JRAD Redux: Judicial Recommendation Against Immigration Detention

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Abstract

There is a dire need for bail reform in the immigration detention system. Scholars have suggested a variety of recommendations to improve the manner in which immigration detention decisions are made. All of these recommendations have rested on the assumption that there is a finite pool of decisionmakers: Immigration and Customs Enforcement, the immigration judge, and, in certain cases, a federal district court judge deciding detention issues in habeas corpus proceedings. In this article, the author proposes the introduction of a new decisionmaker in the immigration detention system: the criminal court judge. This proposal is a JRAD redux—instead of a judicial recommendation against deportation ("JRAD"), as previously existed in immigration law, it is a judicial recommendation against immigration detention ("JRAID"). To provide a normative defense of this proposal, the article builds off of literature examining immigration detention as punishment, procedural justice, and the relationship between states and the federal government in immigration enforcement.

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INTRODUCTION

There is a dire need for bail reform in the immigration detention system. Scholars have suggested a variety of recommendations to improve the manner in which immigration detention decisions are made. For example, the immigration detention system can grant more procedural protections in bond hearings,[1] improve the risk assessment tool used by Immigration and Customs Enforcement ("ICE") agents,[2] require decisionmakers to seriously consider a wide variety of alternatives to detention,[3] and decrease reliance on money bail.[4] All of these

1 *See, e.g.*, Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 76 (2016) (recommending that the government, not the detainee, bear the burden of proof in bond hearings); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 63 (2012) (recommending court-appointed counsel for a hearing on whether a detainee is properly included in a mandatory detention category); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 719–22 (2009) (recommending the adoption of the Bail Reform Act standards for immigration bond hearings in order to comply with constitutional limits on preventive detention). *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469 (2007) (arguing that the immigration system has incorporated the enforcement norms of the criminal justice system without also incorporating the procedural protections from this system).

2 *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 789 (2020); Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 53 (2014).

3 *See, e.g.*, Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2141, 2170 (2017) (recommending that immigration judges and ICE consider alternatives to detention, including community-based alternatives to detention); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 161–62 (2013) (critiquing immigration detention's institutional design and recommending the increased use of alternatives to detention and the use of evidence-based models to assess flight risk and

recommendations have rested on the assumption that there is a finite pool of decisionmakers: ICE, the immigration judge, and, in certain cases, a federal district court judge deciding detention issues in habeas corpus proceedings.[5] This Article proposes the introduction of a new decisionmaker in the immigration detention system: the criminal court judge. This proposal is a JRAD redux—instead of a judicial recommendation against deportation ("JRAD"), as previously existed in immigration law, it is a judicial recommendation against *immigration detention* ("JRAID").

Immigration scholars have advocated for the return of some version of the JRAD legislation that was revoked in 1990.[6] This Article is the first to carve out detention as the question on which to seek the criminal court judge's opinion.[7] In making such a recommendation, this Article's proposal seeks to give a legislative acknowledgment to the reality that immigration detention is punishment.[8] It places the detention decision with a judge who is closer in place and time to any criminal allegations, which play an outsized role in many immigration detention decisions.[9] It gives the detention decision to the judge with more expertise in deciding what is frequently the dispositive issue in

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danger such as risk assessment tools); *see also* Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 San Diego L. Rev. 1, 2 (2022) (critiquing how electronic monitoring has become the primary alternative to immigration detention).

4 *See, e.g.*, Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. Davis L. Rev. 521, 522, 530 (2018); Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 Ind. L.J. 157, 197–202 (2016).

5 *See* Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 Md. L. Rev. 1076, 1078 (2021) (recommending that federal magistrate judges, with review by federal district court judges, decide all immigration detention decisions because immigration judges are not truly independent, and arguing that limited scope of habeas corpus review is insufficient to protect detainees' liberty interests); *see also* Kerry Martin, *Jail By Another Name: ICE Detention of Immigrant Criminal Defendants on Pretrial Release*, 25 Mich. J. Race & L. 147, 155 (2020) (arguing in favor of federal district courts that have held ICE violated the federal Bail Reform Act by detaining a defendant released pretrial).

6 *See, e.g.*, Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. Rev. Online 36, 45–50 (2015); Stephen Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 598–600 (2013); Margaret H. Taylor and Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 Emory L.J. 1131, 1169–84 (2002).

7 *See infra* Section III.A.

8 *See infra* Section III.B; Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 Queen's L.J. 55, 58 (2014); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346, 1349 (2014).

9 *See infra* Section III.B; *cf.* Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & Soc. Inquiry 227, 247–48 (2019) [hereinafter Ryo, *Predicting Danger*] (discussing judicial reliance on criminal *conviction* history); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & Soc'y Rev. 117, 146–49 (2016) [hereinafter Ryo, *Detained*] (discussing the role of criminal *conviction* history).

an immigration bond hearing—dangerousness.[10] The proposal also grants immigration detainees access to certain procedural protections and norms of the criminal justice process, which are more in line with basic liberty principles that should apply to immigration detention as well. These include an independent judge, court-appointed counsel, the right to have a judge consider alternatives to detention, and a government–borne burden of proof.[11] Finally, it allows immigration detainees to benefit from bail reforms of the criminal justice system that should apply given the parallel liberty interests in the criminal and immigration systems[12] and promotes efficiency in both systems.[13]

Now is the moment to consider such a legislative proposal because President Biden must deliver on his promise to reverse course on President Trump's anti-immigrant agenda.[14] During the Trump Administration, the number of persons in immigration detention reached an all-time daily high of 55,654 in 2019.[15] At the same time, average lengths of immigration detention have risen,[16] with thousands of immigration detainees spending one year or more in immigration detention while fighting deportation.[17] Under the watch of several presidential administrations, the United States created the largest immigration detention system in the world.[18]

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10 *See infra* Section III.B.

11 *See infra* Section III.B.

12 *See infra* Section III.B; *see also* Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 864 (2020) [hereinafter Gouldin, *Reforming Pretrial Decision-Making*]; Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2251, 2292 (2019) [hereinafter, Mayson, *Bias In, Bias Out*]; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 502–03 (2018) [Mayson, *Dangerous Defendants*]; Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 714 (2018) [hereinafter Gouldin, *Defining Flight Risk*]; SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 61–69 (2017); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 428–34 (2016).

13 *See infra* Section III.B.

14 *See* Michael D. Shear, *Biden to Announce Broad Plan to Reverse Trump Immigration Policies*, N.Y. TIMES (Feb. 18, 2021), https://www.nytimes.com/2021/01/19/us/politics/biden-immigration-policies.html [https://perma.cc/FF7X-5YMF].

15 *ICE Detainees*, TRAC REPS., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/ZEC4-NJDA].

16 *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 107 (2019) (reporting that the average length of immigration detention in 1981 was 3.6 days, whereas the average length in fiscal year 2015 was 38 days).

17 *See id.* ("8,671 adults who were released from immigration detention in fiscal year 2015 had been detained 6 to 12 months; 1,800 had been detained 1 to 2 years; 273 had been detained 2 to 3 years; and 117 had been detained more than 3 years.") (citation omitted).

18 The "largest detention system" in the world refers to the number of people detained by the government who are in civil exclusion or expulsion proceedings. *See* ELLIOTT YOUNG, FOR-

The daily population of detainees decreased because of the COVID-19 pandemic, dropping to 13,529 in early 2021.[19] The Biden Administration's initial days in office saw ICE announcing interim guidance on immigration enforcement,[20] setting forth priorities on whom to detain and deport,[21] and abandoning President Trump's "priority-free" immigration enforcement regime.[22] As the Biden Administration allows detention numbers to rise to prepandemic levels,[23] the JRAID presents a solution that takes the decision out of the hands of immigration actors in some cases, giving it instead to a criminal court judge who presides over any criminal charges.

Now is also the right moment because immigration judges, who review ICE officers' detention decisions in bond hearings,[24] are suffering significant critique because they are not truly independent adjudicators.[25] They are employees of the Department of Justice and answer

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ever Prisoners: How the United States Made the World's Largest Immigration Detention System 3–18 (2021) (discussing history of how the U.S. immigration detention system developed into the world's largest).

19 *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC Reps. (Mar. 15, 2021), https://trac.syr.edu/immigration/reports/640/ [https://perma.cc/2HFE-ZBKR]; *see also* Nishant Uppal, Elizabeeth T. Chin, Paarsa Erfani, Raquel Sofia Sandoval, Caroline H. Lee, Ranit Mishori & Katherine R. Peeler, *Trends in Decarceration, COVID-19 Cases, and SARS-CoV-2 Testing in US Immigration Detention Centers from September 2020 to August 2021,* JAMA Network Open, Feb. 2022, at 1–3 (discussing that monthly detained populations within ICE detention centers are correlated with monthly COVID-19 case rates).

20 *See generally* Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/AW44-2TTE].

21 *See* Memorandum from John D. Trasviña, Principal Legal Advisor, ICE, to All OPLA Attorneys (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/2Y9M-XKB3] (listing national security, border security, and public safety as the three priorities for immigration enforcement).

22 *See generally* Am. Immigr. Council, *The End of Immigration Enforcement Priorities Under the Trump Administration* (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf [https://perma.cc/RUY7-87HW] (discussing Trump Administration's broadening of enforcement priorities to include deportation without removable offenses).

23 *Immigration Detention Quick Facts*, TRAC Immigr., *https://trac.syr.edu/immigration/quickfacts/* [https://perma.cc/BH53-U8RL] (showing 24,170 people in immigration detention as of January 29, 2023); *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC Immigr. (Mar. 15, 2021), *https://trac.syr.edu/immigration/reports/640* [https://perma.cc/3ZFM-DNTF] (showing daily detainee population at 13,529 in early 2021); *see also* Hamed Aleaziz, *The Number of Immigrants Jailed by ICE Has Ballooned Under Biden This Year*, BuzzFeed News (June 29, 2021, 6:17 PM), https://www.buzzfeednews.com/article/hamedaleaziz/ice-detainee-numbers-increasing-biden [https://perma.cc/MV4C-UUFD].

24 *See infra* Part I.

25 *See, e.g.*, *For the Rule of Law, An Independent Immigration Ct: Hearing before the U.S. H.R, Jud. Comm. Immigr. and Citizenship Subcomm*, 117th Cong. 15 (2022) (statement of Honorable Mimi Tsankov, President, National Association of Immigration Judges) ("[T]he mission

to the Attorney General, the nation's top law enforcement officer, who has an immigration enforcement agenda.[26] So far, the Biden Administration has not prioritized immigration court reform,[27] despite numerous calls to do so.[28] While his administration appointed federal court judges with diverse professional backgrounds, including those who worked as public defenders,[29] the first immigration judges taking the bench under his watch were Trump-era picks whose immigration experience, if any, involved working for ICE.[30] Until meaningful immigration court reform happens—which is not foreseeable, given the unanswered calls for such reform for over four decades[31]—the JRAID presents an alternative solution. It is one way to ensure that liberty decisions are in the hands of a criminal court judge instead of an "imitation judge."[32]

Part I of this Article describes the immigration detention process as it currently exists in order to explain the role of various executive branch decision makers in the process. This Part also outlines many of the flaws in the current immigration detention system. Part II explains

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of the DOJ simply does not align with the mission of a court of law. Courts are supposed to be independent from all external pressures . . . ."); Holper, *supra* note 5, at 1081–1100; Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN. L. REV. 1275, 1276–77, 1306–29 (2020) [hereinafter Holper, *Fourth Amendment Implications*].

26 *See infra* Part I.

27 *See* Gregory Chen, *Biden's First 100 Days on Immigration: A Test of Leadership*, JUST SECURITY (Apr. 29, 2021), https://www.justsecurity.org/75934/bidens-first-100-days-on-immigration-a-test-of-leadership/ [https://perma.cc/89GM-WQXV] (describing that the Executive Office for Immigration Review, the subagency within the Department of Justice that houses immigration adjudicators, is still primarily staffed by ideologically minded Trump appointees).

28 *See, e.g.*, AM. IMMIGR. LAW. ASS'N, CONGRESS MUST PASS THE REAL COURTS, RULE OF LAW ACT OF 2022 (H.R.6577) 1 (2022) (recommending passage of bill that would remove immigration judges from the Department of Justice and make immigration courts Article I courts); AM. IMMIGR. LAW. ASS'N, AILA DOC. NO. 20110933, A VISION FOR AMERICA AS A WELCOMING NATION: AILA RECOMMENDATIONS FOR THE FUTURE OF IMMIGRATION 6 (Nov. 9, 2020) (recommending the creation of an Article I immigration court that is independent from the Department of Justice).

29 *See* AM. CONST. SOC., *On the Bench: Federal Judiciary* (May 13, 2021), https://www.acslaw.org/judicial-nominations/on-the-bench/ [https://perma.cc/R842-H4UW] ("The White House put an emphasis on the professional and personal diversity of these nominees. The White House particularly highlighted that several of the nominees had spent time as federal defenders.").

30 *See* Rebecca Beitsch, *Biden Fills Immigration Court with Trump Hires*, THE HILL (May 8, 2021, 10:17 AM), https://thehill.com/policy/national-security/552373-biden-fills-immigration-court-with-trump-hires [https://perma.cc/89WC-92NV].

31 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1276–77 (listing various proposals, dating back to the early 1980s, for immigration court reform).

32 *See* Holper, *supra* note 5, at 1077–78 (recommending that a federal magistrate decide all immigration detention matters, with review by a federal district court judge).

the operation of the original JRAD, including its introduction into and repeal from immigration law. Part III outlines the proposal for a JRAID and explores the normative arguments both for and against the JRAID. Part IV concludes the Article.

I. The Flaws in the Current Immigration Detention Process

Actors who sit within the executive branch are primarily responsible for decisions related to an immigration detainee's liberty.[33] Detention is part of the removal process, and serves the government's stated goals of ensuring that a detainee returns to court and does not harm society while awaiting a final hearing.[34] Despite these stated goals, which align with the goals of other types of civil detention, detention is viewed as punitive in intent and impact.[35] A Department of Homeland Security officer—typically an ICE officer—first decides whether a noncitizen should be detained during the immigration proceedings or released.[36] The primary factors that an ICE officer considers are dangerousness and flight risk.[37] The officer could permit release under a money bond or order that the detainee comply with conditions of release, such as electronic monitoring.[38] If the detainee is unsatisfied with ICE's bond decision, some but not all detained persons may request that an immigration judge review that decision in what is commonly called a bond hearing.[39] At a bond hearing, the immigration judge decides whether the detainee is a danger or flight risk.[40] Dangerousness, however, may be the dispositive issue, since judges may not consider flight risk unless the judge first finds that the detainee is not dangerous.[41] The detainee has only one bond hearing, absent a material change in the detainee's circumstances that would

33 *See* Holper, *supra* note 3, at 51–54.

34 *See id.* at 31–35 (discussing the stated goals of immigration detention, such as protecting the public and preventing flight risk, and the unstated goals, such as deterrence).

35 *See infra* Section III.B.1.

36 *See* Gilman, *supra* note 4, at 165.

37 *See id.* at 172.

38 *See* Holper, *supra* note 3, at 17–18 (noting that electronic monitoring is ICE's primary alternative to detention and describing the various types of electronic monitoring that ICE uses).

39 *See* Gilman, *supra* note 4, at 169–71; *see also infra* notes 89–92 and accompanying text (describing mandatory detention).

40 Gilman, *supra* note 4, at 172; *see* 8 C.F.R. § 1003.3(a)(1) (2021).

41 *See* Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) (holding that immigration judges may not reach the issue of flight risk unless the judge first decides that the detainee is not a danger to the community).

permit a new bond hearing.[42] Either the detainee or DHS prosecutor, who represents the government at the bond hearing, may appeal the immigration judge's bond decision to the Board of Immigration Appeals.[43] Both the immigration judge and the Board are housed within the Executive Office for Immigration Review of the Department of Justice.[44] Executive branch officials are both judge and jailer, in terms of immigration detention.

This author argued elsewhere that immigration judges should not decide important questions of physical liberty since they are not truly neutral, independent judges.[45] This author also argued that the detention of noncitizens without a truly neutral judge to decide their cases is an illegal seizure under the Fourth Amendment.[46] The lack of an independent adjudicator in this immigration detention system has led some immigration judges to call themselves "imitation judges."[47] Multiple factors contribute to the "imitation judge" label. Immigration judges are employees of the Department of Justice and answer to the Attorney General, the nation's top law enforcement officer, who has an immigration enforcement agenda.[48] The other adjudicators within the immigration system are members of the Board of Immigration Appeals, who also work for the Department of Justice and answer to the Attorney General.[49] Attorneys General during the Trump Administration made their position on immigration enforcement clear, publicly boasting about deportation numbers on the website of the Executive Office for Immigration Review, the subagency within the Department of Justice that houses the supposedly independent adjudicators,[50] and inviting the judges to participate in implementing the administration's enforcement priorities.[51] Attorney General Sessions

42 *See* 8 C.F.R. § 1003.19(e) (2021).

43 *See* Gilman, *supra* note 4, at 169–71.

44 *See* Holper, *supra* note 5, at 1082.

45 *See id.* at 1078–79.

46 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1276–79.

47 *See* Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 66 FED. LAW. 67, 70 (2016).

48 *See* Holper, *supra* note 5, at 1081–1100.

49 *See id.*

50 *See* Jeffrey S. Chase, *The Need for an Independent Immigration Court*, JEFFREY S. CHASE: OPS./ANALYSIS ON IMMIGR. L. (Aug. 17, 2017), https://www.jeffreyschase.com/blog/2017/8/17/the-need-for-an-independent-immigration-court [https://perma.cc/L9DA-H73Q].

51 Former Attorney General Sessions stated in a training for immigration judges, "'[a]ll of us should agree that, by definition, we ought to have zero illegal immigration in this country,' and reminded IJs in attendance that they are required to 'conduct designated proceedings "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."'" Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 22 (2018)

also publicly chastised the noncitizens who appear before the immigration judges as lawbreakers who are attempting to steal their way into the United States to gain access to the immigration system's bloated procedural protections, aided by "dirty immigration lawyers" who assist them in falsely claiming asylum.[52] One empirical study shows that the Trump Administration's efforts to control immigration judges' decisions paid off; immigration judges were less likely to grant release during Trump Administration, regardless of which president's attorney general appointed them.[53]

Several attorneys general have asserted control over immigration adjudicators in a number of ways: (1) appointing and confirming only judges with immigration enforcement backgrounds[54] or as political favors,[55] (2) reassigning Board members who most frequently ruled against the government to nonadjudicative positions,[56] (3) offering to "buy out" existing Board members during a financial crisis to create openings for more enforcement-minded adjudicators,[57] (4) enacting a "gag rule" that prevented immigration judges from speaking in public,[58] (5) creating performance quotas for judges to ensure swift deportations,[59] (6) eliminating procedural tools available to a judge that would increase a noncitizen's chances of succeeding in the case,[60] (7) enacting regulations that permit the ICE prosecutor to override an

(quoting Jefferson Sessions, U.S. Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program in Washington, D.C. (June 11, 2018)).

52 U.S. Dep't of Just., *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/4U7W-A8F9].

53 *See* Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 Duke L.J. 1855, 1855–56 (2020).

54 *See* Jeffrey Chase, *The Immigration Court: Issues and Solutions*, Jeffrey S. Chase: Ops./Analysis on Immigr. L. (Mar. 28, 2019), https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi [https://perma.cc/6E4P-FA6C] ("At present, nearly all new IJ hires are former prosecutors or those who otherwise have been deemed to fit this administration's ideological profile.").

55 *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1665–66 (2010) (describing controversy during Attorney General Gonzales's tenure in which immigration judge positions were awarded as political favors in the Republican Party, which became a subject of congressional inquiry).

56 *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 375–79 (2006) (describing how Attorney General Ashcroft purged the Board of all its members who were most likely to grant cases and reassigned them, including to nonadjudicative positions).

57 *See* Holper, *supra* note 5, at 1097.

58 *See id.* at 1096–97.

59 *See id.* at 1084–86.

60 *See id.* at 1097–98.

immigration judge's decision to release a detainee after the ICE prosecutor loses at a bond hearing,[61] and (8) writing published immigration decisions[62] that removed immigration judge's adjudicative discretion in various matters, several of which relate to immigration detention.[63]

Beyond the issue of the decisionmaker's lack of independence, there are additional problems with the way immigration custody decisions are made. Immigration bond hearings are relatively informal proceedings by design,[64] occurring as a sideshow and a distraction away from the individual hearing on the merits of whether someone should be deported from the country. Bond hearings present the detainee with a one-time shot to convince a judge that one is not a danger or flight risk.[65] If unsuccessful at this critical hearing, the detainee suffers from lengthy detention[66] that can feel so endless and punitive[67] that it often causes one to give up valid claims for relief from removal.[68] There is no right to periodic bond hearings to test whether detention is still necessary after a certain period of time—the detainee's fate turns on that one bond hearing.[69] At that hearing, the detainee has no right to court-appointed counsel,[70] although empirical research has demonstrated the positive impact of legal representation in the bond hearing.[71] The requirement that immigration judges consider alternatives to detention or a detainee's ability to pay a bond is a

61 *See id.* at 1089–90.

62 *See id.* at 1094–95.

63 *See id.* at 1081–1100.

64 *See* Chirinos, 16 I. & N. Dec. 276, 277 (B.I.A. 1977) ("Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter. To achieve this objective we not only countenance, but will encourage, informal procedures so long as they do not result in prejudice. . . . Obviously, this informality cannot carry over to a deportation hearing." (emphasis added)).

65 The only way an immigration detainee may obtain a second bond hearing is if there is a material change in circumstances. 8 C.F.R. § 1003.19(e).

66 *See* Ryo, *supra* note 16, at 107 (reporting that the average length of immigration detention in 1981 was 3.6 days, whereas the average length in fiscal year 2015 was 38 days); *see also id.* (reporting that "8,671 adults who were released from immigration detention in fiscal year 2015 had been detained 6 to 12 months; 1,800 had been detained 1 to 2 years; 273 had been detained 2 to 3 years; and 117 had been detained more than 3 years").

67 *See* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024–25, 1031 (2017).

68 *See* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 249–50 (2019).

69 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018) (holding that immigration detention statutes do not contain any provision requiring periodic bond hearings and it was incorrect for the lower courts to read such requirements into the statutes).

70 *See* Ryo, *Predicting Danger*, *supra* note 9, at 234.

71 *See id.* at 246–47; Ryo, *Detained*, *supra* note 9, at 144–46.

relatively new phenomenon, guaranteed only through federal court litigation.[72] The Board has instructed immigration judges to default to detention, not freedom;[73] certain class actions have operated to flip that presumption but they do not extend to all immigration courts.[74] Also, the future for these successful class action lawsuits is uncertain, as these decisions are on appeal.

To determine the dispositive issue of dangerousness, immigration judges give an outsized role to negative input from the criminal justice system, while disregarding positive input from that system. For example, judges frequently rely on uncorroborated and unreliable hearsay evidence to substantiate a dangerousness claim, such as police reports and gang allegations.[75] Yet, inputs that are positive, such as success with an alternative to detention program or release on bail in the criminal justice system, are deemed less relevant.[76] The combined ef-

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72 *See* Holper, *supra* note 3, at 9–11 (describing litigation where federal courts have instructed immigration judges that they must consider alternatives to detention and explaining how most immigration judges did not believe that they had the authority to order such alternatives). *But see* Miranda v. Garland, 34 F.4th 338, 365 (4th Cir. 2022) (reversing the district court's grant of injunctive relief to class of immigration detainees and holding that class plaintiffs are unlikely to succeed on the merits of their claim because the Due Process Clause does not require the immigration judge to consider alternatives to detention); Brito v. Garland, 22 F.4th 240, 252–56 (1st Cir. 2021) (holding that class representative's argument that the immigration judge did not consider alternatives to detention during a bond hearing could not be raised under prudential exhaustion principles in habeas corpus petition because they were not raised before the immigration judge).

73 *See* Holper, *supra* note 1, at 92–95 (describing Board case law that has required detainees to bear the burden of proving they are not a danger or flight risk, thus creating a presumption of detention).

74 *See* Holper, *supra* note 3, at 9–11 (describing class action litigation where federal courts have instructed immigration judges in certain courts that the government, not the detainee, must bear the burden of proving dangerousness and flight risk at a bond hearing); *see also Miranda*, 34 F.4th at 365–66 (reversing the district court's grant of injunctive relief to class of immigration detainees and holding that class plaintiffs are unlikely to succeed on the merits of their claim because the Due Process Clause does not require the government to bear the burden of proof in § 1226(a) immigration bond hearings).

75 *See, e.g.*, Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 752–53 (2018) (discussing highly unreliable hearsay contained in gang verification reports on which immigration judges rely); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL OF RTS. J. 675, 675, 693–700 (2015) (discussing highly unreliable hearsay contained in police reports on which immigration judges routinely rely).

76 For example, the Immigration Judge Benchbook, which was published in 2007 by the Executive Office of Immigration Review as a guide to immigration judges, lists as a less significant factor in a bond determination any early release from prison, parole, or low bond in related criminal proceedings. *See* CHARLES A. WIEGAND, III, IMMIGRATION JUDGE BENCHBOOK: FUNDAMENTALS OF IMMIGRATION LAW 15–16 (2011), https://www.justice.gov/eoir/archived-resources [https://perma.cc/N7K8-KMQE] (listing as significant factors in bond determinations: fixed address, length of residence in the United States, family ties, particularly those that can confer immigration status, employment history, immigration history, attempts to evade authori-

fect of a detainee bearing the burden of proof and uncorroborated evidence that the government presents makes a bond hearing feel like a "trial by suggestion, not evidence."[77] This quick, informal bond hearing, with dangerousness as a primary inquiry, is a perfect recipe for immigration judges to rely on psychological shortcuts and heuristics.[78]

It is true that some of the aforementioned critiques of the system can be resolved through a habeas corpus challenge to the deficient procedures, seeking the involvement of an Article III federal district court to remedy the unlawful detention.[79] As this Author explained elsewhere, however, habeas relief is often elusive.[80] The lack of court-appointed counsel for immigration detainees requires a certain level of triage, and detainees and their advocates often choose to spend their resources fighting against deportation.[81] Even those who spend the time and money challenging procedural deficiencies in the bond process may find their efforts fruitless, as many such habeas corpus petitions become moot because the habeas process is slow and the detained deportation case is fast-tracked.[82] As a result, the deportation case is often resolved before the federal court can decide whether to grant a more procedurally robust new bond hearing to determine whether the noncitizen should be detained or not during that deportation case.[83] Furthermore, any complaints about the manner in which

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ties, prior court appearances, and criminal record). Although the Benchbook is archived as of 2017 and no longer updated, it is an example of how immigration judges were instructed for many years to conduct bond hearings. *See* Matthew Hoppock, *Here is the Current Immigration Judge Bench Book (Sort Of)*, HOPPOCK L. FIRM (July 3, 2017), https://www.hoppocklawfirm.com/immigration-judge-bench-book/ [https://perma.cc/H56K-9KJ2].

77 *See* Abira Ashfaq, *"We Have Given Them this Power": Reflections of an Immigration Attorney*, NEW POL., Summer 2004, at 66, 68.

78 *See* Ryo, *Predicting Danger*, *supra* note 9, at 245–46; Fatma Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428–41 (2011) (discussing various factors contributing to implicit bias in immigration courtrooms, which are the judges' lack of independence, limited opportunity for deliberate thinking, low motivation due to stress and burnout, the legal and factual complexity of cases, and limited appellate review). Emily Ryo has cited as an example of such a heuristic at an immigration bond hearing the heuristic that a Central American male is a dangerous person because he is probably involved with a gang. Ryo, *Predicting Danger*, *supra* note 9, at 245–46.

79 Holper, *supra* note 5, at 1117.

80 *See id.*; Mary Holper, *The Great Writ's Elusive Promise*, CRIMMIGRATION: THE INTERSECTIONS OF CRIM. AND IMMIGR. LAW (2020), available at https://lira.bc.edu/work/ns/b79f46c8-86e8-4a0d-9317-bf2bd4203f4a [https://perma.cc/N44K-975D]; *see also* Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State Court Criminal Convictions*, 61 ARIZ. L. REV. 291, 295 (discussing contractions in federal habeas review, leading to meaningless habeas review).

81 *See* Holper, *supra* note 5, at 1117–1120, 1128.

82 *See id.* at 1128.

83 *See id.* at 1117–1120, 1128–1129.

an immigration judge exercised discretion in a bond hearing are unresolvable before an Article III court because Congress blocked judicial review of all discretionary decisions related to detention.[84]

These various critiques of immigration bond hearings do not even touch upon a major flaw in the immigration detention system—the congressional authorization of mandatory detention, which eliminated immigration judge review of an initial ICE detention decision in broad categories of cases. Starting in the late 1980s, Congress authorized mandatory detention without a bond hearing for immigration detainees removable due to numerous criminal convictions and security reasons.[85] The Supreme Court upheld the statute against a due process challenge in 2003, assuming based on incorrect statistics presented by the government that all such detentions were brief.[86] Detainees who seek asylum and similar protections also are subject to mandatory detention if they present at the border or were previously deported and reentered.[87] Class actions challenging prolonged mandatory detention have allowed many of these detainees to gain access to bond hearings.[88] These class actions have also guaranteed better procedural protections at such bond hearings.[89] However, the Supreme Court in 2018

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84 *See id.* at 1131; *see also* 8 U.S.C. § 1226(e).

85 *See* 8 U.S.C. § 1226(c); Holper, *supra* note 1, at 83–89 (describing series of statutes leading up to the current mandatory detention statute).

86 *See* Demore v. Kim, 538 U.S. 510, 531 (2003); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) ("The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.").

87 *See* 8 U.S.C. § 1225(b) (authorizing mandatory detention for those who are stopped at the border seeking admission to the United States); 8 U.S.C. § 1231(a) (authorizing mandatory detention for those who have already been ordered removed).

88 For example, through the *Reid v. Donelan* class action, many immigration detainees in prolonged mandatory detention under 8 U.S.C. § 1226(c) gained access to bond hearings, until the First Circuit Court of Appeals in 2021 reversed the class action as a mechanism to provide such relief. *See* Reid v. Donelan, 390 F. Supp. 3d 201, 209, 219 (D. Mass. 2019), *vacated in part, aff'd in part*, 17 F.4th 1, 9–12 (1st Cir. 2021) (reversing district court's use of a class action as a mechanism to provide individual habeas relief for those whose mandatory detention under 8 U.S.C. § 1226(c) had become unreasonably prolonged but reasoning that nothing prohibited class members from filing individual habeas corpus petitions); *see also* Rodriguez v. Robbins, 804 F.3d 1060, 1090 (9th Cir. 2015), *rev'd and remanded sub nom.*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (upholding relief that required bond hearings before immigration court once mandatory detention under 8 U.S.C. § 1226(c) exceeded six months).

89 *See, e.g.*, *Rodriguez*, 804 F.3d at 1074–76 (providing for periodic bond hearings every six months where the government must prove dangerousness and flight risk by clear and convincing evidence); *see also Reid*, 390 F. Supp. 3d at 210, 224–225 (at bond hearings, requiring that the government bear the burden of proof and the immigration judge consider alternatives to detention and a detainee's ability to pay). *But see Reid*, 17 F.4th at 9–12 (reversing district court's judgment that guaranteed procedural protections in bond hearings for class members because

determined that the manner in which these courts decided whether the mandatory detainees had access to bond hearings was defective and remanded the cases for further consideration.[90] Other attempts for detainees to gain access to bond hearings by reading exceptions into these mandatory detention statutes have failed at the Supreme Court.[91]

It can be difficult to pinpoint any one of these flaws as the "but for" contributor to the immigration system's over-detention, although many scholars have sought to answer this question by suggesting causes.[92] Yet, it is clear that the U.S. has the largest immigration detention system in the world.[93] And it is also clear that there are real societal costs to immigration detention. Beyond the physical costs to detain a person,[94] there is the loss to society of a person who could otherwise be gainfully employed, the loss of tax revenues that person could have provided, the loss of caretakers or emotional supporters in many families or communities, and civil disengagement that such detention can produce.[95]

Given the significant number of flaws in the immigration detention system, this Article seeks an alternative solution in the form of a JRAID. As the JRAID borrows elements of the once-existing JRAD, it is necessary to examine this model whereby a criminal court judge ordered the immigration authorities to provide relief for a noncitizen.

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the court lacked jurisdiction to render guidance when no individual class member suffered prejudice because of the lack of procedural protections).

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

91 *See, e.g.*, Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021) (denying right to bond hearing for noncitizens detained under a final order of removal pursuant to 8 U.S.C. § 1231(a) who are seeking withholding of removal); Nielson v. Preap, 139 S. Ct. 954, 972 (2019) (denying right to bond hearing for noncitizens detained pursuant to 8 U.S.C. § 1226(c) who were not immediately detained by ICE following their release from criminal custody).

92 *See* Holper, *supra* note 3, at 7–9 (summarizing scholars' theories on the growth of the U.S. immigration detention system). Theories include the post-1980 increase in refugees racialized as nonwhite, the immigration system's adoption of incarceration practices from the war on drugs and war on crime, the financial benefits to the private prison industry and local governments where detention facilities have been cited and shifting immigration case law that created a presumption of detention with limited oversight by the judiciary. *See id.*

93 *See* YOUNG, *supra* note 18, at 3–18.

94 *See* Laurence Benenson, *The Math of Immigration Detention*, *2018 Update: Costs Continue to Multiply*, NAT'L IMMIGR. F., (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/ [https://perma.cc/DPZ7-J792] (for fiscal year 2018, reporting the daily rate of an ICE detention bed to be $208).

95 Das, *supra* note 3, at 143–45 (describing public and private costs of immigration detention); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion,* 30 U. MIAMI INTER-AM. L. REV. 531, 541–42 (1999) (describing public and private costs of immigration detention).

II. The Rise and Fall of the JRAD

In 1917, Congress began the "modern regime of deportation for post-entry criminal conduct,"[96] authorizing deportation for a crime involving moral turpitude ("CIMT") if the crime occurred within five years of the noncitizen's entry into the United States, or two such crimes occurring at any time.[97] Congress with the same legislation authorized a role for the criminal court, permitting the sentencing judge to issue a JRAD.[98] The JRAD, although technically called a "judicial recommendation," was actually a command to the immigration authorities to not deport the noncitizen for this crime.[99] The statute required the judge to give notice of the JRAD to state authorities and the prosecutor for the jurisdiction of conviction, in addition to the Immigration and Naturalization Service ("INS").[100] The notice provision permitted enforcement actors from both the criminal justice and immigration systems to object to the JRAD prior to its issuance.[101]

Scholars have offered explanations of the JRAD's legislative history.[102] Peter Schuck has described the JRAD as "a concession to lawmakers who opposed the power to deport post-arrival criminals at all."[103] Margaret Taylor and Ronald F. Wright have written that members of Congress believed that the judge who sentences a noncitizen offender is in the best position to decide whether that person should be deported.[104] They have also explained how Congress rejected an amendment that would allow the sentencing court to issue a JRAD at any time before deportation and instead put in place a timeline requiring noncitizen defendants to seek a JRAD within thirty days of sen-

96 Daniel Kanstroom, Deportation Nation: Outsiders in American History 133 (2007).

97 Immigration Act of 1917, Pub. L. No. 301, ch. 29, § 19, 39 Stat. 889 (codified at 8 U.S.C. § 155(a)); Cade, *supra* note 6, at 38.

98 *See* Immigration Act of 1917 § 19; Cade, *supra* note 6, at 38.

99 Cade, *supra* note 6, at 38; García Hernández, *supra* note 8, at 1377.

100 *See* Taylor & Wright, *supra* note 6, at 1143–44.

101 *See id.*

102 *See* Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14-02 Immigr. Briefings 1, 4–5 (2014); Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 Geo. Immigr. L.J. 597, 636 (2013); Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1058 (2012); Taylor & Wright, *supra* note 6, at 1143–48.

103 Schuck, *supra* note 102, at 636 (noting that the "concession" also included the "fact that these immigrants would be imprisoned in the United States until their deportations").

104 Taylor & Wright, *supra* note 6, at 1144; *see also* 53 Cong. Rec. 5171 (1916) (statement of Rep. Powers) ("[A]t the time the judgment is rendered and at the time the sentence is passed, the [sentencing] judge is best qualified to make these recommendations.").

tencing.[105] This statute of limitations required the sentencing judge to issue a JRAD "promptly and when the entire matter is fresh."[106] Julia Simon-Kerr has explained that when Congress adopted the JRAD alongside the CIMT grounds of deportation, courts already had interpreted CIMT as a ground of immigration exclusion.[107] In an influential 1913 opinion by Judge Noyes of the Southern District of New York, the immigration "categorical approach" came into existence.[108] The categorical approach, as interpreted, requires judges interpreting CIMT to ignore the facts of the offense and focus exclusively on the elements of the statute of conviction.[109] So while Congress adopted criminal deportation grounds that ignored the individual facts of a person's crime, at the same time it gave a criminal court judge leeway to explore those underlying facts and mitigating circumstances.[110]

Crime-related grounds of deportation increased, with the JRAD keeping somewhat apace.[111] In 1988, Congress introduced the now-infamous "aggravated felony" ground of deportation, which at the time was limited in its reach but has since grown to become a "colossus."[112] For a few years, those deportable for aggravated felony convictions were eligible for a JRAD.

In 1990, Congress repealed the JRAD, without any debate on the floor over its repeal.[113] Although the legislative history behind the repeal is sparse, scholars have opined that the repeal of the JRAD is consistent with the broader congressional agenda to fast-track deportation of those convicted of crimes and remove any opportunity for

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105 Taylor & Wright, *supra* note 6, at 1144.

106 *Id.* (quoting 53 CONG. REC. 5169–71 (1916)).

107 *See* Simon-Kerr, *supra* note 102, at 1055–59.

108 *See id.* at 1055–59 (discussing United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914)).

109 *See id.* at 1056.

110 *See id.* (quoting 53 CONG. REC. 5169 (1916) (statement of Rep. Mann)) (describing how "[o]ne Congressman argued that 'the objection' that immigrants would be deported for petty crimes was 'taken care of by the provision in the bill which forbids deportation if the judge who enters the sentence does not desire to have a man deported'"). Simon-Kerr, however, writes that "[d]espite the Noyes opinion, the congressional record gives no indication that when Congress allowed sentencing judges to make recommendations; it anticipated that the federal courts would bar themselves entirely from reviewing the facts of the crimes supporting deportation orders." *Id.* at 1058. *But cf.* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

111 *See* Legomsky, *supra* note 1, at 483.

112 *Id.* at 484.

113 *See* Taylor & Wright, *supra* note 6, at 1151.

judges to give second chances to these noncitizens.[114] The INS Commissioner advocated for Congress to eliminate JRADs and other relief from removal, claiming that procedural rights allowed lawyers for noncitizens to "keep a case in the system for years."[115] Congress accepted the position of the INS, in spite of state court judges' opposition to the repeal.[116] The Committee Report for the Comprehensive Crime Control Act of 1990 stated, "[b]ecause the Committee is convinced that it is improper to allow a court that has never passed on immigration related issues involved in an alien's case to pass binding judgment on whether the alien should be deported . . . judicial recommendations will no longer protect aliens from deportation . . . ."[117]

Congress' repeal of JRAD in 1990 did not send the concept into the dustbin of history. Scholars have occasionally called for a return of the JRAD.[118] The next Part explores the return of a different variation of the JRAD. Instead of recommending against deportation, the JRAID recommends against *detention*. In this historical moment when the United States has built the largest immigration detention system in the world,[119] and detention is rarely authorized by a truly neutral decisionmaker,[120] the JRAID presents one solution to remedy some of the flaws in the overuse of immigration detention.

III. The JRAID Proposal

What would the JRAID process look like? What are the normative arguments for and against this proposal? This Part seeks to answer these questions.

A. The Mechanics of a JRAID

Put simply, the JRAID is an order that a noncitizen's criminal defense attorney would seek from a criminal court judge at any point during the criminal proceedings. The most likely moment at which the criminal court judge would issue a JRAID is at the time of a pretrial

114 *See, e.g.*, Cade, *supra* note 6, at 40; García Hernández, *supra* note 8, at 1372–78 (describing how penal norms from the 1980s and 1990s became immigration norms, one of which was to remove judges' discretion to decide punishment because they were perceived to be too lenient).

115 Peter Schuck & John Williams, *Removing Criminal Aliens: The Promises and Pitfalls of Federalism*, 22 Harv. J.L. & Pub. Pol'y 367, 437–38 (1999) (quoting *McNary Working to Gain Control Over INS*, 66 Interpreter Releases 1403, 1403–04 (1989)).

116 *See* Taylor & Wright, *supra* note 6, at 1151.

117 H.R. Rep. No. 101-681, pt. 1, at 149 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6472, 6555; Taylor & Wright, *supra* note 6, at 1151.

118 *See* Cade, *supra* note 6.

119 *See* Young, *supra* note 18.

120 *See* Holper, *Fourth Amendment Implications*, *supra* note 25.

detention decision. Yet, a JRAID could also be ordered at sentencing, when a criminal court judge is again assessing factors relevant to immigration detention, such as dangerousness. The JRAID order would bind both ICE and the immigration judge, preventing them from detaining a noncitizen throughout the duration of the immigration proceedings.

Although the burden would be on the noncitizen to request the JRAID, the ultimate burden of persuasion would lie with the prosecution, who must justify detention.[121] The standards of proof would reflect the bifurcated standards of the federal Bail Reform Act ("BRA") that apply to criminal pre-trial detention determinations: the government must prove dangerousness by clear and convincing evidence, and flight risk by preponderance of the evidence.[122] There would be no mandatory immigration detention categories—instead, those categories would shift to presumptions of detention that a detainee may rebut,[123] as is the case with criminal pre-trial detention decisions under the BRA.[124] In creating the JRAID process, Congress could also re-examine which categories should lead to a presumption of dangerousness.[125] The prosecutor would present evidence to contest the JRAID, seeking to meet its burden that the noncitizen is a danger, flight risk, and that no alternatives to detention could reasonably ensure the safety of the community or the defendant's appearance.[126] Although this proposal does not require notification to the immigration authorities, as previously existed when a noncitizen sought a JRAD, it is likely that the prosecutor will seek input from ICE.[127] The

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121 This burden allocation is in keeping with longstanding Supreme Court precedent that in all forms of civil detention, it is the government, not the detainee, who must bear the burden of proof. *See* Holper, *supra* note 1, at 96–99.

122 *See* Reid v. Donelan, 390 F. Supp. 3d 201, 224–25 (D. Mass. 2019) (adopting bifurcated standard of proof as exists in the BRA).

123 *See* Holper, *supra* note 5, at 1121–26 (recommending that federal magistrate judges decide immigration detention matters and convert the mandatory detention categories into presumptive detention categories).

124 *See id.*

125 *See* García Hernández, *supra* note 8, at 1404 (noting that "the INA's detention provisions sweep much more broadly" than those categories that permit pretrial detention based on dangerousness in the federal criminal context).

126 18 U.S.C. §§ 3142–43.

127 *Cf.* Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 26–28 (2012) (describing officewide policies and individual prosecutor's decisions to incorporate immigration consequences into plea bargaining after *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010), which created a Sixth Amendment duty for criminal defense counsel to advise about certain immigration consequences).

defense attorney would present all evidence rebutting the prosecution's case that the noncitizen is a danger or flight risk.

The JRAID order, if entered, would include any alternatives to detention that the criminal court judge sees as appropriate. For example, the criminal court judge could order a community-based alternative to detention, money bail, electronic monitoring, house arrest, or release on the detainee's own recognizance with regular check-ins.[128] The criminal justice system's probation officers would monitor compliance with alternatives to detention throughout the duration of the criminal case. Once the criminal case is concluded, if the immigration case is still ongoing, the immigration system's equivalent of probation officers—ICE and its subcontractors who manage its alternatives to detention program—would continue to monitor compliance with any conditions of release.[129]

The criminal court judge may decide not to grant a JRAID. In this case, the JRAID order could be appealed in the same manner in which a bail order is appealed within the criminal justice system.[130] If, ultimately, no JRAID is entered by the criminal justice system, the existing immigration bond procedures go into effect for the detainee.[131]

The JRAID proposal reaches only immigration detainees who have been through the criminal justice system, and thus reaches only a subset of potential immigration detainees. Indeed, this proposal does not even reach the majority of immigration detainees, since noncriminal border detainees make up the majority of those who enter immigration detention.[132] Yet, as Emily Ryo has demonstrated through two empirical studies of immigration court bond hearings, the existence of interactions with the criminal justice system heavily influences immi-

128 *See* Holper, *supra* note 3, at 5–11 (explaining various alternatives to detention and arguing against the use of the alternative to detention that is most common in the immigration context: electronic monitoring).

129 *See id.* at 10–11 (explaining how ICE effectively operates as a probation officer, monitoring compliance with alternatives to detention). ICE could also outsource compliance with its alternatives to detention through a subcontractor, as it has done with its alternatives to detention program. *Id.* at 13–14.

130 *See, e.g.*, 18 U.S.C. § 3145 (providing for review and appeal of a federal pretrial detention order).

131 *See supra* Part I. Although outside of the scope of this Article, Congress could also amend the immigration detention procedures to align more closely with the BRA. *See* Cole, *supra* note 1, at 719–22.

132 *See* ICE, *FY 2022 Detention Statistics*, https://www.ice.gov/detain/detention-management [https://perma.cc/D5MJ-TAH5] (showing that of the 25,134 fiscal year 2022 ICE detainees, 6,430 were "convicted criminal[s]," 2,040 were "pending criminal charges," and 16,446 were "other immigration violator[s]").

gration bond determinations.[133] In other words, persons who have interacted with the criminal justice system are more likely to be detained by immigration authorities than those without. It is therefore appropriate that additional protections and inputs from the criminal court be made available in those cases that include criminal histories and that, as a result, are otherwise likely to end in immigration detention.

For detainees who have not interacted with the criminal justice system, the JRAID is not applicable. For these detainees, immigration judges are more likely to make bond determinations on flight risk rather than dangerousness.[134] Immigration judges will continue to make custody determinations, without input from a criminal court judge, based on factors such as family ties, a fixed address, a history of compliance with past immigration cases, and the existence of a prima facie case for relief.[135]

B. Why Adopt a JRAID?

This Article offer five reasons why Congress should adopt the JRAID into law: (1) to give a legislative acknowledgement to the reality that, in practice, immigration detention functions as punishment, (2) to assign the detention decision to the decisionmaker who has more expertise in the relevant inquiry and is closer to the problem, (3) to allow immigration detainees to benefit from certain procedural protections of the criminal justice process, (4) to allow immigration

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133 Ryo, *Predicting Danger*, *supra* note 9, at 247–48; Ryo, *Detained*, *supra* note 9, at 146–49.

134 The Board listed several factors relevant to an immigration judge's bond decision, which include: (1) whether the detainee has a fixed address in the United States, (2) the detainee's length of residence in the United States, (3) the detainee's family ties in the United States, and whether they may entitle the detainee to reside permanently in the United States in the future, (4) the detainee's employment history, (5) the detainee's record of appearance in court, (6) the detainee's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses, (7) the detainee's history of immigration violations, (8) any attempts by the detainee to flee prosecution or otherwise escape from authorities, and (9) the detainee's manner of entry to the United States. Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). Only the sixth and ninth factors pertain to dangerousness, as the remaining factors address flight risk. *See id.*

135 *See Guerra*, 24 I. & N. Dec. at 40 (B.I.A. 2006); *see also* R-A-V-P-, 27 I. & N. Dec. 803, 807 (B.I.A. 2020) (upholding immigration judge's denial of bond based on the conclusion that the detainee did not demonstrate a sufficient likelihood of an asylum grant at future hearings). *But see* Jeffrey Chase, *BIA: "Lock Them Up!"*, JEFFREY S. CHASE: OPS./ANALYSIS ON IMMIGR. L. (Apr. 6, 2020), https://www.jeffreyschase.com/blog/2020/4/6/bia-lock-them-up [https://perma.cc/66DF-5XSD] (critiquing *R-A-V-P-* decision and stating that "[t]he question isn't whether the respondent will be granted asylum; it's whether his application for asylum will provide enough impetus for him to appear for his hearings relating to such relief").

detainees to benefit from recent bail reform, and (5) to ensure more efficient functioning of both the criminal justice and immigration processes.

1. A Legislative Reckoning: Immigration Detention is Punishment

Placing the liberty decision into the hands of a criminal court judge is a legislative affirmation of the idea that immigration detention functions as punishment.[136] The logic of immigration detention, even though it is constitutionally limited to serve as civil pre-trial detention, tracks the punitive logic of the criminal justice system in its role as adjudicator of punishment. In determining criminal liability and sentencing, the criminal justice system seeks to punish, stigmatize, express society's condemnation for the acts of the convicted person,[137] and exclude a convicted individual from society.[138] In practice, the intent and impacts of immigration detention track many of these same goals.[139] César Cuauhtémoc García Hernández has argued, applying

136 *See* Stumpf, *supra* note 8, at 58 ("Civil detention is an oxymoron. The detention of noncitizens in the United States bears only a hazy resemblance to the resolution of civil disputes and has a much closer connection with criminal and national security law."); García Hernández, *supra* note 8, at 1353–54 (describing how the Supreme Court has repeatedly held that immigration detention is not punishment without explaining why); *see also* Taylor & Wright, *supra* note 6, at 1169–74 (proposing a merger of criminal and immigration proceedings, and arguing that the merger of the two systems "counters the prevailing view—really a judicially-created myth—that deportation is not punishment for a crime").

137 Sandra Mayson, describing the literature on what separates punishment from other forms of state coercion, has written, "[t]he consensus point is that punishment conveys a judgment of culpability. Other exercises of state power inflict hardship, aim to deter disfavored conduct, incapacitate the dangerous, or promote rehabilitation." Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. 301, 317–18 (2015). She summarizes that punishment "necessarily 'expresses blame.'" *Id.* (quoting Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. Crim. L. & Criminology 771, 800–05 (1998)); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 520–21 (2001) (discussing the "expressive potential of criminal law," which is "the use of the criminal justice system not primarily to make and carry out threats, but to send signals" to the regulated population).

138 Mayson, *supra* note 137, at 318–19 (reasoning that criminal punishment "may serve consequentialist aims" such as preventing harm through deterrence or incapacitation, rehabilitation, or expressing community norms); *see also* Cade, *supra* note 6, at 51–52 ("[T]he very criminal justice system that produced the predicate criminal history in the first place has formally determined that the countervailing factors—rehabilitation, remorse, hardship, health, et cetera—warrant formally withdrawing (or avoiding) the consequences of a conviction."); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 380 (2006) (comparing functions of criminal law and immigration law and noting that these two systems "are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders.").

139 *See* Holper, *supra* note 3, at 20–25 (discussing stated goals of immigration detention,

H.L.A. Hart's theory of punishment, that immigration detention is punishment.[140] Immigration detention involves the "deliberate deprivation of liberty carried out by immigration officials operating under the authority" of immigration laws; it "involve[s] pain or other consequences normally considered unpleasant"; and it is a consequence largely imposed for a criminal offense.[141] Immigration detainees themselves have expressed that they perceive immigration detention to be punishment.[142] García Hernández also has argued that immigration detention seeks to stigmatize a detainee.[143] Federal immigration authorities seek to exclude detainees from society,[144] both by placing physical barriers around them and transferring them to be detained in remote rural areas.[145] Several scholars have noted that immigration detention serves an expressive purpose,[146] in that it expresses community disapproval for conduct that resulted in detention[147] and also

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which are to prevent flight risk and protect the community, and unstated, expressive goals, which are deterring future border-crossers, deterring detainees from pursing relief from removal, and demonstrating that the government has control over its borders). *But see* R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 175, 189–90 (D.D.C. 2015) (holding that the government may not use immigration detention to deter future border crossers).

140 García Hernández, *supra* note 8, at 1380–82.

141 *Id.*

142 In a study published in 2017, Emily Ryo interviewed detainees, many of whom had recently lost a bond hearing, and those who had recently been released on bond. Ryo, *supra* note 67, at 1019–20. She concluded that the detainees believe immigration detention to be act of penal confinement, not "civil," as it has been classified; they also believe that legal rules are "inscrutable by design" and that legal outcomes are arbitrary. *Id.* at 1024–48.

143 *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. Rev. 245, 282–83 (2017).

144 *See id.*; César Cuauhtémoc García Hernández, *Immigrant Defense Funds for Utopians*, 75 Wash. & Lee L. Rev. 1393, 1412 (2018) (describing the "physical segregation" in both imprisonment and deportation that society justifies as necessary in order to create outsiders and linking these goals of the immigration and criminal justice systems).

145 *See* García Hernández, *supra* note 143, at 282; Emily Ryo & Ian Peacock, The Landscape of Immigration Detention in the United States 2 (2018), https://americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [https://perma.cc/E7NT-BS8S] ("About 48 percent, 26 percent, and 22 percent of detainees were confined at least once in a facility that was located more than 60 miles, 90 miles, and 120 miles away, respectively, from the nearest nonprofit immigration attorney who practiced removal defense."); César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 Berkeley La Raza L.J. 17, 19–20 (2011) [hereinafter García Hernández, *Detainee Prison Transfers*] (describing common occurrence of ICE transferring immigration detainees, often to rural, isolated detention facilities).

146 *See, e.g.*, Holper, *supra* note 3, at 24–28; Ryo, *supra* note 68, at 249–50; Stumpf, *supra* note 8, at 93; Legomsky, *supra* note 95, at 540; Margaret Taylor, *Symbolic Detention*, 20 Def. Alien 153, 154–55 (1997).

147 García Hernández, *supra* note 8, at 1381.

sends a message to society that the government is in control of its borders.[148]

In sum, immigration detention itself is punishment as it stands now, even though it should be constitutionally limited to those instances where it is necessary for some administrative purpose.[149] Because immigration detention functions as punishment, there is an expressive benefit in assigning criminal court judges to the immigration detention decision: the reality of punishment is acknowledged. Also, since immigration detention is effectively punitive, it follows that the guarantees and limitations that attach to punishment decisions should apply. Criminal court judges are appropriate decisionmakers, because they apply such guarantees and limits in the normal course of their punishment decision-making.

2. Expertise and Proximity of Criminal Court Judges

Criminal court judges are also uniquely positioned to determine the first, and often dispositive, issue in an immigration bond determination—dangerousness.[150] These judges have more experience, and thus expertise, in determining whether a person is a danger to the community.[151] Over the years, legislators have given criminal court judges the authority to determine dangerousness in various settings, such as sentencing,[152] civil commitment,[153] pretrial detention deci-

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148 *See* Taylor, *Symbolic Detention, supra* note 146, at 154–55.

149 Stumpf, *supra* note 8, at 61, 73–74. Rather, Stumpf argues that "modern detention drives deportation rather than the other way around." *Id.* at 62.

150 *See* Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

151 In the criminal justice system, "expertise" does not have one single definition. *See* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2782 (2022). Levin describes three different types of criminal justice expertise:

> (1) expertise based on vocation or on-the-job experience (e.g., the police officer, the judge, or the criminal law practitioner); (2) expertise based on education or elite training (e.g., the criminologist, the law professor, or the data analyst); and (3) expertise based on lived, day-to-day experience (e.g., the incarcerated person, the person frequently stopped by police, or the crime victim).

Id. This Article relies on the first type of expertise, which is based on the daily on-the-job training of criminal court judges. *See id.*

152 Scholars have noted that criminal sentencing incorporates two functions—punishment and risk assessment. *See, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1444–49 (2001) (tracing how, starting in the 1950s, the criminal justice system began to shift away from punishment to prevention); *see also* Mayson, *supra* note 137, at 317–27 (arguing for a conceptual, if not institutional, separation between punishment and prevention).

153 *See, e.g.*, Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 156–64 (2011) (discussing history and case law addressing civil commitment of mentally ill based on a finding of dangerousness due to the mental illness);

sions,[154] and detention decisions while a defendant appeals a criminal verdict.[155] For as long as judges have been tasked with predicting dangerousness—assessing whether someone will commit a future crime—there have been critiques that such predictions are impossible.[156] Yet, predictions of dangerousness have fallen squarely in the hands of criminal court judges in several different contexts,[157] and such judicial predictions have the blessing of the U.S. Supreme Court.[158] As discussed *infra*, criminal court judges have become risk assessors in addition to risk managers, since they both calculate risk and decide whether conditions of release can mitigate that risk.[159] If a criminal court judge can decide dangerousness in proceedings to determine if

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id. at 164–69 (discussing history and case law addressing civil commitment of sexually violent predators). Not all such statutes require a judge to make such a finding; rather, civil commitment dangerousness decisions are often in the hands of a jury, with the criminal court judge presiding over the civil commitment trial. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 354 (1997) (describing Kansas commitment procedures for sexually violent predators, which requires a jury finding of dangerousness); Addington v. Texas, 441 U.S. 418, 420–21 (1979) (describing Texas commitment procedures for mentally ill, which requires a jury finding of dangerousness).

154 *See, e.g.*, Mayson, *Dangerous Defendants*, *supra* note 12, at 502 ("Nearly all U.S. jurisdictions authorize courts to impose pretrial conditions of release on the basis of dangerousness. Some authorize full-scale preventive detention as well.") (footnotes omitted); BARADARAN BAUGHMAN, *supra* note 12, at 68 ("Though flight risk is still very relevant in bail decisions, the primary focus of judges is on dangerousness.").

155 *See* 18 U.S.C. § 3143(b) (authorizing bail pending appeal if (1) the appeal is "not for the purpose of delay," (2) the defendant "raises a substantial question of law or fact" in the appeal, and (3) the defendant shows by "clear and convincing evidence" that he "is not likely to flee or pose a danger to the safety" of the community if released).

156 *See, e.g.*, Mayson, *supra* note 137, at 323 ("It is especially hard to accurately predict that a given person will commit a specific future crime. There is a contentious debate among experts about whether the likelihood of such an event can be assigned on an individual basis at all.") (footnotes omitted); Robinson, *supra* note 152, at 1450 ("A scientist's ability to predict future criminality using all available data is poor; using just the proxy of prior criminal history, a scientist's prediction is even less accurate. It is often true that a person who has committed an offense will do so again. But it is also frequently false—many offenders do not commit another offense.") (footnotes omitted).

157 Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 7–10 (1985) (giving "brief catalog" of the criminal justice system's historical and contemporary reliance on dangerousness determinations).

158 *See* Barefoot v. Estelle, 463 U.S. 880, 896 (1983) ("The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel."); Jurek v. Texas, 428 U.S. 262, 274–75 (1976) ("It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."); *Addington*, 441 U.S. at 429–30 (acknowledging the fallibility of psychiatric predictions of dangerousness and accounting for that uncertainty by allocating a "clear and convincing evidence" standard of proof on the state, instead of a "proof beyond reasonable doubt" standard).

159 *See infra* Sections III.B.3–.4.

the defendant is likely to reoffend while out of custody awaiting trial, that same defendant becomes no more or less of a danger in proceedings to determine deportability.[160]

To be sure, immigration judges have some expertise in deciding dangerousness. Protecting the public has been a factor in bond hearings dating back to the 1950s.[161] However, as a result of mandatory detention laws, immigration judges have had fewer opportunities to decide dangerousness because they lack jurisdiction if the noncitizen is removable for any of a long list of criminal offenses.[162] Another matter in which immigration judges decide dangerousness is when they must decide whether, owing to a particularly serious crime, a noncitizen is a danger to the community, and thus precluded from certain forms of relief.[163] The particularly serious crime determination, however, does not require a separate determination of dangerousness.[164] It is thus unlike a bond hearing, where an immigration judge considers present dangerousness by factoring in past criminal charges and conviction, mitigated against rehabilitative factors.[165] Bond hearings and particularly serious crime determinations are the two situations in which immigration judges most commonly decide dangerousness,[166] but these decisions form a small slice of an immigration judge's docket.[167]

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160 *See* Holper, *supra* note 1, at 128.

161 *See* Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1492–98 (2012) (describing the justifications for immigration detention, which evolved from securing the border to national security and domestic crime control).

162 *See* 8 U.S.C. § 1226(e).

163 *See generally* Mary Holper, *Redefining Particularly Serious Crimes in Refugee Law*, 69 FLA. L. REV. 1093, 1093 (2017).

164 *See* Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

165 *See* Holper, *supra* note 163, at 1106.

166 There are other, less common, instances where immigration judges must make a dangerousness determination. For example, for noncitizen who cannot be repatriated after a final order of removal, regulations provide for continued detention after a hearing in which an immigration judge decides whether detention is warranted due to special circumstances, which include noncitizens whose release "would pose a special danger to the public." *See* 8 C.F.R. §§ 241.13(e)(6), 241.14(a). *But see* Tran v. Mukasey, 515 F.3d 478, 482–83 (5th Cir. 2008) (holding that ICE exceeded its authority in passing the regulation permitting this continued detention based on a detainee's classification as "specially dangerous"). Also, the Alien Terrorist Removal Court, implemented in 1996, authorizes an immigration judge presiding over the removal proceedings of a suspected "alien terrorist" to determine dangerousness and flight risk. *See* 8 U.S.C. §§ 1534–1536. As of 2022, these proceedings had never been used. *See* FED. JUD. CTR., *Alien Terrorist Removal Court, 1996–Present*, https://www.fjc.gov/history/courts/alien-terrorist-removal-court-1996-present [https://perma.cc/R7AB-6LLM].

167 The Executive Office for Immigration Review, in their annual statistical yearbook for 2018, reflects that nationwide, the immigration courts received 434,158 new matters, only 91,291

On the other hand, there is reason to pause before authorizing a criminal court judge to decide flight risk for an immigration detainee.[168] The likelihood of flight varies depending on whether the noncitizen is in criminal or removal proceedings.[169] When comparing the two types of proceedings, several factors make it more likely that the noncitizen will lose in immigration court, and thus create a disincentive to appear. For example, the government carries a higher burden of proof in criminal proceedings,[170] meeting that burden requires the government to produce witnesses who may not appear in court,[171] noncitizens have no court-appointed counsel (which increases the chances they will lose),[172] and the exercise of prosecutorial discretion to dismiss charges is a regular feature in criminal proceedings while sporadically used in removal proceedings.[173] Yet, when one considers the factors that an immigration judge typically considers in determining flight risk, it is clear that they align almost perfectly with the flight risk analyses that most criminal court judges undertake.[174] Factors that are relevant in both flight risk determinations—length of residence in the community, employment history, community ties, fixed address,

(21%) of which were bond cases. EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK: FISCAL YEAR 2018, https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/7Q4A-YLRH]. The number of bond cases that each court handles can depart significantly from the national average, however, as certain courts adjudicate only detainee removal cases. *Compare id.* at 10 (showing that the Krome immigration court received 8,504 new matters, of which 5,531—65%—were bonds), *with id.* (showing that the Boston immigration court received 11,047 new matters, of which 1,275—12%—were bonds). It is impossible to ascertain from these statistics which percentage of cases involved the application of the particularly serious crime dangerousness test, as the statistics do not reflect that level of specificity within the "total matters" received by the courts. *See generally id.*

168 *See* Holper, *supra* note 1, at 127.

169 *See id.*

170 *See id.*

171 In contrast, in removal proceedings, the government frequently meets any legal burden it carries through the use of hearsay documents, which are admissible in immigration court unless reliance on them is fundamentally unfair. *See, e.g.*, Holper, *supra* note 75, at 693–95.

172 *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 6, 76 (2015) (analyzing over 1.2 million immigration removal cases over six years and concluding that detainees were five times less likely to obtain representation than nondetained respondents, and without representation, were more likely to lose their cases and be deported).

173 *See, e.g.*, Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1792–93 (2021); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INTEREST L.J. 243, 243–44 (2010).

174 *See* Gilman, *supra* note 4, at 203–05 (comparing factors immigration judges must consider to those factors considered in criminal pretrial detention decisions and demonstrating that the factors largely mirror one another).

and record of appearance at criminal court hearings[175]—do not change when the noncitizen transforms from criminal defendant to immigration respondent. The only additional factor for flight risk that requires any immigration expertise is whether the noncitizen has a prima facie case for relief.[176] Yet, this type of inquiry does not require a full vetting of the merits of the case; it merely requires one to show that there is enough of a case to incentivize a return to court.[177] Also, determining the likelihood of success on the merits of an immigration case is a question entrusted to nonimmigration judges in other contexts. For example, federal district court judges, who are not immigration experts, must make such determinations when considering whether an immigration detainee who complains of prolonged mandatory detention has the right to a bond hearing.[178] Thus, a criminal court judge is sufficiently qualified to make flight risk determinations.

With respect to dangerousness determinations, criminal court judges are also better qualified than immigration judges because they are closer to the problem, having presided over the proceedings related to the criminal charges that later become the primary basis of ICE or the immigration judge's detention decision.[179] Criminal court judges have a better sense of the impact of this crime on the community, given that they are deciding whether to issue a JRAID while situated within the community that was harmed by the noncitizen's alleged conduct,[180] not long after the conduct occurred.[181] The immigration judge deciding bond, in contrast, is often physically far from the community impacted by the noncitizen's conduct. Detainee transfers are a regular occurrence within the immigration detention system;

175 *See id.*

176 *See* Chase, *supra* note 135.

177 *See id.* ("The question isn't whether the respondent will be granted asylum; it's whether his application for asylum will provide enough impetus for him to appear for his hearings relating to such relief.").

178 *See, e.g.*, Reid v. Donelan, 390 F. Supp. 3d 201, 219 (D. Mass. 2019) (determining whether detention is unreasonably prolonged and thus a noncitizen subject to mandatory detention under 8 U.S.C. § 1226(c) merits a bond hearing, listing as one of factors the "likelihood that the proceedings will culminate in a final removal order"); *see also* Holper, *supra* note 5, at 1123–34 (arguing that federal magistrate and district court judges are equipped to determine whether an immigration detainee is likely to succeed in the merits of the immigration case).

179 *See* Ryo, *Predicting Danger*, *supra* note 9, at 247; Ryo, *Detained*, *supra* note 9, at 146–48.

180 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

181 *See* Toussie v. United States, 397 U.S. 112, 114 (1970) ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.").

there is simply no guarantee that the detainee will remain close to the community impacted by any wrongdoing.[182] The immigration judge also is often examining the facts of the crime or alleged crime long after the events took place. This is because there is no statute of limitations on removal proceedings;[183] judges regularly examine criminal charges or convictions from decades prior to the bond hearing.

3. Procedural Protections of the Criminal Justice System Reaching Immigration Detainees

The immigration system has generally followed, not led, the criminal justice system, in the implementation of procedural norms that ensure a fair hearing.[184] More specifically, the immigration detention system has been late to adopt procedural norms from the criminal justice pretrial detention system, in response to impact litigation.[185] For example, a government-borne burden of proof, the requirement that immigration judges consider alternatives to detention, and a detainee's ability to pay are relatively new procedural protections available in immigration bond hearings.[186] However, these procedural protections are not available to every immigration detainee, due to the slow and localized nature of impact litigation to resolve such procedural deficiencies;[187] nor are they guaranteed to last, as these decisions are on appeal.[188] There are other procedural protections from the criminal justice system that have not reached immigration detainees, such as court-appointed counsel[189] and an independent judge.[190]

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182 *See* García Hernández, *Detainee Prison Transfers*, *supra* note 145, at 19–21.

183 *See* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste,* 58 UCLA L. REV. 1705, 1746 n.190 (2011).

184 The immigration system has lagged behind the criminal justice system in nearly all reforms, with scholars and advocates repeatedly recommending certain procedural protections available to defendants facing criminal charges that should be available to noncitizens facing deportation. *See, e.g.*, Legomsky, *supra* note 1, at 472 (arguing that the immigration system has incorporated the enforcement norms of the criminal justice system without also incorporating the procedural protections from this system); *see also* Holper, *supra* note 75, at 675 n.2 (collecting law review articles that advocate for the introduction of procedural norms from the criminal justice system into the immigration system).

185 *See* Holper, *supra* note 3, at 16 (describing procedural reforms to immigration bond determinations, such as a government-borne burden of proof and the requirement that immigration judges consider alternatives to detention and a detainee's ability to pay, which were accomplished through class action lawsuits).

186 *See id.* at 16.

187 *Id.*; *see* Holper, *supra* note 5, at 1128–30.

188 Holper, *supra* note 3, at 16–17.

189 There is a small subset of immigration detainees who are eligible for court-appointed representation because they have been found by an immigration judge or the BIA to be incompetent to represent themselves. *See* EXEC. OFF. FOR IMMIGR. REV., *National Qualified Represen-*

The JRAID would allow noncitizens to benefit from the procedural protections available during the criminal process, rather than seeking to import the criminal justice system's procedural protections into immigration court through piecemeal habeas litigation.[191]

This author presumes that the additional procedural protections described will create a more just detention adjudication system. This presumption acknowledges, however, that additional procedural protections may not necessarily solve all the problems of the immigration detention system. Indeed, critical theorists have described how procedural protections in the criminal justice system, such as the right to court-appointed counsel, have offered the mirage of a "fair hearing."[192] Yet, incarceration levels have risen, causing some to critique robust criminal procedures as meaningless, since the system achieves the same result after putting on a show of an objective hearing.[193] The systems in place are then deemed legitimate by society at large, even though the rights guaranteed through procedural protections do not alter the status quo in any meaningful way.[194] On the other hand, other critical theorists have celebrated rights discourse as a way to give pause to powerful systems that oppress poor people, build solidarity among the rights holders, give voice to the voiceless, and stigmatize subordination.[195] As Kimberlé Crenshaw noted, "[p]eople can

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tative Program, https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/K28Y-QZF9]. The government created this program in response to class action litigation that won the right to court-appointed counsel for immigration detainees with serious mental disorders that render them incapable of representing themselves. *See* ACLU S. CAL., Franco v. Holder, https://www.aclusocal.org/en/cases/franco-v-holder [https://perma.cc/SU6E-2UJN] (describing class action lawsuit).

190 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1275–76.

191 *See* Holper, *supra* note 5, at 1130.

192 *See, e.g.*, Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2190–91 (2013).

193 *See id.* at 2178, 2191.

194 *Id.* at 2197; *see also* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 753 (1992) (describing cases guaranteeing certain procedural protections as "amusement-park version of social change. We can experience the *frisson* that comes with upheaval and revolt, all the while secure in the knowledge that we need not suffer any of the discomfort and insecurity that would accompany an actual redistribution of social resources."); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 758–59 (1990); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 275–76 (1990).

195 *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301, 303–07 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365, 1381 (1988).

only demand change in ways that reflect the logic of the institutions that they are challenging."[196]

The first procedural protection that would become available to an immigration detainee is an independent adjudicator.[197] The criminal court judge is located in the judicial branch of government, which by design is separate and apart from the executive branch.[198] Not so in the immigration system; although the judges wear robes and are called "judges," they are actually executive branch employees.[199] The independence of the criminal court judge stands in stark contrast to actors who make decisions about immigration detention system. In this system, an ICE officer (a law enforcement officer under DHS authority) makes the first determination of a noncitizen's liberty.[200] The only other person regularly reviewing that decision is the immigration judge, who works for the Department of Justice and has suffered significant critique for not being truly independent.[201] Although there exists a regulation telling immigration judges to "exercise their independent judgment,"[202] that same regulation first tells them they "shall act as the Attorney General's delegates in the cases that come before them."[203] As this Author and others have discussed in more detail, attorneys general have repeatedly told immigration judges how to exercise their judgment and sent the message that they rule against the government at the risk to their own professional livelihoods as immigration adjudicators.[204] An adjudicator who does not have the

196 Crenshaw, *supra* note 195, at 1367.

197 There is a question about whether state court judges who are elected are truly independent. *See* ALICIA BANNON, RETHINKING JUDICIAL SELECTION IN STATE COURTS 6–16 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Rethinking_Judicial_Selection_State_Courts.pdf [https://perma.cc/2UDU-49S6] (describing impact of judicial elections on fairness in state court processes); *id.* at 4–5 (explaining that in 16 states, judges are elected without listing their party affiliation on the ballot and in 5 states, judges are elected with a ballot listing their party affiliation). Samuel Wiseman has described why judges, especially those who are elected, can err on the side of pretrial detention. Wiseman, *supra* note 12, at 428–32. Although many state court judges are elected, William Stuntz has commented that "even elected judges are much less politically accountable than legislators or elected prosecutors." Stuntz, *supra* note 137, at 540. This is because "[c]ontested judicial elections are less common than contested elections for legislative seats, and bar associations and other professional groups typically play a large role in judicial nominations, at least by custom." *Id.*

198 Stuntz, *supra* note 137, at 568.

199 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1275–76.

200 *See* Gilman, *supra* note 4, at 165–68.

201 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1275–77.

202 *See* 8 C.F.R. § 1003.10(b).

203 *See id.* § 1003.10(a).

204 *See* Holper, *supra* note 5, at 1081–1100; Holper, *Fourth Amendment Implications*, *supra* note 25, at 1307–29; Legomsky, *supra* note 55, at 1670–71; Legomsky, *supra* note 56, at 374–79.

freedom to reach her own decision without fear of personal consequences is not independent.[205]

Noncitizens also would have the benefit of the "crown jewel" of procedural protections—court-appointed counsel[206]—who can request a JRAID on their behalf.[207] In removal proceedings, no such right to court-appointed counsel exists.[208] Emily Ryo's empirical work has shown that for immigration bond hearings, counsel makes a difference in the outcome.[209] Of course, in every criminal court system, there are court-appointed criminal defense attorneys who do not live up to "Gideon's Promise."[210] Overworked, underpaid, and at times lacking motivation to zealously represent their clients, there will be many noncitizen defendants whose defense attorneys are not aware that asking for a JRAID is even an option.[211] Yet, there are several tools available to criminal defense attorneys in the form of immigration advice,[212] and such immigration advisors would certainly instruct defense attorneys about the JRAID option, were it to become law.[213] Criminal courts also could add a procedure whereby each defendant is warned

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205 *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 434 (2007).

206 *See* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 542 (2011) ("The Sixth Amendment right to counsel in criminal cases is the crown jewel of criminal procedural protections and, for good reason, is the right most coveted by noncitizens in immigration court.").

207 *See* Cade, *supra* note 6, at 51. Not all states provide for the right to court-appointed counsel in bail hearings. Ryo, *Predicting Danger*, *supra* note 9, at 234–35; John P. Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 841 (2017) (noting that in thirty-two states, defendants do not have the right to counsel during bail hearings). However, this proposal allows a criminal defense attorney to request a JRAID at any point in the representation of the client in the criminal case.

208 8 U.S.C. § 1362 (affording the right to counsel but at no cost to the government). There are some projects that have funded a model of a public defender for detained noncitizens in removal proceedings, but these are available only in certain areas of the country where the funding for such a model has been available. García Hernández, *supra* note 144, at 1401–02.

209 *See* Ryo, *Predicting Danger*, *supra* note 9, at 246–47; Ryo, *Detained*, *supra* note 9, 144–45.

210 GIDEON'S PROMISE, https://www.gideonspromise.org/ [https://perma.cc/6L4R-CSKW] (organization whose vision is "a nation where every person has access to zealous, outstanding representation necessary to ensure 'equal justice for all' in the criminal justice arena" and provides training and support to public defenders nationwide).

211 *See* Ed Lyon, *Appointed Defense Lawyers, Public Defenders: Overworked, Underpaid, Ineffective*, CRIM. LEGAL NEWS (May 15, 2019), https://www.criminallegalnews.org/news/2019/may/15/appointed-defense-lawyers-public-defenders-overworked-underpaid-ineffective/ [https://perma.cc/77JK-YEZF].

212 *See* Altman, *supra* note 127, at 19–20.

213 *See, e.g.*, CPCS IMMIGRATION IMPACT UNIT, *IIU Practice Advisories*, https://www.publiccounsel.net/iiu/iiu-practice-advisories/ [https://perma.cc/J6RJ-TD2J].

that if he or she is not a U.S. citizen, there is a right to seek a JRAID.[214] Armed with this information, noncitizen criminal defendants would inquire about such an option with their defense attorney.

The criminal pretrial detention process has an additional procedural protection that can benefit noncitizens: the right to have a judge consider alternatives to detention. In the federal system, criminal court judges are already required to consider whether any "condition or combination of conditions [imposed on release] will reasonably assure . . . the safety of any other person and the community."[215] States have followed suit in requiring this inquiry, with state judicial officers regularly considering conditions of release when deciding pretrial detention.[216] In the immigration context, on the other hand, alternatives to detention are not meaningfully considered in deciding the need for immigration detention. Although ICE has an alternative to detention program in place,[217] this program has suffered critiques for its overreliance on electronic monitoring and its use as an "alternatives to release" program, whereby those who did not require detention are now under electronic surveillance.[218] Also, the program has only been a tool for ICE officers as they make their detention decisions.[219] Immigration judges rarely consider whether there are conditions of release that could reasonably assure the safety of the community or another person.[220] This is likely because immigration judges do not believe they have the authority to order alternatives to detention, or the

214 This procedure would be akin to the "alien warning statutes," whereby states require, as part of a plea colloquy, that every defendant be warned of certain immigration consequences of a criminal conviction. *See* Padilla v. Kentucky, 559 U.S. 356, 374 n.15 (2010) (listing several examples of states statutes that require trial courts to warn noncitizens of immigration consequences of a plea). To meaningfully implement JRAID advisories, it is important to examine how such "alien warning" statutes have impacted noncitizen defendants' decisions to alter their plea decisions after hearing such warnings. *See, e.g.*, Julian A. Cook III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1076, 1088 (2019) (discussing how Federal Criminal Procedure Rule 11, which includes an "alien warning" among other warnings to a defendant prior to a guilty plea, and stating that "[e]xpediency and facial compliance with the governing rules (as opposed to searching inquiries regarding a defendant's knowledge and coercive influences) characterize federal-court procedure").

215 *See* 18 U.S.C. § 3142(e)(1).

216 Gross, *supra* note 207, at 833 ("An aspect of the federal system that states have embraced is that judicial officers set conditions of release based on the likelihood of conviction and the potential threat a defendant poses to public safety.").

217 Holper, *supra* note 3, at 13–14.

218 *See id.* at 18, 20; García Hernández, *supra* note 8, at 1406, 1410–11 (quoting Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 56 (2010)).

219 *See* Holper, *supra* note 3, at 15.

220 *Id.*

means to supervise compliance with such alternatives.[221] Only in recent years have federal district court judges ordered immigration judges to consider alternatives to detention; those decisions only impacted a subset of detainees nationwide, and were reversed on appeal.[222]

Because criminal courts routinely consider alternatives to detention as part of a pretrial detention decisions, they have significant familiarity with how to ensure that they can protect the community or a person to whom the defendant might pose a threat. They are equipped at balancing the individual's liberty interest against the need to protect the community at large or a specific person within the community.[223] As stated by the District Court for the Northern District of California, when reviewing an immigration judge's dangerousness decision in a bond hearing, one notable place to look for guidance "is how the court that handled the underlying crime . . . handled the case at bar" because that court "makes determinations on dangerousness and the availability of less restrictive alternatives to detention on a daily basis."[224]

A final procedural protection from the criminal justice system that would be available to immigration detainees through the JRAID is a government-borne burden of proof. When criminal court judges decide whether a defendant should be restrained in any way prior to a finding of guilt, this determination is made against a backdrop of a constitutional right to liberty[225] and, in many states, a constitutional right to bail.[226] In contrast, in the immigration system, there is no right to bail,[227] and agency case law and regulations have reaffirmed that immigration detainees do not enjoy a presumption of liberty.[228] The burden allocation has shifted due to successes in impact litigation, although these decisions do not reach all immigration detainees.[229]

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221 *See id.*

222 *See id.*; Miranda, *supra* note 72, at 365; Brito, *supra* note 72, at 252–56.

223 *See* Holper, *supra* note 3, at 18, 22–24 (describing how alternatives to detention can mitigate dangerousness).

224 Obregon v. Sessions, 2017 WL 1407889, at *6 (N.D. Cal. Apr. 20, 2017).

225 *See* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

226 For example, twenty-three states have a constitutional right to bail. *See* Mayson, *Dangerous Defendants*, *supra* note 12, at 515 n.19.

227 *See* Carlson v. Landon, 342 U.S. 524, 540, 546 (1952); *see also* R-A-V-P-, 27 I. & N. Dec. 803, 804 (B.I.A. 2020) ("Neither section 236(a) of the Act nor the applicable regulations confer on an alien the right to release on bond.").

228 *See* Holper, *supra* note 1, at 90–95.

229 *See* Holper, *supra* note 3, at 15–17.

Thus, a JRAID could bring these procedural protections to all immigration detainees by shifting the immigration detention question to the criminal proceedings, where the procedural protections already exist.

4. Bail Reform Reaching Immigration Detainees

In addition to introducing criminal justice norms into the immigration detention system, the JRAID allows the immigration detention system to benefit from criminal justice reforms. When comparing the reforms in each pretrial detention system, one can see how much further along the criminal justice system has come. Adopting the JRAID allows for certain immigration detention decisions to benefit from criminal justice reforms in real time, instead of awaiting a substandard implementation of the reforms.

Many states' criminal justice systems have responded to calls for bail reform,[230] seeking to shrink the country's swollen jail populations.[231] In what is described as the "third generation" of bail reform, the central critique has been the bail system's reliance on money bail, and the shift has been toward actuarial risk assessments.[232] A dangerousness determination calls on the judge to answer whether the defendant is likely to commit a violent crime.[233] The criminal justice system has sought to answer this question through actuarial risk assessments, which take in certain data about the defendant and produce an algorithm to predict the defendant's future behavior.[234] The goal is to reduce the impact of biases, which are inherent in subjective risk assessments made by judges.[235]

The immigration detention system has again trailed behind the criminal justice system, jumping on the bandwagon of risk assessment, but implementing it poorly. Incorporation of criminal court judges into the decision-making process can help to alleviate this problem.

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230 *See, e.g.*, Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 876 ("In just the last three years, nearly every state in the country has made changes to its pretrial system.").

231 *See id.* at 875.

232 Bail scholars have discussed the "third generation" of bail reform, which replaced reliance on money bail with risk assessment tools. *See* Mayson, *Dangerous Defendants*, *supra* note 12, at 508–10; Gouldin, *Defining Flight Risk*, *supra* note 12, at 680–81.

233 *See* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2221.

234 *See id.* at 2227–28.

235 *See id.* at 2277–79; Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 887 ("The promise of these [risk-assessment] tools is simple: they calculate the riskiness of defendants and assign them a score, so that judges making these decisions no longer have to rely on their intuition.").

ICE adopted a risk assessment, yet it has suffered significant critique for not accomplishing any of its goals.[236] It did not actually ensure risk-based custody decisions because ICE manipulated the algorithm to reflect its enforcement priorities.[237] During the Trump Administration, ICE eliminated the release option, so the tool could only choose between detention and supervisor review.[238] It did not ensure uniformity in ICE custody decisions due to its allowance of supervisor overrides of any release recommendations.[239] Transparency was yet another goal ICE did not accomplish; scholars wishing to study the tool had to suffer extensive litigation under the Freedom of Information Act to receive information about the tool.[240] Nor does the detainee, the detainee's advocate, or the immigration judge in a bond hearing have access to the tool's outputs.[241] Finally, it did not prevent harm to vulnerable detainees, even though that was a stated goal of ICE's use of the tool.[242] It appears that ICE, in creating this risk assessment tool, accomplished a single goal—adding "a scientific veneer to enforcement that remains institutionally predisposed towards detention and control."[243]

This Article's aim is not to suggest that the recent bail reform movement has been an overwhelming success, or that it should provide a roadmap for reforming the immigration detention system. Indeed, the newfound reliance on algorithmic risk assessment tools as an answer to bail reform has created its own set of problems, in that algorithms perpetuate the racial inequalities of the criminal justice system while giving off the air of scientific reliability.[244] As bail scholar San-

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236 *See* Evans & Koulish, *supra* note 2, at 833–46.

237 *See id.* at 834, 835–37 ("Instead of industry-standard risk methodology informing the use of civil detention, the customary use of detention was driving the methodology.").

238 *See id.* at 832–33.

239 *See id.* at 838 ("[T]he [Risk Classification Assessment] sacrificed standardization from the start. Instead, geography continues to drive detention, in place of risk.").

240 *See id.* at 841–43.

241 *See id.* at 841 ("With no transparency of the RCA in bond hearings, ICE officers are not accountable for their mistakes in administering the RCA and DHS attorneys do not have to defend the methodology to adjudicators.").

242 *See id.* at 843–46. This was because supervisors could easily override a release recommendation based on a detainee's vulnerability; there was little regular communication on this issue between the detention center and ICE; and there were poor screening mechanisms to alert an ICE officer to a detainee's vulnerability. *See id.* at 843–46.

243 Noferi & Koulish, *supra* note 2, at 45. *See generally* Evans & Koulish, *supra* note 2, at 833–46.

244 *See, e.g.*, KATHERINE FORREST, WHEN MACHINES CAN BE JUDGE, JURY, AND EXECUTIONER (2021); Mayson, *Bias In, Bias Out*, *supra* note 12, at 2221; Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1053, 1083–1102 (2019); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015);

dra Mayson has noted, "what prediction does is identify patterns in past data and offer them as projections about future events. If there is racial disparity in the data, there will be racial disparity in prediction too."[245] Thus, algorithmic crime prediction, relying heavily on factors heavily correlated with race, can only "entrench the inexcusable racial disparity so characteristic of our justice system, and to dignify the cultural trope of black criminality with the gloss of science."[246] Yet, Mayson demonstrates that the previous bail system—subjective decisions made by judges, which rely on biases—was a less accurate version of the same problem.[247]

Despite these problems, criminal justice systems have come much further than the immigration system in enacting policies and procedures that ensure judges equitably exercise their discretion, and do not simply default to detention. For example, the risk assessment tools implemented throughout the criminal justice system have become an alternative tool for judges to implement so that they are not simply relying on hunches and biases, but on data.[248] Criminal court judges have become risk assessors in addition to risk managers, since they both calculate risk and decide whether conditions of release can mitigate that risk.[249] In the immigration system, however, judges have never had access to the risk assessment tool, so hunches and biases continue to be the basis for judge-made bond decisions.[250] Immigration judges leave any risk management to ICE, who uses detention as its primary risk management tool and saves its alternatives to detention program for those who present no risk.[251] The criminal justice risk assessment tools were widely available to the public from the outset, subjecting them to substantial scrutiny by scholars and advocates.[252]

Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination,* 66 STAN. L. REV. 803, 803 (2014).

245 Mayson, *Bias In, Bias Out*, *supra* note 12, at 2251. She writes that this is true of all predictions, however; whereas actuarial predictions rely on data of past occurrences, subjective prediction "reflects a foggy image of anecdotal data." *Id.*

246 *Id.* at 2222.

247 *Id.* at 2277–79.

248 *See* Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 867–68; Mayson, *Dangerous Defendants*, *supra* note 12, at 492–93; Mayson, *Bias In, Bias Out*, *supra* note 12, at 2277–79 (describing how risk assessment tools are corrected for subjective assessments by judges).

249 *See* Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 902–03, 905.

250 *See* Evans & Koulish, *supra* note 2, at 795.

251 *See* Holper, *supra* note 3, at 8–10, 16.

252 *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 865–71 (2016) (describing various pretrial risk assessment tools); Mayson, *Bias In, Bias Out*, *supra* note 12, at 2279 ("The human being who judges a person to be a good risk or a

This accessibility to the public has moved the conversation toward reforming the racial disparities in the algorithms.[253] In contrast, the immigration risk assessment tool went into use cloaked in secrecy, only to became available after protracted litigation by scholars.[254] The criminal justice risk assessment tools are not regularly manipulated by its own users,[255] whereas ICE manipulated its tool to match its own enforcement priorities.[256] Thus at least the criminal justice risk assessment tools could be said to reliably predict future arrests, even if not predicting who will actually commit crimes.[257] The immigration risk assessment tool, on the other hand, has been manipulated so that it predicts whatever the ICE agent wants it to predict, and thus cannot claim any scientific veneer of reliability.[258]

The criminal justice system also has advanced ahead of the immigration system in its diagnosis and treatment of implicit bias in judicial decision-making. At present, immigration judges receive no training about implicit bias.[259] This is a significant problem when it comes to bond hearings, because these hearings are informal and rushed,[260] so judges can easily default to psychological shortcuts, especially for dangerousness.[261] Production quotas for individual judges make matters worse, because immigration judges are asked to decide cases as

bad one may not herself understand why she has done so. Most risk-assessment algorithms, by contrast, can be examined and interrogated; the trend is away from proprietary algorithms and toward transparency.") (internal footnotes omitted).

253 *See* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2227–33 (describing public response to racial disparities in criminal justice algorithms); *id.* at 2262–81 (discussing various proposals to correct for such racial disparities).

254 Evans & Koulish, *supra* note 2, at 796–800.

255 *See* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2260; PRETRIAL JUST. INST., PRETRIAL RISK ASSESSMENT: SCIENCE PROVIDES GUIDANCE ON ASSESSING DEFENDANTS 3–4 (2015), https://www.ncsc.org/__data/assets/pdf_file/0016/1654/pretrial-risk-assessment-science-provides-guidance-on-assessing-defendants.ashx.pdf [https://perma.cc/8HGJ-9VE9] (describing how empirically-derived pretrial risk assessment tools are developed and validated for a jurisdiction).

256 *See* Evans & Koulish, *supra* note 2, at 804–33.

257 *See* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2252–53.

258 *See* Evans & Koulish, *supra* note 2, at 833–35; *see also* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2280 ("Algorithmic assessment carries a scientific aura, which can produce unwarranted deference or a mistaken impression of objectivity.").

259 *See* AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 19 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [https://perma.cc/57SF-PKQ8] (recommending training for immigration judges on implicit bias by social workers and psychiatrists).

260 *See* Chirinos, 16 I. & N. Dec. 276, 277 (B.I.A. 1977).

261 *See* Ryo, *Predicting Danger*, *supra* note 9, at 234.

quickly as possible or risk their jobs.[262] Immigration judges also work within a system that has sent them the message that detainees are presumed to be a danger and a flight risk, and must beg for their liberty.[263] They also work for the nation's top law enforcement officer, who has an immigration enforcement agenda that has been announced in no uncertain terms in the recent past.[264] These messages sent by their boss, in combination with efforts by attorneys general to control the outcomes of their decisions, and with little review of their decisions, allow for psychological shortcuts to substitute for reasoned decision-making.[265]

Criminal court judges suffer under similarly crippling dockets and must make bail decisions under circumstances that are equally as rushed as in the immigration system.[266] However, these judges enjoy the judicial independence that has eluded immigration judges.[267] They are also are well ahead of immigration judges in the implicit bias training that they receive.[268] Although undoubtedly there is still work to be done,[269] many criminal court judges have undergone training to at least become aware of their biases and how these will impact their decisions.[270]

In sum, the criminal justice system's bail reforms are well underway, seeking to reduce pretrial detention and ensure fairness and ac-

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262 *See* Holper, *supra* note 5, at 1084–85.

263 *See* Holper, *supra* note 1, at 90–95.

264 *See* Chase, *supra* note 50.

265 *See* Marouf, *supra* note 78, at 417, 428–41 (examining "how factors such as immigration judges' lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review all allow implicit bias to drive decision making").

266 *See, e.g.*, Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 962 (2020) ("Despite the important implications on a defendant's life, the pretrial detention decision is a very quick one that lacks adequate attention by courts or attorneys.").

267 *See* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1306–31.

268 *See, e.g.*, PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II & JENNIFER K. ELEK, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012) (describing National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, which was launched in 2006, and which included training on implicit bias for state court judges).

269 *See, e.g.*, David Arnold et al., *Measuring Racial Discrimination in Bail Decisions*, 1–2, 13–14 (Harvard Kennedy Sch., Working Paper No. RWP20-014, 2020), http://dx.doi.org/10.2139/ssrn.3569293 [https://perma.cc/5S8C-L6GA] (reporting outcomes of study of bail decisions in New York City between 2008 and 2013 and finding discrimination against black defendants).

270 One way to overcome implicit bias is to be trained on its existence, so that one is aware of how the brain operates to perform psychological shortcuts based on unconscious adoption of stereotypes. *See, e.g.*, CASEY ET AL., *supra* note 268, at 2 ("Promoting awareness about implicit sources of bias in this way [through educational programs about the science behind implicit bias] may help motivate participants to do more to correct for bias in their own judgments and behaviors.").

curacy in pretrial detention decisions. Scholars will continue to study these bail reforms to see that they achieve their desired impacts.[271] The public's access to criminal justice tribunals facilitates external oversight, which increases the level of transparency about each reform in the criminal justice system.[272] Meanwhile, to put it simply, the immigration pretrial detention system has not gotten the memo. Thus, the many calls for further bail reforms in the criminal justice system[273] are likely to fall on deaf ears in the immigration system. The JRAID is a way for immigration detainees to benefit from these reforms as they happen, instead of hoping for a delayed and imperfect implementation of them by the law enforcement agency that controls the immigration courts.

5. Increased Efficiency of Both Systems

Another benefit of a JRAID is increased efficiency in both the immigration and criminal justice systems. For the criminal justice system, efficiency results when a noncitizen's criminal proceedings remain pending once they are in immigration removal proceedings. In several cases, it has been documented that ICE failed to bring a defendant to criminal court, causing the criminal proceedings to stall indefinitely throughout the duration of the ICE detention.[274] This caused the criminal charge to remain open longer than necessary, and often the failure to appear by the defendant would lead to a warrant for

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271 *See, e.g.*, Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Guthrie Armstrong & Anthony Potts, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1240 (2020) (presenting results from qualitative research study across state of Georgia, which examines impact of bail reform, and calling for similar empirical research in other states).

272 *See* Mayson, *Bias In, Bias Out*, *supra* note 12, at 2227–31 (describing public response to racial disparities in criminal justice algorithms); *id.* at 2262–81 (discussing various proposals to correct for such racial disparities).

273 *See, e.g.*, Mayson, *Bias In, Bias Out*, *supra* note 12, at 2218, 2286–96 (proposing, to correct for inevitable racial bias in algorithms, that the tools be instead repurposed to identify and provide services to at-risk populations so that criminal justice system actors "respond to risk with support rather than restraint"); Gouldin, *Defining Flight Risk*, *supra* note 12, at 725 (proposing the adoption of a taxonomy of flight risk so that "true absconders" can be treated differently from those whose nonappearance is avoidable through better pretrial management systems).

274 *See* Aff. of Jennifer Klein at ¶¶ 5–9, Doe v. Tompkins, No. 1:18-cv-12266-PBS (Nov. 27, 2018), ECF No. 21-2 (on file with author) (describing how, beginning in 2017, the Boston ICE office developed a policy of refusing to transport detainees to attend state court proceedings); *see also* Velasco Lopez v. Decker, 978 F.3d 842, 847 (2d Cir. 2020) (describing how "on four separate occasions between February 2018 and April 2018, ICE declined to produce Velasco Lopez for criminal court appearances related to [pending criminal charges]").

arrest.[275] Although such a warrant could be cleared, the onus would be on the freshly-released ICE detainee to resolve the warrant in criminal court.[276] The noncitizen, often lacking legal representation to clear the warrant[277] and afraid of arrest by state authorities, has less motivation to return to court. The issuance of a JRAID would operate to avoid all of these unnecessary pauses in the criminal justice process.[278] To the extent that immigration detention puts a wrench in the works of the criminal justice process, a JRAID order allows a criminal court judge to prophylactically remove that wrench.

It is also more efficient and effective if a JRAID order is entered after a pretrial detention release decision and prescribes conditions of release that are overseen by the criminal justice system's probation officer during the criminal proceedings. Although ICE has alternatives to detention program,[279] it has a subcontractor who monitors compliance, so noncitizens released in this program have separate check-ins with that subcontractor.[280] If a noncitizen is monitored by a probation officer during the criminal process, it is more efficient if that noncitizen only meets with that one probation officer. In the absence of a JRAID, it is possible that ICE or an immigration judge might later order release under ICE's alternatives to detention program, which has its own set of check-ins with different enforcement actors.[281] All of these check-ins with various state and federal enforcement officers are not only inefficient but can easily lead to confusion and missed appointments. Of course, missed appointments become the recipe for an ICE re-arrest,[282] as the noncitizen would be deemed a flight risk.[283] Only once the criminal proceedings conclude will the

275 *See* Aff. of Jennifer Klein, *supra* note 274, at ¶ 17 ("For the individuals not transported to court, in the majority of cases, the criminal case remains open and a default warrant issues.").

276 *See* E-mail from Jennifer Klein, CPCS Immigration Impact Unit, to author (Nov. 12, 2020) (on file with author).

277 *See id.* (explaining that in Massachusetts, when a defendant is in active warrant status, the court-appointed lawyer is removed from the case; the defendant must clear up the warrant in order to be assigned a new court-appointed lawyer).

278 *See* Aff. of Jennifer Klein, *supra* note 274, at ¶ 17 ("The ongoing problems with transportation [ICE not transporting detainees to criminal court] have been increasingly frustrating to defendants as well as the to the criminal justice system generally.").

279 *See* Holper, *supra* note 3, at 13.

280 *See id.* at 13–14.

281 *See id.* at 8.

282 *See* 8 U.S.C. § 1226(b) (providing authority to ICE to re-detain at any time during removal proceedings); *see also* Holper, *Fourth Amendment Implications*, *supra* note 25, at 1325–29 (describing history of ICE's rearrest authority and caselaw interpreting this authority).

283 Lauryn P. Gouldin proposes three categories of flight risk: (1) the "true flight risk"—those who flee the jurisdiction to avoid prosecution, (2) "defendants who remain in the jurisdic-

noncitizen's compliance be monitored by ICE and its subcontractors. Thus, at any given moment the noncitizen is only monitored by one compliance officer, which decreases the risk of missed appointments.[284]

A final, and obvious, increase in efficiency is that a JRAID prevents the immigration judge from replicating the same decision that was made by a criminal court judge. Many noncitizens who are arrested by ICE and seek bond already have interacted with the criminal justice system, where one of the first determinations made was a pretrial detention decision.[285] In that determination, the criminal court's primary focus was dangerousness and flight risk.[286] Thus an actor from the criminal justice system—relying on certain inputs, such as risk assessment tools, pretrial reports, and judicial discretion—has decided the exact same issue that an immigration judge later decides.[287] It is simply inefficient for the immigration judge to repeat that same inquiry, especially when they do not have as many tools that can help them make an unbiased decision. The JRAID proposal leaves the immigration judge to decide issues that are squarely within that judge's expertise, such as the morass of complex legal questions that arise when interpreting the Immigration and Nationality Act and its corresponding regulations.[288]

Scholars who propose some restoration of JRAD authority have made similar efficiency arguments.[289] They argue that the criminal court judge, in the sentencing process, already has carefully considered the crime, impact of the crime on the victim, and any mitigating

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tion but actively and persistently avoid court, described as *local absconders*," and (3) defendants who remain in the jurisdiction but miss court due to scheduling confusion or other excusable reason. Gouldin, *Defining Flight Risk*, *supra* note 12, at 677, 683–84. She describes how the third category, the "inadvertent absconders," can be assisted through means such as better notification procedures and better community supervision. *See id.* at 730. She proposes a taxonomy of flight risk, which can identify "less intrusive and lower-cost interventions than those currently used in most jurisdictions" while "more efficiently and fairly manag[ing] the full range of nonappearance and flight risks." *Id.* at 685, 724–37.

284 *See* Gouldin, *Defining Flight Risk*, *supra* note 12, at 683–84.

285 *See* Baradaran Baughman, *supra* note 12, at 39.

286 *Id.* at 40–41, 61.

287 *See id.* at 40–43.

288 *See* Holper, *supra* note 5, at 1126; Legomsky, *supra* note 55, at 1637.

289 Similar efficiency arguments have been made to defend the longstanding "categorical approach," whereby an immigration judge makes no attempt to recreate the facts underlying a conviction, but instead engages in a comparison of the elements of the state crime as compared to the elements of the deportable offense. *See, e.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1738–41 (2011).

facts about the defendant.[290] If the noncitizen already was convicted and sentenced, the sentencing judge can easily issue a JRAID based on this information. For a noncitizen who was never convicted or has yet to be sentenced, the criminal court judge's careful consideration of these factors has not taken place and thus cannot serve as a reliable surrogate for such a determination by an immigration judge.[291] It is also possible that in the state court system, it was not even a judge who decided whether to continue pretrial detention.[292] It is important to note, however, that a criminal court judge who feels too time-pressured to engage in the analysis required of a JRAID need not undertake such a consideration. The grant of this authority, however, allows the criminal court judge to undertake an inquiry to send a message to the immigration system that this noncitizen is not to be detained—because the criminal court judge does not deem this crime to be serious enough to merit detention, the individual facts of the noncitizen's case mitigate any risk of danger or flight risk, or alternatives to detention can mitigate those risks. It can also have the added bonus of ensuring that the noncitizen returns to criminal court for all future hearings to respond to the criminal charges.[293]

C. The JRAID Critique

One can envision critiques of the JRAID proposal: (1) it gives too much authority to state actors when immigration is controlled by federal authorities, (2) it will decrease uniformity in immigration enforcement, (3) it creates a "slippery slope" where criminal court judges will begin to opine on multiple collateral consequences of a crime, and (4) the focus should be on abolishing immigration detention, not creating more procedures. This Part seeks to respond to these concerns.

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290 *See* Cade, *supra* note 6, at 45 ("A criminal sentencing order is typically the product of a nuanced and holistic evaluation of the underlying criminal activity and any mitigating circumstances presented by the case. It thus offers the potential to serve as a valuable surrogate for the kind of balancing that previously would have taken place in immigration court, before Congress curtailed adjudicative discretionary authority.").

291 *See* Cade, *supra* note 6, at 45.

292 Not all states require a judge to make the pretrial detention system; some states delegate these decisions to nonjudges and nonlawyers, such as bail commissioners. *See* BARADARAN BAUGHMAN, *supra* note 12, at 40–41. The JRAID proposal in this Article, however, contemplates that the criminal court judge will be the actor who issues a JRAID, even if the state system did not assign that judge the role of deciding bail in the criminal case.

293 *See, e.g.*, Aff. of Jennifer Klein, *supra* note 274, at ¶¶ 5–9 (describing how, beginning in 2017, the Boston ICE office developed a policy of refusing to transport detainees to attend state court proceedings).

1. *Immigration Enforcement as a Federal, Not State Issue*

One obvious critique of the JRAID is that it entrusts immigration enforcement to state, not federal, actors.[294] Whom to detain is a question of immigration enforcement.[295] Congress has commanded that it be the attorney general who makes detention decisions, not criminal court judges.[296] After more than a century of federal government control over immigration matters, how can Congress cede such authority to states?[297]

The reality is that state court actors already function as gatekeepers in a variety of immigration contexts, deciding key issues of immigration enforcement and relief from removal.[298] In the criminal justice system, prosecutors and police officers decide whether to certify a noncitizen victim's helpfulness in order to obtain a U visa or T visa; prosecutors consider immigration consequences in plea negotiations; and prosecutors and criminal court judges determine whether to agree to and grant post-conviction relief to avoid immigration consequences.[299] Even the decision about whom to arrest for a crime entrusts some immigration enforcement authority to state and local police, due to the criminal justice system's use as a pipeline to immigration enforcement[300] and the federal government's lack of resources to enforce the immigration laws against the entire population of removable noncitizens.[301] In the family and juvenile law context, state family and probate courts decide whether a child has been abused,

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294 *See* Arizona v. United States, 567 U.S. 387, 394–95 (2012).

295 *See* Johnson, *supra* note 20 (describing detention as part of ICE's enforcement decisions).

296 *See* Carlson v. Landon, 342 U.S. 524, 540–41 (1952).

297 *See* Hiroshi Motomura, Immigration Outside The Law 65–69 (2014) (briefly summarizing historical shift of immigration enforcement authority from states to the federal government).

298 *See* Lee, *supra* note 6, at 577–86; Ingrid Eagly, *Prosecuting Immigration*, 104 Nw. L. Rev. 1281, 1289 (2010).

299 *See* Lee, *supra* note 6, at 580–81.

300 *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. Rev. 1819, 1838–39 (2011); *see also id.* at 1853–56 (arguing that 287(g) agreements, Secure Communities program, and state officers' arrests for federal immigration crimes all "threaten to usurp basic aspects of federal control over immigration enforcement" because state and local decisionmakers act as gatekeepers, "filling the enforcement pipeline with cases of their choice for civil removal and possibly criminal prosecution as well").

301 *Id.* at 1856–57 ("Recall that the unauthorized population of the United States is an estimated 11.2 million, but only a small percentage are ever apprehended, let alone deported. . . . Filling the federal enforcement pipeline with state or locally generated cases that do not address national security concerns limits the federal government's operating latitude.").

abandoned, or neglected, the first step in a special immigrant juvenile ("SIJ") petition.[302] These courts thus act as gatekeepers to the child's immigration status.[303] If state law actors already perform the function of immigration screeners, then Congress might as well codify their role. At the same time, Congress can ensure that it diversifies the criminal justice actors involved, handing some authority to criminal court judges instead of keeping all of the gatekeeping functions in the hands of prosecutors and police.[304]

Jason Cade has made this argument in advocating for some restoration of the JRAD in deportation cases.[305] Cade defends such a delegation of immigration enforcement authority to state court actors because such a delegation is already in place.[306] He explains, "the immigration system relies on convictions, generated by law enforcement actors outside the immigration system, as a second-order signal about [the] first-order concerns" of deporting the undesirable.[307] He notes that "the underlying criminal history triggering deportation is itself only a proxy for undesirability."[308] Because the immigration system already delegates some immigration enforcement decisions to state court actors, such as police officers, prosecutors, and judges, as a policy matter, it is sensible to allow one of those actors—the judge—to temper the impact of a conviction.[309] As Cade writes, "the criminal history proxy for dangerousness and antisocial character is itself only a proxy. So when that criminal history is mitigated or negated, the proxy greatly weakens, and in many cases disappears."[310]

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302 *See* 8 U.S.C. § 1101(a)(27)(J).

303 Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AM. BAR ASS'N. (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent/ [https://perma.cc/V7KE-R8VC]. Child welfare agencies may also function as gatekeepers for children in state custody.

304 Stephen Lee makes this argument, focusing on the role of the criminal court prosecutor in acting as a gatekeeper. Lee, *supra* note 6, at 597–601. While Lee takes no position on whether this is normatively a positive development in immigration law, he advocates that if Congress is in the business of delegating immigration enforcement to state criminal justice actors, Congress might diversify which state court actors have a role to play. *Id.* He argues for Congress to restore the JRAD that it eliminated in 1990. *Id.*

305 *See* Cade, *supra* note 6, at 50–60.

306 *Id.* at 57–58.

307 *Id.* at 57.

308 *Id.*

309 *See id.* at 58.

310 *Id.*; *see also* Eagly, *supra* note 298, at 1289 ("Although the criminal law is generally appreciated for its role in exacting moral blame, this Article shows how, in application, it performs the work of immigration law. Through concrete terms of written plea agreements, orders

At present, the immigration bond system gives an outsized role to certain inputs from the criminal justice system, focusing on those that paint the detainee as a danger, while ignoring those that point to the opposite conclusion. The written report of a police officer who recorded an alleged crime becomes the basis of a dangerousness finding, even if the criminal justice system later decides that this defendant is not guilty or the prosecutor decides to drop the charges.[311] Allegations by the police that a noncitizen is a gang member point to dangerousness, even if the criminal justice system never had probable cause to arrest the person for a crime.[312] The charges brought by a prosecutor point to danger even if the defendant successfully complied with an alternative to detention and has no further arrests.[313] A conviction entered by the criminal justice system is the basis for a dangerousness finding even if that system later determined that parole or early release is more appropriate for that defendant.[314] The JRAID is a way to incorporate into the immigration pretrial detention decision *all* of these inputs from the criminal justice system, rather than exclusively focusing on the negative inputs.

Because of the longstanding entrustment of immigration enforcement to the federal authorities, coupled with complexity of immigration law, is there a risk that criminal court judges will not wish to tell the immigration authorities whom to detain? During the time period when the JRAD was in effect, "the [sentencing] judges were often reluctant to delve into the unfamiliar realm of immigration law or to intrude on the authority of immigration officials."[315] Today, however, criminal justice system actors have more familiarity with immigration law, given that defense attorneys have a Sixth Amendment duty to

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of criminal courts, and mandatory criminal deportation rules, the criminal prosecution, rather than the administrative agency removal process, acts as the de facto immigration adjudicator.") (internal footnotes omitted).

311 *See* Holper, *supra* note 75, at 677–78; *cf.* Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO STATE J. CRIM. L. 329, 341 (2020) ("Since some police officers bend the rules or make mistakes, prosecutors need to be independent. That's why one of the most important roles of the prosecutor is screening out rotten cases.").

312 *See* Hlass, *supra* note 75, at 714–15, 752–53.

313 *See* Amaury Reyes Batista, A 042-895-111 (B.I.A. July 13, 2020) (on file with author) (in response to argument that immigration judge, in bond hearing, failed to consider his ability to abide by conditions of release in his criminal case, responding that immigration judges need not assign "greater or less weight, or to even consider, alternatives to detention").

314 WIEGAND, *supra* note 76, at 15–16 (describing as a less significant factor in a bond determination any early release from prison or parole).

315 Taylor & Wright, *supra* note 6, at 1150 (describing how "the INS opposed JRADs on the principle that sentencing judges did not know enough about immigration law to make deportation decisions").

advise their noncitizen clients about certain immigration consequences[316] and thus prosecutors see more requests for "immigration safe" pleas and criminal court judges see more post-conviction relief motions based on the failure to give immigration advice.[317] It is also important to note that the JRAID addresses an interlocutory question—whether a noncitizen will be detained during removal proceedings—but leaves the ultimate question of removal to the immigration judge. This ultimate question of removal incorporates all of the complexities of immigration law, including eligibility for relief from removal.[318]

The JRAID, however, asks that the criminal court judge opine on dangerousness and flight risk—questions that are well within their expertise *and* that they will likely already have decided.[319] Also, the criminal court judge may be more motivated to issue a JRAID than a JRAD because they want defendants out of immigration custody when criminal proceedings are still underway, given ICE's past failures to transport detainees to criminal court to resolve pending charges.[320] Finally, there already are examples of criminal court judges telling ICE not to detain a noncitizen defendant who has been released on bail.[321] Several federal district courts have declared ICE arrests to violate defendants' rights under the Bail Reform Act.[322]

316 *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

317 *See, e.g.*, Altman, *supra* note 127, at 26–28 (describing office-wide policies or individual prosecutor's decisions to incorporate immigration consequences into plea bargaining after *Padilla*); Labe Richman, *Thoughts on Ten Years of Effectuating the Promise of* Padilla v Kentucky, IMMIGRANT DEF. PROJECT (2020), https://www.immigrantdefenseproject.org/padilla-anniversary-richman/ [https://perma.cc/7WRU-ULMY].

318 *See* Legomsky, *supra* note 55, at 1337–38.

319 *See supra* Section III.B.2.

320 *See* Aff. of Jennifer Klein, *supra* note 274, at ¶¶ 5–9. Even in jurisdictions where ICE has a set of procedures in place that permit detainees to be transported to state court, the onus still lies with defense counsel to request an order from the state court judge, who must then issue the order to ICE to transport. ICE detainee-defendants can slip through the cracks of this system, causing absences in criminal court, leading to warrants that an ICE detainee must resolve upon release. Thus, there are numerous administrative costs that burden the criminal justice system, due to ICE's failure to transport a detainee to criminal court to resolve criminal charges. *Id.* at ¶ 17.

321 *See* Martin, *supra* note 5, at 150 (collecting cases).

322 The Bail Reform Act has a provision that requires the judicial officer who orders pretrial release to direct the government attorney to notify the relevant immigration official, within ten business days, of the defendant's release. 18 U.S.C. § 3142(d). The statute then reads, "If the [immigration] official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." *Id.* Courts have interpreted this provision to mean that if ICE does not take the noncitizen into custody within ten days, either the district court must release the defen-

Although these courts' statutory interpretation has not withstood appellate review,[323] these examples indicate that criminal courts are willing to order ICE not to detain a defendant.

What if criminal court judges feel uncomfortable binding immigration actors into perpetuity? The immigration authorities may not become aware of the noncitizen until years later, and the removal proceedings themselves can last years. One way to solve that problem is to place a time limit on a JRAID order, so that after a certain period of time, it converts to a presumption instead of a mandate.[324] However, an expiration date of a JRAID is not the ideal solution because the further into the future, the further in the past the interaction with the criminal justice system is. Thus, a JRAID order that finds a noncitizen defendant to not be a danger to the community only becomes stronger once the alleged or proven criminal acts are years in the past.[325] There is the possibility that the noncitizen has further interactions with the criminal justice system. Yet, at that time, the criminal court judge who issued the JRAID could revoke it, in the same manner that a judge could find a probation violation.[326] Also, the unpredictability of immigration court dockets should be a motivating factor for a criminal court judge to issue a JRAID, because a judge inclined to issue such an order does not want an immigration detainee whom the judge does not see as a danger or a flight risk enduring prolonged immigration detention while fighting against deportation.[327]

The JRAID could become another way for state actors to show that they are "sanctuary" jurisdictions,[328] since it provides a mechanism for state and local criminal justice actors to express disagreement

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dant from custody or the prosecution must dismiss the criminal charges. *See* Martin, *supra* note 5, at 150.

323 *See* Martin, *supra* note 5, at 161–62 (describing two appellate decisions to have considered the issue, both of which reversed the district court's orders).

324 *See* Cade, *supra* note 6, at 58 (suggesting, as part of proposal for a nonstatutory JRAD Deportation, that DHS adopt guidelines that would ignore such recommendations by criminal courts if they are issued too far in the past).

325 *See* Brief for National Immigrant Justice Center as Amicus Curiae Supporting Respondents at 3, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363), 2018 WL 3870176 ("Those who resettle in the community after serving a term of imprisonment and live peacefully for months or years are particularly unlikely to pose a danger.").

326 *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 165 (1997).

327 In the federal system, courts have established a test to determine when a defendant's pretrial detention has become unreasonably lengthy, and defendants who have suffered such prolonged pretrial detention have been released on conditions. *See* BARADARAN BAUGHMAN, *supra* note 12, at 41–42; *see also* United States v. Ojeda Rios, 846 F.2d 167, 169 (2d Cir. 1988).

328 *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59

with federal immigration policy.[329] Labelling this proposal as a sanctuary policy could, however, ensure that the proposal never gets off the ground in Congress.[330] During the Trump Administration, any locality deemed a "sanctuary city" was considered an enemy of the federal government's goals of maintaining law and order, since these jurisdictions were deemed to "willfully violat[e] Federal law in an attempt to shield aliens from removal from the United States."[331] However, this Article has outlined several practical reasons in favor of the JRAID proposal, which have nothing to do with criminal court judges using the policy solely to express their disagreement with ICE's enforcement policies.[332] As such, like other "sanctuary" policies, it is not "simply an attempt to frustrate federal policy, but an effort to ensure that local governments and the federal government can operate independently in their respective policymaking arenas."[333] The JRAID proposal also presents one simple counter-weight to the many ways in which criminal justice actors create a pipeline to immigration detention and removal.[334]

Would the JRAID face constitutional challenges of the sort that have plagued other policies where states and the federal government have butt heads on immigration enforcement? This Article's proposal does not suggest an executive branch policy adopting JRAID, but instead calls on Congress to create such a statutory commend. As such, there need not be concerns that the policy is vulnerable to Take Care Clause challenges[335] by those who believe that the executive branch is

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B.C. L. REV. 1703, 1736 (2018) (describing and cataloguing various sanctuary policies and outlining the policy rationales put forth by states and localities who adopted them).

329 *Id.* at 1753 (describing the findings of the primary rationales for "sanctuary" policies, listing as one "a wish to express disagreement with federal immigration policy").

330 *See* MOTOMURA, *supra* note 297, at 58–59 ("[T]his label ['sanctuary'] covers an array of measures so vast that the label supplies more of a political characterization than any precise analysis of laws and policies.").

331 Lasch et al., *supra* note 328, at 1714 (quoting Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017)).

332 *See supra* Section III.B.5.

333 *See* Lasch et al., *supra* note 328, at 1772.

334 *See id.* at 1719–23; Motomura, *supra* note 300, at 1853–56.

335 An example of this type of litigation is the lawsuit of *Texas v. United States*, which was filed to enjoin President Biden's order to pause removals for 100 days. *See* Complaint, Texas v. United States, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (No. 6:21-cv-00003). Texas argued that this pause on removals violated the Take Care Clause of the U.S. Constitution, which requires that the executive branch "take care that the laws be faithfully executed." *Id.* ¶ 51 (citing U.S. CONST. art. II § 3). The district court granted a temporary restraining order, blocking implementation of the 100-day pause, based on the likelihood of success on Texas's arguments that the policy violates the Immigration and Nationality Act and is arbitrary and capricious. Texas v. United States, 515 F. Supp. 3d 627, 632 (S.D. Tex. 2021). The district court then entered a preliminary injunc-

not carrying out Congress's command to enforce immigration law.[336] Nor is this a policy written by states to preempt federal enforcement, and thus face the same outcome as similar state policies.[337] Finally, this Article's proposal would not violate the Tenth Amendment's anti-commandeering principles[338] because state court judges are under no obligation to issue JRAIDs and thus need not be forced into doing the federal government's immigration enforcement work.[339]

2. The Lack of Uniformity

What about the concern for uniformity, as the adoption of this proposal will lead to vast disparities in who gets a JRAID based on where that person was arrested? There is a good chance that more JRAIDs will be issued by immigrant-friendly state courts, while noncitizens arrested in other state courts are likely to see no such benefit.[340] Or, some defense attorneys may not request a JRAID out of fear of

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tion against the implementation of the 100-day pause, based on the likelihood of success on Texas' arguments that the policy violates the Immigration and Nationality Act, the Administrative Procedure Act ("APA"), and is arbitrary and capricious. Texas v. United States, 524 F. Supp. 3d 598, 651–56 (S.D. Tex. 2021). In a similar lawsuit, Texas and Louisiana sought to enjoin the Biden Administration's new enforcement priorities, arguing that they violated the APA, DHS's agreement with the states, and the Take Care clause. *See* Texas v. United States, 606 F. Supp. 3d 437, 486–497 (S.D. Tex. 2022). The district court enjoined the operation of the enforcement priorities after determining that Texas had standing and was likely to succeed on the merits of the APA claim; the court did not reach the Take Care clause claim. *Id.* at 33–44, 47. On appeal, the Fifth Circuit upheld the district court. Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022). The Supreme Court granted certiorari. United States v. Texas, 143 S. Ct. 51 (mem.) (2022).

336 Jason Cade addresses this issue in his recommendation to bring back the JRAD in the form of a nonbinding presumption. *See* Cade, *supra* note 6, at 53–55 (discussing constitutional objections to his recommendation, which include separation of powers concerns and take care clause concerns, and responding that a nonbinding presumption would alleviate these concerns). If the JRAID were created as an executive branch policy instead of a legislative solution, it would be vulnerable to this attack, as in some cases it would conflict with the INA's mandatory detention laws. *See supra* notes 89–92 (describing mandatory detention laws).

337 *See, e.g.*, Arizona v. United States, 567 U.S. 387, 400–10 (2012) (holding that federal law preempted three of Arizona's provisions: (1) the provision making failure to comply with federal alien-registration requirements a state misdemeanor, (2) the provision making it a misdemeanor for unauthorized alien to seek or engage in work in Arizona, and (3) the provision authorizing arrests for removable offense).

338 *See* Printz v. United States, 521 U.S. 898, 933 (1997) (holding that federal statute requiring states to conduct background checks for prospective handgun purchasers is an unconstitutional violation of the Tenth Amendment's prohibition on commandeering states to enforce federal law).

339 *See* Taylor & Wright, *supra* note 6, at 1180 (proposing that criminal sentencing judges conduct make certain deportation decisions and rejecting possible Tenth Amendment challenge because of an opt-out provision).

340 *See* Cade, *supra* note 6, at 58–59.

flagging a noncitizen to the immigration authorities[341] or for fear that the criminal court judge will treat the defendant as a flight risk because of the immigration case.[342] While uniformity of immigration law enforcement is no doubt a laudable policy, it is, quite frankly, a dead letter. In the realm of "crimmigration," the intersection of immigration and criminal law, uniformity has long been a lost cause.[343] Because states can vary so drastically in the criminal codes, and enforcement of their criminal codes, any immigration enforcement action predicated on an interaction with the criminal justice system necessarily involves a lack of uniformity.[344] Even within the same state, immigration consequences can vastly differ, as various state prosecutors have different policies and practices in their plea negotiations.[345]

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341 The JRAD that existed in immigration law until 1990 required notice to the immigration authorities as part of the process of a criminal court judge considering and issuing such an order. *See* Taylor & Wright, *supra* note 6, at 1143–44. For this reason, defense attorneys who were aware of JRADs in some cases made the strategic choice to not ask for such a judicial recommendation, out of fear of notifying the immigration authorities about their clients. *Id.* at 1150. The strategy behind this decision factored in the realities of that bygone era, when there was a low probability that the Immigration and Naturalization Service would become aware of a noncitizen who was deportable. *See id.* at 1150 ("[D]uring most of the seven decades that JRADs were available, the INS had no procedures in place to identify deportable offenders. Many noncitizens convicted of crimes simply served out their sentences and returned to the community without ever being placed in deportation proceedings."). Today, the pipeline from the criminal justice system to the deportation system is nearly seamless, due to several initiatives that have enlisted state and local criminal justice actors to serve as "force multipliers" for the ever-growing force of ICE agents. *See* Lasch et al., *supra* note 328, at 1719–23 (describing the origins of "crimmigration," the interweaving of immigration and criminal law, and noting that one contributing factor was deputizing state and local law enforcement as "force multipliers" for immigration enforcement); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. Rev. 1457, 1483–85 (2013) (describing increased participation of local law enforcement in immigration enforcement). Thus, a criminal defense attorney's strategic choice to notify ICE of a noncitizen client's existence and the criminal court judge of the potential removability by requesting a JRAID is likely to be different—especially when ICE is literally at the criminal courthouse door. *See* Memorandum from the Comm. for Pub. Couns. Servs., Immigr. Impact Unit (Apr. 27, 2021) (on file with author) (describing that although the Biden Administration has walked back some of the harshest policies around courthouse arrests, the Administration has permitted situations where they may still be appropriate).

342 *See* Eagly, *supra* note 298, at 1308 (describing some states in which criminal court judges deny bail or increase bail amounts due to knowledge that the defendant is potentially removable and therefore an increased flight risk). *But see* Martin, *supra* note 5, at 154 n.24 (describing federal district court cases that have held an ICE detainer or immigration status alone cannot be the basis for denying a defendant pretrial release).

343 *See* Cade, *supra* note 6, at 59; Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 Geo. Immigr. L.J. 665, 665 (2008).

344 *See* Cade, *supra* note 6, at 59.

345 *Id.*; Stuntz, *supra* note 137, at 522 (discussing decentralization of police and prosecutors, who are controlled locally, so that enforcement of a criminal code can significantly vary within a state). As one example, the District Attorney for Manhattan, Alvin Bragg, made a policy choice

Moreover, this article proposes a judicial recommendation *against* detention, not a judicial recommendation *in favor of* detention. Should there be a particularly anti-immigrant state court judge, such judge would not recommend against detention. In this situation, the immigration detention system would function as it currently does.[346]

In sum, this proposal assumes that criminal court judges will differ in their decision making in response to JRAID requests. But that is not necessarily a bad thing.[347] As Stephen Legomsky has noted, "As long as adjudicators are flesh-and-blood human beings, as long as the subject matter is ideologically and emotionally volatile, and as long as limits to the human imagination constrain the capacity of legislatures to prescribe specific results for every conceivable fact situation, there will be large disparities in adjudicative outcomes and justice will depend, in substantial part, on the luck of the draw."[348]

3. The Slippery Slope: Other Collateral Consequences

Why, among the myriad collateral consequences that attach to a person's involvement with the criminal justice system,[349] should avoiding immigration detention be a priority for criminal court judges?

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not to prosecute crimes such as marijuana misdemeanors, resisting arrest, and trespass in his district. *See* Memorandum from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of New York, to All Staff (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/9PWS-4MLB]. Just across the county border, that same crime may be prosecuted, and a noncitizen convicted is likely to now stand convicted of a crime involving moral turpitude, which is a ground for deportation. *See* 8 U.S.C. § 1227(a)(2)(A)(i).

346 This is similar to the state of the law when the JRAD was in existence—if the sentencing judge did not issue a JRAD, the deportation process would continue. Indeed, notwithstanding the issuance of a JRAD, some courts held that the deportation process could continue if the ground of deportation was not the criminal conviction on which the criminal court had issued a JRAD. *See* Cade, *supra* note 6, at 38 n.11 (describing cases deciding whether the conviction for which a JRAD was granted could still be considered when a noncitizen was deportable for a different reason and sought discretionary relief).

347 Stephen Legomsky, responding to the *Refugee Roulette* study that demonstrated vast disparities in asylum decisions, describes why inconsistency in adjudicator's decisions is not necessarily bad in comparison to policies that aim for consistency. *See* Legomsky, *supra* note 205, at 445 (discussing Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007)). He discusses alternative solutions to decrease inconsistency, such as more centralized control over the adjudicators, which would involve penalizing outliers, imposing minimum or maximum asylum approval rates, more robust review of decisions by an agency head or other politically accountable officials, eliminating judicial review or shifting it to one appellate court. Legomsky, *supra* note 205, at 445, 457–73. With each possible solution, he presents why it would create worse problems in the immigration adjudication system. *Id.*

348 Legomsky, *supra* note 205, at 415–16.

349 *See, e.g.*, Mayson, *supra* note 137, at 306–09 (describing collateral consequences of convictions and efforts by both state and federal criminal justice systems to reduce or at least comprehensively list them); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era*

Wouldn't this proposal lead to a slippery slope whereby criminal court judges must make pronouncements to various decisionmakers in collateral actions—landlords, affordable housing authorities, employers, and family courts? As compared to these other collateral consequences, immigration detention involves depriving a person of the right to physical liberty. While there are certainly liberty interests involved in parental termination—eviction, employment, and access to affordable housing—none of those deprivations involve "shackles, chains, or barred cells."[350] Many have argued that immigration detention—although nominally civil—is punishment.[351] For that reason, the recognition that "detention is different"[352] has caused some carve-outs to traditional legal norms when courts have considered questions of immigration detention.[353] Others have argued that "deportation is different"[354] from other collateral consequences.[355] This is especially so in the wake of the Supreme Court's *Padilla v. Kentucky*[356] decision, where the Court recognized a Sixth Amendment right for a noncitizen defendant to be warned by their counsel about whether a guilty plea carries a risk of deportation.[357] The *Padilla* Court also distinguished deportation from other collateral consequences of a criminal conviction.[358] Even if immigration detention is at most a "helpmate to deportation,"[359] if deportation is punishment, then detention while a judge

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of Mass Conviction, 160 U. PA. L. REV. 1789, 1799–1803 (2012) (describing various collateral consequences of convictions).

350 *See* Reno v. Flores, 507 U.S. 292, 302 (1993); Stumpf, *supra* note 8, at 85 ("Immigrants are often detained in the same facilities as criminal pretrial detainees and post-conviction inmates. Alternatively, they are held in federal or privately operated facilities with structures that mimic criminal justice facilities, with walls, guards, and security-oriented restrictions on clothing, personal effects and liberty.").

351 *See, e.g.*, Stumpf, *supra* note 8, at 87, 94; García Hernández, *supra* note 8, at 1349.

352 Holper, *supra* note 5, at 1118–21.

353 *See, e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (examining Supreme Court decisions and arguing that there exists a "liberty exception" to the *Chevron* doctrine of judicial deference to the executive branch is when courts review the legality of a government intrusion on physical liberty); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 149–50 (2015) (arguing that normal principles of deference to administrative agencies should not apply when courts decide immigration detention issues).

354 Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1332 (2011).

355 *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1480 (2011).

356 559 U.S. 356 (2010).

357 *Id.* at 374.

358 *Id.* at 365–66.

359 *See* Stumpf, *supra* note 8, at 61.

decides whether to issue the punishment of deportation is a similarly consequential decision that requires serious consideration and protections.[360] This is particularly true since detention often leads to deportation.[361] At a minimum, immigration detention in service of deportation proceedings is directly analogous to pre-trial criminal detention and should be treated as similarly serious and exceptional. Thus, avoiding such detention is an end worthy of some extra time spent by a criminal court judge. And, as already discussed, there is a benefit to criminal court judges in that the issuance of a JRAID may cause more noncitizen criminal defendants to come to court to answer charges instead of missing court dates due to immigration detention.

4. Abolition, Not Procedural Reform

Is the recommendation of yet more procedures into the immigration detention system—this time in the form of a JRAID—a useless exercise in seeking to fix a broken detention system that is rotten to its core, in need of abolition instead of procedural fixes? César Cuauhtémoc García Hernández has argued in favor of abolishing immigration detention.[362] He compares the path toward abolishing immigration detention to that sought by those seeking to reform the death penalty through procedural protections, all with little success.[363] None of these procedural protections could fix the death penalty's inherent flaws—the disproportionate killing of black men, who are "stripped of their inherent worth" by turning them into "vessels of atonement."[364] He notes similar racial disparities in the immigration detention system, given the high percentage of men of color who are detained when compared to the total deportable population.[365] He also notes similar commodification of black and brown bodies in the immigration detention system, given that its rapid growth has lined the pockets of the

360 *See* United States v. Salerno, 481 U.S. 739, 750–51 (1987) (analyzing the "restriction on liberty" that comes with pretrial detention in the criminal context and upholding the constitutionality of such regulatory detention due to heightened procedural protections and limited scope of the pretrial detention statute, which only applies to the "most serious of crimes").

361 Eagly & Shafer, *supra* note 172, at 6, 32, 49 (analyzing over 1.2 million immigration removal cases over six years and concluding that detainees were almost five times less likely to obtain representation than nondetained respondents, and without representation, were more likely to lose their cases and be deported).

362 García Hernández, *supra* note 143, at 246.

363 *See id.* at 268–69.

364 *Id.* at 269–72.

365 *Id.* at 283–84 (noting that Canadian and European visa violators could fill ICE detention spaces, but that in fiscal years 2012 and 2013, over ninety percent of the immigration detainee population were "almost exclusively racialized as nonwhite in the United States").

private prison industry.[366] Thus, any arguments for procedural protections in the immigration detention system are simply making minor fixes to a racist system that needs to be torn down.[367] In a separate commentary of the use of the criminal justice system as sorting mechanism for immigration benefits, García Hernández critiques the "egotistical belief that some people are good and others bad, and that law and legal processes can determine who falls into which box."[368]

This Article's proposal is undoubtedly a procedural band-aid onto what is a flawed immigration detention system for the reasons that García Hernández notes. Yet, it is also a means of incorporating some of his visions for an alternative path to immigration prison abolition.[369] García Hernández writes that "the role of prosecutors is vital" to ending immigration imprisonment,[370] because prosecutors can use their discretion to not seek detention in each and every case.[371] His writing reflects the current reality of the criminal justice system, in which the locus of power is the prosecutor, not the judge.[372] The JRAID proposal, in recognition of this reality, envisions the criminal court prosecutor in the role of either advocating for a JRAID or opposing it. Although the discretion to grant a JRAID would be in the hands of the criminal court judge, the realities of the criminal justice system will lead judges to defer to prosecutors. It should also be noted that some jurisdictions are electing progressive prosecutors,[373] some of whom have gone so far as to sue ICE over their enforcement practices.[374] These prosecutors may advocate for more JRAIDs, if they be-

366 *See id.* at 285–86.

367 *Id.* at 292.

368 García Hernández, *supra* note 144, at 1413.

369 *See* García Hernández, *supra* note 143, at 292–300.

370 *Id.* at 298.

371 *See id.* at 298.

372 *See* Stuntz, *supra* note 137, at 519–23 (explaining how broad penal codes transfer "lawmaking" power from courts to enforcers).

373 *See, e.g.*, Bellin, *supra* note 311, at 336 (discussing examples of progressive prosecutors, whose version of justice includes "less (unnecessary) severity, decriminalizing poverty, and eliminating racial bias"); David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 25–27 (2017) (giving examples of recent elections of "reform-minded" prosecutors whose goals are not merely to seek convictions, but to restore integrity and reduce racial biases in the criminal justice system).

374 The Trump Administration's courthouse arrest policy led to a lawsuit against ICE in Massachusetts District Court, brought by two district attorneys, the state public defender organization, and an immigrants' rights organization. *See* Chris Villani, *DAs Drop ICE Courthouse Arrest Suit After Biden Curbs Policy*, LAW360 (May 21, 2021, 12:49 PM), https://www.law360.com/pulse/articles/1387089/das-drop-ice-courthouse-arrest-suit-after-biden-curbs-policy [https://perma.cc/4X2L-K357]. The plaintiffs filed a motion in district court stating that the lawsuit was now moot, in light of the new Biden Administration guidance. *See id.*

lieve that the charged offense is not serious enough to merit detention,[375] and if it means that the defendant can actually make it to criminal court to answer the charges that the prosecutor's office brought. Also, bestowing criminal court judges with the authority to issue a JRAID answers calls to restore power to the criminal court judge.[376]

García Hernández also writes that "the greatest potential for a future without immigration prisons, however, does not lie with the three branches of government. It instead lies in the power of storytelling outside the strictures of legislatures, law enforcement, and courtrooms."[377] In each of his recommendations to abolish immigration detention, he sees the role of empathy, where the narrative shifts away from the "dangerous criminal alien" assumption on which our immigration detention rests.[378] This Article's proposal provides a mechanism whereby a criminal court prosecutor, who has a more regular practice of exercising discretion than the immigration prosecutor,[379] has a larger role to play in immigration detention decisions and can exercise that empathy. The proposal also gives another actor—the criminal court judge—the opportunity to exercise that empathy. Finally, every new venue in which one can make the case for a favorable exercise of discretion provides one more avenue for communities to participate and shift the narrative against the current immigration system's default use of detention. This, in turn, could lead to a collective conclusion that immigration detention is not necessary.

Conclusion

There is no better time than now to curb the thirst for detention that has dominated immigration enforcement policy. The numbers of detainees reached a historic low as a result of the COVID-19 pandemic. Before ICE begins simply repopulating its jails at pre-pandemic levels, the Biden Administration has an opportunity to

375 *See* Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 879–80 (describing how prosecutors in some offices were the locus of bail reform, refusing to advocate for pretrial detention for low-level crimes).

376 *See, e.g.*, Stuntz, *supra* note 137, at 587 (recommending as a reform to the criminal justice system a return to "the system of criminal lawmaking that existed when courts, not legislatures, defined crimes").

377 García Hernández, *supra* note 143, at 298.

378 *See id.* at 292–300.

379 *See* Motomura, *supra* note 300, at 1836 (arguing that the "discretion that matters" from the standpoint of enforcement discretion is the initial criminal arrest, since ICE rarely exercises its prosecutorial discretion to not deport a person).

seriously consider legislative proposals that can decrease the detention population, while still meeting the goals of protecting the community and preventing flight. Many have sought proposals to reform immigration law that bypass Congress, assuming that any proposed legislation to ameliorate the harsh consequences of the immigration system is dead on arrival.[380] This Article's proposal, while perhaps overly optimistic in its expectation that Congress will cure the excesses of the bloated immigration detention system, also recognizes that the JRAID proposal can become part of broader nationwide efforts at decarceration[381] or bail reform in the criminal justice system.[382] The proposal simply shifts the locus of the initial decision to the criminal court judge for an entire category of cases when the issue to be decided is as important as a noncitizen's liberty.

380 *See* Cade, *supra* note 6, at 39; Jennifer M. Chacón, *A New Hope: Bringing Justice Back into Removal Proceedings*, 91 N.Y.U. L. Rev. Online 132, 133–34 (2016); Kevin R. Johnson, *Back to the Future? Returning Discretion to Crime-Based Removal Decisions*, 91 N.Y.U. L. Rev. Online 115, 118 (2016).

381 *See* Bellin, *supra* note 311, at 334–35 (discussing bipartisan federal First Step Act, which reduced federal sentences); *id.* at 335 ("For a long time, people critiqued reformers by saying there's not a proven track record for incarceration alternatives. Now, people are asking 'What's the evidence that *prison* works?'").

382 *See* Gouldin, *Reforming Pretrial Decision-Making*, *supra* note 12, at 858–59. There is a history of immigration reforms coming to Congress packaged as something else—to name a few, relief to victims of domestic violence, violent crimes, or relief to abused, abandoned, or neglected children. Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 Lewis & Clark L. Rev. 663, 684–89 (2018). Even many anti-immigrant legislative reforms came dressed up as something else—for example, anti-drug, anti-terrorism, or anti-death penalty laws. Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214. AEDPA, among other immigration restrictions, expanded the definition of aggravated felony and reduced some of the sentences for a crime to qualify as an aggravated felony. *See* Legomsky, *supra* note 1, at 484; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344 (introducing the "aggravated felony" ground of deportability to immigration law).