — and the means vary according to the detention's purpose — of insuring both the accuracy of individual detention judgments and the necessity of those detentions. Necessity is not, in American practice, a static determination over time. As we have shown, some detention authorities shrink as circumstances change. Others expand. The doctrine has a way of following society's perception of necessity at particular moments in time. At any given time, the permissible bounds of detention almost always seem defined by society's judgment of the threat of a serious harm and the minimum constraint necessary to prevent it.

Finally, detention regimes seem to migrate, as they narrow, towards the use of multi-pronged triggers by way of both defining necessity and increasing accuracy. This does not happen in all detention areas, but it does happen in many. Specifically, triggers tend to develop that require a separate evaluation of both an underlying condition or status *and* a risk of harm. In the case of mental illness, for example, it is not enough to be mentally ill; one must *also* pose a significant threat to oneself or others. In the case of material witness detention, one must not merely have information relevant to a criminal proceeding; one must *also* pose a flight risk. Separating these two categories of judgment causes both an individualized assessment of the person and a categorical judgment of the dangers of that sort of person before authorizing a detention. It forces a layered consideration, rather than simply a categorical judgment. Is the proposed detainee, for example, a paranoid schizophrenic, a type of person who may have a predisposition to uncontrollable violent behavior? If so, are there adequate indicia that he *individually* is behaving in a fashion that causes one to worry about *his* behavior? Detention regimes tend to evolve over time towards separate considerations of these two types of question — and requiring affirmative answers to both before allowing a person's incarceration.

To return this discussion to preventive detention in the counterterrorism arena, one might begin by asking how comfortably preventive detention in the terrorism space fits into these general parameters. The simple answer is that if such detention is truly necessary and tailored to encompass only those who pose genuine dangers, it fits relatively smoothly in conceptual terms alongside these various authorities.

Much as the detention of the sexual predator post-conviction evolved as a specialized variant of the broader authority to detain the dangerously mentally ill, the detention of the suspected al Qaeda combatant is currently evolving as a specialized variant of the broader category of the detention of unlawful combatants. Like the broader category, these detentions involve people associated with the enemy in military conflicts, and their purpose is the incapacitation of enemy forces by means short of killing. A plurality of the Supreme Court in *Hamdi* described "detention to prevent a combatant's return to the battlefield" as "a fundamental incident of waging war"[516] — implying an acceptance of its necessity. And the political branches have both concurred. Congress has both authorized the conflict and passed legislation regulating various aspects of detention operations. And the executive branch, under both the Bush and Obama administrations, has insisted on the propriety of non-criminal, military detention of captured terrorists. While human rights groups, detainee lawyers, and academics have repeatedly questioned the necessity and propriety of preventive detention in this space, no branch of government has done so.

Yet the evolution of this category of detention has also followed the pattern of a narrowing authority closely tailored to ensuring the accuracy of detention judgments. The Supreme Court in *Boumediene* grafted onto Guantánamo detentions habeas corpus review, providing robustly adversarial judicial processes for military detentions the courts had not traditionally supervised.[517] Military detainees, at least those at Guantánamo, thus get access to counsel, and an opportunity to challenge the legality of their detentions in federal court. At least for now, the burden of proof lies with the government, and the government has lost a majority of the habeas cases that have gone to decision.[518] The due process norms that are

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[516] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).
[517] Boumediene v. Bush, 553 U.S. 723 (2008).
[518] *See generally* BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING

developing here are quite elaborate — and so are those in most of the proposals for statutory administrative detention schemes.[519] This new preventive detention variant is simultaneously emerging, out of a broader detention authority, because of perceived necessity *and* developing more rigorous due process protections to guarantee that it does not authorize more detention than is truly necessary. It is, in short, following the broader pattern relatively neatly.

There is even some movement toward the formal use of multi-pronged triggers, though that is still nascent. In one habeas case, U.S. District Judge Ellen Huvelle created what is effectively a multi-pronged trigger as a test for detention, requiring the government to show not merely that the detainee was a part of enemy forces but also that he posed a risk of rejoining the enemy.[520] While the Court of Appeals for the D.C. Circuit has explicitly rejected this approach,[521] the use of multi-pronged triggers in prospective detention cases — even if not in legacy cases like those from Guantánamo — is a very live possibility. One proposal, by one of the present authors, suggests the following statutory trigger for future detentions:

> The model law authorizes the detention of an individual who is (1) an agent of a foreign power, if (2) that power is one against which Congress has authorized the use of force, and if (3) the actions of the covered individual in his capacity as an agent of the foreign power pose a danger both to any person and to the interests of the United States.[522]

(2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

[519] *See, e.g.*, BENJAMIN WITTES & COLLEEN PEPPARD, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION (2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf; MADELINE MORRIS, [MODEL] COUNTERTERRORISM DETENTION, TREATMENT, AND RELEASE ACT OF 2009 (2009), *available at* http://www.law.duke.edu/fac/morris/counterterrorismact.pdf.

[520] Basardh v. Obama, 612 F. Supp. 2d 30, 34–35 (D.D.C. 2009).

[521] *See* Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (noting no specific finding of ongoing dangerousness to the United States is required to sustain detention; that detainee was "part of" al Qaeda is sufficient).

[522] WITTES & PEPPARD, *supra* note 519, at 11.

Whether such a trigger eventually catches on is at this stage unclear. Right now, in the habeas cases, most of the judges have interpreted the government's detention authority as conditioned by only one factor: Whether the detainee is "part of" or "supporting" enemy forces.[523] Even before the D.C. Circuit weighed in, several district judges explicitly declined to follow Judge Huvelle's suggestion that the detention authority in the 2001 Authorization for Use of Military Force[524] covers only those who threaten to rejoin the fight.[525]

This dispute reflects a deeper uncertainty about the degree to which terrorists actually are analogous to traditional state military forces. Traditionally, membership in a military force serves as a proxy for intent to continue fighting if released, since the soldier is presumed to be a loyal agent of the sovereign.[526] Whether one believes this principal-agent relationship holds in the case of terrorist groups should dictate whether the simple membership or "supporting" test, or Judge Huvelle's individualized determination of intent to rejoin the fight, is the most appropriate test for detainability.[527]

What is clear is that whether America's ultimate administrative detention regime for counterterrorism emerges via common law or statutory development, it will have followed the basic pattern described by these other areas. It will not, as asserted by the civic mythology, be a radical departure from the American tradition, a writing into the law books of a preventive detention regime for the first time. It will, rather, have evolved from a much broader authority that has coexisted with criminal law detention powers for

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[523] *See* Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) ("Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, 'an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,' or the modified definition offered by the government that requires that an individual 'substantially support' enemy forces."); *see also* WITTES ET AL., *supra* note 519, at 20–21 (noting cases differing on question of whether support must be "substantial").

[524] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[525] *See* WITTES ET AL., *supra* note 519, at 30–31 (noting cases adopting approaches in tension with Judge Huvelle's approach).

[526] *See supra* Part I.A.

[527] *See* Adam Klein, Note, THE END OF AL QAEDA? RETHINKING THE LEGAL END OF THE WAR ON TERROR, 110 COLUM. L. REV. 1865, 1894 (2010) (arguing that principal-agent relationship justifying the link between group membership and individual detainability breaks down in the context of terrorist organizations).

hundreds of years — and it will be a narrowing of that broader authority, one designed with an eye towards minimizing the possibility of error and of ensuring the true necessity of detentions.

If such detention is necessary and tailored to encompass only the truly dangerous, we argue, it fits relatively comfortably in conceptual terms alongside the many preventive detention powers upon which state and federal authorities rely to protect the public from serious harms.