

# Embracing Crimmigration to Curtail Immigration Detention

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*Immigration advocates have long objected to both the constitutionality and conditions of immigration detention. However, legal challenges to the practice have been largely unsuccessful due to immigration law's "exceptionality." Placing recent litigation carried out against immigration detention during the COVID-19 pandemic within the context of the judiciary's approach to immigration, this Article argues that litigation is an extremely limited strategic avenue to curtail the use of immigration detention. I then argue that anti-immigration detention advocates should attempt to incorporate their agenda into criminal legal reform and decarceration efforts. This is important for both movements. Normatively, immigration detention raises comparable issues: Namely, that jailing people is, on the one hand, an extreme and cost-ineffective form of social control, and on the other, a tool to marginalize or "otherize" entire communities. Furthermore, there is evidence that ongoing efforts to decarcerate states and localities may be foiled by immigration detention. To the extent, therefore, that decarceration reforms are based on commitments to freedom or condemnation of the extensive use of carceral institutions, they are incomplete and even dangerous without including measures to address immigration detention. Immigration advocates, on the other hand, are more likely to succeed by placing the anti-immigration detention agenda within the scope of larger criminal legal reform than by pursuing immigration detention reform or through litigation.*

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Introduction .....	1210
I. Litigating Against Immigration Detention: An Uphill Battle .....	1217
II. The Rise in Immigration Detention.....	1223
III. Immigration Detention and Incarceration: a Growing Relationship .....	1228
A. How the Detainee Can Become the Inmate: The Role of Crimmigration.....	1228
B. How the Detainee Can Become the Inmate: The Role of Incentives.....	1231
IV. Opportunities for Immigration and Criminal Legal Reforms .....	1233
Conclusion.....	1240

## INTRODUCTION

Throughout the late spring and early summer of 2020, as the COVID-19<sup>1</sup> pandemic spread across the United States, litigants throughout the nation filed hundreds of lawsuits challenging the conditions of confinement at both the federal and state level. According to data gathered by The Bronx Defenders, a legal services provider in New York City, almost 400 lawsuits were filed in federal courts all around the country between April 2020 and the end of July that same year, seeking the release of thousands of individuals in state and federal custody as well as in immigration detention.<sup>2</sup> Out of these, eighty-three lawsuits were focused on immigration detainees. Each claim was different, of course, but all of them sought the immediate release of individuals detained due to heightened health risks caused by being incarcerated during the COVID-19 pandemic.<sup>3</sup>

These lawsuits were grounded in a mix of claims, from failures to comply with the Administrative Procedure Act and/or the Immigration and Nationality Act (“INA”) to purported constitutional violations. Most of them, however, focused on assertions of Fifth Amendment due process violations.

Most courts ruled against plaintiffs. Yet, in eleven cases, litigants succeeded in obtaining temporary restraining orders and/or preliminary injunctions against the federal government ensuring the release of individuals confined in immigration detention.<sup>4</sup> It is important to note that, in all these cases, judges went out of their way to assert the exceptionality of the circumstances and outcome. In a typical

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1. COVID-19 is the disease caused by the coronavirus—SARS-CoV-2—a virus that emerged in China in December of 2019. Throughout this article I will be referring to “the coronavirus” when referring to the virus and “COVID-19” when referring to the disease.

2. See *COVID-19 Litigation Database*, BRONX DEFENDERS, <https://www.bronxdefenders.org/covid-19-litigation/> [https://perma.cc/GA7N-WJGW] (last visited July 13, 2022).

3. Jails and prisons are generally at grave risk for the transmission of infection of COVID-19 due to their inherent structure and mission. See, e.g., Nicole Wetsman, *Prisons and Jails Are Vulnerable to COVID-19 Outbreaks*, VERGE (Mar. 7, 2020, 8:30 AM), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> [https://perma.cc/QE5D-5V46].

4. As a disclaimer, the LSU Immigration Law Clinic, where I work, assisted in some of these cases with interviewing plaintiffs. The Clinic, however, did not represent any of these plaintiffs in court.

example, Kevin McNulty, U.S. District Judge in New Jersey, stated that “[t]his decision should not be taken as signifying a result in any other individual case; rather, it is a reflection of the unique circumstances present in this particular case.”<sup>5</sup>

These cases confirmed that the judiciary will be deferential to the executive branch in immigration matters.<sup>6</sup> As reviewed in more depth in Part I, courts that summer were, for the most part,<sup>7</sup> resolving constitutional due process challenges by analyzing whether detention was “reasonably related to a legitimate governmental objective.”<sup>8</sup> This analysis requires a balance of the equities between the purpose of detention—namely, avoiding flight risk and/or danger to the community—and the threat to an individual’s life given continued detention in the midst of a global pandemic. Given that, as explored in Part IV, immigration detention is unnecessary to achieve the goals of administrative efficiency it purports to achieve,<sup>9</sup> it is difficult to see how these objectives would win the day over real threats to people’s lives.<sup>10</sup>

However, even in these circumstances, courts were incredibly hesitant to grant release from detention and only did so when the individuals were at tremendous risk because of their particular health conditions.<sup>11</sup> These cases reflect the extent to

5. Juan E.M. v. Decker, 458 F. Supp. 3d 244, 247–48 (D.N.J. 2020). Judge McNulty repeated the same statement in Leandro R.P. v. Decker, 455 F. Supp. 3d 85, 89 (D.N.J. 2020).

6. See *infra* Part I.

7. Some courts applied other tests like the deliberate indifference standard. See, e.g., Coronel v. Decker, 449 F. Supp. 3d 274, 282 (S.D.N.Y. 2020).

8. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

9. As argued *infra* Part I, over eighty-five percent of immigrants in non-detained removal proceedings attend their hearings, and there is no evidence showing that subjecting people to detention makes people safer. Ingrid Eagly, Steven Shafer, and Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Cal. L. Rev. 785 (2018). See also , Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014) (finding no empirical connection between the program Secure Communities and crime reduction).

10. It is difficult to overstate the coronavirus’s threat on public health. In the first half of 2020, the virus infected ten million people around the world and killed about half a million people. See Ed Yong, *How the Pandemic Defeated America*, ATL. (Aug. 4, 2020, 1:12 PM), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> [<https://perma.cc/WML9-7TR4>]. The Centers for Disease Control and Prevention (CDC) has found that custodial institutions present “unique challenges for control of SARS-CoV-2 transmission”. *Guidance for Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://web.archive.org/web/20200722013044/https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>] (last visited July 22, 2020). “Nationwide the known infection rate for Covid-19 in jails and prisons is about 2.5 times higher than the general population.” *Covid-19’s Impact on People in Prison*, EQUAL JUST. INITIATIVE (May 21, 2020), <https://ejj.org/news/covid-19s-impact-on-people-in-prison/> [<https://web.archive.org/web/20200522152131/https://ejj.org/news/covid-19s-impact-on-people-in-prison/>].

11. The CDC has found that “certain underlying medical conditions” place individuals at “increased risk of severe illness from COVID-19.” *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://web.archive.org/web/20200730002440/https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>] (last visited July 30, 2020).

which courts have given *carte blanche* to the federal government in administering immigration law and policy.<sup>12</sup> In terms of detention in particular, notwithstanding an initial win for detainees in 2001,<sup>13</sup> the Supreme Court has essentially validated a regime that allows for continuous indefinite detention.<sup>14</sup>

Beyond detention, legal scholars have concluded that—to use a borrowed phrase—immigration is exceptional.<sup>15</sup> This is especially true for issues that have to do with constitutional rights. The executive branch of government is given tremendous deference and, following the plenary power doctrine, which protects the federal government from claims that it is violating an individual's constitutional right to equal protection when it imposes discriminatory burdens on non-U.S. citizens, the scope of judicial review in immigration matters has been fairly limited.<sup>16</sup>

If courts indeed offer such a constrained path for relief, the question remains: what should strategic efforts aiming to curtail detention look like?

One option is to push for reform that changes the grounds and conditions for detention. However, given the vexed politics of immigration policy, it is unlikely that such a focus would be fruitful.<sup>17</sup> Moreover, as I discuss in Part II, the growth in immigration detention is largely thanks to a phenomenon rooted in the ways in which the law is implemented, rather than what it says. To that end, unless immigration detention is made fully unlawful, or numerically constrained, reform is unlikely to provide long-standing relief. In this Article, I argue that rather than focusing on immigration law as it exists on the books, or even on the ground,<sup>18</sup> advocates should attempt to fold efforts to reform immigration detention within efforts to end carceral exceptionalism in the United States.

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12. This trend has continued. Just in this term, the Supreme Court held that federal courts lack jurisdiction to review even clearly erroneous findings of fact in discretionary immigration relief cases. This position was so extreme that neither DHS nor the DOJ advocated for it (the case was argued by an amicus attorney assigned by the Court). *See Patel v. Garland*, 142 S. Ct. 1614 (2022).

13. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that if an individual is not removed six months after an order has been issued then they can seek release).

14. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) (holding that prolonged detention while in removal proceedings is constitutional); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 847–48 (2018) (holding that respondents are not entitled to periodic bond hearings).

15. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L.R. 583 (2017).

16. *See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

17. *See, e.g., Claire Felter, Danielle Renwick & Amelia Cheatham, The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS (Aug. 31, 2021, 8:00 AM), <https://www.cfr.org/backgrounder/us-immigration-debate-0> [<https://perma.cc/2CP2-4WDB>](discussing the political impasse around immigration policy since the George W. Bush presidency and the move to a more exclusively executive arena); *see also Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law*, 119 YALE L.J. 458 (2009) (discussing the legal history of executive involvement in immigration matters).

18. After all, many of the outcomes in immigration have to do with how government actors execute the broad discretion that they are given. *See, e.g., Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (showing that historically and legally the Executive has very few constraints with regards to how immigration law is enforced).

Throughout the past ten years, all across the country, there has been a growing interest and legislative focus on ending mass incarceration and overcriminalization.<sup>19</sup> This is happening on top of an already dropping prison population.<sup>20</sup> While it is true that the extent of bipartisan consensus on criminal legal reform is much more limited than commonly assumed<sup>21</sup>—which significantly narrows the scope and reach of reform<sup>22</sup>—the current growth in immigration detention is at odds with the sweeping changes being sought.<sup>23</sup>

19. See generally *infra* Part II.

20. While this drop is still not enough to bring the country level with the rest of the world, let alone other liberal democracies, the U.S. prison population has fallen by about 200 thousand people since its peak at above 2.3 million in 2008. See ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST (12th ed. 2018), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf) [<https://perma.cc/7CGH-J5X8>]. Some data from 2021 has shown a slight growth in prison population, however there is not enough evidence to suggest that this marks a new trend rather than a deviation caused in part by the effects of the COVID-19 pandemic. See, e.g., Mikaela Meyer, Ahmed Hassafy, Gina Lewis, Prasun Shrestha, Amelia M. Haviland & Daniel S. Nagin, *Changes in Crime Rates During the COVID-19 Pandemic*, 9 STAT. & PUB. POL'Y, no. 1, 2022, at 97 (finding that crime rates varied according to type of offense as well as the type of policy response to the COVID-19 pandemic in a particular locality); Christopher Stone, *Progressive Prosecutors and Public Safety: Success Even During the 2020 Rise in Violent Crime*, U. OF OXFORD: VOICES (Jan. 31, 2022), <https://www.bsg.ox.ac.uk/blog/progressive-prosecutors-and-public-safety-success-even-during-2020-rise-violent-crime> [<https://perma.cc/YVX7-C6HS>] (suggesting crime in cities with more liberal criminal prosecution policies has fallen).

21. See, e.g., Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (showing that the idea of consensus around criminal justice reform is derived from conceptual indeterminacy or confusion around what is meant by criminal justice reform in both what problem it is trying to solve and the mechanism to do that); see also MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015) (criticizing conservative efforts and justifications of criminal justice reform and finding them incompatible with the approaches and/or critique coming from the left).

22. That these reforms are not as far-ranging and are unlikely to bring incarceration rates in the United States in line with the rest of the world is fairly uncontroversial. See John Pfaff, *Decarceration's Blindspots*, 16 OHIO ST. J. CRIM. L. 253 (2019); Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126–27 (2017); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1299 (2013) (reviewing STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012)) (explaining that technocratic policy reform in criminal law is unlikely to fully address the problems that are sought to be solved). More generally, in the popular press many of these laws have been criticized. See, e.g., Justin George, *Is the "First Step Act" Real Reform?*, MARSHALL PROJECT (May 22, 2018, 8:53 PM), <https://www.themarshallproject.org/2018/05/22/is-the-first-step-act-real-reform> [<https://perma.cc/Q55E-BNWL>]; Roger Lancaster, *The Carceral Problem Is Getting Worse*, JACOBIN (Dec. 30, 2018), <https://www.jacobinmag.com/2018/12/criminal-justice-reform-first-step-act> [<https://perma.cc/6UFN-3XTY>].

23. Since 1994, the use of immigration detention has increased going from an average daily population of 6,785 that year to a little over 40,000 at the beginning of 2020. Unless otherwise noted, data of the number of people in immigration detention is drawn from two Immigration and Customs Enforcement databases that stop in January 2020. A copy of the integrated databases is available upon request. They can be found at *ICE Detention Facilities as of November 2017*, NAT'L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/ice-detention-facilities-november-2017> [<https://perma.cc/3SDD-KKT5>] (last visited July 14, 2022); *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detention-management> [<https://web.archive.org/web/>

Advocates seeking to end immigration detention should take advantage of this movement and present immigration detention as part of the carceral state. Despite the fact that courts have long recognized a distinction between criminal and civil confinement,<sup>24</sup> that incarceration and immigration detention should be understood in tandem is evident when they are analyzed through the framework of the “total institution.” As explained further *infra*, a total institution is one which serves effectively as a “barrier to social intercourse with the outside.”<sup>25</sup> This concept has been used to show that mental health asylums and incarceration are one large project of confinement.<sup>26</sup> Similarly,<sup>27</sup> both in geography and purpose, immigration detention is also a total institution. Most detention centers are actually jails or prisons where detainees are subjected to similar schedules, meals, and administrative and punishment regimes (including solitary confinement) as inmates.<sup>28</sup> Also, immigration detention is justified—at least in part—to protect the community from the perceived threat of the persons housed within.<sup>29</sup> Furthermore, just like in jails and prisons, confinement in immigration detention centers is

20200225141011/https://www.ice.gov/detention-management] (last visited Feb. 25, 2020) (although the ICE database is updated monthly, this paper only looks at data ending in January of 2020).

24. See, e.g., *Hudson v. United States*, 522 U.S. 93, 99 (1997) (“Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, ‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’” (first citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); and then quoting *United States v. Ward*, 448 U.S. 242, 248 (1980))); *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (finding that civil detention becomes unconstitutional when it is “not [or no longer] reasonably related to a legitimate, non-punitive governmental objective.” (quoting *Hare v. City of Corinth*, 74 F.3d 633, 640 (5th Cir. 1996)))).

25. Erving Goffman, *The Characteristics of Total Institutions*, in SYMPOSIUM ON PREVENTIVE AND SOCIAL PSYCHIATRY 43, 43–44 (Nat’l Rsch. Council 1958).

26. See Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006); Sacha Raoult & Bernard E. Harcourt, *The Mirror Image of Asylums and Prisons: A Study of Institutionalization Trends in France (1850–2010)*, 19 PUNISHMENT & SOC’Y 155 (2017) (finding that trends of institutionalization in asylums and prisons in France have “mirrored” each other in the last 150 years, maintaining “total institutionalization” constant).

27. As addressed *infra* Section III.A, Harcourt argues that the same populations are being confined in different institutions; the argument here is rather that actors will confine a new population to ensure institutional continuity.

28. See Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 22–24, 35 n.175 (2017); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); René Lima-Marín & Danielle C. Jefferis, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 964–65 (2019) (describing the similarity between both immigration detention and prison, and the ways in which immigration detention is *more* punitive than prison).

29. Under section 236 of the Immigration and Nationality Act (INA), an immigration judge is allowed to deny release on bond if she deems that the noncitizen “will not pose a danger to the safety of other persons or of property.” Immigration and Nationality Act § 236, 8 U.S.C. § 1226(c)(2). The Supreme Court has also justified detention under these terms. Furthermore, as discussed *infra* Part II, that much of the apparatus is constructed under a racialized notion that views immigrants as the problem is obvious to many. See, e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 148 (2013). However, one need not believe that claim in order to recognize that detention is used to address *a* problem, whatever problem that may be.

government-mandated and compulsory. Moreover, as César Cuauhtémoc García Hernández has argued, the ramping up of both incarceration and immigration detention served the same legislative intent of fighting the war on drugs.<sup>30</sup> Finally, whether legally through the merger of criminal and immigration (“cimmigration”) systems or practically by several facilities housing both inmates and detainees, the immigration detention and incarceration systems are already operating as a singular institution, rather than two of the same type.<sup>31</sup> Therefore, a rising number of immigrant detainees is incompatible with decarceration efforts.

Moreover, much of criminal legal reform is not fully congruous with expanding the use of immigration detention. After all, regardless of how it is justified, a specific objective of criminal legal reform is to *reduce* the prison population.<sup>32</sup> That is, whether articulated through the prism of law and economics or critical legal analysis, there is a consensus that incarceration should be used more sparingly.<sup>33</sup> I do not mean to imply that all reform in this area is premised on a rejection of the moral legitimacy of prisons as a whole,<sup>34</sup> but rather that the goal of reducing prison populations is a common denominator regardless of the normative impetus for criminal legal reform.

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30. García Hernández, *supra* note 28, at 1361.

31. *See generally* César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457 (detailing how and to what extent criminal and immigration systems have merged through expansion of immigration consequences for criminal activity, militarization of police control, criminalization of migration, and relaxation of criminal procedure standards for immigration-related crimes). *See also* Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 25–35 (2017) (proposing a path forward for states looking to minimize the impacts of cimmigration).

32. The push for criminal justice reform has transcended the traditional left/right divide and, consequently, is justified in various ways. Advocates often point to, for example, budget pressures, normative excesses, increased tension between police and communities, lack of future opportunities for employment for incarcerated individuals, and prisons being breeding grounds for more criminals. *See, e.g.*, Jeremiah Mosteller, *Why Prison Reform Matters in America*, CHARLES KOCH INST. (June 22, 2018), <https://charleskochinstitute.org/stories/why-prison-reform-matters-in-america/> [<https://perma.cc/L4D4-U6DD>]; *End Mass Incarceration*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/end-mass-incarceration> [<https://perma.cc/FM5X-BJX3>] (last visited July 14, 2022).

33. Political efforts to cut incarceration openly recognize that the use of imprisonment in the United States should be reduced. *See, e.g.*, *Who We Are*, DREAM CORPS JUST., <https://www.thedreamcorps.org/our-programs/justice/about/> [<https://perma.cc/8WLB-TPG8>] (last visited July 14, 2022) (a bipartisan commitment prison reform coalition that sought to reduce incarceration levels by half in the country).

34. There are many reasons to question the moral legitimacy of locking people in cages in general. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (introducing an “abolitionist framework” for analyzing criminal law and policy). However, the point being advanced here is much more limited: measures that promote expanding imprisonment, whether civil or penal, are incompatible with criminal law reform that seeks to decrease the reliance on imprisonment. Dorothy E. Roberts, *The Supreme Court, 2018 Term—Forward: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 110–17 (2019) (providing a framework for grounding prison abolition in the Constitution); MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 27 (Tamara K. Nopper ed., 2021) (introducing general audiences to the idea that prisons are not necessary nor useful to address or prevent social harm).

That localities will turn to immigration detention to keep their jails or prisons open becomes evident when we consider that the carceral state is an extremely “resilient, flexible, and enabling institution that can resist, incorporate, redefine, and absorb critical discourse.”<sup>35</sup> Given the number of vested interests that currently exist in the prison industry,<sup>36</sup> it is possible that pressure to expand immigration detention will begin to build especially if opposition to criminal incarceration becomes more successful. Furthermore, we cannot underestimate the economic impact that decarceration can have in localities that depend on jails for employment.<sup>37</sup> As such, current analyses suggest that decarceration can be a factor in increased immigration detention at the local level.<sup>38</sup>

Understanding immigration detention as part and parcel of the capacity of confinement highlights the limitations to decarceration approaches that focus solely on criminal law. This is not only because these approaches ignore a large number of confined individuals, but also because efforts to push for decarceration that do not consider immigration detention, and/or the economic impacts of decarceration, may lead to growth in alternative measures of confinement. In this way, ending, or seriously curtailing, immigration detention should become paramount for advocates of criminal legal reform as well. On the flip side, immigration advocates looking for strategic efforts to end detention are more likely to succeed by taking advantage of the growing decarceration movement and presenting immigration detention as a part of it.

Part I outlines the history of immigration detention, discusses the very narrow legal grounds for challenging detention, and explains the limited success of this strategy as a result of a broader judicial understanding of immigration law. Part II briefly describes the rise in immigration detention and explains that it is a result of law on the ground rather than law on the books. Part III argues that the relationship between immigration and criminal confinement is likely to grow; a trend consistent with the rise of crimmigration generally. Finally, Part IV outlines the reasons why advocates for criminal legal reform and immigration reform should work together to achieve the common goal of reducing the use of confinement as a policy tool. Namely, normative concerns around both types of confinement are the same, meaning that advocates of ending or reducing carceral populations should also be

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35. GOTTSCHALK, *supra* note 21, at 14. *See generally* KELLY HANNAH-MOFFAT, PUNISHMENT IN DISGUISE: PENAL GOVERNANCE AND FEDERAL IMPRISONMENT OF WOMEN IN CANADA (2001).

36. *See* GOTTSCHALK, *supra* note 21, at 15 (arguing that criminal law reform is unlikely in the face of the “tenacity of neoliberalism in American politics”).

37. Tim Arango, ‘Nothing Will Be the Same’: A Prison Town Weighs a Future Without a Prison, N.Y. TIMES (Jan. 12, 2022), <https://www.nytimes.com/2022/01/10/us/susanville-california-prison-closing.html> [<https://perma.cc/Z5UU-9WSH>] (detailing the struggles faced by small rural towns where jails will be closed).

38. *See* Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 LAW & SOC’Y REV. 66, 91 (2020) (arguing that relative fluctuations in the local criminal inmate population seem to be indicative of levels of immigration detention).

concerned about detention. Moreover, immigration advocates are severely limited in both legal and political terms. Strategically, it may be advantageous for immigration reform advocates to join the decarceration movement to overcome both constraints.

#### I. LITIGATING AGAINST IMMIGRATION DETENTION: AN UPHILL BATTLE

Immigration detention is somewhat of a “historical anomaly.”<sup>39</sup> When it was first used, around the time of the passage of the Chinese Exclusion Act of 1882, detention was used for short periods of time.<sup>40</sup> For much of the twentieth century, immigration detention remained as an exceptional measure, so much so that in 1980 only 4,062 people were detained per day.<sup>41</sup> However, throughout the 1990s and into the twenty-first century, immigration detention skyrocketed, reaching almost 52,000 in 2019,<sup>42</sup> and leveling off at around 38,000 in early 2020<sup>43</sup> before the coronavirus pandemic essentially shut the border (and thus the influx of migrants to jails).<sup>44</sup> In this Part, I explain how this shift has been a result of legal reforms and, moreover, how these reforms have been implemented.

Given the short history of the sustained and systematic use of immigration detention, it is not surprising that there is a less extensive jurisprudence analyzing the constitutionality of detention regimes and practices in comparison to criminal incarceration.<sup>45</sup> Even today, when the number of people in immigration detention

39. Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J.F. 238, 239 (2019).

40. See Robert Barde & Gustavo J. Bobonis, *Detention at Angel Island: First Empirical Evidence*, 30 SOC. SCI. HIST. 103, 113 (2006) (finding that detention periods at Angel Island lasted ten nights on average). See also ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 8 (2010) (claiming that immigrants were mostly detained at Ellis Island for hours and only in extreme cases for a few days).

41. García Hernández, *supra* note 28, at 1466.

42. Hamed Aleaziz, *More than 52,000 People Are Now Being Detained by ICE, an Apparent All-Time High*, BUZZFEED NEWS (May 20, 2019, 3:58 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border> [<https://perma.cc/Z48X-AD6F>].

43. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS 60, 72 (2019) (arguing that the United States has implemented a border-to-prison pipeline).

44. Since March 2020 and up until the day of this writing, the land border in the United States has been shut down to asylum seekers under 42 U.S.C. § 265, which allows the CDC to “prohibit . . . the introduction” of individuals when “there is a serious danger of the introduction of [a communicable] disease into the United States.” See 42 U.S.C. § 265. This has artificially depressed the number of asylum seekers, thus temporarily reducing the number of detainees. Given that this is the result of a temporary policy rather than a shift in immigration enforcement writ large, the analysis of this paper will focus on immigration policy and enforcement before the COVID-19 pandemic. See AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/title\\_42\\_expulsions\\_at\\_the\\_border\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf) [<https://perma.cc/USZ3-MT2R>].

45. Just for the sake of comparison, criminal legal scholarship has produced histories spanning over 100 years of how courts have understood the notion of criminal due process, see, e.g., WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Michael Willrich, *Criminal Justice in the United States*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 195, 198 (Michael

has drastically increased, the average length of detention is fifty-five days,<sup>46</sup> which is generally not enough time to bring about a claim regarding the legality or the conditions of detention without the issue becoming moot. This by no means suggests that there are no cases where detention is sufficiently prolonged to allow for litigation to arise and continue, but simply that the universe of possible cases that can be used to advance the law is relatively narrow.

Considering this, it should perhaps be unsurprising that the Supreme Court has handed down only four major decisions regarding the constitutionality of immigration detention in the last thirty years.<sup>47</sup> In 2001, the Court held in *Zadvydas v. Davis* that there is a constitutional limit on the length of time a detainee with a removal order can be confined beyond the 90-day period within which immigration officials must execute that removal order.<sup>48</sup> In the wake of the September 11 attacks, and, therefore, in a considerably different context, the Court validated the constitutionality of unlimited detention while an individual is in removal proceedings in *Demore v. Kim*.<sup>49</sup> In 2005, the Court extended *Zadvydas* to apply to noncitizens apprehended at entry.<sup>50</sup> Most recently, in *Jennings v. Rodriguez*, the Court held that U.S. law does not grant detained individuals the right to periodic bond hearings during the course of their detention.<sup>51</sup>

In all these cases, the Court emphasized that there is a difference between immigration detention, which is civil in nature, and criminal incarceration, which is punitive.<sup>52</sup> This distinction has given the Supreme Court a jurisdictional hook

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Grossberg & Christopher Tomlins eds., 2008), and—accordingly—critical responses to these histories, see, e.g., Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246, 1246 (2019) (arguing that there was no such thing as a due process revolution under the Warren Court).

46. AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY 4 (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration\\_detention\\_in\\_the\\_united\\_states\\_by\\_agency.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf) [<https://perma.cc/36JH-VS32>].

47. As Hiroshi Motomura has written, very “little constitutional immigration law has ever taken root.” Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992). At the time of this writing, the Supreme Court had heard oral arguments, but had not yet released opinions, on two cases addressing questions of immigration detention. These cases have now been decided. First, *Johnson v. Arteaga-Martinez*, which held that the INA does not require bond hearings before immigration judges after six months of detention in which the Government bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or a danger to the community. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022). Second, *Garland v. Aleman Gonzalez*, which held that the INA deprived federal court jurisdiction to entertain noncitizens’ requests for classwide injunctive relief. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). The conclusions in both cases further narrowed access to relief from detainees and therefore do not detract from the overall argument made here. If anything, they lend support to it.

48. *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001).

49. *Demore v. Kim*, 538 U.S. 510, 531 (2003).

50. *Clark v. Martinez*, 543 U.S. 371, 385–86 (2005).

51. *Jennings v. Rodriguez*, 138 S. Ct. 830, 847–48. As discussed above, the recent decision in *Arteaga-Martinez* also held that individuals with a removal order that are seeking withholding of removal are not entitled to a bond hearing before an immigration judge. See *Arteaga-Martinez*, 142 S. Ct. 1827.

52. See *Zadvydas*, 533 U.S. at 690; *Clark*, 543 U.S. at 380; *Jennings*, 138 S. Ct. at 865.

to invoke due process protections under the Fifth Amendment of the U.S. Constitution when immigration detention becomes problematic (rather than an Eighth Amendment analysis). In *Zadvydas*, for example, prolonged detention after a removal order was pending was held unconstitutional because proceedings were “civil, not criminal . . . [and therefore] nonpunitive in purpose and effect.”<sup>53</sup> There was no justification for long detention to administer the statute, because the Court had validated immigration detention only as a means of administrative efficiency. For the class of people covered by *Zadvydas*, there was no need to continue detaining people longer than six months because by then their detention was not serving the goal of removal.<sup>54</sup>

My aim in this Part is not to criticize the Court for this reasoning. As many have pointed out, arguing that immigration detention exists solely for civil purposes ignores the fact that public officials have explicitly articulated that detention is a means of deterring further immigration.<sup>55</sup> Confining people for deterrence purposes is seen as a method of criminal, not administrative, law. Therefore, if immigration detention is premised on this goal, then it should be unconstitutional. However, courts will not rule this way as long as the government is able to articulate a reasonable justification for detention as it pertains to administrative efficiency. Furthermore, I am not suggesting that all the issues around the constitutionality of prolonged immigration detention have been settled. Notably, *Jennings* skirted the thorniest constitutional issue, which is whether the INA’s validation of indefinite detention of noncitizens without a bond hearing is constitutional.<sup>56</sup> Rather, I am pointing to these cases to suggest that the opportunities to vindicate immigrant rights through litigation are seriously constrained. As David Rubenstein and Pratheepan Gulasekaram have argued,

[S]ubstantive constitutional rights—such as equal protection, due process, freedom of association, and so on—tend to garner less judicial scrutiny in immigration cases than other areas of federal regulation . . . . [R]ights challenges to the federal political branches’ immigration decisions generally swim upstream against the plenary power doctrine and its vestiges.<sup>57</sup>

The Supreme Court’s due process analysis is consistent with how the Court has *generally* viewed the executive branch’s authority over immigration law. As Cox

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53. *Zadvydas*, 533 U.S. at 690.

54. A key in understanding *Zadvydas* is that it is a case about people with post-final removal orders that, for one reason or another, the government cannot deport. *See Zadvydas*, 533 U.S. at 701. The Court reasoned that the government needed some time to carry out this process and six months was ample time to do it. *Id.* Detention after that would no longer serve the purpose of securing removal because it was clear that the government would not be able to effectuate removal soon. *Id.* Therefore, continued detention at that point became punitive. *See Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997).

55. *See Emily Ryo, Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 238–40 (2019).

56. *See Jennings*, 138 S. Ct. at 851–52.

57. Rubenstein & Gulasekaram, *supra* note 15, at 595–97; *see also* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 168–73 (showing the even more narrow avenues for vindication of constitutional rights for immigrants detained in private prisons).

and Rodriguez have shown, the history of U.S. immigration law in the twentieth century is one of an ever-expanding use of powers “expressly delegated to [the President] by Congress to advance his own immigration agenda.”<sup>58</sup> Moreover, the Supreme Court itself has found that the executive branch has broad power and authority over immigration.<sup>59</sup> The many losses for the Trump administration notwithstanding,<sup>60</sup> the executive branch of government has generally prevailed in imposing its desired immigration policy.<sup>61</sup>

The recent experiences of many litigants around the country challenging the continued detention of individuals in the midst of the COVID-19 pandemic shows just how complicated it is to vindicate immigrant detainees’ rights through the courts. The Bronx Defenders, a legal services provider, gathered data on all litigation around detention conditions throughout the pandemic.<sup>62</sup> Reviewing the immigration detention cases, I found that in most of these cases,<sup>63</sup> district courts have been tremendously deferential to the federal government in its continued rationale for the detention of immigrants.

Even in cases where courts granted relief in the form of release from detention, judges made it explicitly clear that the decisions did not question the validity of detention as a means of administrative adjudication, nor were they a wholesale rejection of the appropriateness of confining individuals for these purposes, even amidst a pandemic that threatened their livelihood. Rather, in case after case, judges emphasized that very specific factors were responsible for meriting relief. As a judge in California found, “the Court has not seen[] a case finding that increased likelihood of contracting the virus rendered unconstitutional the detention of a person without underlying medical conditions or some other vulnerability.”<sup>64</sup>

It is worth noting that the COVID-19 cases involved intensive fact-finding and the conclusions seem to be more a result of these facts found than the law. A

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58. Cox & Rodríguez, *supra* note 18, at 116.

59. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

60. Those losses were more a product of sloppy process than of law. Most notably in the recent case *Department of Homeland Security v. Regents of the University of California*, reviewing the Deferred Action for Childhood Arrivals program, the Trump administration lost because it did not follow the APA in rescinding DACA not because the rescission was unlawful. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

61. This is not to say that the Court closes all doors to litigants in favor of the government. Despite handing down a defeat to immigrants in *Jennings v. Rodriguez*, for example, the Court found no jurisdictional bars to appellants challenging either the conditions or the framework allowing for confinement prior to the determination of removal, contradicting a strict textual interpretation of the INA. *Jennings*, 138 S. Ct. at 839–840.

62. See BRONX DEFS., *supra* note 2.

63. I am not arguing that the government won most cases (although they did win fifty-four percent of them). See *id.* Rather, whether they won or not, courts treated the practice of immigration detention as presumptively justified.

64. *Martinez Franco v. Jennings*, 456 F. Supp. 3d 1193, 1199 (N.D. Cal. 2020); see also *Riggs v. Louisiana*, No. 20-0495, 2020 WL 1939168, at \*2 (W.D. La. Apr. 22, 2020) (finding that “prisoners are not entitled to release or transfer based solely on generalized COVID-19 fears and speculation”).

review of the cases revealed that courts have applied different standards to review plaintiffs' constitutional arguments, but the discrepancy in results cannot be attributed to this legal analysis.<sup>65</sup> Instead the outcomes have been driven by courts painstakingly addressing the facts that led them either to grant or deny motions for release.

Most cases have been decided by an analysis of a range of factors. Accordingly, courts have developed multi-factored tests to determine whether continued detention was warranted.<sup>66</sup> A court in Louisiana, for example, found it relevant:

(1) whether the petitioner has been diagnosed with COVID-19 or is experiencing symptoms consistent with the disease; (2) whether the petitioner is among the group of individuals that is at higher risk of contracting COVID-19 as identified by the CDC . . . ; (3) whether the petitioner has been directly exposed to COVID-19; (4) [the ability to practice social distancing in] the physical space in which the petitioner is detained . . . ; (5) the efforts that detention facility officials have made to . . . mitigate the spread of [the virus] . . . ; (6) any danger to the community, or to the petitioner's immigration proceedings, that may be posed by the petitioner's release; and (7) any other relevant factors.<sup>67</sup>

These fact-based conclusions have led to different outcomes in remarkably similar cases, and even in the same lawsuits. In *Dada v. Witte*, a case in Louisiana, the court released thirteen out of sixteen plaintiffs because one of the plaintiffs contracted COVID-19 while the suit played out (so was assumed to be at low risk of reinfection), while the remaining two were held in a facility with no reported COVID-19 cases.<sup>68</sup>

Lists like the one above are not atypical.<sup>69</sup> They reflect a hesitancy from courts to upend the aforementioned, long-standing view that federal enforcement of immigration laws is generally constitutional. Beyond that however, the lists serve as a way to understand how courts have analyzed the issue of release. On the one hand, factors one through five show a concern with how much a plaintiff is at risk of contracting COVID-19, and if they contract it, whether or not their life is at risk. On the other hand, factor six, which is also the inquiry carried out by immigration bond proceedings, reflects a concern with administrative efficiency of immigration proceedings (flight risk) and danger to the community. That is, even during the

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65. See, e.g., *Dada v. Witte*, No. 20-CV-00458, 2020 WL 5510706 (W.D. La. Apr. 30, 2020), *report and recommendation adopted in part, rejected in part*, No. 20-CV-00458, 2020 WL 2614616 (W.D. La. May 22, 2020); *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330, 338 (S.D. Tex. 2020) (applying the reasonable relationship standard of review found in *Bell v. Wolfish*, 441 U.S. 520, 539 (1979), to plaintiffs' assertions of Fifth Amendment due process violations). *Contra* *Coronel v. Decker*, 449 F. Supp. 3d 274, 284 (S.D.N.Y. 2020) (applying the deliberate indifference standard to immigration detainees' substantive due process claims but ordering detainees' release).

66. See, e.g., *Saillant v. Hoover*, 454 F. Supp. 3d 465, 471 (M.D. Pa. 2020) (detailing a "non-exhaustive list of factors" to be considered when determining release).

67. *Dada*, 2020 WL 5510706, at \*22–23.

68. *Id.* at \*14–22.

69. See e.g., *Saillant*, 454 F. Supp. 3d at 471.

COVID-19 pandemic, federal judges considered the “efficient” immigration adjudication system to be as important as the health of detainees.

Moreover, courts did not inquire whether detention was actually necessary to achieve the goals of immigration efficacy. Under the INA, detention is warranted to prevent flight or security risks (or both).<sup>70</sup> However, as argued in Part IV, there is no evidence that either of these goals are actually attained by immigration detention,<sup>71</sup> or that they could not be better attained through other measures.<sup>72</sup> Nevertheless, it is assumed that immigration detention serves a purpose even in extraordinary circumstances that should, at the very least, make us question whether detention is necessary at that moment in time. In other words, if courts were generally reluctant to devalue the purpose of detention even in the throes of a global pandemic, it seems unlikely that legal analysis will ever lead courts to conclude that alternative measures to detention are preferable to confinement.

It is worth noting that in the majority of the COVID-19 litigation, plaintiffs had underlying health conditions, which was why they were selected to be plaintiffs in the first place. That is, these cases were not brought on behalf of individuals who were healthy yet still at heightened risk of being infected by the coronavirus in comparison to the general population, as there is continually increasing evidence that prisons and jails are some of the most at-risk environments in the country.<sup>73</sup> Rather, cases were brought on behalf of individuals who were even more in danger of major complications if they became infected. Even in these scenarios, however, courts were reluctant to release physically vulnerable people from detention. This reluctance reflects courts’ view of immigration detention as acceptable as long as the executive branch has decided to carry it out. Only under very particular and drastic conditions will courts force the government to release a detainee.

I point to this litigation because it presented extreme and unprecedented circumstances through which we can assess the value in pursuing litigation as a strategic endeavor to challenge immigration detention. I emphasize the strategic

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70. Immigration and Nationality Act, 8 U.S.C. § 236(a), (c)(1). *See also* Fatahi, 26 I. & N. Dec. 791, 793 (2016) (“An alien who seeks a change in custody status must establish to the satisfaction of the Immigration Judge and the Board that he is not ‘a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.’” (citing Guerra, 24 I. & N. Dec. 37, 39 (2006))).

71. Over eighty-five percent of immigrants in non-detained removal proceedings attend their hearings and there is no evidence showing that subjecting people to detention makes people safer. *See, e.g.*, Eagly et al., *supra* note 9. Nonetheless judges—be they immigration judges in bond proceedings or federal judges reviewing constitutional claims—do not adjust their analysis to reflect that the likelihood of flight risk or security risk is great. In the end, immigrants have the burden of proving they will show up and are not a threat to life or property. Given the unlikelihood of either, however, we should question whether it would be beneficial for that burden to shift to the government. After all, detention is rather costly—much more so than alternatives to detention—so if the government wants to hold people then it should bear the burden of proving detainees are a flight or safety risk.

72. Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. Rev. 2141, 2143 (2017) (outlining alternatives to detention from releasing individuals on their own recognizance to electronic monitoring and community-based alternatives).

73. *See* Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW (July 1, 2020), <https://pew.org/3eMrIM1> [<https://perma.cc/Z8PF-RJH5>].

aspect because, evidently, there is value in pursuing litigation as an individual matter. Furthermore, this is what litigants do.<sup>74</sup> However, the normative question here is whether, as a matter of obtaining substantive policy shifts, it is a good strategy to devote considerable resources to pursuing constitutional challenges to detention.

These cases show that, even in the midst of a highly contagious airborne pandemic that mainly spreads by being in close proximity to others, courts will be reluctant to release individuals from detention, let alone find that their detention is unconstitutional. The outcomes in these cases confirm the overall history of the judiciary's deference to the executive branch in immigration law matters generally and immigration detention specifically.<sup>75</sup> Given the remarkable resources required to find cases and fight them in Court, it may be beneficial to redirect some of those efforts into other areas of advocacy. Of course, strategic litigation and advocacy need not be mutually exclusive, but insofar as there are constraints to what reformers can accomplish, litigation seems to be an inefficient intervention.

In the remainder of this Article, I describe the rise in immigration detention and how it relates to criminal incarceration more broadly. This will lead me to suggest that the way to end immigration confinement is through criminal legal reform efforts writ large. In the next Part, I will start by outlining the factors that have driven the tremendous growth in immigration detention in an effort to show why immigration reform efforts that stop short of ending immigration detention practices will also fail.

## II. THE RISE IN IMMIGRATION DETENTION

Immigration detention is a growing phenomenon in the United States (and the world).<sup>76</sup> In the United States, immigration detention is allowed under the INA, section 236. This Part stipulates who can be detained (in sum, any noncitizen whose ability to enter or remain in the United States is in question) and who *must* be detained (noncitizens with certain criminal convictions). “Between fiscal years 1994

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74. It is also the bulk of the work that I do as a clinician.

75. I am not arguing here, or above, that the executive authority over immigration has not been challenged or restrained. There are numerous cases where it has been. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001); *Wong Wing v. United States*, 163 U.S. 228, 237–39 (1896) (holding that it was unconstitutional to subject deportees to hard labor prior to deportation). My claim is only that, these cases notwithstanding, overall, the judiciary has accepted the federal government's almost exclusive authority over immigration law matters. Note, however, that this is not how the Court has treated constitutional protections for noncitizens in areas *other* than immigration law. *See Motomura, supra* note 47 (showing that courts have been consistent in affording citizens and noncitizens alike protections in areas other than immigration, like discrimination).

76. As Stephanie Silverman and Evelyne Massa put it, “[a]s of 2012, all liberal, democratic states practice some form of immigration detention.” Stephanie J. Silverman & Evelyne Massa, *Why Immigration Detention Is Unique*, 18 POPULATION SPACE & PLACE 677, 677 (2012). Data from the Global Detention Project shows that immigration detention is a global phenomenon. *See* Detention Centres, GLOB. DET. PROJECT, <https://www.globaldetentionproject.org/detention-centres/map-view>, [https://perma.cc/3282-RNTB] (last visited July 15, 2022). For an international look at immigration incarceration, see, for example, *DETAINING THE IMMIGRANT OTHER: GLOBAL AND TRANSNATIONAL ISSUES* (Rich Furman, Douglas Epps & Greg Lampheareds., 2016).

and 2017, the [Average Daily Population (ADP)]<sup>77</sup> of immigrant detainees in the United States climbed steadily from 6,785 to 38,106, a more than fivefold increase.<sup>78</sup> Over the past five years, after a slight decline before 2015, the ADP steadily rising to more than fifty thousand in 2019 and has currently leveled off at about forty thousand.<sup>79</sup>

Much of legal scholarship, unsurprisingly, attributes the rise in detention to changes in law.<sup>80</sup> Legal explanations center on the expansion of the kinds of criminal convictions that trigger immigration consequences and/or mandatory detention, as well as policies that allow for the detention of asylum seekers.<sup>81</sup> However, these legal and policy changes are necessary, but not sufficient, conditions for increased detention.

In reality, immigration detention is a result of law on the ground, not law on the books. That is, the law creates the opportunity for federal actors to detain immigrants, but the large levels of detention are not mandated by law.<sup>82</sup> According to the INA, “pending a decision on whether the alien [*sic*] is to be removed from the United States,” an individual can be subject to detention either because they represent a flight or security risk (or both), or because they have a criminal conviction rendering them subject to mandatory detention.<sup>83</sup> Although some

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77. Because there is a high-volume daily turnover of immigrants in detention, and seasonality affects migration numbers, analyses of immigration detention usually use the ADP as a way to measure detention levels. The ADP, as implied by the name, is simply calculated by dividing the total population of detained immigrants in a particular time period by the number of days in that time period.

78. Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. SOC. SCI. 97, 101 (2019).

79. A recent drop can be attributed to the slowing of entries due to the policy known as Migration Protection Protocol as well as the closing of the border due to the Coronavirus. As this drop reflects current temporary policies but not the trend observed for the last six years, we cannot suppose that it reflects an actual drop in the use of detention.

80. See Ryo, *supra* note 78, at 98.

81. Immigration scholars often point to the Anti-Drug Abuse Acts of 1986 and 1988, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 as being the three main legal drivers of immigration detention. See generally, Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATL. Q. 621, 622 (2014); Das, *supra* note 29; Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 U. MICH. J.L. REFORM 879 (2015).

82. This is further supported by the fact that DHS provides guidelines determining their enforcement priorities, demonstrating that law enforcement actions like detention are generally a choice not a mandate. See, e.g., U.S. DEPT OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW, 7, 2 (2021) <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/C93U-YXP2>] (vacated by *Texas v. United States*, No. 21-CV-00016, 2022 WL 2109204, at \*47 (S.D. Tex. June 10, 2022)). That the precise scope of these memoranda is a matter of litigation does not take away from the main point that enforcement is subject to policy choices.

83. Immigration and Nationality Act § 236(a), (c)(1); see also Fatahi, 26 I. & N. Dec. 791, 793 (2016) (“An alien who seeks a change in custody status must establish to the satisfaction of the Immigration Judge and the Board that he is not ‘a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.’” (citing Guerra, 24 I. & N. Dec. 37, 39 (2006))).

argue that even the INA's mandatory provisions allow for discretion,<sup>84</sup> it is clear that at least some<sup>85</sup> custody determinations are made by immigration officers. That decision can be made at any time during formal removal proceedings.<sup>86</sup> If an individual is detained, then they can request a bond hearing before an immigration judge (and therefore before the Department of Justice rather than the Department of Homeland Security).<sup>87</sup> In this way, every detainee that is not subject to mandatory detention is the result of one or many actors that have—as a matter of discretion—determined that the individual poses a flight or safety risk. I am by no means arguing that individuals never fit this profile, but rather that the detention of those individuals is not *mandated* by law.

Furthermore, even mandatory detention is a result of particular enforcement decisions. Across all areas, underenforcement of laws is both standard and permissible.<sup>88</sup> Of course, at a certain point, not enforcing constitutional laws becomes unlawful.<sup>89</sup> Nevertheless, the extent to which immigration enforcement articulates priorities that land more people in mandatory detention is also a result of policy decisions, not law. In a sense, under the Obama administration, whether under the Secure Communities Program or the Priority Enforcement Program (“PEP”), the explicit targeting of individuals detained by local law enforcement officers, who are thus more likely to have criminal records, is a high-level policy choice that rendered likelier the detention of a greater percentage of the people subject to immigration enforcement.<sup>90</sup>

Finally, the fact that rising detention has to do with enforcement choices, rather than legal mandates, can be surmised through the chronology of detention itself. Most of the reforms that expanded the grounds for detaining immigrants

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84. Torrey, *supra* note 81, at 883 (arguing that the mandatory detention statute in the INA could be interpreted in a way to give ICE more discretion over custody determinations).

85. Exact percentages of how many people in detention recently are confined due to mandatory detention provisions is unknown because ICE has not released enough data. While the Obama administration was pursuing the Secure Communities program, a large majority of people in detention were there due to INA § 236(c)(1).

86. 8 C.F.R. § 236.1(g)(1) (2016) (“At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I-286, Notice of Custody Determination.”).

87. 8 C.F.R. § 1003.19(a) (2006) (“Custody and bond determinations made by [ICE] pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.”).

88. See Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1205 (1996) (explaining the circumstances under which law is not enforced as a matter of policy); Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426 (2002) (claiming that not enforcing certain laws is a cost-beneficial strategy for certain crimes). *But see* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717–18 (2006) (criticizing underenforcement because it reflects the inequities in power of those who are subject to the law).

89. See Cox & Rodríguez, *supra* note 18, at 174–208 (arguing that the best way to identify the legality of this suspension is to analyze whether and how it has been institutionalized).

90. For a summary and critique of Secure Communities, see Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154–56 (2014). For a summary and critique of both Secure Communities and PEP, see Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015).

occurred in the 1980s and 1990s, but we have seen continual growth in detention levels long after the reforms were passed. Between 1994 and 2004 the ADP increased from 6,785 to 21,928.<sup>91</sup> However, since then, immigration detention has been more characterized by sudden jumps. Between 2005 and 2007 the ADP rose by over 10,000, stabilizing at around 32,000 until 2015, and since then, it grew again by around 10,000—with the caveat that in 2019 it reached 52,000.<sup>92</sup>

If the law were responsible for the growth in detention, we would not expect this rise in fits and starts, but rather we would see a continuous rise or—at the very minimum—numbers that track some indicator related to migration. We do not see this, however. In fact, there seems to be an inverse relationship between the actual levels of migration and the number of people in immigration detention.<sup>93</sup>

A number of studies have pointed to factors other than the law that explain the recent expansion of immigration detention. Emily Ryo and Ryan Peacock, for example, have shown that political and economic factors push localities to participate in detention. They observed that localities where immigration detention grew were those with high levels of unemployment that were “relatively small, nonurban . . . , largely Republican and located in the South.”<sup>94</sup> This collaboration is crucial because a driver of increased detention is the extent to which immigration laws are enforced by local authorities.<sup>95</sup> Those jurisdictions that cooperate with federal agencies in enforcing immigration laws apprehend more people and therefore have more immigration detention.<sup>96</sup> Another factor is the existence of

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91. See Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 10 fig.1 (2018).

92. See *id.*

93. Ryo, *supra* note 78, at 98.

94. Ryo & Peacock, *supra* note 38, at 87.

95. Local governments are able to cooperate with immigration enforcement authorities through 287(g) agreements, coming from INA § 287(g) which allows these types of intergovernmental cooperation. Scholars have identified that these agreements increase the enforcement capacity of the Federal Government. See DORIS MARIE PROVINE, MONICA W. VARSANYI, PAUL G. LEWIS & SCOTT H. DECKER, *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES* (2016).

96. Jillian Jaeger has shown that the actual enforcement capacities of a locality, not only whether or not they sign 287(g) agreements, matter in determining how many immigrants are in fact detained. See Jillian Jaeger, *Securing Communities or Profits? The Effect of Federal-Local Partnerships on Immigration Enforcement*, ST. POL. & POL'Y Q. 362 (2016); see also Margot Moinester, *Beyond the Border and Into the Heartland: Spatial Patterning of U.S. Immigration Detention*, 55 DEMOGRAPHY 1147, 1147 (2018) (showing tremendous disparities in likelihood of immigration enforcement in the United States is explained by geographical factors).

private prisons.<sup>97</sup> Other recent analyses have shown that differences in adjudication may be contributing to increased detention.<sup>98</sup>

In sum, expansion of civil immigration detention is determined not only by law and policy, but by geography, race, and politics. Consequently, reform that focuses only on changing the applicable grounds for detention will not prevent continued growth in enforcement and detention. As long as detention is legal, the executive can enforce laws such that detention continues to grow. Legislators, generally, want their policies to withstand countering ideological impulses from a future administration. However, given the large discretion that the executive is given, and the large impact of the particular decisions of various law enforcement actors—from local police officers to immigration judges—on the overall level of detention, legislation that does not end immigration detention will not be a durable solution curtailing its use.<sup>99</sup>

Even with an executive branch that wants to end detention, at the core of these dynamics, the reality is that immigration detention has begun to occupy carceral spaces such that it may in fact prevent decarceration. That is, even if criminal legal reform is successful in emptying jails, confinement levels may not change as much if immigration detention remains legal. This is a product of the fact that immigration detention has generally become ensconced in the criminal legal system.<sup>100</sup> This process has led to the development of the subfield of “cimmigration,” which—as suggested by the name—is defined as “the intertwinement of crime control and migration control.”<sup>101</sup> I turn to this development in the next Subsection. It is necessary to understand this process to see why anti-immigration detention efforts will be more successful if they are constructed as anti-incarceration projects more generally.

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97. See Torrey, *supra* note 81, at 896–97 (arguing that “private prisons wield a level of political capital that can ensure harsh custody policies and practices”); Loren Collingwood, Jason L. Morin & Stephen Omar El-Khatib, *Expanding Carceral Markets: Detention Facilities, ICE Contracts, and the Financial Interests of Punitive Immigration Policy*, 10 RACE SOC. PROBS. 275 (2018) (finding that the mere presence of a private prison that holds immigration detention is predictive of the likelihood that legislators will co-sponsor harsh immigration legislation).

98. Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 792 (2018).

99. Furthermore, given the complicated politics of immigration, it is likely complicated to end detention as an immigration issue.

100. As David C. Brotherton and Philip Kretsedemas write in their introduction to their collection *Immigration Policy in an Age of Punishment*, “[t]he punitive public culture that has come to define immigration policy can be understood as the emblematic feature of an age, a zeitgeist of the times.” See PHILIP KRETSSEDEMAS & DAVID C. BROTHERTON, *Introduction: Immigration Policy in an Age of Punishment*, in IMMIGRATION POLICY IN THE AGE OF PUNISHMENT: DETENTION, DEPORTATION, AND BORDER CONTROL (2017).

101. Joanne van der Leun & Maartje van der Woude, *A Reflection on Cimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 41, 43 (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2013).

### III. IMMIGRATION DETENTION AND INCARCERATION: A GROWING RELATIONSHIP

#### *A. How the Detainee Can Become the Inmate: The Role of Crimmigration*

That immigration and criminal law have become intertwined is not a novel idea. Crimmigration as a field shows that both criminal and immigration law have become more similar. On the criminal side, crimmigration is seen in the “dispensing [of] certain procedural protections traditionally afforded criminal defendants when immigration-related activity forms the basis for the criminal prosecution.”<sup>102</sup> On the immigration side, scholars usually point to the growth in crimes with immigration consequences, the criminalization of migration, and the use of traditional police and military tactics for immigration enforcement.<sup>103</sup>

Furthermore, “immigration enforcement and criminal justice [have come to] form part of the same carceral regime and occupy the same carceral space.”<sup>104</sup> Both immigration detention and incarceration occur in jails that are either the same or look the same. More importantly, perhaps, they are both experienced as punishment.<sup>105</sup>

The convergence of immigration detention and incarceration can be understood through the prism of the “total institution.” In a 2006 article, Bernard Harcourt suggested such an analysis in a different context.<sup>106</sup> He argued that we should measure institutionalization by the combined number of people in both prisons and mental health asylums in part because both of those institutions are addressing the same kinds of concerns.<sup>107</sup> Harcourt’s work was motivated by decades of social theory that had explored how institutions affected social structures and, in particular, at the rise of “total institutions.” In this literature, a total institution is “a place of residence and work where a large number of like-situated

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102. García Hernández, *supra* note 28, at 1457.

103. *See id.*; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

104. Ryo, *supra* note 78, at 99.

105. *See* García Hernández, *supra* note 28, at 1359 (arguing that immigration detention is punitive from a rule-based approach arguing that whether detention is civil or criminal depends on legislative intent and “[i]f Congress developed the immigration detention statutory scheme within a political context infused with a desire to punish immigrants, as [this Article] posits it did, then to detain is necessarily to punish”); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (making the functionalist argument that immigration detention conditions are so harsh that it is in fact a “quasi punitive regime”); Mary Bosworth, *Subjectivity and Identity in Detention: Punishment and Society in a Global Age*, 16 THEORETICAL CRIMINOLOGY 123, 124 (2012) (carrying out an ethnography of immigration detention in the U.K. to show how civil detention has become punitive).

106. Harcourt, *supra* note 26. I mention Harcourt’s work also because Marie Gottschalk points to the successes of deinstitutionalization, whereby thanks to federal leadership, states were able to close mental institutions in the latter half of the 20th Century. Gottschalk, *supra* note 21. However, Harcourt’s work pushes us to reconsider deinstitutionalization; showing that it was nothing but a substitution. The same dynamic was also found to occur in France. *See* Raoult & Harcourt, *supra* note 26.

107. Harcourt, *supra* note 26, at 1755.

individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.”<sup>108</sup> While a boarding school and a prison were both “total institutions,” Erving Goffman categorized institutions into different types according to their stated purpose.<sup>109</sup>

Harcourt, following Goffman and others<sup>110</sup> analysis, understood asylums, prisons, and jails as the same particular *type* of total institution because all of them were built and operated to address perceived human threats to society. As Harcourt wrote, “mental illness was an abstraction designed to rationalize the confinement of individuals who manifested disruptive and aberrant behavior and the asylum’s primary function was to confine social deviants and/or unproductive persons.”<sup>111</sup> This function, according to Harcourt, is now carried on by the prison.<sup>112</sup>

Immigration detention can also be understood as a total institution. In a legal sense, detention is at least partly warranted on community safety grounds. As the Supreme Court put it, immigration detention “has two regulatory goals: ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community.”<sup>113</sup> We see this reflected in Section 236 of the INA, which mandates detention<sup>114</sup> for people with certain criminal records and precludes immigration judges from releasing individuals when they are deemed to “pose a danger to the safety of other persons or of property.”<sup>115</sup> The Supreme Court has found that detention can be extended for as long as the government sees fit without triggering mandatory administrative review.<sup>116</sup> In this sense, immigration detention, like jails, serves the function of confining individuals who can be considered

108. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES* (1961).

109. *Id.*

110. David Rothman’s *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971) and Michel Foucault’s *Madness and Civilization* are particularly influential.

111. Harcourt, *supra* note 26, at 1759.

112. Harcourt also justified his analysis on functionalist grounds. He writes, “what we are trying to capture when we use the variable of imprisonment is something about confinement in an institutional setting—confinement that renders the population in question incapacitated or unable to work, pursue educational opportunities, and so forth.” *Id.* at 1755. In other words, when we are using incarceration as an explanatory variable, we are actually trying to understand the effects of confinement writ large. Therefore, according to Harcourt, we should use a full count of confinement for these analyses. *Id.* at 1756. Measuring institutionalization by the combined number of people in both prisons and mental health asylums, Harcourt showed that a rise in incarceration rates since the 1970’s was not a rise in institutionalization. *Id.* at 1755. Confinement remained constant, but the proportion confined in mental health hospitals had decreased while the proportion confined in prisons had increased. *Id.* at 1755.

113. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

114. The Supreme Court has held that mandatory detention is constitutional. *Demore v. Kim*, 538 U.S. 510 (2003).

115. Immigration and Nationality Act § 236(c)(2), 8 U.S.C. § 1226(c)(2).

116. *See* *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). In that case the court struck down a Ninth Circuit decision holding that mandatory administrative review of bond decisions was necessary after six months in detention. The Court did not indicate if mandatory review was ever necessary, but without any guidance we can assume that mandatory bond review is unavailable regardless of the length of detention.

dangerous. The fact that it holds other individuals that are not dangerous, such as asylum seekers or children, on efficiency grounds does not negate that the detention is also propped up by the same sorts of concerns as criminal incarceration. In addition to this, as discussed *supra*, immigrant detention occurs in carceral spaces and is understood as punishment by its subjects, and the rise in legal framework that allowed immigration detention to increase arose at the same time and from the same concerns that brought mass incarceration. Immigration detention can therefore also be understood as a “total institution” in the same way that prisons and jails are.

This conceptualization matters because it helps show the degree of proximity between immigration detention and criminal incarceration.<sup>117</sup> It is not only that they look the same but that they are similarly legally legitimized. Of course, incarceration is not only justified on public safety grounds, but others such as retribution and rehabilitation. Likewise, as mentioned in the preceding paragraph, immigration detention is about more than community safety. My argument here is not that they are both legally justified on exactly the same grounds, but rather that the legal rationales for both overlap.

Furthermore, scholars have argued that the rise of crimmigration itself has allowed for immigrants to be understood as criminals.<sup>118</sup> Both the criminalization of illegal entry, with the high visibility of prosecution and persecution of this crime, and the continued rhetoric and enforcement of laws against the “criminal alien,” are fomenting the creation of the “crimmigrant.” Other scholars propose, rather, that crimmigration is the result of a history of disdain for immigrants of color along with

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117. Moreover, this overlap matters in terms of social science. Scholarship and policy about incarceration will be flawed if they don't account for immigration detention. Harcourt made a compelling case that analyses using imprisonment as an explanatory variable alone are limited because “what we are trying to capture when we use the variable of imprisonment is something about confinement in an institutional setting—confinement that renders the population in question incapacitated or unable to work, pursue educational opportunities.” See Harcourt, *supra* note 26, at 1755. If, for example, we were measuring the economic impact of decarceration and did not factor in that some of that decarceration was tempered by immigration detention, we would be underestimating the impact of our variable of interest. After all, immigration detention could ensure that employment at correctional facilities remained relatively stable (and thus all the secondary market impacts do as well). Properly estimating this impact is not merely academic. The success of decarceration efforts will depend on properly anticipating their economic toll. Much of criminal legal reform is justified on economic grounds. This means that, for many, decarceration will only make sense if it is an economically viable project. In this sense, wider decarceration efforts will hinge on public policy evaluations that properly estimate the impact that closing jails has had. Accurately doing this will require us to factor in immigration detention. The same is true for any other covariate of interest. If one is trying to measure the effect of incarceration on employment, crime, housing, etc., immigration detention is relevant to truly capture the effect of institutional confinement on those outcomes.

118. Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, J. SOC. & ECOLOGICAL BOUNDARIES, Winter 2005-2006, at 56, 57 (arguing that immigrants were seen as criminals once the legal category “criminal alien” was formed). See Xia Wang, *Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 CRIMINOLOGY 743, 743 (2012) (providing empirical evidence that places where people perceive the immigrant population to be larger than it is are associated with having people that view immigrants as criminals).

a willingness of Americans to use “penal norms to address social phenomena deemed problematic.”<sup>119</sup> Whether the construction of immigrants as criminals is first social and then legal or vice versa is unimportant, for both phenomena create a feedback loop.<sup>120</sup>

Given crimmigration’s prevalence, we can expect immigration detention to stay stable and, more likely, grow. After all, immigration control has now become more closely associated with crime control.<sup>121</sup> Not only has the crime of unlawful entry literally become a priority for law enforcement, but the methods of crime control, including confinement, have also become integral to immigration control. Eventually, it may become difficult to determine whether carceral methods are being used for or because of immigration or penal problems.<sup>122</sup>

### *B. How the Detainee Can Become the Inmate: The Role of Incentives*

The rise of crimmigration helps explain why we may expect to see more immigration detainees. In sum, the more immigrants are perceived as criminal, and the more criminal methods and tools are used to regulate immigration—i.e., as the crimmigration regime expands—the more we can expect the traditional tools of criminal law to be used more frequently in the immigration context. Furthermore, this can create a situation in which the problems of crime and immigration are treated as one, following the same trajectory that mental health and crime did in the previous century.<sup>123</sup> This in turn may lead to seeing more immigrants fill up the bed space created by decarceration efforts.

There are also more pragmatic reasons to expect a continued rise in immigration detention. Prisons and jails are often advertised as good sources of

119. García Hernández, *supra* note 28, at 1460.

120. It is worth noting that this is particularly true for immigrants of color. Beyond the rhetoric and policy from the Trump administration, immigration enforcement has largely been brought to bear on Hispanic communities and the southern border, despite the fact that there are national security threats coming from north of the border. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-470, NORTHERN BORDER SECURITY: CBP IDENTIFIED RESOURCE CHALLENGES BUT NEEDS PERFORMANCE MEASURES TO ASSESS SECURITY BETWEEN PORTS OF ENTRY (2019), <https://www.gao.gov/assets/710/700012.pdf> [<https://perma.cc/YYJ3-FHCT>] (“Border Patrol identified an insufficient number of agents that limited patrol missions along the northern border . . . primarily because CBP’s priority is to secure the U.S.-Mexico (southwest) border.”)

121. The recent Supreme Court decisions in the cases of *Egbert v. Boule* and *Hernández v. Mesa* further cement this approach. *Egbert v. Boule*, 142 S. Ct. 1793, 1798 (2022); *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020). Though both cases concern immigration law enforcement activity, the analysis found therein is indistinguishable from that found in cases involving national criminal law enforcement activities.

122. In *Discipline and Punish*, Michel Foucault explained that prison only became inevitable after their construction and use. Similarly, immigration detention will seem natural and inevitable once its use expands. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

123. See Harcourt, *supra* note 26, at 1759–63.

employment, and therefore good for communities' economies.<sup>124</sup> This is true even when the economic impact of a correctional facility on a particular locality is not clearly positive.<sup>125</sup> Nevertheless, because of their perceived economic benefits, local governments will be interested in keeping correctional facilities open because decarceration will be perceived as a cost for localities.

First, each inmate loss represents a loss of income from the state that pays the locality for incarcerating them. Second, as jails are emptied, you are likely to see correctional officers losing their jobs. Both John Pfaff and Marie Gottschalk have argued that an often-overlooked aspect of criminal legal reform is the role that correctional officer unions can have in impeding criminal legal reform in order to keep jails open.<sup>126</sup>

The immigration detainee is an attractive remedy for the potential costs of decarceration. One big reason for that is that the federal government pays more per detainee than the state does.<sup>127</sup> Also, the immigration detainee is politically disenfranchised, especially in the places where detention has grown in the last decade.<sup>128</sup> It is not only that undocumented immigrants have few political rights and no representatives,<sup>129</sup> but also that these facilities are located in areas far away from communities that advocate on their behalf.

In terms of immigration detention, there is an even greater incentive to participate, as there are no economic costs and only benefits for doing so.<sup>130</sup> Many local officials have gone on the record saying as much. When Allen Parish signed a contract with ICE, Sheriff Doug Herbert III said, “[T]his facility will be good for

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124. See, e.g., *The Advantages of a Career as a Corrections Officer*, CHRON. (June 17, 2020), <https://work.chron.com/advantages-career-corrections-officer-15094.html> [<https://perma.cc/2RW7-S4E7>].

125. Compare Tracey L. Farrigan & Amy K. Glasmeier, *The Economic Impacts of the Prison Development Boom on Persistently Poor Rural Places*, 30 INT'L REG'L SCI. REV. 274, 274 (2007) (finding that prison construction has “no significant economic effect on rural places in general, but [] may have a positive impact on poverty rates in persistently poor rural counties . . . [but that there is] little evidence . . . that prison impacts were significant enough to foster structural economic change”), with Janjala Chirakijja, *The Local Economic Impacts of Prisons 1* (Oct. 1, 2018) (unpublished working paper), <https://economics.smu.edu.sg/sites/economics.smu.edu.sg/files/economics/pdf/Seminar/2019/20190410.pdf> [<https://perma.cc/B66T-86XD>] (finding that correctional facilities are responsible for a two to four percent decline in housing value).

126. See John Pfaff, *supra* note 22, at 273–74; Gottschalk, *supra* note 21.

127. We don't have an exact amount the federal government pays on a per facility basis. However, as a point of comparison, Louisiana paid Richwood \$28.07 per inmate while the federal government paid \$64.07. Noah Lanard, *Louisiana Decided to Curb Mass Incarceration. Then ICE Showed Up.*, MOTHER JONES (May 1, 2019), <https://www.motherjones.com/politics/2019/05/louisiana-decided-to-curb-mass-incarceration-then-ice-showed-up/> [<https://perma.cc/K6K7-3S57>].

128. Ryo & Peacock, *supra* note 38, at 84–86 (finding that between 1983 and 2013, rural and small-scale urban counties with populations between 10,000 and 249,999 people were the counties that experienced more growth in immigration detention).

129. Some have argued that this in fact may not be a bad thing. Angelica Cházaro, for example, argues that providing representation legitimizes a system that is fundamentally indefensible and pushes off the possibility of deportation abolition. See Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021).

130. There may be political losses due to pro-immigrant groups, but we know that in locations where detention has grown, and is likely to grow, those groups are in the minority.

Allen Parish. It has already created a bunch of jobs and added additional law enforcement officers. We will reap all the benefits, including the revenue.”<sup>131</sup> Along the same lines, Lily Morgan, County Commissioner of Josephine County in Oregon, said of an ICE contract with a local jail that “[ICE] still [is] helping our community . . . It’s still a revenue source to our community.”<sup>132</sup> And finally, as Lieutenant Bill Davis, of the Bossier, Louisiana Sheriff’s Office, said when asked about the facility signing a contract with ICE, “[o]ur job is to house inmates . . . whether they’re ICE inmates, or whether they’re parish or state, we’re housing them. That’s it.”<sup>133</sup>

Emily Ryo and Ryan Peacock have already found evidence that some of the factors just described are driving immigration detention growth. They wrote, “[O]ur regression analysis results suggest that county labor market conditions, *together with relative fluctuations in the local criminal inmate population*, may generate a policy environment that is particularly conducive to immigration detention.”<sup>134</sup> More to the point, they found that “excess bed space positively moderates the relationship between local unemployment rate and the likelihood of counties holding ICE detainees.”<sup>135</sup>

These findings should tell us that the economic incentives outlined above are likely to play an impact in the future as decarceration continues (if it does). As more local jails lose inmates, we may see a greater need to replace the revenues from these in some way. I have outlined above why the immigration detainee may just be that replacement.

#### IV. OPPORTUNITIES FOR IMMIGRATION AND CRIMINAL LEGAL REFORMS

So far, I have laid out the current relationship between decarceration and immigration detention. To summarize, through both legal and social processes, both systems have intertwined and begun a process of reification. This, on its own, should mean that any movement to end or decrease the confined population needs to be a work of both criminal and immigration legal reform.

In this Section, I take a normative turn to outline why advocates of decarceration and immigration detention share similar preoccupations. This leads me to conclude that efforts to decrease the use of incarceration are limited if they are focused solely on criminal law, not only because they ignore a large portion of the confined population, but also because they will miss how decarceration efforts

131. Doris Maricle, *A Look Inside Allen Parish Detention Center: Public Tours \$5M Facility Built to House Federal Detainees*, AM.PRESS (June 15, 2019), [https://www.americanpress.com/news/local/public-tours-mfacility-built-to-house-federal-detainees/article\\_d38c67f8-9127-11e9-8257-8782841260e4.html](https://www.americanpress.com/news/local/public-tours-mfacility-built-to-house-federal-detainees/article_d38c67f8-9127-11e9-8257-8782841260e4.html) [<https://perma.cc/KK4J-5HXU>].

132. Conrad Wilson, *ICE Pays to Use 2 Oregon Jails Despite Sanctuary State Law*, OPB (June 21, 2018, 2:37 PM), <https://www.opb.org/news/article/ice-jail-oregon-norcor-josephine-contract-sanctuary-state/> [<https://perma.cc/962J-W6S4>].

133. Lanard, *supra* note 127.

134. Ryo & Peacock, *supra* note 38, at 91.

135. *Id.* at 88.

may be foiled through alternative methods of confinement. Moreover, because of the very serious legal constraints outlined in Parts I and II faced by immigration advocates, I argue that it would be advantageous to pursue immigration detention reform within broader criminal decarceration efforts.

Political support for decarceration is growing.<sup>136</sup> We can see this reflected in the passing of criminal legal reform at the state and/or federal level,<sup>137</sup> the election of progressive prosecutors,<sup>138</sup> and/or the growth of abolitionist rhetoric

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136. See, e.g., BRENNAN CTR. FOR JUST., ENDING MASS INCARCERATION: IDEAS FROM TODAY'S LEADERS (Inimai Chettiar & Priya Raghavan eds., 2019), <https://www.brennancenter.org/our-work/policy-solutions/ending-mass-incarceration-ideas-todays-leaders> [https://perma.cc/25GS-L4EJ].

137. Legislatures all across the United States have taken some of these measures and enacted laws that adopt one or many of these policies. From January of 2015 through March of 2020, there have been forty-one state and federal initiatives under the broad banner of criminal legal reform. Out of all these bills, thirteen were passed—many in conservative states like Mississippi, Georgia, or Louisiana—sixteen failed, and the rest are still being discussed. The efficacy of these bills is quite contested. After all, most of them focus on “nonserious, nonviolent, non-sex-related offenders,” the least impactful issues in terms of mass incarceration. See GOTTSCHALK, *supra* note 21, at 259; see also JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 205–06 (2017).

138. The figure of the progressive prosecutor is on the rise, Stephanie Morales was elected Commonwealth's Attorney in Portsmouth, Virginia in 2015 and re-elected in 2017; Kim Foxx was elected State's Attorney for Cook County, Illinois (Chicago) in 2016; Aramis Ayala was elected State Attorney for the Ninth Judicial Circuit of Florida in 2016; Larry Krasner was elected District Attorney of Philadelphia, Pennsylvania in 2017; Rachel Rollins was elected District Attorney of Suffolk County, Massachusetts (Boston) in 2018; Wesley Bell was elected Prosecuting Attorney of St. Louis County in 2018; Chesa Boudin was elected District Attorney of San Francisco, California in 2019. See, e.g., Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 71 n.12 (2020) (citing Emily Bazelon & Miriam Krinsky, Opinion, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. Times (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [https://perma.cc/JQX6-F7L9]). *Though* Boudin was recently ousted in a special recall election, most progressive prosecutors have won reelection. It is therefore not clear that Boudin's defeat is the end of the progressive prosecution movement. Whether much of the promise held in progressive prosecution is fundamentally misguided is yet to be seen. *Id.* at 71 (noting that progressive prosecutors will still prosecute violent crime, which is a main driver of rates of incarceration in the United States, that the system still will weigh favorably towards plea bargaining, and that internal resistance will impede significant impact); see also Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 759 (2018) (adopting a critical theory on the notion of progressive prosecution, exposing the limits of reformist efforts within the law when the laws as currently written reflect racially driven motives that were “never intended to keep marginalized people safe”); Brad Haywood, *Busting the Myth*, INQUEST (June 10, 2022), <https://inquest.org/busting-the-myth-progressive-prosecutors/> [https://perma.cc/HQ6B-MTXS] (arguing that progressive prosecutors have not actually changed prosecution policies very much).

and proposals.<sup>139</sup> Of course, all of these efforts are limited, either in scope<sup>140</sup> or short-term feasibility.<sup>141</sup> However, even moderately successful reforms can be profound.

The current decrease in the prison population is illustrative. According to data from the Vera Institute of Justice, between 2010 and 2016, the number of people incarcerated has dropped by 176,400 people.<sup>142</sup> In the scale of the total carceral population, this change seems modest. However, if we think in terms of numbers of facilities, we can see that a drop of 170,000 is not insignificant. A decarceration of that scale, if carried out uniformly, could mean closing between 140 to 170 prisons (depending on the size of the prisons closed) across the country.<sup>143</sup> Given that there are only seventy-four “large” prisons in the United States (those holding over 2,500 people), closing 100 prisons would not be minor.<sup>144</sup> Of course, assuming that prisons will close at the same rate as the incarceration population falls is unrealistic. Just as prison growth was and is uneven, so is decarceration. Nonetheless, this exercise is useful so as to not minimize important gains.

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139. Angela Davis, Dorothy Roberts, and Allegra McLeod, among others, have with renewed force pushed the academy to reconsider abolitionist ideas. *See, e.g.,* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Roberts, *supra* note 34; McLeod, *supra* note 34. I do not suggest that this list is exhaustive nor that these writers have been the first or only ones to advance abolitionist arguments in the legal academy generally. The abolitionist movement started over fifty years ago and abolitionist ideas have been in scholarship since then. However, in the last few years we have seen renewed interest in these ideas, in part as a response to these scholars.

140. A fundamental issue of reformist agendas is that they are technocratic approaches for political problems. As Marie Gottschalk has articulated, “criminal justice is fundamentally a political problem, not a crime and punishment or a dollars-and-cents problem.” *See* GOTTSCHALK, *supra* note 21, at 22. Moreover, as David Garland has suggested, without confronting the causes of violence, namely unrestrained market forces and minimal safety nets, technocratic efforts to decarcerate will not bring the U.S. incarceration rates in line with the rest of the world. *See* David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC’Y 321, 322–23 (2019).

141. Even proponents of abolitionism acknowledge that the types of changes being advocated will take time. *See* McLeod, *supra* note 34, at 1161 (arguing that the goal of abolitionism is not merely to close jails, rather, the objective is to imagine and build an alternative that better and more humanely achieves the goals that jails are meant to: deterrence, incapacitation, rehabilitation, and retribution).

142. *About Incarceration Trends: Methodology, Data, and Acknowledgements*, VERA INST. OF JUST., <https://trends.vera.org/methodology/> [<https://perma.cc/8PN2-DE84>] (last visited Sept. 9, 2022). The Bureau of Justice Statistics (BJS) shows a different number because it reports people in state and federal facilities, not local jails. *See Quick Tables*, BUREAU OF JUST. STAT., <https://csat.bjs.ojp.gov/quick-tables> [<https://perma.cc/EV9G-YJHX>] (choose “1978–2019” under the “Years” column in the top row, “Prisoners under the jurisdiction of state or federal correctional authorities, December 31, 1978–2019”) (noting that there were 1,613,803 in 2010 and 1,506,757 in 2016).

143. This is a very rough estimate based on BJS data about correctional facilities. Per that data, there are 1,821 state and federal prisons. *See* BUREAU OF JUST. STAT., *supra* note 142. In terms of capacity, the BJS divides prisons into four categories: those that fit fewer than 500 (small), between 500–999 (medium), from 1,900 to 2,499 (large) and greater than 2,500 (largest). *Id.* The category with most facilities is the small one. *Id.* Taking these data, the average prison in the United States holds around 1,000 people.

144. As argued *infra* Section III.B, these prisons represent entire communities that rely on them for jobs and economic stability that are likely to fight for them to remain open.

While the reasons behind the support of reformist or transformational agendas are diverse and distinct, Benjamin Levin has identified two frameworks to understand the various justifications given for reform. One is the “over” framework, which holds that “there may be an optimal rate of incarceration or criminalization, but the current rate is too high.”<sup>145</sup> In other words, people support decarceration as part of an acknowledgment that the state is incarcerating people for too long and for too little. The other framework is the “mass” one. According to it, “criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities.”<sup>146</sup> Here, people support decarceration as a way to impair the state from exerting control over marginalized populations. These frameworks are not necessarily in conflict with each other, nor are they always easily distinguished. However, “the mass frame is more (or at least more explicitly) an ideological critique. In contrast, the over frame is more ideologically indeterminate—the fiscal conservative, the libertarian, and the liberal/progressive egalitarian all might adopt it.”<sup>147</sup> Immigration detention raises the same sorts of concerns as incarceration as seen through the prism of either of these frameworks.

One simple way of explaining the “over” framework is that it asserts that current incarceration levels are not cost-justified. There may be benefits to incarceration, but we are currently simply spending too much money without seeing them (and in fact, at current levels, incarceration may be net-negative).<sup>148</sup> To see whether immigration detention is also not cost-benefit justified, we must first understand what the goals of immigration detention are. According to the INA, immigration detention is meant to either avoid flight risk or protect the community.<sup>149</sup> In other words, immigration detention is supposed to ensure that people attend their immigration removal hearings and/or protect the community from potentially violent people while they adjudicate their immigration trials.

Preoccupations around flight risk mainly serve to detain arriving asylum seekers with no connections to the United States under the idea that because they have no connections, there are fewer ways to find them if they abandon their

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145. Levin, *supra* note 21, at 262.

146. *Id.* at 263.

147. *Id.* at 273.

148. See, e.g., Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231, 235–37 (2014) (highlighting that “Americans pay dearly for . . . extremely high rates of incarceration” both monetarily, socially, and in terms of public policy opportunity cost; and that the “the high cost of incarceration supports a system that often does not work”).

149. See Immigration and Nationality Act § 236, 8 U.S.C. § 1226(c)(2); see also Fatahi, 26 I. & N. Dec. 791, 793 (2016) (“An alien who seeks a change in custody status must establish to the satisfaction of the Immigration Judge and the Board that he is not ‘a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.’” (citing Guerra, 24 I. & N. Dec. 37, 39 (2006))).

frivolous claims.<sup>150</sup> On the other hand, concerns about safety are more often invoked when detaining an individual who has been in the United States for enough time to have a criminal record.<sup>151</sup>

In any case, for immigration detention to be at the “right” level, we would expect that as detention rose there would be fewer immigrants missing their removal hearings and/or fewer crimes being committed by people in removal proceedings. Neither of these figures have changed as immigration detention has increased (and in fact, they are both relatively rare).<sup>152</sup> In other words, detention does not contribute to making more people appear at their removal hearings, nor does it contribute to safety. According to one estimate, the federal government spends over three billion dollars a year on immigration detention.<sup>153</sup> It is hard to see how a policy with such costs that has not delivered on its own key performance indicators is cost-justified.

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150. See *Guerra*, 24 I. & N. Dec. at 40 (outlining the criteria used to determine an individual’s custody status, notably: length of residence in the United States, family ties in the United States, a fixed address in the United States, a record of appearing in court, and the manner of entry into the United States). All of these factors count against individuals who entered to claim asylum. *Id.*

151. See *id.* (finding that criteria such as criminal record can be dispositive in assessing dangerousness). Of course, a criminal conviction is not dispositive. See *Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) (“[N]ot all criminal convictions conclusively establish that an alien presents a danger to the community, . . .”). However, because people entering are unlikely to have criminal records, dangerousness is more often found in people who have already spent time in the United States. This is not a bright line rule, and there are many exceptions, as custody determination is fact-specific and particularized. See, e.g., *Fatabi*, 26 I. & N. Dec. at 794–95 (2016) (finding that an individual who had entered the United States with a passport stolen by terrorist groups posed a danger to the community).

152. See AM. IMMIGR. COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_and\\_families\\_appear\\_in\\_court\\_setting\\_the\\_record\\_straight.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf) [<https://perma.cc/QM95-H5DZ>] (showing that only about sixteen percent of immigrants do not appear in court and that this number has stayed constant over time). In terms of safety, we know that immigrants commit fewer crimes than the native born, and we have state-level evidence suggesting that the relationship holds for undocumented immigrants as well. Although to my knowledge there are no studies assessing criminality of those in removal proceedings, from these data we have nothing to infer that removal proceedings are pushing immigrants to more criminality. From the analyses that we do have, we see no correlation between higher levels of immigration detention of individuals with criminal records and public safety. See Miles & Cox, *supra* note 9. If anything, given the high stakes of their immigration case and the grave harm that could be caused by criminal legal involvement, we would expect people in removal proceedings to be less of a danger to the community than the average citizen. See WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 1 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) [<https://perma.cc/AP8L-AGH2>]; ALEX NOWRASTEJ, CATO INST., CRIMINAL IMMIGRANTS IN TEXAS: ILLEGAL IMMIGRANT CONVICTION AND ARREST RATES FOR HOMICIDE, SEX CRIMES, LARCENY, AND OTHER CRIMES (2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf> [<https://perma.cc/6QBQ-RFQX>].

153. NAT’L IMMIGR. F., THE MATH OF IMMIGRATION DETENTION, 2018 UPDATE: COSTS CONTINUE TO MULTIPLY 2 (2018), <https://immigrationforum.org/wp-content/uploads/2018/05/Math-of-Detention-2018-Update-FINAL.pdf>, [<https://perma.cc/SJ23-55RE>].

Another possibility is that the current immigration detention level is justified under a deterrence theory. While not identified in the INA as such, the U.S. government has articulated that immigration detention serves as a deterrent for people coming to the United States to seek frivolous immigration claims.<sup>154</sup> If immigration detention is justified, then we would expect that arrivals would see mirror images, perhaps lagged, of arrivals and detention. This relationship does not exist.<sup>155</sup> The reality is that migration patterns are far too complex, and information about the possibility of detention in the destination country is too remote for these types of policies to disincentivize migration. Assuming for the sake of argument that detention does have a deterrent effect, it is outweighed by the opportunity cost of staying in the home country and discounted by informational gaps and behavioral biases that impede people from calculating the probability of detention.<sup>156</sup>

Many immigration scholars and advocates have made arguments for curbing immigration using the “over” framework. One common proposal is to expand the use of alternatives to detention because these are more humane, equally capable of guaranteeing future appearances in immigration court, and much cheaper.<sup>157</sup> Others have called for improving the conditions of detention.<sup>158</sup> Following this approach would be more costly than using the current carceral infrastructure, which would mean spending more per immigrant detained, and therefore, make detention much rarer. An alternative approach, which would be less costly, is to eliminate detention altogether in favor of a system of “civil supervision.”<sup>159</sup> Finally, many have articulated that the institutional design of immigration proceedings should be changed so that adjudicators rely less on detention.<sup>160</sup> All of these

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154. See *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015) (showing an argument by the federal government that detention could serve as a message to those “who may be considering immigration”). Immigration judges often articulate similar preoccupations. See D-J-, 23 I. & N. Dec. 572, 579 (2003) (finding that the release of an individual who unlawfully entered the United States by sea would encourage “unlawful mass migrations”).

155. The number of total apprehensions in the border and the interior dropped from about 1.3 million people in 2001 to just around 500 thousand in 2017, while immigration detention’s ADP has consistently increased. See Ryo, *supra* note 78, 101 fig.2.

156. See Ryo, *supra* note 55, at 241 (arguing that there are three “deterrence hurdles” impeding any deterrent effect: immigrants do not know about detention, even if they know, it may be impossible for them to factor the possibility of detention into their decision making about migrating, and that even if detention is factored in immigration decisions, its risk will probably still be net positive).

157. See, e.g., Torrey, *supra* note 81, at 879–913 (arguing that the mandatory detention statute in the INA could be interpreted in a way to give ICE more discretion over custody determinations).

158. See, e.g., Dora B. Schriro, *Improving Conditions of Confinement for Immigrant Detainees: Guideposts Toward a Civil System of Civil Detention*, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES* 57, 58 (Daniel Kanstroom & M. Brinton Lykes eds., 2015); see also García Hernández, *supra* note 29, at 1405 (arguing for a “truly civil” detention system).

159. See Lima-Marín & Jefferis, *supra* note 28, at 970.

160. See Das, *supra* note 29, at 155 (arguing that there is an overreliance on detention and that there is a legal burden-shifting mechanism that impairs the government’s ability to gather the information necessary to properly only use detention when it is necessary); see also Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained*

reform proposals implicitly suggest that at least some measure of immigration detention/supervision is necessary or justified to achieve the goals of immigration law, just as some measure of incarceration is necessary or justified to achieve the goals of criminal law.

Explaining why rising immigration detention is problematic from the perspective of the “mass” framework is much more straightforward than from that of the “over” framework. To recall, the “mass” framework is an ideological critique of the penal system that sustains that it is weaponized to marginalize certain groups and further structural inequities and unequal power dynamics. Much of the critical theory around immigration detention has made this same argument: that this is precisely the objective both of criminalizing immigration in general, and of immigration detention specifically. Probably the strongest articulation of this critique was made by César Cuahutémoc García Hernández, who argued that “immigration imprisonment . . . operates as a means of class-based exploitation.”<sup>161</sup> One need not go as far as abolishing detention, however, to recognize that immigration detention can serve to otherize or marginalize immigrants just as it does with certain communities of U.S. citizens in the criminal incarceration context. As more fully articulated in Section III, the very act of imprisoning immigrants may further negative perceptions towards them. If we believe this to be true, then—in the country with the largest foreign-born population in the world<sup>162</sup>—immigration detention should at the very least be limited to those who are true threats to the community and whose flight risk cannot be reduced through some alternative to detention.<sup>163</sup>

This discussion helps to show that immigration detention is not a concern because it looks like incarceration, but rather because it functions (or does not) in very much the same way as incarceration. Through the “over” and/or the “mass” frameworks, we can see that immigration detention raises similar concerns as criminal incarceration. Therefore, advocates seeking to reduce our federal, state, and local reliance on prisons should pay attention to a potential replacement of the inmate with the immigrant. As argued in the preceding Section, there are many incentives for local governments to turn to immigration detention as a way to control the cost of decarceration. Yet, insofar as advocates of criminal legal reform are motivated by the normative considerations outlined, immigration detention raises those same concerns and should thus be incorporated into reform platforms.

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*Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 74 (2012) (arguing that immigrants subject to mandatory detention be afforded counsel).

161. García Hernández, *supra* note 29, at 249.

162. Phillip Connor & Gustavo López, *5 Facts About the U.S. Rank in Worldwide Migration*, PEW RSCH. CTR. (May 18, 2016), <https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/> [<https://perma.cc/WM3Z-SP88>].

163. As Phil Torrey has argued, only a very small percentage of those subject to immigration detention have a propensity for violence or are unlikely to appear in their removal procedures. *See* Torrey, *supra* note 81, at 882.

From the perspective of immigration advocates, articulating immigration detention as part of the criminal legal system (as I have tried to do) will allow detainees to be folded into discussions of criminal legal reform more generally. As discussed *supra*, even with many caveats, there is mounting pressure to end carceral exceptionalism in this country. We do not see the same impetus or broad agreement behind changing immigration administration practices. In fact, the politics of immigration reform are more fraught than ever. By wedding efforts to curtail the use of immigration detention to large-scale criminal legal reform, advocates can reframe the issue in a language different to that of migration. A language that has higher chances of success. Also, because, as discussed in Section I, litigation in this area is so fraught, strategic efforts should take advantage of the policy moment and advocate for immigrants in tandem with criminal defendants. If, as scholars in the field of crimmigration have argued for a long time, the legal distinction between immigration and criminal law has evaporated, rather than fight this development, efforts for reform should follow suit accordingly.

#### CONCLUSION

Ending immigration detention is a long way away. However, strategic advocacy will be necessary to get there. Although in this Article I have not outlined a specific path for advocacy, I have argued that anti-immigration detention proponents should look for ways to incorporate their demands in decarceral agendas writ large. Given executive primacy in immigration law, reform will not offer change that will withstand anti-immigrant impulses from the White House. Furthermore, courts have shown themselves to be inadequate spaces for changing immigration detention practices. Rather than fighting crimmigration, therefore, reformers need to lean into it and seek to end detention through broader efforts to decarcerate the nation. The only way out is through.