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PRACTICAL ABOLITION: UNIVERSAL REPRESENTATION AS AN ALTERNATIVE TO IMMIGRATION DETENTION

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INTRODUCTION

Many scholars have advocated for the abolition of jails and prisons in the criminal justice context.[1] Discussion of abolition has rightfully extended to the topic of immigration detention in favor of eliminating facilities operated by private for-profit companies and otherwise.[2] Abolition seeks to eliminate a harmful system of imprisonment and to build up something supportive in its place that is aligned with the ultimate policy goal for which prisons were created—preventing harm to communities. This Article seeks to extend the theoretical framework of abolition to immigration detention in a discrete way: advocating for universal representation as an alternative to immigration detention. The current abolition movement "aims at dramatically reducing reliance on incarceration and building the social institutions and conceptual frameworks that would render incarceration unnecessary."[3] The idea is to diminish the size of one institution that is harmful and build up something else in its place that is both effective and supportive to the affected individuals. Here, universal representation is in itself a way to end the vast majority of

1. See, e.g., the works of Paul Butler, Angela Davis, Ruth Wilson Gilmore, and Allegra McLeod for a discussion.

2. *See, e.g.*, César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246–300 (2017).

3. Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015).

immigration detention and to ensure that immigrants attend their hearings while also increasing the likelihood that they will succeed in their cases.[4] This Article seeks to expand the audience in the abolition conversation by proposing that the provision of universal representation in immigration proceedings, in lieu of pre-hearing immigration detention, can help lower costs to taxpayers and promote a more just and equitable society. The idea is that this appeal to fiscal conservatives could reach across typical partisan or ideological divides, and that an economic argument might enjoy a broader appeal to disparate groups.

This approach is a practical one and built upon the same premise that has led to the success of the decarceration movement in the criminal context. Over the past decade, there has been a realization across ideologies that the increasing number of individuals being held in jails and prisons throughout the United States is untenable.[5] An effort to reduce those numbers has been embraced by both liberal and conservative factions, though for different undergirding reasons.[6] Advocates on the left based their support for lowering prison populations on the fact that imprisonment in the United States disproportionately affected people of color, was overly punitive, and was not aligned with the ultimate goal of these harsh policies—

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4. Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2188 (2017) ("[D]eterrence is not a legitimate reason for immigration detention. . . . [I]mmigration detention is supposed to be nonpunitive and, therefore, should be based on civil, rather than criminal principles."); *see also* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 248 (2019) (arguing that while some observers believe that "the perceived costs of migration have not yet reached a point where they offset the potential benefits [of migrating to] the U.S.[,]" immigration detention costs the federal government $8.43 million per day).

5. Martha T. Moore, *Conservatives, Liberals Unite to Cut Prison Population*, USA TODAY (Mar. 17, 2014, 6:30 PM), https://www.usatoday.com/story/news/politics/2014/03/16/conservatives-sentencing-reform/6396537/; *see also* Shaila Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This.*, N.Y. TIMES, Nov. 14, 2018, at A18 (noting Trump's endorsement of the First Step Act after legislative changes in "traditionally red states").

6. *See* Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 461–66 (2019) (finding that while left-leaning liberals focused on defining their reform efforts as a need to confront structural racism and social inequality, conservatives argued that prison budgets consumed too many tax dollars). Criminal justice reform is an ascendant issue in both the Democratic and Republican parties: "Since the end of the crime wave, a determined combination of libertarians, budget hawks, and evangelical activists have taken advantage of falling crime rates to successfully challenge the Republican Party's longstanding tough-on-crime positions." *Id.* at 463. An unlikely coalition has formed around the issue, most notably a bipartisan criminal justice reform advocacy group that united the Koch brothers with the ACLU and the NAACP, leading to the passage of the First Step Act. *Id.* at 464–66.

reducing crime levels. Advocates on the right based their support primarily on the fiscal repercussions that accompanied an ever-increasing prison population—namely, that too much of the overall state and federal budgets were devoted to the costs associated with imprisonment.[7] Remarkably, broad support for prison decarceration has been achieved. An unlikely advocate, President Trump, supported many of the movement's goals and signed the First Step Act into law in 2018 with the goal of reducing the overall federal prison population and promoting reentry programs.[8]

As the argument for prison abolition becomes increasingly more cogent and mainstream, useful lessons can be taken from that argument and applied in the context of immigration detention. This Article seeks to do just that. If the U.S. can comfortably release individuals from criminal detention while mitigating concerns about flight risk and danger to the community, then surely it can do the same for civil immigration detention. In fact, since individuals held in immigration detention are held for pending civil matters rather than criminal charges, the argument here is even stronger.[9]

César Cuauhtémoc García Hernández provides the guiding text for the abolition of immigration detention in his recent work *Migrating to Prison*. In it, he lays out the theoretical framework and logical underpinnings to support abolition. García Hernández admits that there is not yet a clear plan or path forward for what might successfully take the place of immigration detention. However, he does note that successful programs so far have used a "straightforward cocktail of support to increase compliance: individualized education and legal representation combined with

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7. *See* Shane Bauer, *How Conservatives Learned to Love Prison Reform*, MOTHER JONES (Mar./Apr. 2014), https://www.motherjones.com/politics/2014/02/conservatives-prison-reform-right-on-crime/ (describing the "Right on Crime" prison reform initiative led by fiscal conservative Newt Gingrich).

8. *President Donald J. Trump is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/; First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

9. *See, e.g.*, Peter L. Markowitz, *Abolish ICE . . . and Then What?*, YALE L.J.F. 130, 141 (2019) ("There are large categories of undocumented immigrants who are both potentially subject to deportation and eligible to obtain lawful status. . . . Immigration authorities have a choice between two enforcement pathways: punish the noncompliance through deportation, or allow the individual to come into compliance by applying for permanent residence."). Markowitz also contrasts the immigration approach of ICE with that of other civil enforcement agencies such as OSHA, the FDA, and the IRS, which have favored compliance over punishment. *Id.* at 138–41.

community collaboration."[10] This Article hopes to build upon that framework by advocating for universal representation as an initial step toward abolition.

This Article utilizes Derrick Bell's convergence theory[11] to demonstrate both that immigration detention abolition is possible and explain practically how it might be accomplished. The proposal is that individuals should be provided with free, public-defender style representation in lieu of being detained during the pendency of their immigration hearings. All funding that currently goes toward immigration detention would be reallocated to local legal nonprofits and public defender offices. These organizations would then provide legal representation to those individuals who would have otherwise been detained by Immigration and Customs Enforcement (ICE) during the pendency of their immigration proceedings. This reallocation works to satisfy the purported rationale for immigration detention: ensuring that individuals appear for their proceedings. Functionally, it eliminates the cruel apparatus of immigration detention, which separates families and harms those who are subject to jail-like conditions for a lack of civil status. Importantly, providing legal representation is a more cost-effective way to satisfy the government's goal of having individuals appear at their hearings. This fiscal argument provides a rationale that can span ideological differences. Last, legal representation results in an important positive externality: individuals who are represented by a skilled legal representative are significantly more likely to obtain relief that is available to them. While not adhering to a strict abolitionist ethic, this proposal works to further the goals of abolition by removing funding from a harmful system that targets individuals of color and reallocating it to local organizations that are tailored to support those same communities as they confront a complex and confusing system.

Anticipated critiques of this Article revolve around the idea that a universal representation program would result in complicity in a system that is attempting to exclude and remove massive numbers of immigrants from the United States. It is true that this practical approach does not align exactly with all the goals and methods put

10. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON 153 (2019).

11. Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–33 (1980) (arguing that policy changes are possible only when the proposed outcome of those policy changes align with the interests of the majority white population).

forth by many abolition scholars.[12] However, this Article's proposal aims to reach one specific goal of abolition: reducing or completely eliminating the number of people who are in immigration detention.[13] Therefore, it clearly furthers the decarceral goals of abolition. Moreover, it comports with the idea of tearing down one structure and building up a different supportive structure in its place. Here, all funding that goes toward supporting immigration detention would instead by reallocated to local non-profits and public defender offices. This funding shift fits within the abolition ethic, as does the ultimate outcome of the proposal: the elimination of immigration detention. Defunding the current institution and reallocating funds to a new system more within the control of the local communities affected is exactly the solution called for by the abolition movement.

Part I of this Article outlines and broadly describes the harm of immigration detention, both to the individuals who are confined and to their families and communities who suffer from their absence. Part II briefly articulates the premise of immigration detention and its alleged purpose. Part III describes one response that has been used to counteract and alleviate the harm caused by immigration detention: the implementation of successful universal representation programs in various local non-profit and public defender organizations. Part IV confirms that, despite the benefits of universal representation programs in immigration detention centers, and apart from other proposals for how to reduce the harm of immigration detention, the goal should still be abolition of the immigration detention system. Part V proposes that universal representation itself can be used as a practical step toward abolition, specifically by relying on convergence theory and utilizing a broadly appealing argument about fiscal sensibility. In conclusion, universal representation is itself a potential

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12. *See* Allegra McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 173–78 (2012) (echoing the work of Ruth Wilson Gilmore, Angela Davis, and many others, proposing a re-evaluation of the policy goals of immigration policy and suggesting a dedicated focus toward economic development and the recognition of the human rights and inherent dignity of all persons); s*ee also* McLeod *supra* note 3, at 1161 (explaining how these principles relate back to the prison abolition movement).

13. *See, e.g.*, Dianne Solis, *Immigration Detention Centers Are Emptying Out as the U.S. Cites Coronavirus for Removals*, DALLAS MORNING NEWS (Oct. 2, 2020, 12:47 PM) https://www.dallasnews.com/news/immigration/2020/10/02/immigration-detention-centers-are-emptying-out-as-the-us-cites-coronavirus-for-deportations/?utm (discussing the drastic pandemic-related reduction of persons detained by ICE); *see also* Denise L. Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 182–83 (2016) (finding that release from immigration detention often depends on arbitrary factors such as available bed space).

first practical step toward abolition that can find support in both liberal and conservative audiences.

I. IMMIGRATION DETENTION IS HARMFUL

For decades, the perception of immigration detention as a non-punitive, civil measure to ensure attendance at future immigration hearings has persisted. However, its status as "non-punitive" has been rightfully critiqued.[14] Regardless of whether it is intended to be punitive or not, immigration detention is harmful on a broad scale. It separates families, imprisons asylum seekers, and subjects a massive number of people—including U.S. citizens[15]—to dehumanization. That so many individuals are deprived of their liberty, and arguably due process, while under the guise of a non-punitive civil process is troubling.

Immigration detention centers are prisons.[16] Despite their civil legal status, and notwithstanding attempts by the Trump administration to label detention centers in a cheery fashion,[17] immigration detention causes real harm.[18] It is physically harmful because of its harsh conditions, lack of adequate physical and mental health care, and, most recently, its ability to quickly spread contagious disease among an already vulnerable population.[19]

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14. *See* Annie Flanagan, Note, *Resisting Racialized Immigration Enforcement through Community Bond Funds*, 11 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 45, 50 (2019) (describing similarities between civil immigration detention and criminal incarceration); *see also* Danielle C. Jefferis, *Private Prisons, Private Governance: Essay on Developments in Private-Sector Resistance to Privatized Immigration Detention*, 15 NW. J.L. & SOC. POL'Y. 82, 82–97 (2019).

15. *See, e.g.*, Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 days. He's Not the Only One Who Had to Prove his Citizenship*, L.A. TIMES (Apr. 27, 2018), https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html (describing the stories of nearly 1,500 individuals who had been arrested by ICE and then later released based on evidence that DHS admitted "tended to show that the individual may, in fact, be a U.S. citizen").

16. Altaf Saadi et al., *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH AND HUMAN RIGHTS J. 187, 189 (2020) ("The immigration detention system . . . operates under civil law. . . . [D]etention conditions are often like those of prisons or jails.").

17. Maria Sacchetti, *ICE's Chief Called Family Detention 'Summer Camp.' Here's What it Looks Like Inside.*, WASH. POST (Aug. 25, 2019, 8:23 AM), https://www.washingtonpost.com/immigration/the-head-of-ice-called-family-detention-summer-camp-heres-what-it-looks-like-inside/2019/08/25/8f32609e-c679-11e9-b5e4-54aa56d5b7ce_story.html.

18. Saadi et al., *supra* note 16, at 189 (describing reports of civil- and human-rights abuses, including preventable in-custody deaths).

19. *See, e.g.*, Solis, *supra* note 13.

Immigration detention separates family members, otherizes and dehumanizes[20] those who are held there for any period of time, and is ultimately a costly burden on the U.S. government and its taxpayers. Its existence further mars the United States' weakened reputation for fairness and justice. Its elimination is a necessary measure. Abolition is possible and achievable. The first practical step in that process could be the assignment of counsel in removal proceedings. But first, a discussion of immigration detention's harm is necessary.

A. Conditions of Detention: Harm to Those Who Are Detained

Abuses in detention centers are frequent.[21] The effect on the mental health of detainees is well-documented. A report exploring the psychological effects of detention noted that, "[t]he nature of immigration detention, compounded by the uncertainty of its length, is regarded as a major contributing factor to mental deterioration, despondency, suicidality, anger, and frustration."[22] This "systematic review of the mental health implications of detaining asylum seekers found that studies consistently supported an association between the experience of immigration detention practices and poor mental health."[23] Such a result is unsurprising given that many individuals held in immigration detention centers are pursuing asylum cases, meaning they are actively fleeing harm in their home countries.[24] Many may have suffered a similar fate of confinement, mistreatment,

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20. *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349–50 (2014) (arguing that, in the context of the "war on drugs" beginning in the 1980s, both "immigration and criminal confinement were intended to stigmatize and penalize those who engage in drug activity").

21. *See, e.g.*, Andrea Castillo & Paloma Esquivel, *California Police Got Hundreds of Calls About Abuse in Private ICE Detention Centers. Cases Were Rarely Prosecuted*, L.A. TIMES (Oct. 18, 2020, 8:00 AM), https://www.latimes.com/california/story/2020-10-18/california-police-immigration-detention-abuse?utm; *see also* Tanvi Misra, *Immigrants Punished for Not Cleaning Detention Center, Court Papers Suggest*, ROLL CALL (Oct. 14, 2020, 3:21 PM), https://www.rollcall.com/2020/10/14/immigrants-punished-for-not-cleaning-detention-center-court-papers-suggest/.

22. Kalina M. Brabeck et. al., *Immigrants Facing Detention and Deportation—Psychological and Mental Health Issues, Assessment, and Intervention for Individuals and Families*, *in* NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 167, 171 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

23. *Id.* at 171.

24. Marouf, *supra* note 4, at 2151 ("For people fleeing human rights violations in their own countries, the experience of being detained can inflict particularly severe emotional harm, re-traumatizing them and exacerbating existing mental illnesses, such as posttraumatic stress disorder, anxiety, and major depression.").

and dehumanization before coming to the United States. Finding themselves in identical circumstances after making an arduous trek to seek safety, it is no wonder that many experience negative mental health effects from detention.

Though detention centers are required to adhere to certain standards, they regularly fail to do so.[25] In a recent report by Department of Homeland Security's (DHS) own Office of the Inspector General, all four inspected facilities revealed violations of ICE's own standards, which are typically considered lax. Immediate risks or egregious violations of detention standards at facilities in Adelanto, California and Essex County, New Jersey included nooses in detainee cells, overly restrictive segregation, inadequate medical care,[26] unreported security incidents, and significant food safety issues.[27] This neglect and inadequacy in detention centers has resulted in the frequent deaths of detainees. In the 2019–2020 fiscal year, 17 immigrants died while in ICE custody.[28] Over 200 detainees have died in ICE custody since 2004.[29] A recent report found that many of these deaths are the result of failing to adequately evaluate and record

25. *See* OFF. OF INSPECTOR GEN., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019); *see also* Nick Miroff, *Immigrants Held at Md. Jail Were Excessively Strip-Searched, According to DHS Inspector General*, WASH. POST (Oct. 30, 2020, 10:10 PM) ("Guards at a Maryland jail strip-searched immigrant detainees after they met with their attorneys, attended chapel or went anywhere outside their dormitory area, a practice that federal authorities say was excessive and violated U.S. detention policies . . . .").

26. *See* José Olivares & John Washington, *"A Silent Pandemic": Nurse At ICE Facility Blows The Whistle on Coronavirus Danger: Irwin Detention Center, run by LaSalle Corrections, has refused to test detainees and underreported Covid-19 cases, the nurse says*, THE INTERCEPT (Sept. 14, 2020, 10:24 AM), https://theintercept.com/2020/09/14/ice-detention-center-nurse-whistleblower/ (describing allegations that hysterectomies were regularly performed on detainees without their consent); *see also* Letter from Project S. Inst. for the Elimination of Poverty & Genocide to Joseph V. Cuffari, Inspector Gen., Off. of the Inspector Gen. (Sept. 14, 2020), https://www.scribd.com/document/476013004/OIG-Complaint (same).

27. *See* OFF. OF INSPECTOR GEN., *supra* note 25 (detailing detention facility violations including expired food, improper segregation, failure to provide recreation, inadequate bathrooms, inadequate clothing and hygiene, and failure to allow in-person visitation).

28. Daniella Silva, *17th Immigrant Dies in ICE Custody, Twice as Many as Last Fiscal Year*, NBC NEWS (Aug. 7, 2020, 12:19 PM), https://www.nbcnews.com/news/us-news/17th-immigrant-dies-ice-custody-twice-many-last-fiscal-year-n1236152.

29. *8 People Died in Immigration Detention in 2019, 193 Since 2004*, CATO INST. (Jan. 8, 2020), cato.org/blog/8-people-died-immigration-detention-2019-193-2004; *see also Detainee Death Reporting*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detainee-death-reporting (last updated Dec. 14, 2021).

patient care, leading to unnecessary death and suffering.[30] ICE regularly obfuscates[31] and attempts to vilify those who perish in its custody.[32]

Another major concern about housing many individuals in civil custody is the exposure to various pathogens and illnesses. This has been made manifest by the uncontrolled spread of COVID-19 in several ICE facilities.[33] A recent study found that "[i]mmigrants detained by [ICE] are at increased risk of contracting COVID-19 due to over-inflated jail populations, decreased access to medical care, and inadequate sanitation and hygiene."[34] An ICE detention center in Farmville, Virginia had an outbreak so severe that nearly every detainee tested positive for the virus, and a federal lawsuit prevented the transfer in or out of any additional individuals.[35] Such outbreaks

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30. Darius Tahir, *Black Hole of Medical Records Contributes to Deaths, Mistreatment at the Border*, POLITICO (Dec. 01, 2019, 6:52 AM), https://www.politico.com/news/2019/12/01/medical-records-border-immigration-074507.

31. *See* AM. C.L. UNION ET AL., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 1–28 (2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf ("[E]ven in the eight cases where [ICE Office of Detention Oversight] death reviews concluded that violations of ICE medical standards contributed to people's deaths, ICE's deficient inspections system essentially swept those findings under the rug.").

32. *See, e.g.*, Press Release, U.S. Immig. & Customs Enforcement, Canadian Man in ICE Custody Passes Away in Virginia (Sept. 21, 2020), https://www.ice.gov/news/releases/canadian-man-ice-custody-passes-away-virginia (exhibiting ICE's inclusion of a deceased detainee's criminal convictions in its press release).

33. The Seton Hall University School of Law Immigrants' Rights and International Human Rights Clinic noted the spread of COVID-19 in a recent report.

> As of April 17, 2020, [ICE] reported that 124 detainees in its custody, across at least 25 detention centers, had tested positive for COVID-19, as well as 30 detention center employees and personnel." Importantly, "ICE does not count detainees being treated at hospitals or third-party contractors working at ICE facilities in reporting confirmed cases, nor does ICE report how many people at its facilities have been tested or are being monitored for the virus.

HAFSA S. MANSOOR & KATHERINE COMLY, A LONG TIME COMING: HOW THE IMMIGRATION BOND AND DETENTION SYSTEM CREATED TODAY'S COVID-19 TINDERBOX 2 (2020), https://law.shu.edu/docs/publications/clinics/how-immigration-bond-and-detention-system-created-todays-covid-19-tinderbox.pdf.

34. *Id.* at 1.

35. Antonio Olivo, *House Committee Seeks Records in Coronavirus Outbreak*

are easily preventable.[36] In fact, "[a] significant cause of the present COVID-19 threat to immigrant detainees is the overcrowding of detention centers [brought on] by the decades of immigration and bond policies that . . . use[] a criminal carceral response to civil immigration concerns."[37] ICE demonstrates either a staggering level of unpreparedness or else complete negligence in its approach to this issue. Despite concerns that detention would be a tinderbox, ICE took few precautions in its facilities and engaged in a reckless number of transfers which resulted in actively spreading the contagion. A report found that in "the third week of March, ICE reported that there were no 'confirmed' cases of COVID-19 in its detention system," despite the fact they were not actually testing but by June 15, ICE reported that 2,059 detainees had tested positive.[38] While ICE has released a significant number of detainees it considered vulnerable to COVID-19 and its effects, [39] this begs the question: Why was it necessary for these individuals to be in ICE detention in the first place?[40]

B. Harm to Families

Immigration detention is also harmful to families. Detention, by nature, separates an individual from larger society and, frequently, from close family members and relations. The Trump administration brought this issue to the forefront with its family separation policies.

Inside Virginia Immigrant Detention Center, WASH. POST (Aug. 7, 2020), https://www.washingtonpost.com/local/virginia-politics/house-committee-seeks-records-in-covid-19-outbreak-inside-virginia-immigrant-detention-center/2020/08/07/9a8186d6-d8da-11ea-aff6-220dd3a14741_story.html.

36. *See, e.g.*, Antonio Olivo & Nick Miroff, *ICE Flew Detainees to Virginia so the Planes Could Transport Agents to D.C. Protests. A Huge Coronavirus Outbreak Followed*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html?arc404=true&_=ddid-2-1599836400.

37. MANSOOR & COMLY, *supra* note 33, at 6.

38. DONALD KERWIN, CTR. FOR MIGRATION STUD., IMMIGRANT DETENTION AND COVID-19: HOW THE US DETENTION SYSTEM BECAME A VECTOR FOR THE SPREAD OF THE PANDEMIC 3 (2020), https://cmsny.org/publications/immigrant-detention-covid/.

39. Matt Katz, *ICE Releases Hundreds Of Immigrants As Coronavirus Spreads in Detention Centers*, NPR (Apr. 16, 2020, 12:21 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835886346/ice-releases-hundreds-as-coronavirus-spreads-in-detention-centers.

40. *See* Heroes Act, H.R. 6800, 116th Cong. § 191205 (as passed by House, May 15, 2020) (requiring DHS to review the immigration files of all persons during the current public health emergency to assess the need for continued detention, and requiring ICE to prioritize non-mandatory detainees for release); *see also* KERWIN, *supra* note 38.

However, family separation is an ongoing issue for children, partners, and other family members who have a loved one in detention.[41] Separation can result in psychological trauma, financial stress, poor physical health, and other disruptions in the daily lives of families in the United States. Importantly, these detention policies affect many mixed-status families, meaning that U.S.-citizen children and partners of detained individuals were harmed because of Trump-era immigration detention policies.[42] Such harm is unnecessary and can be alleviated through a process of abolition.

As mentioned above, the most illustrative example of harm to families was the Trump Administration's decision in the summer of 2018 to criminally charge adults with illegal entry into the United States, and as a result, funneling them through a system which resulted in the mass separation of nearly 3,000 children from their parents or caregivers.[43] While the summer of 2018 resulted in outcry from the public and an eventual cessation to this policy, a lawsuit filed by the American Civil Liberties Union discovered that these separations had actually begun in July 2017.[44] Moreover, a current analysis shows that, during the Trump Administration, over 5,400 children were separated from their families.[45] While this issue has risen to prominence in the public view, the harm inflicted on families is much broader in its reach.

Another example of how family separation might occur in an equally harmful way is to look at the August 7th, 2019, workplace raid

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41. Marouf, *supra* note 4, at 2154 ("Approximately 4.5 million U.S. citizen children have a parent who is in the country without legal immigration status. These children live in a state of constant uncertainty about their lives.").

42. *Id.* ("The financial stress that detention inflicts on a family can also lead to instability in housing and in caregiving arrangements, which further exacerbates emotional harm.").

43. STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 7, 18–20 (2020); Associated Press, *More than 5,400 Children Split at Border, According to New Count*, NBC NEWS (Oct. 25, 2019, 4:58 AM), https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new- count-n1071791; *see also* Julia Ainsley & Jacob Soboroff, *Lawyers say they can't find the parents of 545 migrant children separated by Trump administration*, NBC NEWS (Oct. 21, 2020, 5:52 AM), https://www.nbcnews.com/politics/immigration/lawyers-say-they-can-t-find-parents-545-migrant-children-n1244066?utm (exemplifying the egregiousness of this policy through the fact that, as of October 21, 2020, nearly 545 children had still not been reunited with their parents).

44. *Family Separation Under the Trump Administration—A Timeline*, S. POVERTY L. CTR. (June 17, 2020), https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline.

45. *See* Associated Press, *supra* note 43.

of a local chicken processing plant in Morton, Mississippi. This resulted in the arrest of 342 people and was part of a larger raid throughout Mississippi in which a total of 680 people were arrested.[46] While the actual arrests of the plant workers were incredibly traumatic,[47] the fallout from this operation has led to diffuse trauma throughout the small community in Mississippi. One of the workers recounted how her three children remained at home while she was in ICE detention for forty-nine days, waiting for a bond before being released. She explained that her 6-year-old son struggles the worst, saying "[w]henever I leave the house, my little boy worries if I'll come home[.]"[48] In a study of similar workplace raids, approximately 500 children were left in the care of others with little to no information on the whereabouts of their parents.[49] Researchers have found that this "sudden disappearance of a family member" has traumatic effects on migrants who have "experienced state-sponsored kidnapping and murders in their countries of origin . . . ."[50] The long-term effects on the children "include[] anxiety, withdrawal, anger/aggression, clinginess, developmental difficulties (e.g., speech delay), and behavioral and academic decline at school."[51]

Research has shown that unauthorized migrants experience great stress as they attempt to craft a life for their families in the United States without work authorization. In fact, "parent legal status is a predictor of multiple adverse outcomes for children, including emotional well-being," and "[c]hildren of unauthorized migrants are more likely to report anxiety, fear, sadness, post-traumatic stress symptoms, anger, and withdrawal."[52] This stress extends to the other family members of detained immigrants.[53] Separation creates anxiety

46. *See* Ari Shapiro, *Months After Massive ICE Raid, Residents of a Mississippi Town Wait and Worry*, NAT'L PUB. RADIO (Nov. 17, 2019), https://www.npr.org/2019/11/17/778611834/months-after-massive-ice-raid-residents-of-a-mississippi-town-wait-and-worry.

47. *See id.* (describing one worker's fear that the ICE agents were terrorists following a recent racially-motivated mass shooting).

48. *Id.*

49. Kalina M. Brabeck, Katherine Porterfield & Maryanne Loughry, *Immigrants Facing Detention and Deportation: Psychosocial and Mental Health Issues, Assessment, and Intervention for Individuals and Families, in* THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 172 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

50. *Id.* at 172–73.

51. *Id.* at 173.

52. *Id.* at 170.

53. *See, e.g.*, Chris Outcalt, *When a Family Separation Becomes Permanent*, ATLANTIC (Aug. 2, 2020), https://www.theatlantic.com/politics/archive/2020/08/ice-

and uncertainty leads to stress. The data is clear that immigration detention is harmful to families.

C. Otherization

Another harmful effect of immigration detention is that it is supported by and sustains the otherization of non-white individuals.[54] While immigration detention extends back to the origins of immigration law itself, and past administrations are certainly not without blame, the Trump-era policy of widespread immigration detention has bolstered the notion that, in general, people of color should be viewed with skepticism and disdain.[55] This question of who belongs to a society and who can demonstrate their membership in that society is not a new one.[56] However, the Trump administration's many policy choices, including the decision to eliminate enforcement priorities in immigration proceedings, has created space for the continued marginalization of our most vulnerable populations. Finally, the rhetoric endorsing these policies has invited our most abhorrent perspectives about tribalism and fear, while simultaneously promoting the theory that non-white individuals and most immigrants are responsible for many perceived ills and wrongdoings within American society.[57]

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family-separation-death/614335/ (describing the story of Arri Woodson-Camara, who committed suicide in April 2019 after being separated from her detained husband for 265 days).

54. *See* Kelly Lytle Hernández, *Amnesty or Abolition: Felons, Illegals, and the Case for a New Abolition Movement*, BOOM J. CALI., Winter 2011, at 54, 65 ("Since the era of emancipation, the rise of immigration control and mass incarceration has created a racialized caste of outsiders within the United States.").

55. *See* ELIZABETH BROWN & GEORGE BARGANIER, RACE AND CRIME: GEOGRAPHIES OF INJUSTICE 333 (2018) ("Prisons are, in effect, systems of dehumanization, working to exclude their inhabitants from the category of human."); *see also The Discriminatory and Broken Criminal Justice System Has Cascading Immigration Consequences*, IMMIGRANT JUST. NETWORK (2018), https://www.ilrc.org/sites/default/files/resources/criminal_racial_justice_backgrounder_final1.pdf ("Although only 7% of non-citizens are black they represent 20% of people in deportation proceedings on criminal grounds.").

56. *See* Hernández, *supra* note 54, at 57 (noting that "the foundation for the rights and status of persons coming to be known as 'illegal aliens' in the United States was established" in two late-nineteenth century Supreme Court decisions: *Ping v. United States*, 130 U.S. 581 (1889) and *Fong v. United States*, 149 U.S. 698 (1893)).

57. *See generally* NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (2014) (discussing the history of racialized scripts and the reconstitution of these scripts for application to newcomers to the United States).

Otherization is a philosophical theory that describes the centering of the individual or collective self and ascribes undesirable characteristics to those who fall outside of the centered group.[58] This results in the creation of a "subaltern"—a group that is disfavored and traditionally subjugated or subordinate in some way to the centered group.[59] This philosophical approach creates unity by dehumanizing others through the creation of an "in group" and an "out group," best displayed by President Trump's statements shortly after his election, describing the alleged danger that immigrants present to U.S. citizens: "They come from Central America. They're tougher than any people you've ever met. . . . They're killing and raping everybody out there. They're illegal. And they are finished."[60] As Emily Ryo explains, "these and similar remarks by Donald Trump have . . . helped propel him onto the national stage by activating people's deep-seated fears about immigrants."[61] She notes that, "[i]nvocations of immigrant criminality play a powerful role in U.S. politics despite the well-established empirical evidence that shows that immigrants, including undocumented immigrants, are significantly less likely to engage in crime than the native-born population."[62]

This rhetoric is based on the ideological formations of fear and has been the cause for an increase in immigration detention.[63] It is a manifestation of the fact that the majority of white Americans cannot imagine themselves in the shoes of immigrants.[64] This results in, at least, a lack of empathy and, at most, angry antagonism. The

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58. *See e.g.,* Allison Mountz, *The Other*, *in* KEY CONCEPTS IN POLITICAL GEOGRAPHY 328 (Carolyn Gallaher et al. eds., 2009); OXFORD COMPANION TO PHILOSOPHY, 637 (Ted Honderich ed., 1995).

59. *See e.g.,* García Hernández, *supra* note 2, at 288–89 (describing parallels between the ongoing stigmatization of migrants of color and the post-9/11 targeting of Arab and Muslim populations by the FBI and INS).

60. Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227, 227 (2019) (citations omitted).

61. *Id.* (citations omitted)

62. *See id.*

63. *See* ALINA DAS, NO JUSTICE IN THE SHADOWS, 162–63 (1st ed. 2020) (describing President Trump's characterization of an immigrant who unintentionally shot a woman as an "animal," and noting that such moments have "fueled the growth of America's crime-based deportation machine"); *see also* Jean Guerrero, *The Man Who Made Stephen Miller*, POLITICO (Aug. 1, 2020), https://www.politico.com/news/magazine/2020/08/01/stephen-miller-david-horowitz-mentor-389933 ("Fear is a much stronger and more compelling emotion . . . . Republicans should appeal to voters' base instincts.").

64. *See e.g.*, García Hernández, *supra* note 2, at 283–84 (contending that the vilification of immigrants is deep-rooted in America's racist attitudes toward minority populations).

dehumanization of migrants permits this otherization which in turn lays the groundwork for civil detention to become the monstrous thing that it is today.[65]

At this time, real harm is being perpetrated against real people under the guise of some hypothetical security measures that imagines and assigns terroristic ambitions to regular people. In reality, this system of detention inflicts actual terror against those same people. Claudia Rankine condensed this perspective neatly in her book *Citizen: An American Lyric* with the line:

> because white men can't
> police their imagination
> black men are dying.[66]

César Cuauhtémoc García Hernández discusses this sentiment in his book *Migrating to Prison*, saying "[w]e need to stop demanding that migrants be exceptional and instead embrace their ordinariness."[67] He encourages embracing the concept that migrants are "doing what people have done for millennia: moving from place to place in search of comfort, safety, adventure—all that makes life worth living."[68] García Hernández advocates that this ordinariness be extended to the fact that, "[l]ike all of us, migrants mess up."[69] He continues by confirming that areas with large migrant populations are known for lower rates of both violent and property crimes, but also shares that, "[s]ome migrants steal, and others hurt people. Denying that reality is to hold migrants to an impossibly high bar."[70] Moreover, he says, "[p]ointing to exceptionally talented and saintly migrants as a model is a recipe for lumping mere mortals—that's most of us—into the category of undesirable arrivals."[71] His solution? "Let's stop sanctifying migrants and embrace the profound ordinariness that makes migrants, like citizens, human."[72] As Morgan Parker states in

65. *See id.* at 286 ("The rhetoric framing immigration prisoners as criminals disassociates prisoners from those who may influence their wellbeing, leading to treatment of confined migrants as dangerous and disposable.").

66. *See* CLAUDIA RANKINE, CITIZEN: AN AMERICAN LYRIC 134–35 (2014).

67. *See* GARCÍA HERNÁNDEZ, *supra* note 10, at 157.

68. *Id.* (providing three examples from the Abrahamic traditions: "In the Christian tradition, trekking across the Earth begins with Adam and Eve's fall from grace. In Islam, it started with Muhammed's search for safety. In Judaism, it is central to the Jewish people's survival.").

69. *Id.* at 160.

70. *Id.*

71. *Id.*

72. *Id.*

her anthology of poems, "I do everything right just in case…. [but] I am a tree and some fruits are good and some are bad."[73] It is possible to avoid the pitfalls of veneration and otherization by simply empathizing and imagining oneself in the same position as those vilified by the Trump administration.

II. PREMISE OF IMMIGRATION DETENTION

The current status quo of immigration detention is perplexing. Over the past several decades, there has been an exponential increase in the number of individuals held in immigration detention centers in the United States.[74] In 1955, there were only four individuals held in immigration custody that were seeking entry into the U.S.[75] In 2019, the average U.S. immigrant detainee population was approximately 50,000 people.[76] In 2020, the detained population was under 20,000 people and falling, largely due to self-imposed or judicially-required mandates to stop the spread of COVID-19 in detention facilities.[77] The premise of immigration detention is that it is necessary to ensure the future attendance of individuals at their removal proceedings and, in some cases, that it is necessary to confine certain individuals because they present a danger to the community.[78] But, if that is the ultimate purpose, there are two major problems: first, the current custody

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73. MORGAN PARKER, THERE ARE MORE BEAUTIFUL THINGS THAN BEYONCÉ 4 (2017).

74. *See* 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, 959–61 (2019).

75. Ana Raquel Minian, *America Didn't Always Lock Up Immigrants*, N.Y. TIMES (Dec. 1, 2018), https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html; *see also, e.g.*, Herbert Brownell, U.S. Att'y Gen., Address at American Council of Voluntary Agencies Committee on Migration and Refugee Problems: Humanizing the Administration of the Immigration Law 2 (Jan. 26, 1955) ("Under our new policy, aliens found to be unlawfully in the United States are now released under conditional bond or parole or supervision while their deportation proceedings are pending so long as they appear to be deserving of their personal liberty.").

76. Solis, *supra* note 13.

77. *See id.*; *see also* Rebecca Plevin, *Judge Orders ICE to Reduce Population at Adelanto Detention Center Amid COVID-19 Outbreak*, DESERT SUN (Oct. 15, 2020), https://www.desertsun.com/story/news/2020/10/15/judge-orders-ice-reduce-population-adelanto-detention-center-amid-covid-19-outbreak/3667578001/.

78. *See* Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1488 (2012) (arguing that immigration detention has served "three historical purposes: (1) to ensure the compliance of potential flight risks, (2) to neutralize potential national security threats, and (3) to control future domestic crime").

determination regime is ill-equipped to address those concerns and is problematic in its lack of consistency; and second, there are more efficient and economical ways to address the two purported policy concerns. This section provides a brief explanation of how the current detention system functions, while critiquing the detention regime for its inefficient, inhumane, and biased results.

A. Overview

Immigration detention has not always existed in the way that it does now.[79] As stated above, immigration detention began as an allegedly non-punitive way to ensure that an individual would attend future immigration hearings.[80] It evolved to address concerns about dangers to national security and, eventually, a new standard was created that required an individualized determination about a detainee's dangerousness to be made prior to release.[81] However, these factors do not seem to be dispositive one way or the other when drawing a conclusion about who will be detained by ICE or whether ICE will release a person from their custody. Under scrutiny about the spread of COVID-19 in its facilities, ICE has released nearly 60% of its detained population, raising an alarming question: Why were those more than 30,000 people in detention to begin with? But these extralegal considerations are not new. In fact, ICE has both detained and released individuals from immigration detention solely based on the available bed space in its facilities.[82] Apart from the fact that immigration detention is frequently divergent from its purported rationale, even when it does function in the way that it is intended it produces problematic results.

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79. *See* Flanagan, *supra* note 14, at 49 (describing the progression of U.S. immigration policy from the Immigration and Nationality Act of 1952 to the Anti-Terrorism and Effective Death Penalty Act of 1996).

80. *See* Raquel Minian, *supra* note 75 ("Detention was reserved for migrants who were deemed likely to abscond or who posed a threat to national security or public safety.").

81. *See* HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 12 (2019) (discussing the implementation of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, which required an immigration detainee to demonstrate that his or her release would not "pose a danger to property or persons" and that he or she was "likely to appear for any future proceeding").

82. *See* Gilman, *supra* note 13, at 182.

B. Pre-hearing Detention, Mandatory Detention, and Abolition Applicability

This Article seeks to explain how immigration detention could be eliminated. In order to do so, it is important to briefly explain the different ways in which people are held in immigration detention. This Article focuses primarily on those individuals being held in pre-hearing detention, meaning that a decision has yet to be made on the merits of their cases, and there is an avenue by which he or she could be permitted to remain in the United States. The two types of individuals held in pre-hearing detention are: (1) Those subject to mandatory detention,[83] and (2) those subject to discretionary detention under Immigration and Nationality Act (INA) § 236 in which ICE has decided to deny bond (or impose a prohibitively expensive bond), thus preventing a non-citizen's release from immigration detention.[84] Individuals may be held in mandatory detention for a number of reasons, but scholars have continued to question the purpose of mandatory detention, its rationale, and the mechanisms through which it is effectuated.[85] For example, "arriving aliens,"[86] who are seeking relief from removal through a fear-based application, such as asylum, are typically eligible for release only at

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83. *See e.g.*, Marouf, *supra* note 4, at 2146–47 (critiquing DHS's interpretation of provisions of the Immigration and Nationality Act relating to mandatory detention).

84. See Gilman, *supra* note 13, at 166 for an incredibly helpful chart detailing all of the different ways that an individual may end up in immigration detention during the pendency of their removal proceedings. Other scholars have addressed the harm imposed by mandatory detention and have advocated for remedies to prevent such harm. *See, e.g.*, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008) (exploring the tension between the firmly established civil label on immigration proceedings and the contrary experience of people subject to proceedings); Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533, 543 n.60 (2014) ("The criteria for mandatory detention, such as the determination of an 'aggravated felony' or 'crime involving moral turpitude,' are extremely complicated, and can encompass minor conduct such as simple drug possession or subway turnstile jumping.").

85. *See* Marouf, *supra* note 4, at 2146–47. *See generally* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010) (skeptically discussing the purpose of mandatory detention); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody"*, 48 U. MICH. J.L. REFORM 879 (2015) (same).

86. This term, "arriving aliens," is used in the statute. While the term "alien" is both dehumanizing and linguistically inarticulate, it is used here for the sake of familiarity among immigration scholars and to conform with the vernacular of the statute.

ICE's discretion through a process known as "parole."[87] They are primarily detained under § 235(b)(1) which requires their detention[88] but permits parole if the individual's release is in the public interest—that is, they are neither a flight risk nor a danger to the community.[89] Individuals held for discretionary detention are detained under INA section 236.[90] They are first evaluated by ICE to determine whether they are a flight risk or a danger to the community, and if denied bond or release, they can request a review by an immigration judge through a custody redetermination hearing.[91] Regardless of how an individual is detained, a government agency, whether the Department of Homeland Security or the Department of Justice, through immigration judges, is typically able to grant release when it deems it appropriate.

While many scholars have written about how immigration detention is, in fact, punitive, this Article will, despite many misgivings, assume the premise that the Supreme Court and other

87. *See* Gilman, *supra* note 13, at 168 n.32 and accompanying text.

88. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal[.]"); 8 C.F.R. § 235.3(b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge [IJ], the alien shall be detained."); 8 C.F.R. § 235.3(b)(5)(i) (providing that an alien whose claim of being a U.S. citizen, lawful permanent resident, asylee, or refugee cannot be verified "shall be detained pending review of the expedited removal order under this section").

89. 8 C.F.R. §§ 212.5(b), 236.3(a). An alien's continued detention is not considered in the public interest if the alien establishes his or her identity to an immigration officer and shows that he or she presents neither a flight risk nor a danger to the community. *See also* 8 C.F.R. § 212.5(d) (providing that, in deciding whether to grant parole, agency officials may consider "relevant factors," including whether there are reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so; the alien's community ties such as close relatives with known addresses; and any agreement to reasonable conditions such as periodic reporting requirements).

90. 8 C.F.R. §§ 236.1–236.6; *see also* Marouf, *supra* note 4, at 2148 ("[As of 2015,] [t]wo-thirds of the people in immigration detention (25,000 out of 37,000) do not have a final order of removal, which means that they may ultimately be allowed to remain in the United States. Of these 25,000 individuals, approximately 15,000 have no criminal record whatsoever.").

91. 8 C.F.R. § 236.1(d). Under Subpart A of Section 236, an individual must establish to the satisfaction of the immigration judge and the Board of Immigration Appeals that he or she does not present a danger to property or persons. 8 C.F.R. § 236.1(c)(3); *see also, e.g.*, *In re* Adeniji, 22 I. & N. Dec. 1102 (B.I.A. 1999); *In re* Guerra, 24 I. & N. Dec. 37 (B.I.A. 2006).

judicial bodies have so far asserted—that immigration detention is civil in nature, and that its sole purpose should be to ensure attendance at future hearings or to prevent harm to the community.[92] In both decisions about whether to retain an individual in its custody, ICE is supposed to make an individual determination about whether the person is: (1) a danger to the community, or (2) a flight risk. Therefore, to understand the detention regime, a brief explanation will be provided below about what considerations are taken into account when making a decision about dangerousness and flight risk. It should be noted that immigration judges only have review of ICE's decision regarding "bond redeterminations," which is when an individual is being discretionarily held under section 236. Parole denials are not reviewable outside of the agency, though blanket denials have been subject to scrutiny and litigation in the federal court system has resulted in some success in the form of review.[93] Regardless, ICE typically has a presumption of detention.[94] By statute, ICE is permitted to release an individual on their own recognizance, but such decisions are rare.[95] Instead, the most frequent

92. One additional concern about detention is that the current bond framework requires detainees to prove that they are neither a flight risk nor a danger to the community. 8 C.F.R. § 236.1(c)(3). This burden shift inverts the traditional paradigm used in criminal court proceedings. *See, e.g.*, Brito v. Barr, 395 F. Supp. 3d 135 (D. Mass. 2019) (showing how, in Massachusetts, the burden has shifted away from the detainees and back to the state). For a full critique of both this requirement and an argument for the shifting of burden to the government, see Class Action Complaint and Petition for Writ of Habeas Corpus, Miranda v. Barr, 463 F. Supp. 3d 632 (D. Md. 2020) (Civil No. 20-1110).

93. *See, e.g.*, Robert Moore, *US Immigration Officers Accused of Refusing Parole for Asylum Seekers*, THE GUARDIAN (Aug. 22, 2018), https://www.theguardian.com/us-news/2018/aug/22/ice-us-immigration-officers-accused-of-refusing-parole-for-asylum-seekers (describing a lawsuit against ICE arising from blanket denials of humanitarian parole). As a result of this lawsuit, many ICE field offices began conducting individualized parole reviews, and in some cases, granting parole, but with new and unorthodox conditions, such as an asylum seeker from Cuba who was granted parole but was required to pay a $10,000 bond before ICE would release her. Others are also being granted prohibitively expensive bonds. *See* Carmen Sesin, *'Abuse of Power': Asylum-Seekers, Advocates Decry New Use of High Bond Fees as Condition of Parole,* NBC NEWS (June 16, 2020), https://www.nbcnews.com/news/latino/abuse-power-asylum-seekers-advocates-decry-new-use-high-bond-n1231066.

94. Gilman, *supra* note 13, at 171–74 (describing how this process subverts the constitutional protections that are set in place for a similar bond process in the criminal justice system where "[l]iberty is the norm, and deprivation of freedom is the limited exception").

95. *Parole vs. Bond in the Asylum System*, HUM. RTS. FIRST (Sept. 5, 2018), https://www.humanrightsfirst.org/resource/parole-vs-bond-asylum-system ("Despite

path is for ICE to deny bond or issue a monetary bond, after which the individual who remains detained will then seek review from a judge.[96] Because immigration judge decisions are reviewable by the Board of Immigration Appeals (BIA), there is more clarity about why and how these decisions are made. Therefore, the question of what merits dangerousness or being a flight risk is necessarily limited here to the context of discretionary detention under section 236, but the arguments can again be more broadly applied in support of finding that the decision-making processes and analyses in these cases are frequently flawed, biased, and arbitrary.

C. Current Forms of Release from Immigration Detention Are Arbitrary and Biased

The guidelines for determining whether a respondent in removal proceedings is likely to be a flight risk or danger to the community rely on two cases: *In re R-A-V-P-* and *In re Guerra*.[97] A variety of factors may be considered and the immigration judge "may choose to give greater weight to one factor over others[.]"[98] *In re R-A-V-P-* also states that "[t]he Immigration Judge is in the best position to analyze these considerations[.]"[99] But is the immigration judge in the best position to do so? Such a broad variety of factors seem difficult to contextualize in the setting of an immigration bond hearing, which typically lasts only a few minutes. Moreover, the discretion provided to immigration judges does little to identify a standard for dangerousness or flight risk. In fact, research has shown that a variety of extrinsic factors including race, ethnicity, and gender guide judges' determinations in criminal proceedings.[100] For example, studies have shown that "Hispanic males face the least favorable set of outcomes throughout the pretrial release process and are the group most likely to be detained" in criminal proceedings.[101] In immigration proceedings, the result is that "[t]he odds of being deemed dangerous are about 68 percent higher for Central Americans than for non-

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having the legal authority to forgo setting a monetary bond, almost all immigration judges do—most likely due to a misconception that they must impose a bond.").

96. *Id.*

97. *In re* R-A-V-P-, 27 I. & N. Dec. 803 (B.I.A. 2020); *In re* Guerra, 24 I. & N. Dec. 37 (B.I.A. 2006).

98. *In re R-A-V-P-*, 27 I. & N. at 804–05 (quoting *In re Guerra*, 24 I. & N. Dec. at 40) (discussing *In re Guerra* and the factors affecting "dangerousness").

99. *Id.* at 804.

100. Emily Ryo, *Predicting Danger in Immigration Courts*, 44 LAW & SOC. INQUIRY 227, 231 (2019).

101. *Id.*

Central Americans."[102] In addition, "[d]etainees with an attorney at their bond hearings have about 47 percent lower odds of being deemed dangerous than detainees who lack legal representation."[103]

The federal government first established immigration detention during the pendency of civil immigration proceedings to ensure that a noncitizen would appear for future hearings.[104] This rationale aligned with historical methods that had been used in criminal-based proceedings. Eventually, the permissible purpose of immigration detention expanded and it became a potential tool to neutralize alleged "national security" threats.[105] This latter definition grew to encompass a broader category of people—those who were considered a "threat to the community."[106] This expansion and inclusion of the "dangerousness" category has been readily critiqued as a punitive measure that has been incorporated into a system that claims to be non-punitive and has been adjudged by the Supreme Court to be non-punitive.[107] Moreover, questions about whether such considerations are punitive, subjecting someone to detention after they have already been subject to the authority of the criminal court system raises major questions. This new system, created with the 1996 legislation,[108] resulted in the creation of a "crimmigration" system which continues to funnel migrants from one system to the other and builds support for the narrative that there is some correlation between immigrants and criminality, despite the fact that such a conclusion has been

102. *Id.* at 245–46 (discussing social and cognitive factors that may lead judicial decisionmakers to assign stereotypes or biases to Central Americans).

103. *Id.* at 241, 246 ("[L]awyers advance personal or individuating information about their clients that makes it difficult for immigration judges to engage in simple heuristics or categorical thinking about detainees as dangerous criminals."). The study also confirmed that the odds of being deemed "dangerous" increased significantly with each additional felony conviction or violent conviction. *Id.* at 241. However, this begs the question about whether dangerousness should be considered in a non-criminal bond hearing, when, presumably, the "criminal justice system" is specifically set up for such a purpose.

104. Kreimer, *supra* note 78, at 1488.

105. *Id.*

106. *Id.* at 1496–97.

107. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001); *see also* Lima-Marin & Jefferis, *supra* note 74, at 964 ("The law may hold that civil immigration confinement and punitive incarceration are distinct but, in the reality of the modern civil immigration detention regime, it is a distinction with no difference.")

108. García Hernández, *supra* note 20, at 1369–70.

frequently disproved.[109] Scholars continue to note the suspect nature of this interaction.[110]

It seems, then, that the question of dangerousness is influenced by biases and arbitrary inferences by immigration judges. Moreover, when someone is denied bond by an immigration judge despite being granted bond in their criminal proceedings, such an outcome is counterintuitive. The criminal court has access to witnesses and evidence, while an immigration judge typically relies on unfounded assertions by DHS attorneys and second-hand evidence. The complicated factoring system enumerated in *In re R-A-V-P-* supports the notion that judges are ill-equipped to make decisions based on dangerousness and flight risk.[111] Moreover, dangerousness is a determination best made in other courtrooms more proximate to the alleged acts that causes the person's arrest in the first place. Last, ICE is an enforcement arm that has demonstrated its desire to detain as many individuals as possible. Its own internal decision-making is difficult to trust as the annual average number of individuals detained continues to climb.

In conclusion, the problems with the dangerousness and flight risk factors are many. First, there is a presumption of detention. It is the immigrant's burden to prove that they will be neither a flight risk nor a danger to the community.[112] Second, proving a negative is difficult to do—thus it is easy to see why the BIA has created a contorted set of metrics to try to fill in the blanks. The perverse irony here is that it is the migrant's burden to prove a lack of dangerousness, while in the criminal context, the presumption for that individual is release and it is the state who must prove that the accused is a flight risk or a likely danger.[113] Last, dangerousness was not always a factor in bond proceedings. It was added as a factor in the mid-1990s in the throes of the "tough on crime" approach, but such an approach is

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109. *See, e.g.*, Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018) (Racial animus towards immigrants, first Chinese and then Mexican, explains in large part the impetus for the creation of the first immigration crimes."); Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2009), https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html.

110. Hernández, *supra* note 54, at 62 (tracing the historical roots of the linguistic and psychological shift from "migration control" to "crime control").

111. *In re* R-A-V-P-, 27 I. & N. Dec. 803, 804–05 (B.I.A. 2020) (stating that "[t]he Immigration Judge is in the best position to analyze these considerations[,]" and noting that the complexity of the factoring system belies its point).

112. 8 C.F.R. § 236.1(c)(8).

113. Gilman, *supra* note 13, at 192–94.

inappropriate here, especially as the nation moves in a bipartisan way to reduce the harmful effects of the "war on crime" movement. Given that there has been a shift in the criminal context regarding bond, it is appropriate that there would be a similar shift in immigration proceedings.

III. THE SUCCESS OF UNIVERSAL REPRESENTATION

One response to the harms of immigration detention has been the implementation of universal representation programs. This part of the Article will provide more detail about how some of these programs are already operating and will identify the additional benefits that result from having legal representation in immigration proceedings. Specifically, this section touches on the importance of representation regarding case outcomes. It then focuses on how the current programs might serve as a model for expansion and examines what funding measures would be necessary to expand the programs. Finally, the last portion of this section addresses potential critiques to universal representation and concludes that it can still be implemented as a successful policy notwithstanding those critiques.

A. Explanation of Universal Representation Programs

Systemic efforts have already been implemented in many localities and have proven the efficacy of this program.[114] The first of these programs, known as the New York Immigrant Family Unity Project (NYIFUP) began in 2013 as a pilot program, administered by the various public defender and legal aid offices throughout the boroughs.[115] Due to its overwhelming success, it was scaled up to represent nearly all detained individuals who are residents of New York City.[116] A similar project was developed in New Jersey shortly thereafter through the Friends Representation Initiative of New Jersey (FRINJ) at the American Friends Service Committee (AFSC)

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114. *See, e.g.*, Kica Matos & Helen Gym, *One Big Thing Cities Can Do on Immigration*, BLOOMBERG (Oct. 26, 2020, 11:57 AM), https://www.bloomberg.com/news/articles/2020-10-26/one-big-thing-cities-can-do-to-protect-immigrants (noting that "[t]oday, there are nearly 40 jurisdictions across 18 states that provide lawyers to as many immigrants as possible facing deportation" and that one poll found that 87% of people "support government-funded lawyers for people in immigration court.").

115. JENNIFER STAVE ET AL., VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT 2 (2017), https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation.

116. *Id.* at 3.

in Newark, New Jersey.[117] And it has been expanded into the Detention and Deportation Defense Initiative (DDDI) administered by Legal Services of New Jersey.[118] Both the NYIFUP and the DDDI projects have grown substantially from their initial pilot phases with continued success.[119] Similar efforts now have sprung up throughout the country, most notably through the Vera Institute of Justice's SAFE Network.[120]

The purpose of these programs was to create a universal representation program, or a randomized approximation of such a program via pilot programs in response to low representation rates of detained individuals.[121] The outcomes of each program were clear successes—the key finding being that, when someone has legal representation in their removal proceedings, their likelihood of obtaining relief increases between 300% and 1100%.[122] One program serving immigrants in the Washington, D.C. metropolitan area found that

> Among detained immigrants without lawyers . . . , people in Arlington were only successful in their cases 11 percent of the time and unrepresented people in Baltimore only successful 7 percent of the time. . . . [H]aving a lawyer in Arlington more than doubled a person's chances of being able to remain in the U.S. and quadrupled a person's chance of obtaining relief in Baltimore.[123]

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117. N.J. COAL. FOR IMMIGRANT REPRESENTATION, LEGAL REPRESENTATION KEEPS FAMILIES TOGETHER: FINDINGS FROM NEW JERSEY'S DETENTION AND DEPORTATION DEFENSE INITIATIVE YEAR 3 (2020), https://www.afsc.org/sites/default/files/documents/DDDI%20Report%207.29.2020.pdf.

118. *Id.* at 1.

119. *Id.* at 3.

120. The Vera institute worked to help structure the NYIFUP program, and also assisted AFSC in much of its program design and data evaluation. STAVE ET AL., *supra* note 115, at 5–6 (2017); *see also* Press Release, Vera Inst. of Just., SAFE Network Expands to 18 Communities Fighting for Legal Representation for Immigrants Facing Deportation (July 16, 2019), https://www.vera.org/newsroom/safe-network-expands-to-18-communities-fighting-for-legal-representation-for-immigrants-facing-deportation.

121. STAVE ET AL., *supra* note 115, at 5–6.

122. *See* LORI A. NESSEL & FARRIN ANELLO, SETON HALL L. CTR. FOR SOC. JUST., DEPORTATION WITHOUT REPRESENTATION: THE ACCESS-TO-JUSTICE CRISIS FACING NEW JERSEY'S IMMIGRANT FAMILIES 2 (2016); *see also* STAVE ET AL., *supra* note 115, at 5–6.

123. MAGGIE CORSER, THE CTR. FOR POPULAR DEMOCRACY, ACCESS TO JUSTICE:

Moreover, there is significant support for these types of programs, and up to 87% of people in the United States support government funding to provide attorneys to individuals in immigration court.[124]

The most important components of a universal representation program are that they are: (1) truly universal—there are no exclusion points except for income considerations and current representation by other counsel,[125] and (2) administered through local non-profits who have already established successful programs in removal defense for noncitizens.[126]

B. Successful Implementation of Universal Representation Programs

The NYIFUP program, initiated in 2013 as a pilot, expanded to full representation in 2017.[127] It is based primarily in New York City and is a universal representation project for any New York resident who is in immigration detention.[128] The program has experienced enormous success.[129] On average, NYIFUP clients have been present in the U.S. for 16 years before being placed in removal proceedings.[130]

ENSURING COUNSEL FOR IMMIGRANTS FACING DEPORTATION IN THE D.C. METROPOLITAN AREA 1 (2017).

124. VERA INST. JUST., PUBLIC SUPPORT IN THE UNITED STATES FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT (2020).

125. Some current programs, such as NYIFUP, have had their funding limited by New York City councilmembers who have sought to exclude individuals with certain convictions from the program. As a result, they have had to obtain funding elsewhere. *See* Emma Whitford, *Anonymous Donation Secures Immigrant Defense Funding Without Restrictions*, GOTHAMIST (Aug. 1, 2017), https://gothamist.com/news/anonymous-donation-secures-immigrant-defense-funding-without-restrictions; *see also* César Cuauhtémoc García Hernández, *Immigrant Defense Fund for Utopians*, 75 WASH. & LEE L. REV. 1393, 1403 (discussing the exclusion of certain individuals with criminal convictions from representation). *See generally* Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503 (2018) (providing foundational scholarship on universal representation).

126. *See* García Hernández, *supra* note 125, at 1403.

127. STAVE ET AL. *supra* note 115, at 3.

128. For a more complete analysis of the NYIFUP program, see Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 197 (2019) (discussing how to move toward a successful *Gideon*-style public defender system in the immigration context using the NYIFUP as an example).

129. *See Evaluation of the New York Immigrant Family Unity Project*, VERA INST. OF JUST. (Nov. 2017), https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation (providing the full report of the program cited in *supra* note 115 including summaries and methodological appendices).

130. STAVE ET AL., *supra* note 115, at 5.

Nearly 1,600 lawfully present or U.S.-citizen children have had a parent represented in the program.[131] Simply having a NYIFUP attorney has increased the likelihood of success in removal proceedings from 4% (for those without counsel) to 48% (for those with NYIFUP counsel): an increase of 1100%.[132] As a result, an additional $2.7 million in tax revenue will be paid by these individuals released from detention, on an annual basis.[133] Importantly, In New York's universal representation model, "only 10 of the 611 [or about 2% of] NYIFUP clients released on bond received orders of removal *in absentia* for failing to appear for a subsequent court date."[134]

These results are stunning and, while they are limited to a highly specific cohort, they demonstrate the benefits to families, communities, and individuals that can result from a universal representation program. It is also important to note how difficult it is to represent someone in detention.[135] The overall likelihood of success, even when represented, is significantly lower when compared to the likelihood of success for individuals who are not detained.[136] Therefore, it is likely that the probability of success would increase in these cases if they were released from detention and represented.

The FRINJ project, mentioned above, started in early 2015 with its own pilot, following the success of the NYIFUP program just across the Hudson River.[137] Based in Newark, the FRINJ project seeks to represent all immigrant detainees who are New Jersey residents.[138] In 2018, due to the program's success, the pilot was expanded, with funding awarded to Legal Services of New Jersey (LSNJ) to provide additional representation via funding directly from the state of New Jersey.[139] This program is now known as the Detention and

131. *Id.*

132. *Id.* at 2.

133. *Id.* at 6.

134. *See* JENNIFER STAVE ET AL., ADVANCING UNIVERSAL REPRESENTATION: A TOOLKIT 20 n.30 (2018), https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1.

135. Nash, *supra* note 125, at 525 (explaining that "detained cases have generally been perceived as more challenging for a range of reasons").

136. Marouf, *supra* note 4, at 2151 n.57 and accompanying text ("Detention . . . impairs the ability to mount a defense by making it difficult to obtain evidence from the outside world. Given the number of obstacles that must be overcome, many detainees simply give up and never file or abandon applications for relief.").

137. *See* ANDREA BLACK & JOAN FRIEDLAND, NAT'L IMMIGRATION L. CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 18–19 (2016).

138. N.J. COAL. FOR IMMIGRANT REPRESENTATION, *supra* note 117, at 3.

139. *Id.* at 1, 5.

Deportation Defense Initiative.[140] The state sponsored funding that supports this program has increased between 2018 and 2020.[141] Currently, the program has been allocated approximately $3 million per year.[142] A full implementation of the program would require $15 million annually.[143] A recent report found that New Jersey employers pay an estimated $5.9 million in annual turnover-related costs as they are forced to replace detained or deported employees.[144] Lost wages for New Jersey's workforce total $18 million annually due to immigration detention, and $1.6 million in tax revenue is lost.[145] There are also significant costs related to caring for children of deported parent since 87.5% of children in New Jersey who have immigrant parents are U.S. citizens themselves.[146] The seminal study in New Jersey found that individuals in detention avoided removal 49% of the time with counsel, compared to only 14% of the time without counsel[147], and a more recent report confirms that success rates are now 50% or higher in both securing release from detention and obtaining relief at a merit hearing before an immigration judge.[148] If 50% of represented clients are getting out on bond and 50% of clients who go to merit hearings are getting relief, this begs the question: Why are we spending government funds to lock up individuals who will ultimately merit relief?

Following the success of the NYIFUP and DDDI programs, the Vera Institute has been working to replicate their universal representation models throughout the United States through its SAFE Network.[149] Currently, there are eighteen jurisdictions collaborating with VERA, mostly cities and counties in Texas, California, Colorado, Georgia, Maryland, and Pennsylvania.[150] With

140. *See id.* at 1.

141. *Id.*

142. *Funding Increase For Immigrants' Representation Means Keeping More Families Together*, AM. C.L. UNION-N.J. (July 1, 2019), https://www.aclu-nj.org/news/2019/07/01/funding-increase-immigrants-representation-means-keeping-mor.

143. *See* AM. FRIENDS SERV. COMM., DUE PROCESS FOR ALL: PROMOTING ACCESS TO JUSTICE FOR IMMIGRANTS IN NEW JERSEY 2 (2019).

144. *Id.* at 5.

145. *Id.*

146. *Id.* at 5–6.

147. NESSEL & ANELLO, *supra* note 122.

148. Monsy Alvarado, *Advocates Push for $12M Boost in Legal Aid for N.J. Immigrants Fighting Deportation*, NORTHJERSEY.COM (July 29, 2020, 4:42 PM), https://www.northjersey.com/story/news/new-jersey/2020/07/29/nj-advocates-push-12-m-boost-state-program-fight-deportations/5534682002/.

149. *SAFE Initiative*, VERA INST., https://www.vera.org/initiatives/safe-initiative (last visited Oct. 11, 2021).

150. *Id.*

projects throughout the Northeast, Midwest, South, and West, it is no surprise that public support for this type of funding is high. In fact, a recent report from the Vera Institute states that 86% of likely voters (including 76% who self-identity as Republicans and 73% of those who voted for Trump in 2016) "support government-funded attorneys for people in immigration court."[151] This support is striking and makes clear that universal representation is a viable policy option for politicians.

These individual examples have been confirmed by a study looking at a larger, more comprehensive period, analyzing the representation of over 1.2 million immigration removal cases decided between 2007 and 2012.[152] The authors of this study, Ingrid Early and Steven Shafer, found that, compared to immigrants without attorneys, immigrants with attorneys fared far better: among similarly-situated removal respondents, "the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, [and] five-and-a-half times greater that they obtained relief from removal . . . ."[153] In addition, "[r]epresented respondents . . . were also more likely to be released from custody[,]" and, once released, "were more likely to appear at their subsequent removal hearings."[154] It is clear that universal representation is an effective alternative to detention because it is nearly as effective as detention, while being more cost-effective and morally justifiable than detention.[155] Moreover, it has the added benefit of a greater likelihood of positive outcomes, which in turn result in community and family stability.[156]

C. Expansion of Universal Representation Programs: Funding

One major question that remains is how to create a secure funding source. The crux of this Article's argument is that the federal government should take the money it is now spending on immigration detention and divert it to fund local non-profits who can establish a broad infrastructure of universal representation programs. Many of the current representation programs receive their funding in part

151. *See* STAVE ET AL., *supra* note 115, at 1.

152. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015).

153. *Id.* at 57.

154. *Id.* at 75.

155. *See id.*

156. See Outcalt, *supra* note 53 for an example on how current immigration policies affect family stability and mental health.

from foundations and partially through local and state governments.[157] While such a model has proven to be viable,[158] it makes sense that the federal government should play a role in ameliorating the harm that immigration detention has inflicted on so many individuals and communities because immigration detention is a function of the federal government.[159] This Article, as it advocates for the replacement of immigration detention with universal representation programs, proposes a simple solution: the diversion and reallocation of federal funds from payments to immigration detention centers and private prisons to the coffers of various public defender and legal services offices. These local legal services providers would then have a dependable funding source through which to build and support their universal representation programs.

In fact, the federal government has already implemented a similar program, the National Qualified Representative Program (NQRP).[160] This program was created to provide representation to individuals in immigration detention who are deemed "incompetent" and found to be unable to represent themselves, or that their pro se representation would result in a process that was not fundamentally fair.[161] Through this program, local non-profits are identified who have experience representing clients with mental health issues. The Department of Justice then contracts with those providers to pay for the provision of counsel to the individual in immigration detention who has been found unable to represent themselves.[162] A number of scholars have provided training, commentary, and feedback about how the program should be best implemented.[163] There are a number of critiques and

157. *See, e.g.*, BLACK & FRIEDLAND, s*upra* note 137, at 18–19; STAVE, ET AL. *supra* note 115, at 3.

158. *See* BLACK & FRIEDLAND, s*upra* note 137, at 18–19; STAVE, ET AL. *supra* note 114, at 3.

159. *See* Marouf, *supra* note 4, at 2149 (discussing how much money the federal government allocates to immigration); *see also* Kreimer, *supra* note 78, at 1488 (discussing the historical purposes of federal immigration detention).

160. DONALD KERWIN, ZOLBERG INST. ON MIGRATION & MOBILITY, STRENGTHENING THE U.S. IMMIGRATION SYSTEM THROUGH LEGAL ORIENTATION, SCREENING AND REPRESENTATION: RECOMMENDATIONS FOR A NEW ADMINISTRATION 1, 4 (2020).

161. *Id.*

162. *Id.*

163. *See, e.g.*, Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 379–84 (2011); Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 998 (2014); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill*

recommendations, but the main point is that a government-funded program, implementing the provision of counsel via partnerships with local non-profits, is not only feasible: it is already happening.[164] The next step would be to scale the project to encompass representation of all individuals who would have otherwise been held in detention.

D. Potential Critiques to Universal Representation

Because this Article advocates for universal representation as an inherent solution to the injustices wrought by immigration detention, it is subject to many of the same criticisms directed at the public defender system developed after *Gideon v. Wainwright*.[165] While the data are clear in that representation increases the likelihood of attendance at immigration proceedings, there are still concerns about the external effects of a universal representation program.[166] The first of those concerns is whether universal representation actually leads to better outcomes in the substantive cases.[167] The second critique is that access to government-funded counsel is a due process right in immigration hearings and the best way to access this right is through litigation.[168] Last, and perhaps most important, is the law-and-society critique about whether such a universal representation system would actually implicate itself as part of a system that is inherently flawed. This last critique would contend that the immigration enforcement system (which uses the hammer of removal proceedings as its only tool) should be eradicated because of its oppression and dehumanization of immigrants. Each is addressed in turn below.

Respondents in Removal Proceedings, 67 HASTINGS L.J. 1023, 1058 (2016); Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 340 (2015); Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. SOC. & CHANGE 1, 15–19 (2013).

164. *See National Qualified Representative Program (NQRP)*, THE U.S. DEP'T OF JUST. (Feb. 18, 2020), https://www.justice.gov/eoir/national-qualified-representative-program-nqrp.

165. 372 U.S. 335, 339 (1963).

166. Eagly & Shafer, *supra* note 152, at 73–74.

167. *Id.*

168. *Id.*

1. Is Universal Representation Beneficial?

The first anticipated critique raised here is whether a universal representation program is as effective as it claims to be in promoting successful outcomes in immigration hearings. Many of the reports by the Vera Institute show that individuals with assigned or private counsel tend to have a higher likelihood of success than when an individual proceeds unrepresented before an immigration judge.[169] However, other recent studies have perhaps found otherwise.[170]

Most notable is a recent report from the Transactional Records Access Clearinghouse (TRAC) from Syracuse University, which monitors data on the various outcomes of immigration proceedings throughout the country.[171] Its June 2020 report on bond hearing outcomes in immigration courts found that,

> Despite the rising rate of representation, bond grant rates have not improved. During [fiscal year] 2015 and [fiscal year] 2016, immigration judges granted bond at 56 percent of these hearings. This fell to 50 percent during [fiscal year] 2018. Since [fiscal year] 2018 grant rates have fallen to 48 percent where they have remained for the last three years.[172]

There are a number of reasons why this recent study might demonstrate lower current bond grant rates while not necessarily contradicting the fact that having counsel in immigration proceedings typically will result in more favorable outcomes. First, the Trump administration moved quickly and aggressively to promote and hire immigration judges during the first two years of his tenure.[173] As of April 2019, the administration had appointed 190 immigration judges, accounting for 43% of the current total.[174] Past studies have shown that, apart from whether an individual is represented, the biggest predictor of success in an immigrant's case is the judge to

169. *See* discussion *infra* Section V.C.

170. *See Representation at Bond Hearings Rising but Outcomes Have Not Improved*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 18, 2020), https://trac.syr.edu/immigration/reports/616.

171. *Id.*

172. *Id.*

173. *See* Amy Taxin, *Trump Puts His Stamp on Nation's Immigration Courts*, AP NEWS (July 23, 2019), https://apnews.com/article/50e97a112fb142f2abffa061ed5737d6.

174. *Id.*

which the case is assigned.[175] Second, the reviewability of bond decisions has also been compromised by Trump's efforts to push out BIA members, appoint new, more hardline members in their place, and expand the BIA so that he could continue to appoint judges with low grant rates.[176] This study also does not account for the other important roles that attorneys might fill. For example, a Human Rights First report from 2017 details several instances where "advocacy by an attorney prevented [Customs and Border Protection's] wrongful deportation of an asylum seeker."[177] Simply put, "[b]ringing a trained legal advocate to the immigration courtroom is a significant improvement that cannot be overstated."[178] Importantly, the elimination of immigration detention would abrogate the need for these bond hearings in the first place.

Another critique concerns the quality of the attorney representing each client.[179] A 2015 study found that, using data from 1990 to 2010, "not being represented by legal counsel is actually better than being represented by a poor lawyer and that variation in attorney capability is a primary driver of the disparity in asylum outcomes in U.S. immigration courts."[180] This study also found that, "[o]btaining an attorney that specializes in immigration does not improve the probability of a successful outcome . . . ."[181] But importantly, this same study also found that "[a]verage attorneys . . . are considerably better than no representation" and, "[a] good immigration attorney . . . is on average 32 percentage points better than an average one and about 40 percentage points better than no representation."[182] However, the clear finding from this study was that "[b]eing unrepresented . . . appears to make one more likely to receive relief than being

175. *See* JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 3 (2009). *See generally* Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295 (2007).

176. Noah Lanard, *The Trump Administration's Court-Packing Scheme Fills Immigration Appeals Board With Hardliners*, MOTHER JONES (Aug. 29, 2019), https://www.motherjones.com/politics/2019/08/the-trump-administration-has-packed-the-immigration-appeals-board-with-hardliners/.

177. Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 55–58 (2019) (citing data from the CARA Pro Bono Project which suggests that adequate access to counsel would mitigate against erroneous removals).

178. García Hernández, *supra* note 125, at 1420.

179. *See e.g.*, Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y REV. 209, 209 (2015).

180. *Id.* at 209–10.

181. *Id.* at 227.

182. *Id.* at 229.

represented by a poor attorney[,]"[183] and, therefore, "having no attorney is consistently more beneficial than having a low-quality attorney."[184] These findings do not contradict the possibility of a successful universal representation project, but they do emphasize the importance of identifying, training, and funding skilled lawyers.

Thus, these critiques are well-received, but, nonetheless, do not overcome the merits of universal appointment of counsel. Simply creating a universal representation project is not necessarily the only tool needed to create a system which results in due process.[185] Some critics emphasize the importance of training and developing skilled lawyers to understand and work within a complex immigration system.[186] This is part of the rationale for why current non-profits, legal services organizations, and public defenders' offices would be the best location for the implementation of universal representation projects for immigrants.

2. Due Process Arguments for a Constitutional Right to Counsel in Immigration Proceedings

Much of the research regarding a universal public-defender style program considers whether there is a Fifth or Sixth Amendment right to counsel provided by the federal government. Those arguments are outlined here, but this Article abstains from evaluating the merits of each and, instead, proposes a change in policies. In doing so, this Article seeks to serve as a complement to the well-established due process considerations.

There have been a number of arguments articulating a right to counsel both generally and for discrete groups.[187] Many scholars have

183. *Id.*

184. *Id.* at 230.

185. For example, many have pointed to concerns that the current system of immigration judges, because their authority falls under the administration of the Department of Justice, and thus Executive authority, are not independent. To this end, many scholars have called for the creation of an Article I court to help create an independent judiciary and alleviate the political pressure that now exists within the Executive Office of Immigration Review (EOIR), and under which immigration judges are now subject. *See, e.g.*, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1665–66, 1678 (2010).

186. *Id.*

187. *See, e.g.*, *Developments in the Law–Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1659 (2013); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 154–55 (2009); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L.

voiced the need for a right to counsel for children in immigration proceedings[188] or for those seeking certain types of relief, such as asylum.[189] Others have advocated for a right to counsel for those found to lack the mental competency to proceed pro se.[190] Some have suggested that intervention is necessary, prior to the initiation of removal proceedings, for criminal defendants whose immigration status may be affected by certain convictions or pleas.[191] Other scholars focus their arguments on the provision of counsel for lawful permanent residents,[192] detained lawful permanent residents,[193] and detained immigrants generally.[194] Still others have focused on affirming a general right to government appointed counsel due to the complexity and high stakes of immigration proceedings.[195] Many of

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1299, 1358–60 (2011); Kevin Gardner, Note, *Prisoners in the Face of Gladiators: Providing a Sword and Shield to Aliens in Removal Proceedings Through Court-Appointed Counsel*, 52 AKRON L. REV. 1189, 1220–21 (2018).

188. *See, e.g.*, Linda Kelly Hill, *The Right To Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 44 (2011); Sharon Finkel, Note, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y. L. SCH. J. HUM. RTS. 1105, 1107 (2001); Benjamin Good, Note, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 111 (2014).

189. *See, e.g.*, Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1038 (2015); John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009); Kaitlin M. Talley, Comment, *Dignity and Due Process for Asylum Seekers: Why Achieving Universal Representation for Asylum Seekers is Essential to Due Process*, 52 U.S.F. L. REV. 299, 300 (2018).

190. Wilson & Prokop, *supra* note 163, at 3.

191. *See, e.g.*, PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFS. ASS'N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN 1, 6 (2009); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1468 (2011); Andrés Dae Keun Kwon, Comment, *Defending Criminal(ized) "Aliens" After* Padilla: *Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1038 (2016).

192. Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2397 (2013).

193. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116 (2008).

194. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012).

195. *See, e.g.*, Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. CIV. RTS. & ECON. DEV. 533, 540 (2014); Carla L. Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to*

the due process arguments forwarded by scholars have worked to analogize the right to counsel for certain defendants in criminal proceedings as described in the seminal case *Gideon v. Wainwright*.[196] In doing so, scholars primarily rely on the Fifth Amendment[197] and Sixth Amendment,[198] working within the frameworks laid out in *Mathews v. Eldridge*[199] and *Turner v. Rogers*.[200] These arguments have been met with limited success, most notably in *Franco-Gonzalez*.[201] Some scholars have noted that seeking a "discovered" right to government appointed counsel in immigration proceedings through litigation is unlikely to be successful.[202] Still others have

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Counsel, 17 UDC/DCSL L. REV. 131, 132 (2014); Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. STATE U. L. REV. 889, 936 (2015); Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 567, 601 (2013).

196. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see, e.g.*, Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of* Gideon*: Immigration, Deportation, and the Right to Counsel*, HUM. RTS., Apr. 2013, at 14, 14.

197. *See, e.g.*, Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 923, 963 (2016); Soulmaz Taghavi, Montes-Lopez v. Holder*: Applying Eldridge to Ensure a Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 T. MARSHALL L. REV. 245, 269 (2014).

198. *See, e.g.*, Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 588–89 (2011); Note, *A Prison is a Prison is a Prison: Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 524 (2015).

199. 424 U.S. 319, 334–35 (1976).

200. 564 U.S. 431, 444–45 (2011); *see, e.g.*, Shane T. Devins, Comment, *Using the Language of* Turner v. Rogers *to Advocate For a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893, 895 (2013).

201. Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1046 (C.D. Cal. 2010) (requiring government-appointed counsel for certain immigrant detainees in certain facilities with mental disabilities who are found to be "incompetent" or unable to adequately represent themselves in immigration proceedings). *But see* Matter of M-A-M-, 25 I. & N. Dec. 474, 478, 481–82 (B.I.A 2011) (declining to find that the provision of counsel to incompetent respondents was always the appropriate remedy and determined that other provisions or "safeguards" may be appropriate to ensure that the proceeding is "fair").

202. *See, e.g.*, Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2292–93, 2303, 2305 (2013) (although finding little progress in right-to-counsel jurisprudence, noting positive developments in legislative action); Careen Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 UDC/DCSL L. REV. 165, 167 (2014); Kara A. Naseef, Note, *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary*

argued that this rights-based rhetoric could actually lead to more harm than good.[203] In contrast, this Article does not seek to expand upon or respond to this rights-based discourse, but rather to propose an alternative approach through policymaking. Importantly, many of the statistics and underlying arguments about fairness in proceedings support this Article's proposed solution: universal representation. The difference in approach is simply the method by which the outcome is achieved. Whereas the aforementioned scholars have made compelling arguments for a constitutional right to appointed counsel in immigration proceedings, this Article seeks to show how a policy change is possible and will ultimately yield the same fruit.

Generally, immigrants in removal proceedings are statutorily permitted to have access to counsel, but "at no expense to the Government."[204] While this language has been used to defeat efforts to gain universal representation under due process arguments, the possibility of using government funding for such a project has not been completely foreclosed.[205] In 1995, INS general counsel issued an opinion finding that the above provision precludes a "right to representation at government expense," but that it does not necessarily "prohibit federal expenditures to 'facilitate' representation."[206] This interpretation has led to the implementation of legal orientation programs throughout detention centers in the United States.[207] In 2010, the principal deputy general counsel of DHS issued a legal opinion finding that there is "no general statutory prohibition" preventing the use of discretionary funding for legal representation in removal proceedings, "so long as Congress authorized it for this purpose."[208] This demonstrates how the legislature could lawfully act to implement a universal representation system. In fact, the Department of Justice has already created a pilot

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Detention, 52 U. MICH. J.L. REFORM 771, 773 (2019); *see also* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 526 (2015) (arguing that "appointed counsel is increasingly a legislative matter"); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1675 (1997) ("[T]he persistent problems that make it all but impossible for most detainees to secure legal representation have not been—and probably cannot be—effectively resolved by judicial decree.").

203. *See* Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIA. L. REV. 556, 559 (2016).

204. KERWIN, *supra* note 160, at 2.

205. *Id.*

206. *Id.*

207. *Id.* at 3.

208. *Id.* at 2.

of sorts with its representation program for a select portion of the detained population, known as the National Qualified Representative Program (NQRP).[209] Here, there is an available avenue for implementation of a large-scale universal representation program, and the federal government is well-equipped and legally permitted to allocate funds accordingly.

3. Law and Society / Critical Theory Critiques

Last is the question of whether a universal representation proposal can survive the many critiques that exist decrying the unmet promises of *Gideon*.[210] Here, two scholars, Stephen Bright and Paul Butler, have scrutinized the public defender system's panacea approach, finding that it could well be doing more harm than good.[211] They find that this approach has resulted in a justification for the criminal justice system and all its faults, and the creation of such a large-scale structure promotes complicity with a system that continues to target and marginalize vulnerable individuals.[212] This is the most salient critique to consider in whether to embark on this entire enterprise of universal representation in the immigration context. However, there are some important distinctions between the structure of *Gideon*-style appointed representation and the policy proposed by this Article. First, the proposed universal representation program would not rely on appointed counsel. Instead, it would involve partnering with local non-profits who have dedicated and experienced lawyers with a desire to do this specific type of work. Second, it would also be fully funded by the federal government through its diversion of funds typically reserved for immigration detention to those non-profit legal service organizations. Last, because the proposed solution is policy-oriented, it would not be subject to the same rights-based critiques that have been directed at the limitations of the *Gideon* implementation.[213]

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209. *See* U.S. DEP'T OF JUST., *supra* note 164 ("NQRP [is] a nationwide program to provide Qualified Representatives (QRs) to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.").

210. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837–41 (1994); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2176 (2013); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

211. *See generally* Bright, *supra* note 210; Butler, *supra* note 210.

212. *Id.*

213. *Id.*

a. Quality of counsel concerns

One critique is that of Stephen Bright, who provided a compilation of bad, unethical, and ultimately harmful lawyering in his important essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*.[214] In his essay, Bright brings light to the underlying warning of Anthony Lewis, who, writing in response to the *Gideon* decision, says,

> It will be an enormous task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every person charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.[215]

The prospect of creating a nation-wide universal representation program is equally grand in scope and ambition. While such warnings should be duly heeded, they should not serve to create an impasse in the path toward creating such a program. Bright continues in his essay to provide examples of individuals with limited intellectual capacity and undiagnosed and/or unmedicated mental illness, who were executed despite this information not being presented to the court by defense counsel.[216] Bright points to a number of concerns in many public defender systems: the poor pay, the varied appointment processes, the fact that many of these attorneys had poor or no training, and that they frequently held biases against their own clients.[217] Bright's conclusion is that the majority of the death row population are distinguished "by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments . . . and the poor legal representation they received."[218] Bright cites these results as the failure to keep the promise of *Gideon*, relying on an report by the American Bar Association which stated that "long-term neglect and underfunding of

214. Bright, *supra* note 210, at 1837–41.
215. *Id.* at 1836 (quoting ANTHONY LEWIS, GIDEON'S TRUMPET 205 (1964)).
216. *Id.* at 1837.
217. *Id.* at 1838–39, 1842–43.
218. *Id.* at 1840.

indigent defense has created a crisis of extraordinary proportions in many states throughout the country."[219]

Bright's article serves as an apt cautionary tale and provides helpful direction for how to avoid these issues in the establishment of a nation-wide universal representation program.[220] First, counsel will not be appointed at random, but rather through a uniform process supervised and overseen by local non-profits and public defender offices.[221] This structure provides an opportunity for quality control, training, and professional development. Second, pay and resources are a large concern raised by Bright.[222] However, in the pilot projects that have been initiated, the average costs of cases have already been accounted for in the funding proposals regularly submitted and approved by the non-profit organizations and public defender offices who have piloted these projects.[223] Last, because of the nature of these offices and their work, they recruit and identify new attorneys who will be dedicated to this work in a way that cannot necessarily be expected of the bar at large.[224]

4. The Critique of Rights

Another important critique of a universal representation project is presented in Paul Butler's article, *Poor People Lose: Gideon and the Critique of Rights*.[225] Butler exposes an important fact followed by an equally stunning premise in his abstract:

> A low income person is more likely to be prosecuted and imprisoned post-*Gideon* than pre-*Gideon.* Poor people lose in American criminal justice not because they have ineffective lawyers but because they are selectively targeted by police, prosecutors, and law makers. The critique of rights suggests that rights are indeterminate and regressive. *Gideon* demonstrates

219. *Id*. at 1866 (quoting RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS 25 (1993) (prepared for the American Bar Association Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis)).

220. See generally Bright, *supra* note 210 for his more detailed cautionary tale.

221. Bright, *supra* note 210, at 1870.

222. *Id.* at 1851.

223. *See, e.g.*, COLO. FISCAL INST., A MATTER OF JUSTICE: COST SAVINGS FROM UNIVERSAL LEGAL REPRESENTATION FOR ALL COLORADO IMMIGRATION PROCEEDINGS (2021), https://www.coloradofiscal.org/wp-content/uploads/2021/02/2.12.21-Final-Report-2.pdf.

224. Bright, *supra* note 210, at 1851.

225. Butler, *supra* note 210.

> this critique: it has not improved the situation of most poor people, and in some ways has worked their plight. *Gideon* provides a degree of legitimacy for the status quo.[226]

As Butler states, "It would be preferable to be a poor black charged with a crime in 1962 than now, if one's objective is to avoid prison or serve as little time as possible."[227] He bases this declaration on objective evidence,[228] which he states demonstrates the critique of rights.[229] He defines the critique of rights as positing that, "'nothing whatever follows from a court's adoption of some legal rule' and that 'winning a legal victory can actually impede further progressive change.'"[230] These are important criticisms that Butler levels at *Gideon* and its resulting inadequacies. However, this Article distinguishes its proposal in that it does not ground its support for universal representation in the due process arguments under the Fifth and Sixth Amendments that many scholars have advocated.[231] Instead, this Article advocates for a policy change, one which is grounded in abolition theory. By eliminating immigration detention and reallocating that funding to a representation project, this proposal would effectively eliminate an oppressive system while building up a supportive one in its place.

Butler rightfully explains that African Americans are more policed, subject to "social conditions that breed some forms of law-breaking," and are disproportionately poor and/or subject to "explicit and implicit bias by key actors[.]"[232] These same concerns are present for immigrants who are policed for their skin color, language or accent, and presence in specific communities.[233] While the Obama administration had provided a format for evaluating whether a person

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226. *Id.* at 2176.

227. *Id.* at 2178.

228. *Id.* at 2180 ("In 1960, three years before *Gideon*, the black incarceration rate was approximately 660 per 100,000. By 1970, it had fallen some, to slightly under 600 per 100,000. In 2010, the rate of incarceration among black males was an astronomical 3,074 per 100,000." (footnotes omitted)).

229. *See id.*

230. *Id.* at 2178 (quoting Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26, 32 (1993)).

231. *See id.* at 2197 ("Procedural fairness not only produces faith in the outcome of individual trials; it reinforces faith in the legal system as a whole.") (quoting Michael O'Donnell, *Crime and Punishment: On William Stuntz*, NATION, (Jan. 10, 2012), http://www.thenation.com/article/165569/crime-and-punishment-william-stuntz.).

232. *Id.* at 2183 (citations omitted).

233. See generally MOLINA, *supra* note 57 for a discussion on how racial biases impact immigration and immigrants.

might be arrested by ICE, the Trump administration resorted to a policy of non-priority, meaning that all individuals without immigration status (or in danger of losing their status) can rightfully be fearful of being detained by ICE. In fact, despite Trump's rhetoric conflating migration with crime, current data shows that the vast majority of detained immigrants have no criminal conviction on record.[234]

While creating a universal representation system does rely heavily on the ideal of fairness, and thus risks further validating the system that it already well-entrenched, it serves two important goals. First, it would be a practical and achievable first step toward eliminating immigration detention, appealing to more than the ideologically committed few, because of its reliance on an economic argument. Second, it may help to initiate a severance between the notions of immigration and criminality that currently permeate the larger societal psyche in the United States by eliminating the specter of immigration detention.

Butler's critique is well-heeded. Engaging with the system lends credence to the system and further justifies its existence. It may be that the creation of this system does make the abolition of the removal process less likely. Be that as it may, this proposal is a practical one that requires little imagination on behalf of the targeted cohort. In fact, that may be the reason why it could result in a more immediate implementation. It reaches across the spectrum of ideologies in a coherent way. There is certainly tension here, but the tension can be resolved by the fact that this proposal furthers the goal of abolition – if implemented, the ultimate result would remain the complete dismantling of the immigration detention system. Moreover, it would satisfy the abolitionist goal of removing funding from the hands of a government agency and instead distributing it among local non-profit agencies and public defender offices, who can more aptly address the needs of their local communities. This redistribution would lead to the elimination of immigration detention and supplant it with a universal representation program that would be more economical while still satisfying the ultimate goal of promoting client appearance. The ultimate goal of abolition is to eliminate a harmful system and to build up something supportive in its place. This Article shows how an unorthodox approach may be able to build more support for such a vision while still doing its best to adhere to the abolitionist ethic of

234. *See Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583/ (finding that 64% of detainees had no criminal conviction on record, up from just under 40% nationwide four years earlier).

tearing down something destructive and rebuilding something positive in its place.

In fact, Butler concludes his critique by first advocating for the necessity of "people . . . still becom[ing] criminal defense attorneys[,]" because "effective defense counsel can . . . make[] an enormous difference in the lives of incarcerated people and their families."[235] While Butler does not advocate for a particular approach, he calls upon scholars and organizers to abandon a legal rights-based approach in favor of other methods for creating social change.[236] Many current grassroots organizations and others argue for the abolition of ICE and the entire enforcement system.[237] This Article's proposal to pursue a policy of universal representation could fit within this vision for alternative social change. The hope is that this Article illuminates a path forward that is already broadly supported, has found its origins in grassroots efforts, and is driven by data that shows its effectiveness.

IV. ABOLITION IS STILL THE SOLUTION

The movement for the abolition of immigration detention is grounded in similar principles to those that have created support for the criminal decarceration movement. First, abolition argues that the detention of migrants is inhumane, immoral, and inadequate in its purpose.[238] Second, the abolition movement emphasizes the importance of building up another structure, one that is humane, moral and more adequately suited to its purpose, to replace that of the current detention system.[239] Such a vision is not one of utopia; it is eminently possible.[240]

> Prison abolition does not mean opening every prison. . . . [It does not mean] let[ting] everybody go home tomorrow. [I]t . . . [is] a process of gradual

235. Butler, *supra* note 210, at 2202.

236. *Id.* at 2202–04.

237. *See* Markowitz, *supra* note 9, at 131.

238. In fact, the creation of immigration detention and expulsion in the 19th century meant that, "For the first time since slavery, an entire category of people in the United States could be imprisoned without a trial by jury." Hernández, *supra* note 54, at 57.

239. See Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1687 (2019).

240. *See* Paul Butler, Professor, Geo. L. Ctr., Jefferson Lecture at University of California Berkeley: How Prison Abolition Would Make Us All Safer (Jan.17, 2020), https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler/.

> decarceration with the goal of finding how close we can get to completely eliminating incarceration while finding alternative means of accomplishing any of the possible benefits of prison.[241]

This excerpt from Paul Butler's speech at U.C. Berkeley in January 2020 highlights the same point he iterated when speaking later that year at my own institution.[242] He made it clear that abolition is a movement not of erasure, but of replacement—a new system replacing the old.[243] His theory rests on three fundamental points:

> One is that we need abolition to solve the problem of mass incarceration. Reform is not going to work. Second, there are alternatives to incarceration that can provide any of the crime control benefits we think prison does now. Third, to be truly transformative, abolition has to be more than just tearing down the prison walls. We have to build something up, too.[244]

Abolition has a long history, but its purpose has always been the same: the elimination of a policy which dehumanizes and harms fellow human beings.[245] The current abolition movement imagines "an array of alternative nonpenal regulatory frameworks and an ethic that recognizes the violence, dehumanization, and moral wrong inherent in any act of caging or chaining—or otherwise confining and controlling by penal force—human beings."[246] Angela Davis spoke of the harm of confining people and excluding them to a different reality. She explains that "[w]e become numb to the inhumanness of prison and we dissociate ourselves from the people in prison."[247] Noting how prisons target minority groups, Davis acknowledges that abolitionists

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241. *Id.*

242. Peter Jetton, *Paul Butler to Deliver Inaugural Smith Lecture at W&L Law*, WM. & MARY: COLUMNS (Feb. 5, 2020), https://columns.wlu.edu/paul-butler-to-deliver-inaugural-smith-lecture-at-wl-law/.

243. Butler, *supra* note 240.

244. *Id.*

245. *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9–10 (Open Media ed., 2003). The prison industrial complex "is a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and court agendas." *Id.* at 107. The abolitionist approach is to not look "for prisonlike substitutes for the prison, such as house arrest safeguarded by electronic surveillance bracelets." *Id.*

246. McLeod, *supra* note 3, at 1172.

247. DAVIS, *supra* note 245, at 25.

should defend immigrants' rights as a next step in the abolition process.[248] She calls for the decriminalization of undocumented immigrants in the fight for prison abolition.[249] This theory of abolition is easily extended to the question of immigration detention.[250] As Prof. García Hernández says, "[t]o be sure, this proposal represents a radical transformation, but it is not without precedent. The public's shift away from slavery was no less radical."[251] Compared to the institution of criminal jails and prisons, immigration detention is relatively new.[252] However, the call for its abolition can resound loudly because it builds on the injustices raised by other abolition movements, most recently through the decarceration movement.[253] In essence, "the logical conclusion of this narrative is that, as a modern addition to the United States' long history of radicalized policy making, immigration imprisonment is indefensible and, as such, should be abolished."[254]

While the idea of working within the system may seem contradictory to some of the underlying tenets of abolition, there is a way to reconcile the disparate notions. Providing universal representation can be a way to support the abolitionist framework even if the policy proposal is in itself not strictly abolitionist. Here, there is an interest convergence that has already resulted in beneficial policies reducing the overall number of individuals incarcerated for criminal purposes.[255] This Article proposes to use that successful campaign for a similar purpose: the elimination of immigration detention. The ultimate effect, therefore, is one of abolition. The proposal is merely a practical approach for how to go about massively reducing or eliminating the number of individuals held in immigration detention. If abolition is to succeed, then the coalition needs to grow larger. One way to incorporate unlikely supporters into this effort is by making good use of the economic argument: namely, that there are more efficient ways to ensure appearance at immigration proceedings than detention.

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248. *See id.* at 110.

249. *Id.*

250. *See* Hernández, *supra* note 54, at 66.

251. García Hernández, *supra* note 2, at 299.

252. See SMITH, *supra* note 81, at 2–5 for an overview of the legal and historical background of immigration detention.

253. *See* discussion *infra* Section V.D.1.

254. García Hernández, *supra* note 2, at 300.

255. *See* discussion *infra* Part V.

V. UNIVERSAL REPRESENTATION AS A PRACTICAL FIRST STEP TOWARD ABOLITION

As mentioned above, abolition requires that something be built up in place of the system which is being dismantled.[256] Here, advocacy for the abolition of immigration detention is accompanied by a solution to replace it. This part of the Article proposes that universal representation is an equally effective and more cost-efficient way to ensure the appearance of individuals at their immigration hearings.[257] Before delving into an explanation of how a universal representation program could supplant immigration detention, this section addresses other proposals and pilot programs that have been met with varying levels of success. Many of the proposals are not absolute—they permit discretion in determining whether someone should remain in detention or monitored by some other means. Here, the proposal is for wholesale elimination of the immigration detention system in favor of universal representation. Providing an attorney to individuals, and perhaps coupling this representation with other low-cost wrap-around services,[258] will result in the desired outcome—attendance at future immigration hearings. Importantly, it will do so at a lower cost and in a way that promotes that humanity of individuals seeking relief and their families.

A. Carceral Alternatives to Detention

The primary way to avoid immigration detention after arrest by ICE is to demonstrate that one is neither a flight risk nor a danger to

256. *See* discussion *supra* Part IV.

257. Again, despite assertions to the contrary, the data is very clear that the majority of individuals show up for their immigration proceedings. *See* Salvador Rizzo, *How Many Migrants Show up for Immigration Court Hearings?*, WASH. POST (June 26, 2019), https://www.washingtonpost.com/politics/2019/06/26/how-many-migrants-show-up-immigration-court-hearings/; *see also* VERA INST. OF JUST., FACT SHEET: EVIDENCE SHOWS THAT MOST IMMIGRANTS APPEAR FOR IMMIGRATION COURT HEARINGS (2020), https://www.vera.org/downloads/publications/immigrant-court-appearance-fact-sheet.pdf.

258. In other countries, community-based case management programs have proven to be effective alternatives to immigration detention. Australia, Sweden, the Netherlands, Belgium, Hong Kong, Thailand, and Indonesia have all successfully implemented such programs. Compliance rates are ninety-four percent in Australia, ninety-seven percent in Hong Kong, ninety-seven percent in Thailand, which has a program that focuses specifically on unaccompanied children seeking refugee status, and ninety-four percent for a similar program in Indonesia. These examples show that case management is an effective tool to help people navigate complex immigration proceedings. Marouf, *supra* note 4, at 2169–70.

the community and then pay a bond to ICE.[259] But, there are many alternatives to immigration detention and bond determinations by ICE or an immigration judge.[260] These alternatives include ankle monitoring,[261] algorithms for determining whether a person should be released,[262] house arrest, check-ins either by phone or in-person, and a number of other solutions that are cumbersome, costly, and invasive.[263] These alternatives are typically a way of monitoring a person without technical confinement; however, they are still harmful.[264] This Article declines to consider those alternatives, as

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259. Bonds are supposed to ensure that individuals attend and complete their immigration hearings. However, the difficult recovery process of these payments has resulted in nearly $204 million held by ICE in bond money, with more than 18,000 bond payments left unclaimed. *See* Meagan Flynn, *ICE is Holding $204 Million in Bond Money, and Some Immigrants Might Never Get It Back*, WASH. POST (Apr. 26, 2019), https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df_story.html.

260. A range of alternatives to detention already exists, yet detention remains the default, rather than being used as a last resort. Furthermore, the most coercive alternative-to-detention program, which involves electronic monitoring, is used far more often than less restrictive alternatives. Meanwhile, community-based alternatives involving case management, which have proven highly successful in other countries, are just getting off the ground in the United States. Marouf, *supra* note 4, at 2143.

261. *See, e.g.*, Kreimer, *supra* note 78, at 1515 (explaining that many new alternatives to detention (ATDs) in the modern world were technologically impossible in the past, including ankle monitors and other electronic devices).

262. *See, e.g.*, Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 162–63 (2013) (proposing a "risk assessment tool").

263. "[M]any advocates and commentators have made persuasive legal arguments, supported by federal court precedents, that 'custody' should be more broadly interpreted to include other forms of restrictions on liberty, such as house arrest and electronic monitoring." Marouf, *supra* note 4, at 2147 (citing Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody"*, 48 U. MICH. J.L. REFORM 879, 906–11 (2015)); *see also* CARL TAKEI ET AL., AM. C.L. UNION, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 6 (2016).

264. *See, e.g.*, MARK NOFERI, AM. IMMIGR. COUNCIL, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVE TO DETENTION FOR ASYLUM SEEKERS 9–10 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_humane_approach_can_work_the_effectiveness_of_alternatives_to_detention_for_asylum_seekers.pdf.). *But see* RUTGERS SCH. OF LAW-NEWARK IMMIGRANT RTS. CLINIC & AM. FRIENDS SERV. COMM., FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 2 (2012), https://www.afsc.org/sites/default/files/documents/Freed-but-not-Free.pdf (critiquing the "alternative detention" approach).

many scholars have already done so. Instead, this Article seeks to investigate an alternative that promotes compliance in a non-carceral and non-punitive way.[265]

B. Non-Carceral Alternatives to Detention

There has already been remarkable success with a variety of non-carceral and non-punitive alternatives.[266] The history of these successes dates back to the Reagan era, when INS worked with the United States Catholic Conference to provide "education, job training, substance abuse treatment, and weekly meetings to" a large group of Mariel Cubans from 1987 to 1999, during which 75% of the participants complied with the program requirements.[267] Following this success, in 1997, INS partnered with the Vera Institute of Justice to develop a compliance-support pilot program which sent migrants to live with community sponsors instead of confining them to detention centers.[268] There, they were oriented and provided with information about how to seek legal counsel.[269] This program, initiated during the Clinton era, saw an 85% compliance rate.[270] Last, a study of an Obama-era program run by Lutheran Immigration and Refugee Services demonstrates similar success.[271] While only a small sample of ten migrant families, these individuals were provided with help to find housing, were educated about the legal process, and importantly, provided legal counsel.[272] This program had a 100% compliance

265. *See, e.g.*, 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 (2019) (discussing proposals for a system of civil supervision).

266. *See generally* DAVID SECOR ET AL., NAT'L IMMIGRANT JUST. CTR., A BETTER WAY: COMMUNITY-BASED PROGRAMMING AS AN ALTERNATIVE TO IMMIGRANT INCARCERATION (2019), https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration.

267. GARCÍA HERNÁNDEZ, *supra* note 10, at 151. It should be noted that Prof. García Hernández references the fact that these were known to be some of INS's "most notorious detainees" and alludes to *Scarface* as a helpful illustration of the typical participant. *See also* DONALD KERWIN, ET AL., CATH. LEGAL IMMIGR. NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES 27–28 (2000).

268. GARCÍA HERNÁNDEZ, *supra* note 10, at 151–52.

269. *Id.* at 152.

270. *Id.*; *see also* MEGAN GOLDEN ET AL., VERA INST. OF JUST., THE APPEARANCE ASSISTANCE PROGRAM: ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION 6–7 (1998).

271. *See* GARCÍA HERNÁNDEZ, *supra* note 10, at 152.

272. *Id.*

rate.[273] As Alina Das explains, the partnership with Vera in the 1990s provided "an alternative to traditional detention that ensured community supervision and appearance of noncitizens for the removal process at significantly lower costs."[274] However, "Congress implemented mandatory detention before giving the agency an opportunity to implement these alternative methods on a larger scale."[275] Yet, these programs demonstrate that "it is possible to comply with immigration requirements and enjoy the freedom most of us take for granted."[276]

One key artifact of a successful program is its approach to legal orientation. Several programs currently provide legal orientation in detention centers.[277] However, while legal orientation programs are helpful, the likelihood of success is highly dependent on whether an individual is represented by counsel or not.[278] The immigration system is complex, rapid, and of great import. A common refrain is that our current system requires immigration judges to conduct the equivalent of "death penalty cases in a traffic court setting."[279] This experience can be intimidating, frustrating, and result in tragic outcomes.[280] Moreover, a lack of understanding could ultimately result in failure, or reluctance, to appear for their scheduled hearings. However, the presence of skilled counsel can have a significant effect on the likelihood of success in a given case. Instead of being viewed separately from immigration detention, providing legal

273. *Id.*; *see also* LUTHERAN IMMIGR. & REFUGEE SERV., FAMILY PLACEMENT ALTERNATIVES: PROMOTING COMPLIANCE WITH COMPASSION AND STABILITY THROUGH CASE MANAGEMENT SERVICES 8 (2016), http://lirs.org/wp-content/uploads/2016/04/LIRS_FamilyPlacementAlternativesFinalReport.pdf.; KATHARINA OBSER, WOMEN'S REFUGEE COMM'N, THE FAMILY CASE MANAGEMENT PROGRAM: WHY CASE MANAGEMENT CAN AND MUST BE PART OF THE US APPROACH TO IMMIGRATION 8–10 (2019), https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf; Ruthie Epstein, *The Tried-And-True Alternatives to Detaining Immigrant Families*, AM. C.L. UNION BLOG (June 22, 2018, 4:30PM), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/tried-and-true-alternatives-detaining.

274. Das, *supra* note 262, at 153–54.

275. *Id.* at 154.

276. GARCÍA HERNÁNDEZ, *supra* note 10, at 153.

277. KERWIN, *supra* note 160, at 2.

278. *See* discussion *infra* Section V.C.

279. Hon. Mark A. Drummond, *"Death Penalty Cases in a Traffic Court Setting." Lessons from the Front Lines of Today's Immigration Courts*, AM. BAR ASS'N (Jan. 15, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/death-penalty-cases-traffic-court-setting-lessons-front-lines-immigration-courts/.

280. *See* Outcalt, *supra* note 53 (discussing how current immigration policies affect family stability and mental health).

representation to immigrants should be supported as an alternative to detention.

C. Providing Immigrants with Counsel Increases the Already High Levels of Compliance

Broadly speaking, this Article is premised on the idea that immigration detention should be eliminated. If the singular purpose of immigration detention is to ensure attendance at future immigration hearings, this Article proposes that there are a significant number of alternatives that are equally effective, while being more just, humane, and cost-effective than large-scale detention of migrants.

First, immigration detention is per se unnecessary because individuals released from detention simply show up to their hearings. While the Trump Administration claimed that the vast majority of immigrants in removal proceedings never show up to their hearings,[281] that simply isn't true. In 2019, 99% of asylum seekers appeared at all of their hearings.[282] This alone should be sufficient data to demonstrate that immigration detention is unnecessary. However, not all will feel comfortable with the idea of permitting a large number of individuals to be released from detention on their own recognizance with little more than a promise to appear, regardless of what the data bear out. In order to help assuage those concerns, this Article proposes an economically efficient way to ensure appearance—providing universal representation to those individuals who would have otherwise been detained and building wrap-around support systems that promote hearing attendance at a fraction of the cost of detention.

Providing individuals with an attorney correlates strongly with that individual's likelihood to appear at future hearings. The seminal study on this issue found that "68% of pro se nondetained respondents were removed in absentia, compared to only 7% of nondetained cases with legal representation."[283] The importance of counsel is proved by the full study, which concluded that, over a six-year period, "only 32%

281. *Full Transcript of "Face the Nation" on June 23, 2019*, CBS NEWS (June 23, 2019, 2:12 PM), https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-june-23-2019/ (quoting then-Vice President Pence: "[T]he vast majority [of asylum seekers] never show up for their hearings.").

282. Nicole Narea, *Trump Says Most Asylum Seekers Don't Show Up for Their Court Hearings. A New Study Says 99% do.*, VOX (Jan. 10, 2020, 4:50 PM), https://www.vox.com/2020/1/10/21059924/trump-asylum-seekers-show-up-court-hearing.

283. Eagly & Shafer, *supra* note 152, at 73.

of nondetained pro se respondents showed up to court, compared to 93% of nondetained respondents with counsel."[284] The Department of Justice's own data show that "89 percent of all asylum applicants attended their final court hearing to receive a decision on their application."[285] This trend has been even stronger in earlier years, where, again, according to the DOJ's own statistics, "92 percent of asylum seekers appeared in court to receive a final decision on their claims" between 2013 and 2017.[286] Importantly, when represented by counsel, the number skyrockets. In 2018, the rate of compliance for families and unaccompanied children who were represented by attorneys was 98%.[287] Asylum seekers who had been released from immigration detention had a 98.5% compliance rate, whether represented by counsel or not.[288] In fact, the overall rate of missed hearings has dropped nearly 25% since 2012.[289] In 2018, 89.4% of individuals who applied for asylum attended all hearings, and overall, approximately 75% of individuals attend their hearings as required.[290] This number has held steady from 2013–2018, despite a variety of policy changes during that time.[291]

These statistics show: (1) that immigrants are more likely than not to show up to their proceedings, and (2) that the likelihood of attending immigration hearings increases when one has counsel. This correlation demonstrates the importance of having counsel in a complex immigration system. Because of the labyrinthine nature of immigration proceedings, having experienced counsel is necessary if to act as nothing more than a guide. Moreover, having counsel may result in people simply feeling like they are getting a fair shake in immigration proceedings.

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284. *Id.*

285. HUM. RTS. FIRST, *Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings* (Jan. 25, 2019), https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings.

286. *Id.*

287. *Id.*

288. *Id. Cf.* President Donald Trump, Address at the 100th Annual Farm Bureau Convention (Jan. 14, 2019), https://www.c-span.org/video/?456954-1/president-trump-addresses-farm-bureau-convention.

289. HUM. RTS. FIRST, *supra* note 285.

290. *Id.*

291. Narea, *supra* note 282 (citing U.S. DEP'T OF JUST., Statistics Yearbook Fiscal Year 2018, https://www.justice.gov/eoir/file/1198896/download).

D. Fiscal Argument and Convergence Theory

The central thesis of this Article is that a successful abolition movement will need to broaden to incorporate the support of individuals who might not typically align with a "progressive movement" or might find it objectionable to support a policy that they believe opposes "law and order." The argument in this Article relies strongly on Derrick Bell's interest-convergence theory. Bell's theory provides a critique of *Brown v. Board of Education*, finding that there were ancillary interests beyond "equality" that drove this decision, including foreign, domestic, and economic policy concerns.[292] Essentially, Bell claimed that, "The interests of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[293] This theory has been borne out with the advent and rise of the decarceration movement that has been embraced by a broad spectrum of both politically and fiscally conservative advocates.[294] The success of this movement, culminating in the recent First Step Act signed into law by the Trump administration, should be examined in determining how it might be possible to demonstrate that the interests of those who are traditionally opposed to rights for migrants might actually align with many of the underpinnings of the immigration detention abolition movement.

1. Convergence Theory in the Decarceration Movement

As Bell rightly explained, white people, as the collective beneficiaries of a society built upon structural racism, will be resistant to yielding such power unless they believe there is some individual or collective good that could derive from that power.[295] Here, whiteness creates a presumption of belonging, both as part of the citizenry, but also as part of the decision-making apparatus that wields power. Traditionally, such power is most effectively wielded under the auspice of fiscal responsibility. The success of this argument can be seen in the rise in support of the decarceration movement from many who would traditionally oppose the mass release of individuals from

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292. Bell, *supra*, note 11 at 524. This theory was grounded in the idea that there was no miraculous conversion of the public; indeed, there was limited public support for desegregation. The Court cast itself as one of magnanimity, refusing to perpetuate the continued segregation of children in schools based on race. However, Bell points out that there were other concerns at the time. *Id.* at 523–25.

293. *Id.* at 523

294. *See Getting out of Prison Sooner*, NAT'L PUB. RADIO, (Jul. 17, 2020), https://www.npr.org/transcripts/892465005.

295. *See* Bell, *surpa* note 230, at 524.

prisons and jails. If it is politically acceptable for a conservative individual to be supportive of the decarceration movement, then logically, it would seem possible to shift the collective conservative perspective to support the abolition, or at least reduction, of immigration detention.

One specific example of unlikely support for the decarceration movement is visible in Oklahoma, where Kris Steele, a Republican in the Oklahoma House of Representatives describes his own personal reckoning on this issue.[296] He notes how it used to be that there was "[p]olitical value . . . in being [seen as], quote-unquote, 'tough on crime,' and we gave very little thought to the actual cost."[297] He describes how, when he was appointed to the committee governing the state's budget, he realized that "corrections had become Oklahoma's second-fastest growing expenditure."[298] The shift occurred when he analyzed that all of this incarceration was not having a measurable effect on criminality.[299] Steele goes on to say, "[i]t would be one thing if mass incarceration actually worked in reducing crime or improving public safety. It does not. In fact, not only does Oklahoma have higher incarceration rates, our crime rate is not decreasing nearly as rapidly as in other states."[300]

When considering the alternatives to immigration detention, a fiscally conservative individual may be convinced that there is a benefit to limiting immigration detention because it could lower the expenses of the US government. This argument would appeal both to the average neutral taxpayer and to any political representative who purports to be influenced by the importance of balancing the budget. Such an appeal is especially timely given that the U.S. deficit has now exceeded its annual GDP.[301] A rudimentary analysis can be made by aggregating the current overall costs of immigration enforcement and detention, and then looking to how these financial burdens might be alleviated. Several states and localities have already undertaken and completed studies specific to their respective geographic regions.[302] These studies outline the various realms that should be considered in

296. *See* NAT'L PUB. RADIO, *supra* note 294.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. Kate Davidson, *U.S. Debt Is Set to Exceed Size of the Economy Next Year, a First Since World War II*, WALL ST. J. (Sept. 2, 2020, 5:18PM), https://www.wsj.com/articles/u-s-debt-is-set-to-exceed-size-of-the-economy-for-year-a-first-since-world-war-ii-11599051137.

302. *See generally* VERA INST. OF JUST., *supra* note 149 (highlighting the many states that have a publicly funded deportation defense program).

this analysis when making an economic argument.[303] They include: (1) the cost of detaining someone versus alternatives, (2) lost local, state, and federal income tax when a person is detained instead of working, and (3) the supportive costs (i.e. safety net) that must be made up for a family when the main income earner is detained.[304]

2. Convergence Theory in the Immigration Detention Abolition Movement: A Solution that Follows the Money

If the abolition movement is to be successful, it will need support from a broad coalition. An argument premised on the fiscal benefit of immigration detention abolition is most likely to be appealing across ideological lines and specifically to a conservative audience.[305] In this case, there is a clear and simple cost-benefit analysis to show that providing legal counsel and incorporating community-based support programs is less costly than immigration detention while still promoting attendance at future hearings.[306] Added benefits to a universal representation program include the fact that it eliminates the harm of detention and results in better long-term results for immigrants and their families by increasing the likelihood an individual will succeed in her case.

Since the creation of the Department of Homeland Security in 2003, the federal government has spent an estimated $333 billion on the agencies that carry out immigration enforcement.[307] Since its creation, Immigration and Customs Enforcement spending has nearly tripled, from $3.3 billion to $8.4 billion today.[308] According to a recent report, much of this spending "has gone to increasing the agency's ability to hold immigrants in detention in locations around the country."[309] The number of ICE agents devoted to Enforcement and Removal Operations (ERO) increased from 2,710 in 2003 to 8,201 in 2019.[310] Despite Congress only appropriating funding for 40,250 beds,

303. *Id.*
304. *Id.*
305. *See* Markowitz, *supra* note 9, at 145 ("[I]mplementing such a program on a national scale would be costly, but the massive scale-down in punitive enforcement contemplated . . . would more than offset any such costs.").
306. *Id.* at 144–45 ("The data demonstrate that the most important thing we can do to improve appearance rates in immigration court is to provide lawyers.").
307. AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 1 (2020), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.
308. *Id.* at 3.
309. *Id.*
310. *Id.*

in 2019, ICE's average daily population in custody was 50,165 persons, an increase of 19% from the prior year.[311] Additionally, in 2019, the Trump administration constructed several "tent camps" throughout the desert, near the border. The daily cost of detaining each of the thousands of children who were held there totaled $775.[312] Inhumanity aside, the average cost of detaining children with their families was estimated at between $256–$298 per day.[313] These costs arose because of the administration's knee-jerk effort to institute a policy of "zero tolerance" and family separation. In comparison, other countries, such as Canada, have a presumption of release (which the U.S. also had previously), and provides community wrap-around services.[314] The result has been a compliance rate of 94 percent and a cost of $10–12 per day as opposed to the $179 needed per day to detain a single adult.[315] The economic costs of immigration detention clearly demonstrate that it is unwarranted, and point toward other more cost-effective, humane, and sustainable solutions.[316] Though not examined here, additional costs of the current immigration detention system include various externalities that occur during detention of a massive number of persons—such as the splitting up of families or distrust in the government.

311. *See ICE Details How Border Crisis Impacted Immigration Enforcement in FY 2019*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/features/ERO-2019 (last updated Oct. 29, 2021).

312. Luke Darby, *Trump's Child Detention Camps Cost $775 Per Person Every Day*, GQ (June 25, 2019) https://www.gq.com/story/trump-detention-camps-cost.

313. *Id.*

314. SECOR ET AL., *supra* note 266.

315. *Id.*; *see* INT'L DET. COAL., THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION (2013), https://idcoalition.org/alternatives-to-detention-in-canada/; *see also* ALICE EDWARDS, UNITED NATIONS HIGH COMM'N FOR REFUGEES, LEGAL AND PROTECTION POLICY RESEARCH SERIES: BACK TO BASICS: THE RIGHT TO LIBERTY AND SECURITY OF PERSON AND 'ALTERNATIVES TO DETENTION' OF REFUGEES, ASYLUM-SEEKERS, STATELESS PERSONS AND OTHER MIGRANTS (2011), https://www.unhcr.org/4dc949c49.pdf (discussing alternatives to detention in other countries); OPHELIA FIELD, UNITED NATIONS HIGH COMM'N FOR REFUGEES, LEGAL AND PROTECTION POLICY RESEARCH SERIES: ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES (2006), https://www.refworld.org/pdfid/4472e8b84.pdf (discussing international detention practices).

316. *See, e.g.*, WOMEN'S REFUGEE COMM'N, THE FAMILY CASE MANAGEMENT PROGRAM: WHY CASE MANAGEMENT CAN AND MUST BE PART OF THE US APPROACH TO IMMIGRATION 8–10 (2019), https://s33660.pcdn.co/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf (arguing that case management programs are far cheaper than either detention in an adult facility or in ICE's family detention facilities).

Immigration detention is inordinately expensive.[317] This is especially so when considered against other civil enforcement agencies.[318] Much of the reason for this rise in expense is likely due to the conflation of criminal activity and migration,[319] despite a deafening roar of evidence to the contrary.[320] Therefore, the key issue is whether providing legal counsel is a more cost-efficient way of ensuring compliance with immigration hearings. As outlined below, the data demonstrate that it is.

3. Fiscal Analysis

On average, the daily cost of immigration detention is $129.64 for one adult[321] and $295.94 for a member of a family unit, with an average predicted daily population of 54,000.[322] In 2019, the average stay in detention was approximately fifty-five days.[323] However, this

317. See Markowitz, *supra* note 9, at 136, 144 (noting that ICE's funding "has risen from $3.3 billion in 2003, the year after its creation, to $7.5 billion in 2018—an increase of approximately 130%[,]" while also noting that, "[i]n 2000, just before the creation of ICE, the country's undocumented population stood at 7 million[,]" while "DHS's most recent estimate of the undocumented population is 12 million.").

318. *See* Marouf, *supra* note 4, at 2149 ("The United States spends more money on immigration enforcement than on the FBI, Drug Enforcement Agency, Secret Service, U.S. Marshalls Service, and Bureau of Alcohol, Firearms and Explosives combined.").

319. Flanagan, *supra* note 14, at 51–52 ("The integration of criminal and immigration law enforcement agencies and the expansion of immigration detention 'indicate that incapacitation to prevent future criminality has assumed unprecedented prominence as a justification for immigration detention.'" (quoting Kreimer, *supra* note 78, at 1514)).

320. *See, e.g.*, Alex Nowrasteh, *Immigration and Crime—What the Research Says*, CATO AT LIBERTY BLOG (July 14, 2015, 11:49AM), https://www.cato.org/blog/immigration-crime-what-research-says (presenting a thorough, if informal, accounting of the various most prominent studies and theories debunking the conflation of criminality and migration); *see also, e.g.*, Holly Yan & Dan Simon, *Undocumented Immigrant Acquitted in Kate Steinle Death*, CNN (Dec. 1, 2017, 2:21AM), https://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html (discussing the resolution of the killing of Kate Steinle).

321. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T BUDGET OVERVIEW, FISCAL YEAR 2020, at 6, 16 (2019); *see also* DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2017, at 5–6 (2017) (funding 30,913 detention beds for fiscal year 2017); Marouf, *supra* note 4, at 2149 (estimating a cost of $187 per person).

322. U.S. IMMIGR. & CUSTOMS ENF'T, CONGRESSIONAL BUDGET JUSTIFICATION, FISCAL YEAR 2020, at ICE-6, ICE–O&S-16 (2019), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

323. AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY

data may not account for a true representation of the duration of a typical detention stay. For example, a 2013 lawsuit produced data showing that "noncitizens who applied for relief from removal were held in California ICE detention centers for an average of 421 days."[324] Even by the lower number, the average cost of a total stay in detention for an adult would be over $7,000 for a single adult and over $16,000 for a member of a family unit. By comparison, the approximate cost for representation of an individual in removal proceedings by an attorney working for a non-profit is $5,000.[325] The most successful pilot program for family case management, which has a 99% compliance rate, would cost less than a mere additional $15 per day.[326] This would bring the total to $5,825 to provide an individual with an attorney for the duration of their case, as well as wrap-around services for those two months during which they would have been detained. This demonstrates a per-case savings amount of over $1,000. However, as mentioned above, immigration detention is not just costly to taxpayers because it is expensive. Immigration detention is costly because of the harm it does to families and the disruption it causes in the daily life of those who are detained. A recent study found that the universal representation program in New York would save

AGENCY 4 (Jan. 2, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf.

324. *Id.*

325. CAL. COAL. FOR UNIVERSAL REPRESENTATION, CALIFORNIA'S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS 16 (2016), https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf; LOCAL PROGRESS: THE NAT'L MUN. POL'Y NETWORK, UNIVERSAL REPRESENTATION: FILLING THE DUE PROCESS GAP FOR PEOPLE IN IMMIGRATION COURT 57 (2019), https://localprogress.org/wp-content/uploads/2019/01/Universal-Representation.pdf. It is worth noting that these estimates are based on representation in high-cost areas such as New York City, and typically require travel to remote detention facilities. It is possible that the cost could be reduced based on the geographic area where representation is taking place.

326. WOMEN'S REFUGEE COMM'N, *supra* note 316, at 1, 8, 10 (estimating a daily cost of $38.47 per 2.5-member family unit or $14.05 per person).

the state about $5.9 million annually.[327] Similar cost savings have been found in other states.[328]

This fiscal accounting demonstrates that universal representation is a viable alternative to immigration detention, because of its focus on justice, economic efficiency, and beneficial outcomes for society at large. Most importantly, universal representation is a viable alternative because it increases the likelihood that individuals will attend their hearings, while significantly reducing the costs to taxpayers. When families have an attorney, they will appear at their hearings nearly 100% of the time.[329] Because of the civil purpose implicit in immigration detention—i.e., that its main purpose is to ensure attendance at future hearings—providing universal representation would eliminate the need to detain any individual being held in immigration detention.[330]

There are several current projects that are now successful, and there is a large advocacy effort underway to support the expansion of these programs.[331] One additional benefit is that these programs have demonstrated a substantial increase in the likelihood of success. Here, that success is meaningful as it affects an individual's ability to gain long-term employment, support their family, and contribute to society generally. Immigration status, which typically is the result of a successful case, results in stability, which itself has important positive economic benefits.

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327. CTR. FOR POPULAR DEMOCRACY, THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS 5 (2013), https://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf (basing its cost-savings analysis on estimates to the shift in costs that would occur in employer turnover costs, loss of taxpayer income, education costs, foster care costs, and costs in child health insurance programs following the deportation of a parent).

328. ERIKA NAVA, N. J. POL'Y PERSP., LEGAL REPRESENTATION IN IMMIGRATION COURTS LEADS TO BETTER OUTCOMES, ECONOMIC STABILITY 4 (2018), http://www.njpp.org/wp-content/uploads/2018/06/NJPP-Universal-Legal-Representation-Report-June-2018.pdf (discussing New Jersey's estimated cost savings).

329. Markowitz, *supra* note 9, at 145 (2019) ("[D]ata show that virtually every family who was released from immigration detention and had a lawyer showed up for all their immigration court hearings (99%).").

330. *See* Karen Berberich, Annie Chen, Corey Lazar, & Emily Tucker, VERA INST. OF JUST., *Module 1: The Case for Universal Representation*, *in* ADVANCING UNIVERSAL REPRESENTATION: A TOOLKIT 14 (2018) https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1 ("When the government detains people during their removal proceedings, one of the primary reasons is to ensure that they make their upcoming court appearances.").

331. *See, e.g.*, VERA INST. OF JUST. *supra* note 149 (discussing the Vera Institute's SAFE Network, which supports eighteen programs in eleven different states).

4. Conclusion

Some may object to the inclusion of an economic argument because it reduces the humanity of the individuals for whom it advocates to a series of figures and numbers. Yet, as mentioned above, Bell's convergence theory supports the conclusion that ideologically, an economic argument may be the only way to obtain support from certain political actors. As García Hernández explains, "Bell's theory . . . remains persuasive: the possibility of forward-moving shifts in the law exist in moments in which elite interests align with those of subordinated groups."[332] In the current landscape, an example can be made of the Washington Football Team, the owner of which resisted for years the changing of its name, fighting tooth and nail, denying claims of racism. The owner vowed that the name would never change, until it became apparent that continuing to resist this change would result in financial fallout.[333] Many decried the fact that it took money to make this decision - that the only reason the Washington Football Team no longer uses a racist trope as its mascot is because it was no longer profitable. But isn't that the point? The reality is that money is now frequently used in place of actual voice preferences as a form of speech or expression.[334] One way to look at this advocacy is as a direct translation of the will of the people. The same lesson could apply here.

CONCLUSION

In conclusion, a federally funded universal representation program can serve as a practical first step toward the abolition of immigration detention and the other harsh enforcement mechanisms that are utilized today. While abolition is typically an ideology espoused by a small subsection of the general population, its purpose can be achieved through a less partisan and broader reaching ideal –

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332. García Hernández, *supra* note 125, at 1399.

333. Ken Belson & Kevin Draper, *Washington N.F.L. Team to Drop Name, Pro Football*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/sports/football/washington-redskins-new-name.html (last updated Aug. 19, 2021); *see also* Dave Johnson, *Column: It Took Financial Pressure for Snyder to Change Name*, WTOPNEWS (Jul. 13, 2020), https://wtop.com/washington-football/2020/07/column-it-took-financial-pressure-for-snyder-to-change-name/; Rick Maese, *A Redskins name change would be costly at first but it could end up as a lucrative move*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/sports/2020/07/08/redskins-name-change-would-be-costly-first-could-end-up-lucrative-move/.

334. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2010).

fiscal efficiency and responsibility. By demonstrating that the provision of counsel and other wrap around services is significantly less costly than immigration detention, while also showing that providing counsel and wrap around services is an extremely effective way to ensure compliance, this Article hopes to demonstrate appeal for such a proposal to those who may not typically align with an abolitionist ethic. It is clear that immigration detention is harmful and inordinately expensive. It separates families, causes psychological and physical harm to parents and their children, and all too frequently results in death and other irreparable harm. Immigration detention causes economic harm to local communities and strains state and federal resources. Universal representation is in itself a way to end the vast majority of immigration detention. It will ensure immigrants attend their hearings, while also ensuring a greater likelihood of success in their cases. Universal representation can help keep families together, lower costs to US taxpayers, and promote a more just and equitable society.