

DETENTION AS DETERRENT: DENYING JUSTICE TO IMMIGRANTS AND ASYLUM SEEKERS

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ABSTRACT

In the first year of the Biden administration, the United States finds itself in a unique moment of opportunity to reimagine the historical (mis)use of immigration detention as a means of deterring unauthorized migration and of dissuading immigrants from vigorously advocating for their legal rights. The pandemic has significantly reduced the number of people in immigration detention, which gives policymakers an opportunity to take stock of the nation's historical mass incarceration of immigrants and acknowledge its substantial costs and the many viable alternatives.

This Article shines a light on the successive Obama and Trump administrations' wrongful use of detention to deter migration and limit due process as a legal and policy matter and on the high human and financial costs of those policies. U.S. immigration law permits the detention of immigrants solely for the purposes of ensuring their appearance for removal proceedings and protecting public safety. However, a review of the two most recent administrations' actions shows that detention has been used as a cudgel designed to make the U.S. immigration system daunting enough to deter people who would otherwise seek to benefit from it. Detention takes a heavy toll—on a human level and on our nation's obligations to humanitarian protection, the quality of legal process, and the national budget.

The Biden administration and a new Democratic-controlled Congress are setting out to make their own mark on immigration policy. It is imperative that before or as they do so, they carry out an unflinching assessment of the efficacy and costs of current immigration detention policy, which runs afoul of our national values, domestic and international laws, and common sense. Doing so will reveal our distorted national immigration detention policy as

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one of the drivers of mass incarceration for people of color. Policymakers should seize this unique opportunity to end it.

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I. INTRODUCTION

The United States finds itself in a unique moment of opportunity to reimagine the historical (mis)use of immigration detention as a means of deterring unauthorized migration and of dissuading immigrants from vigorously advocating for their legal rights. Nominally, U.S. immigration law permits the detention of immigrants for the purposes of ensuring their appearance for removal proceedings and of protecting public safety. In reality, for many years, our national detention policy has improperly served to punish unauthorized

migrants in the hope of deterring future unlawful migration. Despite the tremendous human and fiscal costs of detaining individuals and families for civil immigration violations, the Department of Homeland Security (“DHS”) in successive administrations has doubled down on detention¹ as one of the principal cudgels to make the nation’s immigration system daunting enough to dissuade those fleeing violence, extreme poverty, or a lack of opportunity from trying to seek protection or litigating their claims to remain in the United States.² The threat of detention—and detention in difficult conditions—has been a primary element of government strategies to stem the flow of migrants at our southwest border and in the interior. The recent Trump administration used the detained status of thousands of asylum seekers as an excuse to summarily expel them from the country with no asylum proceedings, under cover of the COVID-19 pandemic (an order the Biden administration continues to enforce and rely on).³ Detention takes a heavy toll—on a human level for those locked up and their families, on our nation’s obligations to humanitarian protection, on the quality of legal process available to those detained, and on our national budget (costing billions of dollars a year). Nonetheless, it has become a U.S. strategy of choice to deter immigration, fostering mass incarceration in the immigration system that mirrors and amplifies the mass incarceration of people of color in the criminal legal system. However, the pandemic has significantly reduced the number of people in immigration detention, creating an ideal moment for immigration policymakers to rethink the use and misuse of detention, acknowledge its substantial costs and the many viable alternatives, and discontinue the use of mass incarceration of immigrants as a deterrence strategy. This Article seeks to

1. The average daily population maintained in ICE detention facilities in Fiscal Year 2020—in the midst of a pandemic—was 33,724. U.S. IMMIGR. & CUSTOMS ENF’T, *ICE Detention Statistics* (Dec. 29, 2020), <https://perma.cc/5WHH-2PRU>. This average was considerably lower than the administration’s original goal of 54,000 for the year because of COVID-19 and the closures of the borders. See U.S. DEP’T OF HOMELAND SEC., *Immigration and Customs Enforcement Budget Overview* 6 (2020), <https://perma.cc/V2EW-AUJH>. The fact that the average daily detained population remains in the tens of thousands during the pandemic reflects the institutional inertia in the use of detention, which is borne out in the consistent and the consistently rising numbers in non-pandemic years. In the midst of the pandemic, the Trump administration sought congressional funding to increase the average daily detained population to 60,000 people. U.S. DEP’T OF HOMELAND SEC., *FY 2021 Budget in Brief* 3 (2020), <https://perma.cc/F8VA-SFBU>.

2. Other such strategies DHS has used at the southwest border in the Obama and Trump administrations include federal criminal prosecution for illegal entry and reentry, “metering” and other ways of refusing access to the asylum system at ports of entry, the so-called Migrant Protection Protocols that require asylum seekers to remain in precarious and sometimes life-threatening conditions in Mexico while they pursue asylum claims in tent-courts across the border, and perhaps most famously, the forced separation of parents and children at the border. See AM. IMMIGR. COUNCIL, *Policies Affecting Asylum Seekers at the Border* 1–3 (Jan. 29, 2020), <https://perma.cc/YR8P-BRA6>; Muzaffar Chishti & Sarah Pierce, *Trump Administration’s New Indefinite Family Detention Policy: Deterrence Not Guaranteed*, MIGRATION POL’Y INST. (Sept. 26, 2018), <https://perma.cc/P4MP-D7N9>.

3. See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020); HUM. RTS. WATCH, *US: COVID-19 Policies Risk Asylum Seekers’ Lives* (Apr. 2, 2020), <https://perma.cc/G47P-AGL9>. The Biden administration continues to rely on this order to summarily expel noncitizens arriving at U.S. borders, with the exception of unaccompanied children. See AM. IMMIGR. COUNCIL, *A Guide to Title 42 Expulsions at the Border* 1, 6 (Oct. 2021).

assist in the first two of these steps, shining a light on successive administrations' wrongful use—as a legal and policy matter—of detention as a deterrent to migration and the many costs of that misuse.

A. *The Persistent and Bipartisan Use of Detention as a Deterrent*

Prior to the onset of the pandemic, rates of immigration detention had never been higher in the United States. In August of 2019, U.S. Immigration and Customs Enforcement (“ICE”) held a record 55,238 people in detention on average per day.⁴ The Trump administration had asked Congress to allocate \$2.7 billion for Fiscal Year 2020 to lock up a daily average of 54,000 people per day.⁵ In the end, Congress allocated \$3.14 billion to ICE for immigration detention.⁶ For Fiscal Year 2021, the Trump administration requested \$3.1 billion for 60,000 beds, including 5,000 family units.⁷

Both the Trump administration and the Obama administration explicitly justified expanded and increasingly harsh detention policies as a means of deterring immigration. As detailed below, both administrations significantly ramped up their detention of immigrants, not for reasons of flight risk or safety, but simply as a deterrent—to stop asylum seekers and others from coming to the United States and to stop immigrants in the interior from challenging their removal from the United States. These deterrent policies have been most explicit in the asylum context. For example, on June 20, 2014—ironically, World Refugee Day—the Obama administration announced that it would increase its use of detention of asylum-seeking families arriving at the southern border to “deter others from . . . illegally crossing into the United States.”⁸ Then-DHS Secretary Jeh Johnson made the administration’s

4. U.S. IMMIGR. AND CUSTOMS ENF’T, *ICE Detention Statistics FY 2019* (2020), <https://perma.cc/FT69-YGEK>.

5. Jasmine Tyler, *Public Comment Session: Immigration Detention Centers and Treatment of Immigrants*, HUM. RTS. WATCH (Apr. 12, 2019), <https://perma.cc/N4TD-MUT2>. The FY 2020 budget request stated it would use discretionary funding to support 51,465 beds. It included a “strong desire to work with the Congress to create a new Border Security and Immigration Enforcement Fund” that would “identify revenue streams” to fund an additional 2,535 beds to make up for the difference to 54,000. See DEP’T OF HOMELAND SEC., *FY 2020 Budget in Brief 2* (2019), <https://perma.cc/7G74-KD5V>. It should be noted that the reliability of ICE’s figures used to justify entering into contracts to obtain new detention space has been scrutinized by the Government Accountability Office, resulting in a report detailing recommendations to improve planning, documentation, and oversight of detention facility contracts. See U.S. GOV’T ACCOUNTABILITY OFF., *GAO-21-149, ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS 2* (2021), <https://perma.cc/KW85-4S6S>.

6. U.S. GOV’T ACCOUNTABILITY OFF., *GAO-21-149*, *supra* note 6, at 1.

7. See U.S. DEP’T OF HOMELAND SEC., *supra* note 2, at 3; Nicole Narea, *Trump’s 2021 Budget Proposal Doesn’t Stop at the Border Wall*, VOX (Feb. 10, 2020), <https://perma.cc/8GKF-P85D>.

8. U.S. DEP’T OF HOMELAND SEC., *Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal* (June 20, 2014), <https://perma.cc/B7WD-BMZ7>; HUM. RTS. FIRST, *World Refugee Day 2016: Family Detention at Two Years 1* (June 2016), <https://perma.cc/EX7B-QGMS>; see Katharina Obser, *Locking Up Family Values Again: The Detention of Immigrant Families*, WOMEN’S REFUGEE COMM’N (Oct. 30, 2014), <https://perma.cc/QX9D-MXPG>; STEPHEN W. MANNING, *THE ARTESIA REPORT*, <https://perma.cc/4CU6-WBWW> (last visited May 13, 2021); IMMIGR. IMPACT, *The Failings of Family Detention at Artesia* (Oct. 2, 2014), <https://perma.cc/2FFH-LBTW>; Dree K. Collopy & Stephen W. Manning, *Why Is Obama Still Locking Up So Many Innocent Women and Kids on U.S. Soil?*, GUARDIAN

intentions crystal clear, focusing on the message the policy would send to potential future migrants: “Our message is clear to those who try to illegally cross our borders: you will be sent back home.”⁹ The Trump administration, for its part, continued to make clear that it saw detention as an effective and appropriate deterrent to migration. When speaking of the administration’s 2020 priorities, then-acting DHS Secretary Chad Wolf promoted what the administration referred to as the end of the “catch-and-release” policy, indicating that the administration continued to see detention as one of the tools the government can use to promptly “remove, return, and repatriate” migrants who are found crossing illegally (regardless of whether they were—lawfully—seeking asylum).¹⁰

Meanwhile, in the interior enforcement context, the use of immigration detention had also steadily increased over the previous decade, reaching a high of 1,148,024 people apprehended or detained as inadmissible in 2019.¹¹ The majority of these arrests occurred along the southwest border where U.S. Customs and Border Protection (“CBP”) apprehended over 851,508 migrants, a 115 percent increase from Fiscal Year 2018 to Fiscal Year 2019 and higher than any year in the previous decade.¹² The average daily population in detention reached an all-time high of 55,238 in August of 2019, not long before the pandemic.¹³ Far from backing away from policies that led to this excessive use of detention, high-level administration officials in both the Obama and the Trump administrations explicitly endorsed policies that increased the number of immigrants in detention. The Trump administration often justified its excessive use of detention by claiming officials were enforcing a set of laws created by Congress to take dangerous criminals off the streets.¹⁴ For example, Barbara Gonzalez, then-ICE Assistant Director, justified detention and other harsh treatment by saying that she has had to “hold the hand of too many mothers who have lost a child to a DUI, or somebody else who’s been raped by an illegal alien or someone with a nexus to immigration.”¹⁵

(Nov. 4, 2014), <https://perma.cc/E3Z8-HMRX>; Stephen W. Manning, *Let These Women Go*, THINK IMMIGR. BLOG (Sept. 3, 2014), <https://perma.cc/SM6A-6DCL>.

9. *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, U.S. DEP’T OF HOMELAND SEC. (July 10, 2014), <https://perma.cc/D5NA-YY9R>.

10. *Acting Secretary Wolf’s Prepared Remarks to the Homeland Security Experts Group on 2020 Homeland Priorities*, U.S. DEP’T OF HOMELAND SEC. (Jan. 17, 2020), <https://perma.cc/A8DW-XXJH>.

11. This is a 68 percent increase from the previous fiscal year. See U.S. IMMIGR. & CUSTOMS ENF’T, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report 1*, 3 (2019), <https://perma.cc/764B-AAD5>.

12. *Id.*

13. U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 5.

14. Abigail Hauslohner, *The Trump Administration’s Immigration Jails Are Packed, but Deportations Are Lower than in Obama Era*, WASH. POST (Nov. 17, 2019), <https://perma.cc/Y7BC-A4MV>.

15. In 2019 approximately 70 percent of those detained in ICE prisons had no prior criminal convictions. *Id.*

Similarly, under the Obama administration, Secretary Johnson made three separate announcements in 2016 that ICE would ramp up raids in the interior in order to apprehend, detain, and place in deportation proceedings recent border-crossing families and unaccompanied minors. ICE Director Sarah Saldaña repeatedly stated that more immigrants should be detained and that enforcement policies should be more aggressive, even when those statements conflicted with or went beyond stated administration policies.¹⁶ These policies led to the prolonged detention of many migrants coming to the United States fleeing dangerous and violent circumstances in their home countries.¹⁷ When the Obama administration announced a change in enforcement methods and priorities in 2014, it asserted that ICE would only be targeting serious criminals or threats to national security and would be significantly decreasing its use of detention requests to state and local authorities.¹⁸ In reality, immigration authorities continued to target individuals with no criminal records, and the announced changes had little to no effect on interior enforcement activities.¹⁹ Of course, the Trump administration rescinded these policies entirely and instituted policies that made any person out of lawful status an enforcement priority.²⁰ Accordingly, ICE continued to detain people who did not pose a high flight or safety risk, often without bond or the opportunity to seek release before an immigration judge.²¹ In at least one immigration court that was studied, ICE increasingly denied bond altogether in the first seven months of the Trump administration, and bond amounts increased 38 percent

16. See, e.g., Elise Foley, *Immigration Official Walks Back Support for Mandating That Police Hold Immigrants (UPDATE)*, HUFFINGTON POST (Mar. 26, 2015), <https://perma.cc/2CPX-H6NW>. The ICE Director has also consistently refused to grant prosecutorial discretion to meritorious cases. See Stephen Dinan, *Chastened Deportation Chief Retracts Call to Override Sanctuary Cities*, WASH. TIMES (Mar. 20, 2015), <https://perma.cc/XR7D-YAND>.

17. See, e.g., Mark Price, *Charlotte Immigrant Teens at Center of Controversial ICE Arrests*, CHARLOTTE OBSERVER (Mar. 13, 2016), <https://perma.cc/G9L2-5K3K>; see Press Release, Am. Immigr. Lawyers Ass'n, CARA Family Detention Pro Bono Project Succeeds in Winning Stays of Deportation of Four Mothers and Their Children Recently Rounded-Up by ICE (Jan. 6, 2016), <https://perma.cc/Y77C-2CQL>.

18. See U.S. CITIZENSHIP & IMMIGR. SERVS., *2014 Executive Actions on Immigration*, <https://perma.cc/2VD4-K4JY> (last updated Apr. 15, 2015); see also Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs and Border Prot., Leon Rodriguez, Dir., U.S. Citizenship and Immigr. Servs., Alan D. Bersin, Acting Assistant Sec'y for Pol'y, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), <https://perma.cc/HDB5-HWRJ>.

19. See TRAC IMMIGR., *Reforms of ICE Detainer Program Largely Ignored by Field Officers* (Aug. 9, 2016), <https://perma.cc/EJW7-HKWX>; TRAC IMMIGR., *New ICE Detainer Guidelines Have Little Impact* (Oct. 1, 2013), <https://perma.cc/TV2W-3UMJ>.

20. Muzaffar Chishtii, Sarah Pierce & Jessica Bolter, *Shifting Gears, Trump Administration Launches High-Profile Worksite Enforcement Operations*, MIGRATION POL'Y INST. (Jan. 24, 2018), <https://perma.cc/67DU-HTF9>; Sarah Pierce & Randy Capps, *Trump Executive Order and DHS Guidance on Interior Enforcement: A Brief Review*, MIGRATION POL'Y INST. (Feb. 2017), <https://perma.cc/DZ2N-CNXH>; Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) ("Enhancing Public Safety in the Interior of the United States").

21. See SIRINE SHEBAYA & ROBERT KOULISH, *DETAINED WITHOUT PROCESS: THE EXCESSIVE USE OF MANDATORY DETENTION AGAINST MARYLAND'S IMMIGRANTS 3* (2016), <https://perma.cc/USU7-LLWU>.

during that period, even after review by an immigration judge.²² Despite an increase in representation rates for detained immigrants at bond hearings nationally, bond grant rates have not improved, and the median bond amount continues to rise.²³ The resulting prolonged detention makes it harder for immigrants to pursue viable legal challenges to removal from the United States and deters people with strong claims to relief from continuing to pursue their immigration cases.

B. *The High Costs of Detention*

This increased use of immigration detention exacts a heavy societal toll on many levels. The most obvious is the literal financial cost. Detention costs taxpayers over \$3 billion annually and \$8.21 million on any given day.²⁴ Prior to the pandemic, these numbers had been set to go even higher, as the Trump administration requested \$3.1 billion for Fiscal Year 2021 from Congress to increase capacity in immigration detention centers around the country.²⁵

In addition to financial costs, detention imposes serious costs on immigrants who are detained and their families. For detained adults, detention leads to physical and mental health problems,²⁶ loss of income, loss of the ability to parent their children, and loss of the ability to earn money to pay lawyer fees, among many other costs.²⁷ Similarly, children in custody do not have access to adequate physical and mental health treatment or proper education. The harms associated with detention are equally or even more severe for children, since they have to endure the trauma of being separated from family members while often being housed in cages. Child detention can

22. GABRIELA KAHL, MICHELLE MENDEZ & MAUREEN A. SWEENEY, PRESUMED DANGEROUS: BOND, REPRESENTATION, AND DETENTION IN THE BALTIMORE IMMIGRATION COURT 1 (2019), <https://perma.cc/C6FX-49Q9>.

23. TRAC IMMIGR., *Representation at Bond Hearings Rising but Outcomes Have Not Improved* (June 18, 2020), <https://perma.cc/8V6A-JFSX>. In FY 2020, two out of every three (66 percent) detained immigrants were represented at their bond hearings; double the representation rate compared to five years ago, but the outcomes did not improve.

24. Emily Kassie, *Detained: How US Built the World's Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019), <https://perma.cc/YG6Y-YRG2>.

25. Narea, *supra* note 8.

26. See U.S. COMM'N ON CIVIL RTS., TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES 63–64, 85 (Oct. 24, 2019), <https://perma.cc/QT9F-9EH8>. Health clinics in many of the detention facilities are often closed when detainees need treatment and they often wait weeks before they are able to be seen, regardless of the urgency. Testimony and documentation have shown that “even individuals who have a history of mental illness and suicide attempts have been put in solitary confinement while in detention facilities and tragically, this has led to the deaths of multiple detainees.” *Id.* at 85.

27. See Caitlin Patler & Tanya Maria Golash-Boza, *The Fiscal and Human Costs of Immigrant Detention and Deportation in the United States*, 11 SOCIO. COMPASS 5 (Nov. 1, 2017), <https://perma.cc/7RDM-S2EV>; Saba Ahmed, Adina Appelbaum & Rachel Jordan, *The Human Cost of IIRIRA—Stories from Individuals Impacted by the Immigration Detention System*, 5 J. MIGRATION & HUM. SEC. 194, 211–13 (2017).

sometimes even lead to death.²⁸ Most recently, reports and lawsuits have highlighted the health costs of detention, most pointedly instances of physical, sexual, and medical abuse suffered in ICE custody²⁹ and the increased risk that detainees face of exposure to COVID-19.³⁰ In addition to these financial and health costs, civil immigration detention also strips immigrants of essential community supports; there are no reentry programs for immigrants returning to their communities after long stints in detention. Immigrants are expected to find a way to readjust to life on the outside after months or sometimes years of being detained unnecessarily and to make their case for returning to their homes and communities in the United States without any meaningful support.

One must also consider the cost on the families of the detained, who often deal with emotional trauma and extreme financial insecurity when a family breadwinner is detained.³¹ Thousands of children lose the support of their parents and endure a forced transition into relatives' homes or the foster care system. Similarly, families of lawful permanent residents (LPRs) and United States citizens can end up having to rely on welfare because of the detention of a family member by immigration authorities.³² Studies have documented the traumatic effects of the fear of immigration enforcement and of having a

28. U.S. COMM'N ON CIVIL RTS., *supra* note 27, at 59 ("After over a decade with no child deaths in federal immigration custody, at least six migrant children have died while in custody since September 2018 based on public reports.")

29. On September 14, 2020, the Institute for the Elimination of Poverty and Genocide sent a whistleblower complaint to the Irwin County Detention Center (ICDC) and DHS. Letter from Project S., Inst. for the Elimination of Poverty and Genocide, to Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., Cameron Quinn, Officer for Civil Rts. and Civil Liberties, Dep't of Homeland Sec., Thomas P. Giles, Acting Dir. Atlanta ICE Field Off., U.S. Immgr. And Customs Enf't Atlanta Field Off., David Paulk, Warden of Irwin Cty. Detention Ctr. (Sept. 14, 2020), <https://perma.cc/5AYP-22FN>. The complaint was based on interviews with ICDC detainees and a nurse, Dawn Wooten, who formerly worked at the facility. The complaint alleged ICDC denied proper medical care and COVID-19 testing to immigrants in custody, and, more shockingly, ordered hysterectomies on women without obtaining informed consent. The detention facility denied the complaint's allegations. In response to the complaint and sharp outcry from the public and from Congress, the DHS Inspector General announced it had opened an investigation two days after receiving the complaint. Tanvi Misra, *5 Hysterectomies Referred by ICE Center, DHS Tells Congress*, ROLL CALL (Oct. 7, 2020, 6:04 PM), <https://perma.cc/H2GR-QMNL>. As of publication, the findings of the investigation have not been published. On May 20, 2021, DHS Secretary Alejandro Mayorkas directed ICE to sever its detention contracts with ICDC "as soon as possible." Maria Sacchetti, *ICE to Stop Detaining Immigrants at Two County Jails Under Federal Investigation*, WASH. POST (May 20, 2021), <https://perma.cc/35FQ-HS8J>.

30. In April 2020, for example, a federal district court granted a nationwide preliminary injunction requiring ICE to take a number of steps to protect medically vulnerable detainees from COVID-19. *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 718 (C.D. Cal. 2020); *S. POVERTY L. CTR., Fraihat et al. v. U.S. Immigration and Customs Enforcement, et al.* (Aug. 19, 2019), <https://perma.cc/87DR-Y4TL>; *see also* AM. IMMIGR. LAWYERS ASS'N, *Deaths at Adult Detention Centers* (Mar. 17, 2021), <https://perma.cc/G839-EDN6>.

31. Long-term detention can lead to difficulty paying mortgage, rent, or utilities, covering medical expenses, and even paying for food for the families of the detainees. *See* Patler & Golash-Boza, *supra* note 28, at 5

32. *See, e.g.*, Vanessa Cecaña, *Immigration, Deportation, and Family Separation*, SAN DIEGO FREE PRESS (Sept. 4, 2014), <https://perma.cc/LE5L-PVPS>; Joan Friedland, *Falling Through the Cracks*, AM. IMMIGR. COUNCIL (Dec. 12, 2012), <https://perma.cc/VUW5-ZVF9>; AM. IMMIGR. COUNCIL, *U.S. Citizen Children Impacted by Immigration Enforcement* (June 24, 2021), <https://perma.cc/AM3N-7ZAG>.

loved one taken away.³³ These impacts are particularly pronounced in children.³⁴

Detention also exacts a toll on due process. It is difficult for detained immigrants to get legal representation and assist in preparing and presenting their own cases, making it substantially harder for them to win meritorious claims to relief from deportation.³⁵ Moreover, detained immigrants have trouble finding and working with lay and expert witnesses, many of their trials take place by video rather than in-person, and their cases are on expedited timetables, giving them less time to prepare. These effects, which often amount to a denial of meaningful access to the legal system, are particularly problematic where detention is being used intentionally as a routine and deliberate method of deterring immigrants from pursuing their immigration cases.

C. *A Moment of Opportunity and Decision*

And yet, instead of acknowledging these costs and reining in the use of detention, Congress has facilitated the appetites of successive administrations to detain immigrants in removal proceedings. It took a pandemic for ICE to curtail the average daily population in detention. The consistently strong detention rates demonstrate the federal government's commitment to the use of detention as a deterrent to asylum seekers and refugees, as well as other immigrants in removal proceedings, without a meaningful examination of the legitimacy and effectiveness of that strategy. Despite strong statements about reversing the Trump administration's course on immigration policy, the Biden administration has yet to take any definite steps to restrict the misuse of detention as a deterrent to unauthorized migration. Instead, the administration has cited the pressure of asylum seekers at the border as a rationale to continue pursuing deterrence strategies, sending the message to would-be migrants: "Don't come now."³⁶

In this Article, we detail the recent history of the federal government's use of detention to deter migrants from seeking refuge or relief to which they

33. See, e.g., RANDY CAPPS, SARAH HOOKER, HEATHER KOBALL, JUAN MANUEL PEDROZA, ANDREA CAMPETELLA & KRISTA PERREIRA, IMPLICATIONS OF IMMIGRANT ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES, MIGRATION POL'Y INST. & URB. INST. (Sept. 2015), <https://perma.cc/VL74-B6EC>; HEATHER KOBALL, SARAH HOOKER, RANDY CAPPS, JUAN MANUEL PEDROZA, KRISTA PERREIRA, WILLIAM MONSON, ANDREA CAMPETELLA & SANDRA HUERTA, HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS, MIGRATION POL'Y INST. & URB. INST. (Sept. 2015), <https://perma.cc/3HB5-K4QZ>; Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and Well-Being*, KFF (2018).

34. See, e.g., CAPPS, HOOKER, KOBALL, PEDROZA, CAMPETELLA & PERREIRA, *supra* note 34; KOBALL, HOOKER, CAPPS, PEDROZA, PERREIRA, MONSON, CAMPETELLA & HUERTA, *supra* note 34; Artiga & Lyons, *supra* note 34.

35. MAGGIE CORSER, ACCESS TO JUSTICE: ENSURING COUNSEL FOR IMMIGRANTS FACING DEPORTATION IN THE D.C. METROPOLITAN AREA, CTR. FOR POPULAR DEMOCRACY (Mar. 2017), <https://perma.cc/79FH-EERK>; Robert Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 *FORDHAM L. REV.* 485, 486 (2018).

36. "Don't Come NOW": DHS Chief Laments US Border Isn't Ready to Handle Influx of Illegal Migrants in "Orderly, Safe & Humane" Fashion, RT (Mar. 1, 2021), <https://perma.cc/3P3G-88YU>.

may legally be entitled by describing the practices, policies, and legal arguments of the recent Obama and Trump administrations. We focus on policies of the Obama administration to counteract the possible misconception that problems with immigration detention began with the Trump administration or are likely to evaporate in the current Biden administration. Our analysis on the history of immigration detention shows that the detain-to-deter policy is not only illegal, inhumane, and ineffective policy but also that it is longstanding and bipartisan.

It is worth noting that the misuse of detention was only one of the aggressive deterrent strategies deployed by the Trump administration to deter migrants. Other strategies included criminal prosecution, family separation, manipulation of case law by the Attorney General, policies to keep asylum seekers at the border in Mexico during their proceedings, and sending asylum seekers to Guatemala to have their cases heard by that country.³⁷ In March of 2020, the Trump administration took advantage of the President's public health authority and traditional border enforcement authority to further its anti-immigrant agenda. Specifically, the administration used the global health crisis and the need to slow the spread of COVID-19 in detention center populations as a pretext to summarily close the border and expel migrants.³⁸ Between March 2020 and January 2021, the federal government expelled 649,060 adults, families, and children who had been detained near the southern border.³⁹ Notably, while the Trump administration cited public health concerns about the pandemic to expel thousands of detained asylum seekers and others from the country, it vigorously opposed reducing detention center populations by releasing detained immigrants in COVID-related cases within the United States.⁴⁰

As the Biden administration and a new Democratic-controlled Congress set out to make their own mark on immigration policy, they will presumably be moving to unwind many of the Trump administration's most aggressive deterrent policies, including—eventually—the Title 42 COVID-19 orders

37. *Policies Affecting Asylum Seekers at the Border*, *supra* note 3; Chishti & Pierce, *supra* note 3.

38. 42 U.S.C. § 265 (2018).

39. U.S. CUSTOMS & BORDER PROT., *FY 2020 Nationwide Enforcement Encounters* (Nov. 20, 2020), <https://perma.cc/BTN2-CGQ5>; U.S. CUSTOMS & BORDER PROT., *Nationwide Enforcement Counters* (Sept. 15, 2021), <https://perma.cc/K7J9-U8N2>.

40. *See* *Coreas v. Bound*, 451 F. Supp. 3d 407 (D. Md. 2020) (initially denying but later releasing detainees from the Worcester County Detention Center because of their underlying medical conditions that placed them at higher risk of serious complications or even death from COVID-19); *see also* *Toure v. Hott*, 458 F. Supp. 3d 387 (E.D. Va. 2020) (denying the release of nine ICE detainees from Virginia detention centers despite their vulnerability to serious illness or death from COVID-19 due to their age and/or medical conditions); *Sacal-Micha v. Longoria*, 449 F. Supp. 3d 656 (S.D. Tex. 2020) (holding that ICE's denial of detainee's release was justifiable regardless of finding that in the case of COVID-19 the detention center would be unable to protect and provide adequate medical attention to detainee who was an elderly man with serious underlying medical conditions); *Dawson v. Asher*, 447 F. Supp. 3d 1047 (W. D. Wash. 2020) (denying the immediate release of nine detainees despite detainees' vulnerability to serious illness or death if infected by COVID-19 as a result of their age and/or medical conditions and increased exposure to the disease due to the inability to achieve social distancing in an overcrowded facility).

that have greatly reduced the numbers of people detained near the border. It is imperative that before or as Congress and the administration do so, they carry out an unflinching assessment of the efficacy and costs of the mass detention of immigrants. Given the history, the ineffectiveness, and the severe costs of detention, it is vital for the new Congress and the Biden administration to recognize that the United States government's detention practices run afoul of domestic and international laws and values and change course. Both Congress and the administration must take concrete steps to ensure immigration detention is completely phased out. The pandemic, despite its brutal costs, has given us a unique opportunity to shift the course of our national policy on locking up immigrants. We must use this moment to extend our societal turn against mass incarceration and end the routine use and misuse of immigration detention as a deterrent.

II. DETENTION OF ASYLUM SEEKERS AT THE BORDER⁴¹

A. *A Systematic Increase in the Use of Family Detention as a Deterrent*

The use of detention against asylum-seeking families provides a crystal-clear example of the way the Obama and Trump administrations used detention as an improper deterrent to migration. Detaining asylum seekers has costs that go beyond even the usual high costs of widespread detention, and it is rarely justified on the traditional matrices of flight risk or danger. When asylum seekers are detained—particularly in the family detention setting—it compounds the trauma from which they have fled and poses serious barriers to accessing the tools necessary for presenting an effective asylum claim, such as legal counsel,⁴² witnesses and documentation, interpreters, medical and mental healthcare, and support networks. Moreover, detained immigrants, including asylum seekers, are rushed through proceedings on a faster immigration court docket.⁴³ Many of them, being detained in remote locations far away from any immigration courts, have their cases heard by video, rather than in-person.⁴⁴ The procedures for detained individuals, including asylum seekers, are severely truncated. None of this dissuaded the Obama or

41. This section includes excerpts from DREE K. COLLOPY, AILA'S ASYLUM PRIMER (7th ed. 2015).

42. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, SPECIAL REPORT ASSESSING THE U.S. GOVERNMENT'S DETENTION OF ASYLUM SEEKERS (Apr. 2013), <https://perma.cc/T3UK-DT74> [hereinafter U.S.C.I.R.F., SPECIAL REPORT]; HUM. RTS. FIRST, *supra* note 9 (stating that more than one-third of detained asylum seekers are not represented by counsel); *see also* MANNING, *supra* note 9 (discussing the significant reduction in deportations after the arrival of pro bono counsel for women and children detained at the Federal Law Enforcement Training Center in Artesia, New Mexico); TRAC IMMIGR., *Representation Is Key in Immigration Proceedings Involving Women with Children* (Feb. 18, 2015), <https://perma.cc/YD5W-9LFS> (finding that even though they had been able to demonstrate "credible fear" of returning to their home country, deportation was ordered for 98.5 percent of women with children who were not represented by an attorney).

43. EXEC. OFF. FOR IMMIGR. REV., IMMIGR. CT. PRAC. MANUAL 144 (Aug. 2, 2018), <https://perma.cc/Q5MT-7DVH>.

44. U.S.C.I.R.F., *supra* note 43, at 8–9. From October to December of 2019 over one out of six final immigration court hearings was held by video. TRAC IMMIGR., *Use of Video in Place of In-Person Immigration Court Hearings* (Jan. 28, 2020), <https://perma.cc/UN7Z-8QJ2>; *see also* Christina Goldbaum,

Trump administrations from relying on detention as a regular feature of policies designed to reduce the number of families seeking asylum in the United States.

By U.S. law, all arriving asylum seekers who are placed into expedited removal must be detained initially, and detention is mandatory pending credible and reasonable fear interviews.⁴⁵ However, once they establish a fear of return to their home country, asylum seekers can be released to await their hearing date. The history of the last decade and a half has nonetheless been one of increasing detention for asylum seekers in expedited removal. In 2006, DHS expanded its detention practice for the first time to include arriving families⁴⁶ and opened the 500-bed T. Don Hutto detention facility in Texas that it claimed was specifically equipped to meet family needs.⁴⁷ Over 90 percent of the mothers detained in the Hutto facility expressed fear of return to their home countries.⁴⁸ In addition, there were soon allegations of mistreatment and prison-like conditions in this facility.⁴⁹ Human rights groups in the United States strongly criticized the detention of asylum seekers and the negative impact that detention had on their ability to present their asylum claims, as they had since long before the opening of the Hutto facility in 2006.⁵⁰

During the Obama administration, ICE announced reforms that it alleged would address many of the complaints about immigration detention.⁵¹ Specifically, ICE announced that within three to five years, it would:

Videoconferencing in Immigration Court: High-Tech Solution or Rights Violation?, N.Y. TIMES (Feb. 12, 2019), <https://perma.cc/WV74-FCAV>.

45. 8 U.S.C. § 1225(b)(1) (2018).

46. Press Release, U.S. Immig. and Customs Enf't, DHS Closes Loophole by Expanding Expedited Removal to Cover Illegal Alien Families (May 15, 2006), <https://perma.cc/LK3U-SF5W>.

47. *Id.*

48. See LUTHERAN IMMIGR. & REFUGEE SERV. & WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 31–32 (Feb. 2007), <https://perma.cc/2VKV-XR48> [hereinafter WOMEN'S COMM'N, LOCKING UP FAMILY VALUES]; Katharina Obser, *Locking Up Family Values Again: The Detention of Immigrant Families*, WOMEN'S REFUGEE COMM'N: BLOG (Oct. 30, 2014), <https://perma.cc/7ZA8-SG9H>.

49. The ACLU brought seventeen lawsuits against DHS Secretary Michael Chertoff, and six officials from ICE, on behalf of children detained at the T. Don Hutto detention facility in Taylor, Texas. See Press Release, ACLU, ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions (Mar. 6, 2007), <https://perma.cc/M8PT-7UA3>; see also WOMEN'S COMM'N, *supra* note 50. These lawsuits contended that the Hutto facility violated the regulations arising out of *Flores v. Meese*, which ended in a 1997 court settlement that established minimum standards and conditions for the housing and release of all minors in federal immigration custody. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997). On August 27, 2007, a settlement was reached in the Hutto detention center litigation. See Settlement Agreement, *In re Hutto Family Detention Center*, No. A-07-CA-164-SS (W.D. Tex. Aug. 26, 2007).

50. HUM. RTS. FIRST, *supra* note 9; WOMEN'S COMM'N, *supra* note 49; see also, KAREN TUMLIN & LINTON JOAQUIN, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS, NAT'L IMMIGR. L. CTR. (2009), <https://perma.cc/9ZD6-J4ZX>; Bill Frelick, *U.S. Detention of Asylum Seekers and Human Rights*, AMNESTY INT'L (Mar. 1, 2005), <https://perma.cc/HEU3-VMC3>.

51. U.S. IMMIGR. & CUSTOMS ENF'T, *Immigration Detention Reform: Principles and Next Steps* (Aug. 6, 2009) <https://perma.cc/J6HK-74A4>.

(1) “design facilities located and operated solely for immigration detention purposes; (2) revise its immigration detention standards to reflect the conditions appropriate for various immigration detainee populations; (3) review its contracts with detention facilities to ensure that they comply with the new standards; [and] (4) devise a risk assessment and custody classification tool to place detainees in appropriate facilities.”⁵²

As part of these 2009 reforms, ICE also announced—after years of controversy, media exposure, and a lawsuit—the end of the common use of family detention and the shift of the T. Don Hutto family detention facility to holding only adult women.⁵³

Instead of following through on these reforms, in the summer of 2014, the Obama administration resurrected and dramatically expanded family detention in response to the “surge” of Central American families crossing the southern border of the United States in search of protection, announcing “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”⁵⁴ The administration’s hastily-erected facility in Artesia, New Mexico had a capacity of over 600 women and children. Still, the facility closed on December 15, 2014, following fourteen grants of asylum out of fifteen cases that went to hearing on the merits,⁵⁵ extensive media exposure,⁵⁶ and a lawsuit regarding inhumane conditions and due process concerns.⁵⁷ However, this was not the end of family detention. With the conversion of an existing detention facility in Karnes City, Texas, with a capacity of over 500 women and children, and the opening of a new 2,400 bed facility in Dilley, Texas, the Obama administration made clear it intended to continue the policy of detaining women and children asylum seekers in family detention camps as a means to deter future border crossers.⁵⁸ In short, between 2001 and 2016, the government’s capacity to detain families increased 3,400 percent.⁵⁹

52. U.S.C.I.R.F., *supra* note 43, at 2.

53. See ACLU, *Enforceable Standards and Community-Based Alternatives to Detention Still Needed*, Says ACLU (Aug. 6, 2009), <https://perma.cc/25X5-4HL5>.

54. U.S. DEP’T OF HOMELAND SEC., *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations* (July 10, 2014), <https://perma.cc/Q3Q7-6PBL>.

55. Note that the “14 out of 15” number is the number of cases tried on the merits during the twenty-one weeks that the AILA pro bono project operated in Artesia. See AM. IMMIGR. LAWYERS ASS’N, *Artesia Family Detention Asylum Case Examples* (Feb. 13, 2015), <https://perma.cc/HAG8-B4PE>.

56. See, e.g., Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://perma.cc/8ZJL-EDRS>; Collopy & Manning, *supra* note 10.

57. See M.S.P.C. v. Johnson, No. CIV 14-769 JCH/CG, 2015 WL 74544248, at *1 (D.N.M. Sept. 23, 2015); see also AM. IMMIGR. COUNCIL, *Groups Sue U.S. Government Over Life-Threatening Deportation Process Against Mothers and Children* (Aug. 22, 2014), <https://perma.cc/Z6VL-JZ34>.

58. See U.S. IMMIGR. & CUSTOMS ENF’T, *ICE’s New Family Detention Center in Dilley, Texas to Open in December* (Nov. 18, 2014), <https://perma.cc/7YGP-NWS2>; Julia Preston, *Detention Center Presented as Deterrent to Border Crossers*, N.Y. TIMES (Dec. 15, 2014), <https://perma.cc/7P2K-BVXQ>.

59. INGRID EAGLY, STEVEN SHAFER & JANA WHALLEY, *DETAINING FAMILIES: A STUDY OF ASYLUM ADJUDICATION IN FAMILY DETENTION* 1, 8 (2018).

The Trump administration had ICE double down on the strategy of detaining families and individuals seeking asylum at the southwest border. In March 2019 alone, Border Patrol apprehended over 53,000 family units, a dramatic 600 percent increase from the year before.⁶⁰ The Trump administration did much to publicize its effort to end the immigration policy it called “catch and release” which allowed migrants to be released into the community as they awaited their hearings in immigration court.⁶¹ The administration announced it would detain all apprehended migrants, including families, children, and asylum seekers until the conclusion of their immigration proceedings.⁶² Additionally, it sought to terminate the 1997 settlement agreement in *Flores v. Reno*, which set standards for the detention, release, and treatment of children in immigration custody and limited the time the government could hold children (and thus families) in detention.⁶³ Although these objectives were struck down, Attorney General Jeff Sessions continued to push to eliminate the ability of asylum seekers to bond out of detention while awaiting their hearings, which significantly increased the number of immigrants held in detention.⁶⁴ The administration maintained that its detention strategies were designed to send a message to others who might be considering immigration, despite their limited effectiveness as a deterrent and the intense pressure many migrant families and asylum seekers faced to flee their country of origins. For many, the benefit of migration—a safe haven in the United States—continued to outweigh the punitive costs, including harsh enforcement measures and detention.⁶⁵

In light of increasing detention of families, advocacy and legal organizations continued to fight against family detention in the Dilley and Karnes facilities in south Texas, as well as the smaller facility in Berks, Pennsylvania.⁶⁶ Herculean pro bono efforts sought to provide free representation to detained families, at least for the period of time they were detained. For example, the nonprofit organization RAICES claims to have provided pro bono services to up to 90 percent of families detained at Karnes.⁶⁷ Meanwhile, a study of asylum adjudications for families detained between 2001 and 2016 found huge disparities in access to counsel and in outcomes between families who remained detained and those who were released.

60. HOMELAND SEC. ADVISORY COUNCIL, FINAL EMERGENCY INTERIM REPORT: CBP FAMILIES AND CHILDREN CARE PANEL 1 (Apr. 16, 2019), <https://perma.cc/9R4G-KS69>.

61. Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. 237, 239 (2019).

62. Chishti & Pierce, *supra* note 3.

63. *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015); *see also* Pl.s’ Mem. in Supp. of Mot. to Enforce Settlement of Class Action, *Flores v. Johnson*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 30, 2015) (a copy of the memorandum is available at <https://perma.cc/CM8M-6NTT>). The *Flores* settlement provides protection for children in detention by limiting the number of days children can be held in detention. Chishti & Pierce, *supra* note 3.

64. Chishti & Pierce, *supra* note 3.

65. Ryo, *supra* note 62, at 239–40.

66. *See* AM. IMMIGR. LAWYERS ASS’N, *CARA Family Detention Pro Bono Project* (June 29, 2015), <https://perma.cc/D2VE-NP58>.

67. *Karnes Pro Bono Project*, RAICES, <https://perma.cc/DT9M-TKDX> (last visited May 25, 2021).

76 percent of families who were released found counsel for their final asylum hearings, while only 53 percent of detained families did, even with widespread pro bono efforts on behalf of detained families.⁶⁸ Nearly half (49 percent) of family members who were released and found representation ultimately won relief, while only 8 percent of those who remained detained and without representation did so.⁶⁹ Although many of these individuals ultimately won their cases in court, the Obama administration, followed by the Trump administration, continued the government's commitment to a policy of detention-as-deterrence. They maintained this commitment despite class action lawsuits challenging the practice and conditions of detention, reports, and studies documenting the due process violations and traumatic impact of family detention, and complaints before the DHS's Office of Civil Rights and Civil Liberties and the Office of the Inspector General. The hundreds of thousands of hours of pro bono legal services donated to detained immigrants, numerous grants of asylum and withholding of removal for detained and formerly detained families, Congressional calls to end family detention, press conferences, and relentless media criticism, detainee hunger strikes, expressed outrage from religious figures and social service providers. Even federal district court orders likewise did not end the policy.

B. *The Illegality of Detention-as-Deterrence*

The Obama administration committed to a policy of detaining asylum seekers as a means of deterring additional arrivals and applicants, and the Trump administration expanded on that policy as part of its escalated attempts to cut off access to the asylum system. However, these detain-to-deter policies are illegal. First, a detention policy based on deterrence precludes fair review of the individual circumstances that would support detention or release in each case, as called for by both international and domestic law.⁷⁰ Second, it is illegal to deter people from fleeing persecution and seeking protection. Doing so is essentially a violation of one of the most fundamental of human rights, "the right to seek and to enjoy in other countries asylum from persecution."⁷¹

Specifically, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees ("Protocol"), which incorporated Articles 2 through 34 of the 1951 United Nations Convention Relating to the

68. EAGLY, SHAFER & WHALLEY, *supra* note 60, at 2.

69. *Id.*

70. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; U.N. REFUGEE AGENCY, *The 1951 Refugee Convention*, <https://perma.cc/H3QT-T9X2> (last visited Oct. 26, 2021); *see also* 8 U.S.C. § 1226 (2021); 8 C.F.R. §§ 241.4(f)(7)–(8) (2011) (stating factors that should be weighed when determining whether detention is necessary include "likelihood that the alien is a significant flight risk" or a danger to the community); *Matter of Fatahi*, 26 I. & N. Dec. 791 (B.I.A. 2016) (holding that immigration judges are required to consider both direct and circumstantial evidence of dangerousness when determining whether a noncitizen presents danger to the community and thus should not be released).

71. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 14 (Dec. 10, 1948).

Status of Refugees (“Refugee Convention”). Thus, the United States became obliged to abide by its provisions, including the definition of “refugee” and the principle of *non-refoulement*, that is, the protection of those facing persecution for recognized reasons.⁷² The U.S. Congress then passed the Refugee Act in 1980⁷³ to bring U.S. law into conformity with its international obligations under the Protocol. Thus, both international and domestic law requires the United States to offer protection to bona fide refugees and to abide by the founding principles of the Refugee Convention, which include the prohibition of imposing penalties for illegal entry or presence. Specifically, Article 31(1) of the Refugee Convention states as follows:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees⁷⁴

Having acceded to the 1967 Protocol, the United States made no reservations or declarations with regard to Article 31(1). Additionally, Congress was keenly aware of the United States’ international treaty obligations when it drafted the Refugee Act of 1980. As the U.S. Supreme Court noted, “If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968.”⁷⁵ According to the United Nations High Commissioner for Refugees’ guidelines on the detention of asylum seekers, “detention that is imposed in order to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.”⁷⁶

Moreover, the detention of children for immigration purposes is a clear violation of the United Nations Convention on the Rights of the Child (“CRC”), which the United States is a signatory of.⁷⁷ The Committee on the Rights of the Child states that “regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children’s rights, is never in their best interests and is not justifiable.”⁷⁸ Thus, enforcement actions meant to punish people—adults or

72. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; United Nations Convention Relating to the Status of Refugees, *supra* note 71.

73. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

74. United Nations Convention Relating to the Status of Refugees, *supra* note 71, at art. 31(1); see also U.N. REFUGEE AGENCY, *supra* note 71.

75. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citations omitted); see *Negusie v. Holder*, 555 U.S. 511, 520 (2009) (citing with approval this quote from *Cardoza-Fonseca*); see also H.R. Rep. No. 96-781, at 19 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 160, 161; H.R. Rep. No. 96-608, at 9 (1979); S. Rep. No. 96-256, at 4 (1979), as reprinted in 1980 U.S.C.C.A.N. 141, 144-45.

76. U.N. REFUGEE AGENCY, DETENTION GUIDELINES 19 (2012), <https://perma.cc/BZ22-SXHJ>.

77. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

78. COMM. ON THE RTS. OF THE CHILD, REPORT OF THE 2012 DAY OF GENERAL DISCUSSION: THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION 10 (2012), <https://perma.cc/F2G4-3KC4>; see also United Nations Convention on the Rights of the Child, *Consideration of Reports*

children—for entering without valid documents and to deter them from fleeing persecution and seeking protection in the United States not only violate a fundamental human right but also U.S. international and domestic legal obligations.

In expanding its use of family detention, DHS has asserted that asylum seekers should not be released, even on bond, because release would implicate the national security interests of the United States. This policy represented a stark shift in DHS detention practices because, prior to June 2014, DHS generally did not detain families seeking asylum and especially not those who had passed a credible fear screening interview and who were eligible for release on bond or conditional parole because they did not present a danger to the community and were not a flight risk. This policy shift signaled that DHS would deny release not because these families posed a danger to the community or a flight risk but because, according to DHS, the detention of asylum seekers is necessary to deter future asylum seekers from crossing the southern border and to disrupt “active migration networks” as a means of protecting national security.⁷⁹ As support for this argument, DHS asserted that the Board of Immigration Appeals case *In re D-J-* applied.⁸⁰ Under *In re D-J-*, an immigration judge must review the custody redetermination of an individual in light of any Executive Branch statements that, because of mass migration concerns, individual liberty interests weigh less.⁸¹ However, there was no declared national emergency that would trigger *D-J-* review, and the facts of that case were significantly different from those of the women and children detained in the family detention camps.⁸²

Courts held this policy to be likely illegal. A federal court in 2015 held that it was likely illegal for the government to consider deterrence as a factor in bond determinations and enjoined the Obama administration’s policy of denying bond across the board for deterrence reasons.⁸³ In December of 2014, the American Civil Liberties Union (“ACLU”) filed a lawsuit on behalf

Submitted by States Parties Under Article 44 of the Convention, U.N. Doc. CRC/C/15/Add.268 (Oct. 20, 2005).

79. Jonathan Hiskey, Mary Malone & Diana Orcés, *Violence and Migration in Central America*, Americas Barometer Insights: 2014 at 1, 2 (2014), <https://perma.cc/YJ5K-TGPU>; Detention Watch Network, *Ending the Use of Immigration Detention to Deter Migration* 2–3 (Apr. 2015), <https://perma.cc/KF64-V6G3>.

80. *Matter of D-J-*, 23 I. & N. Dec. 572 (A.G. 2003).

81. *Id.* at 581.

82. *See id.* at 576–77; 50 U.S.C. § 1622(d) (2012). In *D-J-*, the Attorney General stated that, where a National Emergency has been declared, it may be appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented migrants into the United States without adequate screening. However, the Attorney General carefully tailored his opinion to apply when “[u]nder the current circumstances of a declared National Emergency” a mass migration would strain DHS’s ability to investigate the individual status of a noncitizen. *D-J-*, 23 I. & N. Dec. at 576–77. The National Emergency in *D-J-* concerned the alleged use of Haiti as a staging ground for terrorist activity from Pakistan. *Id.* at 580; *see* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

83. *R.I.L-R- v. Johnson*, 80 F. Supp. 3d 164, 189–90 (D.D.C. 2015); *see also* ACLU, *Federal Court Blocks Government from Detaining Asylum Seekers as Tactic to Deter Others from Coming to U.S.* (Feb. 20, 2015), <https://perma.cc/MU5H-FYCT>.

of the nationwide class of detained mothers and children who fled violence in Central America to seek asylum in the United States.⁸⁴ The lawsuit challenged DHS's policy of detaining Central American families seeking asylum in order to deter future migration from the region and its outright refusal to even consider release of class members on recognizance or bond under 8 U.S.C. § 1226(a). On February 20, 2015, the U.S. District Court for the District of Columbia provisionally certified the nationwide class of these families and granted a preliminary injunction prohibiting DHS from detaining families "for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in custody determinations."⁸⁵ Thus, under the court's order, DHS was enjoined from relying on general deterrence as a basis to detain class members. The district court based its preliminary injunction of this practice on its conclusion that section 236(a) of the Immigration and Nationality Act ("INA") does not permit detention based on generalized deterrence. Moreover, even if detention based on deterrence was permitted, there was no evidence justifying such detention here. The court stated, "[i]ncantation of the magic words 'national security' without further substantiation is simply not enough to justify significant deprivations of liberty."⁸⁶ In May of 2015, following the court's ruling, DHS announced that it would no longer invoke general deterrence in custody determinations involving families.⁸⁷ However, the Obama administration continued to detain asylum seeking families as a matter of policy. The Trump administration doubled down on this policy, continuing to claim that it must focus on harsher options in order to deter the large influx of migrants coming in and that releasing migrants into the interior while their cases are pending encourages others to attempt to cross into the United States.

Finally, a U.S. District Court in California has also repeatedly ruled that the government's family detention policies have been illegal in their treatment of children, as they violated the settlement agreement in *Flores v. Reno*.⁸⁸ The Obama administration tried to challenge the application of the *Flores* settlement by arguing that the settlement did not address ICE family detention centers because there was no meeting of the minds of the parties with regard to such facilities and that the settlement was never intended to apply to accompanied minors. However, on July 24, 2015, District Court Judge Gee found DHS in breach of the *Flores v. Reno* settlement, holding

84. ACLU, *RILR v. Johnson* (July 31, 2015), <https://perma.cc/M48K-8MEY>; *R.I.L.-R.*, 80 F. Supp. 3d at 172.

85. *R.I.L.-R.*, 80 F. Supp. 3d at 191; see also ACLU, *Practice Advisory* (Mar. 3, 2015), <https://perma.cc/C4TH-F5MR>.

86. *R.I.L.-R.*, 80 F. Supp. 3d at 190; see also *id.* (holding that detention "cannot be justified by mere lip service").

87. U.S. IMMIGR. & CUSTOMS ENFT, *ICE Announces Enhanced Oversight for Family Residential Centers* (May 13, 2015), <https://perma.cc/XY6S-MYJM>.

88. *Flores v. Johnson*, 212 F. Supp. 3d 864, 872 (C.D. Cal. 2015); see also Pl.'s Mem. in Supp. of Mot. to Enforce Settlement of Class Action, *Flores v. Johnson*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 30, 2015) (a copy of the memorandum is available through AILA at <https://perma.cc/2593-5R85>).

that the settlement applied to all minors in DHS custody, not just unaccompanied minors, and that none of the family detention centers met the *Flores* standards.⁸⁹ This decision was affirmed by the U.S. Court of Appeals for the Ninth Circuit on July 6, 2016, which ordered the immediate release of children detained in the family detention facilities.⁹⁰

Despite these rulings, the Trump administration again doubled down on prior efforts to detain asylum-seeking families and children. For example, the administration tried to request a modification to the *Flores* settlement agreement that would have increased the amount of time that children could be incarcerated in detention facilities.⁹¹ However, on September 27, 2019, Judge Gee issued a permanent injunction against the DHS and HHS regulations and compelled the agencies to continue to comply with *Flores* settlement agreement standards and requirements.⁹²

Both the Obama and the Trump administrations persisted with the policy of detaining and sending families and other asylum seekers to the same facilities designed to deter future border crossers. These facilities have been widely criticized by immigrant and human rights organizations, medical and mental health professionals, lawyers and advocates, and members of both houses of Congress. The media, religious figures and social service providers, and the suffering detainees themselves have denounced them as being harmful to children's health and development, violating access to counsel and other due process rights, and violating domestic and international law. The Trump administration, as part of its comprehensive effort to close off what it considered to be an asylum "loophole," attempted to expand the use of mandatory detention to *all* arriving asylum seekers in the April 2019 *Matter of M-S-* decision by then-Attorney General William Barr.⁹³ This decision would have completely eliminated the possibility of release for people who established a credible fear of return to their home countries. However, the decision was enjoined by a federal court in July 2019 as violating due process.⁹⁴

If this history were not enough to indicate the likelihood that the government—barring some intervention—will continue to rely on detention as a deterrent, one need only look at the failure of repeated administrations to invest in facilities at the border that would be appropriate to families and migrants seeking humanitarian protection or to improve conditions in DHS detention generally. Rather than investing in adapting border facilities for

89. See *Flores*, 212 F. Supp. 3d at 872–73; see also AM. IMMIGR. LAWYERS ASS'N, *District Court Finds DHS in Breach of Flores Agreement* (July 24, 2015), <https://perma.cc/249Y-UYMQ>.

90. See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

91. *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST 4–5 (Oct. 2018), <https://perma.cc/56ZN-ZEY3>.

92. See *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019); see also Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, N.Y. TIMES (Sept. 27, 2019), <https://perma.cc/FFP4-8WRB>.

93. *Matter of M-S-*, 27 I. & N. Dec. 509, 510, 518–519 (A.G. 2019).

94. *Padilla v. U.S. Immigration & Customs Enf't*, 379 F. Supp. 3d 1170, 1181–82 (W.D. Wash. 2019).

families and other asylum seekers—who have represented the clear majority of border crossers in recent years—both the Obama and the Trump administrations allowed the exceptionally harsh conditions found in CBP border facilities to remain a gauntlet that border crossers must run to win the “privilege” of seeking protection in the United States.⁹⁵ For example, CBP detention facilities are known as “hieleras” or “ice boxes” due to the frigid temperatures the detainees are subjected to at all times of year.⁹⁶ Plaintiffs in *Unknown Parties v. Johnson* alleged that a CBP facility in Tucson, Arizona held men, women, and children in deplorable conditions violating the U.S. Constitution.⁹⁷ In January of 2020, the district court in that case found the conditions in the facility violated the Constitution and granted a permanent nationwide injunction against detaining people in these facilities for more than 48 hours unless their “basic human needs” are being met.⁹⁸ In a case including border crossers transferred to a federal prison in California, detained immigrants alleged they had inadequate and insufficient food and minimal access to fresh air and sunlight.⁹⁹

These accounts are confirmed by the DHS Office of Inspector General, which documented deplorable conditions and systematic problems with medical care in ICE facilities.¹⁰⁰ In the last two years, over twenty-eight pregnant women may have miscarried while in custody.¹⁰¹ On the other hand, men seeking medical and mental health care were often ignored, dismissed, or even mocked and verbally abused.¹⁰² Heightened risk of exposure to COVID-19 has added a deadly urgency to concerns over medical care in DHS detention facilities as COVID-19 cases have been confirmed and DHS has failed to provide adequate protection to detainees.¹⁰³ Even with all of these violations coming to light, the Trump administration released new National Detention Standards in December 2019 that weakened critical protections and lowered the already abysmal oversight requirements.¹⁰⁴ Given the longstanding nature of these deplorable conditions and the stubborn

95. See Victoria López, *Rampant Abuses in Immigration Detention Prove ICE Is Rotten to the Core*, ACLU (Mar. 1, 2019, 6:15 PM), <https://perma.cc/EYE7-QHLP>.

96. *Id.*

97. See *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *1 (D. Ariz. Nov. 18, 2016).

98. *Challenging Unconstitutional Conditions in CBP Detention Facilities, Doe v. Wolf*, No. 15-00250, AM. IMMIGR. COUNCIL, <https://perma.cc/GWJ6-7R7A> (last visited Oct. 9, 2021).

99. *Teneng v. Trump*, ACLU, <https://perma.cc/AUJ3-M6ZC> (last updated Aug. 1, 2018).

100. López, *supra* note 98.

101. *Id.*

102. López, *supra* note 98; ACLU, *supra* note 100.

103. Eunice Cho, *Immigration Detention Was a Black Box Before COVID-19. Now, It's a Death Trap*, ACLU (Apr. 30, 2020), <https://perma.cc/PT95-VG5Z>. In May of 2020, there were at least forty-five detainees who had tested positive for COVID-19 even though less than 2% have been tested nationwide. After a detainee died in CBP custody of COVID-19, another detainee reported that they have been denied access to gloves and disinfectants and have been given only one mask to reuse for at least two weeks. Elizabeth Trovall, *UPDATE: Inmate Dies of COVID-19 at Facility ICE Detainees Call Cramped and Unsanitary*, HOUS. PUB. MEDIA (May 15, 2020, 8:06 PM), <https://perma.cc/8U7Y-KB64>.

104. Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, ACLU (Jan. 14, 2020), <https://perma.cc/4CNZ-TAVU>.

refusal to adapt border facilities for the families and asylum seekers who have been arriving there for years, it is hard to conclude anything other than that the persistence of harsh conditions is intended to as another method of deterrence.

III. PROLONGED DETENTION OF IMMIGRANTS FIGHTING REMOVAL FROM WITHIN THE UNITED STATES

The government does not restrict the misuse of its detention power to asylum seekers at the border. The situation in the interior of the United States is not much different, as the last two administrations also significantly ramped up the use of detention to deter individuals from pursuing challenges to their removal from the United States.

A. *The Mass Incarceration of Immigrants in the Interior of the United States*

The government has implemented its policy of using detention to deter legal challenges in a number of different ways, three of which will be highlighted in this section: (1) aggressive use of “mandatory” no-bond immigration detention under 8 U.S.C. § 1226(c); (2) disproportionate bond amounts that neither correspond with the strength of bond applicants’ equities nor take into consideration their ability to pay; and (3) practices aimed at using detention to stop people from pursuing valid immigration claims.

1. “Mandatory” No-Bond Detention

Some of these changes began in the context of a series of draconian additions to the immigration laws enacted in 1996, when Congress enacted a provision codified at 8 U.S.C. § 1226(c) requiring that immigrants facing deportation based on certain criminal convictions be taken “into custody.”¹⁰⁵ The provision was enacted as part of a series of “reforms” expanding the list of criminal offenses that Congress defined as so-called “aggravated felonies.” This term of art covers a broad range of offenses (many of them neither felonies nor particularly aggravated) that carry the most severe immigration consequences. When a person is found to have committed a crime that falls within this range of offenses, it drastically reduces or eliminates the discretion of an immigration judge to grant relief from deportation on the merits in their case.¹⁰⁶ As a result of these changes, many noncitizens convicted of even minor offenses—including decades-old misdemeanor offenses for

105. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 18 U.S.C.S. § 122956 (LEXIS through Pub. L. No. 117-47(1996)).

106. See, e.g., MARGARET H. TAYLOR, THE STORY OF DEMORE V. KIM: JUDICIAL DEFERENCE TO CONGRESSIONAL FOLLY, in IMMIGRATION STORIES 343, 344 (David A. Martin & Peter H. Schuck eds., 2005); Walter A. Ewing, Daniel E. Martínez & Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 14 (2015), <https://perma.cc/QG8N-ENUM>.

which they served no time in jail—are routinely subjected to detention for the entire duration of their immigration proceedings, even when they last for months or years.¹⁰⁷

This so-called “mandatory detention” provision is one reason that the number of noncitizens detained pending their removal proceedings has skyrocketed despite the significant financial costs on taxpayers—an estimated \$208 per detainee per day¹⁰⁸—to say nothing of the financial and emotional costs on immigrants and their families.¹⁰⁹ Many noncitizens placed in mandatory detention have been convicted of nonviolent offenses, such as theft, simple possession of small amounts of drugs, check or ID fraud, and similar offenses. Many serve little to no jail time in the criminal legal system and have strong equities that make them obvious candidates for release on bond or on other conditions, and many have previously been released on bond by state criminal courts following the usual flight risk and safety analysis.¹¹⁰ Yet, they all end up detained for the entire duration of their immigration proceedings, even when they have strong challenges to deportation and are ultimately able to remain permanently in the United States.

2. *Excessively High Bonds*

Exacerbating the problem of detention without bond, the practice of setting bond—known as bail in criminal court—in the immigration context is severely out of step with ordinary conceptions of what justifies a high bond or a discretionary denial of bond.¹¹¹ Two recent studies showed that the average amount of immigration bonds was between \$11,200 and \$11,868.¹¹² Unlike in the criminal context, migrants posting an ICE bond generally had to pay the full amount owed to ICE before being released.¹¹³ In criminal courts, if a defendant does not have enough money to post the entire bail, bail companies will generally guarantee the amount while requiring the defendant to pay 10 percent.¹¹⁴ Additionally, in criminal courts, nearly everyone is eligible for bail, whereas in immigration courts, there are many people who are

107. See SHEBAYA & KOULISH, *supra* note 22, at 3; *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 1–2 (2021), <https://perma.cc/L8PL-RB22>.

108. Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT’L IMMIGR. FORUM. (May 9, 2018), <https://perma.cc/LGA8-2RBK>.

109. For a discussion of the human costs of detention, see *supra* notes 26–33 and accompanying text; *infra* note 122.

110. See, e.g., SHEBAYA & KOULISH, *supra* note 22, at 6–7.

111. For example, in 2014, ICE was routinely setting bonds for arriving Central American asylum seekers at \$15,000–\$30,000 bonds (as reported by immigration practitioners providing pro bono services at the Dilley and Karnes facilities), but this practice appears to have ceased after the court decision in *R.I. L-R- v. Johnson*, see *supra* Section I, was issued.

112. KAHL, MENDEZ & SWEENEY, *supra* note 23, at 1–2; *Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches*, 85 Fed. Reg. 45,968, 45,972 (July 31, 2020).

113. KAHL, MENDEZ & SWEENEY, *supra* note 23, at 7.

114. Max Siegelbaum, *It’s Cheaper to Get Out of Jail Than Immigration Detention*, DOCUMENTED NY (June 11, 2018, 6:00 AM), <https://perma.cc/3P22-WVH8>.

not even eligible for bond.¹¹⁵ One need only sit through a morning of master calendar (preliminary) hearings in immigration court to see many detained migrants routinely denied bond altogether for entirely capricious reasons. Others are given a bond of \$10,000–\$15,000 or more for minor offenses like driving while intoxicated, despite extensive family ties in the United States and other positive factors such as stable employment, long-term residence at the same address, payment of taxes, involvement in the community, a strong likelihood of success in their immigration proceedings, and other equities.¹¹⁶ It is common for immigrants who were released on minimal bond in the criminal legal system—which itself is fraught with injustices—to have bond denied or to see an egregiously high bond set in immigration court, sometimes years after the criminal offense and despite very positive equities.¹¹⁷ Thus, even immigrants who are eligible for bond often remain detained for long periods simply because they cannot afford the bond that immigration courts require them to pay in order to be released.¹¹⁸

Immigration courts have failed to consider a person's ability to pay before setting bond and have put the burden on the detained immigrants—who are typically without representation—to prove “to the satisfaction of” an immigration judge that they are not a threat to the community or a flight risk.¹¹⁹ Recent litigation has been challenging these procedures. For example, the U.S. District Court for Maryland in *Miranda v. Barr* recently ordered immigration judges to consider ability to pay and to shift the burden to the government to demonstrate why a person must stay in detention.¹²⁰ Nevertheless, immigration courts continue to lag behind bail reform efforts undertaken in the criminal court context. In New York, for example, criminal bail reform has eliminated pretrial detention and cash bail as an option in an estimated 90 percent of arrests, and judges are required to release people on their own recognizance or with other release conditions ensuring that the immigrant will return to court.¹²¹ In many federal and state criminal bail systems, judges are

115. *Id.*

116. As witnessed by one of the authors at a Master Calendar Hearing in Arlington, Virginia, and as reported routinely by immigration practitioners. For additional examples, see also the stories reported in SHEBAYA & KOULISH, *supra* note 22; KAHRL, MENDEZ & SWEENEY, *supra* note 23.

117. See SHEBAYA & KOULISH, *supra* note 22.

118. See, e.g., *Hernandez v. Lynch*, EDCV 16-00620-JGB (KKx), 2016 U.S. Dist. LEXIS 191881 (C.D. Cal. Nov. 10, 2016) (contending that the policy of not considering detainees' ability to pay when setting bonds violates the INA (specifically section 1226(a)), the Due Process and Equal Protection Clauses of the Fifth Amendment, and the Excessive Bail Clause of the Eighth Amendment); see also *ACLU Sues Federal Government Seeking Bond Reform in Immigration System*, ACLU (Apr. 6, 2016), <https://perma.cc/C4PM-48HY>.

119. *Miranda v. Barr*, No. 20-1110, 2020 U.S. Dist. LEXIS 94283, at *22 (D. Md. May 29, 2020).

120. *Id.* at *1; see also *Hernandez*, 2016 U.S. Dist. LEXIS 191881, at *89 (holding that immigration officials setting bond amounts must consider detainees' financial situation and alternatives to detention to satisfy Due Process, the Equal Protection Clause, and the Excessive Bail Clause of the Eighth Amendment).

121. Taryn Merkl, *New York's Upcoming Bail Reform Changes Explained*, BRENNAN CTR. FOR JUST. (Dec. 10, 2019), <https://perma.cc/AXL4-F62C>.

required to consider a defendant's ability to pay before setting bail.¹²² However, the majority of immigration courts continue to allow immigration officials to ignore ability to pay when setting bond amounts.¹²³

3. *Punitive Practices and Conditions of Detention*

Over the past decade, the number of pending removal cases in the immigration court system has quadrupled. This is largely due to Trump administration policies that have caused removal cases to rise at an unprecedented pace to nearly 1.3 million.¹²⁴ For those subjected to it before and even through the pandemic, prolonged detention in the interior enforcement context effectively functions as a disincentive to pursue legitimate defenses against deportation because of the hardships that detention causes. To begin with, many immigration detention facilities across the United States are in remote locations.¹²⁵ Since immigrants in removal proceedings do not have a right to government-provided counsel, many struggle to find legal representation.¹²⁶ This struggle is exacerbated by the difficulty private counsel and pro bono attorneys or legal service providers have in reaching the locations where most immigration detainees are held.¹²⁷ Locating or obtaining documents and paperwork necessary for defending against deportation, as well as locating and working with fact and expert witnesses who can support their applications for relief, also becomes difficult or impossible when a person is detained for the duration of proceedings. The remoteness of detention facilities, combined with restrictive visitation rules and archaic and expensive phone systems makes it extremely difficult for detainees to receive visits from family

122. ACLU Analytics and Immigrants' Rights Project, *Discretionary Detention by the Numbers*, ACLU, <https://perma.cc/27LP-2P2H> (last visited May 26, 2021).

123. *Id.*

124. *The State of the Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), <https://perma.cc/6BXV-U7J7> (showing, as of 2021, the backlog of cases in immigration courts at 1,294,797).

125. For example, even just in the Washington, DC metropolitan region, the vast majority of immigration detainees are held either in Farmville, Virginia—which is a three- or four- hour drive from DC—or in Worcester County, Maryland—which is easily a three-hour drive from each of DC and Baltimore, where most immigration attorneys and legal service providers are located. The situation is far worse in other parts of the country, where detention facilities can be located hundreds of miles from any urban centers and completely isolated from legal or other forms of social services for detainees and their families. See Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM), <https://perma.cc/68V9-RGDH> (reporting that in 2018, 52 percent of detained noncitizens were held in rural areas where families and legal representation of detained individuals were not able to visit often due to the distance).

126. See, e.g., Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (finding that “only 37% of all immigrants, and a mere 14% of detained immigrants” are able to obtain legal representation); *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), <https://perma.cc/6EDM-XT85> (finding that only a third of immigrant children have legal representation in immigration court); *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases*, TRAC IMMIGR. (July 15, 2015), <https://perma.cc/7FD5-DN23> (finding representation makes a fourteen-fold difference in success rates for women with children).

127. See, e.g., Eagly & Shafer, *supra* note 127, at 35.

members or to stay in touch with their spouses and children.¹²⁸ The logistical, psychological, emotional, and financial strain these circumstances place on immigration detainees makes it tremendously difficult for them to continue fighting court battles against their removal from the United States. Prolonged immigration detention also imposes severe costs—both financial and human—on detained immigrants’ family members, many of whom are U.S. citizens or LPRs. It is particularly difficult for children when families are left for long periods without breadwinners or significant sources of financial and emotional support.¹²⁹

It can be inferred from positions the government has taken in litigation on related issues, as well as statements that officials have made to detainees, that policymakers and officials are well aware of the deterrent effect detention has on the pursuit of defenses against removal. Government officials at least exploit and sometimes actively encourage this use of detention as a deterrent. This is best illustrated by two practices and positions the government has espoused: (1) the blaming of prolonged detainees for their own incarceration; and (2) deceptive assertions to detainees that the only way to get release is to sign voluntary departure or stipulated orders of removal.

First, the government has repeatedly asserted that lengthy pre-removal detention time is not a constitutional violation because it results from the person’s own pursuit of their immigration case.¹³⁰ The government has used appeals by detainees, requests for stays, and legitimate or necessary requests for continuances to argue that a person’s prolonged detention is essentially their own fault.¹³¹ The clear implication is that the only way to escape detention is to stop fighting—an assertion that ICE deportation officers have reportedly made explicitly to immigration detainees.¹³² In fact, the government has even argued that pursuing a valid legal challenge to deportation “suspends” the removal period and allows the government to continue a person’s detention for as long as the litigation takes.¹³³

128. See, e.g., Andrea Black, *Locking Up Immigrants Is Wrong*, CNN (Mar. 4, 2013, 4:50 PM), <https://perma.cc/T2HF-GWJV>.

129. See *id.*; see also Gretchen Gavett, *Study: 5,100 Kids in Foster Care After Parents Deported*, PBS: FRONTLINE (Nov. 3, 2011), <https://perma.cc/9TN8-283K>.

130. For example, see the government briefs filed in *Jarpa v. Mumford*, 211 F. Supp. 3d 706 (D. Md. 2016), *Leslie v. Attorney General*, 611 F.3d 171 (3d. Cir. 2010), *Chavez-Alvarez v. Warden*, 783 F.3d 469 (3d Cir. 2015), *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

131. See *supra* note 127.

132. Per anecdotal reports to authors. See also Jennifer Lee Koh, Jayashri Srikantiah & Karen Tumlin, *Deportation Without Due Process* 10–11 (Sept. 2011), <https://perma.cc/GS2S-89RA> (detailing deceptive practices that led thousands of detainees to sign stipulated orders of removal); Eunice Hyunhye Cho, Tara Tidwell Cullen & Clara Long, *ACLU, Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU RESEARCH REPORT 6 (Apr. 2020), <https://perma.cc/9WJL-875L> (reporting ICE officers who have blocked asylum seekers from parole, denied the existence of court orders, told detainees falsely they could not apply for parole, or told detainees falsely parole was only available for individuals who were dying).

133. See, e.g., Br. for Resp’t, *Etienne v. Kavanaugh*, No. 1:15-CV-00998 (D. Md. 2015) (DHS brief arguing that detainees may be held in detention for as long as it takes to litigate their cases because a stay of removal from an appellate court “suspends” the ninety-day removal period and stops the *Zadvydas* clock).

Second, immigration officials have also used coercive tactics to force immigrants to agree to voluntary departure orders and waive their rights to a hearing before an immigration judge. Such officials have deceptively asserted to immigrants in their custody that continuing to fight their cases will cause them to be detained and that the only way for them to be released is through the signing of a voluntary departure order or a stipulated order of removal.¹³⁴ The practice of coercing immigrants into signing voluntary departure orders was the subject of an extended class action lawsuit by the ACLU of San Diego, which resulted in a settlement agreement that significantly reformed ICE and CBP practices in this regard and allowed some class members to return and litigate their removal cases.¹³⁵ But even where no explicit deception is used, the government persists in using coercive tactics, tacitly or openly suggesting to noncitizens that they face a “Sophie’s choice”: give up their chance to pursue legitimate claims to remaining in the United States or stay locked up in detention for months or even years as their cases slowly wind their way through the backlogged immigration court system.¹³⁶

The result is the systematic and pointless incarceration of immigrants who could easily and safely be released pending the conclusion of their removal proceedings.¹³⁷ Many eventually win relief and are able to remain in the United States—but only after enduring long months or even years of detention¹³⁸ while they pursue their cases. But many others, worn down by the length of their detention and the extreme costs of pursuing their immigration cases or intimidated by the prospect of lengthy detention and poor conditions, eventually give up and stop fighting deportation, sometimes despite having strong legal claims for relief.¹³⁹ Coercive and deceptive practices,

134. See Koh, Srikantiah & Tumlinet al., *supra* note 133, at 4, 11; *ACLU Achieves Class Action Lawsuit Settlement that Ends Deceitful Immigration Practices*, ACLU SAN DIEGO & IMPERIAL COUNTIES (Aug. 27, 2014, 9:58 AM), <https://perma.cc/JG47-A3FP>.

135. *Lopez-Venegas v. Johnson - Settlement*, ACLU (Aug. 27, 2014), <https://perma.cc/TR7C-CWPF>; ACLU SAN DIEGO & IMPERIAL COUNTIES, *supra* note 135. In 2015, a federal judge provided a way for members of the class who were swiftly expelled to Mexico by the “voluntary return” apply to return to their families in the United States. Proceedings (In Chambers) Order Re Representative Class Pls.’ Mot. for Att’y’s Fees and Costs (DKT.99) and Mot. for Settlement Approval of Class-Wide Portions of Agreement (Final Approval) (DKT.101) 6, *Lopez-Venegas v. Johnson*, No. LA CV 13CV13-003972 JAK(PLAx), 20154 WL 12772087 (C.D. Cal. Mar. 11, 2015) (a copy of the Civil Minutes from the February 25, 2015 proceedings is available at the University of Michigan Law School’s Civil Rights Litigation Clearinghouse at <https://perma.cc/RSL5-29FV>).

136. See Cho, Cullen & Long, JUST. FREE ZONES, *supra* note 134, at 6; Koh, Srikantiah & Tumlin, *supra* note 133, at 10–11.

137. SHEBAYA & KOULISH, *supra* note 22. In early 2019, nearly 64 percent of immigrant detainees had no criminal conviction whatsoever. *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC IMMIGR. (Nov. 26, 2019), <https://perma.cc/A9UF-XZ9F>.

138. *Detention By the Numbers*, FREEDOM FOR IMMIGRANTS, <https://perma.cc/GVM9-BLHF> (last visited May 27, 2021).

139. This is a very common feeling and statement to lawyers and service providers among detained clients. As just one recent example, one of the authors recently experienced a young client with a viable immigration case choosing, after almost a year in detention, to opt for deportation to a dangerous country because he could not bear to continue pursuing his case while detained. See also Christie Thompson & Andrew Calderon, *More Immigrants Are Giving Up Court Fights and Leaving the U.S.*, MARSHALL PROJECT (May 8, 2019), <https://perma.cc/XSM4-SUNM>. Poor conditions in detention centers and inadequate health care also contribute to the sense of peril that people feel in immigration detention. See,

egregiously high bonds and no consideration of ability to pay, and mandatory detention laws and their over-expansive application are significant contributors to the general deterrent effects that detention has on people's exercise of their legal rights to challenge their removal from the United States.

Despite the inhumanity of these practices and repeated court findings questioning the legality and constitutionality of prolonged detention, the government has persisted in fighting to keep its broad ability to detain immigrants. The usual policy justifications often do not support automatic, prolonged detention in many of these circumstances, so whatever it may *claim* about the purposes of immigration detention, the government continues to actually use detention to deter persons from pursuing their immigration cases, even when they have been living in the United States for years, have strong family and community ties, and would face severe harm if returned to their home countries. But both legal and policy considerations militate against detention-as-deterrence, which in addition to being unnecessary and highly expensive to taxpayers, has a devastating impact on families and communities and often exceeds the government's statutorily granted authority.

B. *The Illegality of the Current Interior Detention Regime*

The government's detention practices in the interior enforcement context violate a number of well-established legal and constitutional principles. To begin with, immigration authorities interpret and apply the statutory mandatory detention provisions over-expansively in ways that violate constitutional principles and result in the incarceration of many more than the proper meaning of the statute would authorize.¹⁴⁰

First, as detailed in extensive litigation in numerous circuits and in reports by advocacy organizations and legal service providers, the government continues to fight against even the most basic process of a bond hearing for non-citizens who have been detained under 8 U.S.C. § 1226(c) for prolonged periods of time. Six circuit courts that considered the question have found that this prolonged detention is unconstitutional and have interpreted § 1226(c) to require a bond hearing either after six months or after a "reasonable" period of time.¹⁴¹ In 2003, the Supreme Court upheld the mandatory detention laws as constitutional. However, the Court relied critically on the

e.g., *Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST. (May 24, 2021), <https://perma.cc/KMV8-4ZJG> (decrying "deplorable" conditions in DHS detention, including immigrants at the Stewart detention center in Georgia who were consistently denied medical assistance related to COVID-19 and were violently, physically punished for requesting help); *Deaths at Adult Detention Centers*, AM. IMMIGR. LAWS. ASS'N (Mar. 17, 2021), <https://perma.cc/43M7-7BE3> (tallying and continually updating ICE press releases on deaths at adult immigration detention centers).

140. See generally SHEBAYA & KOULISH, *supra* note 22.

141. Six appellate courts have now found prolonged detention of noncitizens to be constitutionally suspect, with the Ninth and Second Circuits mandating bond hearings at six months, and the First, Third, Sixth, and Eleventh Circuits finding a bond hearing is required after detention exceeds a reasonable period of time. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Diop v. ICE*, 656 F.3d 221 (3d Cir. 2011); *Chavez-Alvarez v. Warden*, 783 F.3d 469 (3d Cir.

government's representation that such mandatory detention lasts for a short period of time ranging from forty-five days to five months—figures that the government has since admitted were inaccurate even at the time and are certainly not accurate now.¹⁴² When the question of prolonged detention reached the Court again in 2018 in *Jennings v. Rodriguez*, the Court overturned the lower court decision but did not decide the constitutional question, remanding it to the lower court, where the case is still pending.¹⁴³ While we await a decision, the government has continued to fight, at great expense to taxpayers, to deny noncitizens the opportunity to even argue their case for release on bond or other conditions when detention extends long past the six-month mark.¹⁴⁴ This policy results in significantly increasing the hardship to respondents of pursuing strong legal defenses against removal, and it paradoxically results in the longest detention times for those who have the most viable challenges to the government's attempts to deport them.

Second, the government interprets the mandatory detention provision of § 1226(c) expansively as applying even to noncitizens who have strong challenges to being designated as mandatory detainees and to noncitizens who have strong claims to relief that would allow them to remain in the United States.¹⁴⁵ At its inception, the mandatory detention provision was intended to help expedite the removal of immigrants whose convictions barred them from remaining in the United States. This narrow purpose would prohibit its application to people who have a strong claim to relief or a strong challenge to deportability because they are unlikely to be ultimately deported from the United States. For example, many LPRs qualify for cancellation of removal even if their criminal convictions could, as a threshold matter, render them deportable.¹⁴⁶ Others are eligible for refugee waivers or a new grant of asylum or withholding of removal.¹⁴⁷ Some immigrants may have legal challenges to both their deportability and their designation as mandatory detainees under § 1226(c), based on a mismatch between their criminal

2015); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016).

142. *Demore v. Kim*, 538 U.S. 510 (2003); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, at 8467 (2018) (brief in opposition to *certiorari* citing an average detention of greater than 400 days for persons detained under § 1226(c)).

143. *Jennings*, 138 S. Ct. at 843; *Rodriguez v. Marin*, No. CV07-03239 TJH (RNBx), 2019 WL 7840673, at *3 (C.D. Cal. Nov. 7, 2019). The Court likewise vacated the judgment in *Shanahan v. Lora* (in which the Second Circuit had found detention in excess of six months without a hearing likely to be unconstitutional) and remanded it for further consideration in light of the recent *Jennings* decision. *Shanahan v. Lora*, 138 S. Ct. 1260 (2018). The case was dismissed as moot on remand, as Mr. Shanahan had been granted relief from removal in immigration court. *Lora v. Shanahan*, 719 Fed. App'x 79, 80 (2d Cir. 2018).

144. Outside the circuits that have ruled against the government on prolonged detention, ICE continues to routinely detain immigrants well past the six-month mark for the entire duration of their proceedings. Even within circuits that have decisions mandating a bond hearing after a reasonable period of time, ICE does not release mandatory detainees until and unless they file and win a habeas petition in federal court—a burdensome process that can sometimes take many months to reach a favorable conclusion.

145. *See, e.g.*, the stories detailed in Shebaya & Koulisch, *supra* note 22.

146. 8 U.S.C. § 1229b(a) (2018).

147. 8 U.S.C. § 1158 (2018); 8 U.S.C. § 1159(c) (2018); 8 U.S.C. § 1231(b)(3) (2018).

convictions and the generic federal definition of the deportable offense of which they have been charged.¹⁴⁸

In all these cases, the detainee has a bona fide challenge to removal and will not be subject to removal unless and until they lose, after what could be complex legal determinations and extended fights over discretionary relief. At the end of proceedings, many of these detainees win relief that allows them to remain indefinitely in the United States. Thus, their detention without a bond hearing is both futile and violates their due process right to not suffer the most significant deprivation of liberty based on presumptions of deportability that do not apply to them. Moreover, the practice of applying the mandatory detention provisions to people with substantial challenges to removal or claims to relief significantly expands the scope of those provisions, which were intended to apply narrowly to persons the government could expeditiously remove from the United States. As noted, these broad detention policies dissuade many from pursuing their immigration cases. Others find it impossible to obtain legal representation or any of the documents necessary to properly fight their removal cases because of the practical restrictions of being detained.

The government's practices in setting high initial bond amounts are equally problematic. Although the Department of Justice (DOJ) itself has argued in the criminal justice context that detention solely because of an inability to pay for release is unconstitutional and violates the Equal Protection Clause of the Fourteenth Amendment,¹⁴⁹ DOJ has sanctioned the very same practice of setting bonds in the immigration context without any consideration of a detainee's ability to pay.¹⁵⁰ Additionally,, immigration authorities require that detainees post the full cash amount of their bail, and they refuse to accept a deposit amount or any other collateral as a substitute for cash payment.¹⁵¹ These practices make it harder for low-income people to pay bonds and leave immigrants vulnerable to financial exploitation by bond companies or condemned to prolonged detention if they are unable to pay.¹⁵²

148. See, e.g., *Mellouli v. Lynch*, 575 U.S. 798 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Mena v. Lynch*, 820 F.3d 114 (4th Cir. 2016); *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015); *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012).

149. See, e.g., Statement of Interest of the U.S. 1, *Varden v. Clanton*, No. 2:15-cv-34-MHT-WC No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015), <https://perma.cc/G6X5-WNM9>; Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020), <https://perma.cc/8HW2-MC92>; *Valdez-Jimenez v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 976 (Nev. 2020).

150. See *Hernandez v. Lynch*, No. EDCV 16-00620-JGB(KKx), 2016 U.S. Dist. LEXIS 191881, at *1–2 (C.D. Cal. Nov. 10, 2016); *Brito v. Barr*, 395 F. Supp. 3d 135 (D. Mass. 2019).

151. Agency practice also requires that the detainee have a green card holder or U.S. citizen sign as obligor of any bond. This is obviously an additional factor that can make it more difficult to comply with the government's bond procedures.

152. One example is Libre by Nexus, a company that charges immigrants exorbitant rates and requires unconscionable conditions such as long-term ankle bracelet monitoring in exchange for help paying high ICE bonds. See, e.g., Gabe Ortiz, *Profiting from Immigrants: Bail Bond Company Charges \$420 a Month for a GPS Ankle Bracelet*, AM.'S VOICE (Oct. 5, 2015), <https://perma.cc/TY99-Q85P>.

Immigration authorities also fail to systematically consider less restrictive alternatives to detention for indigent noncitizens, only doing so in a limited number of cases.¹⁵³ Thus, even people not subject to the mandatory detention provisions may very likely be unable to pay bond, which means they may end up spending many months in detention in order to pursue their immigration cases.

In *Hernandez v. Lynch*, a class action suit filed by the ACLU, a federal judge concluded that immigration officials setting initial bond amounts are required to look at detainees' financial situation and alternatives to detention to satisfy the Due Process Clause of the Fifth Amendment and the Eighth Amendment's Excessive Bail Clause.¹⁵⁴ Litigation on these issues parallels recent efforts that challenged cash bail and debtors' prisons in the criminal context, arguing that the same constitutional protections that apply to criminal incarceration should apply with equal (if not greater) force to civil immigration detention as well. Unfortunately, despite considerable advances, many immigration courts continue to subject immigrants to extremely high bonds without any consideration of their ability to pay, effectively leaving them detained because they are indigent.

Lastly, several courts have squarely rejected the government's reasoning that detention does not pose a problem because immigrants are responsible for prolonging their own detention when they pursue their legal claims. As discussed above, the government has repeatedly asserted that lengthy pre-removal detention results from an immigrant's own decision to fight deportation and is therefore not a violation of their rights. But multiple courts have stated explicitly that accepting this justification would amount to punishing individuals for pursuing valid legal claims and that immigration detainees should not be punished for pursuing bona fide legal challenges to removal.¹⁵⁵ Yet, the government has not backed away from this reasoning, notably making the same assertion in its petition for certiorari to the Supreme Court in *Jennings v. Rodriguez*.¹⁵⁶ The government is fighting hard to ensure that the only path certain immigrants have to escape detention is to simply give up their challenges to removal and agree to depart from the United States—sometimes putting their lives in danger, or otherwise placing themselves in great financial, emotional, or other difficulty.¹⁵⁷

153. See *Hernandez v. Lynch*, No. EDCV 16-00620-JGB(KKx), 2016 U.S. Dist. LEXIS 191881 (C. D. Cal. Nov. 10, 2016) (citing data on Intensive Supervision Appearance Program ("ISAP") and ISAP II program effectiveness). The authors of this report do not condone or encourage the use of ankle bracelets, which in themselves are extremely restrictive and burdensome, but mention these alternatives because, in extreme cases where monitoring is required, they are at least less restrictive than physical incarceration between the four walls of a detention center.

154. *Id.*

155. See, e.g., *Chavez-Alvarez v. Warden York Ctny. Prison*, 783 F.3d 469 (3d Cir. 2015); *Leslie v. U.S. Att'y Gen.*, 611 F.3d 171, 182–83 (3d Cir. 2010).

156. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 833 (2018).

157. See Sarah Mehta, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM*, ACLU (Dec. 2014), <https://perma.cc/CJ76-BX2K>; see also Guillermo Cantor & Victoria Johnson,

Each of the detention practices described in this section raises a number of significant legal concerns. But even if they were not blatantly illegal, they are also bad policy and stand in stark contrast to the government's stated commitments to reduce mass incarceration of people of color in the criminal justice context.

C. *The Policy Costs and Inconsistencies of Detaining Immigrants*

In the criminal context, both the Obama and the Trump administrations at least nominally backed efforts to reduce incarceration. The Obama administration took a strong stance against abusive police practices, excessively harsh sentencing laws that disproportionately affected people of color, and the detention of indigent criminal defendants simply because of their inability to afford cash bail.¹⁵⁸ This shift represented a profound recognition of the pervasive racial bias embedded in our criminal justice system, from the “front end” of police practices to the “back end” of sentencing laws. The Obama administration conducted investigations and issued reports about abusive police practices, recommended systemic changes in sentencing laws, and explicitly took on the goal of reducing the number of persons incarcerated for long periods in the United States.¹⁵⁹ In fact, the Obama administration began to grant early release or sentence commutations to large numbers of individuals convicted of nonviolent offenses for which they received excessively harsh sentences.¹⁶⁰ A case in point involves people serving long sentences for nonviolent drug convictions, about 6,000 of whom were granted early release by the Obama administration in 2016.¹⁶¹ The Trump administration likewise claimed criminal justice reform as a priority.¹⁶² The First Step Act, which was passed with bipartisan support in 2018, shortens sentences for some inmates and increases job training and other such programs.¹⁶³

Detained, Deceived, and Deported: Experiences of Recently Deported Central American Families, AM. IMMIGR. COUNCIL (May 18, 2016), <https://perma.cc/J6FX-7HW3>.

158. See, e.g., Statement of Interest of the U.S. 1, *Varden v. Clanton*, No. 2:15-cv-34-MHT-WC (M. D. Ala. Feb. 13, 2015), <https://perma.cc/YQ7W-CZNH>; Eric Holder, U.S. Att’y Gen., Shifting Law Enforcement Goals to Reduce Mass Incarceration, Keynote Address at Brennan Center Conference (Sept. 23, 2014), <https://perma.cc/E6HQ-TXEG>; *Investigation of the Baltimore City Police Department*, U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (Aug. 10, 2016), <https://perma.cc/QD8M-MCGG>; Barack Obama, U.S. President, Remarks by the President at the NAACP Conference, Keynote Speaker at NAACP Conference (July 14, 2015), <https://perma.cc/8VMZ-CDDW>.

159. Barack Obama, U.S. President, Remarks by the President at the NAACP Conference, Keynote Speaker at NAACP Conference (July 14, 2015), <https://perma.cc/8VMZ-CDDW>.

160. Gregory Korte, *Obama Issues Record-Breaking 214 Commutations*, USA TODAY (Aug. 3, 2016), <https://perma.cc/JD32-UVFE>; Sari Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), <https://perma.cc/EX4E-LDDZ>; Matt Ford, *Freedom for 6,000 Federal Prisoners*, ATLANTIC (Oct. 6, 2015), <https://perma.cc/G58K-FB9X>.

161. See Ford, *supra* note 161.

162. Lea Hunter, Ed Chung & Akua Amaning, *Fact Sheet: Trump Says One Thing and Does Another on Criminal Justice*, CTR. FOR AM. PROGRESS (Feb. 23, 2020, 9:02 AM), <https://perma.cc/ZN4Y-8HXB>.

163. First Step Act of 2018, 115 P.L. 391, 132 Stat. 5194 (2018); Matt Zapotosky, *3,100 Inmates to Be Released as Trump Administration Implements Criminal Justice Reform*, WASH. POST (July 19, 2019), <https://perma.cc/4VW7-K8FQ>.

Despite these steps, all of these acknowledged failures within the criminal legal system continue to be imported wholesale into and perpetuated in the immigration context. For example, the immigration laws automatically harshly punish anybody convicted of even the most minor drug offenses, without regard to racial disparities.¹⁶⁴ Racial disparities in arrests, charges, and sentencing are well-documented.¹⁶⁵ Yet immigration authorities refuse to grant any clemency or prosecutorial discretion to people convicted in the criminal justice system of offenses that most now agree are excessively punished and primarily target communities of color. As a result, drug convictions now account for the largest share of deportations from the United States—the same drug convictions that the government has in other contexts criticized as being punished too harshly.¹⁶⁶ The Obama administration was also remarkably unwilling to extend to immigrants a similar “second chance” to the one it freely extended to citizens, even when they were longtime LPRs with strong ties to the United States and otherwise similarly situated to citizens benefiting from clemency.¹⁶⁷ For example, of the 6,000 early releases for drug convictions, roughly a third were immigrants who, instead of being released to the street, were routed directly into ICE custody, where they were immediately placed in mandatory detention.¹⁶⁸ The administration denied in short order a collective request for prosecutorial discretion on behalf of these detainees, and then denied individual requests on behalf of those with very strong equities.¹⁶⁹

Similarly, even where the government has taken a position against high cash bail and detention of indigent criminal defendants in the criminal legal system, it continues to allow the detention of immigrants in civil proceedings. It also tolerates the biased policing that routes immigrants into deportation proceedings, thereby undermining its own criticisms of biased enforcement against persons of color.¹⁷⁰ Successive administrations have appeared not to see the contradictions between their own stances on police and criminal

164. 8 U.S.C. § 1227(a)(2)(b) (2018); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2018).

165. See generally Tia Stevens & Merry Morash, *Racial/Ethnic Disparities in Boys' Probability of Arrest and Court Actions in 1980 and 2000: The Disproportionate Impact of "Getting Tough" on Crime*, 13 YOUTH VIOLENCE & JUV. JUST., 77, 77–95 (2015); Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME & DELINQUENCY 15, 15–34 (1985).

166. See HUM. RTS. WATCH, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (2015), <https://perma.cc/R5EN-84RD>.

167. See, e.g., Casey Tolan, *The U.S. Will Release 6,000 Inmates Next Month—and then Deport 2,000 of Them*, SPLINTER (Oct. 7, 2015), <https://perma.cc/J8S7-8NW5>.

168. See *id.*; see also ACLU, Letter from ACLU, Am. Immigration Council, Am. Immigration Lawyers Ass'n, Capital Area Immigrants' Rights Coal., Det. Watch Network, HIAS, Human Rights First, Human Rights Watch, Immigrant Def. Project, Nat'l Immigrant Justice Ctr., Nat'l Immigration Law Ctr., Nat'l Immigration Project of the Nat'l Lawyers Guide, Serv. Emps. Int'l Union, United We Dream to Sarah Saldaña, Director., U.S. Immigr. and Customs Enf't (Oct. 29, 2015), <https://perma.cc/K3RE-QRAX>.

169. See, e.g., Renee Feltz, *Immigrants Facing Deportation Could Be First to Benefit from US Drug Law Reform*, GUARDIAN (Mar. 28, 2016), <https://perma.cc/NS5Q-BUT4>.

170. See, e.g., NAT'L IMMIGR. L. CTR., *Priority Enforcement Program: Why "PEP" Doesn't Fix S-Comm's Failings*, NAT'L IMMIGR. L. CTR. (June 2015), <https://perma.cc/Z382-HX4J>

justice reform and their harsh refusal to give the same consideration to noncitizens, simply because of the accident of their birth location. As a result, immigration detention has become one of the major contributors to the mass incarceration of people of color in the United States.¹⁷¹

IV. CONCLUSION

Immigration detention is an extreme form of deprivation of liberty and has repeatedly been shown to be unnecessary to ensure appearance in court or to guarantee community safety. It is also extremely expensive, costing billions of dollars a year. The human toll that detention takes on detainees and their families and communities is severe and incalculable. Furthermore, it is both unjust and illegal for the government to use immigration detention as a deterrent to immigrants' ability to properly and fairly pursue their claims to protection or residence in the United States. Yet that is precisely what two successive administrations—which agreed on little else in the way of immigration policy—have done, and a third threatens to continue. Rather than continuing to use immigration detention as a blunt, catch-all deterrence measure, the Biden administration should recognize detention as a major contributor to the crisis of mass incarceration of people of color in this country. The administration should take the unique opportunity afforded by the low levels of detention brought on by the pandemic to reimagine an immigration system that does not rely on detention as a weapon of enforcement. Objective evaluation reveals that detention imposes severe costs on society broadly while conferring little benefit that could not be gained by other means. As such, the Biden administration—in concert with Congress—should take bold steps to end the widespread detention of immigrants and move to a model that would allow immigrants to stay in their families and communities while their cases are being considered by the immigration agencies. Such a system would be far more humane and effective and far less expensive than our current addiction to mass incarceration.

171. See Juan Gonzalez & Amy Goodman, *Transcript of Democracy Now! Interview with Michelle Alexander*, TRUTHOUT (Mar. 5, 2015), <https://perma.cc/T5DG-4ECS> (Michelle Alexander discussing immigration detention as one source of mass incarceration); see also Altaf Saadi, Maria-Elena De Trinidad Young, Caitlin Patler, Jeremias Leonel Estrada & Homer Venters, *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUM. RTS. J. 187, 1910 (2020) (“[I]mmigration enforcement agents may also use racial profiling as an enforcement strategy.”).