ARTICLES

A DETAINEE'S CATCH-22: WHAT CAN NEW JERSEY'S BAIL REFORM TEACH US ABOUT IMMIGRATION DETENTION?

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ABSTRACT

Bail reform has been an ongoing project for years for both scholars and advocates, and now many states have adopted some measure of bail reform policy, often with positive results. Scholarship has long discussed the need for the elimination of monetary bail and an overhaul of detention practices in the federal immigration system. However, the immigration detention regime has learned no lessons from recent developments in the criminal justice system. Federal immigration detention still heavily relies on the use of monetary bond and overly invasive surveillance and alternatives-to-detention systems. Moreover, the current immigration bond systems lack any meaningful risk assessment tools that exist in the criminal justice pre-trial detention systems, leading to an overwhelming tendency in favor of detention because immigration officials lack guidance, training, or expertise to meaningfully make detention determinations. In 2017, New Jersey eliminated monetary bail and overhauled its pre-trial detention system, drastically reducing its detention rates. This article contends that as states implement bail reform in the criminal justice system, the immigration system continues to fall behind this changing landscape. Comparing the immigration detention system with New Jersey's bail reform system, this article hopes to highlight the severe discrepancies between the two detention systems. This article utilizes the New Jersey

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detention system as a model to compare the current immigration bond system. Not only does this comparative analysis highlight the deficiencies in the immigration detention system, but it also brings to the forefront the ways in which these two detention systems intersect. Noncitizen defendants find themselves in the ultimate Catch-22—after being released from criminal pre-trial detention, they end up in immigration detention where they cannot secure release due to their pending criminal charges, despite a state criminal court judge having already found them to merit release. This article proposes that the immigration detention system must catch up to the reforms in the criminal justice system in order for both systems to work efficiently and fairly.

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I. INTRODUCTION

Oscar[1], an asylum seeker, fled Honduras with his family after they experienced threats from gang members. They arrived in the United States, without valid entry documents, and were paroled[2] by immigration officials and resettled in New Jersey. A few years into the family's new life in New Jersey, Oscar was arrested following a domestic dispute with his partner and children, his first and only arrest. The prosecution declined to pursue pre-trial criminal detention and the New Jersey criminal court released Oscar from detention within a few days of his arrest. Pursuant to New Jersey's recent bail reform policies, Oscar was released from detention on non-monetary conditions. The parties agreed that Oscar was reasonably likely to continue to appear at his future hearings and did not pose a safety risk to others. Despite this, the U.S. Department of Homeland Security's Immigration and Customs Enforcement ("ICE") detained Oscar immediately after his release from criminal custody and placed him in removal proceedings.

Oscar asked the immigration court to release him from detention, this time on a monetary bond. Instead, the immigration judge found that Oscar did not warrant release from detention due to the pending charges resulting from his first-time arrest—the very same charges that the prosecution and state criminal judge found did not warrant pre-trial detention while the criminal case was being adjudicated. Denied release from detention, Oscar then languished in immigration detention for over a year and a half until he could no longer bear detention in the midst of a global pandemic. By this point, the criminal prosecution was willing to offer Pre-Trial Intervention to Oscar, a diversionary program that helps first-time offenders avoid a criminal conviction with the use of supervision programs and rehabilitation resources. Through this state program, Oscar had a pathway to return to his life without a criminal record. However, due to his continued detention by immigration officials, Oscar was unable to attend any of his criminal court hearings and was unable

1. This name has been changed to preserve anonymity and confidentiality. Documents related to this case are in possession of the author.

2. Parole is an immigration policy which enables certain individuals seeking entry into the United States that are otherwise subject to mandatory detention to be released into the interior of the country pending the adjudication of their removal proceedings. *See* INA § 212(d)(5). Parole is often used to allow the release of asylum seekers who seek entry at a border or airport port-of-entry.

to resolve his underlying state criminal offense—the same one that ICE and the immigration judge used as a basis for denying him release from ICE custody. Oscar was caught in an ultimate Catch-22: Immigration officials deemed him to be a danger while he had pending criminal charges, but he was unable to resolve these criminal charges while he languished in immigration detention. Unable to bear continued detention by ICE, Oscar withdrew his pending appeal of his immigration case and accepted removal, despite this offer from the state prosecutor. Following his removal from the United States, a bench warrant was issued in his absence. Oscar is now deemed a fugitive through no fault of his own.

This is not an isolated story. Rather, Oscar's story reveals a serious tension between the criminal pre-trial detention system and the immigration detention system. While states like New Jersey implement comprehensive reform to the criminal detention systems and eliminate the use of cash bail in favor of non-monetary regimes, noncitizens like Oscar face an increasingly uphill path in fighting their immigration detention. Oscar, like many criminal defendants, benefited from New Jersey's bail reform policies, which are intended to reform the problematic system of cash bail in the criminal context. He was afforded release from detention and access to rehabilitation services, but as a noncitizen facing deportation, he was unable to secure release. Moreover, any release he could have obtained from the immigration courts would be reliant solely on his ability to pay a monetary bond.

Justice Breyer once asked, "Which class of persons—criminal defendants or asylum seekers—seems more likely to have acted in a manner that typically warrants confinement?"[3] While this question seems to address the disparity in how we treat criminal defendants compared to asylum seekers facing immigration detention, what does it mean for individuals like Oscar who faced distinctive experiences as both a criminal defendant and an asylum seeker in immigration detention? What do the changes in criminal detention policies mean for immigration detention, if they matter at all? Not only do these questions impact individuals like Oscar who had some interaction with the criminal justice system, but they also carry implications for the many asylum seekers and noncitizens that have no criminal history and yet face detention by ICE.

Scholars and advocates have long criticized the use of a cash bail system in both the criminal detention context and the immigration context.[4] They have found that these systems disproportionately impact the poor and result

3. Jennings v. Rodriguez, 583 U.S. 281, 336 (2018) (Breyer, J., dissenting). *Jennings* involved a noncitizen who was detained subject to mandatory detention provisions. He subsequently filed a writ of habeas corpus challenging his prolonged detention without a bond hearing as unconstitutional. *Id.* at 281-82 (majority opinion).

4. *See* Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS LAW. REV. 521 (2018); Richard Frankel, *Risk Assessment and Immigration Court*, 80 WASH. & LEE L. REV. 1 (2023); Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. REV. 69 (2017).

in increased unnecessary detention that ultimately does not serve the public. Soon enough, many politicians began advocating for the end of a cash bail system, with President Biden once calling for an end of the "modern-day debtors' prison."[5] For the past several years, many states and jurisdictions have sought to reduce or eliminate the use of cash bail in their pre-trial criminal detention schemes. New Jersey passed comprehensive bail reform in 2017 that not only eliminated cash bail, but also restructured pretrial criminal detention by allowing judges in criminal cases to take into consideration a multitude of factors and implement alternatives to detention. This reduced the criminal pre-trial detention population by about twenty percent[6] and resulted in the shutdown of some county facilities.[7] Now, criminal court judges must consider whether the defendant is a danger to the community, with the burden on the prosecution, and whether the defendant is likely to attend future criminal hearings. This is different than adjudicators making release reliant solely on one's ability to pay a monetary bail amount. Other jurisdictions have introduced similar policies and reform, although New Jersey's bail reform policies remain the most long-lasting and most successful in the country.

In the immigration detention context, there has been no similar shift in the approach to detention and bond proceedings. Federal immigration detention is nothing new; the federal government has broad authority to detain immigrants pending their removal proceedings as part of its powers to regulate immigration.[8] Like in the pre-trial criminal detention context and other forms of civil and administrative detention, the government justifies the civil detention of immigrants for two main reasons: to ensure immigrants appear at their pending removal hearings, and to minimize the perceived danger to the community.[9] Release from immigration detention relies heavily on cash bonds, requiring noncitizens or their family to pay thousands of dollars to secure release from detention. Immigration law also greatly limits which individuals are even eligible for release with many noncitizens being subject to mandatory detention, including asylum seekers.[10]

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5. Katie Park and Jamiles Lartey, *Election 2020: The Democrats on Criminal Justice*, THE MARSHALL PROJECT (Apr. 8, 2020, 6:00 PM), https://perma.cc/24HZ-REKJ.

6. Thomas Hanna, *The Facts on New Jersey Bail Reform*, ARNOLD VENTURES (Mar. 1, 2023), https://perma.cc/8G5J-VB83 (noting that the pretrial jail population decreased by 20% between 2015 and 2022).

7. Noah Cohen, *N.J. County to Close Most of its Jail, Send Inmates to Nearby Facility*, NJ.COM (Apr. 23, 2021, 9:28 PM), https://perma.cc/3YWP-GHJX (noting Union County's plans to close its operation in its country jail due to a 67% drop in inmates over the past decade, following NJ's shift away from cash bail).

8. *See* Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

9. *See* Zadvydas v. Davis, 533 U.S. 678, 690-92 (2001) (holding that immigration detention is civil detention that requires strong justification, usually in the form of flight risk or danger to the community). The Supreme Court has made clear that civil detention should only be permitted where a "special justification" exists to limit one's individual liberty. *Id.* at 690.

10. *See* 8 U.S.C. § 1226(c). *See also* 8 U.S.C. § 1225(b) (authorizing mandatory detention noncitizens at the border seeking admission to the United States); 8 U.S.C. § 1231(a) (authorizing mandatory detention for noncitizens previously ordered removed from the United States).

As states and localities across the country consider eliminating reliance on cash bail and reforming their pre-trial detention scheme, which is critical to reducing the overall incarcerated population as part of broader criminal justice reform, little to no progress has been made in the realm of immigration detention. This article utilizes New Jersey's scheme as a primary model to analyze how bail reform policies impact noncitizens in federal immigration detention. This article will address the serious tension between current bail reform policies and the federal government's existing immigration detention scheme by comparing both approaches to detention. Specifically, by looking at New Jersey noncitizens' experiences in the immigration and criminal detention context, this article hopes to highlight the disparities between the two detention systems and propose concrete areas for reform and change. To further illustrate the interplay between criminal pre-trial detention and immigration detention, this article will include qualitative data drawn from interviews with practitioners, attorneys and legal service providers on immigration detention practices in states that have passed bail reform.[11] While this piece will address current empirical data on the outcomes of bail reform in New Jersey as well as immigration detention and bond rates nationwide, these interviews supplement existing information by providing practitioners' accounts of their experiences as they navigate detention practices, including what immigration detention looks like in various jurisdictions, what legal and administrative hurdles organizations face in representing their clients, and how the intersection between criminal law and immigration law has changed in their particular state, if at all.

These interviews resulted from a study to obtain data and information from legal service organizations and immigration practitioners on immigration detention practices conducted by the author of this article. The data sought included rates of detention, detention center locations, state and local law enforcement policies, and substantive and procedural hurdles experienced by organizations that represent immigrants in detained removal proceedings. Such data was obtained through contacting practitioners and attorneys at legal service organizations known for representing detained noncitizens and asking individual practitioners a set of pre-outlined interview questions[12] about their organization's work and local immigration policies. Due to the piece's comparative analysis between the federal immigration detention system and New Jersey's bail reform regime, the study focused on immigration practitioners in the state of New Jersey. Participants in the study volunteered to be interviewed after outreach via email to legal service

11. This research project has been reviewed by the Georgetown University Institutional Review Board (IRB), which has determined that this research project does not involve human subjects and thus, official review and approval is not required. A copy of the study protocol summary, correspondence with the IRB, and related materials are available upon request.

12. A copy of the interview questions is available with the author and can be provided upon request.

organizations and email networks.[13] The qualitative data obtained from this study provided an on-the-ground understanding of the interplay between the criminal justice system and immigration detention system. As states have implemented comprehensive bail reform policies, there are gaps on how these bail reform policies impact federal immigration policy, if at all, including what the legal and practical factors exist for individuals who benefit from bail reform and are later detained by federal immigration officers. This additional piece of research bridges some of the gaps of knowledge regarding how bail reform policies impact immigrant communities, particularly noncitizens who are detained by immigration.

II. OVERVIEW OF IMMIGRATION DETENTION AND BOND SYSTEM

The legal scheme of immigration detention consists of a hodpodge of statutory, regulatory and regulatory provisions which encompass various federal agencies, definitions, and exceptions and sometimes inconsistent terminology.[14] Essentially, the process consists of two parts: First, DHS makes a decision to detain or release a noncitizen following their apprehension, and second, an immigration judge conducts a hearing to examine the noncitizens detention before the immigration court.[15] While deportation proceedings and immigration detention are connected, they are nonetheless separate processes. This is analogous to the criminal justice system: The pretrial detention determinations are separate from criminal proceedings used to determine guilt or innocence. Many noncitizens are placed in deportation proceedings having never been detained, and the fact that someone has been detained by immigration officials may not necessarily lead to their deportation.[16] To understand the deficiencies in the immigration detention system, this article will seek to unravel a key aspect of the detention process, namely how are noncitizens detained under the legal and administrative process, who makes those determinations, and how are those determinations made and reviewed.[17] After outlining the statutory and legal landscape that form immigration detention, the article will also outline the scope of immigration detention nationwide, and with a particular focus on the status of New Jersey, to understand what the immigration detention system looks like in practice. These descriptions lay the

13. A total of five practitioners participated in these interviews.

14. *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 164 n.16 (Early Winter 2016) (noting that the commonly used terms for "bond hearings" or "bond proceedings" are not found in the statute or regulations, but are commonly used in practice).

15. *Id*. at 164.

16. *See id*.

17. This article is focused on noncitizens who are detained pending their ongoing deportation proceedings, rather than individuals who may have already been removed or face other statutory or regulatory restriction to their release from immigration detention. This article also does not address individuals who are subjected to expedited removal proceedings and summarily ordered removed under 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) who may also experience detention.

groundwork and provide necessary background to understand the immigration detention landscape and how it compares to that of the pretrial criminal detention system as part of the article's core analysis.

A. *Immigration Detention Procedures and Legal Standards*

Section 236(a) of the Immigration and Nationality Act ("INA") empowers the federal government to detain noncitizens who are apprehended within the United States pending their removal proceedings.[18] There are several provisions that require mandatory detention of certain immigrants, such as immigrants seeking admission at the border, including asylum seekers,[19] detention of noncitizens convicted of certain enumerated crimes, including Lawful Permanent Residents ("LPR") and individuals who have been previously ordered removed.[20] The mandatory provisions have long been criticized by scholars and advocates, and have the lack of opportunity to seek release before a judge has long been litigated.[21] Recently, in January of 2025, Congress passed the Laken Riley Act, which greatly expanded mandatory detention to include individuals who are merely "charged" or "arrested" for certain crimes, even if they were not convicted, and thus further limiting ability to seek release from detention.[22] However, the focus of this article is on the subset of individuals who *do* have the opportunity to seek release before an immigration judge. For those individuals not subject to mandatory detention, the statute provides that "pending a decision on whether the alien is to be removed from the United States. . . the Attorney General—(1) may continue to detain the arrested alien; and (2) may release the alien on—(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole. . ."[23] ICE serves as the arresting authority in immigration proceedings and initiates removal proceedings via the filing of a Notice to Appear (NTA).[24] ICE may arrest

18. INA § 236(a) (codified at 8 U.S.C. § 1226(a)).

19. INA § 236(b) (codified at 8 U.S.C. § 1226(b)).

20. *See* 8 U.S.C. § 1231(a)(1) (requiring mandatory detention during a 90-day period after an order of removal is issued against the noncitizen); *In re*. Joseph, 22 I&N Dec. 799 (BIA 1999) (holding that immigration judges have the authority to decide whether a noncitizen is properly subject to the mandatory detention provisions).

21. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363 (2014); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (holding that noncitizens subject to mandatory detention are not statutorily entitled to periodic bond hearings during the course of their detention).

22. INA § 236(c)(1)(E) (codified at 8 U.S.C. § 1226(c)(1)(E)) (requires detention to "any alien who. . . is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person.")

23. Immigration and Nationality Act (INA) § 236(a), 8 U.S.C. § 1226(a). There are two other statutes that govern detention pending removal proceedings: INA § 236(c), 8 U.S.C. § 1226(c), which provides for the mandatory detention of noncitizens who are apprehended inside the United States and face removal based on certain crimes, and INA § 235(b), 8 U.S.C. § 1225(b), which provides for the detention of noncitizens apprehended when arriving at a port-of-entry.

24. 8 U.S.C. § 1229(a). The NTA serves as a charging document and summons in removal proceedings that notifies the noncitizen that he or she is at risk of removal from the United States. *See id*.; Pereira v. Sessions, 138 S. Ct. 2105, 2110–11 (2018) (outlining the requirements of an NTA under the immigration laws).

individuals in a range of ways, including without a warrant,[25] or by assuming custody over individuals who are in jail or prison or who have recently completed criminal sentences.[26] However, DHS regulations require that in cases where individuals are arrested without a warrant, a custody determination must be made within forty-eight hours unless there is an "emergency or other extraordinary circumstance."[27]

ICE often effectuates these arrests through the use of immigration detainers or "ICE holds,"[28] which are authorized by the INA.[29] Immigration officials have the power to arrest "any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[30] Through these detainers, ICE may request that local and state law enforcement officials "hold" the noncitizen for forty-eight hours until ICE can transfer them to their custody and initiate removal proceedings; these holds may—and frequently do—include holding a noncitizen at a local state or county jail or prison until ICE can transfer them to their custody.[31] Such detainers are often honored at law enforcement's discretion and the legality of these detainers has been called into question.[32] In fact, several courts have found that local and state enforcement's compliance with these detainers constitute an unconstitutional arrest.[33]

Once a noncitizen is transferred to immigration custody, ICE then makes the initial custody determination on whether an individual will be detained or released in accordance with conditions set by ICE.[34] These initial determinations are often made shortly after apprehension.[35] ICE typically sets one of the three options outlined by the statute: 1) the noncitizen is to be kept in detention with no option for release; 2) the noncitizen may be released under bond of at least $1,500; or 3) the noncitizen may be released on conditional parole.[36] ICE may also implement conditions related to Alternatives to Detention (ATD), such as ankle monitors, electronic monitoring, or other conditions. ICE maintains full authority, in its discretion, to release individuals subject to discretionary detention on any of these options, even after the initial determination. However, ICE rarely reconsiders and releases detainees after their initial decision.[37]

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25. 8 C.F.R. § 236.1(b)(1) (2024) ("[T]he respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest."); 8 U.S.C. § 1357(a)(2) (noting that in some cases, the immigration officer may arrest without a warrant if he has reason to believe the noncitizen is present unlawfully and is likely to escape before a warrant can be obtained).
26. *See* 8 C.F.R. §§ 287.5(c), 287.8(b)(2) (2024).
27. *See* 8 C.F.R. § 287.3(d) (2024).
28. Alia Al-Khatib, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 115 (2014).
29. 8 U.S.C. § 1357(a)(2). Detainers are also regulated under 8 C.F.R. § 287.7 (2024).
30. 8 U.S.C. § 1357(a)(2).
31. Al-Khatib, *supra* note 28, at 111.
32. *See id.* at 125.
33. *See id.* at 134.
34. *See* 8 C.F.R. §§ 1236.1(d)(1), 1003.19(a).
35. *See* 8 C.F.R. § 287.3(d).
36. *See* 8 U.S.C. § 1226(a).
37. Gilman, *supra* note 14, at 167.

ICE's initial custody determination is then entitled to review at a bond hearing before an immigration judge within the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ), at which point the noncitizen must demonstrate that his or her release "would not pose a danger to property or persons, or that [he or she] is likely to appear for any future proceeding."[38] A detainee must request such a custody redetermination before an immigration judge; it is not automatic.[39] In essence, the standard can be boiled down to two prongs: 1) whether someone is a danger to the community; and 2) if they are not a danger to the community, whether they are a flight risk.[40] Unlike with criminal pre-trial detention or even other civil detention contexts,[41] the burden falls squarely on the noncitizen to prove that they should be released from detention. If the individual proves that they are not a danger and are likely to appear at future proceedings, the ICE officer or an immigration judge determines whether the noncitizen may be released on his or her own recognizance, whether a bond should be set, or other conditions that would address any risk of the noncitizen fleeing or avoiding the adjudication of his or her immigration case.[42] Any bond set must be a minimum of $1,500, and an immgration judge is entitled to increase or decrease any bond sent by an ICE officer.[43] Despite regulations outlining that release on their own recognizance and conditional parole are options for custody redetermination hearings before the immigration judge, many immigration judges refuse to consider this option, often finding that they can only release someone pursuant to a monetary bond.[44] In fact, prior EOIR guidelines and manuals limit the role of immigration judges to "redetermine the amount of bond set by DHS," rather than effectively evaluate detention and release.[45] While this has since been clarified following a precedential administrative decision, immigration judges still rely predominately on monetary bond as the primary—and often times only—consideration for release. Immigration judges are often not required to consider ATD, absent specific federal court litigation demanding they do so.

The noncitizen bears the burden of proof in custody redeterminations[46] and adjudicators may consider:

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38. 8 C.F.R. § 1236.1(c)(8); Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) ("The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond.").

39. *See* 8 C.F.R. § 1236.1(d).

40. *Guerra*, 24 I&N Dec. at 40.

41. *See* Laila L. Hlass & Mary Yanik, *Studying the Hazy Line Between Procedure and Substance in Immigrant Detention Litigation*, 58 HARV. C.R.-C.L. L. REV. 203, 225-26 (2023). The Supreme Court has placed "strict procedural safeguards" in the civil commitment context, striking down systems that place the burden on the detained individual to prove they are not a danger to society. *See id*.

42. *Guerra*, 24 I&N Dec. at 40.

43. INA § 236(a) (codified at 8 U.S.C. 1226(a)).

44. Gilman, *supra* note 14, at 189 (noting that Immigration Judge Benchbook stated that the INA does not allow immigration judges to order release on recognizance); Rivera v. Holder, 307 F.R.D. 539, 543-44 (W.D. Wash. 2015).

45. Gilman, *supra* note 14, at 189.

46. 8 C.F.R. § 236.1(c)(8). Custody redetermination hearings are also often referred to as "bond hearings."

> whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.[47]

The case law makes clear that there is no "right" to release.[48] Instead, ICE and immigration judges have broad discretion in deciding whether an individual should remain detained, including any factors that go toward potential danger or flight risk.[49] This may include any criminal history, including minor offenses.[50] Adjudicators are even allowed to consider facts outlined in police reports, pending charges, or even dismissed criminal cases.[51] While ICE may consider custody at any point filing the NTA,[52] respondents are often only entitled to one bond hearing before an immigration judge unless they demonstrate changed circumstances since their initial bond hearing.[53] These draconian legal standards are a relatively new phenomenon with prior Board of Immigration Appeals (BIA) case law suggesting that detention be the exception, rather than the norm.[54] The default towards detention emerged as part of a series of "tough on crime" legislative policies and that trend has persisted until today.[55]

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47. *Guerra*, 24 I&N Dec. at 40.
48. *Id.* at 39.
49. *Id.* at 40.
50. *Id.*
51. *See id.* (upholding a denial of bond for a noncitizen who had been charged with drug trafficking, but had not been convicted); Thomas v. Garland, 25 F.4th 50, 54 (1st Cir. 2022) ("[W]e have repeatedly held that an immigration court may generally consider a police report when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction."). *See also Mary Holper, Confronting Cops in Immigration Court*, 23 WM. & MARY BILL OF RTS. J. 675, 693-700 (2015) (discussing the reliance on police reports in immigration court and the reliability concerns involved in such deference).
52. 8 C.F.R. § 236.1(g)(1) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I-286, Notice of Custody Determination.").
53. 8 C.F.R. § 1003.19(e).
54. Gilman, *supra* note 14, at 175-76 ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to national security, or that he is a poor bail risk." (quoting Matter of Patel, 15 I&N Dec. 666 (BIA 1976))).
55. Gilman, *supra* note 14, at 176; César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. Rev. 1346, 1360 (2014) ("Specifically, the concerns that led Congress to prosecute the nascent 'war on drugs' were intertwined with concerns that immigrants were bringing the scourge of drug use and drug trafficking into cities across the country.").

As for procedural considerations, bond hearings before the Immigration Judge lack any formalities associated with other immigration proceedings.[56] These proceedings are often not recorded or transcribed, and detainees have no right to court-appointed counsel.[57] Although the custody redeterminations by an immigration judge can be appealed to the BIA, the appellate administrative body within EOIR, current BIA guidelines have created an inclination towards detention, rather than release.[58] Notably, review of custody determinations are not available in federal courts, leaving the administrative body as the final arbiter on release.[59] The only alternative method to challenge immigration detention in federal court is through a habeas petition, which only challenges the legality of the custody determination, or lack thereof, but federal courts may not review the merits of an specific decision to detain or release an individual.[60]

B. *Current Immigration Detention Trends*

Immigration detention population has comprised the fastest growing federal prison population.[61] Between 1995 and 2016, the average daily immigration detention population grew from approximately 7,500 to 33,300 persons.[62] DHS detains over 400,000 noncitizens each year.[63] TRAC Immigration, a data research project housed at Syracuse University, reports that as of May 7, 2023, roughly 21,000 individuals were held in ICE custody.[64] In 2019, DHS held an average of 48,000 people daily—sixty percent of whom were apprehended at the border with forty percent being a result of ICE interior enforcement.[65] While the COVID-19 pandemic resulted in a general decrease in the detention population, those numbers have been steady

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56. Mary Holper, *JRAD Redux: Judicial Recommendation Against Immigration Detention*, 91 GEO. WASH. L. REV. 561, 570 (2023) (citing Matter of Chirinos, 16 I&N. Dec. 276, 277 (BIA 1977) ("Our primary consideration in a bail determination is that the parties be able to place the facts as promptly as possible before an impartial arbiter. To achieve this objective we not only countenance, but will encourage, informal procedures so long as they do not result in prejudice. . . . Obviously, this informality cannot carry over to a deportation hearing.").

57. *See id.*

58. *See id.* at 570-71.

59. Gilman, *supra* note 14, at 171 (citing *Demore v. Kim*, 538 U.S. 510, 517 (2003)).

60. *See id.;* INS v. St. Cyr, 533 U.S. 289, 311 (2001) ("In the immigration context . . . . 'judicial review' and 'habeas corpus' have historically distinct meanings.") (citing Heikkila v. Barber, 345 U.S. 229, 236 (1953).

61. *See* Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, PBS News (Oct. 18, 2011), https://perma.cc/H75D-LAYN.

62. CARL TAKEI ET AL., AM. CIVIL LIBERTIES UNION, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons* (2016), 7.

63. *See* U.S. IMMIGR. & CUSTOMS ENF'T (ICE), FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2019),https://perma.cc/9RCH-JKPG.

64. TRAC IMMIGR., https://perma.cc/S76D-YEVW. Current detention numbers are accessible at: https://perma.cc/8HYF-VD3L.

65. U.S. DEP'T OF HOMELAND SEC. (DHS), BUDGET-IN-BRIEF: FISCAL YEAR 2021 (Washington, DC: DHS, 2020), https://perma.cc/Z49T-EZ4N; and Emily Kassie, "Detained," The Marshall Project (September 24, 2019) https://perma.cc/E3KG-G6YM.

increasing.[66] In 2023, ICE relied on 150 detention facilities across the U.S. to detain over 273,000 individuals.[67] Most recent detention statistics corroborate this trend; as of January 28, 2024, 38,498 individuals are held in ICE detention.[68] It is expected that the immigration detention rates will rise and match pre-pandemic rates, despite the government's expansion of ATD programs, particularly under the new Trump administration.

Because this paper later focuses on comparisons to the New Jersey criminal justice system, it is important to take a closer look at the immigration detention statistics in the state. According to data obtained by the non-profit organization Legal Services of New Jersey, 13,577 individuals were detained within the jurisdiction of the New Jersey Immigration Courts.[69] Most of these individuals were detained either in facilities within New Jersey, namely the Elizabeth Detention Center, or the Moshannon Valley Processing Center in Phillipsburg, Pennsylvania.[70] The majority of the noncitizens detained were New Jersey residents or had some connection to New Jersey, even if they were detained in Pennsylvania.[71] Roughly, seventy percent of the noncitizens detained during this period were detained as a result of ICE's Enforcement and Removal Operation (ERO) internal enforcement, and only about twenty-five percent of the noncitizens detained were detained as a result of CBP enforcement, which typically involved noncitizens who recently arrived at the southern border and were later transferred or noncitizens apprehended at a New York or New Jersey airport.[72] The average time in detention was 56.26 days, but time spent in detention varied widely with the longest period of detention being 555 days.[73] Noncitizens apprehended in New Jersey and then transferred to Pennsylvania spent on average more time in detention compared to other individuals detained in New Jersey and Pennsylvania.[74] The time spent in detention often varied by race with black noncitizens spending on average 97.52 days in detention in Pennsylvania compared to 57.75 detainees classified as white.[75]

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66. *See* Laila L. Hlass & Mary Yanik, *supra* note 41, at 216; *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC IMMIGR. (Mar. 15, 2021), https://perma.cc/YY7K-DWEL.

67. *See FY 2023 ICE Annual Report*, U.S. IMMIGR. & CUSTOMS ENF'T, 18-19 & fig. 10 https://perma.cc/BE72-PKUJ.

68. Transactional Records Access Clearinghouse, *34,498 Immigrants in Detention According to Latest ICE Detention Data,* SYRACUSE UNIVERSITY (2024), https://perma.cc/P5PT-LWA5.

69. Shira Wisotsky & Zoe Burke, Legal Services of New Jersey, *Stories by Numbers: Detention and Removal in New Jersey and the Region* (Jan. 9, 2024). This presentation was recorded for attendees and a copy of that recording is with the author.

70. *Id.*

71. *Id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.* It is important to note that the race classifications are based on data obtained from ICE on how they "code" individuals based on race, but because it is not clear how these identifications are made or under what guidelines. For example, ICE does not allow classifications for individuals of two or more races. Nonetheless, this data provides important insight in possible racial discrepancies in detention conditions and practices.

C. *Lack of Comprehensive Alternatives to Detention and Pre-Trial Services*

Often touted as a "lesser evil" to detention, ICE's ATD program complements and supplements the immigration detention system, and thus, it is important to analyze its implementation, limitations and the way in which it interacts with the monetary bond system. The ATD program includes "releasing an individual on her own recognizance, through a grant of parole, under an order of supervision, upon payment of a bond, into an Intensive Supervision Appearance Program, or into community-based programs that utilize case management."[76] Individuals in removal proceedings facing discretionary detention who seek a bond from an immigration judge typically do not benefit from ATD as an alternative condition to monetary bail. However, some advocates have reported certain immigration judges encouraging ICE to utilize ATD, specifically ankle monitoring, in addition to the payment of a bond. ATD is most frequently used for individuals who are not otherwise eligible for a bond determination before an immigration judge, but may nonetheless be released on parole or other method at the discretion of ICE.

During the COVID-19 pandemic, ICE significantly expanded its ATD program with Congress investing significant funding to grow these programs.[77] Even as ICE has expanded ATD, the conditions implemented by ICE are largely more restrictive than those used in the criminal context, including house arrest, electronic monitoring, mandatory check-ins, and ankle bracelets.[78] Such methods are often used with individuals who have no criminal history and pose little to no flight risk. In essence, ICE has merely used ATD to supplement detention and increase surveillance of immigrant communities, rather than to reduce detention.[79] As of May 2021, one-third of the individuals who were being monitored via ICE's ATD program were subject to an ankle monitor.[80] Individuals with any interaction with law enforcement—including individuals with pending criminal charges—face little to no opportunity of release, let alone access to these restrictive forms of ATD. While many noncitizens and advocates alike prefer enrollment in ATD over

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76. *See id*. at 2155.

77. *See Enforcement and Removal Operations: Alternatives to Detention*, IMMIGR. & CUSTOMS ENF'T 2 (Apr. 2021), https://perma.cc/Y79X-MJH5 (noting that Congress expanded ATD funding in 2020 to $149 million and again, in 2021, with ICE receiving nearly $440 million to grow the program).

78. *See* U.S. Gov't Accountability Off., *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 7 (2014), https://perma.cc/6E3R-QPEJ; Fatma E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141, 2155-70 (2017); *see also* Colleen Long et al., *ICE Issuing More Immigrant Ankle Monitors. But Do They Work?*, AP NEWS (Aug. 25, 2018), https://perma.cc/C3JS-57R8.

79. *See* David Secor et al., *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration*, NAT'L IMMIGR. JUST. CTR. 11 (Apr. 22, 2019), https://perma.cc/PS3Y-CYAG; Hernández, *supra* note 55, p. 1410-11.

80. *See* Tosca Giustini et al., *Immigration Cyber Prisons; Ending the Use of Electronic Ankle Shackles*, at 7 (2021), https://perma.cc/WP3F-L5E9; *see id*. at 2 ("As large numbers of people were released from physical detention [because of the pandemic], often only by court order, ICE immediately imposed electronic ankle shackles on many of them. As of May 2021, 31,069 people were subjected to electronic ankle shackling by ICE."). This is in contrast with New Jersey's use of electronic monitoring in less than 7% of cases where release from pre-trial detention was warranted.

detention, these programs must nonetheless be viewed from a critical lens against the broader conversation of liberty and fairness in the immigration detention context.

III. STATE BAIL REFORM POLICIES AND IMPACT: NEW JERSEY'S MODEL

Academics and scholars have long compared the immigration detention system with the criminal justice's detention and incaraceration system, often highlighting the shared challenges the two schemes of detention and advocating for similar reforms to both. This article also seeks to delve into the that comparison, particularly in examining what the current trend of bail reform policies can teach us about immigration detention. To do so, we must begin with an analysis of what bail reform policies look like today and how they have been implemented, specifically looking to New Jersey's current model as a case study. This description will provide helpful background in subsequent analysis of the two detention systems.

Pre-trial criminal detention has become the norm with approximately eleven million people who are arrested facing the possibility of detention before trial every year.[81] The numerous legal and practical consequences to pre-trial detention and monetary bail schemes have been debated for years, primarily with the focus on how it negatively impacts the poor.[82] Many criminal defendants languished in jail for no other reason than they could not afford to pay the bail set in their cases.[83]

Bail reform attempts to tackle major inequities in the pre-trial criminal detention system. Advocates have also long argued that eliminating cash bail can reduce the pre-trial detention population, resulting in fewer people enduring criminal detention merely because they cannot afford bail.[84] Such reform leads to a more effective system for a variety of reasons: The defendant is better able to access legal services if they are not detained; there is less pressure on public defenders and prosecutors because they have less detained cases to litigate, which are constitutionally required to move on an expediated timeline; individuals are able to continue to work and seek support from the community, friends, and family, which reduces negative consequences on the individual and the community.[85] Bail reform and reduction in pre-trial detention in the criminal context further long-term state goals, including avoiding

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81. Melissa Hamilton, *Modelling Pretrial Detention*, 72 AM. U. L. REV. 519, 521 (2022) (citing *Will Dobbie & Crystal S. Yang*, *The U.S. Pretrial System: Balancing Individual Rights and Public Interests*, 35 J. ECON. PERSPS. 49, 49 (2021)).

82. Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 798 (2018); Jordan Gross, *Devil Take the Hindmost: Reform Consideration for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1046 (2018).

83. *Id*. (noting the disproportionate negative impact of cash bail on minority and poor defendants).

84. *See* Brave New Films, *Lessons for the Nation: New Jersey's Historic Bail Reform*, American Civil Liberties Union New Jersey (Dec. 12, 2017), https://perma.cc/L2JM-7MWA (noting the challenges faced by criminal defendants in New Jersey who could not afford their bail).

85. *See id.*

poor case outcomes and future arrests.[86] Individuals who are subject to pre-trial detention are at increased risk of a conviction and recidivism; defendants are also at risk of receiving longer jail and prison sentences or accepting worse terms in their guilty pleas.[87] Any period of detention negatively impacts individuals connections to employment, housing, family, and community networks, which only increase risks of recidivism.[88] In fact, states that have implemented bail reform have explicitly recognized these risks as their justification for policy change and their desire to reduce their criminal detention population.[89]

States that have passed, or are in the process of passing, bail reform laws include New Mexico,[90] Colorado,[91] New Jersey, Kentucky, Ohio, and Illinois,[92] with several local jurisdictions implementing similar policies on a smaller scale. Out of these the jurisdictions, New Jersey's efforts at bail reform have been well-documented by the state in various reports since the passing of Criminal Justice Reform Act (CJRA).[93] Because these bail reform policies have been in place since 2017 and sufficient quantitative and qualitative data exists on its impact, this article will look at New Jersey's policies and its impact as a model for criminal bail reform and how it intersects with, and impacts, immigration detention.

A. *How Does New Jersey's Bail Reform System Work?*

In 2017, New Jersey essentially eliminated cash money bail and overhauled its pre-trial detention system.[94] This reform was supported by bipartisan legislation and a constitutional amendment supported by sixty-two percent of voters.[95] The law now requires that a decision on pre-trial detention (or release) be made no later than forty-eight hours after the defendant's

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86. *See* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 655 (1964); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 60 (2014).

87. Srikantiah, *supra* note 4, at 537-38.

88. *Id*. at 538; *see also* Matt Katz, *Study shows those released under NY's bail reform laws are less likely to get rearrested*, THE GOTHAMIST (Mar. 15, 2023), https://perma.cc/YH7K-LSKR.

89. *See* N.J. JOINT COMM. ON CRIM. JUST., REPORT OF THE RECONVENED JOINT COMMITTEE ON CRIMINAL JUSTICE, at 1-3 (2023).

90. N.M. CONST. art. II, § 13 (New Mexico passed a constitutional amendment in 2016 that essentially eliminated cash bail).

91. Prompt Pretrial Liberty and Fairness Act, ch 288, sec. 1-3, §§ 16-4-102, -111, 2019 Colo. Sess. Laws 2666.

92. Alexandra Arriaga, *New bond fund freeing immigrants from ICE detention*, INJUSTICE WATCH (June 10, 2021), https://perma.cc/5Z8F-UM9H. ("Although Illinois recently eliminated the use of cash bail, Illinois residents who are detained by the federal immigration system still need to pay bond in order to be released.")

93. *See* Criminal Justice Reform Act, ch. 31, 2014 N.J. Laws (codified at N.J. STAT. ANN. §§ 2A:162-15 to 25 (2014)).

94. *Id*. *See also* N.J. OFF. OF ATT'Y GEN., NO. 2016-6, ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE, AT 8-9, (2016) (these reforms also included a speedy trial provision intended to ensure that criminal cases of individuals in pre-trial detention are processed efficiently and swiftly).

95. *New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, BALLOTPEDIA, https://perma.cc/F67X-XGUP.

commitment to jail following the issuance of a complaint-warrant.[96] During this time, the Pretrial Service Program prepares a risk assessment with recommendations on conditions of release.[97] In order to make these decisions, judges rely on the Pretrial Services Program's risk assessment tool, called the Public Safety Risk Assessment (PSA), and its recommendations on conditions of release as well as any additional information brought forth by either the prosecution or defense.[98] The PSA consists of a review of "a defendant's criminal history, record of prior court appearances and other objective information."[99] Judges must then determine "the likelihood that a defendant will flee, commit a new criminal activity, or obstruct justice by intimidating victims and other witnesses."[100] The PSA uses nine factors to generate scores that estimate the likelihood of three potential outcomes: 1) that a defendant will fail to appear for their criminal proceedings, referred to as failure to appear (FTA); 2) that the defendant will be arrested for a criminal offense, referred to as new criminal activity (NCA); or 3) that the defendant will be arrested for a *violent* criminal offense, referred to as new violent criminal activity (NVCA).[101] The nine factors considered include: (1) age of the defendant at the current arrest, (2) whether or not the defendant is currently charged for a violent offense[102], (3) whether the defendant had a pending criminal charge at the time of the current arrest, (4) whether the defendant had a prior conviction for a disorderly persons offense under New Jersey law, (5) whether the defendant had a conviction for an indictable offense or felony, (6) whether the defendant had a conviction for any prior violent offense, (7) whether the defendant had failed to appear for any criminal court hearing in the past two years prior to the current arrest, (8) whether the defendant had any failure to appear for any court appearance beyond the two year period, and (9) whether any sentence of incarceration to jail or prison of fourteen days or more was imposed on the defendant.[103] Although the PSA does not rely on use of artificial intelligence or other digitized formats, it nonetheless creates an algorithm and scoring mechanism for judges to evaluate risk factors.[104] The PSA weighs these factors to varying degrees and judges conduct a step-by-step analysis to guide their determination on FTA, NCA or NVCA risks.[105] Importantly, the risk assessment tools used by New Jersey judges are

96. *See* N.J. STAT. ANN. §§ 2A:162-16(a) to (b)(1) (2017).
97. *See* § 2A:162-16(a).
98. *Id.*
99. Stuart Rabner, Opinion, *Chief Justice: Bail reform puts N.J. at the forefront of fairness*, NJ.COM (Jan. 9, 2017), https://perma.cc/756Y-KA7Y.
100. N.J. Off. of Att'y Gen., *supra* note 94, at 9.
101. N.J. ADMIN. OFF. OF THE CTS., PUBLIC SAFETY ASSESSMENT, at 1 (2018); N.J. ADMIN. OFF. OF THE CTS., PRETRIAL RELEASE RECOMMENDATION DECISION MAKING FRAMEWORK, at 1 (2022).
102. A violent defense is defined as an offense where "a person causes or attempts to cause physical injury through use of force or violence against another person." *Id.* at 1.
103. *Id.*
104. New Jersey Administrative Office of the Courts, Pretrial Release Recommendation Decision Making Framework (Aug. 2, 2022), available at: https://perma.cc/N7Q6-5FF4.
105. *See id.*

codified in legislation.[106] The New Jersey judicial system has issued annual reports on the implementation of the CJRA and bail reform policies, which have often included recommendations to the state governor and legislature on ways to further improve this system.[107] Because the risk assessment tools and data on the CJRA's successes are made publicly available, practitioners and shareholders are able to continue to evaluate and advocate for changes or modifications to the system.[108]

After the fourty-eight-hour waiting period, the judge may 1) release the defendant on his or own recognizance "or on execution of an unsecured appearance bond," 2) release the defendant on non-monetary conditions as a means to ensure that the individual appears to all required hearings and secure the protection of the community, 3) release the defendant on monetary bond with some additional non-monetary conditions, or 4) detain the defendant in jail pursuant to a motion of the prosecutor for a pre-trial detention hearing.[109] If a motion for pretrial detention is filed by the prosecutor, then the a pre-trial detention hearing is scheduled, typically sometime after the fourty-eight-hour waiting period. Pre-trial detention hearings only occur upon request of the prosecutor. Guidance from the New Jersey Attorney General makes clear that there is a presumption against seeking detention except for extreme circumstances, such as cases where the defendant is charged with murder or facing significant life imprisonment.[110] To overcome this presumption, prosecutors must show there is a serious risk that the defendant "(i) will not appear in court when required, (ii) will pose a danger to any other person or the community, or (iii) will obstruct or attempt the criminal justice process. . ."[111] The burden of pre-trial detention falls squarely on the prosecution, who must file a motion to detain a defendant and generally, should only do so where the defendant has been accused of a serious crime or "certain special conditions exist to justify preventive detention."[112] At pre-trial detention hearings, a defendant cannot be detained unless he or she receives an attorney and access to discovery, given an opportunity to call witnesses and cross-examine the prosecution's witnesses, and other due process protections.[113] Judges can

106. *See id.*

107. New Jersey Administrative Office of the Courts, Criminal Justice Reform Annual Report to the Governor and Legislature (2015—2021), available at: https://perma.cc/NN5S-RZ44.

108. *See* Dillon Reisman, "How New Jersey Used An Algorithm To Drastically Reduce Its Jail Population and Why it May Not be the Right Tool for the Job," ACLU New Jersey (Aug. 20, 2022), https://perma.cc/2L9H-LB8S. ("New Jersey's experience using the PSA underlines the imperative for comprehensive regulation and oversight of government algorithms and automated decision systems. The government should have the obligation to constantly assess the algorithms it relies on to better understand their impact on marginalized communities – and these systems shouldn't be shielded from public scrutiny and accountability. Some studies have already analyzed the performance of the PSA but understanding its impact, and the effect of systems like it, is a crucial undertaking that needs support.")

109. *See* N.J. STAT. ANN. § 2A:162-20 (list of the types of information judges may consider when determining whether a defendant should be detained pretrial).

110. N.J. Office of Att'y Gen., *supra* note 94, at 58-59.

111. *Id.*

112. *Id.*

113. N.J. STAT. ANN. § 2A:162-19 (outlining the hearing and protections available to individuals in pretrial detention hearings); *see* California Courts, Summary of Release and Detention Process Under SB 10 (Bail Reform Legislation), available at: https://perma.cc/KE6U-DU87 (noting existence of

consider a multitude of factors on whether—and what conditions—a defendant should be released.[114]

Generally, the conditions for release fall into five categories: 1) Release on Recognizance (ROR), meaning that the individual is released with no conditions; 2) Pretrial Monitoring Level (PML) 1, meaning that the individual will be released but will be required to report to pretrial services once a month, usually via telephone; 3) PML2, meaning the individual is required to report biweekly, alternating between phone and in-person reporting; 4) PML3, meaning that the individual is required to do routine in-person check-ins with pretrial services; and 5) PML3+, meaning the individual is subject to electronic monitoring that is tracked via GPS. The majority of criminal defendants generally fell between PML1 and 3, which consisted of 66.6% of criminal defendants.[115] Only 6.1% of criminal defendants were released subject to consistent electronic/GPS monitoring as required by PML3+.[116]

B. *The Impact of New Jersey's Criminal Justice Reform Act on the Criminal Justice System*

New Jersey's bail reform system has been lauded as a success and a model for bail reform efforts across the country.[117] Prior to bail reform, nearly thirty-nine percent of defendants held in New Jersey jails could not afford bail[118] with twelve percent of these defendants being detained because they could not pay bail amounts of $2,500 or less.[119] Since December of 2015, the state's overall pretrial jail population rates have declined by 43.9%, with some counties having been reduced to nearly half.[120] In the first year of bail reform, seventy-eight percent of defendants were released under some

presumption of detention where the crime was committed with a threat of violence or where the defendant assessed as "high risk" has been convicted of a serious or violent felony within the past five years, among other circumstances).

114. *See* N.J. STAT. ANN. § 2A:162-17 (providing a comprehensive list of considerations during pretrial detention hearings as well as examples of monetary and non-monetary conditions of release).

115. New Jersey Administrative Office of the Courts, 2021 Criminal Justice Reform Annual Report to the Governor and the Legislature, at 37 (2021), available at https://perma.cc/3X3T-37RR.

116. *Id.*

117. *See* Rebecca Everett, *Here's How N.J. Scores on Bail Reform (Hint: It's Better Than Other States)*, NJ.com (Nov. 1, 2017), https://perma.cc/Q57W-MY3J; *see also* Pretrial Justice Institute, *The State of Pretrial Justice in America* (Nov. 2017), https://perma.cc/7LQN-DB3K

118. Lisa W. Foderaro, *New Jersey Alters its Bail System and Upends Legal Landscape*, NEW YORK TIMES (Feb. 6, 2017), https://perma.cc/THD6-2SEL ("A study by the Drug Policy Alliance in New Jersey, released in 2013, found that 39 percent of inmates were eligible to be released on bail, but that many could not meet amounts as low as $2,500.").

119. THE JOINT COMM. ON CRIMINAL JUSTICE, Report of the Joint Committee on Criminal Justice 1 (2014), https://perma.cc/V255-R6ES. The Joint Committee on Criminal Justice was formed in 2013 by New Jersey Chief Justice Stuart Rabner, consisting of judges, prosecutors, public defenders, private attorneys, court administrators, and staff from the legislature and governor's office. *Id.* The committee focused on issues relating to bail and the right to a speedy trial. *Id. See also* New Jersey Administrative Office of the Courts, 2021 Annual Report to the Governor and the Legislature (2021), https://perma.cc/56E2-CH6D.

120. THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, 2018 Annual Report to the Governor and the Legislature (2019), at 38-39, perma.cc/N6DY-NC2Z.

conditions[121] and only eighteen percent of defendants were detained because they were deemed too dangerous to be released.[122] According to the American Civil Liberties Union of New Jersey, "[f]rom 2017 to 2022, New Jersey's prison population plummeted by more than 45 percent. During the pandemic, New Jersey released a higher share of its prison population than any other state in the nation."[123]

Crime rates have decreased in the years following the implementation of bail reform.[124] The percentage of people charged with non-violent offenses detained decreased in 2018.[125] In addition to the elimination of cash bail, bail reform has expanded pretrial supervision programs that include a variety of potential services to ensure individuals appear for their criminal hearings.[126] Several other jurisdictions have similarly demonstrated reduction of failure to appear when implementing such low-cost pretrial services.[127] Even minor forms of interventions, such as text or family reminders, have demonstrated benefits.[128] For individuals deemed a higher risk, evidence suggests that release with increase pretrial supervision is successful, further supporting that individuals should not be detained pending their criminal charges in most circumstances.[129] Outside of monitoring services, jurisdictions who have implemented bail reform are also reimagining the ways in which defendants can obtain key social services, such as mental health treatment or drug and alcohol addiction services, to improve results for both individual defendants and the broader community without reliance on detention. In the years since bail reform has been implemented to New Jersey, the judiciary and other stakeholders continue to advocate for increase access to social services. The New Jersey Committee on Criminal Justice, consisting of members of the New Jersey Supreme Court, non-profit organizations, and other key members involved in the detention and pretrial services program, made several recommendations to increase funding and resources for Pretrial Services

121. 7.8% of defendants were released on their own recognizance.THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants, January 1—November 30, 2017, 1,(2017), https://perma.cc/K3DC-8434

122. *Id.*

123. ACLU, *Decarcerating New Jersey: A Transformative Vision of Justice*, p. 6, available at: https://perma.cc/54FA-7EDK.

124. Alexander Shalom & Claudia Joy Demitro, *Is Bail Reform in New Jersey a Success*?, 318 N.J. LAW 10, 10 (June 2019); *see also* Rebecca Ibarra, *Crime Rates Plunge in New Jersey, and Bail Reform Advocates are Gloating*, National Public Radio, (Nov. 28, 2018), https://perma.cc/N5EW-S6PX.

125. THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, Report to the Governor and the Legislature (2018), at p. 6, https://perma.cc/N6DY-NC2Z.

126. THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, 2021 Annual Report to the Governor and the Legislature (2021), at 48, https://perma.cc/5NJR-RX64.

127. Srikantiah, *supra* note 4, at 535.

128. THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, Criminal Justice Reform: Frequently Asked Questions (April 2023), https://perma.cc/D7Z5-HQF7 ("For low-risk defendants… [pretrial release services] could amount to nothing more than a phone call or text to remind them to show up in court."); *see also* Prisoner Reentry Inst., City Univ. of N.Y., Pretrial Practice: Building a National Research Agenda for the Front End of the Criminal Justice System 24-25 (2015), https://perma.cc/AJJ2-E9LX.

129. *See id.*

to provide to resources that can address mental health and addiction, housing, employment, and other basic needs.[130]

Despite this, bail reform in New Jersey has not been without its challenges. The use of risk assessment tools and new bail reform regimes do not completely eliminate concerns of over-incarceration and bias against people of color in the criminal context.[131] In fact, many advocates have criticized reliance on algorithms and use of risk assessment tools that exacerbate implicit bias that state criminal judges may exhibit as they manage over-burdened dockets. For example, in New Jersey, before the implementation of bail reform, Black defendants represented fifty-four percent of New Jersey's jail population, and that number has largely remained the same, even when overall jail populations have been reduced.[132] Advocates and scholars have grappled with the challenges of reducing an individual's life to a short list of factors to make life-or-death decisions on an individual's liberty.[133] Similarly, despite New Jersey's implementation of various levels of pre-trial monitoring, it is unclear whether more restrictive forms of monitoring are being overrelied upon or being used disprortionately against defendants of color, resulting in what some advocates call a form of "e-carceration" in "digital prisons."[134] These criticisms reveal that criminal justice reform and decarceration efforts in New Jersey—and across the country—are merely a starting point for what is ultimately a long journey towards dismantling our problematic system of mass incarceration. Bail reform in New Jersey was a collaborative effort of various partners, including government officials, state judges, and as other states follow suit in implementing their own bail reform

130. THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, Report of the Reconvened Joint Committee on Criminal Justice (June 2023), at 7-15, perma.cc/FAV5-VMQ7.

131. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L. J. 59, 95-96 (2017); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1053, 1083-1102 (2019); Sonja B. Starr, Evidence-Based Sentencing and the Scientific Rationalization of Discrimination, 66 STAN. L. REV. 803, 803 (2014). *See also* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, PRETRIAL JUSTICE INSTITUTE, at 35 (2011), available at https://perma.cc/S8KM-62SA; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821 (2014); Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://perma.cc/FAV5-VMQ7 (finding risk assessment tools were biased against black Americans).

132. Dillon Reisman, *"How New Jersey Used Algorithm Drastically Reduce Its Jail Population and Why it May Not be the Right Tool for the Job,"* ACLU NEW JERSEY (Aug. 20, 2022), https://perma.cc/4MK5-WX8S.

133. *See id*. *See also* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94-99 (2017); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1053, 1083-1102 (2019); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 803 (2014); Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, PRETRIAL JUSTICE INSTITUTE, at 35 (2011), available at: https://perma.cc/S8KM-62SA; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821 (2014); Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://perma.cc/5V3C-GXRU (finding risk assessment tools were biased against black Americans).

134. Michelle Alexander, *"The Newest Jim Crow,"* THE NEW YORK TIMES (Nov. 8, 2018), https://perma.cc/KX22-WKMD.

policies, society has a significant foundation to reimagine the criminal justice system to drastically reduce our incarcerated population and create a more just system.

IV. HOW DOES IMMIGRATION DETENTION COMPARE TO CRIMINAL PRE-TRIAL DETENTION POST-BAIL REFORM?

In order to analyze what—if anything—recent efforts at bail reform can teach us about the current immigration system, one must compare the two systems. Despite the immigration system being labeled as a "civil" detention system, it shares many similarities to its criminal pretrial detention counterpart. Most importantly, the conditions the government utilizes to deprive noncitizens of their liberty bare a virtually identifical ressemblence to the jails and prisons used to house criminal defendants and convicted individuals. However, the current efforts at bail reform and other policies in the criminal justice space reveals a variety of key differences that highlights the ways in which the immigration detention system grossly violates concepts of liberty and due process in ways equally, if not more, egregious than what we see in the criminal justice system. Namely, the immigration detention continues to struggle with a lack of meaningful risk assessment tools or guidance to adjudicators on what situations warrant detention, and there continues to be no real due process or legal protection in immigration court bond proceedings. In comparing the immigration detention system with the New Jersey model for bail reform, data reveals a significant disparity in the rates of detention and release between criminal defendants and immigration detainees that suggest that an individual is much more likely to face detention in the immigration context, than in the criminal pretrial detention context, regardless of its nature as "civil detention."

A. *Consequences of Immigration Detention Often Match, or Exceed that, of Criminal Detention*

As an initial matter, a key question should be examined: How do the actual conditions of confinement for detained noncitizens compare to their criminal defendant counterparts? This is one area that the two systems share similirities. Justice Breyer once noted, "the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails. And in some cases, the conditions of their confinement are inappropriately poor."[135]

135. Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, S. dissenting) (citing to Dept. of Homeland Security (DHS), Office of Inspector General (OIG), DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, e.g., indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee)).

Although federal immigration detention is considered "civil confinement,"[136] the reality is that noncitizens are detained in prison-like conditions. DHS detains noncitizens in private detention facilities, federally owned detention facilities, or state and county jails leased to the federal government for the purpose of immigration detention.[137] Noncitizens are often detained miles from the closest cities and in many cases, several states away from their family, community, and even their attorneys. Detained cases are also on an expediated timeline; while this is intended to minimize an individual's prolonged detention, the reality is that most individuals in detained immigration proceedings are at a disadvantage in their ability to corroborate and present their cases in immigration court. ICE frequently detains and transfers noncitizens to jurisdictions far from their homes; controls their communications, including charging for phone calls, and has unfettered discretion over the conditions of their detention.[138] Immigration detention negatively impacts noncitizens financially, physically, emotionally, and psychologically as they suffer from separation from family, community, employment, and other networks which contribute to their future well-being, in addition to social, cultural, and language barriers.[139] These consequences of detention are no different from the major concerns that plague the criminal pretrial detention system: the psycholigcal harms to detained populations, limited access to resources and family support, and increased burden of fast-tracked criminal proceedings. Such harms imposed by a detention scheme that overly relied on cash bail and discouraged release is precisely what prompted jurisdictions like New Jersey to turn to bail reform and an overhaul of their pretrial detention scheme.

However, there is one key difference between immigration proceedings and criminal proceedings that sets them apart: access to counsel. Unlike criminal defendants, the majority of immigration detainees lack counsel in immigration proceedings, nearly eighty-seven percent of detained noncitizens lacked representation.[140] Having a lawyer in immigration proceedings makes a dramatic difference in a removal case, with a study finding that detained

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136. *See e.g.*, Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893) ("[D]eportation is not a punishment for crime."); *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("[R]emoval proceedings are civil in nature.").

137. Srikantiah, *supra* note 4, at 526. *See also* AMNESTY INT'L, Jailed Without Justice: Immigration Detention in the USA, 29-43 (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf; Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1525-26 (Summer 2011); *FY 2023 ICE Annual Report*, U.S. IMMIGR. & CUSTOMS ENF'T, 18-19 & fig. 10 (2023), https://perma.cc/7J6Y-WXYQ.

138. *See* Aditi Shah, *Constitutional and Procedural Pathways to Freedom from Immigration Detention: Increasing Access to Legal Representation*, 35 GEO. IMMIGR. L. J. 181, 185 (2020).

139. Kalina M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 497-99 (2014).

140. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 8 (2015); *see also* Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55659, 55659-60 (proposed Sept. 17, 2014) (to be codified at 8 C.F.R. pt. 1003) ("Of the 265,708 initial case completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented.").

immigrants with counsel had a ten-and-a-half times greater chance of success in their applications for relief in removal proceedings when compared to their *pro se* counterparts.[141] Without an attorney, a detained noncitizen has limited access to resources, evidence or support systems that would allow them to effectively litigate their applications for relief from removal. Not only does representation make a huge difference in the merits of the removal proceedings, but it also is a determining factor in whether an individual obtains an opportunity to seek release via a custody determination hearing. Per a 2014 study, only forty-four percent of detained immigrants with legal representation obtained a custody determination hearing compared to only eighteen percent of *pro se* detainees.[142] "[R]epresented detainees were almost seven times more likely than their pro se counterparts to be released from the detention center (48% versus 7%)."[143]

Immigration detention shares many features of pretrial criminal detention—the expediated timeline, limited access to resources and support due to confinement, and social and phsychological risks due to detention. But it lacks a key protection: gauranteed right to counsel. This has created an immigration detention system where the conditions of detention not only match that of pretrial criminal detention, but in fact exceed it in some respects. This is particularly troubling given immigration detention is "civil" and must be curtailed to be as narrow as possible.[144] As the criminal justice system moves away from cash bail and overreliance on detention, the immigration detention system similarly needs to evaluate its own system in light of the high cost it places on individual noncitizens.

B. *Lack of Meaningful Risk Assessment Tools or Guidance in Immigration Custody Determinations*

Outside of the similarities—and differences—in how the immigration system and criminal justice detains people, it is equally important to note that the two systems differ widely in *how* they determine who warrants detention and who does not. At first glance, some may argue that the implementation of the aforementioned bail reform polcies in the criminal context has no impact on immigration detention policy or practice.[145] An individual released from criminal custody pursuant to bail reform may be subject to an immigration detainer and thus put into ICE custody, at which point they would then have a

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141. Eagly & Shafer, *supra* note 140, at 9. *See also* Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM LAW REV. 485, 495 (2018) (explaining that non-detained immigrants with lawyers had successful outcomes 74% of the time, while detained immigrants without counsel prevailed 3% of the time).

142. Eagly & Shafer, *supra* note 140, at 70.

143. *Id*. at 70-71.

144. *See* Gilman, *supra* note 14, at 172 (noting that the U.S. Supreme Court has frequently found that with civil detention, "liberty is the norm" and detention should be limited to prevent flight or danger to the community.)

145. *See* Hon. Dorothy Harbeck, *A New Calculus for the Measure of Mercy: Does the New Jersey Bail Reform Affect the Immigration Court Bond Hearings?*, 44 RUTGERS L. REC. 106, 117 (2017).

custody determination by an ICE official and/or a bond hearing before an immigration judge.[146] An ICE officer and immigration judge will consider factors on whether an individual may be subject to release, including the potential danger to the community and flight risk that the noncitizen poses.[147] On the surface, one could argue that this system is no different than the bail reform system implemented in New Jersey, where criminal court judges implement a multi-factor risk assessment and determine whether release is appropriate and under what conditions, if any, should an individual be released.[148] However, examining these two system closely tells a much different story.

While the statutory and regulatory scheme provides broad discretion to ICE officials and immigration judges in custody determinations, the immigration system has failed to recognize or implement a reliable system of risk assessment that have been slowly incorporated in the criminal context in some jurisdictions. The general trend for ICE has involved rarely setting a bond in many cases, finding that no conditions can justify release.[149] While some respondents have an opportunity to seek bond before an immigration judge, most bond requests are denied with significant variation in results depending on the location of the immigration court and identity of the judge.[150]

Jurisdictions that have introduced bail reform rely on actuarial risk assessments tools to predict how much of a danger or flight risk an individual defendant poses, and notably, what tools or systems exist to minimize or counteract that risk.[151] Jurisdictions utilizing these risk assessment tools consider factors such as criminal history, current charges, employment, drug history, and family ties, similar to the factors considered in immigration custody redeterminations, although the extent at which they are considered and weighed vary greatly.[152] This is precisely what we see implemented in the New Jersey system's Public Safety Risk Assessment (PSA). Risk assessment tools like the PSA tool are not perfect, and advocates and scholars alike continue to grapple with questions of racial bias, transparency, and oversight for such tools to ensure that society is not replacing existing bail systems with another system that overly punishes the poor and people of color.[153]

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146. *See* 8 C.F.R. §§ 287.5(c), 287.8(b)(2), 1236.1(c)(8); Al-Khatib, *supra* note 28, at 111; *Guerra*, 24 I&N Dec. 37, 40 (BIA. 2006).

147. *Guerra*, 24 I&N Dec. at 40.

148. Harbeck, *supra* note 145, at 117.

149. Hlass & Yanik, *supra* note 41, at 219 (citing Jason Tashea, *ICE Risk Assessment Tool Now Only Recommends 'Detain'*, ABA J. (June 28, 2018)), https://perma.cc/RZT5-SNWF.

150. *See id.* at 220; *see also* Immigration Court Bond Hearings and Related Case Decisions, TRAC IMMIGR. (last visited on Sept. 29, 2024), https://perma.cc/625K-HSSZ.

151. *See* Frankel, *supra* note 4, at 3. *See also* N.J. STAT. ANN. §§ 2A:162-16(a) (West 2024).

152. *Id.* at 18.

153. Reisman, *supra* note 132. *See also* Eaglin, *supra* note 131, at 94–99; Huq, *supra* note 131, at 1053, 1083–1102; Mamalian, *supra* note 131, at 36; Starr, *supra* note 131, at 82; Angwin et al., *supra* note 131 (finding risk assessment tools were biased against black Americans).

However, progress—as slow as it may be—continues to be made in the criminal justice system. For example, jurisdictions that have relied on risk assessment tools, including New Jersey, have made those tools publicly available. In New Jersey, the risk assessment process is codified in legislation and thus, there is more transparency in what factors are weighed in detention determinations. Moreover, bail reform is subject to more internal and external oversight as the public can easily access the criminal justice system.[154] This has been the case in New Jersey, where the judiciary provides annual reports to the governor and legislature on the impacts of bail reform, including recommendations for improvement.[155] Even though risk assessment and current systems to determine relevant release factors are not perfect, they provide a necessary first step towards reform that seeks to reduce pretrial detention, ensure fairness and transparency in the criminal justice system, and encourage advocacy and evaluation in how our current systems treat defendants.

The elimination of cash bail and implementation of robust bail reform regimes has led to an overall decrease in incarceration rates, which is a major win in the realm of criminal justice reform. However, no equivalent or transferrable tool exists in the immigration context. When it comes to determinations by immigration judges, there is limited data on what factors the judge can, and do, rely on in making custody determinations. Immigration judges receive no implicit bias training and often, engage in generalizations or reliance on assumptions to evaluate dangerousness.[156] Instead, it is possible, and common, for an individual to be granted release from criminal custody pursuant to these newly implemented risk assessment tools—having been found not to be a danger or a flight risk based on concrete factors and analysis—only to then be denied a bond by ICE officials and immigration judges based on the same underlying facts and circumstances. This is precisely what occurred to Oscar and what other practitioners in the immigration practice have reported.[157]

ICE briefly used a Risk Classification Assessment (RCA) tool as a mechanism for assigning a risk score based on a variety of factors.[158] Under the Trump Administration, ICE eliminated the release option from this tool altogether.[159] Essentially, this made it so that an assessment nearly always resulted in detention.[160] In addition, ICE's RCA contained a multitude of

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154. *See* Holper, JRAD Redux, *supra* note 56, at 598–99 (citing Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Guthrie Armstrong & Anthony Potts, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1240 (2020) (discussing empirical data on bail reform in Georgia and the importance for similar research in other states).

155. New Jersey Administrative Office of the Courts, Criminal Justice Reform Annual Report to the Governor and Legislature (2015—2021), available at: https://perma.cc/48AN-MJ4C.

156. Holper, JRAD Redux, *supra* note 56, at 597.

157. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 146 (2016).

158. Srikantiah, *supra* note 4, at 539.

159. *Id.*

160. *Id.*

problems, including that it captured a wide variety of individuals who were determined to be low risk of danger and flight by nature of their immigration status or entry in the United States, and in general, there was a lack of transparency and data in ICE's use and implementation of the RCA.[161] Even before the Trump Administration eliminated the release option, DHS detained eighty-two percent of individuals assessed in contrast with New Jersey criminal court judges recommending release in seventy to eighty percent of cases.[162] Even in situations where ICE utilized some form of risk assessment tool, it lacked the transparency and accessibility to the public, any semblance of agency or judicial independence, and uniformity in implementation compared to systems used in the criminal justice system. Instead, ICE's risk assessment tool seemed to mysteriously match whatever enforcement priorities were being operated, even if that included detention in nearly all cases. Moreover, immigration judges did not gain access to this risk assessment tool, instead deferring to risk assessments presented by ICE during bond proceedings, with little to no guidance or scientific evaluation on their legitimacy.

Outside of nonexistent, or worse ineffective, risk assessment tools, the immigration detention system lacks concrete guidance for ICE officers and immigration judges to meaningfully evaluate whether a noncitizen is entitled to be released from detention. While BIA precedent gives wide latitude for adjudicators to consider a multitude of factors, limited precedent and guidance exists for how immigration judges are expected to weigh such factors or what evidence can be relied upon in making such determinations. There is no meaningful case law or precedent that allows immigration officials or judges to make individualized determinations on the necessity of detention.[163] Notably, immigration officials and judges are not required to consider an individual's ability to pay or other financial circumstances when setting a bond.[164] TRAC Immigration reported that over a 20-year period, about one in five persons who received a bond remained detained at the conclusion of their removal case in immigration court, presumably because they were unable to post the bond amount.[165] For example, "[f]or cases concluded during FY

161. *See* Frankel, *supra* note 4, at 6; *see also* Gilman, *supra* note 14, at 186 (noting that DHS risk assessment tools were not publicly available and focused more on setting conditions of release, rather than actually evaluating the need for detention).

162. *Id.* at 540–41. *See* NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, CHART A: INITIAL RELEASE DECISIONS FOR CRIMINAL JUSTICE REFORM ELIGIBLE DEFENDANTS, JANUARY 1—NOVEMBER 30, 2017 (2017), https://perma.cc/48AN-MJ4C (last visited Sept. 29, 2024) (finding that in the first year of bail reform, nearly 80% of defendants were released on their own recognizance or on a conditional release).

163. Gilman, *supra* note 14, at 19–94 (noting the disparity between the pre-trial criminal detention and immigration detention's systems substantive and procedural approach to individualized detention determinations).

164. *See* Hernandez v. Lynch, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *5–6 (C.D. Cal. Nov. 10, 2016).

165. Transactional Records Access Clearinghouse, *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGR. (Sept. 14, 2016), Mica Rosenberg & Reade

2015, 13 percent remained detained even after the judge granted bond, down from 28 percent who had still been detained at the conclusion of their case in FY 2011 after bond was granted."[166]

As for what factors drive ICE officers and immigration judges' decisions to deny bond, the current precedent allows nearly any factor, no matter how small or unreliable, to be considered. With respect to the perceived "flight risk" that noncitizens pose, government officials have often contended that noncitizens regularly abscond from their immigration court proceedings,[167] when in reality, eighty-eight percent of noncitizens who completed their immigration court proceedings attended all hearings.[168] For example, as in Oscar's case, immigration judges can consider pending or even dismissed criminal charges in their calculation of whether an individual is a "danger to the community." In doing so, ICE officers and immigration judges often rely on police reports, even in cases where those allegations have not yet been proven or are likely to be dismissed.[169] Currently, no comprehensive empirical evidence exists on exactly what factors immigration judge consider in granting and denying bond. Although there is some evidence that criminal history is the primary factor in denying bond, there is no further explanation as to the specific nature of criminal history that is being factored in these decisions. For example, while a criminal conviction is certainly not required for an immigration judge to deny bond, it is not clear to what extent they can rely on mere arrests, pending charges, or even factual allegations resulting from charges that have been dismissed, in their denial of bond. The reality suggests that criminal history, including any interaction with law enforcement or pending charges, is the most significant factor in whether an individual will be granted bond by an immigration judge or officer.[170]

To address some of the gaps in the data of the ways in which criminal history impacts bond hearings and custody determinations, a research study consisting of interviews with immigration practitioners in New Jersey, where bail reform has passed, was conducted.[171] Of the practitioners interviewed, nearly all reported that the most frequent challenge they encounter with the detained immigrant populations they serve was the inability to secure release for their clients due to an open or pending criminal matter. One practitioner

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Levinson, *Trump's Catch-and-Detain Policy Snares Many Who Have Long Called America Home*, REUTERS (June 20, 2018), https://perma.cc/M8CV-D3ND.

166. *Three-Fold Difference in Immigration Bond Amount by Court Location*, TRAC IMMIGR. (July 2, 2018), https://perma.cc/PG3P-95ME.

167. Ingrid Eagly & Steven Shafer, *Measuring in Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 819 (2020) (evaluating the rate of noncitizen appearances in immigration court proceedings between the years of 2008 and 2018).

168. *Id*. at 873.

169. *See* Holper, JRAD Redux, *supra* note 56, at 605 ("The written report of a police officer who recorded an alleged crime becomes the basis of a dangerousness finding, even if the criminal justice system later decides that this defendant is not guilty or the prosecutor decides to drop the charges.").

170. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 146 (2016).

171. As outlined in Part I. Introduction.

reported that "[w]e are constantly stuck in a Catch-22." She explained that often, the pending criminal matter cannot move forward while the noncitizen is in ICE detention, but the immigration matter cannot be resolved, or will often be resolved in an unfavorable matter, because the individual is unable to resolve their criminal case. Practitioners reported that the existence of pending charges, without an arrest, was often the main determining factor in an individual's ability to secure release from detention, although this varied by immigration judge. One practitioner reported that relying on unproven allegations in a complaint or in a police report, or merely the list of charges, could be—and frequently is—used to deny bond. Another practitioner noted that many of her clients were released from criminal custody with release conditions set by the criminal court judge, but they rarely have the opportunity to comply with those conditions prior to their detention by ICE. This made their ability to resolve their criminal charges more difficult, and only helped perpetuate their continued detention by ICE.

Unlike the New Jersey model, there is no equivalent, workable tool or guidance to enable adjudicators to accurately evaluate noncitizens who warrant detention from those who do not. Instead, the current system creates largely arbitrary and inconsistent system of detention. Without any guardrails or guidance, adjudicators have unfettered discretion to consider any and all factors without any consideration of their applicability or relevance to the question of whether an noncitizen should be detained pending their removal proceedings. The lack of concrete guidance on individualized determinations of detention creates a particularly difficult challenge for noncitizens who have had some interaction with the criminal justice system. Because adjudicators can weigh any interaction with the criminal justice system heavily, it has resulted in many noncitizens being detained for unproven criminal charges, even where a criminal court judge has already determined the individual does not warrant detention based on a risk assessment tool.

C. *Widespread Denial of Bond to Immigrant Detainees and Disparity in Outcomes of Bond Hearings Before Judges*

Numerous fundamental substantive, administrative and legal differences exist between the criminal pre-trial detention hearing and the immigration bond hearing, including limited access to counsel, the burden of proof being on the noncitizen, and the use of monetary bond in nearly all cases where release is ordered. These differences have led to dramatic differences in outcomes for immigrants facing civil detention. The data reveals that noncitizens are far more likely to face detention than their criminal defendant counterparts in the pre-trial criminal detention system.

In 2022, out of 29,892 bond hearings conducted, only 10,364 respondents were granted bond.[172] As of April 2023, only 4,706 respondents were granted bond in comparison to the 15,209 bond requests that had been filed.[173] In New Jersey, in 2022, only thirty-three individuals were granted bond out of the 164 bond requests that were filed in that year, showing only a twenty percent rate of securing a bond by an immigration judge.[174] The data obtained by Legal Services of New Jersey via Freedom of Information Act (FOIA) requests from ICE-ERO paints a similar picture of the extremely low chance of obtaining bond in immigration detention. According to data obtained by Legal Services of New Jersey, out of 13,577 noncitizens detained between January 1, 2022 and August 21, 2023 in the New Jersey area, only nine percent were granted bond of any kind by an immigration judge or ICE officer.[175] Prior to the COVID-19 pandemic and the decrease of detention more generally, bond denial rates were particularly poor. In 2019, New Jersey immigration courts had 2,269 bond hearings of which only 894 individuals were granted bond.[176] In New York, rates were significantly lower; in 2022, only 346 individuals were granted bond out of a total of 1904 bond requests—showing only a ten percent chance of being granted bond in New York.[177] Other states that have implemented bail reform show similar bond denial rates, including New Mexico,[178] Nebraska,[179] and Illinois.[180] California's rates were significantly different with a forty-five percent rate of bond being granted in 2022.[181] The wide disparity in numbers—as well as the general trend towards denial of bond—has been consistent for decades.[182] After being denied bond, the majority of cases remain pending by the end of the fiscal year, meaning that individuals remained detained for prolonged periods of time while they to tried to fight for their ability to remain in the United States.[183]

These bond denial rates are significantly lower than the precent of criminal defendants denied release in their criminal proceedings, even in the years prior to implementation of bail reform.[184] With the advent of bail reform, the

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172. *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR. (last visited on October 2, 2024), https://perma.cc/Y3LX-VCKR.

173. *See id.*

174. *See id.*

175. LSNJ presentation, *supra* note 69.

176. *See id.*

177. *Id.*

178. In 2022, only 11% of noncitizens detained in New Mexico were granted bond at their bond hearings. *Id.* (showing that in 2022, out of 782 bond hearings, only 92 resulted in bond grants).

179. In 2022, only 12 individuals were granted bond out of the 113 immigration bond hearings that were held in Nebraska. *Id.*

180. In 2022, 198 individuals were granted bond out of a total of 732 bond requests that occurred in Illinois. *Id.*

181. *See id.*

182. *See id.*

183. *See id.*

184. *See* Fatma E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141, 2158 (2017).

opportunity to seek release from pre-trial criminal detention in many jurisdictions has skyrocketed. For example, in New Jersey, prison populations dropped by nearly 45% following the implementation of bail reform.[185] It is much easier for a criminal defendant to obtain release pending their criminal trial. However, the same cannot be said for those facing immigration detention. By looking at the rates of release for criminal defendants facing pre-trial detention in New Jersey and bond denial rates, the data strongly suggests that seeking release pursuant to New Jersey's bail reform policies is significantly higher than seeking release from immigration detention, despite the latter being deemed a "civil" proceeding. The data is corroborated by the experiences of practitioners on-the-ground, who report that having a criminal conviction, or even a pending criminal matter, has major consequences on the result of the immigration proceeding, specifically an individual's ability to secure release from ICE custody.

D. *Impact of State Bail Reform on Immigrant Defendants*

The disparity in release rates between pretrial criminal detention and immigration rates further demonstrates the gaps in the system, particularly for individuals who are released from criminal custody but are then unable to secure release from immigration custody. A noncitizen defendant could secure release from criminal pre-trial detention with little to no restrictions or pretrial supervision, only to be detained subject to an ICE detainer and denied release on a bond because an adjudicator finds them to be a danger to the community based on the same pending charges they were released from detention. Or alternatively, an individual can be released from pre-trial detention on non-monetary conditions, only to be detained in immigration custody and be required to pay a high bond to secure release from detention. Importantly, the majority of immigrant detainees have no criminal history—as of January 28, 2024, 67.5% of immigrant detainees have no criminal history whatsoever—and yet are subject to detention with little to no opportunity for release.[186] Not only do these scenarios highlight the disparity between detention in the criminal context and immigration context, but they also raise several key legal and policy-based considerations.

The inability for criminal defendants to resolve their criminal cases is a long-standing issue, even in the federal criminal context.[187] Once an individual is

185. ACLU, *Decarcerating New Jersey: A Transformative Vision of Justice*, 6, 11 (June 28, 2023), https://perma.cc/4SLG-K2XK

186. *ICE Detainees*, TRAC IMMIGR. (last visited Oct. 1, 2024), https://perma.cc/229L-WB3Z.

187. Some federal courts have declined to release individuals with ICE detainers issued against them because of the risk that they cannot attend future hearings. *See* John Lamont, *A Maze Without Escape: Navigating the Bail Reform Act and the Immigration and Nationality Act,* 26 TEX. J. C.L. & C.R. 57, 60 (2021). Several federal circuit courts have acknowledged the ability for ICE officials to detain noncitizens facing federal criminal charges, even if the federal court agreed to release the defendant pursuant to the federal Bail Reform Act. *See United States v. Lett*, 944 F.3d 467, 469 (2d Cir. 2019); *United States v. Soriano Nunez*, 928 F.3d 240, 245-46 (3d Cir. 2019); *United States v. Veloz-Alonso*, 910 F.3d 266, 269 (6th Cir. 2018). Notably, the Second Circuit has found that a federal court's determination that an

granted bond by a criminal authority, ICE can exercise its power to detain that individual and transfer them to ICE custody, oftentimes many miles away from the jurisdiction of the underlying criminal proceedings.[188] As ICE has expanded its practice of detaining individuals miles away from their home states, it has become increasingly difficult for individuals to resolve their criminal proceedings or maintain access to representation, family and other community support. This is precisely what happened to Oscar as well as other many other individuals facing immigration detention.[189] Oscar was unable to resolve his underlying criminal proceeding due to his continued immigration detention, even when there was an offer for pre-trial intervention that would allow him to avoid a conviction.

Other practitioners have reported that their greatest challenge has been helping their detained noncitizen clients' access to the criminal justice system following their detention by ICE. Multiple practitioners reported that a significant part of their work was assisting their clients in accessing the criminal justice system, including coordinating with the public defender or criminal attorney or even in some cases, assisting their clients in requesting a public defender before the New Jersey courts. Several attorneys reported that in New Jersey municipal court, defendants are not automatically afforded counsel until they request one directly with the court at a hearing. Often, this is not possible when the individual is detained by immigration officials and thus, cannot attend their municipal court hearing. Some municipal courts will refuse to assign a public defender without an actual appearance from the defendant, even if the defendant has requested a public defender in writing. Additionally, the detainee's ability to access virtual municipal court hearings is left completely at the discretion of ICE. Nearly all the practitioners interviewed reported that they spend a considerable amount of time advocating with ICE and detention center officials to have their clients produced via video to their criminal court hearings, often with little to no result. The answer from officials at one facility, Moshannon Valley Processing Center in Philipsburg, PA,[190] has largely been a blanket refusal to allow detainees housed within the facility access technology to attend their criminal court hearings while detained. Currently, ICE has no formal procedures in place to ensuring that detainees in their custody can attend criminal court hearings or any other significant state legal process, even if there is a significant impact of the state legal proceedings on the immigration case. Not only does this

individual is not a flight risk or a danger to the community under the federal Bail Reform Act has no bearing on their potential detention under the INA. *See Lett,* 944 F.3d at 470.

188. Monsy Alvarado, *ICE Continues to Pull Its Detainees from NJ*, NJ SPOTLIGHT NEWS: IMMIGR. (Aug. 5, 2021), https://perma.cc/UK2D-AAUE. *See also* Jordan Levy, *Why ICE Is Leaving New Jersey County Jails*, NEW REPUBLIC (Aug. 27, 2021), https://perma.cc/QVV5-P8GBB.

189. Holper, *supra* note 56, at 599–600 (noting the documented incidents of ICE failing to bring a defendant to criminal court, resulting in pending criminal charges to stall indefinitely and remain open longer than necessary).

190. The practitioners interviewed reported that many detainees who are arrested within the state of New Jersey are currently housed at this detention facility.

place a significant hindrance on detainees' access to justice and state legal systems, but it also interferes with the state's ability to resolve and adjudicate important criminal proceedings.

V. A PATH FORWARD: CAN THE IMMIGRATION SYSTEM CATCH UP TO CRIMINAL JUSTICE AND BAIL REFORM?

The comparison of the immigration detention system and criminal pre-trial detention system reveals a significant mismatch between the systems. The immigration system selectively borrows from the criminal legal system to deprive liberty to noncitizens based on perceived risks of danger or flight risk.[191] Even though most noncitizens detained by our immigration system have little to no criminal history, our immigration system nonetheless borrows heavily from our criminal justice system to favor detention over release. Yet the immigration detention system fails to borrow elements from the criminal legal system when it comes to legal protections and reforms to the way in which adjudicators determine how individuals are detained.[192] As states and localities implement bail reform and reimagine how they make detention decisions, it is clear that the immigration detention system must follow suit through reform of its own. Such reform will require an overhaul of the framework of how our immigration system approaches detention. While the immigration system can learn many lessons from the bail reform efforts—best demonstrated by New Jersey's model, these recommendations merely serve as a starting point to bring the immigration detention system closer to the current understanding of detention and liberty in the criminal context. These reforms do not start, or end, at the federal level; rather, even states and local governments play an important role in guiding immigration detention policies and reform. So long as there continues to be significant similarities—and direct overlap—between the two systems, both federal and state actors have an interest and a duty to ensure noncitizens facing potential detention do not face excessive or unfair barriers to liberty.

A. *Reforming the Immigration Detention System*

Immigration detention must follow suit with the trends established by bail reform throughout the country. Currently, the immigration detention system seems to borrow heavily from the criminal justice system when it comes to consequences and implementation of detention, but with none of the procedural or substantive evolutions to preserve individuals' liberty interests.[193]

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191. Gilman, *supra* note 14, at 214. ("Migrants are treated as similar to criminals simply because of their status as noncitizens in immigration court deportation proceedings.")

192. *Id*. ("...immigration court deportation proceedings are treated as dis-tinct from the criminal process for the purpose of incorporating protections and les-sons learned from the criminal pretrial justice experience, such as prompt, independ-ent, and careful scrutiny of detention decisions and the move away from monetary bond.").

193. *See id*. at 195; Hernández, *supra* note 55, at 1393. (arguing for bringing criminal procedure to immigration detention determinations to overhaul the decision making and adjudication process).

The primary reform requires legislative and political overhaul of our immigration system. First, the most significant change that is required is the elimination of monetary bond in immigration proceedings. The research is clear that cash bail in both the criminal and immigration detention context is ineffective at best, and deeply unfair and harmful to poor communities at worst. As demonstrated in New Jersey's recent efforts to eliminate cash bail, the use of non-monetary alternatives better serves the state's goal to protect public safety and to ensure that criminal defendants attend their criminal court hearings. All evidence suggests that the same would be true if implemented in the immigration detention context.

Second, beyond the elimination of cash bail, significant reform is required for the way that immigration officials approach detention and release requests to bring it in light with criminal justice reform. As in other instances of civil confinement, the burden of proof should fall on the government as the arresting and detaining authority. Particularly given the current regime of having ICE make the initial custody determination before turning for a redetermination before an immigration judge, it should fall on the detaining authority to justify detention. This is an important due process protection, now recognized in the criminal pre-trial context. Under New Jersey's pre-trial detention system, the prosecution must move to detain an individual pending their criminal trial with the burden of proof falling on them. The same should apply to ICE to have them demonstrate that the noncitizen poses a risk of flight or a danger to the community.

Although burden-shifting is an important in preserving the due process rights of detained noncitizens, it is only one missing piece of the puzzle. Regardless of who ultimately bears the burden of proof, our system of immigration detention will not improve so long as there continues to be a lack of meaningful standards and guidance for detention in the immigration context. The current legal standards for custody determinations are so broad that it has resulted in a large percentage of bond requests being denied. There is no clear guidance for how ICE officers and immigration judges should weigh respective risk factors, resulting in an over-inclusion in determinations for "dangerousness" or risks of recidivism.[194] Existing BIA precedent, *Matter of Guerra*, provides insufficient guidance to adjudicators on how to properly determine detention standards.[195] Legal standards should be further developed to incorporate actual risk assessment standards that properly weigh a variety of factors, as used in the criminal contexts. The implementation of risk assessment

194. Gilman, *supra note* 14, at 190–91 ("Because pretrial detention of release-eligible individuals in deportation proceed-ings is best described as automatic rather than limited to cases of individualized necessity, the custody determination process essentially treats every migrant in depor-tation proceedings as posing a threat to security or a significant risk for failure to appear at hearings.").

195. *Guerra*, *supra* note 38, at 40 (holding that immigration judges have broad and essentially unfettered discretion in what factors they consider and how they weigh them in proceedings); Gilman, *supra note* 14, at 188-190 (noting the lack of meaningful individualized decisions on detention in immigration court proceedings).

tools that provide analytical framework for ICE officers and immigration judges in evaluating flight risk and danger to the community outside of the amorphous standards that exist now. Even without jurisprudential change, the agencies themselves—both DHS and DOJ—can implement regulatory and internal policies to incorporate risk assessment instruments as part of the custody determination process. ICE previously used a risk assessment tool, albeit an archaic and ineffective tool. However, as demonstrated in criminal justice systems across the country, including New Jersey, risk assessment tools have significantly evolved to effectively evaluate flight risk and danger to the community in ways that eliminate reliance on cash bail and decrease overall detention rates. Ideally, similar risk assessment tools and guidance should be introduced for immigration custody proceedings that allow for individualized determinations on detention. At minimum, ICE officials and immigration judges should properly weigh a variety of factors that are currently not considered: the noncitizen's ability to afford bond, non-monetary conditions and alternatives that are available beyond the extreme of electronic monitoring, and access to social services, such as drug and alcohol treatment, community monitoring, therapy, among other considerations. If ICE officers and immigration judges are provided guidelines and tools that allow them to focus on the unique characteristics of each detained noncitizen, then there will be more guardrails to ensure that release and detention decisions are based on individualized determinations on flight risk and danger to the community factors, which are the two main considerations in civil detention.[196]

To the extent that an individual has a pending criminal case, ICE officers and immigration judges should evaluate the evidence carefully in light of the fact that the allegations are yet unproven. In particular, in situations where an individual was granted release pursuant to bail reform, the adjudicator should take into consideration the evaluation of the state actors. Oftentimes, the state, an entity responsible for protecting the safety of its residents, has already determined that the individual is not a flight risk or a danger to the community as well as enrolled the individual in pre-trial services to help serve justice and public safety. While the federal government is not bound to such state court decisions, the state's evaluation of a noncitizen's risk of flight and alleged danger to the community should be a factor in ICE or the immigration judge's decision to release an individual, particularly given the state's interest in protecting its community and ensuring that individuals are able to attend their criminal court hearings. Such a proposal would be in line with other areas of immigration law that defer to the judgment and decision-making of state entities.[197]

196. Hernández, *supra* note 55, at 1407.

197. In determining whether a state conviction matches a deportable immigration offense, courts must apply the categorical approach, focusing solely on whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version

One scholar, Mary Holper proposes a Judicial Recommendation Against Immigration Detention (JRAID) process,[198] modelled after Judicial Recommendation Against Deportation (JRAD) law that existed in between 1917 and 1990 before it was repealed by Congress.[199] The JRAD was a binding "judicial recommendation," often issued at the time of sentencing, that directed immigration authorities not to deport a noncitizen for a crime of which they were convicted.[200] Both criminal justice and immigration officials were provided with notice and procedure to object to the usance of a JRAD.[201] The underlying justification arose from a the principle that the criminal court judge who sentences a noncitizen convicted of a crime was in fact in the best position to decide whether that person should be deported.[202] Although this was ultimately repealed as part of larger legislative efforts to expand and expediate deportation of noncitizens with criminal convictions,[203] many state criminal court judges[204] and scholars opposed the repeal. Holper proposes the JRAID process to allow for state criminal judges to issue recommendations against detention of a noncitizen during the pendency of their immigration proceedings.[205] A binding recommendation would allow for three key pieces of reform: (1) the decision of whether an individual poses a danger would remain with the state criminal court, which is in a better position to analyze that within the context of the criminal justice system and community it serves[206]; (2) would allow immigrants who have been released from criminal custody to continue to benefit from the bail reform policies (such as access to social services and the ability to resolve their criminal cases) that facilitated their release from criminal custody without subjecting them to detention by ICE; and (3) would eliminate the risk of "minitrials" in which ICE or an immigration judges' attempt to ascertain guilt in proceedings without judicial due process.[207]

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of the enumerated crime, while ignoring the particular facts of the case. *See* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); Matter of Pichardo-Sufren, 21 I&N. Dec. 330, 335-36 (BIA 1996) (noting that the categorical approach principle that immigration officials not looking behind the record of conviction is "the only workable approach" as Immigration Judges cannot adjudicate guilt or innocence) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984)). Supreme Court precedent has long held that federal government officials, including immigration officials and judges, cannot engage in "relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. 184, 200-01 (2013) (citing to Taylor v. United States, 495 U.S. 575, 601 (1990)).

198. Holper, *supra* note 56, at 577.

199. *Id*. at 575–76.

200. *See id*. at 575.

201. *See id*.

202. *See id*. (citing 53 CONG. REC. 5171 (1916) (statement of Rep. Powers) ("[A]t the time the judgment is rendered and at the time the sentence is passed, the [sentencing] judge is best qualified to make these recommendations.")).

203. *See id* at 576–77.

204. *See id*. at 576–77.

205. *See id*. at 578.

206. *See id*. at 601–02.

207. *See id*. at 601 ("It is simply inefficient for the immigration judge to repeat that same inquiry, especially when they do not have as many tools that can help them make an unbiased decision.").

While a binding recommendation that is prepared contemporaneously with the criminal court's pre-trial detention decision could avoid immigration officials and judges taking it upon themselves to evaluate criminal conduct, there remains challenges to such an approach. First, Congress seems particularly unlikely to issue any immigration reform that would decrease immigration detention, particularly for individuals who have some form of criminal history and thus, have been "criminalized" in the eyes of many political and public figures. Second, the federal government is extremely unlikely to concede the authority to determine dangerousness or flight risk completely to state actors, arguing that federal immigration officials have particular concerns that would not be addressed in a criminal court. Finally, state court judges may be reluctant to make findings that impact immigration enforcement policies under the current political and social culture. However, it is important to note that the overlap between the criminal justice and immigration systems have made this a forgone conclusion as the decisions and findings in state criminal court do have concrete legal and substantive impact in immigration proceedings. Nonetheless, the need to limit ICE's and immigration judges' rehashing of criminal conduct or allegations in immigration proceedings remains apparent, whether it be through a binding recommendation from a state judge or guidance to immigration officials requiring them to heavily weigh or defer to dangerousness determinations to actors within the criminal justice system.

Finally, the immigration detention system needs an overhaul of its ATD program to allow a more robust system of pre-trial services that include coordination with community organizations and interventions outside of just electronic and physical monitoring. The current system relies heavily on electronic and GPS monitoring in a large percentage of cases with little to no other services. Jurisdictions like New Jersey that have reformed their criminal detention systems have expanded their reliance on alternatives to detention to capture a wide range of monitoring options that better coincide with risk assessment decisions. Importantly, in both the immigration and criminal justice setting, any reliance on alternative to detention programs require significant transparency and regular monitoring to ensure that they are not merely supplanting unnecessary detention, increasing surveillance of vulnerable communities, or reinforcing racial and ethnic biases in their implementation. This is precisely why advocates in New Jersey continue to advocate for consistent oversight and regular evaluations for the effectiveness of the current pre-trial detention system to ensure that the system achieves its goals of liberty, fairness and justice.

These proposals serve as the starting point for bringing the immigration detention system and custody determinations within the standards that are becoming the norm in the criminal justice context. Of course, all these reforms require political and social mobilization. The federal government currently has no incentive to conduct robust analysis of detention practices,

or to overhaul its detention centers and eliminate its reliance on monetary bond. Any reform to the immigration detention system requires a complete shift in the political and social landscape that currently underpins discussions of immigration reform. The recent passing of the Laken Riley Act proves that there is no political willpower in Washington, D.C. to *reduce* immigration detention, and DHS has consistently lobbied for increased funding and support for immigration detention. Further, the Biden administration has currently taken efforts to restrict noncitizens' ability to enter and remain in the U.S. as part of its legislative agenda, and the current Trump administration is extremely unlikely to pivot away from a policy of detention. The lack of political willpower to change the landscape of immigration detention stands in stark contrast with the current national conversation on criminal justice reform and the elimination of cash bail. However, this was not always the case for the criminal pre-trial detention context. At one point, the thought of eliminating cash bail—and the large industry of bail bondsman supporting it—seemed like a fantasy. As jurisdictions have made strides to eliminate cash bail and other unfair pre-trial detention practices in their criminal justice system, advocates and communities should continue to rally for the same treatment in the immigration context.

B. *Local and State Policy Changes for Immigrant Communities*

States like New Jersey that have implemented bail reform have consistently cited to their legitimate interests in eliminating the use of cash-bail, decreasing the rates of detention among their population, improving efficiency and appearance rates of defendants in criminal proceedings, and overall, reduction in recidivism and violent crime as part of long-term overhaul of criminal justice.[208] The immigration detention system stands in stark opposition to those goals and, in fact, undermines state interest in implementing criminal justice reform. Because of this tension between state and federal interest, it is particularly important to look at what policy and practices states have taken—and should take—in relation to tacking immigration detention.

States and local jurisdictions have become major actors in immigration enforcement, often implementing policies and reforms to influence the way that immigration enforcement and detention operates within its jurisdictions. For example, the Secure Communities program, expanded during the Obama administration, involved all state and local law enforcement agencies in ICE operations.[209] Every individual arrested by state or local law enforcement had their fingerprints submitted not only to the Federal Bureau of Investigation

208. *Report of the Reconvened Joint Committee On Criminal Justice*, N.J. JOINT COMM. ON CRIM. JUSTICE 2 (June 7, 2023), https://perma.cc/BT54-PHH9 (finding that Criminal Justice Reform in New Jersey has "key objectives: (1) reduction in detention of people charged with minor offenses; (2) consistent incarceration of defendants accused of serious crimes; (3) prevention of new criminal activity; and (4) improved court appearance rates for people on pretrial release.").

209. Jennifer M. Chacón, *Immigration Federalism in the Weeds,* 66 UCLA L. REV. 1330, 1343 (2019) (citing Sameer Ashar, *Movement Lawyers in the Fight for Immigrants Rights,* 64 UCLA L. REV. 1464, 1472 (2017)).

(FBI) database, but also to a DHS database used to determine whether a noncitizen was removable.[210] ICE would then issue a detainer request to the local or state prison facility where the individual was held.[211] Many jurisdictions attempted to opt out of the Secure Communities database screening program, only to be told by DHS that there was no opt out option.[212] Instead, jurisdictions began redesigning their arrest policies to enable them to decline compliance with ICE detainer requests.[213] Throughout the country, jurisdictions began finding that absent probable case, a DHS request that a criminal defendant remain detained pending their transfer to ICE custody violated the Fourth Amendment right to be free from unreasonable seizure.[214] Legal challenges against state compliance with ICE detainers appeared in courts around the country, and some states passed legislation or internal directives prohibiting the honoring of ICE detainers without probable cause to support the detention.[215]

In passing bail reform, states have expressed a strong interest and desire to reduce detention in their communities. This extends to reducing the impacts of immigration detention. States such as New Jersey and California have passed laws to prevent state, local, and private entities from entering into contracts with ICE to detain immigrants within the state's territories.[216] Through these laws, states have recognized their interests in the health and safety of individuals detained within their territory and expressed concern over ICE enforcement undermining community relationships between noncitizens and local agencies.[217] Although California's attempts to end immigration detention were struck down by the Ninth Circuit, New Jersey's efforts at eliminating immigration detention and enforcement within its territories has been a lengthy process for advocates. It led to some successful attempts at reducing cooperation between local law enforcement and ICE, as well as the

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210. *Id.*

211. *See id.*

212. *See id.* at 1343 (noting various local California communities attempts to opt out of the Secure Communities Program).

213. *See id.* at 1343–44.

214. *See id.* at 1344.

215. *See id.* California's Trust Act prohibits state and substate actors from holding individuals subject to an ICE detainer absent a judicial warrant. *See* CAL. GOV'T CODE §§ 7282–7282.5. In New Jersey, the state Attorney General issued the "Immigrant Trust Directive," which mandated a statewide policy to limit state and local cooperation with ICE, including the honoring of ICE detainers absent specific conditions. N.J. ATT'Y GEN., IMMIGRANT TRUST DIRECTIVE, NO. 2018-6 V2.0 (2018), https://perma.cc/X579-8RPJ.

216. California Assembly Bill No. 32 prohibits contacts with private, for-profit prison facilities. CAL. PENAL CODE §§ 5003.1, 9500–05. Similarly, New Jersey Assembly Bill 5207 bans both state, local and private entities from forming contracts with ICE for immigration detention. N.J. STAT. ANN. §§ 30:4-8.15 to 16.

217. Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 322 (2015). *See* Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SEC. 509, 521, 532 (2017). *See e.g.*, N.J. STAT. ANN. § 30:4-8.15 (The State's responsibilities include "ensur[ing] respect for . . . human rights and civil rights [and] . . . protect [ing] the health and safety . . . of individuals detained within New Jersey.").

prohibition of immigration detention within the state. Such policies are aligned with New Jersey's broader efforts at tackling detention, criminal justice reform, and community justice. However, these policies have not been without consequences. ICE responded by transferring numerous detainees out of New Jersey to detention centers in other parts of the country where they would be kept far from family, community, and representation.[218] Moreover, practitioners have reported that many local jurisdictions and law enforcement actors continue to cooperate with ICE when it comes to honoring enforcement requests and detainers, despite statewide policy. Due to the fractured nature of local jurisdictions, there is limited oversight and reporting to ensure compliance with broader statewide policies.

Outside of sweeping state policies, individual state actors have an impact on immigration enforcement. As Jennifer M. Chacon outlines in her examination of California policy, individual police officers and agents have a huge influence on immigration enforcement: "whether and how agents make such arrests, how they handle arrestees' information, and how prosecutors process and charge these cases, all constitute discretionary moments that shape immigration enforcement."[219] Each individual police department and sheriff's office can implement internal policies that substantially change if and when an individual is subject to immigration enforcement.[220] For example, a New Jersey directive prohibits law enforcement from inquiring about immigration status unless this inquiry was (1) necessary to an investigation for an indictable offense and (2) relevant to such offense was upheld as not being preempted by the INA.[221]

States and local jurisdictions should develop policies on how local law enforcement interacts with federal immigration law, particularly in line with their priorities on bail reform, reducing detention, and providing support for immigrant communities. Internal policies should address whether law enforcement should honor ICE detainers, particularly given the path forward in reforming pre-trial criminal detention and reducing detention populations. Because some individuals who are released pursuant to bail reform and then detained by ICE often lack access to state legal systems and processes, local jurisdictions should develop policies for ensuring continued access and limiting the impacts of such detention. For example, during criminal pre-trial detention hearings, the criminal court judges and prosecutors could assert the state's position that the individual should not face further detention by ICE for a variety of reasons. These can include that state and local officials have already found the individual not to be a danger, as evidenced by the result of

218. Monsy Alvarado, *ICE Continues to Pull Its Detainees from NJ*, NJ SPOTLIGHT NEWS: IMMIGR. (Aug. 5, 2021), https://perma.cc/2GVB-PA8J. *See also* Jordan Levy, *Why ICE Is Leaving New Jersey County Jails*, NEW REPUBLIC (Aug. 27, 2021), https://perma.cc/U626-SLKV.

219. Chacón, *supra* note 209, at 1380.

220. *See id*. at 1381.

221. Cnty. of Ocean v. Grewal, 475 F. Supp. 3d 355 (D.N.J. 2020), *aff'd sub nom.* Ocean Cnty. Bd. of Commissioners v. N.J. Att'y Gen., 8 F.4th 176 (3d Cir. 2021).

the pre-trial criminal hearing, or noting that the individual will have access to pre-trial social services and other resources that would make it in the best interest that the individual is not detained, but that minimize any concerns regarding flight risk or danger. While these findings may not be binding on immigration officers and judges, they can serve as an important record for individuals then seeking release from an immigration judge, given that a state entity has already deemed an individual not to be a flight risk or danger. As outlined above, if the federal government were to implement guidance or regulation to force immigration officials to defer, or better yet, comply, with judicial recommendations against detention—or JRAID as proposed by Holper—then that could have a huge impact on noncitizens who have benefited from bail reform. It would unify the state and federal interests by allowing an individual to benefit from pre-trial intervention and release conditions as well as allow a noncitizen to access both the criminal justice and immigration system.

Finally, state and local jurisdictions should implement better administrative policies that allow individuals access to the criminal justice system even if they are detained by ICE, such as having state courts order ICE to produce the detainee for an upcoming criminal hearing. The biggest challenge reported by practitioners was the inability for clients to access the criminal justice system, particularly with municipal courts, to address their pending criminal matters or even, request a public defender to initiate the process of addressing their criminal case. This creates major due process issues, as individuals are unable to access counsel, and such a system prevents the administration of justice. Internal policies must be developed to accommodate defendants in immigration custody who are otherwise unable to access the criminal justice system. Given the significant impediment on state's interests in ensuring fairness and justice in their criminal justice system, states should leverage these concerns in advocacy with local and national immigration agencies to ensure that the rights of defendants within their jurisdiction are being preserved.

CONCLUSION

The criminal justice system has been gradually eliminating its reliance on cash bail and reforming what pre-trial criminal detention can look like, as New Jersey's example shows us. Jurisdictions which have adopted comprehensive bail reform efforts have shown a decrease in the number of criminal defendants who face detention before their trial. These efforts can be adopted by the immigration detention systemand mirror the successes seen within the criminal justice system. First, the immigration detention system needs to re-evaluate its reliance on monetary bail, given the number of individuals who remain detained because they cannot afford their bail, and the lack of alternative non-monetary release options. Second, the immigration detention system needs to overhaul its legal standards and risk assessment analysis when it comes to custody redeterminations, given that most of such requests are

currently denied in immigration courts. While more empirical data is necessary to better understand what factors immigration judges consider denying bond, there is a disconnect between the way state criminal courts and federal immigration courts view flight risk and danger. The immigration detention system needs to adopt a more nuanced approach similar to criminal justice system has adopted alternatives to detention, such as community supervision and rehabilitation services. This reform must include an overhaul of the ATD program to a allow a more robust system of pre-trial services whicht includes coordination with community organizations and interventions outside of electronic and physical monitoring. Lastly, this article proposes that states must develop policies that are responsive to the impacts of newly considered bail and criminal justice reform policies on local immigrant populations. As criminal justice reform takes hold in many states and local jurisdictions, the immigration detention system should be reformed in line with the priorities.