



Ending the Use of Immigration Detention to Deter Migration

Detention Watch Network
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Since its inception in 2002, the Department of Homeland Security (DHS) has managed an immigration enforcement system that has been fundamentally characterized by the inappropriate and arbitrary detention of migrants. The use of detention is and has been based on deeply flawed justifications, including deterring future migration, a rationale which not only lacks moral authority and the support of empirical evidence, but also goes well beyond the scope of longstanding principles underlying the use of civil detention.

Deterrence is deeply embedded in many aspects of the immigration enforcement system, perhaps most obviously within the Consequence Delivery System, a set of enforcement policies intended to punish, incarcerate, and criminalize unauthorized migrants apprehended at the border.¹ Deterrence has also been cited by some members of Congress to support the increased use of and funding for immigration detention. However, the system has largely refrained from using deterrence as a justification during individual custody determinations. Unfortunately, beginning in June 2014, that restraint was all but abandoned in the administration's policy toward Central American asylum-seekers and other migrants. Instead, under an explicit policy of sending a message of deterrence back to Central America, DHS reset detention priorities, built enormous family detention facilities, established "fast track" removal procedures, and refused to release families who were detained.

This administration's recent reliance on the deterrence justification to rationalize the long-term detention of asylum-seeking families marks a new level of aggressive and inappropriate use. Beyond ending this practice for asylum-seeking families, we must remove the deterrence justification once and for all, from our detention system, and from our broader enforcement regime.

Civil Detention as Deterrence: Illegal, Punitive, & Ineffective

The use of immigration detention as a deterrent, in which one person is punished in order to send a message to another person or people to discourage future migration, is illegal under international and domestic law. Detaining immigrants under a general deterrence justification violates their Fifth Amendment rights,² which include access to fair and equitable legal procedures and protections, rights which anyone present in the United States, regardless of legal

¹ Slack, Jeremy, and Daniel E. Martínez, Scott Whiteford, Emily Peiffer. *Journal on Migration and Human Security* 3.2 (2015): 109-128.

² "[G]overnment detention violates [the Due Process] clause unless the detention is ordered in a criminal proceeding with adequate procedural protections...or, in certain special and 'narrow' non-punitive 'circumstances.'" *Zadvydas* at 690-91.



status, is afforded.³ In *Kansas v. Crane*, the Supreme Court wrote that civil commitment may not “become a ‘mechanism for retribution or general deterrence.’”⁴ The United States is also a signatory to treaties⁵ that create government obligations to protect asylum seekers and children.⁶ By arbitrarily locking up immigrants in the hopes that it will deter other irregular migrants (many of whom are seeking protection), the U.S. government is violating its constitutional and international obligations to protect and treat migrants fairly.

Under judicial precedent, civil detention is intended to ensure compliance with immigration proceedings and is not meant to be punitive. In *Zadvydas v. Davis*, the Supreme Court observed that immigration detention could be justifiably used for migrants who pose a flight risk or are a danger to society, and then only if there is an individualized determination.⁷ Deterrence, however, falls outside of even these overly broad parameters and operates as an unwarranted punishment for those who are targeted.

Moreover, this deterrence does not work.⁸ Many countries, despite having increasingly severe detention systems, experience similar—and even greater—rates of unauthorized migration.⁹ DHS has historically backed the deterrence justification with anecdotal evidence,¹⁰ but even when DHS has turned to more robust analyses, research findings have failed to support this claim. An immigration specialist from the Congressional Research Service testified before Congress that, “[it] is especially difficult to measure ‘remote deterrence’: the decision by potential migrants, who may be thousands of miles from the border, to choose not to embark on a trip to the United States.”¹¹ When DHS tried to inappropriately use a Vanderbilt study on violence and migration in Central America to support a “no bond” or “high bond” policy to disrupt “active migration networks” (or friends and family of migrants already in the United

³ The Fourteenth Amendment states that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”; In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court wrote that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here in lawful, unlawful, temporary, or permanent.” *Zadvydas* at 693.

⁴ *Kansas v. Crane*, 534 U.S. 407, 412 (2002)

⁵ Protocol Relating to the Status of Refugees, Convention Against Torture, International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child

⁶ The UN Special Rapporteur on Torture Juan E. Mendez recommends that all States “ensure that immigration detention is never used as a penalty or punishment of migrant children, including for irregular entry or presence...[and] [t]o prohibit the use of immigration detention as a method of control or deterrence for migrant children.” *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2015); Also under UNHCR Detention Guideline 4.1.4 (Purposes not justifying detention): “detention as a penalty for illegal entry and/or as a deterrent to seeking asylum.” (2012)

⁷ *Zadvydas*, 533 U.S. at 690-91. Since then, courts have continued to further restrict the use of immigration detention, as in *Chavez-Alvarez v. Warden York County Prison*, No. 14-1402 (3d Cir. 2015).

⁸ International Detention Coalition. *There are Alternatives* (2011). Retrieved from <http://idcoalition.org/publications/there-are-alternatives-2/>

⁹ Edwards, Alice. “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants.” *UNHCR Legal and Protection Policy Research Series* (2011).

¹⁰ “The Coast Guard states that “[a]necdotal reporting and operational experience strongly suggests that detaining and swiftly repatriating those who illegally and unsafely attempt to enter the United States by sea is a significant deterrent to surges in illegal immigration and mass migration.” *Matter of D-J-*, 23 I&N Dec. 572, 578 (A.G. 2003).

¹¹ Rosenblum, Marc R. “Measuring Border Security: U.S. Border Patrol’s New Strategic Plan and the Path Forward.” *Committee on Homeland Security, Subcommittee on Border and Maritime Security* (2012).



States),¹² the study's co-author publicly rejected the Department's reliance on the research findings to rationalize deterrence.¹³

Despite lacking empirical evidence, the U.S. continues to justify the mass incarceration of immigrants on the basis of deterrence without regard to the Constitution and international human rights standards.

Congress Encourages the Deterrence Justification

The administration's use of deterrence as a justification for individual detention decisions has only recently gone into widespread effect. But the deterrence justification has a history of support from Congress. Despite the absence of compelling evidence, many members of Congress continue to reaffirm their belief in the effectiveness of detention as a deterrent to mass migration. For example, in a congressional hearing entitled "Moving Toward More Effective Immigration Detention Management," then Representative Mark Souder (R-IN) and Ranking Member of the Subcommittee on Border Maritime, and Global Counterterrorism stated, "I think the most effective immigration reform is to truly enforce the laws on the books. Detention is important for homeland security, public safety, and is a deterrent for illegal border crossers and false claims of asylum."¹⁴

In apparent response to congressional recognition of the deterrence rationale, DHS has continuously stressed the deterrence value of detention in status reports to the House Committee on Appropriations and Subcommittee on Homeland Security between 2006 and 2009.¹⁵ In a 2006 Secure Border Strategic Plan Report, DHS stated that the "deterrent value of the increased detention rate is evident in the significant and almost immediate decrease in apprehensions of nationalities as the implementation of this policy was phased in."¹⁶

DHS has an obvious interest in catering to Congress, which ultimately controls DHS's budget. By conflating higher detention numbers with lower border apprehension numbers, DHS supports the deterrence justification in order to placate a Congress lobbied by powerful financial interests.¹⁷ However, it is important to note that while this rhetoric has been regularly, if inappropriately, employed when discussing southern border policies and strategies, its widespread use by Immigration and Customs Enforcement (ICE) for individual custody determinations is a more recent development.

Family Detention: *RILR v. Johnson* Preliminary Injunction

In *Matter of D-J-*, decided in 2003, then-Attorney General John Ashcroft wrote a decision that would create the shaky foundation for the deterrence justification in the

¹² Hiskey, Jonathan, and Mary Malone, Diana Orcés. "Violence and Migration in Central America." *Americas Barometer Insights: 2014*. Retrieved from <http://www.vanderbilt.edu/lapop/insights/IO901en.pdf>

¹³ Declaration of Jonathan Hiskey (2014). Retrieved from https://www.aclu.org/sites/default/files/assets/hiskey_affidavit_9.22.14_final.pdf

¹⁴ *Moving Toward More Effective Immigration Detention Management Before the Subcommittee on Border Maritime, and Global Counterterrorism*. 111th Cong. 2 (2009).

¹⁵ *DWN v. ICE*, No. 14-cv-583 LGS (2013), DHS Bates No. 1825, 2047, 3477-3479, 8812

¹⁶ *Id.* at 2013

¹⁷ Carson, Bethany, and Eleana Diaz. *Grassroots Leadership* (2015, April). "Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota." Retrieved from <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota#1>



immigration detention context. He made it appropriate “to consider national security interests implicated by the encouragement of further unlawful mass migrations” in custody determinations by referencing anecdotal evidence that detention deters.¹⁸ Although ICE has not historically considered deterrence in individual custody determinations, this decision created the unfortunate foundation for such a pivot.

In 2009, the new Obama administration stopped detaining families at the 512-bed T. Don Hutto Detention Center in Taylor, Texas, following public opposition and a lawsuit highlighting the inappropriate use of the facility to detain children and families. The resurgence over the last year of family detention (including the establishment of a 2,400-bed facility in Dilley, Texas) is a stunning reversal, and a low point in the history of immigration in the United States.¹⁹ The administration’s open justification for its family detention policy has been deterrence, stating in an ICE press release that “these [family detention] facilities will help ensure more timely and effective removals that comply with our legal and international obligations, while deterring others from taking the dangerous journey and illegally crossing into the United States.”²⁰ In June 2014, Secretary of Homeland Security Jeh Johnson testified before the Senate Committee on Appropriations asking for increased support on, “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”²¹

This message was soon picked up by ICE prosecutors fighting against the release of women and children who had passed the first stage of the asylum process²² in the belief that the release of these families would weaken the deterrence message. Assistant Director of Field Operations for Enforcement and Removal Operations Philip T. Miller and Assistant Director over Investigative Programs for Homeland Security Investigations Traci A. Lembke have gone on the record supporting a “no bond” or “high bond” policy, with Lembke specifically stating the belief that this will deter “further mass migration.”²³ Both DHS officials based their arguments on a misinterpretation of a report so incorrect that the author was forced to publicly declare that their “contentions...are not supported by [this] Report and its underlying research.”²⁴

In response to this egregious use of deterrence as a justification for long-term detention, the American Civil Liberties Union (ACLU), Immigration Clinic of the University of Texas Law School, and pro bono counsel filed a nationwide class-action lawsuit in the U.S. District Court for the District of Columbia on December 16, 2014. *RILR v. Johnson* was filed on behalf of

¹⁸ *Matter of D-J-* at 572.

¹⁹ Detention Watch Network. *Family Detention Background* (2015). Retrieved from http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/dwn_family_detention_backgrounder_and_talking_points.pdf

²⁰ Immigration and Customs Enforcement. (2014). ICE to open additional facility in South Texas to house adults with children [Press Release]. Retrieved from <http://www.ice.gov/news/releases/ice-open-additional-facility-south-texas-house-adults-children>

²¹ Johnson, Jeh. Statement to Senate Committee Appropriations (2014). Retrieved from <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>

²² As of January 27, 2015, 2,625 credible fear interviews have been conducted at family detention facilities and 69.2% of them have established a credible fear. Retrieved from <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-Jul2014-Jan2015.pdf>

²³ Declarations of Philip T. Miller and Traci A. Lembke (2014). Retrieved from <https://immigrantjustice.org/sites/immigrantjustice.org/files/Government%20No%20Bond%20Declarations.pdf>

²⁴ See *supra* 13



asylum-seeking mothers and children who were detained pursuant to the administration’s “no bond” or “high bond” policy of deterring other migrants and sought a preliminary injunction.²⁵

On February 20, 2014, a federal judge granted the preliminary injunction (based on the likelihood of success of the case on its merits) which should have immediately halted the detention of class members under this justification.²⁶ District Judge James E. Boasberg described the government’s argument in using detention as deterrence for mass migration as novel and mentions that “[d]efendants have presented little empirical evidence...that their detention policy even achieves its only desired effect.”²⁷ The district judge further reasoned that the “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty”²⁸ and “[u]nlike economic harm, the harm from detention pursuant to an unlawful policy cannot be remediated after the fact.”²⁹

Nevertheless, exactly a week following the injunction, government attorneys again used the deterrence argument in parallel litigation to justify the detention of migrant children, acknowledging that, “DHS strongly believes that the appropriate use of family detention is a key element of the U.S. Government’s efforts to deter aliens from Central America...”³⁰ Equally disappointing, the U.S. Government has asked the district court to reconsider the preliminary injunction, rather than acknowledge that its most recent experiment with deterrence as a justification for detention was ill-advised and outside the law.

Conclusion

The use of immigration detention as a deterrent for future migration is an absurd justification for detention, lacking both legal and moral authority. Constantly lingering at the periphery of our immigration enforcement system, it remains available for use whenever it is politically convenient.

By indiscriminately locking up individuals in a misguided attempt to deter other migrants, the U.S. is acting punitively and extraneously to its Constitution and international obligations. It is time for the United States to fully reject, once and for all, that some immigrants can be punished on the unproven hypothesis that it will affect the behavior of other potential immigrants hundreds, maybe thousands, of miles away.

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²⁵ *RILR v. Johnson*, No. 1:15-cv-00011 JEB, Amended Preliminary Injunction Motion (2015).

²⁶ *RILR v. Johnson*, No. 1:15-cv-00011 JEB, Memorandum Opinion (2015).

²⁷ *Id.* at 36

²⁸ *Id.* at 37

²⁹ *Id.* at 39

³⁰ *Flores v. Holder*, No. CV 85-4544-DMG, 12 (2015). The government makes the distinction that the *RILR v. Johnson* preliminary injunction pertains to the initial custody determination and, therefore, it is not prohibitive to the government’s argument that family detention can be a deterrent, so long as deterrence was not a criterion considered during the determination.