

# Immigration Detention As An Obstacle To Decarceration

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## ABSTRACT

*Criminal legal reform and measures to reduce carceral populations have received increasing media and public policy attention nationwide. These efforts have mainly ignored a parallel development: the consistent rise in the use of immigration detention over the last decade. This Article bridges that gap by arguing that ongoing efforts to decarcerate states and localities may be foiled by immigration detention. This argument relies on three different descriptive claims. First, much*

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*scholarly work has shown the extent to which vested interests have hampered criminal legal reform; these same interests could look to immigration detention as an alternative protection. Second, the extent to which both the criminal and immigration systems have intertwined has primed us for expanding the use of jails and prisons as tools of immigration control. Third, there is empirical evidence showing a causal connection between empty jail bed space and rising immigration detention at the local level. The Article then argues that if decarceration efforts are premised on the condemnation of the extensive use of carceral institutions, they are incomplete without including measures to address immigration detention. In addition, scholars interested in the effects of incarceration need to account for immigration detention and incarceration together as confinement, because not doing so will skew studies on the impact of decarceration.*

## I. INTRODUCTION

The town of Richwood sits in north central Louisiana near the state's border with Arkansas.<sup>1</sup> It is a town of nearly 4,500 people with an employment rate of only 12.8% and a median household income of roughly \$25,000.<sup>2</sup> The Richwood Correctional Center (RCC), located barely a mile from the town's main throughway, is hidden from view by dense trees. Although it is only a municipal jail, overseen by the local government of Richwood, RCC has capacity for 1,129 people.<sup>3</sup> It is perhaps remarkable that a jail this size exists in a town of only 4,500 people, in a Parish of just over 150,000,<sup>4</sup> until one considers the history of Louisiana's penal system.

In 1971, the main jail in the state, the Angola State Penitentiary, was sued by four inmates<sup>5</sup> "alleging that as the result of illegal conditions and practices countenanced by the defendant officials, the inmates had suffered numerous deprivations of their constitutional rights."<sup>6</sup> In a decision granting the plaintiffs injunctive relief in 1973, U.S. District Judge E. Gordon West "found that conditions at Angola 'shock[ed] the conscience of any right thinking person' and 'flagrantly violate[d] basic constitutional requirements as well as applicable [s]tate laws,' and that 'the [s]tate authorities . . . [were]

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1. Map of Richwood, LA, GOOGLE MAPS, <https://www.google.com/maps/place/Richwood,+LA+71202/@32.4605852,-92.1088051,13z/data=!3m1!4b1!4m5!3m4!1s0x862e494eb505fd69:0x69ae84bbd0cf955e!8m2!3d32.4487568!4d-92.0848562> [https://perma.cc/PB7K-ECCD] (search "Search Google Maps" field for "Richwood, LA").

2. *Richwood town, Louisiana*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=Richwood%20town,%20Louisiana&g=1600000US2264660&tid=ACSDP5Y2018.DP05> [https://perma.cc/WMB8-V2EW].

3. *Richwood Correctional Center*, LASALLE CORRS., <https://lasallecorrections.com/locations-richwood-correctional-center/> [https://perma.cc/L7QV-H5ZH].

4. *QuickFacts: Ouachita Parish, Louisiana; United States*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/ouachitaparishlouisiana> [https://perma.cc/G5JS-RUJT].

5. *Williams v. Treen*, 671 F.2d 892, 894 (5th Cir. 1982).

6. *Id.*

either failing or refusing to take the necessary steps to correct these conditions.”<sup>7</sup> Litigation dragged on through the 1980s but ultimately led to federal oversight of Louisiana’s state correctional institutions.

Under this federal oversight, it immediately became apparent that overcrowding in state jails was a tremendous problem, which led to a program to “decentralize” Angola.<sup>8</sup> Despite initial calls to decrease the carceral population, the state instead opted to increase the capacity of the penal system by building more jails.<sup>9</sup> Nonetheless, even with this additional capacity, the state could not house all inmates without utilizing local jails like RCC, which soon became overcrowded too.<sup>10</sup> Eventually, partly in response to this overcrowding, Louisiana increased the per prisoner per diem paid by the state government to local jails for housing state inmates from \$4.50 to \$18.25.<sup>11</sup> After all, it was cheaper for the state to finance local jails than to build and operate more state prisons.

In the ‘80s, ‘90s, and early 2000s, as Louisiana’s—like the nation’s—penal population increased, local jails continued to be filled with both state and local inmates.<sup>12</sup> This means that RCC has housed both local and state inmates throughout much of its history and has received state funds for doing so. However, following the success of this program and seeking even more revenue for the local government, in the spring of 2019,<sup>13</sup> the town of Richwood signed a contract with Immigration and Customs Enforcement (ICE)<sup>14</sup> that would allow the Federal Government to house

7. Williams v. Edwards, 547 F.2d 1206, 1208 (5th Cir. 1977).

8. Lydia Pelot-Hobbs, *Louisiana’s Turn to Mass Incarceration: The Building of a Carceral State*, AM. ASS’N OF GEOGRAPHERS (Feb. 1, 2018), <http://news.aag.org/2018/02/louisianas-turn-to-mass-incarceration-the-building-of-a-carceral-state> [https://perma.cc/8QRP-K46M].

9. See *id.*

10. See *id.*

11. *Id.*

12. See *id.*

13. This Article will mainly refer to data up until Fiscal Year 2019. This is for two reasons. First, by the time this Article was submitted for publication, Fiscal Year 2020 will have just closed. Second, the Coronavirus pandemic had a tremendous impact on the operation of Immigration and Customs Enforcement and Departments of Corrections. Therefore, statistically, 2020 is an anomaly, and any analysis that includes it should have a theory for why data coming from that year is relevant despite its outlier status.

14. See Gwendolyn Ducre, *More than a Thousand Migrant Detainees from the Border to Be Housed at the Richwood Correctional Facility*, KNOE NEWS 8 (Apr. 4, 2019, 9:45 PM), <https://www.knoe.com/content/news/More-than-a-thousand-migrant-detainees-from-the-border-to-be-housed-at-the-Richwood-Correctional-Facility—508150181.html>; C:\Users\brittanytufenkjian\Downloads\ [https://perma.cc/86EV-NGU9]. Various

up to 1,000 detained immigrants at RCC for \$64.07 per detainee, per day.<sup>15</sup> By comparison, in 2019, the Louisiana Department of Public Safety & Corrections paid local governments \$28.02 per day to imprison state inmates.<sup>16</sup> In March of 2020, ICE reported an average daily population (ADP) of 785 inmates at RCC,<sup>17</sup> meaning that it paid over \$50,000 to Richwood daily to house inmates at RCC.

The town of Richwood was not the only locality in Louisiana to sign contracts with ICE in 2019. In total, four local governments<sup>18</sup> signed these agreements, pushing Louisiana's average daily population of immigration detainees from approximately 2,200 in 2018 to over 7,400 in January of 2020.<sup>19</sup> The only state with more immigration detainees in the United States is Texas.<sup>20</sup>

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reports show that the contract with ICE was not without controversy. See Dede Willis, *Community Outraged: Richwood Correctional Center Could Soon House Migrant Detainees from ICE*, KNOE NEWS 8 (Mar. 27, 2019, 3:53 PM), <https://www.knoe.com/content/news/Community-Outraged-Richwood-Correctional-Center-could-soon-house-migrant-detainees-from-ICE-507750351.html> [<https://perma.cc/5KAY-8A3V>]. However, as local reports have shown, the potential profit of \$500,000 a year was crucial in driving the decision. See Ducre, *supra*.

15. Sofia Millar, *Contracts Between Private Prisons and ICE Mean Extra Money for Towns*, KNOE NEWS 8 (Sept. 5, 2019, 10:40 AM), <https://www.knoe.com/content/news/Contracts-between-private-prisons-and-ICE-mean-extra-money-for-towns-559483101.html> [<https://perma.cc/ZA47-RF8C>]. According to this report, out of the daily rate ICE pays to the Richwood Correctional Center of \$64.07, the town of Richwood only gets \$1.50. *Id.*

16. CORRS. SERVS., LA. DEP'T OF PUB. SAFETY & CORRS., CORRECTIONS SERVICES BUDGET AND COST DATA SUMMARY: FY 2019–2020 EXISTING OPERATING BUDGET (EXCLUDING CANTEEN) 1 (2019).

17. These statistics come from a compilation of data made by the author drawn from the following sources: *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-management> [<https://perma.cc/9E7B-WXGU>], and *Ice Detention Facilities as of November 2017*, NAT'L IMMIGR. JUST. CTR., <https://immigrantjustice.org/ice-detention-facilities-november-2017> [<https://perma.cc/USA6-B6UP>]. The data compilation is on file with the author and hereinafter referred to as "Annex 1."

18. Maria Clark, *Louisiana's Prisons Are Increasingly Being Used to Detain Immigrants*, NOLA.COM: THE TIMES-PICAYUNE (May 8, 2019, 6:50 PM), [https://www.nola.com/news/article\\_9110ce70-bb2f-54e1-b4e1-54140b7a0559.html](https://www.nola.com/news/article_9110ce70-bb2f-54e1-b4e1-54140b7a0559.html) [<https://perma.cc/R6DP-B7RP>].

19. Data compiled by the author from U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 17, NAT'L IMMIGR. JUST. CTR., *supra* note 17, *Incarceration Trends*, VERA INST. OF JUST., <http://trends.vera.org/incarceration-rates> [<https://perma.cc/7TTR-457J>], and *Census of State and Federal Adult Correctional Facilities*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/data-collection/census-state-and-federal-adult-correctional-facilities-ccf-formerly-csfac#publications-0> [<https://perma.cc/PF7S-WHX8>]. Compilation is on file with the author and hereinafter referred to as "Annex 2."

20. *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/72RN-GCTS>]. It is noteworthy that Louisiana has no international border. See GOOGLE MAPS, *supra* note 1.

At the same time, however, Louisiana was experiencing a major reform effort to reduce its penal population as a whole. On June 15, 2017, Louisiana Governor John Bel Edwards signed comprehensive criminal legal reform legislation with the stated purpose of moving Louisiana down the national ranking of incarcerated population by state in the United States.<sup>21</sup> In order to bolster this effort, Governor Edwards established the Louisiana Commission on Law Enforcement and Administration of Criminal Justice to monitor and implement his signature criminal legal legislation.<sup>22</sup> However, nowhere in the Commission's website nor in other constituting documents is immigration detention mentioned.<sup>23</sup>

It seems a contradiction that a state attempting a major decarceration effort is at the same time becoming a hub of immigration detention.<sup>24</sup> One potential objection to framing these developments as a contradiction is that inmates are not detainees. The logic of immigration detention is one of administrative policy that has very little to do with the logic of penal punishment.<sup>25</sup> In essence, according to this argument, since immigration detainees are not being punished, their imprisonment is not carceral.<sup>26</sup>

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21. *Louisiana's 2017 Criminal Justice Reforms: The Most Incarcerated State Changes Course*, THE PEW CHARITABLE TRS. (Mar. 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/louisianas-2017-criminal-justice-reforms> [<https://perma.cc/PSK9-CD85>].

22. LA. COMM'N ON L. ENF'T & ADMIN. OF CRIM. JUST. (2016), <http://www.lcle.state.la.us/> [<https://perma.cc/GYU7-MTTW>].

23. *See generally id.*

24. Whether or not it is truly a major decarceration effort, the State perceives it as such. *See Criminal Justice Reform*, OFF. OF THE GOVERNOR, <https://gov.louisiana.gov/index.cfm/page/58> [<https://perma.cc/57CY-XMCA>] ("Louisiana Governor John Bel Edwards signed into law the most comprehensive criminal justice reform in the state's history."). John Pfaff, among others, has been a leading voice in advocating that a focus on only nonviolent crime is not enough to end mass incarceration. *See, e.g.,* John Pfaff, *Decarceration's Blindspots*, 16 OHIO STATE J. CRIM. L. 253, 256, 271 (2018).

25. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137–40 (2013). Penal punishment is justified on notions of deterrence, incapacitation, rehabilitation, and retribution. CRIMINAL LAW § 1.5 (U. of Minn. Librs. Publ'g 2015) (2010) (ebook). None of these apply to immigration detention, which is justified on administrative efficiency grounds. *See* Das, *supra*, at 137–40. I write "little to do" because more recently, public officials have outlined deterrence as a goal of immigration detention. *See* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 237 (2019).

26. The Supreme Court has endorsed this view. *See generally* *Zadvydas v. Davis*, 533 U.S. 678 (2001) (articulating that while Due Process Clause protections apply to immigration proceedings, nonpunitive detention is allowed to protect the public from

Therefore, expanded immigration detention is of no consequence to criminal legal reform and should not be taken into account when determining the success or failure of general decarceration efforts. However, as further articulated in Section II, it is apparent that this is only a legal distinction without a practical difference. That immigration detention is used, perceived, and serves as punishment is clear to anyone who is even slightly acquainted with these facilities.<sup>27</sup>

Moreover, criminal legal reform is not fully congruous with expanding the use of immigration detention. Regardless of how it is justified, a specific objective of criminal legal reform is to reduce the prison population. From the law and economics perspective, incarceration at the current levels has been criticized for not being cost-justified.<sup>28</sup> Similarly, as argued in this Article's final section, confining immigrants is simply not an efficient way to achieve the purported goals of detention, namely community safety and avoiding flight risk. After all, over 85% of non-detained immigrants go to their hearings, and there is no evidence that people in removal proceedings commit crime at a higher, or even similar, rate than the general population.<sup>29</sup> From the critical perspective, incarceration should be curtailed or eliminated because it serves as a mechanism to marginalize certain groups and increase structural inequities and unequal power dynamics, and so should be reduced.<sup>30</sup> Immigration detention also does this by reifying racial divisions and anti-immigrant sentiments writ large.

Because immigration detention raises these normative concerns, it is important to pay attention to whether states trying to empty their correctional facilities are being foiled by local governments seeking out contracts with ICE to house immigrants in their jails. Although we do not have robust and causal empirical evidence to ascertain that this is already happening, it is important to acknowledge general trends that ground this discussion.

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danger and ensure that noncitizens appear at their hearings, such that they are not flight risks).

27. See generally César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (explaining how immigration detention and penal incarceration have intertwined, such that immigration detention is punishment).

28. See generally Peter N. Salib, *Why Prison?: An Economic Critique*, BERKELEY J. CRIM. L., Fall 2017, at 111 (arguing that prison imposes tremendous social costs without achieving any benefits, and concluding that there are more welfare-maximizing cost effective alternatives to prison).

29. See *Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings*, HUM. RTS. FIRST (Jan. 25, 2019), <https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings> [<https://perma.cc/3XFY-8JPH>]; Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, CATO INST. (Mar. 4, 2019, 1:16 PM), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence> [<https://perma.cc/P3BZ-WFVW>].

30. See discussion *infra* Sections II, V.

Prior to 2014, the ADP of immigrants in detention across the United States stayed relatively stable at around 30,000.<sup>31</sup> Since then, the ADP has climbed, reaching almost 52,000 in 2019<sup>32</sup> and stabilizing at a little over 42,000 in the beginning of 2020.<sup>33</sup> At the same time, from 2010 to 2016, the prison population fell by about 170,000 individuals.<sup>34</sup>

My objective here is not to show that rates of decarceration will determine or drive those of immigration,<sup>35</sup> but that the use of confinement in America is not only carceral; thus, immigration detention may be an obstacle to decarceration. The reason I do not seek to establish a causal relationship is because the data are simply not there. Data about immigration detention are far too limited, and the timespan analyzed is too short for accurate statistical inference. Also, as discussed *infra*, increases in the detention of migrants are more fully explained by changes in immigration law and policy, attitudes about immigration, and changes in criminal law enforcement more generally, than by rates of incarceration. However, in Section IV, I discuss data that suggest that decarceration can be a factor in increased immigration detention at the local level.<sup>36</sup> Furthermore,

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31. See Annex 2; Emily Kassie, *Detained: How the United States Created the Largest Immigrant Detention System in the World*, GUARDIAN: MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), <https://www.themarshallproject.org/2019/09/24/detained> [<https://perma.cc/399P-RH2E>]. ADP is calculated by dividing the sum total of inmates incarcerated each day for a specified time period, typically a year, by the number of days in the period, or year. ROBERT C. CUSHMAN, NAT'L INST. OF CORRS., PREVENTING JAIL CROWDING: A PRACTICAL GUIDE 2 (2d ed. 2002). Because there is a high turnover of people in immigration detention, ADP provides a more accurate measure of immigrant detainees than a single point-in-time population count. See *id.* at 2–4.

32. Hamed Aleaziz, *More than 52,000 People Are Now Being Detained by ICE, an Apparent All-Time High*, BUZZFEED NEWS (May 20, 2019, 6:58 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border> [<https://perma.cc/K6X6-PFBV>].

33. See Annex 2; *Policy Brief: 5 Reasons to End Immigrant Detention*, NAT'L IMMIGR. JUST. CTR. (Sept. 14, 2020), <https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention> [<https://perma.cc/68V4-RQ8W>].

34. See *infra* note 200 and accompanying text.

35. It is also not implausible to imagine a replacement. Even in 2005, Sheila Jackson Lee, an African American often aligned with immigrant communities, and Democrat legislator from Texas, proposed a bill increasing ICE detainee capacity to 100,000. See Rapid Response Border Protection Act of 2005, H.R. 4044, 109th Cong. § 201 (2005); *Representative Sheila Jackson Lee*, CONGRESS.GOV, <https://www.congress.gov/member/sheila-jackson-lee/J000032?q={%22sponsorship%22:%22sponsored%22,%22subject%22:%22Immigration%22}&searchResultViewType=expanded> [<https://perma.cc/BJ49-42Q6>].

36. See generally Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 L. &

although we currently have insufficient information to presume causality, the simple correlation of these events cements the notion that immigration detention should not be analyzed separately from incarceration.

At the outset, it is important to articulate some of the assumptions made and not made in this Article. The first, and most obvious, is that immigration detention policy will continue in the same direction as it has in the last twenty years. Of course, if the Federal Government ends the use of detention for immigration control, then local jails will not contract with it to fill their empty bed spaces. Despite calls for abolishing immigration detention,<sup>37</sup> it is unlikely that the Federal Government will end a practice it has relied on for over twenty years.<sup>38</sup> And although early signs from the Biden Administration indicate that there may be a change in enforcement priorities and in removal operations,<sup>39</sup> there have been no announcements about ending immigration detention or the Federal Government's contracts with private prison operators used for immigration detention. The other assumption is that the Federal Government will continue enforcing immigration law at roughly the same level. Given that the budgets for ICE and Customs and Border Patrol (CBP) have consistently grown,<sup>40</sup> this seems like a safe assumption. Note, however, that immigration levels need not remain constant or increase for detention to grow—in fact, as discussed *supra*, they have been falling. Because any undocumented immigrant is subject to removal and detention,<sup>41</sup> and there are between 10

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SOC'Y REV. 66 (2020) (showing that fluctuations in the local criminal inmate population must be considered in conjunction with economic factors to fully understand the emergence of immigration detention in local jails).

37. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 249–50 (2017).

38. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (arguing that a new administration can choose to abandon or reduce the reliance on immigration detention by simply adopting a policy that for those subject to discretionary detention, ICE will not seek detention, and for those subject to mandatory detention, ICE can loosen the parole guidelines). In essence, there is no legislation that needs to change for detention to drop. That no administration has done this policy move suggests that the problem is not strictly legal.

39. Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb 18, 2021).

40. AM. IMMIGR. COUNCIL, *THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY* 2 (2021).

41. See 8 U.S.C. § 1182(7) (establishing that individuals who entered without documentation are inadmissible); Immigration and Nationality Act, Pub. L. No. 82-414, § 237(a), 66 Stat. 163, 201 (1952) (stating that people found to be inadmissible are removable); *id.* § 236(a), 66 Stat. at 200 (stating that those individuals can be subject to detention).



and 12 million undocumented individuals in the country,<sup>42</sup> even with zero new immigrants, the government has a large pool of potential detainees.

This Article is organized as follows. Section II looks at the state of incarceration in America. It outlines the sorts of proposals that have been made to reduce incarceration levels and their motivations, as well as their limitations. It also describes the rise in immigration detention. Section III sketches the arguments for why we should understand these developments in tandem and how decarceration can become a driver of immigration detention, based both on social theory and law and economics. Section IV provides a summary of the currently available data that suggest a correlation between a rise in immigration detention and decarceration at the local level. Sections III and IV articulate descriptive arguments for why immigration detention should be understood as an obstacle to decarceration. Finally, Section V outlines normative implications of this research, in particular that immigration detention should thus be incorporated into efforts seeking to reduce the carceral population in the United States.

## II. INCARCERATION IN THE UNITED STATES

### *A. The Push Against Criminal Incarceration*

“We live in an era of mass incarceration.”<sup>43</sup> “The United States is home to 5% of the world’s population but 25% of the world’s prisoners.”<sup>44</sup> “We have more total prisoners than any other country in the world, and we have the world’s highest incarceration rate.”<sup>45</sup> This has prompted the growth of “a tenacious carceral state [that] has sprouted in the shadows of mass imprisonment and has been extending its reach far beyond the prison gate”<sup>46</sup>—so much so that “[t]oday, mass incarceration rolls comfortably

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42. Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/> [<https://perma.cc/JG8Y-Y3T9>]. We could also add all lawful permanent residents with criminal convictions to expand the pool of potential detainees.

43. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 260 (2018).

44. 13TH (Kandoo Films 2016).

45. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 1 (2017).

46. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1 (2015).

off the tongues of people of all ideological stripes.”<sup>47</sup> I write this introductory paragraph with the words of others to suggest the extent to which the issue of mass incarceration has become commonplace in all spaces, from popular media to academic discourse and policy conversations.<sup>48</sup>

The plea for reform has been extensive.<sup>49</sup> There have been calls to reduce or end mandatory minimums,<sup>50</sup> limit or eliminate prison sentences for “nonviolent offenses”<sup>51</sup>—especially drug crimes,<sup>52</sup> reduce the length of all sentences overall,<sup>53</sup> increase the use of alternatives to prison—ranging from more coercive alternatives like probation to less coercive ones like community service,<sup>54</sup> change charging practices by prosecutors,<sup>55</sup> reduce the amount of conduct that is categorized as crime—addressing

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47. Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549 (2017).

48. The literature is vast, although slightly outdated. A comprehensive overview is found in Nicole P. Dyszlewski, Lucinda Harrison-Cox & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016). Other more recent works, by no means comprehensive, include EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016); and *THE NEW CRIMINAL JUSTICE THINKING* (Sharon Dolovich & Alexandra Natapoff eds., 2017).

49. See Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016, 5:01 AM), <https://time.com/4596081/incarceration-report/> [<https://perma.cc/Y63N-S77Z>].

50. See, e.g., Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, STATE FACTOR, March 2016, at 1; Lauren-Brooke Eisen, *Mandatory Minimum Sentences—Time to End Counterproductive Policy*, BRENNAN CTR. FOR JUST. (June 9, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/mandatory-minimum-sentences-time-end-counterproductive-policy> [<https://perma.cc/TJ24-YA2A>].

51. See Eisen & Chettiar, *supra* note 49. The distinction between violent and nonviolent crime is much fuzzier than normally assumed. See, e.g., Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 573–75 (2011). Furthermore, the Supreme Court itself has struggled to define the contours of “crime of violence.” See Levin, *supra* note 43, at 271 n.47; see, e.g., *Stokeling v. United States*, 139 S. Ct. 544, 550–52 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207, 1210 (2018).

52. See Levin, *supra* note 43, at 309.

53. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113 (2018).

54. See, e.g., UNITED NATIONS OFF. ON DRUGS & CRIME, *HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT* 28 (2007).

55. See, e.g., Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 815 (2017).

overcriminalization,<sup>56</sup> and eliminate extremely punitive measures such as solitary confinement.<sup>57</sup>

Legislatures across the United States have taken some of these measures and enacted laws that adopt one or many of these policies. According to the news site *The Appeal*, since January 2019 there have been over 100 bills pertaining to these issues introduced to state legislatures.<sup>58</sup> Some have passed, some have failed, but the majority are still being discussed.<sup>59</sup>

Measures approved and proposed vary in size and scope. Much of the legislation has centered on nonviolent offenses. Mississippi's Criminal Justice Reform Act of 2019, for example, increased the use of drug courts for drug possession and use crimes, expanded the ability to apply for expungements, and made it harder for convicted persons to lose their driver's license if they become involved with the criminal legal system.<sup>60</sup> Similarly, the First Step Act at the federal level focused on limiting sentences for nonviolent drug offenses and implementing more reentry programs.<sup>61</sup> Louisiana's criminal legal reform package of ten bills "primarily focuses on non-violent, non-sex offenders and is designed to steer less serious offenders away from prison, strengthen alternatives to imprisonment, reduce prison terms for those who can be safely supervised in the community, and remove barriers to successful re-entry."<sup>62</sup> States like Georgia, Vermont, and New Hampshire also approved discrete measures promoting re-entry programs and limiting sanctions for minor crimes.<sup>63</sup>

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56. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 102–03 (2013).

57. U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1–3 (2016).

58. See Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, APPEAL, <https://theappeal.org/political-report/legislative-round-up/> [<https://perma.cc/TZ8A-MEXF>].

59. See *id.*

60. See H.B. 1352, 2019 Leg., Reg. Sess. (Miss. 2019).

61. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5220–21 (2018).

62. *Criminal Justice Reform*, OFF. OF THE GOVERNOR, <https://gov.louisiana.gov/index.cfm/page/58> [<https://perma.cc/D7MU-WX69>].

63. See *Criminal Justice Reform: Guide to the Issues 2020*, GA. PUB. POL'Y FOUND. (Oct. 1, 2020), <https://www.georgiapolicy.org/2020/10/criminal-justice-reform-2020-guide-to-the-issues/> [<https://perma.cc/58LH-NZ86>]; Alan J. Keays, *Justice Reinvestment Bill Wins Initial House Approval, With One Mystery 'No' Vote*, VTDIGGER (June 11, 2020), <https://vtdigger.org/2020/06/11/justice-reinvestment-bill-wins-initial-house-approval-with-one-mystery-no-vote/> [<https://perma.cc/FU2D-6HW6>]; Mark Hayward, *Jails Emptying*

Some states have targeted the potentially more impactful issue of sentencing, including—or especially—sentencing for violent crime. California’s Fair and Just Sentencing Reform Act, for example, reintroduced judicial discretion by allowing judges to strike mandatory enhancement for individuals with prior felony convictions.<sup>64</sup> New York also passed sentencing reform to allow judges to consider whether a crime was connected to domestic abuse that the defendant suffered.<sup>65</sup> At the time of this writing, Arizona and Maryland are considering sentencing reforms of their own.<sup>66</sup> Of course, not all states are passing criminal legal reforms like these. Alaska, for example, rolled back its decarceration reforms in 2017 and looks poised to continue on that path.<sup>67</sup>

The mere existence of all these criminal reforms is not proof that the states where they have been enacted are on a path to mass decarceration. After all, the efficacy of these bills is quite contested. As discussed further *infra*, there are various concerns that reform focused on the “non-serious, nonviolent, non-sex related offenders” will not be enough because most offenders do not fit into these categories.<sup>68</sup> Nonetheless, that legislation in this arena is being put forth on such a national scale indicates that criminal legal reform is of widespread interest.

Alongside these bills is the fact that the figure of the “progressive prosecutor” is on the rise.<sup>69</sup> As many have noted, progressive prosecution

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as *Criminal Justice Reform Quietly Takes Hold in New Hampshire Counties*, N.H. UNION LEADER (Apr. 20, 2019), [https://www.unionleader.com/news/courts/jails-emptying-as-criminal-justice-reform-quietly-takes-hold-in-new-hampshire-counties/article\\_1bc6e3ec-f288-5951-98e6-5f052c216915.html](https://www.unionleader.com/news/courts/jails-emptying-as-criminal-justice-reform-quietly-takes-hold-in-new-hampshire-counties/article_1bc6e3ec-f288-5951-98e6-5f052c216915.html) [<https://perma.cc/Z9JH-QC8D>].

64. Previously, there was a mandatory five-year sentencing enhancement for people with prior felony convictions. See S.B. 1393 (Cal. 2018).

65. Domestic Violence Survivors Justice Act, Assemb. B. A3974, 2019 Reg. Sess. (N.Y. 2019).

66. See Nichanian, *supra* note 58.

67. See Alan Greenblatt, *After Reforming Criminal Justice, Alaska Has Second Thoughts*, GOVERNING (Feb. 2018), <https://www.governing.com/topics/public-justice-safety/gov-alaska-criminal-justice-increasing-crime-rates.html> [<https://perma.cc/EE94-L9UV>].

68. Marie Gottschalk, *Razing the Carceral State*, SOC. JUST., 2015, at 31, 41; see PFAFF, *supra* note 45, at 185–86.

69. For example, Stephanie Morales was elected Commonwealth’s Attorney in Portsmouth, VA, in 2015 and re-elected in 2017. *Meet Your Commonwealth’s Attorney*, PORTSMOUTH COMMONWEALTH’S ATT’Y, <https://www.portsmouthcwa.com/commonwealths-attorney> [<https://perma.cc/UEB3-2E7N>]. Kim Foxx was elected State’s Attorney for Cook County, IL, in 2016. *Kimberly M. Foxx*, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/about/kimberly-foxx> [<https://perma.cc/6SLB-G85A>]. Aramis Ayala was elected State Attorney for the Ninth Judicial Circuit of Florida in 2016. Monivette Cordeiro, *Orange-Osceola State Attorney Aramis Ayala to Leave Office When Term Ends but Says ‘I’m Not Out of the Fight,’* ORLANDO SENTINEL (Oct. 31, 2019, 9:08 PM), <https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhpn7cvcmmojafaa-story.html> [<https://perma.cc/6VCM-ZH3F>]. Larry

will not be able to solve the problem of mass incarceration.<sup>70</sup> Not only do prosecutors face both internal and external resistance to implementing a reform agenda,<sup>71</sup> but they also face systemic and cultural inertias that limit the extent of what progressive leadership can even accomplish.<sup>72</sup> Nevertheless, prosecutors do have tremendous power. Emily Bazelon and John Pfaff have both made compelling arguments showing that mass incarceration was driven by prosecutorial discretion and the prosecutor-to-politics pipeline that favored “tough-on-crime” prosecutors.<sup>73</sup> In other words, while we may be wary that progressive prosecutors cannot create the kind of radical transformations that many advocates, academics, and defendants would like to see—given that they are currently in the minority of prosecutors writ large—given the power in their office, the more progressive prosecutors we have, the more we can expect incremental change in the direction of decarceration. Although progressive prosecution is still in the minority of

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Krasner was elected District Attorney of Philadelphia, PA, in 2017. *About the District Attorney*, OFF. OF THE DIST. ATT’Y, <https://www.phila.gov/districtattorney/aboutus/Pages/DistrictAttorney.aspx> [https://perma.cc/FG8N-USNC]. Rachel Rollins was elected District Attorney of Suffolk County, MA, in 2018. *Meet District Attorney Rollins*, SUFFOLK CNTY. DIST. ATT’Y’S OFF., <https://www.suffolkdistrictattorney.com/about-the-office/meet-district-attorney-rollins> [https://perma.cc/K2SK-XQ3B]. Wesley Bell was elected Prosecuting Attorney of St. Louis County in 2018. *A Vision for Justice*, ST. LOUIS CNTY. PROSECUTING ATT’Y, <https://www.stlouiscountyprosecutingattorney.com/wesleybell> [https://perma.cc/TV3C-SX8H]. Chesa Boudin was elected District Attorney of San Francisco, CA, in 2019. *About the Office*, S.F. DIST. ATT’Y, <https://www.sfdistrictattorney.org/about-us/> [https://perma.cc/R6YL-LX3S].

70. See, e.g., Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 751, 756–59 (2018).

71. See generally Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019) (describing many of the trajectories of some progressive prosecutors and some of the obstacles they face, from resistance within district attorney’s offices, to new policies, to resistance from other institutions, such as the police, other law enforcement agents, or political leaders).

72. See Note, *supra* note 70, at 759 (adopting a critical theory on the notion of progressive prosecution, exposing the limits of reformist efforts within the law when the laws as currently written reflect racially driven laws that were “never intended to keep marginalized people safe.”). See generally Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y. L. SCH. L. REV. 69 (noting that progressive prosecutors will still prosecute violent crime, which is a main driver of rates of incarceration in the United States; that the system still will weigh favorably towards plea bargaining; and that internal resistance will impede significant impact).

73. BAZELON, *supra* note 48, at xxv; PFAFF, *supra* note 45, at 105–06.

the nation, it is a movement that suggests we will see decreasing incarceration levels.

Finally, we can point to the renewed rise of the prison abolition movement, both in advocacy and scholarship. Scholars such as Angela Davis, and academics such as Dorothy Roberts and Allegra McLeod, among others, have put abolitionism at the forefront of the academic discourse.<sup>74</sup> McLeod argued that failing to adopt what she termed an “abolitionist framework” to imprisonment represented “a failure of moral, legal, and political imagination.”<sup>75</sup> Five years later, the academy has responded by taking the abolitionist challenge seriously. Scholars from disparate, and often conflicting, schools of thought—from critical legal theory<sup>76</sup> to law and economics<sup>77</sup>—have adopted abolitionist ideas. Prison abolition has also made its way to the popular press, in many outlets from *The New York Times* to *Playboy*.<sup>78</sup> By pointing to the rising notoriety of the abolitionist movement, I am not implying that jails will soon cease to exist. Not even abolitionists think that.<sup>79</sup> I simply mean to suggest that the Overton window on decarceration approaches is expanding, and this can impact incarceration levels in the medium and long term. Nonetheless, we must

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74. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (Greg Ruggiero ed., 2003); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019). I do not suggest that this list is exhaustive, nor that these writers have been the first or only ones to advance abolitionist arguments in the legal academy, generally. The abolitionist movement started over fifty years ago, and abolitionist ideas have been in scholarship since. However, in the last few years we have seen renewed interest in these ideas, in part as a response to these scholars.

75. McLeod, *supra* note 74, at 1156.

76. See generally Roberts, *supra* note 74 (arguing that the Thirteenth and Fourteenth Amendments are powerful tools to achieving the goal of living in a society without prisons).

77. See generally Salib, *supra* note 28 (arguing that prison imposes tremendous social costs without achieving any benefits, and concluding that there are more welfare-maximizing cost effective alternatives to prison).

78. See, e.g., Janelle Bouie, *12 Deaths in Mississippi Tell A Grim Story*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/opinion/mississippi-prison-deaths.html> [<https://perma.cc/BRL7-GE7D>]; Eli Day, *What Would a World Without Prisons Look Like?*, PLAYBOY (June 11, 2019), <https://www.playboy.com/read/the-new-abolitionists> [<https://perma.cc/7DVY-5F2A>]; German Lopez, *The Case for Abolishing Prisons*, VOX (June 19, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/6/19/15764176/prisons-abolition-alternatives> [<https://perma.cc/H4NM-JQ5E>]; Melissa Gira Grant, *Imagining a World Without Prisons*, NEW REPUBLIC (Oct. 17, 2019), <https://newrepublic.com/article/155411/imagining-world-without-prisons> [<https://perma.cc/3Z7F-ETP8>].

79. See McLeod, *supra* note 74, at 1156. McLeod argues explicitly that the goal of abolitionism is not to close jails for the purpose of closing jails. *Id.* Rather, the objective is to imagine and build an alternative that better and more humanely achieves the goals of jails: deterrence, incapacitation, rehabilitation, and retribution. *Id.*

recognize that these efforts are currently limited in scope and geography;<sup>80</sup> thus, it is unlikely to tilt the scale to end mass incarceration.<sup>81</sup>

Notwithstanding all these changes, from bipartisan reform movements, to the election of progressive prosecutors and the pressures of abolitionist organizing, it is hard to envision that American penal exceptionalism will end in the near future. The main reason for this is that the most popular reforms are insufficient to end mass incarceration. Part of the consensus that has driven new legislation in the area of criminal justice is that the United States imprisons an enormous amount of “low-level, non[ ]violent,” mainly drug, offenders.<sup>82</sup> As such, much of reform centers around creating alternatives to incarceration for these nonviolent offenses. However, 55% of incarcerated individuals are in prison because of “violent crime.”<sup>83</sup> It is not only that people convicted for violent crime are serving longer sentences, thereby potentially making up a larger percentage of the imprisoned

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80. In the wake of the Coronavirus pandemic, many governments, governmental agencies, and international organizations have adopted efforts to reduce prison populations. See Johann Koehler, *COVID-19 Recasts Criminal Justice Reforms Once Deemed ‘Unthinkable,’* LONDON SCH. ECON. & POL. SCI. (Mar. 31, 2020), <https://blogs.lse.ac.uk/socialpolicy/2020/03/31/covid-19-recasts-criminal-justice-reforms-once-deemed-unthinkable/> [https://perma.cc/L6JS-EV2T]. Italy and Scotland, for example, have agreed to release a number of inmates; the U.N. High Commissioner of Human Rights warned that not releasing vulnerable and low-risk people would violate international human rights law; and the UK Prison Officers’ Association has also advocated for release of inmates. *Id.* Moreover, there has been an increase in acceptance of abolitionist ideas, which has lead U.S. cities like Minneapolis to vote in favor of disbanding the police. Dionne Searcey & John Eligon, *Minneapolis Will Dismantle Its Police Force, Council Members Pledge*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/minneapolis-police-abolish.html> [https://perma.cc/JK4H-YLG2]. Whether these policies and campaigns, and others, lead to permanent reassessment of the need for jails or remain as a response to the pandemic is still to be determined.

81. The recent campaign around closing Rikers in New York City is illustrative. Despite having a well-organized effort that included the support of the city’s main public defender offices, the #NoNewJails movement was unable to impede a plan that would close Rikers by building smaller, borough-based facilities. See Raven Rakia & Ashoka Jegroo, *How the Push to Close Rikers Went from No Jails to New Jails*, APPEAL (May 29, 2018), <https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails/>, [https://perma.cc/D66X-HT8R]. Furthermore, abolitionism once “felt almost inevitable,” and yet it crumbled under the pressures of “tough-on-crime” politics and shifting mores. See Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America Is Impossible? It Once Felt Inevitable*, GUARDIAN (May 19, 2018), <https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable> [https://perma.cc/GJ2G-X5XY].

82. Pfaff, *supra* note 24, at 263.

83. *Id.* at 265.

population, but also that the share of new admissions for violent crime has increased tremendously.<sup>84</sup> This, as John Pfaff argues, means that in order for the United States to decarcerate, attitudes about what to do about violent crime need to change. Unfortunately for advocates of decarceration, “[t]he public and politicians remain committed to the idea that prison is the ‘right’ place for violence, and our on[.]going emphasis on low-level drug cases often reinforces that view, even if unintentionally.”<sup>85</sup>

A perhaps more fundamental issue of reformist agendas is that they are technocratic approaches for political problems.<sup>86</sup> One way to understand this point is to see that criminal legal reforms that are framed as solving economic problems have been more successful than those that target incarceration as a problem.<sup>87</sup> The history of Mississippi’s bill mentioned *supra* is instructive. Initial proposals included sentencing reforms which aimed to reduce the state’s prison population. However, the final version was explicitly focused on eliminating barriers to work. This example is one of many that reflects that the bipartisan fixation on mass incarceration narrows the scope of policy action and imagination to enacting only very circumscribed reform.<sup>88</sup> Gottschalk argues throughout her book that this impedes not only criminal reform but also the construction of a social infrastructure and safety net that are necessary to keep people out of prison.<sup>89</sup>

When we understand criminal reform as an economic rather than political issue, we more clearly see that the United States has developed significant, powerful interest groups that rely on maintaining the carceral state. These interest groups are not necessarily, or only, the private prison industry, but unions of correctional officials, as well as local governments that rely on prisons for their economic sustainability, like Richwood.<sup>90</sup> Because decarceration will mean that many of the people employed in

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84. See PFAFF, *supra* note 45, at 3.

85. Pfaff, *supra* note 24, at 273.

86. Gottschalk, *supra* note 68, at 39.

87. Other examples of this are Louisiana’s reforms from 2017. In that case, a particular bill was approved which explicitly addressed the need to reinvest savings from criminal legal reforms on reentry and anti-recidivism programs. H.B. 489, 2017 Leg., Reg. Sess. (La. 2017).

88. This example also highlights Benjamin Levin’s argument regarding bipartisan agreement on criminal legal reform masquerading acute differences in policy goals and visions. See generally Levin, *supra* note 43.

89. See generally GOTTSCHALK, *supra* note 46.

90. See CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 1, 5–6, 19 (2017). Correctional officers account for two-thirds of the money spent on prisons each year. *Id.* at 9. It is hard, therefore, to underestimate the efforts that will be carried out to protect these expenditures.



jails will be laid off, we can expect these interest groups will try to thwart reform.<sup>91</sup>

Finally, as David Garland argues, remarkably high levels of incarceration are not solely the product of laws or prosecutors, but rather weak alternatives to criminal law that mediate processes of social control and an underdeveloped welfare apparatus that can deliver non-penal services or solutions.<sup>92</sup> In other words, crime and punishment in America are in a vicious cycle with disadvantaged socioeconomic status. According to Garland's theory, high rates of violence are explained by the relatively unrestrained market forces and minimal safety net that create "neighborhood disorganization [and] social dislocation," and impede alternative, perhaps informal, modes of social control.<sup>93</sup> However, because of the lack of trust in government and the inexperience in creating functioning public institutions that can address these issues, there is no public sector to fill in the gap with alternatives to prison. "The result is a default resort to policing and punishment."<sup>94</sup> Consequently, by affecting communities that are already dislocated—using Garland's terminology—this only impedes the development of alternatives to social control, thus reigniting the cycle.<sup>95</sup> Without either confronting the causes

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91. This already happened in New York when Governor Andrew Cuomo attempted to close seven state prisons. Met with challenges from unions of public officers and local governments, he was forced to provide incentives of \$50 million to close the prisons. See *Governor Cuomo Announces Closure of Seven State Prison Facilities*, N.Y. STATE (June 30, 2011), <https://www.governor.ny.gov/news/governor-cuomo-announces-closureseven-state-prison-facilities> [<https://perma.cc/NVN2-FX68>]. In other words, it was not until Cuomo considered the political economy of decarceration that he was able to do it. Perhaps other governors not as committed to decarceration or as solvent as the one of New York will not be able to do the same.

92. David Garland argues that American penal exceptionalism is explained by: America's ultra-liberal political economy—characterized by stark inequalities, weakly restrained market forces, and minimal social protections—is detrimental to the functioning of poor families and communities, tending to limit their social control capacities and giving rise to levels of neighborhood disorganization, social dislocation, and criminal violence that are markedly higher than those of other developed societies. Faced with these social control deficits and the disorders to which they give rise, America's political economy—with its poorly funded public sector and underdeveloped welfare apparatus—also limits the capacity and disposition of governmental agencies to respond with the social services, social policy interventions, and "workable alternatives to imprisonment."

David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC'Y 321, 323 (2019).

93. *Id.*

94. *Id.*

95. *See id.*

of violence, or accepting prison as a way to address it, technocratic efforts to decarcerate will therefore not be able to bring the U.S. incarceration rates in line with the rest of the world.

Structural and political impediments to full scale decarceration need not mean that all efforts to reduce prison populations will be unsuccessful. Much of the critique of reformist agendas is not that they will not achieve anything, but that it will not be enough. John Pfaff, for example, argues that framing mass incarceration as a problem of nonviolent crime will impede subsequent, more profound reforms around violent crime.<sup>96</sup> However, simply reducing the incarcerated population of nonviolent offenders would cut the prison population. If, for example, states were to eliminate the population of people in prison for drug offenses, they could release over 200,000 people.<sup>97</sup> It is currently hard to imagine that all drug offenders would be released; however, the example shows that even small statistical gains represent a significant number of people.<sup>98</sup>

Pfaff has shown that looking at national decarceration trends obscures the fact that only half the country emptied its prisons, while the other half increased them.<sup>99</sup> For example, over 45% of the *national* prison population drop between 2010 and 2016 is attributable to efforts in California alone.<sup>100</sup> Even statewide trends obscure that many localities see prison rates go up, and others see them drop.<sup>101</sup> Precisely because decarceration is localized, however, small proportional numbers are actually incredibly impactful for small communities. If RCC were to lose 500 inmates, it would be a negligible drop in the bucket for the incarcerated population as a whole; however, for that community, a loss of 500 inmates and the dollars and cents that represents for the local government would be tremendous. It is precisely

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96. See PFAFF, *supra* note 45, at 105–23, 185–202.

97. About 16% of people in state prisons are there for drug crimes. See THE SENT’G PROJECT, FACTS ABOUT PRISON AND PEOPLE IN PRISON 1 (2017). There are 1,291,000 people in state prisons; 16% of that is 206,500. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/V88A-VTNJ>].

98. It is beyond the scope of this Article to discuss what is “a lot of people incarcerated or decarcerated.” Many have pointed out that people generally assume that there are too many people in prison but have not presented the case for what would be “the right” level. See, e.g., James B. Jacobs, *Facts, Values and Prison Policies: A Commentary on Zimring and Tonry*, 3 PUNISHMENT & SOC’Y 183, 185 (2001). As Benjamin Levin has argued, however, this idea comes from the assumption that there is an optimal numerical level of incarceration, when perhaps there is no optimal level but rather the problem is whether incarceration “exacerbate[s] troubling power dynamics and distributional inequities.” Levin, *supra* note 43, at 262–63.

99. See Pfaff, *supra* note 24, at 255.

100. See *id.*

101. See PFAFF, *supra* note 45, at 111.

because of that fact that we should be wary of brushing aside criminal legal reform as only modestly consequential.

That the pain of decarceration will be localized, and that the political efforts to prevent it will be too, signals that local governments will look for potential ways to stop the bleeding. One of those ways may be immigration detention. To fully understand why, and how it has already happened, we must first look at the driving forces behind the increasing levels of immigration detention.

### *B. The Rise of Immigration Detention in the United States*

Immigration detention is a growing phenomenon in the United States. Detention is allowed under the Immigration and Nationality Act section 236.<sup>102</sup> This section stipulates who can and who must be detained.<sup>103</sup> “Between fiscal years 1994 and 2017, the Average Daily Population<sup>104</sup> of immigrant detainees in the United States climbed steadily from 6,785 to 38,106, a more than fivefold increase.”<sup>105</sup> Since then, it reached almost 50,000 in 2019 and has currently leveled off at about 40,000.<sup>106107</sup> There is a vast literature explaining this punitive turn. Legal scholarship has focused on changes in law,<sup>108</sup> finding that, as Victor Narro succinctly put it, “comprehensive immigration reform is a crime bill in disguise.”<sup>109</sup>

102. See Immigration and Nationality Act § 236, 8 U.S.C. § 1226(c) (2018).

103. See *id.*

104. Because there is a high volume of daily turnover of immigrants in detention and seasonality affects migration numbers, analyses of immigration detention usually use the Average Daily Population (ADP) as a way to measure detention levels. The ADP, as implied by the name, is simply calculated by dividing the total population of detained immigrants in a particular time period by the number of days in that time period. See CUSHMAN, *supra* note 31.

105. See Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. LAW. SOC. SCI. 97, 101 (2019).

106. See Annex 2.

107. A recent drop can be attributed to the slowing of entries due to the policy known as Migration Protection Protocol, as well as closing down the border due to the Coronavirus. See *Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/LBX4-KBG5>]. As this drop reflects current temporary policies but not the trend observed for the last six years, we cannot suppose that they reflect an actual drop in the use of detention.

108. See Ryo, *supra* note 105, at 98.

109. Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants Than Any President in History?*, NATION (Mar. 31, 2014), <https://www.thenation.com/article/why-has-president-obama-deported-more-immigrants-any-president-us-history/> [<https://perma.cc/YRG2-S7MM>].

However, these legal and policy changes do not tell the whole story. After all, most of these reforms occurred in the 1980s and 1990s, but we have seen continual growth in detention levels much after the reforms were passed.

Other studies have pointed to more localized explanations for the recent expansion of immigration detention. Emily Ryo and Ryan Peacock, for example, have shown that political and economic factors push localities to participate in detention. They observed that localities where immigration detention grew were those with high levels of unemployment that were “relatively small, nonurban . . . [,] largely Republican[,], and located in the South.”<sup>110</sup> Other scholars have also concluded that a driver of increased detention is the extent to which immigration laws are enforced by local authorities.<sup>111</sup> Those jurisdictions that cooperate with federal agencies in enforcing immigration laws apprehend more people, and therefore have more immigration detention.<sup>112</sup> Another factor is the existence of private prisons. Whether through active lobbying<sup>113</sup> or their mere existence,<sup>114</sup> “studies suggest that there are multiple pathways through which private prison companies might be contributing to the growth in detention.”<sup>115</sup>

Finally, recent analyses have shown that differences in adjudication may be contributing to increased detention. Immigrants may be released from immigration detention by either an Immigration Judge or the Department

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110. Ryo & Peacock, *supra* note 36, at 86–87.

111. Local governments are able to cooperate with immigration enforcement authorities through 287(g) agreements, coming from INA § 287(g), which allows this intergovernmental cooperation. See 8 U.S.C. § 1357(g). Scholars have identified that these agreements increase the enforcement capacity of the Federal Government. See DORIS MARIE PROVINE ET AL., POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES 7–10 (2016).

112. Jillian Jaeger has shown that the actual enforcement capacities of a locality matter, not only whether or not they sign 287(g) agreements. See Jillian Jaeger, *Securing Communities or Profits? The Effect of Federal-Local Partnerships on Immigration Enforcement*, 16 STATE POL. & POL’Y Q. 362, 363–66, 380 (2016); see also Margot Moinester, *Beyond the Border and Into the Heartland: Spatial Patterning of U.S. Immigration Detention*, 55 DEMOGRAPHY 1147, 1150–51 (2018) (showing tremendous disparities in likelihood of immigration enforcement in the United States is explained by geographical factors).

113. See Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879, 896–97 (2015) (arguing that “private prisons wield a level of political capital that can ensure harsh custody policies and practices”).

114. See, e.g., Loren Collingwood, Jason L. Morin & Stephen Omar El-Khatib, *Expanding Carceral Markets: Detention Facilities, ICE Contracts, and the Financial Interests of Punitive Immigration Policy*, 10 RACE & SOC. PROBS. 275, 288, 292 (2018) (finding that the mere presence of a private prison that holds immigration detention is predictive of the likelihood that legislators will co-sponsor harsh immigration legislation).

115. Ryo, *supra* note 105, at 103.

of Homeland Security.<sup>116</sup> A study of asylum adjudications, for example, showed that immigration judges routinely detain individuals who are not flight risks, nor pose a danger to the community and, therefore, need not be detained.<sup>117</sup> Emily Ryo, in a study on bond hearings, shows that prior criminal history is not as predictive of favorable bond petitions as are country of origin and the availability of legal representation.<sup>118</sup> More research needs to be carried out in this area to show conclusively that adjudicators now are more routinely deciding to deny bond or parole for immigrants. However, that *how* laws are implemented is as, or more important than, the law itself, is wisdom that also applies in the immigration detention context.

In sum, expansion of civil immigration detention is determined not only by law but also by geography, race, and politics. At the core of these dynamics, however, is that immigration enforcement more generally has become ensconced in the criminal legal system.<sup>119</sup> This process has led to the development of the subfield of “cimmigration,” which, as suggested by the name, is defined as “the intertwinement of crime control and migration control.”<sup>120</sup>

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116. Who has the authority to release the noncitizen is determined by how the noncitizen entered the United States. Immigration Judges release people who entered without inspection, and DHS those who entered through a border check-point. Individuals who entered, or attempted to, through a port of entry are eligible for parole through the DHS. See 8 U.S.C. § 1182 (2012). Those that entered without inspection, or attempted to, are only eligible for bond through a bond proceeding in immigration court. See *id.*

117. Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 791, 839 (2018).

118. Emily Ryo, *Predicting Danger in Immigration Courts*, 44 LAW & SOC'Y INQUIRY 227, 235–36, 239, 241 (2019).

119. As David C. Brotherton and Philip Kretsedemas write in their introduction to their collection *Immigration Policy in an Age of Punishment*, “[t]he punitive public culture that has come to define immigration policy can be understood as the emblematic feature of an age, a zeitgeist of the times.” David C. Brotherton & Philip Kretsedemas, *Introduction to IMMIGRATION POLICY IN THE AGE OF PUNISHMENT: DETENTION, DEPORTATION, AND BORDER CONTROL* 1, 2 (David C. Brotherton & Philip Kretsedemas eds., 2017).

120. Joanne van der Leun & Maartje van der Woude, *A Reflection on Cimmigration in the Netherlands*, in *SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* 41, 43 (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2013).

### III. CAN THE IMMIGRANT REPLACE THE INMATE?

The preceding section explained two trends that are occurring at once: a rise in criminal legal reform—and the correlated decarceration<sup>121</sup>—and an increase in immigration detention. In this section, I argue that we cannot understand these developments in isolation. My argument relies on descriptive claims about the intertwinement of criminal and immigration law, and the political economy of criminal legal reform. I address the first set of claims in the first subsection, where I discuss the crimmigration literature showing that immigration enforcement has become punitive and that a large number of immigrants are now considered and treated as criminals.<sup>122</sup> This has created, both legally and socially, a situation where immigrants will increasingly occupy the space of inmates.

In subsection B, I describe more practical reasons for the possibility that immigration detention will grow, such that it will swallow some of the gains made by decarceration legislation. This analysis is rooted more in the language of law and economics than the preceding theoretical section. It shows that the carceral regime has created a series of incentives that will push people to seek out a “supply” of inmates. That supply is easily found in immigration detainees. Necessarily, both of these subsections and arguments are prognostic. In the following section, I review the currently available data for my hypotheses.

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121. As articulated *supra* Section II.A, decarceration predates much of the reform, so we should be cautious of assigning causality exclusively to law. Nonetheless, even if the law is not pushing decarceration, it is unlikely that measures aiming to reduce the prison population will have the unintended consequence of increasing the number of people incarcerated.

122. It is important to clarify that I am mainly referring to immigrants of color. As Anita Ortiz Maddali has argued, “[i]mmigrants whose culture and values more closely aligned with Anglo-Protestants of Northern European heritage have historically been favored under immigration law and have integrated more easily . . .” Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 647 (2014). This integration is borne not only out of historical favoritism in immigration law, but because of social processes that allow assimilation of non-racialized immigrants. See *id.*; see also Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 163 (2010) (arguing that migration of Latino immigrants to areas of the country that had not experienced much immigration has “lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship”).

### A. The Role of Crimmigration

For over fifteen years, scholars have explored the field of crimmigration,<sup>123</sup> articulating the various ways in which criminal and immigration law have melded. On the criminal side, crimmigration is seen in the “dispensing [of] certain procedural protections traditionally afforded [to] criminal defendants when immigration-related activity forms the basis for the criminal prosecution.”<sup>124</sup> The clearest example is Operation Streamline, where courts adjudicate criminal immigration cases in bulk, with as many as one hundred defendants at a time.<sup>125</sup> Anyone observing these proceedings knows that the defendants do not understand the charges being made against them, the crimes they are pleading to, or the consequences of doing so.<sup>126</sup> On the immigration side, scholars usually point to the expansion of crimes that have immigration consequences,<sup>127</sup> the criminalization of migration, and the use of traditional police and military tactics<sup>128</sup> for immigration

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123. The beginning of this body of work can be attributed to Juliet Stumpf’s 2006 seminal article, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (discussing the merge of criminalization and immigration).

124. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1475 (2014).

125. Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL’Y INST. (Apr. 29, 2010), <http://www.migrationinformation.org/USfocus/print.cfm?ID=780> [<https://perma.cc/LFP3-RJGJ>].

126. See García Hernández, *supra* note 124, at 1477.

127. Immigration consequences for crimes are not novel, and are, in some respects, foundational to the United States. The Transportation Act was passed in 1718 in Britain, allowing Britain to send criminals to Australia, the United States, and other colonies. See ANTHONY VAVER, *BOUND WITH AN IRON CHAIN: THE UNTOLD STORY OF HOW THE BRITISH TRANSPORTED 50,000 CONVICTS TO COLONIAL AMERICA* 54 (1st ed. 2011). This was meant to both supply cheap labor to the colonies and solve the problem of criminals in Britain. See *id.*

128. See García Hernández, *supra* note 124, at 1466 (stating that the “[u]se of firearms and large-scale reliance on detention, for example, were largely unheard of in the immigration law enforcement context. Employees of the Immigration and Naturalization Service (“INS”), the federal agency charged with enforcing immigration laws for much of the twentieth century, were not even authorized to carry firearms until 1990.”). It is worth noting that now the Customs and Border Patrol, in charge of monitoring the borders of the United States, is the federal agency with the most officers that carry firearms. See Robert Longley, *Firearms and Arrest Authority of U.S. Federal Agencies*, THOUGHTCO (Feb. 16, 2021), <https://www.thoughtco.com/firearms-and-arrest-authority-federal-agencies-3321279> [<https://perma.cc/RTS4-ZKER>].

control enforcement.<sup>129</sup>

But crimmigration is more than just about law. It is also about how “immigration enforcement and criminal justice [have come to] form part of the same carceral regime and occupy the same carceral space.”<sup>130</sup> Both immigration detention and incarceration occur in jails that are either the same or have all the same markers.<sup>131</sup> More importantly, perhaps, they are both experienced, and understood,<sup>132</sup> as punishment.<sup>133</sup> So, although the immigration and criminal legal systems are distinguished in their legal motivations, they have become geographically and functionally similar.

Furthermore, beyond the law, both incarceration and detention serve to confine populations that are constructed as social problems writ large. That immigrants have been, at the very least partially, socially constructed as a problem—if not a criminal one—is uncontroversial.<sup>134</sup> As Bridget Anderson argues, “‘migrant’ and its equivalents are increasingly associated

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129. See García Hernández, *supra* note 124, at 1475–76. See generally Stumpf, *supra* note 123.

130. Ryo, *supra* note 105, at 99.

131. See DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2–3, 21 (2009). Ms. Schriro was the founding Director of the ICE Office of Detention Policy and Planning. *Id.* at 2, 35. This report on the conditions of ICE Detention became a watershed moment for crimmigration scholars and advocates, signaling from within the many ways in which detention was carceral.

132. A frustrating experience for many immigrants in detention is to hear from lawyers and judges that their confinement is nonpunitive or carceral. After all, they are held in jails or prisons, have to wear jail uniforms, are handcuffed or shackled when they go to court, have limited visitation rights, and their custody is determined by the government. Breanna Cary, *Living Conditions in U.S. Immigration Detention Centers*, NOLO, <https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> [<https://perma.cc/DTH2-D8TX>].

133. García Hernández, *supra* note 27, at 1359 (arguing that immigration detention is punitive from a rule-based approach, contending that whether detention is civil or criminal depends on legislative intent, and “[i]f Congress developed the immigration detention statutory scheme within a political context infused with a desire to punish immigrants, as [this Article] posits it did, then to detain is necessarily to punish”); see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (making the functionalist argument that immigration detention conditions are so harsh that it is in fact a “quasi-punitive regime”). See generally Mary Bosworth, *Subjectivity and Identity in Detention: Punishment and Society in a Global Age*, 16 THEORETICAL CRIMINOLOGY 123 (2012) (carrying out an ethnography of immigration detention in the United Kingdom to show how civil detention has become punitive).

134. While I discuss here only the social construction of the immigrant, that discussion could be absorbed by a broader discussion of the construction of the “other” or of minorities. There is a long list of theorists who have addressed these issues. See Herbert Blumer, *Race Prejudice as a Sense of Group Position*, 1 PAC. SOCIO. REV. 3, 3 (1958); HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 2 (1967); Lincoln Quillian, *Prejudice as a Response to Perceived Group Threat: Population Composition and Anti-Immigrant and Racial Prejudice in Europe*, 60 AM. SOCIO. REV. 586, 586 (1995).



with the low skilled, the low waged, and the global poor.<sup>135</sup> The term is rarely used to describe professionals or those leaving Northern Europe and North America, who are more likely to be known as ‘expats.’”<sup>136</sup> This differentiation between immigrant and expat signals that the immigrant is not understood as such because of their condition as a foreigner, but rather because of their social position. In Anderson’s telling, that position is one of economic extraction.<sup>137</sup> For Roxanne Lynn Doty, on the other hand, the immigrant poses not so much an economic problem but a cultural one. For her, the immigrant is painted as a threat to a group’s “identity and survival as an entity . . . as a nation, an ethnic, racial, religious, or even socioeconomic group.”<sup>138</sup>

Both of these associations, the immigrant as economic drain and as a cultural menace, are part of a long history of “otherification”<sup>139</sup> of immigrants in U.S. history.<sup>140</sup> Evidently, neither of these associations on its own is the same as characterizing immigrants as criminals. One could argue that understanding immigrants as criminals is a result of this otherification in the context of a long history of associating certain immigrant groups with particular types of crimes. Such associations, for example, have included the association of Italian or Jewish immigrants with organized

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135. Bridget Anderson, *The Politics of Pests: Immigration and the Invasive Other*, 84 SOC. RSCH. 7, 12 (2017).

136. *Id.* Refugees are excluded from this negative association because that term “still retains connotations of deservingness and human rights.” *Id.* at 11.

137. That immigrants are actually economically net-positive is unimportant. Many others have observed this understanding of migrants. *See, e.g.*, Peter H. Schuck, *Alien Rumination*, 105 YALE L. J. 1963 (1996) (reviewing PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995)); Darnell F. Hawkins, *Ethnicity, Race and Crime: A Review of Selected Studies*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* (Darnell F. Hawkins ed., 1995); Daniel P. Mears, *The Immigration-Crime Nexus: Toward an Analytic Framework for Assessing and Guiding Theory, Research, and Policy*, 44 SOCIO. PERSPS. 1 (2001); Rich Furman et al., *The Criminalization of Immigration: Value Conflicts for the Social Work Profession*, J. SOCIO. & SOC. WELFARE 169, 170 (2012).

138. ROXANNE LYNN DOTY, AM. IMMIGR. COUNCIL, *THE ANTI-IMMIGRANT MOVEMENT AND THE POLITICS OF EXCEPTIONALISM* 3 (2010).

139. *See, e.g.*, Douglas Epps & Richard Furman, *The ‘Alien Other’: A Culture of Dehumanizing Immigrants in the United States*, SOC. WORK & SOC’Y, 2016, at 2 (“‘Othering’ can be understood as a social method of identifying individuals thought to be different from one’s self or culture, most specifically the majority culture, that creates or emphasizes dominance and subordination.”).

140. It is, of course, not only a part of U.S. history and can be seen in most countries. *See* Clint Curle, *Us vs. Them: The Process of Othering*, CANADIAN MUSEUM FOR HUM. RTS., <https://humanrights.ca/story/us-vs-them-the-process-of-othering> [<https://perma.cc/U75U-4JU7>]. Nonetheless, the focus of this Article is the United States.

crime,<sup>141</sup> or Muslim or Arab immigrants with terrorism.<sup>142</sup> However, tying one particular immigrant community with generalizations about crime is not the same as subsuming criminality into the immigrant system writ large. Scholars have argued that this jump was made possible by crimmigration itself. Judith Ann Warner, for example, explains that the “social construction of immigrants as ‘criminal aliens’ is increasing due to . . . the ‘criminalization of immigration,’ which involves the unification of social control of both immigrants and criminals through integration of deportation with criminal justice system operation.”<sup>143</sup> In other words, both the criminalization of illegal entry, with the high visibility of prosecution and persecution of this crime, and the continued rhetoric and enforcement of laws against the “criminal alien,” are fomenting the creation of the “crimmigrant.”<sup>144</sup>

It is important to recognize that the kind of immigrant who is criminalized is the immigrant of color. Beyond President Trump’s complaints about bringing in immigrants from “shithole countries,”<sup>145</sup> we have seen the validation of exclusion of immigrants from Muslim-majority countries,<sup>146</sup> an immigration detention system that mainly imprisons Hispanic immigrants,<sup>147</sup>

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141. See generally WILLIAM KLEINKNECHT, *THE NEW ETHNIC MOBS: THE CHANGING FACE OF ORGANIZED CRIME IN AMERICA* (1996) (tracing the association of Italian and Jewish immigrants with organized crime); ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* (2019) (noting that Jewish immigrants faced much discrimination in colonial America).

142. See generally Costas Panagopoulos, *Trends: Arab and Muslim Americans and Islam in the Aftermath of 9/11*, 70 PUB. OPINION Q. 608 (2006).

143. Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, J. SOC. & ECOLOGICAL BOUNDARIES, Winter 2005-2006, at 57 (citing Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000)).

144. There is already some empirical evidence supporting these claims. A study of the perception of immigrants as criminals, for example, found that “the perceived size of the undocumented immigrant population, more so than the actual size of the immigrant population and economic conditions, is positively associated.” Xia Wang, *Undocumented Immigrants as Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 CRIMINOLOGY 743, 743 (2012).

145. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 4:52 AM), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) [<https://perma.cc/EVX2-SQC4>].

146. See, e.g., Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1478 (2018) (questioning the national security justification for the Muslim ban and arguing that the ban represents a seemingly neutral way to exclude a targeted population, or as she calls it, a “backdoor ban”).

147. ICE does not provide demographic information of people in detention; however, we know that the majority of people in detention are Latino. See U.S. IMMIGR. & CUSTOMS ENF’T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT

and a border patrol that almost exclusively operates in the southern border, despite being alerted to terrorism threats from the northern side.<sup>148</sup> The problem of animus against immigrants of color predates the Trump administration, of course.<sup>149</sup> Also, its impact is not only in immigration matters.<sup>150</sup> However, racialized enforcement contributes to the construction of the idea of the immigrant of color as criminal because it is they who is treated as such. Furthermore, it makes the mere presence of the immigrant an example of someone who potentially committed a crime and got away with it.<sup>151</sup>

Under Wagner's hypothesis, another concept that has contributed to the creation of the crimmigrant is the creation of the "criminal alien."<sup>152</sup> A "criminal alien" is a noncitizen who is a subject of deportation by their involvement with the criminal legal system.<sup>153</sup> This figure has been at the center of much immigration discussion as the type of immigrant that is the

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AND REMOVAL OPERATIONS REPORT 8, 28–30 (2019). We know, for example, that around 90% of removals in Fiscal Year 2019 were of citizens of Mexico, Honduras, Guatemala, or El Salvador. *Id.* Also, that same year, 68% of removals were of individuals apprehended along the southwest border by Customs and Border Patrol; most of these are Hispanic individuals. *Id.* at 3, 19.

148. The Government Accountability Office found that "Border Patrol identified an insufficient number of agents that limited patrol missions along the northern border . . . primarily because CBP's priority is to secure the U.S.-Mexico (southwest) border." U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-470, NORTHERN BORDER SECURITY: CBP IDENTIFIED RESOURCE CHALLENGES BUT NEEDS PERFORMANCE MEASURES TO ASSESS SECURITY BETWEEN PORTS OF ENTRY (2019).

149. See, e.g., Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C. RTS.-C. LIBERTIES L. REV., 297, 298 (2009) (exploring the lynching of Latinos during the Jim Crow era); see also McKanders, *supra* note 122, at 163 (comparing the effects of state and local anti-immigrant laws in the current era to the effects that Jim Crow laws had on African Americans).

150. There is a large body of scholarship, for example, addressing how anti-immigrant animus has driven family courts to more often rule against undocumented parents in custody cases. See Maddali, *supra* note 122, at 646; see also David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. POL'Y 45, 47 (2005) (arguing that immigration status was often dispositive in family court cases).

151. It may also have implications beyond immigrants as anti-immigrant animus is driven more and more against Latinos, regardless of their citizenship status. See Regina Branton et al., *All Along the Watchtower: Acculturation Fear, Anti-Latino Affect, and Immigration*, 73 J. POLS. 664, 668–69 (2011).

152. See Warner, *supra* note 143, at 68–69.

153. *Id.* at 68 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-337R, INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS 6 (2005)).

proper target for immigration enforcement. As such, “the deportation of ‘criminal aliens’ has become the driving force in U.S. immigration enforcement.”<sup>154</sup> The fact that the “criminal alien” has become a target of derision across the political spectrum serves to reinforce the construction of immigrants as criminals.<sup>155</sup>

Other scholars propose reverse causality: crimmigration is the result of a history of disdain for immigrants of color along with a willingness of Americans to use “penal norms to address social phenomena deemed problematic.”<sup>156</sup> Or, as Karla McKanders put it, “the law reifies race by legislating cultural norms that reinforce racial divisions and hierarchy in our country.”<sup>157</sup> César Cuauhtémoc García Hernández surveys U.S. history to show that animus towards immigrants is a feature of American history.<sup>158</sup> He writes,

[F]oreigners have been derided in almost every period of the nation’s history. The Chinese were explicitly excluded by statute in 1882 . . . Italians were later described as similar to Chinese or, more commonly, to blacks—neither comparison meant as flattery—and subjected to an array of discrimination. Years later, Mexicans, including United States citizens of Mexican descent, were welcomed as temporary laborers during a labor shortage, only to experience mass deportation when they were no longer wanted.<sup>159</sup>

However, it was not until the 1980s that crimmigration arose because of the punitive turn in the United States. In García Hernández’s telling, once it was acceptable to criminalize deviance, it was only natural to enact “strict immigration laws that emphasized a noncitizen’s involvement in criminal activity,” and pursue more law enforcement tactics to target them.<sup>160</sup> Along the same vein, Marie Gottschalk, argues, “a ‘thick nativist mood is palpable’ in the United States today and is finding expression in record

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154. Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 598 (2016) (citing Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013)). Chazaro argues that the category criminal alien only reinforces a false narrative of good immigrant versus bad one that props up the “criminal removal system,” borrowing the term from Ingrid V. Eagly. *Id.* (quoting Eagly, *supra*).

155. In the recent Democratic primaries, for example, only Julian Castro’s campaign called for eliminating the criminal, non-criminal distinction in immigration law. See Jasmine Aguilera, *Section 1325 of U.S. Immigration Law Was a Hot Topic in Wednesday’s Debate. Here’s Why It’s a Big Deal*, TIME (June 27, 2019, 10:56 AM), <https://time.com/5615757/section-1325-immigration-law-2020-debate> [<https://perma.cc/FY74-FDAZ>].

156. See García Hernández, *supra* note 124, at 1460.

157. McKanders, *supra* note 122, at 164.

158. See García Hernández, *supra* note 124, at 1461–67.

159. *Id.* at 1462.

160. *Id.* at 1457.

numbers of anti-immigrant measures, many of which call for raising the criminal penalties for immigration-related violations.”<sup>161</sup>

Whether the construction of immigrant as criminal is first social then legal or vice versa is unimportant, for both phenomena are currently feeding off each other.<sup>162</sup> What García Hernández’s and Warner’s analyses, and others’<sup>163</sup> point out is that the social and the legal—once in play—work in tandem, creating a vicious cycle that reinforces the melding of immigrant and criminal. Of course, as mentioned above, no construction is definite or fixed. Even a self-reinforcing mechanism as the one just described can be altered. However, current political anxieties and the direction of legislation in the United States, much of Europe, and Australia—to name a few places—indicates that reversal is a long time coming.<sup>164</sup>

Given crimmigration’s prevalence, we can expect immigration detention to stay stable and, more likely, grow. This is especially true once we consider that the figure of the crimmigrant has been constructed and is in a process of reification. Through this process of construction, immigration

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161. GOTTSCHALK, *supra* note 46, at 217. Gottschalk observes that “efforts to criminalize immigration infractions have proceeded under the assumption that capturing more people and branding them as criminals enhances public safety.” *Id.* at 224. The opportunity cost of these efforts has been the ability of federal agencies to prosecute serious drug crimes, human or weapons trafficking, and white-collar crime, among others. *Id.*

162. I do not mean to suggest that only the factors mentioned here are relevant to the social construction of the immigrant as criminal. Other factors such as media portrayals are relevant. See generally ETHICAL JOURNALISM NETWORK, MOVING STORIES: INTERNATIONAL REVIEW OF HOW MEDIA COVER MIGRATION (Aidan White ed., 2015) (finding that press coverage was fueling sensationalism and intolerance). Official discourse can also be important. Anderson, for example, in an analysis breaking down the use of metaphors to describe migrants in the policy discourse, argues that constant allusions to migrants as pests or insects solidify the notion that “migrants are invaders,” and the main problem with them “is a problem of *numbers*.” Anderson, *supra* note 135, at 14, 17.

163. See generally RACIAL CRIMINALIZATION OF MIGRANTS IN THE 21ST CENTURY (Salvatore Palidda ed., 2011) (exploring many ways in which migration has been criminalized because of race, and vice versa).

164. See, e.g., Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17 ETHNOPOLITICS 519, 520 (2018) (arguing that “while there is no universal trend towards nationalism, it has become more prevalent in global politics in recent years”); Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* 15 (Harv. Kennedy Sch., Working Paper No. RWP16-026, 2016), <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash> [<https://perma.cc/7HZ2-JQ9R>] (arguing that xenophobia is on the rise but that it “is only one part of a much broader cultural backlash among the older generation, rejecting many other liberal and cosmopolitan values diffusing throughout post-industrial societies”).

control has become more closely associated with crime control; thus, the methods of one become more acceptable for the other. Crucially, through this process of construction, the willingness to use confinement as a way to deal with a perceived social process becomes more acceptable.

### *B. The Possibility of Increasing Immigration Detention*

The preceding subsection outlined an argument based on social theory for why current trends in immigration enforcement could give rise to a more expansive use of detention. In sum, the more immigrants are perceived as criminal, and the more criminal methods and tools are used to regulate immigration—as the crimmigration regime expands—we can expect the traditional tools of criminal law to be used more frequently in the immigration context. In this subsection, I focus on a more pragmatic explanation for this move. While this explanation need not operate independently from the preceding one, it is constructed more around a theory of incentives than social theory.

Both John Pfaff and Marie Gottschalk have argued that an often-overlooked aspect of criminal legal reform is the role that correctional officer unions and state district attorneys can have in influencing both policy and its enforcement.<sup>165</sup> We can ignore district attorneys in terms of their role of replacing inmates with detainees because their jobs will not be affected by immigration detention. However, corrections unions can be strong political actors that can force their way to ensure that corrections jobs are protected. Evidently, for those jobs to be protected, jails must remain open.

Unions can act strategically *ex-ante* or *ex-post* criminal legal reform. *Ex-ante* they can push against it, or if their message is politically unpalatable, they can seek guarantees from the state that the state will try to secure corrections jobs through contracts with the Federal Government, including ICE. Alternatively, if reform is passed, unions may push local officials to seek out agreements with ICE. Of course, whether or not these agreements are sought and signed will depend on more than interest group activity; however, we should not think that decarceration occurs in a vacuum and that no party will try to reduce the potential economic harm that it will bear as a result.

The immigration detainee is an attractive remedy for the potential costs of decarceration. One big reason is that the Federal Government pays

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165. See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 952, 975–76 (2016).

more per detainee than the state does.<sup>166</sup> Furthermore, the immigration detainee is politically disenfranchised almost by definition.<sup>167</sup> This is especially true for jails and prisons that are more rural and remote—the facilities where detention has transitioned to in the last decade.<sup>168</sup> It is not only that undocumented immigrants have few political rights and no representatives<sup>169</sup> but also that these facilities are located in areas far away from communities that advocate on their behalf, so these facilities are unlikely to experience a backlash in connection with increased incarceration with respect to detainees in the way that they have been the subject of much criminal legislative reform.

Even absent the political economy considerations, we cannot underestimate the economic rationale for towns and cities to participate in immigration detention. We already know, for example, that although paying for more police officers is more beneficial in terms of crime reduction than spending on corrections, localities prefer spending on corrections because those costs are offloaded to the state, as the state pays for those localities to hold state inmates; in contrast, local governments have to bear the cost of each police officer trained, hired, and employed.<sup>170</sup> In other words, localities often choose a worse policy option because it is cheaper.

In terms of immigration detention, there is an even greater incentive to participate, as there are no economics costs and only benefits for doing so.<sup>171</sup> Many local officials have gone on the record saying as much. When

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166. We do not have an exact amount, as how much the Federal Government pays is on a per facility basis. *See supra* notes 15–16 and accompanying text. However, as a point of comparison, Louisiana paid Richwood \$28.07 per inmate, while the Federal Government is paying \$64.07. *See supra* notes 15–16 and accompanying text.

167. Almost all detainees are people seeking admission or undocumented individuals seeking relief, not lawful permanent residents with criminal convictions. *See* Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet> [<https://perma.cc/FG7T-DLLN>].

168. Ryo & Peacock, *supra* note 36, at 84–86 (showing that between 1983 and 2013, rural and small-scale urban counties with populations between 10,000 and 249,000 people were the ones that experienced more growth in immigration detention).

169. Undocumented immigrants are also arguably legally disenfranchised. *See* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 176 (2020) (arguing that similar tort liability that exists in incarceration should be made available to immigrant detainees).

170. *See* PFAFF, *supra* note 45, at 165.

171. *See* Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145, 147 (2018) (examining “the influence of money on system-

Allen Parish signed a contract with ICE, Sheriff Doug Herbert III said, “this facility will be good for Allen Parish,” and “[i]t has already created a bunch of jobs and added additional law enforcement officers. We will reap all the benefits, including the revenue.”<sup>172</sup> Along the same lines, Lily Morgan, County Commissioner of Josephine County in Oregon, said of an ICE contract with a local jail that “[ICE] still [is] helping our community . . . [i]t’s still a revenue source to our community.”<sup>173</sup>

Ryo and Peacock have already found evidence that some of the factors just described are driving immigration detention growth. They write “our regression analysis results suggest that county labor market conditions, *together with relative fluctuations in the local criminal inmate population*, may generate a policy environment that is particularly conducive to immigration detention.”<sup>174</sup> Moreover, they found that “excess bed space positively moderates the relationship between local unemployment rate and the likelihood of counties holding ICE detainees.”<sup>175</sup> An important conclusion from this analysis is that it is not excess bedspace or unemployment on its own that drives immigration detention—although both of those factors are positively correlated with increases in detention—but that the interaction of the two is what has a significant effect on levels of immigration detention.<sup>176</sup>

These findings should tell us that the economic incentives outlined above are likely to play an impact in the future as decarceration continues—if it does. As more local jails lose inmates, we may see a greater need to replace the revenues from these losses in some way. Of course, an important assumption behind all of this is that immigration detention will keep growing. For now, we can expect that the punitive turn in immigration enforcement will continue. All major immigration reforms that have been proposed by “pro-immigration” presidents—George W. Bush in 2005–2007 and Barack Obama in 2012–2014—were predicated on the formula that legalization of undocumented folks, as well as potentially more avenues for legal immigration, would be traded for more money for border security

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wide immigration detention policy with the impact on individual detention decisions”). There may be political losses due to pro-immigrant groups; however, we know that at the locations where detention has grown, and is likely to grow, those groups are in the minority. See *supra* notes 90–91 and accompanying text.

172. Doris Maricle, *Public Tours \$5M Facility Built to House Federal Detainees*, AM. PRESS (June 15, 2019), [https://www.americanpress.com/news/local/public-tours-m-facility-built-to-house-federal-detainees/article\\_d38c67f8-9127-11e9-8257-8782841260c4.html](https://www.americanpress.com/news/local/public-tours-m-facility-built-to-house-federal-detainees/article_d38c67f8-9127-11e9-8257-8782841260c4.html) [https://perma.cc/KK4J-5HXU].

173. Conrad Wilson, *ICE Pays to Use 2 Oregon Jails Despite Sanctuary State Law*, OREGON PUB. BROAD. (Oct. 26, 2017, 4:09 PM), <https://www.opb.org/news/article/ice-jail-oregon-norcor-josephine-contract-sanctuary-state/> [https://perma.cc/962J-W6S4].

174. Ryo & Peacock, *supra* note 36, at 91 (emphasis added).

175. *Id.* at 88.

176. Ryo and Peacock’s analysis is even more nuanced than just articulated.



and enforcement, implying more detention.<sup>177</sup> Even without reform, budgets for both ICE and CBP have consistently risen. Between the 2010 and 2019 fiscal years, CBP's budget grew by nearly 50% and ICE's by 26%.<sup>178</sup> Federal officials, both Republican and Democrat, have consistently called to expand immigration detention capacity.<sup>179</sup> Given President Trump's aggressive anti-immigrant measures, continued growth is unlikely to stop.<sup>180</sup>

#### IV. EVIDENCE: DECARCERATION AS AN ENABLER OF IMMIGRATION DETENTION

In the previous section, I discussed work by Ryo and Peacock showing a positive correlation between empty bedspace in jails and rising immigration detention. These findings are suggestive of a relationship between decarceration and rising immigration detention but not necessarily a causal one. Ryo and Peacock's analysis, in fact, suggests that multiple factors *in tandem* drive local jail participation in immigration detention: county politics, race, economic conditions, and empty bedspace all contribute to determining whether counties participate in immigration detention.<sup>181</sup> These findings serve to frame the discussion here, as they support the conclusion that rising immigration detention and decarceration are not independent phenomena.

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177. See, e.g., Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243, 243 (2005) (observing that "a general mainstream consensus has emerged across partisan lines that to fix a broken immigration system, the United States must first liberalize access to valid immigration status for willing workers, including the pool of undocumented non-citizens already here, which is estimated to comprise approximately eleven million people. Second, concomitant with the fashioning of new and realistic immigration rules for immigration status, it is incumbent on the United States to increase enforcement and adopt 'smart' immigration enforcement measures").

178. AM. IMMIGR. COUNCIL, *supra* note 40, at 3.

179. In 2005, Representative Sheila Jackson Lee (D-TX), introduced a bill in the U.S. House to add 100,000 more immigration beds. See Rapid Response Border Protection Act of 2005, H.R. 4044, 109th Cong., 1st Sess. § 201 (2005).

180. Even if his administration is successful in halting asylum in the southern border—the main source of detainees—there are around twelve million undocumented individuals in the United States. See Kamarck & Stenglein, *supra* note 42. In other words, there is an ample supply of individuals to fill as much bed space as the Federal Government allows.

181. Generally, local participation in immigration detention is positively correlated with counties that are conservative, white, with high unemployment, and have empty jail beds. See Ryo & Peacock, *supra* note 36, at 89–90.

Ryo and Peacock’s analysis stops in 2013, so it would be beneficial to extend it to explore more recent developments.<sup>182</sup> There is a problem, however: data. Official statistics on jail and prison populations, as well as immigration detention, are released with severe time lags or are incomplete. For example, currently the Bureau of Justice Statistics only presents corrections data up to 2018.<sup>183</sup> ICE, on the other hand, provides data up to 2020 and a current snapshot of incarceration.<sup>184</sup> These data lack key variables, from demographics to information about time in detention.<sup>185</sup>

This means that attempting to update Ryo and Peacock’s national regression analysis is not yet possible. Instead, in this section, I briefly outline some descriptive national statistics of what current ICE data show about where immigration detention is happening or rising and look at the particular case of Louisiana. Given the lack of available data, the information presented here does not pretend to portray a statistical causal relationship between decarceration and immigration detention.<sup>186</sup> Rather, it adds to the theoretical analysis in the previous section by giving an empirical snapshot of where immigration detention and incarceration are currently. This exercise is meant to frame in more concrete terms the theoretical discussion presented in the preceding section.

### *A. National Snapshot*

The number of inmates and rate of incarceration in the United States have been steadily declining since 2010, from 637 per 100,000 adults in 2010 to 555 in 2016, as seen in Figure 1. The decrease has been attributed to many factors, from falling crime rates<sup>187</sup> to local efforts to reduce prison population.<sup>188</sup>

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182. Ryo and Peacock’s study runs from 1983–2013, and their regression—causal, not only descriptive—analysis looks only at the period of 1990–2013. *Id.* at 66, 88.

183. See LAURA M. MARUSCHAK & TODD D. MINTON, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018 (2020).

184. See U.S. IMMIG. & CUSTOMS ENF’T, ICE ANNUAL REPORT: FISCAL YEAR 2020 (2020).

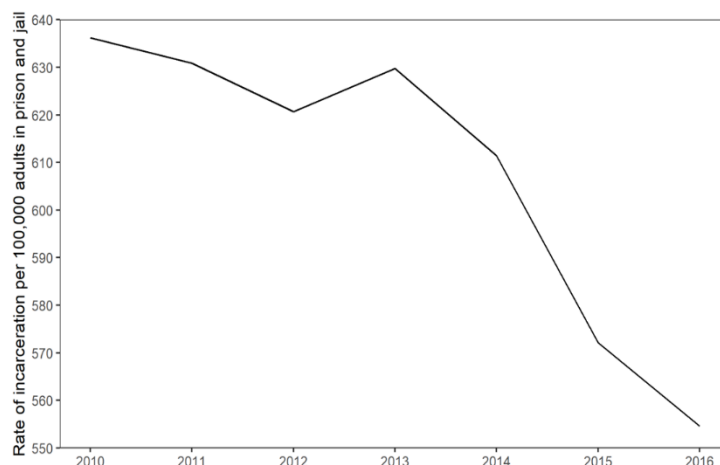
185. See *id.*

186. Nor is it meant to substitute a more sophisticated and accurate causal model.

187. Graham Farrell, Nick Tilley & Andromachi Tseloni, *Why the Crime Drop?*, 43 CRIME & JUST. 421, 425 (2014).

188. See, e.g., Dennis Schrantz, Stephen DeBor & Marc Mauer, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, THE SENT’G PROJECT (Sept. 5, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [<https://perma.cc/4BEK-DS6N>].

FIGURE 1. RATE OF INCARCERATION PER 100,000 ADULTS IN THE UNITED STATES, 2010–2016



Source: Vera Institute of Justice.<sup>189</sup>

These national trends can obscure more than illuminate. For example, almost half of the decline is attributable to efforts in California.<sup>190</sup> In fact, only about half the country saw falling incarceration rates, while the other half saw increasing rates.<sup>191</sup> Furthermore, even a statewide picture can be blurry. Certain counties in the same state may have falling rates, while others have increasing ones.<sup>192</sup> This is why it is important to locate precisely where rates have fallen the most when discussing policy.

The fact that decarceration has been so localized is actually in line with the rise of immigration detention. After all, most new immigration detention is carried out in local jails that sign contracts with ICE. Through these individual contracts, the detainee population has been steadily increasing for the last five years.<sup>193</sup> Previously, the ADP had remained relatively stable at about 35,000. Then, after a slight decline before 2015, the ADP in immigrant

189. See VERA INST. JUST., *supra* note 19.

190. Pfaff, *supra* note 24, at 255.

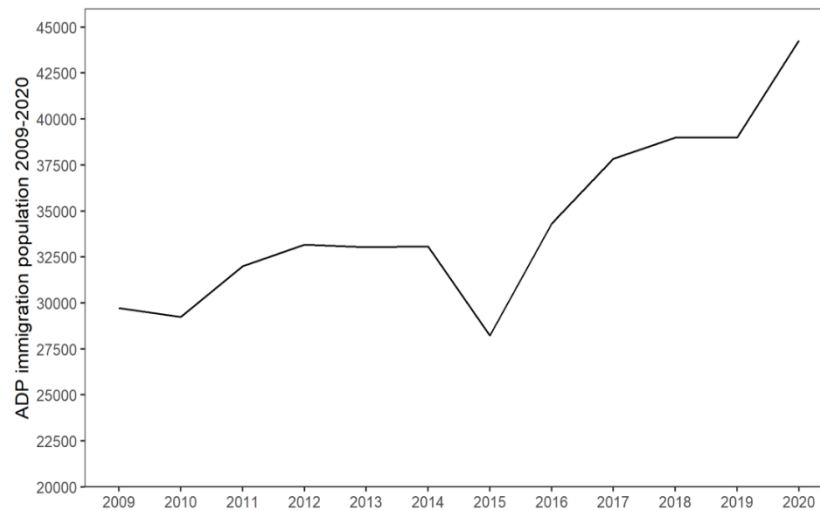
191. *Id.*

192. *Id.*

193. See *infra* Figure 2.

detention began a steady increase and stabilized at about 42,000 in the beginning of 2020.<sup>194</sup>

FIGURE 2. AVERAGE DAILY POPULATION IN IMMIGRATION DETENTION 2009–2020\*



Source: Database generated from ICE Detention Data and the National Immigrant Justice Center Data. \*Stops in January of Fiscal Year 2020<sup>195</sup>

This national snapshot is illuminating only in so far as it depicts concretely the developments outlined on this paper. In reality, however, because there are around two million people incarcerated,<sup>196</sup> changes in the tens of thousands of immigration detainees will always seem like a blip in the system. As articulated *supra*, however, the relationship between decarceration and rising immigration detention will be felt and seen at the local level. After all, it is at the local level that contracts with ICE to hold detainees occur.<sup>197</sup> California is an interesting example of this dynamic. As mentioned

194. See *supra* note 33 and accompanying text.

195. See U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 19; Cullen, *supra* note 167.

196. *Prison Population by State 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/prison-population-by-state> [<https://perma.cc/S84H-33P2>].

197. *Immigration Detection & Enforcement*, NAT'L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/immigration-detention-enforcement> [<https://perma.cc/H4PX-QZ2C>]. ICE can sign contracts with a local law enforcement agency to cooperate in enforcing immigration laws. See *id.* These are known as 287(g) agreements because they fall under section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act. *National Map of*

above, California has undergone a major decarceration effort. It also holds Los Angeles—the county that has decreased its ADP of people in immigration detention the most in the country—and two of the four counties that have increased their populations the most: Orange and San Bernardino.<sup>198</sup>

FIGURE 3. COUNTIES WITH LARGEST INCREASE IN IMMIGRATION DETENTION 2009–2020

State	County	ADP change 2009–2020	Ranking
VA	Prince Edward	569.2	942
CA	Orange	679.2	943
TX	Frio	1216.1	944
CA	San Bernardino	1472.4	945

Source: Data from *Immigration and Customs Enforcement*.

\*Stops in January of Fiscal Year 2020<sup>199</sup>

The story told by the California figures reflects that it is at the local level that these relatively small changes in incarceration are felt. As mentioned above, the incarcerated population has fallen by about 170,000 inmates since 2010, a change that is small relative to the total population but that could lead to over 150 jails closing.<sup>200</sup> All of these jails are in localities that are making individual decisions about whether to close and how to stay open. For this reason, to truly see how decarceration and immigration detention are linked, we must turn to examine the trends at the local level. In the next subsection, I do that by looking at the case of Louisiana.

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287(g) *Agreements*, IMMIGRANT LEGAL RES. CTR., <https://www.ilrc.org/national-map-287g-agreements> [<https://perma.cc/7H8E-T6C4>]. These agreements are not the same as those signed with local jails to house detainees. For a map of where 287(g) agreements exist, see *id.*

198. Data compiled by the author from U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 19 and NIJC, *supra* note 19. Compilation is on file with the author and hereinafter referred to as “Annex 2.”

199. Annex 1.167.

200. See BUREAU OF JUST. STAT., *supra* note 19.

## B. The Case of Louisiana

Louisiana is known as the “incarceration capital” of the world.<sup>201</sup> However, in the last decade it has tried to change this status, and the incarcerated population has decreased by nearly 4,000 people between 2010 and 2016.<sup>202</sup> Similarly, the total<sup>203</sup> number of carceral institutions fell by ten between 2010 and 2017.<sup>204</sup> Examining these trends by looking at immigration detention complicates the image of decarceration. The ADP remained stable throughout the last decade, but in 2019, detention exploded, rising by over 5,000, from 2,196 in 2018 to 7,412 in 2020.<sup>205</sup> Also, the use of facilities for immigration detention grew from three to ten.<sup>206</sup> This means that while in 2018, 98% of immigrants were confined in facilities with only immigration detainees, in 2019 that percentage dropped to 28%.<sup>207</sup> The rest of the immigrant detainees are in mixed correctional facilities where there are both criminal inmates and immigration detainees.<sup>208</sup>

Placing the incarceration and detention rates side by side, as shown in Figures 4 and 5, it is clear that the trends in confinement move in opposite directions. Furthermore, it is remarkable how numerically similar these trends are: incarceration falling by 4,000 and detention growing by 5,000. However, the speed of change is not constant. While the rate of incarceration in the state dropped slowly but consistently, detention spiked dramatically in one year. This time lag can be interpreted as a rejection of the hypothesis that these changes are interrelated. A reason to doubt this interpretation is the relatively short and immediate timespan.<sup>209</sup> It may be obvious, but

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201. Jamila Johnson, *SPLC: Louisiana’s Title of Incarceration Capital of the World an Opportunity for Reform*, S. POVERTY L. CTR. (Apr. 26, 2019), <https://www.splcenter.org/news/2019/04/26/splc-louisiana’s-title-incarceration-capital-world-opportunity-reform> [<https://perma.cc/7HUI-BKQL>]. The state has the highest incarceration rate in the country of people sentenced, at 695 per 100,000 inhabitants. JACOB KANG-BROWN, EITAL SCHATTNER-ELMALEH & OLIVER HINDS, VERA INST. OF JUST., PEOPLE IN PRISON IN 2018, at 1 (2019). The national rate is 450. *Id.*

202. *See infra* Figure 4.

203. This total includes federal, state, and local institutions.

204. *Louisiana 2017*, NAT’L INST. OF CORR., <https://nicic.gov/state-statistics/2017/louisiana-2017> [<https://perma.cc/AMW7-SLES>]; *Louisiana Correctional Populations of Census 2010 Vintage*, PRISON GERRYMANDERING PROJECT, <https://www.prisonersofthecensus.org/data/prisons/LA/> [<https://perma.cc/9ZH2-GX24>].

205. Annex 2.

206. *Id.*

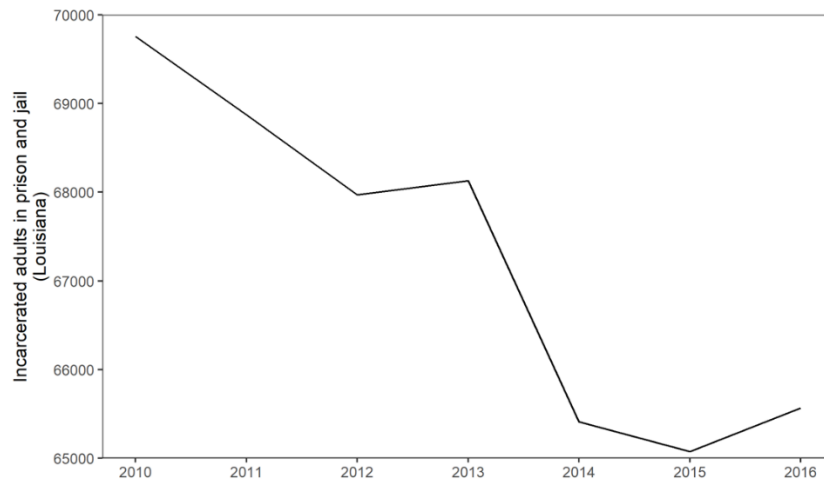
207. Annex 1.

208. ICE classifies facilities in two dedicated (DIGSAs) and non-dedicated facilities (IGSAs). *See* Ryo & Peacock, *supra* note 36, at 71.

209. Raoult and Harcourt’s assessment that rates of incarceration and asylum mirrored it was based on an analysis of over 100 years. *See* Sacha Raoult & Bernard E. Harcourt, *The Mirror Image of Asylums and Prisons: A Study of Institutionalization Trends in France (1850–2010)*, 19 PUNISHMENT & SOC’Y 155, 155 (2017).

policy changes take time. It could be that local governments in Louisiana only started looking for contracts with the Federal Government after the trend in decarceration had become consistent over a number of years.

FIGURE 4. NUMBER OF PEOPLE CRIMINALLY INCARCERATED IN LOUISIANA, ANNUALLY, 2010–2016

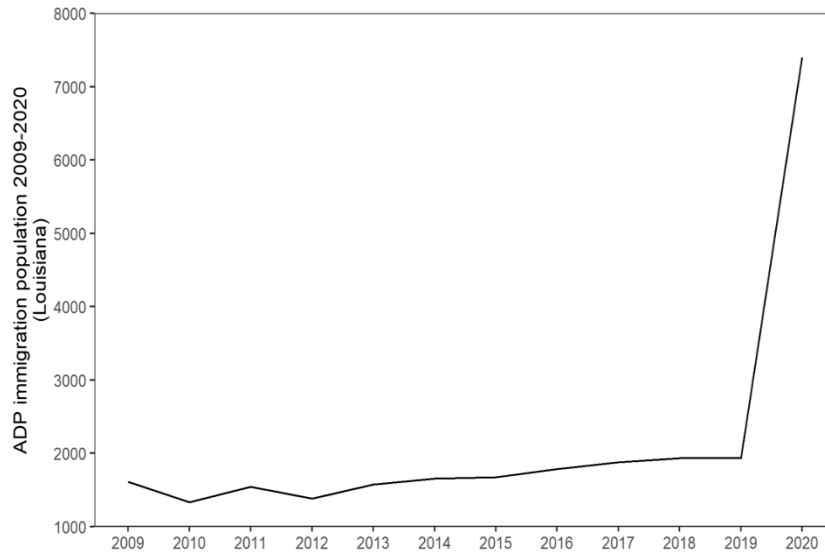


Source: Data from the Vera Institute of Justice.<sup>210</sup>

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210. See VERA INST. OF JUST, *supra* note 19.

FIGURE 5. ADP IN ICE FACILITIES, LOUISIANA 2010–2020



Source: Database generated from ICE Detention Data and the National Immigrant Justice Center Data. \*Stops in January of Fiscal Year 2020<sup>211</sup>

The trends observed in Louisiana correspond to the ones we observe nationally: decarceration is occurring, but immigration detention is expanding as well. However, the trends in Louisiana have been much starker than what we have seen at the national level. The unabated growth of the population of detained immigrants in Louisiana has almost fully eclipsed the state’s decarceration gains, making it impossible for the state to “shed its status” as the incarceration capital of the United States.<sup>212</sup> As established above, I am not suggesting that these trends are causally related. However, they lend credence to the hypothesis that falling incarceration rates may be a necessary, if insufficient, condition for states and localities seeking contracts with ICE to hold detainees.

This hypothesis was suggested by Ryo and Peacock’s analysis mentioned in the preceding section.<sup>213</sup> Their analysis, however, also pointed out that local jails housing ICE inmates correlates with localities having high levels

211. See U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 19.

212. Governor Edwards suggested that this was a goal of the criminal legal reform he enacted. See *Gov. Edwards Releases the Justice Reinvestment Reforms Annual Performance Report*, OFF. OF THE GOV. (July 19, 2019), <https://gov.louisiana.gov/index.cfm/newsroom/detail/2076> [<https://perma.cc/BX7V-FKUS>].

213. See Ryo & Peacock, *supra* note 36, at 75.



of unemployment.<sup>214</sup> On this point, Louisiana is also illustrative. All of the counties with jails that started housing inmates in 2019 have poverty levels of over 25% of the population, and more importantly, unemployment of at least 40%.<sup>215</sup> Poor localities relying on confinement for stabilizing their public finances also has historical precedent in Louisiana.

In the 1970s, after numerous protests and lawsuits over the condition of its prisons, the state was ordered to fix the system.<sup>216</sup> Initially, the state's attempts to imprison state inmates in local jails was met with local opposition.<sup>217</sup> However, by the 1980s, the state increased its per prisoner daily rate from \$4.50 to \$18.25, making it more attractive for localities to house state inmates or to even build new facilities in order to do so.<sup>218</sup> From then on, local governments kept pressuring the state executive to continue or increase those contracts.<sup>219</sup> This system of payment has created perverse incentives to "encourage" imprisonment, as it is sustaining local economies.<sup>220</sup>

In Fiscal Year 2018, Louisiana spent over \$734 million on corrections, out of which \$168 million went to localities to house state inmates.<sup>221</sup> If these expenditures keep falling, it is only natural for localities to look for funds elsewhere.<sup>222</sup>

The analysis laid out here is very limited. Current data with finer temporal and spatial disaggregation would allow me to better test a hypothesis of replacement. Missing local data for each of the jails that have signed contracts with ICE makes it impossible to see if local governments are replacing inmates with immigrants in Louisiana. More importantly, the unavailability of current data on immigration detention and incarceration at the national and state level impedes the development of more sophisticated

214. *See id.*

215. *See* U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 19; NAT'L IMMIGR. JUST. CTR., *supra* note 19.

216. *Williams v. McKeithen*, No. 71-98, 306, 306-07 (M.D. La. June 10, 1975).

217. *See* Pelot-Hobbs, *supra* note 8.

218. *See id.*

219. *See id.*

220. *See* OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUST., *WHAT CAUSED THE CRIME DECLINE?* 33 (2015).

221. LA. DEP'T OF PUB. SAFETY & CORR., 2019 ANNUAL REPORT 7 (2019).

222. Per the GAO, ICE pays local jails on average \$75 per detainee per day. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-149, *IMMIGRATION DETENTION: ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS* 51 (2021).

models to explore causation. As more data is produced, it will be possible to carry out these analyses.

Nonetheless, the national and local sketches presented in this section give texture and support to Ryo and Peacock's more robust quantitative analysis, suggesting that available bed space in jails is a factor in explaining rising immigration detention at the local level. This finding, even if preliminary, has important implications for criminal and immigration law scholars and advocates. I turn to these in the conclusion.

## V. CONCLUSION

Although the empirical evidence of a replacement of inmates with immigrant detainees is not yet available, I have presented strong evidence to suggest that decarceration can be foiled—at least partly—by immigration detention. This should be of concern for proponents of criminal legal reform, regardless of how that reform is justified.

As fully reviewed in Section II, political support for decarceration is growing.<sup>223</sup> While the reasons behind this support are diverse and distinct, there is a consensus view that incarceration is an extreme measure of social control that should be used more sparingly. This is true for the more libertarian critique, which is concerned with overcriminalization of society, as well as the more radical critique, which views carceral institutions as means of marginalization.<sup>224</sup> These positions are not necessarily in conflict with each other, nor are they always easily distinguished. However, they do present distinct claims, and, more importantly, different end goals.<sup>225</sup>

Nevertheless, both camps are concerned with the *current* levels of incarceration. Immigration detention could ensure that those current levels remain the same. Therefore, if one is concerned about people being confined—either because the state should not do that, or because it is an inefficient use of resources, or because it is immoral—then rising detention should also be a cause for concern.

While it may be hard to envision replacement happening, due to the overwhelming difference in scale between immigration detention and incarceration, Bernard Harcourt has shown that this is what happened in the context of mental health asylums.<sup>226</sup> He showed that as the institutionalization of people in mental health facilities decreased, it

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223. See, e.g., BRENNAN CTR. FOR JUST., ENDING MASS INCARCERATION: IDEAS FROM TODAY'S LEADERS (Inimai Chettiar & Priya Raghavan eds., 2019).

224. See generally Levin, *supra* note 43.

225. The first justification sees there being an “efficient” level of incarceration, while the latter is more likely to deny the validity of jail. See *id.* at 269–71.

226. See Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1779–80, 1783 (2006).

increased in prisons.<sup>227</sup> Of course, the comparison is not identical because both asylums and prisons are responses to antisocial *behavior* while immigration detention is a response to a *type of person* that is deemed to be antisocial. However, the continuous rise of detention, anti-immigrant sentiment,<sup>228</sup> and potential increasing migration<sup>229</sup> in the future may give us pause.

Even if one is not worried about a replacement of inmates with immigrants, it is still important to consider immigration detention when asking questions about incarceration more generally. Harcourt, again, is instructive. He made a compelling case that analyses using imprisonment as an explanatory variable alone are limited because “what we are trying to capture when we use the variable of imprisonment is something about confinement in an institutional setting—confinement that renders the population in question incapacitated or unable to work, pursue educational opportunities.”<sup>230</sup> If, for example, we were measuring the economic impact of decarceration and did not factor in that some of that decarceration was tempered by immigration detention, we would be underestimating the impact of our variable of interest. After all, immigration detention could ensure that employment at correctional facilities remains relatively stable, and thus, all the secondary market impacts do as well. Properly estimating this impact is not merely academic. The success of decarceration efforts will depend on properly anticipating its economic toll.

As explained *supra*, much of criminal legal reform is justified on economic grounds. This means that for many, decarceration will only make sense if it is an economically viable project. In this sense, wider decarceration

227. See *id.* at 1754–55, 1775–80; see also Raoult & Harcourt, *supra* note 209, at 157 (finding that trends of institutionalization in asylums and prisons in France have “mirrored” each other in the last 150 years, maintaining constant “total institutionalization”).

228. See Jeanne Batalova, Brittany Blizzard & Jessica Bolter, *Frequently Requested Statistics on Immigrants and Immigration in the United States in 2019*, MIGRATION POL’Y INST. (Feb. 14, 2020), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2019> [<https://perma.cc/6CPJ-LR75>]; Andrew Daniller, *Americans’ Immigration Policy Priorities: Divisions Between—and Within—the Two Parties*, PEW RSCH. CTR. (Nov. 12, 2019), <https://www.pewresearch.org/fact-tank/2019/11/12/americans-immigration-policy-priorities-divisions-between-and-within-the-two-parties/> [<https://perma.cc/Q5JY-GKCU>].

229. There are many reasons why immigration may increase. See, e.g., Saskia Sassen, *A Massive Loss of Habitat: New Drivers for Migration*, 2 SOCIO. DEV. 204, 204–05 (2016) (arguing that development models implemented over the last 30 years and increasing asymmetric wars will increase the number of migrants).

230. Harcourt, *supra* note 226, at 1755.

efforts will hinge on public policy evaluations that properly estimate the impact that closing jails has had. Accurately doing this will require us to factor in immigration detention. The same is true for any other covariate of interest. If one is trying to measure the effect of incarceration on employment, crime, housing, and so forth, immigration detention is relevant to truly capture the effect of institutional confinement on those outcomes.

Just as “the carceral state cannot be understood separately from the wider political, economic, and social context in which it was constructed,” neither can any discussion of immigration detention.<sup>231</sup> We are now in a moment of high anti-immigrant sentiment and strong impetus for at least incremental decarceration reform. If this is the case, then immigration detention can become the perfect foil for discrete decarceration efforts. The give of one movement can become the take of the other.

The data surveyed here suggests that this is slowly happening. And while it may seem far-fetched to think that immigration detention could grow so much to replace the carceral state, it is worth remembering that prison itself only became self-evident once it was built,<sup>232</sup> and its pervasiveness normalized once such high rates of incarceration became established. Immigration detention can follow that same story. The infrastructure, legal apparatus, and political will are there to make it happen.

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231. GOTTSCHALK, *supra* note 46, at 275.

232. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 231–33 (Alan Sheridan trans., 1995).