

NOTES

Resisting Racialized Immigration Enforcement through Community Bond Funds

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I. INTRODUCTION

Although the United States is often called a “nation of immigrants,” the social and policy responses to incoming immigrants are often marked by xenophobia and fear.¹

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1. See, e.g., Chinese Exclusion Act., 18 Op. Att’y. Gen. 542 (1887); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (rejecting constitutional challenges to the Chinese Exclusion Act); David C. Atkinson, *Anti-Irish Nativism and the Local Roots of Federal Immigration Restriction*, 42 *DIPLOMATIC HIST.* 172, 175 (2018) (reviewing HIDEAKA HIROTA, *EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017)); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 *FORDHAM INT’L L.J.* 141 (2015) (analyzing in detail the influence of Mexican criminality on American law and policy).

This is especially true for immigrants perceived as non-white.² These responses have taken different forms,³ but the practice of aggressively detaining immigrants is relatively recent.⁴ During the last few decades, an increasing number of noncitizens have been subject to removal proceedings⁵ and detention during the process.⁶ The shift toward detention is consistent with the use of prisons and the criminal justice system as the primary response for all types of social problems from drug addiction to homelessness.⁷ As the immigration legal system has increasingly utilized detention, it has grown to resemble the criminal justice system. Moreover, the growing emphasis on crime control within the immigration system reproduces the racial disparities of the criminal justice system.⁸ The result is a sprawling, quasi-punitive system: immcarceration.⁹

“Immcarceration,” coined by Anil Kalhan, encapsulates the growing national phenomenon in which an alarming number of immigrants, alleged to have violated civil

2. See generally Kitty Calavita, *Immigration Law, Race, and Identity*, 3 ANN. REV. L. & SOC. SCI. 1, 2 (discussing how anti-blackness has shaped U.S. immigration and naturalization law); ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (analyzing the history of racial disparities in U.S. immigration and criminal law enforcement).

3. See T. ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 2 (8th ed. 2016) (“Some federal laws have been blatantly racist Persons have been excluded or deported for their political beliefs. Enforcement of the immigration laws has, at times, violated fundamental notions of fairness and decency. Noncitizens continue to be scapegoats for some of the problems of American society.”).

4. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-43 (2000) (discussing expansion of deportability grounds); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 247, 248 (2017).

5. While the terms used to describe the expulsion of noncitizens from the country have changed over time, this paper will use “removal” and “removal proceedings” in accordance with the Immigration and Nationality Act § 237. General Classes of Deportable Aliens. 8 U.S.C.A. § 1227 (“Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens”). It will also avoid the use of the dehumanizing term “alien” except where necessary for accuracy within quotations.

6. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45 (2010) (detailing categories of noncitizens subject to detention: individuals alleged to be removable due to criminal allegations, legal permanent residents and asylum-seekers deemed to be inadmissible when they attempt to enter the country, and noncitizens with final administrative removal orders).

7. KATHERINE BECKETT & STEVEN HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 22 (2010); see also, Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621, 624 (2014) (“Perhaps it is no surprise that a society that relies so heavily on incarceration to address problems of crime and general social disorder would turn to the same model to handle concerns about migration. The United States does, after all, lead the free world in its prison population rate.”).

8. See, e.g., JULIANA MORGAN-TROSTLE, KEXIN ZHENG & CARL LIPSCOMBE, BLACK ALLIANCE FOR JUST IMMIGRATION, THE STATE OF BLACK IMMIGRANTS PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 15, <https://www.sccgov.org/sites/oir/Documents/sobi-deprt-blk-immig-crim-sys.pdf> [<https://perma.cc/6R8G-XA9F>] (“Black people are far more likely than any other population to be arrested, convicted, and imprisoned in the U.S. criminal enforcement system – the system upon which immigration enforcement increasingly relies.”).

9. Immigration detention is legally “civil” rather than “criminal” detention. For a discussion of the distinction and its implications, see Chacón, *supra* note 7, at 622-23 (explaining that as a legal matter, the designation means that people in immigration detention are not entitled to the same protections that would apply if they were being incarcerated for a crime such as constitutional limitations on the length of pretrial detention and a right to counsel at the government’s expense to assist in the defense if the defendant cannot afford it).

immigration law, are detained in jail-like settings.¹⁰ It includes people held in an array of secure settings: immigration detention centers under the direct control of the law enforcement arm of the Department of Homeland Security (“DHS”), U.S. Immigration and Customs Enforcement (“ICE”);¹¹ detention centers run by private prison companies under contract with DHS;¹² confinement by the Justice Department’s U.S. Marshals Service due to allegations of committing a federal crime;¹³ Bureau of Prisons facilities after conviction for a federal immigration crime;¹⁴ and local jails and prisons within states that criminalize conduct inextricably linked to a person’s status as a migrant, such as fraudulent use of a social security number or “self-smuggling.”¹⁵ This Note will focus on the subset of people affected by immcarceration that are detained by ICE in immigration detention centers.

Because America’s immigration system increasingly resembles its criminal system, efforts to challenge the carceral state can provide a framework for counteracting immigration enforcement. This is especially relevant because the racial disparities present in immcarceration mirror similar disparities produced by mass-incarceration. Immcarceration advocates can learn from criminal justice reform initiatives by understanding the pretrial justice movement. Hundreds of thousands of defendants facing criminal charges are held for pretrial confinement in local jails during the pendency of their court proceedings unless they can post bail or pay for the services of a bail bond agents.¹⁶ Since its inception in the 1960s, the pretrial justice movement has focused on ending money bail and decreasing jail populations.¹⁷ Although the legal machinations of criminal detention and immigration detention are different, the successes and failures of the pretrial justice movement can inform the movement challenging immcarceration. For instance, while the pretrial justice movement has seen success through grassroots organizing, legislation, and litigation,¹⁸ it has failed to make a dent in pretrial confinement numbers.¹⁹ Lessons from this movement and its critiques can help guide immcarceration reformers on a path to more transformative change.

Community bail funds are an example of one promising tactic that has emerged from the pretrial justice movement. These funds pool money to post bail on behalf

10. Kalhan, *supra* note 6, at 43.

11. See García Hernández, *supra* note 4, at 246-47.

12. Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 975 (2016).

13. See García Hernández, *supra* note 4, at 247.

14. *Id.*

15. *Id.*

16. See *infra*, Section III; see also Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/LY5N-GXLJ>] (showing that in 2018, 536,000 people were being held pretrial in local jails nationwide).

17. This paper will use the term “pretrial justice” to refer generally to “bail reform,” “money bail reform,” and “pretrial reform efforts.” See PRETRIAL JUST. INST., *Why We Need Pretrial Reform*, <http://www.pretrial.org/the-problem/pretrial-injustice/> [<https://perma.cc/32QJ-SKKA>] [hereinafter PRETRIAL JUST. INST., *Why We Need Pretrial Reform*].

18. See *infra* Section III.

19. See PRETRIAL JUST. INST., *Why We Need Pretrial Reform*, *supra* note 17.

of criminal defendants who remain in jail pre-trial due to their inability to pay.²⁰ The use of these funds has been described as “community nullification” because of the way that it enables “popular participation in an individual case to facilitate larger resistance to the policies and practices of state actors.”²¹ Because a defendant in the criminal system is supposed to be presumed innocent, bail should be set at an amount high enough to ensure that they return to court for proceedings but not excessive.²² Nonetheless, in the name of “public safety” and in the face of powerful bail bondsman industries,²³ hundreds of thousands of defendants sit in local jails every year, forcing them to choose between fighting their cases and pleading guilty to go home.²⁴ Community bail funds directly support these people, while simultaneously pushing for broader systemic change.²⁵

Similar to the pretrial criminal detention context, some people currently in immigration detention are eligible to have bonds set and posted, and be released from detention.²⁶ The process by which someone is released on bond from immigration detention is similar, yet different, from that of pretrial criminal detention. In the immigration context, the financial collateral posted to secure a person’s release is called a “bond.” Bonds can be set by ICE officers or later by an immigration judge.²⁷ As with the invocation of public safety in pretrial bail setting, the Bureau of Immigration Appeals directs judges to consider a non-exhaustive list of factors including “whether the respondent poses a danger to the community.”²⁸ Once a bond is set, United States citizens may post bond on behalf of the detainee. This Note will argue that the use of bond funds to resist incarceration can be a form of community nullification.

Section I explores the experience of immigration detention, the legal framework of immigration detention, and the historical developments that have led to its increased use. Section II considers this development within the broader context of racialized over-policing of communities of color which has spurred the pretrial justice

20. See, e.g., BROOKLYN CMTY. BAIL FUND, <https://brooklynbailfund.org/> [<https://perma.cc/5JRL-WN2C>].

21. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017).

22. See PRETRIAL JUST. INST., GLOSSARY OF TERMS AND PHRASES RELATING TO BAIL AND THE PRETRIAL RELEASE OR DETENTION DECISION 3 (July 2015), [https://www.pretrial.org/download/pji-reports/Glossary%20of%20Terms%20\(July%202015\).pdf](https://www.pretrial.org/download/pji-reports/Glossary%20of%20Terms%20(July%202015).pdf) [<https://perma.cc/83BP-8622>] [hereinafter PRETRIAL JUST. INST., GLOSSARY OF TERMS].

23. Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 590 (2018).

24. Udi Ofer, *We Can’t End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), <https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> [<https://perma.cc/SZ6Y-PL72>].

25. See BROOKLYN CMTY. BAIL FUND, *supra* note 20 (“Fighting for justice one bail at a time”).

26. See *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017) (class action suit on behalf of immigrants detained in the Central District of California holding that imprisoning someone “merely on account of his poverty” is a due process violation and requiring that ICE officers and immigration judges consider a person’s ability to post a bond when determining conditions of release); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2144-45 (2017) (discussing the reasons that ICE chooses to detain individuals who are eligible for release).

27. See *infra* Section III.B.

28. *In re Guerra*, 24 I&N Dec. 37, 40 (B.I.A. 2006).

movement. Section III then introduces the concept of community nullification, considering the use of bail funds to resist the widespread, detrimental use of jails for pre-trial criminal detention. Finally, this Note will explore the concept of community nullification and consider its application to the increasingly utilized tool of bond funds for detained immigrants.

II. IMMIGRATION DETENTION

Despite its prevalence today, detaining immigrants has not always been common practice in the United States.²⁹ This section will consider the legal justification for immigration detention, the experience of detention and the role that crime control and race have played in its increasing use.

A. *Development of the Legal Framework for Immigration Detention*

Congress passed the Immigration and Nationality Act (“INA”) in 1952, which gives immigration officials broad authority to detain immigrants. However, it was not until the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) in 1996 that the detention of immigrants became commonplace.³⁰ More than 440,000 people are now placed in immigration detention each year, which is double the number of federal inmates serving sentences for all federal crimes combined,³¹ and far exceeds the detention rate for immigrants in any other country.³² In 2007, Congress created a unique quota system mandating DHS to maintain no less than 34,000 detention beds available at all times.³³ In 1994, approximately 6,000 noncitizens were held in detention on any given day.³⁴ By 2016, that number had grown to 37,000.³⁵ This means that ICE operates the largest detention and supervised release program in the country.³⁶ This ever-expanding system is, unsurprisingly, expensive. Through a sprawling network of over 500 facilities,³⁷ the

29. See García Hernández, *supra* note 4, at 248 (“[I]mmigration imprisonment is a historical anomaly. After relying on confinement in the ugly years of the Chinese exclusion era, the United States did not lock up migrants for migrant-related activities for much of the twentieth century. That historical norm shifted suddenly and radically in the mid-1980s.”).

30. Maria Mendoza, *A System in Need of Repair: The Inhumane Treatment of Detainees in the U.S. Immigration Detention System*, 41 N.C. J. INT’L L. 405, 409-10 (2016).

31. Marouf, *supra* note 26, at 2142. Compare the 440,000 people placed in immigration detention each year with the population total, 185,617, from the Bureau of Prisons in 2017; BUREAU OF PRISONS, *Population Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp [<https://perma.cc/V5TC-JAY6>].

32. Marouf, *supra* note 26, at 2142.

33. Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, § 562, 129 Stat. 39, 43 (2015); *see also*, Marouf, *supra* note 26, at 2145.

34. Kalhan, *supra* note 6, at 44.

35. Marouf, *supra* note 26, at 2142.

36. U.S. DEP’T OF HOMELAND SEC., IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGR. DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/3Z7C-6S8P>].

37. Kalhan, *supra* note 6, at 46.

U.S. government spends \$8.4 million per day to detain people.³⁸

B. *The Experience of Immigration Detention*

Immigration detention is legally considered civil confinement, but its physical conditions and treatment of detainees closely resemble the criminal incarceration system.³⁹ The facilities used to detain immigrants were largely built to operate as jails and prisons, and these facilities rely on “incarceration standards designed [to confine] pre-trial felons and on correctional principles of care, custody, and control.”⁴⁰ The detention facilities therefore look and feel like prisons: drab buildings often located in rural areas, secured by multiple layers of walls and barbed wire fencing.⁴¹ Detainees are also often treated like prisoners: forced to sleep in large dorms with hundreds of other people or be housed in solitary confinement,⁴² where they are frequently moved from one facility to another without warning or regard for the burden to them or their families,⁴³ unable to have contact with visitors,⁴⁴ and shackled for court appearances or appearing remotely by teleconference.⁴⁵ As in prison, detainees in many facilities are forced to work for paltry sums.⁴⁶ The food is terrible and detainees are forced to wear jumpsuits according to the level of threat they supposedly pose.⁴⁷ Medical care, where available, is insufficient.⁴⁸ Detainees are subjected to

38. Perna Lal, *Legal and Extra-Legal Challenges to Immigration Detention*, 24 ASIAN AM. L.J. 131, 133 (2017); Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply Nat'l Immigration Forum* (May 9, 2018), <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/> [<https://perma.cc/X4RU-CQK9>].

39. See generally Chacón, *supra* note 7; see also, Kalhan, *supra* note 6, at 43; T.J. Raphael, *How Immigration Detention Creates a Shadow Prison System*, THE TAKEAWAY (PRI), (May 18, 2017, 5:15 PM), <https://www.pri.org/stories/2017-05-18/how-immigration-detention-creates-shadow-prison-system> [<https://perma.cc/33GC-NDQT>]; JUST. POL'Y INST., THE COST OF CRIMMIGRATION: EXPLORING THE INTERSECTION BETWEEN CRIMINAL JUSTICE AND IMMIGRATION (2017) <http://www.justicepolicy.org/research/11453> [<https://perma.cc/E3W9-DM22>].

40. U.S. DEP'T OF HOMELAND SEC., *supra* note 36, at 2.

41. See Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO LEGAL ENCYCLOPEDIA, <https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> [<https://perma.cc/J9XY-QHTE>].

42. *Id.*

43. See HUM. RTS. INST., A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES (June 14, 2011), <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united> [<https://perma.cc/SEG3-SMPX>]; Marouf, *supra* note 26, at 2154 (“When a parent is apprehended and detained by ICE, the stress increases exponentially. Children often experience great difficulty in communicating with detained parents, due to distinct, strict visiting rules, and the expense of telephone calls to detention centers.”).

44. See Myslinska, *supra* note 41.

45. *Id.*

46. See *Menocal v. Geo Grp., Inc.*, 882 F.3d 905, 910 (10th Cir. 2018) (affirming certification of class of detainees seeking to challenge conditions of forced labor at a detention facility in Colorado).

47. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 147 (2016).

48. See Settlement Agreement, *Woods v. Morton*, No. 08-55476 (9th Cir. 2010), <https://www.aclu.org/news/ice-agrees-improve-health-care-provided-immigration-detainees-part-settlement-aclu-lawsuit> [<https://perma.cc/FU8F-AF4L>] (lawsuit alleging that lack of medical and mental health care led to unnecessary suffering and death); HUM. RTS. WATCH, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN US IMMIGRATION DETENTION (May 8, 2017), <https://www.hrw.org/>

sexual assault, and many die in detention each year.⁴⁹ Detainees have to pay exorbitant rates for telephone calls, and most amenities are not allowed within the facilities.⁵⁰ Finally, for the relatively low number of detainees who are represented by an attorney, scheduling confidential legal calls and visits can be difficult to impossible.⁵¹

C. *Race, Crime, and Enforcement of Immigration Laws*

Immigration is a multifaceted issue that can be approached from many different perspectives, such as the economics that drive migration, the civil and human rights of migrants, or the consequences of U.S. foreign policy, international interventions and global capitalism. Instead, security typically dominates the conversation about immigration. The predominant theme of security is paralleled by the punitive shift in criminal law enforcement since the 1970s. In short, “[s]ecurity became the prism through which migration was examined, and policing became the key response of choice [I]mmigration law and procedure began to adopt features emblematic of criminal policing and punishment.”⁵²

Crime control is now a principle goal of the immigration legal system and a primary driver of incarceration, as demonstrated by the trend toward cooperation between criminal and immigration law enforcement bureaucracies.⁵³ For example, the Secure Communities program vastly expanded the scale of cooperation by enlisting local law enforcement in immigration screening.⁵⁴ The Secure Communities program was designed to identify immigrants in U.S. jails and automate the sharing of information between local jurisdictions and federal immigration enforcement agencies.⁵⁵ Notwithstanding a brief discontinuation during the Obama administration, the Program has been expanding the information sharing capabilities between various criminal and immigration databases since 2008.⁵⁶ The integration of criminal and immigration law enforcement agencies as well as the expansion of immigration

report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention [https://perma.cc/D8JW-BM93].

49. See *id.*; Press Release, EndIsolation, Watchdog Organization Files Civil Rights Complaint Alleging Rising Sexual Abuse, Assault, and Harassment in U.S. Immigration Detention Facilities (Apr. 11, 2017), <http://www.endisolation.org/sexual-assault-in-immigration-detention/> [https://perma.cc/8AHF-5HMZ].

50. See Marouf, *supra* note 26, at 2154.

51. *SPLC Sues DHS for Unconstitutionally Blocking Detained Immigrants’ Access to Lawyers*, SPLC (Apr. 4, 2018), <https://www.splcenter.org/news/2018/04/04/splc-sues-dhs-unconstitutionally-blocking-detained-immigrants-access-lawyers> [https://perma.cc/2LW6-ZPYB].

52. García Hernández, *supra* note 4 at 279-80.

53. Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1485 (2012) (“Whereas immigration detention had historically been justified primarily as a means of ensuring immigration compliance, with a secondary purpose of protecting national security, today’s system increasingly functions in collaboration with criminal law enforcement systems to incapacitate allegedly dangerous individuals for the purpose of preventing potential domestic crime.”).

54. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

55. See *infra*, note 56.

56. See Alex Nowraseth, *Trump Executive Order Reestablishes “Secure Communities”*, CATO INST.: CATO AT LIBERTY (Jan. 25, 2017, 4:28 PM), <https://www.cato.org/blog/trump-executive-order-reestablishes-secure-communities> [https://perma.cc/89B3-BZRK].

detention “indicate that incapacitation to prevent future criminality has assumed unprecedented prominence as a justification for immigration detention.”⁵⁷

These shifts are not unprecedented. Nativism and racism have historically framed perceptions of and responses to immigration.⁵⁸ These sentiments are particularly acute when immigration is conceptually linked to crime control.⁵⁹ Michelle Alexander depicts modern criminal laws as evolving from slavery into the most recent iteration of a system of insidious, racialized control.⁶⁰ She warns that the “genius of the current caste system, and what most distinguishes it from its predecessors, is that it appears voluntary.”⁶¹

Alexander describes a system of criminal laws that is explicitly “color blind” but produces drastically different results for people of different ethnicities. This disparate impact characterizes the immigration enforcement system as well, likely for the same reasons.⁶² César Cuauhtémoc García Hernández analyzes detention statistics to demonstrate how they reflect racially disparate policing and enforcement of immigration laws, indicating a “systemic predisposition to confine citizens” of countries that have been racialized as non-white.⁶³ Immigration detention and deportation policy can therefore be seen as a “tactic needed to . . . maintain racial inequality and ‘colorblind white dominance.’”⁶⁴ Harsh criminal and immigration law enforcement practices can be “understood as related means of social control over marginalized communities, including poor black citizens and immigrants.”⁶⁵

III. THE PRETRIAL JUSTICE MOVEMENT

Whereas the movement to challenge immigration detention has only developed in the last couple decades, the pretrial justice movement is already in its second wave of concentrated action. The subsequent efforts have been necessitated by the fact that the procedural safeguards attained during the first wave of action failed to fundamentally solve the problem of high pretrial jail populations. A comparison with the

57. See Kreimer, *supra* note 53, at 1514.

58. See ALEINIKOFF ET AL. *supra* note 3.

59. Rebecca Sharpless, *Immigrants are Not Criminals: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 737 (2016) (“Contemporary studies show that racism and anti-immigrant sentiment are linked when it comes to crime.”).

60. See generally, MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012).

61. *Id.* at 14-15.

62. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Discriminatory Impacts of Crime-Based Immigration Enforcement*, 66 CASE W. RES. L. REV. 993, 1026 (2016).

63. García Hernández, *supra* note 4, at 284; see also, John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. DEP’T OF HOMELAND SEC. ANN. REP. 1, 5 tbl.5 (2014) (observing that Mexicans and Central Americans constitute over seventy percent of the ICE detention population between 2011 and 2013 despite the fact that Canadian and European immigration law violators could fill half of ICE’s detention population but do not).

64. Yolanda Vásquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 606-07 (quoting IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, 147-48 (2006)).

65. Sharpless, *supra* note 59, at 735; see also Johnson, *supra* note 62, at 998 (discussing the result of the coordination between the criminal and immigration law enforcement systems, in which more than ninety-five percent of the noncitizens removed annually from the United States are from Mexico and Central America, which represents a much higher percentage than the Latinx composition of the nation’s overall immigrant population).

pretrial justice movement indicates the limitations of an approach that exclusively focuses on reforming procedural rights in order to challenge incarceration. Alternatively, advocates should explore responses that enable community members to engage with and directly resist policies they do not support.

A. *Historical Development of the Movement*

The steady growth of detention populations and incarceration was part of a broader expansion of the prison industrial complex that has been underway since the 1970s, during which the U.S. prison system took a hyper-punitive turn.⁶⁶ Vowing to get tough on crime, lawmakers started implementing changes to criminal punishment laws, introducing mandatory minimum sentences, limiting opportunities for parole and probation, and adopting three-strikes laws that put repeat offenders away for long periods or life imprisonment.⁶⁷ Incarceration, lawmakers decided, would be used less for rehabilitation than for “incapacitation, deterrence, and punishment.”⁶⁸ As a result, the prison population exploded. In the next forty years, the state and federal prison population grew sevenfold to house 1.4 million convicted felons by 2003.⁶⁹ Out of a global prison population of nine million people, more than two million people inhabit U.S. prisons, jails, youth facilities, and immigration detention centers today.⁷⁰

Resistance to these devastating policies has been varied and diverse. One segment of the criminal reform movement has focused on “pretrial justice,” or combating the destructive nature of pretrial criminal detention in jails.⁷¹ Every year, millions of people presumed innocent who have not been found guilty of a crime are forced to pay bail to attain their freedom.⁷² Thousands languish in U.S. jails simply because they cannot afford to pay bail.⁷³ Keeping these people in jail is costly—\$9 billion is spent annually on jailing people who have been convicted of no crime—and is catastrophic to the individuals, their families, and their communities.⁷⁴

Beyond the disruption and trauma of jail itself, the inability to post bail diminishes defendants’ access to justice through the criminal process.⁷⁵ Innocent defendants may plead guilty just to get out of jail when faced with the choice of fighting their

66. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 2 (2006).

67. *Id.*

68. *Id.*

69. *Id.* at 3.

70. ANGELA DAVIS, ARE PRISONS OBSOLETE? 10 (2003).

71. See PRETRIAL JUST. INST., *Why We Need Pretrial Reform*, *supra* note 17.

72. ACLU Announces Nationwide Campaign to Support Movement to End Money Bail, ACLU (Dec. 11, 2017), <https://www.aclu.org/news/aclu-announces-nationwide-campaign-support-movement-end-money-bail> [<https://perma.cc/2Q5H-LSSU>].

73. NAT’L BAIL OUT, *Why Do We Do Bailouts?*, <https://nomoremoneybail.org/> [<https://perma.cc/F6T2-HUSY>] (detailing the destruction pretrial jail can have on a person’s life, potentially resulting in job loss, housing instability, or losing custody of children).

74. *Id.*

75. See VERA INST. JUST., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 12-13 (Feb. 2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf> [<https://perma.cc/AK6V-UQ8H>].

case or going home.⁷⁶ In short, the inability to be released from jail can lead to longer sentences, increased risk of future arrests, and convictions.⁷⁷ The story of teenager Kalief Browder demonstrates the potentially tragic tradeoff that pretrial detainees face.⁷⁸ Browder committed suicide in 2015 after spending three years in jail.⁷⁹ After Browder repeatedly refused to plead guilty, prosecutors eventually threw out the charges against him.⁸⁰ Browder's bail had been set at \$3,000, which his family was unable to pay.⁸¹ As a black teenager, Browder's bail was likely set higher than it would have been if he were white.⁸²

The communities and individuals most likely to be held in pretrial detention are disproportionately people of color from marginalized communities.⁸³ According to a report by the Center for American Progress,⁸⁴ LGBT-identifying people are twice as likely to be jailed due to discriminatory enforcement of laws, social stigma, and the criminalization of their lives in general.⁸⁵ The National Bail Out organization therefore focuses its efforts on marginalized subsections of the communities in which they work because these people are both disproportionately targeted for entry into the system and face heightened risk of violence and harm within the system.⁸⁶ This subsection of the reform movement therefore focuses on pretrial justice as an impactful and attainable way to promote justice for some of the most vulnerable people within the criminal legal system.⁸⁷

76. *Id.* at 38.

77. See Christine Tartaro & Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity Upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203, 218 (2009); Simonson, *supra* note 21, at 588 n.52.

78. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/ED5F-AQQ3>].

79. Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then 'A Broken Heart' Killed His Mother*, WASH. POST (Oct. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother/> [<https://perma.cc/Z48K-LNFY>].

80. *Id.*

81. *Id.*

82. Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 938 (2013) ("[N]early every study on the impact of race in bail determinations has concluded that African Americans are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories).

83. The disparities reinforce themselves for immigrants with these same characteristics. See, e.g., MORGAN-TROSTLE, ZHENG & LIPSCOMBE, *supra* note 8.

84. Despite 3.8 percent of adults in the United States identifying as LGBT, 7.1 percent of people in jails identify as LGBT. CTR. FOR AM. PROGRESS, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE 6 (Feb. 2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf> [<https://perma.cc/G7NN-MT4H>].

85. *Id.* at iii-iv.

86. NAT'L BAIL OUT, *Frequently Asked Questions: Until Freedom Comes: A Comprehensive Bail Out Tool Kit*, 31-33, <http://nationalbailout.org/untillfreedomcomes/> [<https://perma.cc/3SRB-DXYT>] ("Black people are disproportionately impacted at every point in the system It is important that we focus our efforts on queer and trans folks because the incidents of sexual assault and other forms of violence are often higher for queer and trans people.")

87. "As people are looking for ways to impact mass incarceration, bail has become a space that feels attainable People are fed up and this feels like a place where we can get change." Dani McClain, *Inside the Movement to Free People Who Are Only in Jail Because They Can't Afford Bail*, COLORLINES (Sep. 6, 2017,

B. *Lessons from Pretrial Justice*

The criminal justice reform movement has seen successes and failures over the years. The Bail Reform Act was signed into law in 1966 by President Johnson, who at the time decried the injustice of pretrial jail.⁸⁸ During this earlier era, multiple states prohibited the commercial bail industry altogether, and pretrial services agencies were established across the country to address the problem of unnecessary pretrial detention.⁸⁹ In 1983, the Supreme Court held in *Bearden v. Georgia* that it was “fundamentally unfair” for Georgia to imprison a criminal defendant who was unable to pay his fines and fees as a result of losing his job.⁹⁰ The Court held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibited this practice, reasoning that detaining the defendant amounted to “little more than punishing [him] for his poverty.”⁹¹

Despite these ostensible legislative, litigation, and policy successes for the pretrial justice movement, more people sit in jail today than before the enactment of the Bail Reform Act or the *Bearden* decision.⁹² These legal developments were ineffective at countering the rhetoric of the 1980s, when policymakers prioritized the War on Drugs over funding for social services like pretrial service agencies.⁹³ These earlier efforts that focused on procedural rights instead of broader systemic change did not bring an end to money bail or debtors prisons.⁹⁴ With this dilemma in mind, reformers and activists have more recently focused on tactics to change the narrative around bail reform and build grassroots support for the pretrial justice movement.⁹⁵ One

4:57 PM), <https://www.colorlines.com/articles/inside-movement-free-people-who-are-only-jail-because-cant-afford-bail> [https://perma.cc/YZD4-7UYJ] (quoting Scott Roberts, director of criminal justice work at Color of Change).

88. President Johnson described the poor defendant who “languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty He stays in jail because he is poor.” President Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966* (June 22, 1966), <http://www.presidency.ucsb.edu/ws/?pid=27666> [https://perma.cc/6DUJ-CZ2K].

89. See SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990, 71-72 (Oxford Univ. Press 1993); HARV. CRIM. JUST. POL’Y PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15 (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [https://perma.cc/F9AZ-8QAY] (describing pretrial services agencies in different jurisdictions).

90. *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983).

91. *Id.* at 671.

92. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, A HISTORY OF BAIL AND PRETRIAL RELEASE 20 (Sept. 23, 2010), <https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf> [https://perma.cc/7JCH-U45H].

93. See WALKER, *supra* note 89, at 71-72; SCHNACKE, JONES & BROOKER, *supra* note 92, at 20 (noting that the War on Drugs was just “the culmination of a conservative ascendancy built on law-and-order rhetoric” that led to the passage of preventive detention regimes, pretrial incarceration, and the defunding of pretrial services agencies).

94. See e.g., Whitney Bennis & Blake Strode, *Debtor’s Prison in 21st-Century America*, ATLANTIC, (Feb. 23, 2016), <https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/> [https://perma.cc/97QG-MFZW].

95. *The Two-Tiered Justice System: Money Bail in Historical Perspective*, SPLC (June 6, 2017), <https://www.splcenter.org/20170606/two-tiered-justice-system-money-bail-historical-perspective> [https://perma.cc/SNR8-GWCU]; *About PJI*, PRETRIAL JUST. INST., <http://www.pretrial.org/about/> [https://perma.cc/GU27-2H7P]; HUM. RTS. WATCH, “NOT IN IT FOR JUSTICE”: HOW CALIFORNIA’S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE (Apr. 11, 2017), <https://www.hrw.org/report/>

tactic that holds intriguing promise is the use of bail funds, which Jocelyn Simonson argues have been used to achieve community nullification.⁹⁶

IV. NULLIFICATION THROUGH COMMUNITY FUNDS

Nullification usually refers to the longstanding practice by which community members serving on a jury reject the decisions of state actors and take the law into their own hands. The choice to nullify reclaims power by jurors, taking it away from institutional law makers and enforcers. The jury rejects the decision to prosecute a defendant by acquitting the charges despite factual guilt. This practice was enshrined in the Constitution through the Sixth Amendment in order to serve as a critical limitation on governmental power.⁹⁷ Jury nullification has been widely studied in legal scholarship,⁹⁸ and prominent scholars have suggested using the practice as a form of resistance to the widespread racial injustice within the criminal justice system.⁹⁹ As criminal jury trials become less common, “it is actually a series of discretionary institutional choices – to stop, to arrest, to charge, to appoint counsel, to set bail, to offer a plea deal – that taken together have a profound, if not complete, influence on the outcome of a criminal case.”¹⁰⁰ Simonson explores how community members can engage in “bottom-up participation” to nullify decisions outside the jury-box through the use of bail funds.¹⁰¹

A. *Bail Funds and the Pretrial Justice Movement*

Bail funds are designed to help post bail for people who cannot afford it. Bail is generally set by a judge or magistrate shortly after arrest, who is charged with considering various factors about the alleged criminal infraction and the defendant. Ideally, bail is supposed to be set at an amount low enough that a criminal defendant can pay it but high enough that it ensures their return to court.¹⁰² This should be the process by which people who have not yet been tried or convicted of crimes can return to the

2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly [https://perma.cc/D3FP-S6SD].

96. Simonson, *supra* note 21, at 586.

97. See Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHIC. L. REV. 1133 (2011) (discussing the history and legal interpretation the Sixth Amendment and jury nullification).

98. See Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 145-51; Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1154 (1997) (describing ways in which jury nullification can be in line with, or subvert, the rule of law).

99. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681-88 (1995). Tahir Duckett, in his Op-Ed, agrees with this opinion stating:

To the white allies wondering how they can support Black Lives Matter, you should know that prosecutors are going to look at your face and assume you will be more likely to convict the black defendant (and it will almost certainly be a black defendant.) You have an incredible opportunity to strike a blow at the heart of mass incarceration in the Age of Trump, and all you have to do is vote not guilty.

Tahir Duckett, *Op-Ed: Here's How Jurors Can Resist Jeff Sessions' Justice Department*, THINKPROGRESS (May 15, 2017), <https://thinkprogress.org/jury-nullification-a-tool-for-resistance-in-the-age-of-trump-f0749a0ebf36/> [https://perma.cc/4HV9-QBJA].

100. Simonson, *supra* note 21, at 588.

101. *Id.* at 592.

102. See PRETRIAL JUST. INST., GLOSSARY OF TERMS, *supra* note 22, at 3.

community after an arrest while their charges are still pending. Unfortunately, in the name of “public safety,” thousands of people are forced to remain in jail every year because the bail set for them is unattainable.¹⁰³ In such circumstances, bail funds have been used to help defendants attain bail and return to the community, thereby challenging the notion that courts and insiders truly represent the interests of the “public” and “community” in the bail setting decision.

The extent to which community bail funds can achieve nullification depends on the design and approach. Both of these aspects can vary widely.¹⁰⁴ One version of community bail funds achieves a larger impact by revolving the money. Specifically, the fund posts money on behalf of a defendant. When that defendant returns for their court dates, the money previously posted for bail is returned to the fund, which in turn uses it to bail out another defendant. The fund therefore intervenes at a crucial moment in the criminal case by paying a defendants’ bail and then cycles the funds to post bail for other defendants. The money revolves back into the fund to help more defendants and is returned to the fund over an extended period of time. This design intentionally enables the fund to have a broad impact on local bail practices as it is used to post bail over and over for different defendants.¹⁰⁵ This differentiates community bail funds from instances in which people raise money to post bail for an individual defendant, or the long history of informal fundraising for legal and bail support done by faith-based groups: “A community bail fund’s interest in a defendant’s case stems not from personal connection to that defendant, but rather from broader beliefs regarding the overuse of pretrial detention among particular neighborhoods, racial or socioeconomic groups, or political organizations.”¹⁰⁶

Proponents of community bail funds distinguish their efforts from incremental reforms they see as enabling the bail system and, more broadly, mass incarceration to function more smoothly. Accordingly, National Bail Out emphasizes that bailouts are a tactic, but the goal is ultimately to leverage the end of money bail and other oppressive systems of incarceration.¹⁰⁷ Activists therefore caution people to be vigilant and ensure the goals and approach of the fund are sufficiently transformative.¹⁰⁸

103. *See id.* at 2 (“In criminal law, bail is the process of releasing a defendant from jail or other governmental custody with conditions set to reasonably assure public safety and court appearance.”).

104. *See* Simonson, *supra* note 21, at 600-02 (comparing recent iterations of bail funds of different forms, such as the bail fund created after the death of Freddie Gray in Baltimore that was established to raise money for the exorbitant bail set for a young protester, and the ongoing efforts of the Freedom Fund in the Bronx and the Chicago Community Bond Fund).

105. *Id.* at 600.

106. *Id.*

107. NAT’L BAIL OUT, UNTIL FREEDOM COMES BAIL OUT TOOLKIT INFORMATION, <http://nationalbailout.org/untillfreedomcomes/> [<https://perma.cc/3SRB-DXYT>].

108. *See* Telephone Interview with Pilar Weiss, Project Director, National Bail Fund Network (Apr. 20, 2018) (“Bail funds have to be part of a larger movement. It has to be intentionally situated within the larger goals. We can’t bail out everybody, so you have to see your work as part of a larger advocacy effort.”) [hereinafter Telephone Interview with Pilar Weiss].

This concern is rooted in a deep skepticism and awareness about the mass incarceration system's ability to adapt and coopt efforts to resist it.¹⁰⁹

When community bail funds truly engage in nullification, the act of posting bail "itself becomes a form of on-the-ground resistance to the workings of the criminal justice system."¹¹⁰ Central to the nullification concept is the potential for bail funds to shape legal meaning by contesting the definition of "community." When attorneys for the government petition to keep someone in pretrial detention, they do so by claiming to speak on behalf of the community to enhance neighborhood safety. Bail funds complicate this representation by demonstrating that at least some members of the community support the defendant's release. This contestation has potential to broadly shift the conversation about money bail and reject the status quo through bottom-up participation.

By "publicly demonstrating the links between poverty and outcomes in criminal cases over time," community bail funds shift and humanize those who are incarcerated.¹¹¹ They also create opportunities for conversations about aspects of the criminal justice system that can be transformative for people outside of the system. Community members can engage with each other and reconceptualize their role and responsibility for the system by participating in bail funds. "[I]ndividual acts can add up to an assertion of popular input into the contours of the criminal justice system writ large."¹¹²

Activists in the immigration community have taken note. Community bail funds are an example of a useful tactic from the pretrial justice movement that advocates are using to resist incarceration as well. In light of the important differences between incarceration and pretrial jail, I will explore whether the application of this tactic to immigration detention might similarly achieve community nullification.

B. Utilizing Bond Funds to Nullify Incarceration

Like defendants exposed to pretrial criminal jail, immigrant detainees can be eligible for release from ICE detention centers under some circumstances.¹¹³ I will explore the circumstances under which such release can be facilitated through immigration bond funds, and whether this constitutes another iteration of "community nullification."

109. Compare, for example, the community bail fund model with that proposed by the American Bail Coalition, a trade group of insurance companies that underwrite bail. In a story about the fund, critics wondered if it was an effort by the insurance companies to soften their own image or use funds to demonstrate that deeper reforms are unnecessary. Executive Director of the Pretrial Justice Institute, Cherise Fanno Burdeen said: "A national bail fund sponsored by the bail bondsman? That's like a free sample of heroin from a drug dealer." Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform> [https://perma.cc/JAD5-7HEJ].

110. Simonson, *supra* note 21, at 590.

111. *Id.* at 610.

112. *Id.*

113. This is admittedly a limited intervention, because large numbers of immigration detainees are subject to mandatory detention. Nonetheless, there are thousands of people in immigration detention who are eligible for release, who could be supported through immigration bond funds. I will therefore explore the utility of community nullification in this context to resist the expansion of incarceration.

As detailed above, despite its legal classification as civil confinement, immigration detention exposes people to similar disruption and trauma as pretrial criminal confinement. Upon his release from ICE custody, Malik Ndaula described the experience: “prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds.”¹¹⁴ The experiential similarity with criminal detention mirrors the doctrinal blending that defines current incarceration to the point where “it is difficult to know where criminal law ends and immigration law begins.”¹¹⁵ Immigrant advocates have also sought to draw procedural safeguards for immigrant detainees from criminal law: the right to an attorney during the immigration process,¹¹⁶ the right to access their attorney and legal materials in detention,¹¹⁷ adequate care for mentally ill immigrants,¹¹⁸ the right to a periodic bond hearing in front of a judge,¹¹⁹ and the requirement that the judge consider a detainee’s ability to pay when setting bond.¹²⁰ As with pretrial detention, a person’s ability to be released from immigration detention has a significant impact on the case prospects and outcomes.¹²¹ Detained immigrants are less likely to be able to attain an attorney and, without an attorney they are less likely to achieve a positive resolution in their case.¹²² In short, the ability to leave immigration detention may determine whether or not a person is deported.

114. Malik Ndaula & Debbie Satyal, *Rafiu’s Story: An American Nightmare, in* KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008).

115. García Hernández, *supra* note 4, at 281 (citing Juliet Stumpf, *The Crimigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006)).

116. See *e.g.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (finding that immigrants have a due process right to obtain counsel of their choice at their own expense).

117. See generally *ACLU Settlement with ICE Will Allow Immigrants Held in Detention to Use Functional Telephones for Contacting Lawyers, Families, Government Agencies*, ACLU (June 14, 2016), <https://www.aclu.org/news/aclu-settlement-ice-will-allow-immigrants-held-detention-use-functional-telephones-contacting-lawyers> [<http://perma.cc/EG7Q-G9R3>]; *SPLC Sues DHS For Unconstitutionally Blocking Detained Immigrants’ Access to Lawyers*, SPLC (Apr. 4, 2018), <https://www.splcenter.org/news/2018/04/04/splc-sues-dhs-unconstitutionally-blocking-detained-immigrants-access-lawyers> [<https://perma.cc/LR2H-CEAB>].

118. See generally *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (class action lawsuit brought on behalf of immigration detainees with mental disabilities); *U.S. Suit Filed for Mentally Disabled Immigrants*, HUM. RTS. WATCH (Mar. 26, 2010), <https://www.hrw.org/news/2010/03/26/us-suit-filed-immigrants-mental-disabilities> [<https://perma.cc/VC74-JRAW>].

119. See *Rodriguez v. Robbins*, 804 F.3d 1060, 1085 (9th Cir. 2015), *rev’d sub nom.* *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (holding noncitizens subject to prolonged detention were entitled to automatic individualized bond hearings and determinations to justify their continued detention).

120. See *Hernandez*, 872 F.3d at 981 (“Deprivations of physical liberty are a pervasive feature of our current system of immigration enforcement . . . the government’s discretion to incarcerate non-citizens is always constrained by the requirements of due process: no person may be imprisoned merely on account of his poverty.”); *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018).

121. See *e.g.*, U.S. Gov’t Accountability Off., *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges*, GAO-08-940 (Washington, D.C., 2008), <http://www.gao.gov/new.items/d08940.pdf> [<https://perma.cc/XQE5-VGBL>] (“Representation generally doubled the likelihood of affirmative and defensive cases being granted asylum.”).

122. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL, 2 (Sep. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/S43Y-D5WA>] (“Nationally, only 37 percent of all immigrants secured legal representation in their removal cases. Immigrants in detention were the least likely to obtain

The process of attaining a bond in immigration proceedings is similar but slightly more complicated than in the criminal context. For those who are eligible, ICE has the power to determine the conditions under which immigrants might be released from detention.¹²³ If ICE chooses not to set a bond or sets a bond that is unattainably high, detainees have the right to ask for a bond redetermination hearing before an immigration judge. The judge will then consider a number of factors before determining whether the detainee merits release on bond and what amount is appropriate. *Matter of Guerra* directs immigration judges to consider, among other factors, whether the respondent poses a danger to the community.¹²⁴ In the event that a bond is set, families of detainees face a slew of challenges beyond those faced by the families of people confined in pretrial criminal detention.¹²⁵

Community bond funds can therefore lend necessary support to families navigating the many challenges associated with getting family members released from immigration detention. Although there are many instances of crowdfunding bonds for individuals within community and faith groups, the phenomenon of dedicated, revolving, community-based immigration bond funds are relatively new but increasingly common. One of the first immigration bond funds was established in response to a massive ICE raid in 2007 that swept up hundreds of workers at three Massachusetts factories. Advocates explained that the motivation for establishing the fund was broader than supporting individual detainees, but also conceived of as “a way to build public opposition to raids, keep families together, and bring another voice into the debate for immigration reform.”¹²⁶ In the following years, and particularly since the election of President Trump, community immigration bond funds

representation. Only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of nondetained immigrants.”).

123. Despite having the discretion to do so, ICE often declines to set conditions on which a detainee could be released. Alternatively, ICE also has the discretion to release people on their own recognizance, on parole and under supervised release conditions including electronic monitoring. Despite all of these available options, alternatives to detention are vastly underutilized by ICE. See Marouf, *supra* note 26, at 2157-71; Ryo, *supra* note 47, at 118 (finding that in ninety-four percent of cases where an immigration judge heard a bond redetermination hearing, ICE had previously refused to set any bond at all).

124. *In re Guerra*, 24 I&N Dec. at 40 (directing immigration judges to consider a list of factors in determining whether and how much bond is appropriate, such as: whether the person has a fixed address in the United States; the person’s length of residence in the United States; the person’s family ties to the United States and whether they may entitle the person to reside permanently within the country in the future; the person’s employment history; the person’s record of appearance in court; the person’s criminal record; including “the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses”; the person’s history of immigration violations; any attempts by the person to flee prosecution, and the person’s manner of entry into the United States).

125. For example, families of detained immigrants are more likely to face language and cultural barriers to understanding and navigating the bond process. These populations are also more vulnerable to the tactics of deceptive *notarios* and exploitative commercial bond companies. The immigration bond itself must be posted at ICE Enforcement and Removal Operations Bond Acceptance Facilities by a U.S. citizen, which can involve handing over large sums of money to unfamiliar people. People in immigration detention can be confined and moved between facilities anywhere in the country, often in rural communities, which makes it difficult to facilitate the return of a loved one after their release.

126. *Immig Bond Fund Kicks Off Fundraising Campaign*, N.Y. DAILY NEWS (Aug. 12, 2008), <http://www.nydailynews.com/latino/immig-bond-fund-kicks-fundraising-campaign-article-1.318345> [<https://perma.cc/37KS-8UCR>].

have increasingly been established. Bond funds are seen as an opportunity to challenge the “insidiousness of the way that immigration laws are being enforced.”¹²⁷ The National Bail Fund Network Directory currently lists four funds dedicated to immigration support: Bay Area Immigration Bond Fund, Immigrant Families Defense Fund, Immigrant Bail Fund of Connecticut, Detained Migrant Solidarity Committee Fianza Fund.¹²⁸ A handful of other funds are in various stages of creation, largely being established in response to the policies of President Donald Trump, the uptick in ICE raids, and widespread use of detention.¹²⁹

As with the diversity of community criminal bail funds, immigration bond funds range in their goals, priorities, and methods. For example, the Bay Area Immigration Bond Fund selectively provides bonds for immigrants with viable forms of relief to enable them to succeed in their immigration cases.¹³⁰ The Detained Migrant Solidarity Committee Fianza Fund, on the other hand, explicitly advocates for the abolition of immigrant detention:

We believe no one should be held in a cage, no matter their status. Abuse, despair, hyper-exploitation, and due process violations are inherent to detention. While people remain detained simply because they can’t pay for their freedom, we will work with them and their families to pay bonds, support people inside, and navigate the long and confusing road to freedom.¹³¹

As described above, some of these funds are “revolving.” The Bay Area Immigration Bond Fund describes the circular process in five steps: bond is set in an individual case; the fund raises money to post the bond; the individual posts the bond and is released; the individual continues to fight their deportation while free from detention; after resolution of the case, the bond money is returned to the fund.¹³² These funds can therefore be utilized to post another bond and the process repeats itself.

Although community bond funds for immigration detention are a relatively new and rarely-used tool, they already indicate the potential for community nullification through immigrant bond funds. The Immigrant Families Defense Fund is a school-based organization that seeks to provide wrap-around legal services to parents and family members of students in the Alameda County School District. Although this fund focuses primarily on providing services to individual detainees, Co-Director

127. See Telephone Interview with Pilar Weiss, *supra* note 108.

128. COMMUNITY JUST. EXCHANGE, *Directory of Community Bail Funds: National Bail Fund Network*, <https://brooklynbailfund.org/nbfn-directory> [<https://perma.cc/K4B6-ENVM>].

129. See Telephone Interview with Pilar Weiss, *supra* note 108; Telephone Interview with Trevor Houser, Co-Director, Immigrant Family Defense Fund (Apr. 30, 2018) [hereinafter Telephone Interview with Trevor Houser].

130. See *Our Mission*, BAY AREA IMMIGR. BOND FUND, <https://www.bayareaimmigrationbondfund.org/what-we-do> [<https://perma.cc/FD2C-8CJL>] (“Our goal is to support detained individuals who are punished for not having the money to post a bond In doing so, we hope to aid these individuals by ensuring they have the opportunity to zealously fight for their right to remain in the United States.”).

131. *What Is the Fianza Fund*, FRONTERIZX FIANZA FUND (DETAINED MIGRANT SOLIDARITY COMMITTEE), <https://www.fianzafund.org/about-the-fund.html> [<https://perma.cc/K33S-8J9P>].

132. See *Our Mission: What We Do*, BAY AREA IMMIGR. BOND FUND, <https://www.bayareaimmigrationbondfund.org/what-we-do/> [<https://perma.cc/L4CC-JT5V>].

Trevor Houser described how the organization's fundraising and volunteer recruitment efforts provide bridge-building opportunities for direct engagement between affected populations and outsiders. The organization recruits volunteers to be service obligors on bonds and host fundraising parties in their houses. These activities involve volunteering to welcome strangers into their homes or traveling to immigration offices alongside detainees' family members to post a bond. This sort of support and involvement with the funds clearly constitutes "a form of communal participation in everyday justice."¹³³ Meeting and interacting with people in their children's school district who are impacted by immigration detention or who are living with the threat of deportation "instills a level of commitment and passion to the issues that cutting a check doesn't necessarily engender."¹³⁴

Houser explains that the extent to which different funds see their work as "impacting immigration policy more broadly and pushing back against the system" varies.¹³⁵ The recent increased interest in community bond funds indicates that many organizers consider it to be a form of resistance to harmful political rhetoric and policy. The Connecticut-based Immigrant Bail Fund makes this explicit, highlighting the text of executive orders passed by the Trump Administration in their informational materials. The website proclaims that this "work is more important now than ever before" and asks people to donate in order to "fight back."¹³⁶

However, immigration policies and enforcement priorities are set at the federal level. The perceived remoteness of policymakers increases the importance of engaging with directly impacted individuals, which immigration bond funds facilitate. In the same way that community bail funds challenge the notion of "community" and "community safety," immigration bond funds call into question the necessity of immigration detention altogether. The funds further inject community participation into the process by building solidarity through direct support and new connections. This solidarity is particularly central to the utility of immigration bond funds because beneficiaries and their families are likely to be politically and socially isolated from the wider society.¹³⁷ In short, whether or not individuals running immigration bond funds see their work as part of a larger contestation of immigration laws, there are clear parallels between these funds and community bail funds.

C. Challenges and Limitations

There are obvious logistical differences between the way that immigration bond funds and criminal bail funds operate in practice. Because immigration cases often take many years to resolve, their length constrains the ability of funds to revolve

133. Simonson, *supra* note 21, at 596.

134. See Telephone Interview with Trevor Houser, *supra* note 129.

135. *Id.*

136. IMMIGR. BAIL FUND, *Home*, <https://www.immigrantbailfund.org/home/> [https://perma.cc/9G3R-3T7Z].

137. See Plyler v. Doe, 457 U.S. 202, 219-21 (1982) (discussing the "shadow population" of undocumented resident noncitizens and their children and the further detriment these communities would face if excluded from basic social institutions like public schools).

bond money back to other detained immigrants and achieve a wider impact.¹³⁸ As bail funds use money to release more and more criminal defendants, policy makers and stakeholders in the local jurisdiction may take note. This impact is difficult for bond funds to replicate in the federal immigration system, which is spread across the entire country with many levels of diffusion from the policymakers themselves. As opposed to bail/bond companies that offer to post a large percentage of the funds in criminal cases, immigrant allies are typically required to post the entire bond, thereby necessitating significantly more capital. Additionally, although one district court has held that immigration judges can release immigrants on their own recognizance, the statutory minimum bond is generally considered to be \$1,500.¹³⁹ The capital required for an immigration bond fund imposes an additional challenge to organizations that seek to establish them. The isolation and fear experienced by noncitizen communities during times of heightened scrutiny further complicates the efforts to build solidarity. On the other hand, aspects of the immigration system may actually create opportunities for activists and advocates. For example, whereas bail practices vary by local jurisdiction, the vastness of the immigration system could enable organizers to more easily coordinate resistance to immcarceration nationally.¹⁴⁰

These differences notwithstanding, lessons from community nullification can be informative to those seeking to counteract immcarceration. Like bail funds in the criminal context, bond funds challenge how immigration detention works directly, publicly, and from the bottom up. This can still be true even when these funds focus primarily or exclusively on supporting individuals. By specifically engaging non-immigrants and those who have no other connection to the immigration legal system, community bond funds create opportunities for resistance. They also enable people to leave detention, thereby influencing the outcome of their immigration cases. Immigration bond funds facilitate resistance to the expansion and injustice of immcarceration in a way that constitutes a form of community nullification.

V. CONCLUSION

Community-based immigration bond funds have developed in the wake of the pretrial justice movement and have become an increasingly popular tool of resistance to immcarceration. This is a creative, though not surprising application, given the

138. See Telephone Interview with Pilar Weiss, *supra* note 108 (“People are still receiving checks from money they contributed to the fund after the 2007 raids. You have to think about the formation of the fund in different terms due to the case lengths.”).

139. See *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015) (holding that immigration judges have authority under INA § 236(a), 8 U.S.C. § 1226(a) to grant release on conditional parole as an alternative to release on a monetary bond). The amount set for bail is not typically dictated by criminal statute, and judges or magistrates in the criminal context usually can choose to release defendants on their own recognizance or, in the alternative, set bail at less than \$1,500.

140. Mary Hooks, Co-Director, Southerners On New Ground (S.O.N.G.), National Lawyers Guild Webinar: Bail Funds & Community-Based Strategies (Mar. 9, 2018) (describing her revelation as a veteran community bail fund organizer about the differences between the immigration and criminal bond systems and potential opportunities these create: “I didn’t realize you can bond anyone out from wherever they’re at. You can pay in Atlanta to bond someone out in California. There’s a broader opportunity there as far as the network of support.”).

many parallels between the overuse of pretrial criminal detention and immigration detention. Using a racial lens to analyze these systems illuminates the manner in which immigration and criminal law enforcement operate as parallel systems of social control. As security and crime control increasingly dominate the state's approach to immigration law and policy, the use of immigration detention has expanded steadily. This expansion was foretold by changes in criminal laws that have driven mass incarceration since the 1970s. Activists and advocates seeking to resist the system of pretrial detention have demonstrated the ways that community bail funds can, in certain circumstances, nullify institutional decision making. Though they face logistical challenges, immigration bond funds provide similar opportunities to contest decisions of ICE officers and immigration judges. Bond funds also facilitate direct support to people affected by incarceration through financial assistance, engagement, and solidarity. As community members insert themselves and their values into the legal system, these instances of individual support can be understood as part of a larger project aimed at resisting the expansion of immigration detention. Immigration bond funds can therefore serve to promote "community nullification."