What *Habeas Corpus* Can (and Cannot) Do for Immigration Detainees: *Scotland v Canada* and the Injustices of Imprisoning Migrants

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Abstract

This paper closely studies *Scotland v Canada* to reveal the normative and substantive justice challenges facing immigration detainees across Canada. The *Scotland* decision at the Ontario Superior Court certified a *habeas corpus* writ as an individual remedy to release Mr. Ricardo Scotland from a pointless, seventeen-month incarceration. The decision frames Mr. Scotland's detention as anomalous or divergent from an otherwise-functioning system. Against this view, this paper argues that access to *habeas corpus* cannot remedy the detention system's scale of injustices. The paper contextualizes Mr. Scotland's incarceration and the Superior Court decision against two primary claims: first, that the Canadian immigration and refugee determination system is arbitrarily biased against certain minoritized individuals, therefore transforming some people into detainable bodies; and second, that the global criminalization of migration trend has nested an arc of penal practices into Canadian policymaking and law, and this arc has seemingly normalized indefinite detention for some migrants. The paper concludes that restoration of access to *habeas corpus* cannot be understood as a substantive remedy to address the miscarriages of justice in the Canadian detention system.

Keywords: detention, discrimination, immigration, Canadian courts, habeas corpus, Canada Border Services Agency, racialization

Résumé

L'arrêt *Scotland c. Canada* a pour objet la libération par bref d'*habeas corpus* d'un homme qui a été incarcéré durant une période de dix-sept mois dans une prison à sécurité maximale pour des motifs d'immigration. Contrairement aux motifs du juge Morgan, qui tendent à caractériser cette situation comme étant anormale ou exceptionnelle, cet article présente une autre vision et considère que la détention

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futile et préjudiciable de M. Scotland était en fait inévitable lorsqu'on la situe dans un cadre sociojuridique plus large. Premièrement, j'argue que le système canadien d'immigration et de détermination du statut de réfugié est partial et arbitraire à l'endroit de certaines personnes minorisées, transformant ainsi certaines catégories de personnes en corps incarcérables. Deuxièmement, dans le cadre de la criminalisation mondiale de la migration, je constate l'existence d'un arc de pratiques pénales qui guide les décisions en matière d'immigration et de réfugiés et qui facilite la normalisation de la détention illimitée de certains non-ressortissants au Canada. Sur la base de cette interprétation, il est évident que la restauration de l'*habeas corpus* ne peut remédier aux lacunes significatives de la justice procédurale et substantive pour les personnes détenues à des fins d'immigration au Canada.

Mots clés : Détention, discrimination, immigration, tribunaux canadiens, habeas corpus, l'agence des services frontaliers du Canada, racialisation

Introduction

Immigration detention is a civil domain that operates outside of, parallel to, and often overlapping with criminal, security, and preventive incarceration regimes. Importantly, immigration detainees in Canada and elsewhere are imprisoned not as a result of criminal convictions but rather for administrative reasons. Detention evidences the trend that States are imposing collateral or deliberate criminal sanctions on migrants without the concurrent rights protections afforded to criminal suspects and those convicted. In 2015, the *Chaudhary*[1] decision reversed a line of cases and found that migrants subject to lengthy detentions in Ontario are entitled to seek release through a writ of *habeas corpus*.

This paper closely studies the facts and logics of one Ontario-based *habeas corpus* detention case, *Scotland*,[2] in order to analyze the procedural, normative, and substantive justice challenges facing detainees across Canada. *Scotland* represents the confluence of jurisdictional understandings of remit and justice: the Federal Court has jurisdiction over immigration, but *Scotland* was decided in the Ontario Superior Court. Accordingly, Morgan J's judgment to release Ricardo Scotland on a *habeas corpus* writ is an individual remedy for procedural injustice suffered solely by Mr. Scotland. Significantly, Morgan J's decision repeatedly and consistently frames Mr. Scotland's incarceration as anomalous or divergent from how detention is meant to function in Ontario. In other words, *Scotland* positions Mr. Scotland's pointless, seventeen-month incarceration in a maximum-security prison to look like an exception in an otherwise-functioning system.

Through two primary claims, my central argument is that access to *habeas corpus* writs cannot remedy the scale of injustices presented by the Canadian immigration detention system. The first claim is that the Canadian immigration and refugee determination system is arbitrarily biased against certain minoritized individuals, therefore transforming certain classes of people into detainable bodies.

[1] *Chaudhary v Canada* (Public Safety and Emergency Preparedness), 2015 ONCA 700.
[2] *Scotland v Canada* (Attorney General), 2017 ONSC 4850.

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Second, as part and parcel of the global criminalization of migration, an arc of penal practices guides immigration and refugee adjudications. This arc influences policymaking and law, and normalizes indefinite detention for some people.

In order to ground these claims, I detail Mr. Scotland's case and Morgan J's judgment in *Scotland*. Next, I explain how detention functions in theory and in practice in Canada. I then turn to examine how the Conservative Governments of Stephen Harper enacted legislative and legal changes to immigration and refugee adjudication standards, leading to more people becoming detainable. I also weave in discussion of additional cases of long-term detention in Canada, as well as the findings of the 2018 external Audit of the Immigration Division (ID) of the Immigration and Refugee Board (IRB) (hereafter, the *Audit*).[3] What emerges from my analysis is not the sense of anomaly or exceptionality that characterizes Morgan J's judgment in *Scotland*, but one that understands Mr. Scotland's pointless and harmful detention as inevitable within the current legislative framework.

Methodology

Before elaborating on Mr. Scotland's plight, however, I will explain my methodology of exegesis of one Ontario case, *Scotland*, combined with an examination of Harper Era legislation, laws, and policies. My socio-legal methodology is premised on resituating laws and law-making into wider social contexts, trends, and histories in order to make sense of judicial and institutional decision-making. My deep scraping of one case refocuses scholarly attention on the socio-legal contexts of arrest and the arc of penal practices, in addition to carceral conditions and legal remedies for indefinite detention.

My account of Mr. Scotland's story as well as certain facets of my argument were partially developed through an iterative process with Mr. Scotland's legal counsel, Subodh Bharati; throughout the months following the decision and Mr. Scotland's release from detention, Mr. Bharati and I engaged in a series of conversations, exchanged published and unpublished documents, and began a nuanced re-reading of Ontario detention proceedings. I also consulted with a number of other Ontario-based lawyers, international detention experts, and

[3] *Report of the 2017/2018 External Audit (Detention Review)*, July 2018, https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx [Unpaginated] In 2017, then-Chair of the Immigration and Refugee Board (IRB), Mario Dion, commissioned an external audit (hereafter, the Audit) to review cases of detention lasting longer than 100 days. The independent auditor randomly selected twenty files pertaining to protracted or long-term detention cases, and combed through 312 related ID hearings and decisions over a seven-month period. Along with highlighting a number of cases that eventually interacted with *habeas corpus* proceedings, the Audit pointed to system-wide shortcomings that I also unpack and analyze in this paper; such shortcomings include inadequate legal representation for detainees applying for release, overreliance on the testimony of Canada Border Services Agency (CBSA) officers, and ID Members accepting factual errors into their decision-making processes. Since the Audit's release, the ID has committed to a platform of reforms aimed at counterbalancing the institutional bias towards detaining too many people for too long. While the Audit is important for studies of release from detention, it says little about socio-legal conditions of arrest and the racialized and gendered profiling of migrants that transforms some people into potential detainees. Accordingly, the Audit will be referenced here but will not form a key component of the analysis.

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detention activists on both statutory questions and "unwritten laws" about how detention unfolds in Ontario.

Mr. Scotland

Four alleged "breaches" characterize Mr. Scotland's seventeen-month incarceration in the Niagara Detention Centre run by the Ontario Ministry of Community Safety and Correctional Services. The Canada Border Services Agency (CBSA) presented these breaches to the Members of the Immigration Division (ID) of the Immigration and Refugee Board (IRB), the presiding and independent decision-makers on admissibility hearings and detention reviews. As will be shown, each of these alleged grounds was discredited. Importantly, there were only ever allegations against Mr. Scotland, never any convictions.

The account begins with Mr. Scotland filing a claim for refugee status in December 2010. As codified in Immigration and Refugee Protection Act (IRPA) Section 49(2), he was issued a conditional removal order after lodging his claim for asylum. In August 2013, Mr. Scotland's home was raided, and he was arrested on charges of possession of narcotics, a firearm, and stolen property over $5,000. Notably, all charges were eventually either withdrawn or stayed. One obligation incurred by Mr. Scotland under the Section 49(2) order was to inform the CBSA when he changed his address. As such, the first "breach" was that Mr. Scotland did not inform the CBSA of his "change of address" upon arrest. However, it was later demonstrated that Mr. Scotland did in fact telephone the CBSA's 1-888 number from jail, though it is unclear whether the phone call was answered and noted. Nonetheless, getting arrested should not be considered a change of address, yet this "breach" led to Mr. Scotland's incarceration on immigration hold.

On July 4, 2013, Mr. Scotland's friend Ms. Patricia Baker posted a $2,000 bond for his release. The CBSA's recommended condition was that Mr. Scotland was to remain under house arrest at Ms. Baker's residence. The second "breach" occurred when the police incorrectly accused Mr. Scotland of associating with a prohibited person and arrested him for breaching his criminal release conditions. Despite the fact that he was released from criminal detention and the police acknowledged that no criminal breach occurred, the ID and the CBSA placed Mr. Scotland in immigration detention and continued to maintain that Mr. Scotland breached his immigration release conditions by not complying with his criminal bail conditions. This resulted in more stringent release conditions. Ms. Baker and a new bondsperson were each required to post bonds in the amount of $2,500, and the ID added two more weekly immigration check-ins to the two criminal check-ins already stipulated in the terms of Mr. Scotland's criminal bail release, leading to a total of four separate requirements to report each week (two to the police, two to the CBSA).

The third "breach" concerned an alleged "failure to report" on one day to both his criminal and immigration check-in after a year of reporting four times a week. After being arrested by the police, the Criminal court determined Mr. Scotland to be not guilty of a breach and ruled that he had simply become confused by the shortened week due to the August civic holiday. Irrespective of the criminal court's

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determination, the CBSA maintained that Mr. Scotland had breached, and the ID simply accepted without question the CBSA's position that his intention was irrelevant. His release was only secured through the imposition of a more stringent curfew. The fourth "breach" relates to confusion over the cancellation of Mr. Scotland's curfew on the criminal side but not on the immigration side. The cumulative totality of his breaches caused the ID Member to reject Mr. Scotland's proposed bondsperson, and he was imprisoned at the maximum-security provincial correctional centre in Thorold, Ontario. He remained in this prison until his *habeas corpus* writ was certified, and Mr. Scotland was set free without conditions.

A final noteworthy episode is the extraordinary nature of the ID's May 2017 rejection of a joint submission filed by the CBSA and Mr. Bharati's office in support of Mr. Scotland's release. The ID Member apparently rejected the submission due to the burden of prior negative decisions. The Member made lengthy reference to incidents when Mr. Scotland supposedly visited a car dealership without his surety despite the fact that security video had clearly shown the surety to be present. Nevertheless, Morgan J writes that "the ID member appears to have used [the visit to the car dealership] against Mr. Scotland. In her stated reasons, she posed it as a ground for rejecting the joint proposal that was before her."[4]

Habeas Corpus

Scotland followed the Court of Appeal for Ontario's 2015 determination in *Chaudhary*[5] that detainees could seek review of their detentions at the Superior Court (not solely the Federal Court). On the basis of the Supreme Court of Canada's reasoning in *May*[6] and *Khela,*[7] *Chaudhary* reversed the *Peiroo*[8] precedent that a "separate but equal" legal regime for detainees existed through the ID hearings.[9] Since *Chaudhary,* a number of *habeas corpus* applications for detainees have been lodged in Ontario[10] and in Alberta,[11] with one Court of Queen's Bench case, *Chhina,*[12] heard in November 2018 at the Supreme Court of Canada.

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4 *Scotland v Canada,* at para 35.
5 *Chaudhary v Canada*.
6 *May v Ferndale Institution*, 2005 SCC 82.
7 *Khela v Mission Institution,* 2014 SCC 24.
8 *Peiroo v Canada* (Minister of Employment and Immigration) 1989, 69 OR (2d) 253, 60 DLR (4th) 574.
9 After deciding that immigration matters rightly rested with the Federal Court of Canada, the Court of Appeal for Ontario decided in *Peiroo* not to grant the appellant the remedy of *habeas corpus*.
10 E.g. *Ali v Canada* (Attorney General), 2017 ONSC 2660; *Alvin Brown v Ministry of Public Safety*, 2016 ONSC 7760; *Ogiamien v Ontario*, 2016 ONSC 3080; *Ogiamien v Ontario* (Community Safety and Correctional Services), 2017 ONCA 839*; Warssama v Canada* (Citizenship and Immigration), 2015 FC 1311; *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878; *Toure v Canada* (Public Safety & Emergency Preparedness), 2018 ONCA 681; *Wang v Canada*, 2018 ONCA 798
11 *Philip v Canada* (Attorney General), 2018 ABQB 167.
12 *Minister of Public Safety and Emergency Preparedness, et al. v Tusif Ur Rehman Chhina* (Alberta) (Civil) (By Leave) (Chhina). On 14 November 2018, the Supreme Court of Canada heard arguments about whether Mr. Tusif Ur Rehman Chhina, after ten months and twelve ID reviews, could apply for a writ of *habeas corpus* at the Court of Queen's Bench of Alberta. His legal counsel argued that his detention was lengthy and indeterminate, and therefore illegal, and invoked *Charter* rights under Section 10(c), Section 7 and Section 9.

These *habeas corpus* applications essentially point to insufficiencies of the mandatory, routine detention reviews before an ID Member. These hearings take place after forty-eight hours, one week, and then every month until release. Remarkably, Canada is the only major detaining State to observe a mandatory hearings procedure. The IRB set up these hearings as *quasi-de novo*. The presiding Member pays deference to past decisions while bringing "fresh thinking" to each detention review (including changes to the factual record). Procedural justice concerns about the ID hearings system include the serial nature of the process, the reviewing officer's role, deference to earlier review decisions, and resting the burden of bringing "new" evidence on the locked-up detainee.[13] Access to *habeas corpus*, however, means that judging the legality of detention falls to a single judge informed in *Charter* and other national, international, and human rights laws who is unconstrained by previous ID decisions. It also flips back responsibility to the government to justify the lengthy detention (whereas the Federal Court requires the detainee to demonstrate that the decision was unreasonable, incorrect, or procedurally unfair).

Adopting a more historical vantage point, official promises to reform the legal and physical architecture of detention and decision-making bodies were arguably catalyzed by a landmark hunger strike in September 2013 organized by 191 immigration detainees incarcerated at the Central East Correctional Centre (CECC) in Lindsay, Ontario.[14] The strike inspired a movement of current and former detainees working with advocates to demand a time limit, a release after ninety days, an end to administrative immigration detention in maximum-security prisons, and an overhaul of the review process. The need for reform is also a matter of life and death: since 2000, at least sixteen immigration detainees have died, with a shocking four deaths since March 2016.[15]

The Scotland Decision

Canadian media were drawn to the *Scotland* case in part because Morgan J wrote his decision in decidedly florid language. He referenced literary tropes from Franz Kafka[16] and Joseph Heller,[17] wrote that Mr. Scotland was "detained for no real reason at all,"[18] highlighted a "vicious cycle of errors,"[19] and urged ID Members to "step back from the thick foliage of technical enforcement and have

[13] *Chaudhary v Canada* at para 91.

[14] The CECC is a provincial jail with a migrants-only "pod" located nearly two hours' drive northeast of Toronto; safety issues at the jail have caused guards to stage work-to-rule actions, and telephone calls are only outgoing. Greg Davis, "Correctional officers walk off the job Central East Correctional Centre in Lindsay," *CTV News*, 21 February 2018, https://globalnews.ca/news/4037845/correctional-officers-walk-off-the-job-central-east-correctional-centre-in-lindsay/.

[15] Petra Molnar and Stephanie J. Silverman, "Migrants Are Dying in Detention Centres: When will Canada act?" *The Conversation,* 14 November 2017, https://theconversation.com/migrants-are-dying-in-detention-centres-when-will-canada-act-87237.

[16] *Scotland v Canada,* at para 2.

[17] Ibid., at para 32.

[18] Ibid., at para 42.

[19] Ibid., at para 59.

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a look at the trees."[20] This excitingly rendered decision, along with the fact that the applicant is highly sympathetic, meant that various members of the Canadian media were drawn to the case; those accounts are incorporated into my analysis where relevant.

Morgan J highlighted numerous procedural failures in *Scotland*. In particular, he drew attention to how the CBSA and ID Members impugned Mr. Scotland's character and painted him unjustly as a flight risk. For instance, as regards the third "breach" of the alleged "failure to report" after reporting every week for more than a year:

> Mr. Scotland appeared in the Ontario Court of Justice on the charge of breach of bail on October 9, 2015. He explained to the court that the week of August 7th was the week of the mid-summer civic holiday, and the short, 4-day week threw him off of his schedule. He had been taking his young daughter to cheerleading practice every day, and on this particular week he confused Friday for Thursday and forgot to take himself to the police station. Nadel J. accepted Mr. Scotland's version of events, and found him not guilty of the charge.[21]

Morgan J demonstrates how the CBSA layered Mr. Scotland's accidental "liability offense"[22] onto the previous two "breaches" to create a cumulative burden that the presiding ID Member seemed unable—or unwilling—to overcome. Morgan J implies that the ID Member impugned Mr. Scotland's character unjustly: "the member equivocated on the character of Mr. Scotland's actions … taking account of his 'history,' which, as we know, is a history of errors on the part of the immigration authorities and police, and thus no reflection on Mr. Scotland."[23] The *Audit* also remarks on this institutionalized distrust of detainees: "in *Scotland, Brown, and Ali*[24], the Ontario Superior Court has stipulated that Charter compliance requires detention determinations to be based on a careful and contextualized consideration of the factual circumstances, including the detainee's testimony."

Scotland demonstrates the dangers of the CBSA's outsized influence on some ID Members, as well as the Members' excision of morality from their decisions. Morgan J rightly criticized the adjudicators' repeated instances of deference to CBSA officers over the representations of Mr. Bharati and even the Ontario Attorney General.[25] The ID's failure to consider Mr. Scotland's social responsibilities and positionality contributed directly to the unjust continuance of his baseless incarceration.[26] As Morgan J writes, "The CBSA is for the most part responsible for the erroneous judgments which have resulted in Mr. Scotland's ongoing detention; it is little wonder that the review process yields no progress toward remedying these errors. This delegation of authority to the enforcement agency who is a party to the case against Mr. Scotland provides a graphic illustration of improper self-judging."[27]

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20 Ibid., at para 76.
21 Ibid., at para 21.
22 Ibid., at para 26.
23 Ibid., at paras 25, 26.
24 *Ali v Canada*.
25 *Scotland v Canada,* at paras 59–68.
26 Ibid., at paras 11, 24, 29.
27 Ibid., at paras 61, 62.

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The *Audit* cites similar problems in the relationships amongst ID Members and CBSA officers, including: "uncritical reliance on statements by CBSA hearings officers"; Members rarely raising the possibility of cross-examining or calling as a witness the CBSA officer who provided enforcement or investigation evidence; denying detainees the opportunity to hear the evidence or ask questions of his or her own witness; Members failing to question CBSA-related delays on obtaining travel documents; and even generating successive decisions relying without challenge "on CBSA submissions that the reason for delay in obtaining travel documents is the detainee's 'complete lack of cooperation.'"

Further, following up on an important study of the U.K. asylum system, Gill (2016) shows how the system's structure encourages bureaucrats, decision-makers and other personnel to fence off their emotional and moral connections to claimants.[28] Since Mr. Scotland's characteristics as a refugee claimant and single father might otherwise engender sensitivity, it is instructive to return to the structural level when levying critiques regarding how ID Members come to their decisions. *Scotland* does not point to a way forward on this issue, nor can the availability of access to *habeas corpus* remedy it.

The Canadian Immigration Detention System: An Overview

Habeas corpus is understood as "an essential remedy in Canadian law."[29] The Canadian Charter of Rights and Freedoms (the *Charter*) Section 10(c) guarantees the right to have the validity of a detention determined by way of *habeas corpus* through an application to Superior Court, and to be released if the detention is unlawful. *Khela* confirmed that jurisdiction to assess both the procedural fairness and the reasonableness of an individual detention decision lies with provincial superior courts, an implication taken up in *Chaudhary* that the same principle applies to immigration detention because the issue is the incarceration not the migration status. As the numbers of *habeas corpus* applications and those cases challenging the lawfulness of a detention multiply, and in the absence of legislative progress towards a time limit, serious questions are being asked about the promises and limitations of *habeas corpus* for Canadian detainees.[30]

From 2012 to 2017, the Canada Border Services Agency (CBSA) detained an average of 7,215 individuals for immigration-related reasons each year. In 2012, the CBSA carried out close to 19,000 deportations, more than doubling its deportation rate of 8,000 people from 2002, and denied entry to about 51,000 individuals.[31]

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28 Nick Gill, *Nothing Personal? Geographies of Governing and Activism in the British Asylum System* (London: Wiley-Blackwell, 2016).

29 *Khela v. Mission Institution,* at para 29.

30 See, e.g., Siena Anstis, Joshua Blum, and Jared Will, "Separate but Unequal: Immigration detention in Canada and the great writ of liberty," *McGill Law Journal* 63 (2017): 1–44; Efrat Arbel, "Immigration Detention and the Problem of Time: Lessons from solitary confinement," *International Journal of Migration and Border Studies* 4 (2018): 326–44; Stephanie J. Silverman and Petra Molnar, "Everyday Injustices: Barriers to access to justice for immigration detainees in Canada," *Refugee Survey Quarterly* 35, no. 1 (2016): 109–27.

31 Karine Côté-Boucher, "Bordering Citizenship in 'an Open and Generous Society': The criminalization of migration in Canada," in *The Routledge Handbook on Crime and International Migration,* ed. Sharon Pickering and Julie Ham (London: Routledge, 2014), 79.

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In fiscal year 2016–2017, CBSA reports detaining 6,251 individuals for a total of 131,617 "detention days," with an average of 19.5 days spent incarcerated.[32] There are no legislated upper time limits.[33] CBSA statistics reveal that 439 people were detained for over ninety days during the 2016–2017 fiscal year.

The IRPA[34] sets the grounds for detention in Canada exclusively as a danger to the public, as a flight risk,[35] in cases involving security, and in cases where identity has not been established.[36] Absent these factors, the official presumption is in favour of release. The CBSA is the migration enforcement arm of the Government of Canada, overseen by the Ministry of Public Safety and Emergency Preparedness. Section 55 of the IRPA vests CBSA officers with the power to arrest individuals. When the IRPA replaced the Immigration Act, which had been in place since 1976, it broadened CBSA immigration officers' discretionary powers to detain. Unlike with Immigration Act rules, the IRPA transformed detention into an administrative procedure. As such, officers can detain non-citizens without a warrant. By law, detention is a last resort, and a decision to be made after all other options have been considered and rejected.

The CBSA operates three detention centres, called immigration holding centres (IHCs). The IHCs are located in Toronto (195 beds), Montreal (150 beds), and Vancouver (twenty-four beds, and for detentions of less than seventy-two hours). The holding centres are securitized sites, featuring barbed-wire fences, CCTV surveillance, and uniformed guards who survey and control detainees' movements in the centres. The main site is the Toronto IHC, officially described as a "low risk detention facility." Until recently,[37] the Toronto IHC refused to admit anyone with criminality regardless of the nature of the crimes committed, sometimes even when there are only allegations, like with Mr. Scotland's case.

The system exhibits regional and gender disparities: the Central Region (Ontario minus Ottawa and Kingston) hosted over half of immigration detainees in Canada in fiscal year 2016–2017, and 76 per cent of the population are men.[38]

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32 Canada Border Services Agency, "Arrests, Detentions, and Removals: Quarterly detention statistics," (Ottawa: Government of Candas, 2017), https://www.cbsa-asfc.gc.ca/security-securite/detent/qstat-2017-2018-eng.html.

33 The lack of upper time limits on detention in Canada compares poorly with thresholds in other countries of destination across Europe, including Ireland (30 days), France (32 days), Spain (40 days), and Italy (60 days). Silverman and Molnar, "Everyday Injustices," footnote 18.

34 Immigration and Refugee Protection Act, SC 2001, c27 [IRPA].

35 Following ID protocol, "flight risk" refers to the IRPA paragraph 58(1)(*b*) determination with respect to whether a permanent resident or foreign national is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under IRPA subsection 44(2). Section 245 of the *IRPA* stipulates that ID Members consider these mandatory factors in assessing whether or not a person is "unlikely to appear": voluntary compliance with a departure order or previous required appearance at an immigration or criminal proceeding; previous compliance with conditions of release and the existence of strong ties to a community in Canada.

36 IRPA Sections 36–41.

37 Before changes to the National Immigration Detention Framework initiated by Prime Minister Justin Trudeau's Liberal Government in August 2016 and supported by a $138 million pledge by Public Safety Minister Ralph Goodale (CBC News, "Canada's immigration detention program to get $138M makeover," 15 August 2016, http://www.cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125).

38 Silverman and Molnar, "Everyday Injustices," 115.

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The *Audit* found that Ontario hosted "the files with long-running and recurring deficiencies," "the lowest rate of representation by counsel," and "five individuals who were held for more than two years [of whom] only one was eventually deported." The Canada Border Services Agency transfers or holds about one-third of detainees to provincial correctional centres, such as the Niagara Detention Centre, where Mr. Scotland was sent. Between 2010 and 2014, an average of over 242 children per year were detained in Canada. As a legal rule, children and youth (minors under eighteen years of age) should not be detained, and the issue of detaining children is highly controversial in Canada.[39]

Although it is within their remit, it is rare for CBSA Officers to release arrestees within forty-eight hours, before they hand over jurisdiction to the ID. The CBSA claims that 74 per cent of detainees are released within forty-eight hours and that 90 to 95 per cent of asylum applicants are released into the community.[40] Silverman and Molnar identify at least three intersecting issues that snowball to inhibit access to justice for detained migrants in Canada: namely, "(1) curtailed telephone access and the arbitrariness of decision-making; (2) the interactions of time, evidence, and prohibitive release conditions to diminish the efficacy of monthly reviews; and (3) the overlapping funding, geographical, informational, and other barriers to finding and retaining high-quality counsel."[41]

All immigration detainees are issued conditional removal orders on the premise that the detention cell is a prison with three walls. However, actual removal from Canada is not always possible, since each removal is a two-way agreement between Canada and the receiving State. A top obstacle is access to travel documents for detainees who do not have authentic identification papers: since no one can cross a transnational border without official documents, Canada needs to wait until the receiving State agrees that the detainee is their national and then produces a passport or similar document to facilitate their travel. Some States refuse to issue travel documents to people with criminal convictions, with Jamaica recently topping this list.[42] Some detainees are *de jure* stateless like the Rohingya in Myanmar or, more commonly amongst the detained population, are *de facto* stateless like Palestinians. Other detainees are virtually unremovable, and they include people whose countries of citizenship or habitual residence are "failed States" or States where the principle of *non-refoulement* could be violated, such as Somalia;[43] who have pending "Humanitarian and

[39] In January 2017, for example, forty-six Canadian medical, legal, and human rights organizations signed a public letter calling for the end of child detention in Canada, arguing that the practice contravenes its domestic and international legal obligations. See Various, "A Statement Against the Immigration Detention of Children," *End Child Immigration Detention*, 2017, https://endchildimmigrationdetention.wordpress.com/statement/.

[40] Silverman and Molnar, "Everyday Injustices."

[41] Ibid. 111.

[42] Andrew Russell and Stewart Bell, "Jamaica tops Canada's list of countries refusing to take back its criminals," *Global News*, 22 March 2018, https://globalnews.ca/news/4099058/jamaica-tops-canadas-list-of-countries-refusing-to-take-back-its-criminals/.

[43] A recent scandal in Canada concerned the Government's hiring of mercenaries to effect deportation to Somalia, a move that some legal scholars called forced migration or "civil death." John Chipman, "To No Man's Land: The story of Saeed Jama's deportation to Somalia," *The Current, CBC Radio*, 4 November 2014.

Compassionate applications";[44] who are unwell physically and not fit to fly; or who are otherwise not able to gain admission in to State in the short-term. As such, long-term detainees are virtually inevitable, although this population is "both more psychologically and physically damaged from their experiences in IHCs and provincial jails, and more likely to remain in Canada after release."[45]

Since the CBSA is a federal body, it must pay the provincial correctional ministries to rent space in their correctional centres. The charges to CBSA range from $184 per day in Quebec to $448.69 for women in New Brunswick. Subcontracting space in Ontario costs the CBSA $258 per person per day. In May 2017, there were about 113 detainees in Ontario prisons, eighty-eight of whom were not seen as dangerous; for this non-dangerous population, the daily cost to the CBSA is approximately $22,188.[46] All of these costs are borne by Canadian taxpayers.

There is no effective and transparent monitoring of the detention system. There is no watchdog for CBSA officials or facilities, or for the conditions of confinement for detainees held in provincial jails. Independent monitors are often barred access to these facilities, and their reports are not published publicly. There are also reports of detainees being held in segregation units, for which there is no legal remedy or time limit. Detainees also speak about the pains of lockdowns endured by criminal justice prisoners in Ontario.[47] As regards vulnerable adults, CBSA does not systematically screen potential detainees nor does it offer counselling services; if anything, those already-detained people exhibiting certain behavioural problems—such as aggressiveness—or severe mental health difficulties—such as suicidal tendencies—may be transferred to prisons where there is on-site medical staff.[48]

Discussion: *Scotland, Habeas Corpus*, and the Inevitability of More Violations in the Canadian Immigration Detention System

We have arrived at a global epoch both of unseen levels of mass displacement and increasing numbers of newcomers being subject to forms of demobilization and incarceration. Many liberal States approach irregular migrants and other newcomers primarily as threats to national security and governance, and have adopted an expansive, penal approach to migration control. Immigration detention plays a

[44] IRPA, Section 25(1), allows foreign nationals already in Canada who have been designated as inadmissible or who are ineligible to apply in an immigration class to apply for permanent residence, or for an exemption from a requirement of the Act, such as deportation orders. Such people apply to IRCC for permanent residence on "humanitarian and compassionate" considerations.

[45] Stephanie J. Silverman, "In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System," *Refuge: Canada's Periodical on Refugees* 30, no. 2 (2014): 32.

[46] Patrick Cain, "Feds pay over $22,000 a day to jail non-dangerous immigration detainees in Ontario," *Global News*, 31 May 2017, https://globalnews.ca/news/3491853/feds-pay-over-22000-a-day-to-jail-non-dangerous-immigration-detainees-in-ontario/.

[47] Brendan Kennedy, "Immigration Detainee Ebrahim Toure Marks Five Years Without Freedom: 'What's going on with me is not right,'" *The Toronto Star,* 28 February 2018, https://www.thestar.com/news/canada/2018/02/25/immigration-detainee-ebrahim-toure-marks-five-years-without-freedom-whats-going-on-with-me-is-not-right.html.

[48] Silverman, "In The Wake of Irregular Arrivals," 31.

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strong and growing role in this process.[49] In the post/neo-colonial context, States have given themselves the freedom to draw less on what people have done in order to justify imprisonments and more on gendered, classed, and racialized representations of detainees as criminals, deviants, and otherwise "risky" people whose mobilities ought to be arrested.[50] As such, an association between criminality and racialized people bolsters support for the penal state's expansion into administrative law.[51] In Canada, this arc of "immigrant penality"[52] accelerated—but did not originate—when the Conservative Governments of Stephen Harper (2006 – 2015) implemented discriminatory pieces of detention-related legislation, which, in turn, lent legitimacy to and drew from the aforementioned biases and contexts.

My central intention with this deep scraping of *Scotland* has been to demonstrate that re-centering the case makes Mr. Scotland's detention in Canada seem unfortunately predictable, not anomalous as Morgan J describes in *Scotland*. The restoration of *habeas corpus* applications in Ontario does not and cannot rectify the procedural and fundamental injustices of the Canadian detention system. Having reviewed Mr. Scotland's case as well as the Scotland decision, I will use the remainder of this paper to expand on my arguments that the Canadian immigration and refugee determination system transforms certain minoritized individuals into detainable bodies, and that the detention system should be understood as part of an arc of penal practices bolstering the global criminalization of migration. Taken together, and in the Canadian context of a neoliberal settler society grappling with Harper-era changes to immigration policymaking and law, indefinite detention is normalized for some people.

Looking across the fields of critical Canadian studies[53], post/neo-colonial theory, and critical race theory, the literature reveals that ethnic, gender, class, and

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49 Cetta Mainwaring and Stephanie J Silverman. "Detention-as-Spectacle," *International Political Sociology* 11, no. 1 (March 2017): 21–38.

50 Mary Bosworth and Sarah Turnbull, "Immigration detention, punishment, and the criminalization of migration," in *The Routledge Handbook on Crime and International Migration,* ed. Sharon Pickering and Julie Ham (London: Routledge, 2014), 91–106; Catherine Dauvergne, "Security and Migration Law in the Less Brave New World," *Social & Legal Studies* 16, no. 4 (2007): 533–49; Tanya Maria Golash-Boza, *Deported: Immigrant Policing, Disposable Labor and Global Capitalism* (New York: NYU Press, 2015).

51 Wendy Chan, "Crime, Deportation and the Regulation of Immigrants in Canada," *Crime, Law and Social Change* 44, no. 2 (September 2005): 153–80; Alison Mountz, Kate Coddington, Tina Catania, and Jenna Loyd, "Conceptualizing Detention: Mobility, containment, bordering, and exclusion," *Progress in Human Geography* 37, no. 4 (2013): 522–41.

52 Anna Pratt, *Securing Borders: Detention And Deportation in Canada* (Vancouver: UBC Press, 2005).

53 Sedef Arat-Koç, "Invisibilized, Individualized, and Culturalized: Paradoxical invisibility and hyper-visibility of gender in policy making and policy discourse in neoliberal Canada," *Canadian Woman Studies* 29, no. 3 (2012): 6–17; Amrita Hari, "Temporariness, Rights, and Citizenship: The latest chapter in Canada's exclusionary migration and refugee history," *Refuge: Canada's Periodical on Refugees* 30, no. 2 (2014): 35–44; Nandita Rani Sharma, *Home Economics: Nationalism and the Making of the "Migrant Workers" In Canad*a (Toronto: University of Toronto Press, 2006); Triadafilos Triadafilopoulos, "Dismantling White Canada: Race, rights, and the origins of the points system," in *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective,* ed. Triadafilos Triadafilopoulos (New York: Springer, 2013), 15–37.

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racial prejudices are built into Canadian immigration law and policy,[54] as they are in other national systems.[55] Discriminatory profiling is integral to the policing functions of immigration control.[56] Raced, classed, gendered, neoliberal, and post/neo-colonial institutional biases compound barriers to accessing and enjoying rights and protections.[57] As Hari *et al.* explain, Canada identifies as an "ethnoculturally diverse state with a large foreign-born population," but its membership "is still tied to notions of nationhood, colonialism, neo-colonialism, 'race,' and gender. When Canada selects migrants and refugees on economic, family reunification, or humanitarian and compassionate grounds, the state conveys the values of the nation and expresses its absolute power over territory."[58]

Post/neo-colonial scholars are explicit in linking Canada's "settler society" status to nation-building projects to select certain immigrants for permanent residence and citizenship;[59] these laws and policies are interpreted as "'new' measures [that] are repackaged 'old' measures [to] facilitate racial forms of governance in settler colonialism."[60]

Relatedly, the growing field of detention studies draws attention to how changes in legal and policy categories, media representations, and popular

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54 Alison Bashford, "Immigration Restriction: rethinking period and place from settler colonies to postcolonial nations," *Journal of Global History* 9, no. 1 (March 2014): 26–48; Canadian Civil Liberties Association, "Who Belongs? Rights, Benefits, Obligations and Immigration Status: A discussion paper," *Canadian Civil Liberties Association* (2010), http://ccla.org/wordpress/wp-content/uploads/2010/10/WhoBelongsdiscussionpaper.pdf; Grace-Edward Galabuzi, Canada's Economic Apartheid: The social exclusion of racialized groups in a new century (Toronto: Canadian Scholars' Press, 2006).

55 The White Australia policy, the pre-War American policy of excluding Asian nationals from citizenship status, and the reluctance of contemporary Germany and other Western European states to admit Muslims have all come under criticism, e.g., Myron Weiner, "Ethics, National Sovereignty and the Control of Immigration," *International Migration Review* 30.1, Special Issue: Ethics, Migration, and Global Stewardship (1996): 171–97; Joseph H. Carens, "Aliens and Citizens: The case for open borders," *Review of Politics* 49.2 (1987): 251–73. More recently, U.S. President Trump's "Muslim Ban" and anti-Hispanic rhetoric are causes for extreme concern amongst immigration observers.

56 Hindpal Singh Bhui, "Introduction: Humanizing migration control and detention," in *The Borders of Punishment: Migration, Citizenship, and Social Exclusion,* ed. Katja Franko Aas and Mary Bosworth (Oxford: Oxford University Press, 2014), 7.

57 Luin Goldring, Carolina Bernstein, and Judith K. Bernhard, "Institutionalizing precarious migratory status," *Citizenship Studies* 13, no. 3 (2009): 239–65; Nandita Sharma, "On Being Not Canadian: The social organization of 'migrant workers' in Canada," *The Canadian Review of Sociology and Anthropology* 38, no. 4 (November 2001): 415–39; On the "everyday racism" of Canadian society and how it affects these other outcomes for newcomers, see, e.g., Gillian Creese and Brandy Wiebe, "'Survival Employment': Gender and Deskilling among African Immigrants in Canada," *International Migration* 50, no. 5 (September 2012): 56–76; Gillian Creese and Edith Ngene Kambere, "What colour is your English?," *Canadian Review of Sociology* 40, no. 5 (2003) : 565–73.

58 Amrita Hari, Susan McGrath, and Valerie Preston, *Temporariness in Canada: Establishing a research agenda*, CERIS Working Paper No. 99 (Toronto: York University, 2013), 2.

59 "The sovereign institutionalized the subjugation of Aboriginal peoples, and the nation's subjects, exalted in law, were the beneficiaries of this process as members of a superior race." Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007), 61.

60 Hari McGrath, and Preston, *Temporariness in Canada*, 1–38. See, also, e.g., Stephanie J. Silverman and Amrita Hari, "Troubling the Fields: Choice, consent, and coercion of Canada's seasonal agricultural workers," *International Migration* 54, no. 5 (2016): 91–104; Ethel Tungohan, "Temporary Foreign Workers in Canada: Reconstructing 'belonging' and remaking 'citizenship,'" *Social & Legal Studies* 27.2 (2018): 236–52.

discourses transform people into "detainable migrants."[61] As Martin and Mitchelson argue, "different groups of people come to be seen as migrants, immigrants, asylum-seekers, refugees, illegal aliens, or criminal aliens, with each term connoting raced, classed, and gendered bodies," and, in turn, "the representational practices that depict different groups as unwanted, foreign, or dangerous inform legal and policy-making discourses, producing these groups as justifiably excludable and detainable."[62] Razack likewise refers to this process when she comments on "how asylum seekers are transformed into human waste in a detention center, their status as disposable made concrete."[63]

Legislators rely on purported migration-related crises "in order to legitimate grounds to implement what might otherwise be controversial security measures" such as detention.[64] This was seen when the MV Ocean Lady (seventy-six men) and the MV Sun Sea (492 men, women, and children) arrived to the shores of British Columbia from Thailand in October 2009 and August 2010, respectively. The Government fanned a "moral panic"[65] that these newcomers were not refugees from Sri Lanka as they claimed to be but terrorists, smugglers, and others posing threats to Canada. This panic tapped directly into a numerically unfounded fear[66] of migrants arriving by boat.[67] Indeed, a fear of racialized and unwelcome boat arrivals is deeply rooted in the Canadian nation-building project: it dates back to at least the infamous 1914 expulsion of 376 mostly Sikh and Muslim British subjects arriving on the Komagata Maru boat, and the subsequent spree of

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61 On how law and policy transform expanding categories of non-citizens into "detainable" persons, see, e.g., Cathryn Costello and Minos Mouzourakis, "EU Law and the Detainability of Asylum-Seekers," *Refugee Survey Quarterly* 35, no. 1 (2016): 47–73; Nicholas De Genova, "The Production of Culprits: From deportability to detainability in the aftermath of 'Homeland Security,'" *Citizenship Studies* 11 No. 5 (2007): 421–28.

62 Lauren Martin and Matthew L Mitchelson. "Geographies of Detention and Imprisonment: Interrogating spatial practices of confinement, discipline, law, and state power," *Geography Compass* 3, no. 1 (January 2009): 468–69.

63 Sherene H. Razack, "Human Waste and the Border: A vignette." *Law, Culture and the Humanities* Advanced Access Online (2017): 2.

64 Jennifer Hyndman, "Geopolitics of Migration and Mobility," *Geopolitics* 17, no. 2 (2012): 243–55; Alison Mountz and Nancy Hiemstra, "Chaos and Crisis: Dissecting the Spatiotemporal Logics of Contemporary Migrations and State Practices," *Annals of the Association of American Geographers* 104, no. 2 (2014) : 382–90; Mainwaring and Silverman, "Detention-as-Spectacle."

65 While the term "moral panic" is admittedly overly broad, the meaning here is strictly in relation to Stanley Cohen's original formulation of "a condition, episode, person or group of persons [that] emerges to become defined as a threat to societal values and interest; its nature is presented in a stylized and stereotypical fashion by the mass media and politicians' Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers* (London: MacGibbon and Kee, 1972), 9.

66 Since 1986, eight ships have arrived to Canada, collectively ferrying about 1,500 people; the two most recent cases—MV Ocean Lady and MV Sun Sea—brought about 575 Tamils to British Columbia in October 2009 and August 2010, respectively. Cumulatively, the eight vessels have conveyed 0.2 per cent of total refugee arrivals in Canada over the past 25 years. Silverman, "In the Wake of Irregular Arrivals," 28.

67 Chelsea Bin Han, "Smuggled migrant or migrant smuggler: erosion of sea-borne asylum seekers' access to refugee protection in Canada" *RSC Working Paper No. 106* (2015) (University of Oxford: Refugee Studies Centre); Luke Taylor, "Designated Inhospitality: The treatment of asylum seekers who arrive by boat in Canada and Australia," *McGill Law Journal* 60, no. 2 (January 2015): 333–79; Silverman, "In the Wake of Irregular Arrivals."

racist attacks by white individuals.[68] Canada Border Services Agency eventually detained the majority of the Sun Sea and Ocean Lady passengers upon arrival due to flight risk.[69]

These cases demonstrate that when asylum seekers are recast as smugglers, criminals, terrorists, and other threats, the State frees itself from abiding by the international humanitarian and human rights rules.[70] In this way, decisions on who gets targeted for arrest and sent to immigration detention in Canada should not be understood as neutral decision-making, and Mr. Scotland's arrest, detention, and continued imprisonment should not be labelled as anomalous.

I also put forward a related claim that an arc of penal practices guides immigration and refugee adjudication in Canada. This arc is formative of a global trend towards criminalizing migrants and mobilities. Legislators are importing legal tools into the migration sphere without bringing along the accompanying protections from the criminal justice side. Beyond legal organizing principles, these tools are used to unduly and unfairly punish certain migrants and mobilities in a superficially race- and class-blind approach.[71] As Pickering and Ham argue, "Criminal justice systems and institutions are increasingly being involved in responding to irregular migration and pre-empting, constructing, and responding to the 'legality' of persons."[72]

Legislators are continuously expanding the range of "offences" that transform a newcomer into a "foreign criminal" and that then feed into the justification for arrests and detentions.[73] As Chacón writes in the U.S. context, "conduct that gets a warning on college campuses can [now] get you arrested, convicted, and deported in heavily policed, low-income neighborhoods."[74]

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68 David Moffette and Shasira Vadasaria, "Uninhibited Violence: Race and the securitization of immigration," *Critical Studies on Security* 4, no. 3 (2016): 299; Sailaja Krishnamurti, "Queue-Jumpers, Terrorists, Breeders: Representations of Tamil migrants in Canadian popular media," *South Asian Diaspora* 5, no. 1 (2013): 139–57; Silverman, "In the Wake of Irregular Arrivals."

69 Ashley Bradimore and Harald Bauder, "Mystery Ships and Risky Boat People: Tamil refugee migration in the newsprint media," *Canadian Journal of Communication,* 36, no. 4 (2011): 637–61.

70 Scott D. Watson, "Manufacturing Threats: Asylum seekers as threats or refugees," *Journal of International Law and International Relations* 3, no. 1 (2007): 95–118.

71 Katja Franko Aas and Mary Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*; Mary Bosworth and Sarah Turnbull, "Immigration Detention, Punishment, and the Criminalization of Migration," in *The Routledge Handbook on Crime and International Migration,* ed. Sharon Pickering and Julie Ham (London: Routledge, 2014), 91–106; Yolanda Vazquez, "Constructing Crimmigration: Latino subordination in a post-racial world," *Immigration and Nationality Law Review*, 36 (2015): 713–72.

72 Sharon Pickering and Julie Ham, "Introduction," in *The Routledge Handbook on Crime and International Migration,* ed. Sharon Pickering and Julie Ham (London: Routledge, 2014), 3.

73 See, e.g., César Cuauhtémoc García Hernández, "Immigration Detention as Punishment" *UCLA Law Review* 61 (2014): 1346–1415; Christina Elefteriades Haines and Anil Kalhan, "Detention of Asylum Seekers En Masse: Immigration detention in the United States," in *Immigration Detention: The Migration of a Policy and its Human Impact*, ed. Amy Nethery and Stephanie J. Silverman (London: Routledge, 2015), 69–78; Juliet P. Stumpf, "Civil Detention and Other Oxymorons," *Queen's Law Journal* 40, no. 1 (2014): 55–98.

74 Jennifer M. Chacón, "Essay: Immigration and the Bully Pulpit," *Harvard Law Review,* 130, no. 7 (2017): 252.

The Canadian detention system exhibits signs of the tautology that "migrants might be criminals, necessitating detention; migrants must be criminals, because they are detained."[75]

Mr. Scotland's case demonstrates that the Canadian immigration detention system can be faulted for failing to provide access to safeguards to protect the basic human rights of its population. Likewise, *Scotland* highlights failures of the ID's detention hearing system as being successful on paper but flawed in practice. The key problem is that, in a switch from the criminal justice context, the hearings are premised on the detainee presenting new evidence to secure his own release. *Habeas corpus* cannot remedy this problem.

The description of Mr. Scotland's treatment as exceptional inscribes or makes knowable his detention in a way that leaves the overall system intact or otherwise-functioning. The Italian political theorist Giorgio Agamben argues that legal exceptions constitute the norm even as they suspend it. Detention is a "zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer make any sense."[76] Detainees experience violence without juridical form.[77] For Agamben, the key markers of contemporary socio-legal life are the state of exception and its attendant suspension of the rule of law to constitute the law. Following Agamben, Mr. Scotland's unreasonable and indefinite incarceration could serve as the exception that is now corrected, and hence a tool of legal reference to normalize the discrimination of the overall system.

I therefore return to my argument that Ricardo Scotland's unjust detention and treatment by the CBSA and ID be situated as part and parcel of a criminalizing, racialized, and gendered logic that was formalized by Harper government legislation and to which Canadian immigration decision-making is still beholden. A circular nature of racialized biases implicate Mr. Scotland's unfair treatment, Harper-era legal and legislative changes, and the intertwining of the MV Sun Sea and MV Ocean Lady in the developing Canadian detention system. Detention reflects the institutional biases that contributed to normalizing the discriminatory "designated countries of origin" policy and the 2013 adoption of C-43, the Faster Removal of Foreign Criminals Act, into the IRPA.[78] It is questionable whether justice can be achieved for immigration detainees in Canada without radical overhaul, if not elimination, of the status quo.

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75 Mountz *et al*., "Conceptualizing Detention."

76 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998), 170.

77 Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 59.

78 This Act allows deportation of a non-citizen following a six-month criminal sentence, without the right to appeal; such people are often transferred directly from correctional centres to IHCs—or held in the same cell but under federal detainer powers—while CBSA makes arrangements for their removal. Research shows that this Act, along with the aforementioned changes, failed to achieve the official goals of deporting more people more efficiently; see Idil Atak, Graham Hudson, and Delphine Nakache, *Making Canada's Refugee System Faster and Fairer": Reviewing the stated goals and unintended consequences of the 2012 reform* (2017), available at http://carfms.org/wp-content/uploads/2017/05/CARFMS-WPS-No11-Idil-Atak.pdf: 18.

Therefore, we must distinguish between the release of Mr. Scotland, and achieving justice for him, current detainees, and potential future detainees. The restoration of *habeas corpus* leaves in place an unfair, biased, and unequal system of incarceration to arrest and imprison other predominantly racialized, classed, and gendered non-citizens. Morgan J's certification of Mr. Scotland's writ does not reconcile the fact that CBSA and the ID did not give Mr. Scotland the benefit of the doubt that it was in his own interest to turn up to court for his refugee hearings.[79] It also does not remunerate him for unlawful imprisonment or support his still-pending claim for asylum in Canada. The arc of penalization is infused into the ID and CBSA, and it explains how Mr. Scotland was unfairly marked and targeted. Yet, this prejudice is not named in Morgan J's decision. Therefore, until there is a serious, institutional reckoning with the larger injustices self-affirming the incarceration of migrants and asylum seekers as "detainable migrants," it seems inevitable that more violations will occur in Canada, with or without access to *habeas corpus*.

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[79] Most migrants do not wish to live clandestinely, let alone parents with ongoing refugee claims who are residing with children in destination States like Canada. Robyn Sampson, Vivienne Chew, Grant Mitchell, and Lucy Bowring, "There Are Alternatives: A handbook for preventing unnecessary immigration detention," (Melbourne, Australia: International Detention Coalition, 2015), 116; Heaven Crawley, "Ending the Detention of Children: Developing an alternative approach to family returns," *Centre for Migration Policy Research Briefing Papers* (updated June 2011) http://www.swan.ac.uk/media/Alternatives_to_child_detention.pdf.

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