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U.S. Mandatory Detention:
The Expressive Function of the Noncitizen Presumption of Dangerousness

Proposed Conference Workshop: Justice and Social Control

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I argue that United States pre-deportation hearing mandatory detention – triggered by a prior criminal act, often minor and long ago – effectively codifies in theory, statute and practice a “noncitizen presumption” of dangerousness which, because of the expressive qualities of preventive detention, will likely endure absent changes to the underlying discourse regarding immigrants.

Although facially, pre-deportation hearing categorical mandatory detention under Immigration and Nationality Act § 236(c) has two stated goals – preventing (1) flight and (2) future crimes – I argue the success of alternatives to incarceration in preventing flight largely negates that first justification. Growing empirical evidence, from Canada’s Toronto Bail Program and others, shows that compliance with deportation proceedings – even by “criminal aliens” lacking relief – can be effectively ensured through alternatives such as supervision, case management, providing legal information, and treating migrants with dignity. Yet the U.S. interprets § 236(c)’s mandate of “custody” (without individualized assessment of danger or flight risk) to require incarceration, rather than less restrictive alternatives.

Effectively then, I argue that U.S. mandatory detention today embodies a noncitizen presumption of dangerousness – that noncitizens are vastly more likely to reoffend (and violently) than citizens who committed similar crimes. The presumption, in turn, relies primarily on traditional stereotypes of foreigners as “dangerous others,” rather than empirical evidence of increased criminality (nevertheless lacking, as Doris Provine and others have shown). It also contravenes fundamental criminal law presumptions normally attendant to incarceration – i.e. that society separates the criminal act from the actor, and incarcерates for what someone does, not who they are.

Moreover, I argue that preventive immigration detention possesses expressive characteristics, similar to incarcerative criminal punishment’s moral condemnation of the convicted, which help explain the noncitizen presumption’s vitality despite empirical and
pragmatic counter-arguments. Even when used preventively, incarceration – modern society’s most serious deprivation of liberty – publicly denotes the relative dangerousness of the confined. Conversely, alternatives to detention lack this expressive quality, as criminal fines or community service penalties lack incarceration’s greater expression of condemnation (as Dan Kahan has argued).

Thus, the noncitizen presumption, by increasing the public severity of U.S. immigration enforcement, amplifies the expressive characteristics of citizenship and membership delineations (that Juliet Stumpf and others have articulated). Even though lawful permanent residents are considered probationary members of society, once one commits a criminal act – even if minor, nonviolent, and long ago – the noncitizen presumption dramatically revokes that probation, returns the immigrant to status quo ante as a dangerous other, and expresses that view in the harshest terms by incarcerating the immigrant for his duration in America.

The noncitizen presumption empirically results in over-detention relative to immigrants’ actual danger, at great human and financial cost. The U.S. categorically detains older non-citizens who possess one criminal conviction, perhaps a fraud or public-order offense, when recent empirical studies show these defendants pose little danger. Still, the expressive quality of preventive incarceration frustrates detention reform efforts, since lesser restrictive alternatives which negate that expressive ideal inevitably engender political opposition. Detention reform will likely follow more fundamental changes to the underlying discourse regarding immigrants.

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I submit to present orally at the conference in person, as well as to prepare this written paper by September 1 for inclusion in the book of conference proceedings. I propose to present at the workshop “Justice and Social Control,” although I would be happy to present in any workshop as needed. (The presentation might alternatively fit the workshop “Discourses of Fear,” for example).