

Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability

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About the Global Detention Project

The Global Detention Project (GDP) is a non-profit research centre based in Geneva, Switzerland, that investigates the use of detention in response to global migration. The GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) facilitating accountability and transparency in the treatment of detainees; and (3) encouraging scholarship in this field of immigration and refugee studies.

About the author

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Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability

By Nicholas De Genova

Abstract: The global expansion of deportation regimes has spurred an analogous expansion of migrant detention. Arguably even more than the onerous punitive power of deportation, detention imposes the sovereign power of a state on to the lives of non-citizens in a manner that transmutes their status into de facto legal non-personhood. That is to say, with detention, the condition of deportable migrants culminates in summary (and sometimes indefinite) incarceration on the basis of little more than their sheer existential predicament as “undesirable” non-citizens, often with little or no recourse to any form of legal remedy or appeal, and frequently no semblance to due process. Castigated to a station outside the law, their detention leaves them at the mercy of the caprices of authorities. The author argues that to adequately comprehend the productivity of this power to detain migrants, we must have recourse to a concept of *detainability*, the possibility of being detained. The paper situates the analysis of immigration detention in the framework of contemporary critical theory, interrogating the economy of different conditionalities and contingencies that undergird various degrees by which distinct categories of migrants are subjected to detention power.

Introduction

In this paper, I invite you to think with me about migrant detention. The general dynamics that I will sketch here are in no sense confined to the ethnographic particulars or socio-historical peculiarities of any specific state or its legal regime, and it is not the principal task of this essay to elaborate any specific ethnographic or historical example. Rather, the primary concerns here are theoretical and critical. What I mean by this is nothing fancy. By “theory,” I want only to suggest that rather than trying to *show* you something, I will offer various ways by which we might attempt to *see* things differently. Rather than presenting a detailed empirical case study or a mass of original research findings, I want to propose some ideas that might offer a fresh critical perspective, a different angle of vision, for the purpose of understanding better the global phenomenon of migrant detention.

What concerns us here is thinking through some of the ways that critical reflection on migrant detention may contribute to a more rigorous approach to both theory and practice in challenging the injustices that confront an ever widening cross-section of migrants, refugees, and others categorized as non-citizens within juridical and law enforcement regimes around the world. In this respect, although this paper emerges from academic scholarship, it is not the expression of any particular disciplinary or methodological perspective, and may offer a new perspective across disciplines and beyond any narrowly scholarly concerns. In line with the interdisciplinary agenda of

this volume, this paper gathers insights from a wide variety of disciplines as an exercise in critical theorizing to formulate concepts that may inform not only more strictly academic sorts of inquiry but also the very ways in which activists, advocates, and other practitioners think about and understand what is at stake in migrant struggles over detention.

Deportability and Detainability

One of the defining features of the socio-political condition of migrants, whatever their precise juridical status within a (nation-)state's immigration system, is the susceptibility to deportation, which is a virtually universal quality of being a non-citizen. Within any given regime of immigration-related conditionalities and contingencies (Goldring and Landolt 2013; cf. Chauvin and Garcés-Mascreñas 2012; Coutin 2003), migrants always remain more or less deportable. This is what we may understand to be an "economy" of *deportability*: even if all non-citizens are potentially subject to deportation, not everyone is deported, and not everyone is subject to deportation to the same degree. There is, in other words, *an unequal distribution* of this particular power over non-citizens' lives and liberties, as well as of the rationalities, techniques, and technologies deployed.

And yet, even in spite of such an uneven distribution of deportation, this condition of deportability has profoundly disciplinary repercussions (De Genova 2002; 2005:213-50; 2010; 2014). The dramatic expansion in recent years of an effectively global deportation regime (De Genova and Peutz 2010)—and the accompanying widening purview of deportability for migrants—has generated the conditions of possibility for an analogous expansion of migrant detention.

Indeed, detention has become an ever increasingly significant feature of how states govern migration. Hence, this essay is interested in developing the idea of an *economy of detainability*. Again, this concept of "economy" does not refer in any narrow or simple sense to "economics," conventionally understood, although it plainly has implications for how migrants come to be exploited as labor or otherwise are subject to specific types of political or juridical inequalities in the field of activities that we customarily call "the economy." Instead, adapting the Foucauldian conception of an "economy of power," we are interested here in how a wider social field encompassing both "economics" and "politics" involves an unequal distribution of rationalities, techniques and technologies that make migrants subject to detention, and thereby administers and governs them through that uneven distribution of their *detainability*, their greater or lesser susceptibility to detention. All may be more or less susceptible to detention, given particular contingencies and circumstances; some may be detained while many others are not; many may be detained as a prelude to deportation, while still others may be detained and then released, while remaining subject to the prospect of subsequent detentions; others may be detained repeatedly. This is what we mean by an *economy of detainability*.

Detention, like deportation, is a term that has no distinguished pedigree in the history of political ideas and legal concepts. In striking contrast with citizenship—which derives from a hallowed history of philosophical debate and political practice concerned with the relationship of individuals to the public life of a larger

community—detention, like deportation, has no exalted genealogy. As a figure of law making and law enforcement, of course, actual practices and procedures of detention will always be found to have a history. But there is something distinctly nondescript about the term, perfunctory even, which underscores its status as a kind of understated, largely unexamined fixture of statecraft. To be *detained*, after all, is suggestive of merely being slowed down (“held up”), and is conventionally used in a manner that would suggest that the condition of being detained arises inadvertently, without having been deliberately perpetrated by any active agent. Etymologically, the word’s origins would indicate a holding back, or a holding away. Hence, detention is figured as a condition of being “held” in custody, but commonly in a manner that has no strict juridical status, and thus without recourse to the formalities of any due process of law: no actual charges leveled, evidence presented, or legal “rights” stipulated.

Also like deportation, detention is pervasively institutionalized as a merely *administrative* measure. And yet, detention in its most basic outline involves a coercive deprivation of a person’s most elementary liberties. Consequently, something that can only be experienced by the non-citizen subjected to it as a profoundly punitive iniquity is presented as an utterly routine and mundane recourse of states “holding” (and eventually, disposing of) their ostensibly unwanted, undesirable, unwelcome foreigners (Hall 2012; Hasselberg 2016). By appearing thus to be something that comes about automatically as a mere effect of a seemingly objective condition related to one or another immigration-related “offense,” detention seems like an inevitable “fact of life”; that is to say, detention tends to be *naturalized*, and rendered more or less unquestionable as a simple and inevitable reality that derives from some sort of self-evident “violation” of the law.

Within the asphyxiating constrictions of this language to describe a punitive experience we begin to appreciate that with detention we are in the midst of what Hannah Arendt famously designated as “the banality of evil” (1963). As is well known, Arendt invoked this notion with regard to the unsettling (and terrifying) “normal”-ness of the high-profile Nazi technocrat Adolf Eichmann, during his trial for war crimes, crimes against the Jewish people, and crimes against humanity (1963/2006:276). While Eichmann was widely considered to be directly implicated in the perpetration of a truly extraordinary evil, in other words, Arendt nevertheless discerned something profoundly important about how mundane that evil was when embodied in the non-descript personality of Eichmann. The particular banality of Eichmann’s evil derived from what Arendt deemed to be not only “the essence of totalitarian government” but also “perhaps the nature of every bureaucracy”: the dehumanizing reduction of individuals into “functionaries and mere cogs in the administrative machinery” (289). It is in this respect that the idea of the “banality of evil” is instructive when we seek to challenge such otherwise routine “administrative” punishments as detention and deportation. The bureaucratic rationality that coldly executes such severely punitive measures as “standard operating procedure,” and the consequently heartless disregard for their veritable cruelty for those whose lives are thereby derailed, convert a systemic evil into the simple and banal functionality of a presumptively efficient governmental apparatus.

Arguably even more than the onerous punitive power of deportation itself, detention may be understood to enact the sovereign power of a state upon the lives of migrants in a manner that frequently transmutes their deportable status into a de

facto legal non-personhood. That is to say, with detention, the effectively rightless condition of deportable migrants culminates in summary (and sometimes indefinite) incarceration on the basis of little more than their sheer existential predicament as “undesirable” non-citizens, usually with little or no recourse to any form of legal remedy or appeal, and frequently no semblance to any due process of law whatsoever. Migrants subjected to detention, very commonly, are literally “guilty” of nothing other than their “unauthorized” (illegalized) status, penalized simply for being who and what they are, and not at all for any act of wrong-doing. With detention, nonetheless, they are subjected to a condition of direct confinement by state authorities, often castigated to a station effectively *outside the law*, and thereby rendered veritably rightless—sometimes indefinitely. For some migrants subjected to detention, consequently, deportation may at least represent some form of finality, the comparative relief of knowing that the punitive process will end. (Of course, for some, deportation only delivers migrants or refugees back into the hands of authorities in their ostensible “home” countries, where they may be “detained” or imprisoned anew, and sometimes also subjected to torture.)¹

Detention, in contrast, often involves imprisonment aggravated by excruciating uncertainty and indeterminacy about any future prospect of release. Little surprise, then, that many detainees would prefer to be deported immediately rather than remain stuck in detention. In other instances, after having served a prison sentence for a conviction for an ordinary criminal offense, migrants (including long-term “legal” residents) abruptly discover that—for no other reason than the mere fact of their statutory non-citizenship—they must suffer the double punishment of expulsion: upon completion of their prison terms, they are summarily delivered into detention (often indefinite) and informed that they will be deported as “criminal aliens” (cf. Griffiths 2015; Hasselberg 2016). In either case, being “detained” introduces a panoply of both legal ambiguities and existential uncertainties for non-citizens that commonly far exceed and casually dispense with the juridical parameters otherwise afforded to ordinary “criminal” citizens serving their time for conventional convictions.

Thus, their detention frequently leaves non-citizens at the mercy of the caprices of the immediate enforcers of their confinement. Here, we may be instructively reminded of Giorgio Agamben’s crucial insight that “the police”—and we may add here, also prison guards or other similarly immediate enforcers of order within detention facilities—“are not merely an administrative function of law enforcement; rather, the police are perhaps the place where the proximity and the almost constitutive exchange between violence and right that characterizes the figure of the sovereign is shown more nakedly and clearly than anywhere else” (1996/2000:103). That is to say, in Agamben’s account, the sovereign power of the modern (liberal, constitutional, democratic) state significantly derives from the capacity to decide upon when there exists a “state of exception” (Agamben 2003), or a “state of emergency,” that requires the state to disregard or suspend the law in order to putatively preserve the integrity of the larger political and juridical order that relies on the Rule of Law. Thus, there inevitably exists what Agamben calls a “zone of indistinction,” which is to say, an area of ambiguity, where it is possible to suspend

¹ See, e.g. Bhartia 2010; Kanstroom 2012. Also, even for those deportees who are indeed able to resume their lives following their coercive return “home,” life is often unviable (see, e.g. Coutin 2010; Kanstroom 2012; Peutz 2010).

the separation of “right” (the law, as an abstraction, that appears to delimit the state’s exercise of power over its subjects) from brute force (the sheer fact of perpetrating violence to enforce relations of rule or domination). If this is so, then the police (and the detention or prison guards) similarly operate on a continuous everyday basis at the blurry intersection where the abstract universality of “the law” routinely becomes real only through the immediate, concrete, interpersonal coercive or violent encounter where “the law” in general is applied, or enacted, in specific instances through its enforcement. The lowest-level enforcers of the law must constantly exercise their own discretion and routinely decide on a case-by-case basis on the “state of exception” between the abstraction of the law and the fact of violence that enforces it, in the putative interests of “order” or “security.” In this sense, it is not necessary for the state to proclaim a “state of emergency” or “martial law” to see that sovereignty is permanently derived from the sorts of acts of “law enforcement” that involve the discretionary exercise of power (including violent coercion) by the most low-level enforcers of “order.” For these ordinary police and prison or detention authorities, the law, in its abstraction and generality, remains largely silent about how it must be applied and enforced through greater or lesser acts of violence. Such mundane acts of enforcement are largely authorized by the law, and yet operate outside of strict purview of the law, and depend on the discretion and predilections of those who embody the state’s sovereign power in the “zone of indistinction” that is everyday life.

Migrant detention often is imposed as a prelude to eventual deportation, although it is also common that actual deportation is not possible for various reasons and consequently, detained migrants are repeatedly released after periods of more or less prolonged interruption of their ordinary lives. Hence, whereas deportation must be situated alongside a variety of other practices of expulsion and in this way represents a kind of coercive *mobility*, or forced movement (Walters 2002), detention instead signals a practice of confinement, and therefore coercive *immobilization*. Notably, detention appears within the purview of “human rights” as a rather generic figure of imprisonment. Article 9 of the Universal Declaration of Human Rights states: “No one shall be subjected to arbitrary arrest, detention or exile.” In this regard, detention and imprisonment are effectively synonymous. Hence, detention must be situated within the nexus of diverse forms of captivity and confinement (Foucault 1972-73/2015; 1975/1979; cf. Walters 2004:248).

Nonetheless, while located within this continuum of coercive confinement, detention must also be distinguished from other forms of incarceration. What chiefly characterizes detention as such is the extent to which it has been reserved as a category for naming precisely those varieties of confinement that are intended to be emphatically distinguished from the more customarily juridical coordinates of penal imprisonment for criminal offenses. In short, detainees are so designated precisely because they are understood to *not* be “prisoners”; detention is so named exactly to the extent that it is conceived to be something that is *not* incarceration. Here, indeed, we may recall Arendt’s memorable insight into the cruel and revealing irony that common criminals in fact had more legal rights and recognition than those “interned” in the Nazi concentration camps, or indeed, than those relegated to the status of stateless refugees (1951/1968:286). To be a “criminal” is to be subjected to the recriminations of the law, and thus to be inscribed within the law and its punishments; in contrast, to be a detainee is to be subjected to an “administrative”

apparatus, and as a consequence, to potentially (and not uncommonly) be figured as outside of the purview of the law altogether.

Ensnared within the pompous gestures of “national” sovereignty and a state’s prerogative to enforce its own (bordered) legal order, therefore, the detention of non-citizens—a punishment that is activated often for no other reason than a person’s mere status as an “irregular” non-citizen—underscores the more elementary fact that some people’s lives are plainly judged to be *unworthy of justice*. More specifically, non-citizens—for no other reason that their pure identity as such—may always be (at least, potentially) relegated to a de facto status of juridical non-personhood: hence, the often arbitrary and authoritarian character of detention regimes.

The detention power commonly operates outside and beyond the parameters of any system of criminal law, and has ordinarily been figured as merely a matter of expediency in a state’s presumed eventual disposal (deportation) of illegalized or criminalized migrants. To adequately comprehend the productivity of this power to detain migrants, we therefore need recourse to a concept of *detainability*: the susceptibility to detention, the possibility of being detained (De Genova 2007). Just as deportability is much more about the deep consequentiality of the possibility of being deported even if most remain un-deported, then detainability (the susceptibility to being detained)—and also actual detentions that do not culminate in deportation—serves to *discipline* migrants’ lives through the unfathomable interruptions that exacerbate their precarity. Thus, we must interrogate the economy of different conditionalities and diverse contingencies (Goldring and Landolt 2013)—within historically specific regimes of immigration, asylum, and citizenship—that undergird the various degrees by which distinct categories of migrants are subjected to this susceptibility to the detention power. Such an economy of detainability necessarily implies that some non-citizens are more susceptible than others to the punitive recriminations of any given detention regime, and experience their relative vulnerability to detention (their detainability) unequally, within a nexus of different degrees of precarity for those whom it subjects to its power (De Genova 2007; see, e.g. Griffiths 2015; Hasselberg 2016).

A non-citizen’s susceptibility to detention—her detainability—therefore involves a deeply existential predicament that is defined by the grim prospect of being apprehended and coercively removed from the spaces and temporalities of everyday life. In this respect, detention provides an instructive example of what Agamben (1995/1998:175) designates “dislocating localization”: people are forcibly dislocated from their lives but nonetheless coercively held in a particular place. While this term could likewise describe ordinary imprisonment, here it underscores the sort of spatial confinement and captivity that is also an interruption of migrants’ *time*: even if the end result is only that migrants are released when actual deportation has proven to be unfeasible, the rhythms of their lives and their larger life projects are profoundly fractured (sometimes repeatedly) by coercive periods of detention. Indeed, detention always entails the enforcement of a dire and usually abrupt separation of an individual non-citizen from all the material and practical coordinates of her day-to-day circumstances, the actual life and livelihood that she has been engaged in sustaining and cultivating, as well as all the immediate and affective human relationships of which these are made. In this respect, detainability is as much entangled (and sometimes even more so) with *un*-deportability as with actionable deportability (the prospect of actual deportation).

Detention and Waiting

Like the ominous prospect of deportation, then, the always unpredictable possibility of detention becomes a defining horizon for many migrants' experience of everyday life. This prospective risk of detention, furthermore, enforces a protracted condition of vulnerability to the recriminations of the law, and consequently, a complex and variegated spectrum of ways in which everyday life becomes riddled with precarity, multiple conditionalities, inequality, and uncertainty. In this respect, detainability is also a *temporal* predicament that can render one's way of life and one's life projects to be always relatively tentative and tenuous (Coutin 2000:27-47). Detainability, like deportability, is therefore entangled with a protracted socio-political condition of uncertainty and with the lived precarity that ensues from the unpredictable hazard of apprehension and detention. Hence, detention power capitalizes on the amorphous temporalities of indefinite (possibly perpetual) *waiting*.²

As Pierre Bourdieu (1997/2000:228) notes: "Absolute power is the power to make oneself unpredictable and deny other people any reasonable anticipation, to place them in total uncertainty. ... The all-powerful is he who does not wait but who makes others wait. ... Waiting implies submission. ... It follows that the art of 'taking one's time' ... of making people wait ... is an integral part of the exercise of power."

Vexed with precautions and often overshadowed by a diffuse but persistent terror—the fear of detection, arrest, detention, and deportation—those who are subjected to the prospect of detention are subjected to a banal (pseudo-)“administrative” power that in fact conceals a brute authoritarianism. This seemingly mundane and merely bureaucratic condition invariably reveals its absolutist character by enforcing a condition of indefinite waiting and being made to live with protracted uncertainty—even if it is never activated in the form of an actual detention. Yet, these more or less torturous conditions of life for those who are compelled by circumstances to make their lives beneath the horizon of the possibility of detention have been made ever increasingly normal—“terribly and terrifyingly normal” (to recall Arendt’s phrase)—within our modern global detention and deportation regime.

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² There is a growing literature—primarily ethnographic in character, and with a noteworthy prominence of studies concerned with migration—on the phenomenology and socio-political consequentiality of “waiting” (see. e.g. Anderson et al. 2013; Conlon 2011; Hage 2009; Khosravi 2014; Mountz 2011; Mountz et al. 2002).

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