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Strangers in a Strange Land: Problems with the Recent Influx of ICE Detainees into Louisiana, and What to Do about It

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* J.D. candidate 2021, Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my husband, Isaac, who inspires me to be better, my daughters, Ruth and Eleanor, who inspire me to make the world better, and my mentor, the late Congressman Elijah E. Cummings, who reminded us all that "we are better than this." I would like to extend my sincerest gratitude to the student editors and faculty advisors of the Louisiana Law Review for their work to bring this Comment to fruition, and especially to Professor Darlene Goring, whose tremendously valuable insight, guidance, and support made this Comment possible.

INTRODUCTION

On October 15, 2019, 43-year-old Cuban asylum-seeker Roylan Hernández Diáz died of an apparent suicide while being held in solitary confinement by U.S. Immigration and Customs Enforcement (ICE) at the Richwood Correctional Center in Monroe.[1] Authorities separated him from the general prison population when he threatened to go on a hunger strike to protest abuse he suffered in detention and the government's multiple rejections of his requests to be released on bond pending a decision on his asylum application.[2] Mr. Hernández Diáz's case is one of several alarming stories of noncitizen detention in Louisiana that reporters recently uncovered.[3] In March 2019, a total of 2,287 detainees in two ICE detention facilities in Louisiana had to be quarantined because of potential exposure to mumps.[4] Detainees protested the harsh conditions through

1. Teo Armus, *A Cuban Immigrant asked for asylum. After months of detention, he killed himself, ICE says*, WASHINGTON POST (Oct. 17, 2019, 6:28 AM), https://www.washingtonpost.com/nation/2019/10/17/cuban-immigrant-asked-asylum-detention-killed-himself-ice/ [https://perma.cc/47R2-RBZT].

2. Hamed Aleaziz & Adolfo Flores, *A Cuban Asylum-Seeker Died of an Apparent Suicide After Spending Months in ICE Detention*, BUZZFEED NEWS (Oct. 16, 2019, 6:45 PM), https://www.buzzfeednews.com/article/hamedaleaziz/cuban-asylum-ice-death-suicide-louisiana-detention [https://perma.cc/G85E-JC4U].

3. Maria Clark, *Mumps quarantine at Louisiana immigration detention centers affecting legal access, lawyers say*, NOLA.COM (Mar. 13, 2019, 10:49 PM), https://www.nola.com/news/article_c7b600fd-bce5-53a5-86c7-2b15a461e7f9.html [https://perma.cc/R6AP-4YXQ].

4. *Id*.

hunger strikes and other methods—and authorities responded by pepper spraying more than 100 people involved in the protest.[5] Then the coronavirus pandemic took hold, leading to a nationwide shutdown and making conditions for a vulnerable population of immigrants who were detained in close quarters even worse.[6] In the Spring of 2020, immigrants in detention and ICE officers at detention facilities were reporting symptoms consistent with the coronavirus infection, though the actual number of infections is unknown because widespread testing was unavailable at the time.[7] In remote areas of Louisiana, the problem was exacerbated by poor access to health care.[8] Many of the symptomatic detainees were deported to their countries of origin, which contributed to the virus' global spread.[9]

Immigrant rights activists have called on Louisiana ICE detention facilities to take additional steps to ensure the safety of those in their custody, noting the particular vulnerability of asylum seekers who come to the United States because they feel unsafe in their home countries.[10] The United Nations High Commission for Refugees discourages countries from detaining asylum seekers, citing their vulnerability due to past trauma and the negative impact that detention can have on them.[11] The federal government justifies such detention as necessary to deter people from

5. Fernanda Echavarri, *Dozens of ICE Detainees Were Pepper-Sprayed by Guards for Protesting at a Louisiana Jail*, MOTHER JONES (Aug. 2, 2019), https://www.motherjones.com/politics/2019/08/immigrant-detention-ice-bossier-louisiana-pepper-spray/ [https://perma.cc/R8ZP-UURW].

6. Jorge Loweree, Aaron Reichlin-Melnick & Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system [https://perma.cc/CU3Y-KCTJ].

7. *Id.*

8. Kristina Cooke, Mica Rosenberg & Ryan McNeill, *As pandemic rages, U.S. immigrants detained in areas with few hospitals*, REUTERS (Apr. 3, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-detention-insi/as-pandemic-rages-u-s-immigrants-detained-in-areas-with-few-hospitals-idUSKBN21L1E4 [https://perma.cc/AAU5-W2KM].

9. Loweree, Reichlin-Melnick & Ewing, *supra* note 6.

10. Armus, *supra* note 1.

11. *See generally UNHRC Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, OFF. UNITED NATIONS HIGH COMM'R FOR REFUGEES GENEVA (Feb. 1999), https://www.unhcr.org/en-us/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention.html [https://perma.cc/A89G-6HVY].

coming to the United States without authorization; however, the deterrence rationale fails to pass constitutional muster.[12]

Ironically, Louisiana's current role in ICE detention has its origins in Governor John Bel Edwards's comprehensive criminal justice reform package that was enacted on June 15, 2017, in an effort to lower Louisiana's incarceration rate, which was the highest in the country at the time.[13] Indeed, progress has been made toward reducing incarceration in the state overall—Louisiana's prison population has decreased by almost 7,500 since 2012, when it was at its peak.[14] Over the past year, however, ICE has filled those newly empty beds with detainees, nearly doubling ICE detention capacity in Louisiana through contracts with local parishes.[15] Louisiana is now second behind Texas in the number of ICE detainees housed in the state, with a population of more than 8,000 people detained in local prisons.[16] This scheme thrusts Louisiana into the center of a national debate involving the detention of noncitizens, raising questions about whether ICE detention practices are unconstitutional on due process grounds and, if so, whether states should refuse to participate in such a system.[17]

Louisiana should reassess and reject its current role in detaining noncitizens.[18] Because ICE contracts directly with local parishes without input from the state, this arrangement denies Louisiana citizens and their

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12. *See infra* Part II.

13. Clark, *supra* note 3; *see Criminal Justice Reform*, OFF. OF THE GOVERNOR, http://gov.louisiana.gov/index.cfm/page/58 [https://perma.cc/3EBZ-9BPK].

14. Louisiana imprisonment went from 39,867 individuals in 2012 to 32,397 in 2018. LA. DEPT. OF PUB. SAFETY & CORR. & LA. COMM'N ON LAW ENF'T, LOUISIANA'S JUSTICE REINVESTMENT REFORMS 2019 ANNUAL PERFORMANCE REPORT (2019), https://gov.louisiana.gov/assets/docs/CJR/ 2019-JRI-Performance-Annual-Report-Final.pdf [https://perma.cc/K5R8-LMXX].

15. Clark, *supra* note 3. ICE obtains the majority of its detention capacity through agreements with state and local governments called "intergovernmental service agreements." Some of those localities then subcontract with private contractors. *See* Lora Adams, *State and Local Governments Opt Out of Immigrant Detention*, CTR. FOR AM. PROGRESS (July 25, 2019, 9:00 AM), https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/ [https://perma.cc/9TNU-PE38].

16. Nomaan Merchant, *Louisiana becomes new hub in immigrant detention under Trump*, ASSOCIATED PRESS (Oct. 9, 2019), https://apnews.com/article/c72d49a100224cb5854ec8baea095044 [https://perma.cc/F7TS-EHZT] (citing statistic of 8,000 detainees in Louisiana).

17. Clark, *supra* note 3.

18. *See infra* Part III.D.

representatives the opportunity to consider whether it is appropriate. This Comment argues that Louisiana should reject its current role in ICE detention based on public policy concerns and because ICE detention practices are unconstitutional on substantive and procedural due process grounds.[19] The substantive due process inquiry turns on whether the government's interest in detaining noncitizens is warranted and, if so, whether that interest justifies the means of detention that the government employs.[20] The procedural due process question asks whether the government's detention policy violates noncitizens' liberty interests.[21] Legal scholars who have examined the constitutionality of current ICE detention practices find that it fails under both analyses.[22] Originally, detention of noncitizens consisted of a strictly administrative system used to hold noncitizens arriving at ports of entry like Ellis Island or Angel Island for brief periods of time while awaiting assessment for admissibility into the United States on health and safety grounds.[23] This system has morphed into widespread, prolonged detention of tens of thousands of people nationwide in prison-like conditions for months or even years.[24] The recent surge of ICE detainees into Louisiana is supporting this system—and the state's citizens and their elected officials should reassess Louisiana's role in that system.[25] Louisiana has gone from having the highest rate of incarcerated people overall to having the second largest population of ICE detainees, thereby replacing one undesirable distinction for another.[26]

The federal government has primary authority over immigration law; however, states are increasingly taking on a more active role.[27] States have

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19. *See infra* Part III.D.

20. Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L. J. F. 238, 254–55 (2019).

21. *Id.*

22. *Id.*; *see* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKLEY LA RAZA L. J. 118 (2018); Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227 (2012).

23. Though not the subject of this Comment, it is worth noting that conditions at Ellis Island, which processed predominantly European noncitizens, were superior to conditions at Angel Island, which processed predominantly Asian noncitizens. Prolonged detention did occur but was atypical. Korthuis, *supra* note 20, at 250–51.

24. *Id.*

25. Merchant, *supra* note 16.

26. *Id.*

27. Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L. 179, 183 (2008).

asserted their own agendas on immigration policy by enacting legislation, cooperating with the federal government when they agree with it, and refusing to cooperate when they disagree.[28] For example, states interested in increasing their involvement in immigration enforcement have found opportunity to do so by entering into cooperative agreements between local law enforcement and the federal government.[29] On the other end of the spectrum, states that oppose the federal government's immigration policies have refused to implement them by establishing sanctuary cities.[30] This framework provides a model for Louisiana's response to the recent influx of ICE detainees into the state.[31] The decision to detain noncitizens in Louisiana is a policy one that should be made at the state level, not on an ad hoc basis through contracts between the federal government and local parishes.[32] Therefore, Louisiana should enact legislation to prevent local parishes from contracting directly with ICE to detain noncitizens in the future.[33]

Part I of this Comment presents a brief history of detention of noncitizens in the United States, from the origins of U.S. immigration policy to its modern framework. Next, Part II discusses the constitutional due process issues raised by current federal immigration policy. Part III then argues that housing ICE detainees in Louisiana is contrary to public policy and that Louisiana should therefore oppose it on federalism grounds. Finally, Part IV offers a legislative proposal, modeled on legislation from California, that would prevent local Louisiana parishes from contracting directly with the federal government to house ICE detainees without the state's express approval. This proposal would empower the state government to oversee ICE detention practices statewide and to ensure their compliance with noncitizens' due process rights.

I. U.S. DETENTION OF NONCITIZENS OVER TIME

Article I, § 8, clause 4 of the U.S. Constitution grants Congress the authority to establish a "uniform rule of naturalization"; however, Congress did not exercise this authority for much of the country's early

28. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017).

29. *See generally* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101 (2016).

30. *Id*.

31. *See infra* Part III.D.

32. Merchant, *supra* note 16.

33. *See infra* Part III.D.

history.[34] Congress first established a federal immigration policy in the mid-19th century, responding to political pressure to exclude large numbers of Chinese immigrants moving to California at that time.[35] The U.S. first welcomed the presence of Chinese migrants through the Burlingame Treaty of 1868, which invited Chinese laborers to the United States to build the Transcontinental Railroad.[36] California—motivated by anti-Chinese public opinion—pushed back against this national policy by enacting legislation that allowed a state immigration commissioner to have discretion over admissions decisions at state ports.[37] The U.S. Supreme Court, however, overturned California's legislation in *Chy Lung v. Freeman*, finding that the state acted beyond its police power authority.[38]

A. The Chinese Exclusion Era: "Vast Hordes Crowding Upon Us"[39]

Eight years later, Congress yielded to state pressure to exclude Chinese laborers from the country when it enacted the Chinese Exclusion Act of 1882.[40] The Supreme Court analyzed the constitutionality of the Chinese Exclusion Act in *Chae Chan Ping v. United States*.[41] Chae Chan Ping was a Chinese laborer who received U.S. residency under the Burlingame Treaty.[42] He then left the United States for a long-term visit to China, but when he attempted to return to the United States after the

34. U.S. CONST. art I, § 8, cl. 4; Korthuis, *supra* note 20, at 244.

35. Gulasekaram & Ramakrishnan, *supra* note 29, at 119.

36. *Id.*

37. *Id.* at 121; *see* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (finding that race is a legitimate basis on which to exclude people from the country).

38. 92 U.S. 275 (1875). Chy Lung was a Chinese passenger aboard a ship docked in San Francisco Bay who, along with 20 other women aboard the ship, was detained because a state immigration official deemed her to be a "lewd and debauched" woman. Chy Lung challenged the constitutionality of the state immigration law, arguing that it was beyond the state's authority to enact such legislation, and the Supreme Court agreed. *Id.*

39. This subheading is adopted from language in the *Chae Chan Ping* decision used to describe Chinese laborers. *Chae Chan Ping*, 130 U.S. 581.

40. The majority of anti-Chinese sentiments came from California, where most Chinese laborers entered the country and settled; however, U.S. labor interests more widely opposed their presence. The Chinese Exclusion Act of 1882 effectively overturned the Burlingame Treaty, barring immigration of Chinese laborers for 10 years after its enactment. *See* The Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943).

41. *See generally Chae Chan Ping*, 130 U.S. 581.

42. *Id.*

Chinese Exclusion Act's enactment, government officials turned him away.[43] The Court upheld the Act, finding that congressional authority to exclude noncitizens is not susceptible to challenge.[44] The Court's opinion established the plenary power doctrine, which recognizes both the federal government's exclusive control over immigration policy as an exercise of national sovereignty and the particular authority of Congress to establish immigration policy under the U.S. Constitution.[45] This judicially created doctrine has largely guided immigration decisions ever since.[46]

B. Early Detention of Noncitizens

Early federal immigration policy contemplated detention of noncitizens; however, the purpose and methods of such detention were much different than those employed today.[47] Customs officials initially used detention as a tool to hold noncitizens for a brief period—days or weeks, but rarely longer—to assess the person's admissibility.[48] Under the Chinese Exclusion Act of 1882, officials first used the hull of a ship docked in San Francisco's harbor to detain for further processing Chinese arrivals whom they believed to be inadmissible.[49] When that practice became untenable because of overcrowded and poor conditions, the federal government built Angel Island.[50] The limited purpose of detention at Angel Island was to process people whose immigration status could not be immediately ascertained and to screen out people who were sick or otherwise dangerous.[51] In 1896 in *Wong Wing v. United States*, the Supreme Court made clear that admissibility was a legitimate rationale for detention, distinguishing it from the punishment rationale behind

43. *Id.*

44. The Court stated: "Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence." *Id.* at 603.

45. *Id.*

46. Rosenbaum, *supra* note 22, at 144.

47. Korthuis, *supra* note 20.

48. *Id.* at 245; *see* Robert Barde & Gustavo J. Bobonis, *Detention at Angel Island: First Empirical Evidence*, 30 SOC. SCI. HIST. 103, 113 (2006) (finding that detention periods at Angel Island were brief, lasting 10.2 nights on average); *see also* ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 70, 78 (2012) (finding that detention of mostly European immigrants at Ellis Island lasted hours or, at most, days).

49. Korthuis, *supra* note 20, at 247.

50. *Id.* at 248.

51. These assessments were often made on the basis of race. *Id.* at 249.

constitutionally impermissible imprisonment and forced hard labor imposed on Chinese immigrants unlawfully present in the country.[52]

For most of the 20th century, detention of noncitizens persisted in much the same fashion—for brief periods of time and for the express purpose of determining eligibility for admission.[53] In 1954, the Immigration and Naturalization Service (INS), the precursor agency to ICE, abandoned its policy of detaining immigrants in all but rare cases where a noncitizen was considered a flight risk or a danger to the nation or community.[54] In 1980, INS detained only 4,062 people.[55] By contrast, today ICE detains more than 10 times that amount—approximately 51,000 people nationally.[56] The reason for this increase is twofold: Congress amended immigration laws in the 1980s and 1990s to expand the categories of noncitizens subject to detention, and in response to increased levels of migration in recent years, the Obama and Trump administrations have pursued policy objectives resulting in detention of greater numbers of noncitizens for longer periods of time.[57] Thus, in recent decades, U.S. immigration-related detention policy has strayed from its historic roots as a purely administrative function designed to facilitate admissibility decisions.[58]

C. The Paradigm Shift in Noncitizen Detention

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which broadened the categories of noncitizens whom the government must detain, while also providing the government with broad discretionary authority to detain noncitizens in

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52. *See generally* Wong Wing v. United States, 163 U.S. 228 (1896).

53. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1466 (2013).

54. INS was the lead federal agency in charge of immigration policy and operations until 2003 when it was abolished and its functions transferred to three separate agencies within the Department of Homeland Security: ICE, Customs and Border Security (CBP), and United States Citizenship and Immigration Services (USCIS). *See also* Hernández, *supra* note 53, at 1466 (citing MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 6–8 (2004)).

55. *Id.*

56. Merchant, *supra* note 16.

57. *Id.*

58. *See generally* Korthuis, *supra* note 20; *see also* Hernández, *supra* note 53; Jennings v. Rodriguez, 138 S. Ct. 830, 859 (2018) (Breyer, J., dissenting) (noting that in 2015, 7,500 asylum seekers and 12,220 noncitizens who finished serving sentences of criminal confinement were detained for more than six months).

other cases.[59] The underlying law that the IIRIRA amended, the Immigration and Nationality Act (INA), grants the U.S. Attorney General authority to detain certain noncitizens in immigration proceedings.[60] Specifically, it provides for detention of three categories of noncitizens: (1) people who have finished serving a sentence for a crime and who are awaiting a decision on whether they will be deported; (2) people who are in the process of challenging the government's decision to deport them; and (3) asylum seekers who are awaiting a decision on their asylum application.[61] Noncitizens in all three categories have the opportunity to request a bond hearing before an immigration judge.[62] Specifically, with respect to asylum seekers, the INA requires that the government detain the applicant pending a "credible fear" interview.[63] In the "credible fear" interview, which typically takes place soon after immigration officials bring asylum seekers into custody, immigration officials determine whether applicants meet the statutory definition of having a credible fear of persecution in their home country.[64] If applicants fail to establish a credible fear, then they are subject to immediate removal from the country.[65] If applicants meet the criteria to establish credible fear, they are then eligible to appear before an immigration judge who makes a final determination as to whether they are eligible for asylum.[66]

While noncitizens await the immigration judge's final determination on their admissibility into the United States, immigration officials have discretion to release the noncitizen on parole or bond.[67] Recent federal government policies trend toward the denial of parole or bond to most asylum seekers who have established credible fear, and immigration judges have consistently refused noncitizens' requests for bond redetermination—leading to detention of noncitizens for months or even

59. Pub. L. No. 104-208, 110 Stat. 3009 (1996). While the INA requires that noncitizens are detained in certain circumstances, such as when they are suspected of terrorism, in other circumstances it affords discretionary authority to immigration officials to determine whether detainees may be released on parole or bond. 8 U.S.C. § 1226(a).

60. *Id.* § 1226(a).

61. *See id*. §§ 1225(b)(1)(A)(i), 1226(c), 1226(a).

62. *See* 8 C.F.R. 1003.19(e), 1103.23(6) (2020).

63. *See* 8 U.S.C. §1225(b)(1)(B)(v).

64. *See id.*

65. *See id*. §1226(a).

66. *Id.*

67. *Id.*

years.[68] Federal courts, which have appellate review over certain immigration court matters, have issued opinions deeming these practices unconstitutional.[69] For example, an April 2019 decision by U.S. Attorney General William Barr, who has authority over all immigration courts, would have eliminated bond hearings for certain classes of detained noncitizens altogether.[70] In July 2019, a U.S. District Court judge in Washington state issued a controlling, contrary opinion that requires the government to continue holding bond hearings for all noncitizens in detention, thus halting application of the Attorney General's decision to future cases.[71] In a Louisiana-based case on appeal, a D.C. Circuit Court judge threatened the federal government with contempt of court for failing to heed his order that immigration field offices in New Orleans must consider detained asylum seekers' requests for parole on a case-by-case basis.[72] The order came in response to a lawsuit filed by detained noncitizens who provided evidence that the New Orleans office had a policy of denying parole to all noncitizens in its custody, regardless of their eligibility.[73] Absent an opinion from the Supreme Court on the constitutionality of ICE's prolonged detention practices, noncitizens continue to litigate the question in the lower courts in a piecemeal fashion.[74] As a result, the number of detained noncitizens in the United States has grown to historically high levels of tens of thousands of people.[75]

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68. *See generally* Dora Schriro, *Immigration Detention Overview and Recommendations*, U.S. DEP'T OF HOMELAND SEC. (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/8BXQ-PLW 4].

69. Under 8 U.S.C. § 1252, federal circuit courts of appeal have limited judicial review in immigration cases over questions of constitutional or federal law. The Supreme Court heard oral argument on December 9, 2019, in the consolidated cases of *Guerrero-Lasprilla v. Barr* and *Ovalles v. Barr*, 139 S. Ct. 2766 (2019), in which it will determine whether circuit courts can rule on mixed questions of fact and law. *See also* Padilla v. U.S. Imm. & Cust. Enf., 354 F. Supp. 3d 1218 (W.D. Wash. 2018); Order of U.S. District Court Judge James E. Boasberg, Mons v. McAllenan, No. 1:19-cv-01593-JEB (Sept. 5, 2019).

70. *See* Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019).

71. The district judge's ruling requires that all immigration courts continue to provide bail hearings to any individual who entered the United States without inspection, established a credible fear of persecution or torture, and is now in expedited removal proceedings. *See Padilla*, No. 354 F. Supp. 3d 1218.

72. *See* Order of U.S. District Court Judge James E. Boasberg, Mons v. McAllenan, No. 1:19-cv-01593-JEB (Sept. 5, 2019).

73. *Id.*

74. *See generally* Korthuis, *supra* note 20.

75. *Id.*; *see also* Hernández, *supra* note 53.

D. "Crimmigration" and the Deterrence and Punishment Rationales

The reasons for this shift to high rates of noncitizen detention are complex, reflecting in large part the changing role of criminal law in society and the increased migration of people coming from the Northern Triangle countries of El Salvador, Honduras, and Guatemala.[76] Following the civil rights movement and the subsequent stigmatization of overt racism, policymakers began turning to facially neutral criminal laws to institute racist policies that were previously overt.[77] This trend bled into immigration policy—where noncitizens of color have historically received harsher penalties than their white counterparts—and led to the melding of criminal law and immigration law, or "crimmigration" law.[78] Immigration reforms in the 1980s and 1990s resulted in a more punitive immigration system in which the law imposes mandatory removal from the country on non-citizens convicted of crimes, and punishes immigration-related offenses through penal systems.[79] Faced with a steep rise in the number of people seeking asylum in the United States from the Northern Triangle region that began in 2000 and peaked in 2008, the Obama administration instituted this statutory framework to discourage people from coming to the United States.[80] The Obama administration specifically cited the objective of deterring noncitizens from coming to the United States as the rationale for denying bond to asylum seekers awaiting a hearing before an immigration judge.[81] A federal court rejected this deterrence rationale, and the Trump administration has never tried to reassert it as a legal argument in court.[82] In practice, however, the Trump administration continues to use

76. *See generally* Korthuis, *supra* note 20.

77. Hernández, *supra* note 53, at 1459. For example, U.S. Sentencing Commission reports on the sentencing disparity resulting from facially neutral crack cocaine and powder cocaine mandatory minimum sentencing guidelines eventually led Congress to enact the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372 (2010); *see also Crack, powder cocaine sentence guidelines adjusted*, BOSTON.COM (Oct. 15, 2010), http://archive.boston.com/news/nation/washington/articles/2010/10/15/crack_powder_cocaine_sentence_guidelines_adjusted/ [https://perma.cc/8WNG-4K3A].

78. Central American and Mexican immigrants make up over 90% of deportations, yet are only approximately 50% of all immigrants. Rosenbaum, *supra* note 22, at 144; *see also* Hernández, *supra* note 53, at 1459 (coining the term "crimmigration").

79. Hernández, *supra* note 53, at 1467.

80. Korthuis, *supra* note 20, at 241–42.

81. *Id.* at 242.

82. R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 175–76 (D.D.C. 2015); Korthuis, *supra* note 20, at 242.

detention of noncitizens to deter immigration, as evidenced by the its rhetoric and policies, such as across-the-board denials of bond and parole, family separation, and poor conditions at detention facilities.[83]

The issue is whether these punishment and deterrence rationales are constitutionally sound reasons for detaining noncitizens at historically high levels.[84] The United Nations High Commission for Refugees claims that detention of asylum seekers is inherently objectionable.[85] The U.N. cautions that governments should not subject vulnerable asylum seekers to the negative psychological effects of detention and that countries receiving asylum seekers should develop alternatives to detention.[86] The constitutional right to due process of law calls into question the legitimacy of the prolonged detention of even those noncitizens who are not asylum seekers.

II. FEDERAL IMMIGRATION POLICY'S DUE PROCESS DEFICIT[87]

Given the paradigm shift in immigration law from a purely administrative function to one inextricably linked to the criminal law concepts of deterrence and punishment, legal scholars have questioned whether the current immigration framework can pass constitutional

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83. *See* Makini Brice, *Trump says immigrants 'unhappy' with detention centers should stay home*, REUTERS (July 3, 2019), https://www.reuters.com/article/us-usa-immigration/trump-says-immigrants-unhappy-with-detention-centers-should-stay-home-idUSKCN1TY1A5 [https://perma.cc/7NYL-NRZX] (quoting the following Tweet from President Trump: "If Illegal Immigrants are unhappy with the conditions in the quickly built or refitted detentions centers, just tell them not to come. All problems solved!"); *see also* Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html [https://perma.cc/TT6R-KRNA]; SOUTHERN POVERTY LAW CENTER, NO END IN SIGHT: WHY MIGRANTS GIVE UP ON THEIR U.S. IMMIGRATION CASES 27, 30, 36 (Oct. 3, 2018), https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf [https://perma.cc/2UZM-VL4X] (describing instances in which noncitizens did not pursue potential appeals because of prolonged detention).

84. Korthuis, *supra* note 20, at 242.

85. *See UNHRC Revised Guidelines*, *supra* note 11.

86. *See id.* The United States does employ some alternatives to detention in the immigration context, including the use of ankle monitors and home detention; however, those practices are not widespread. *See* 8 U.S.C. § 1226(a)(2)(B).

87. This heading is inspired by the title of Carrie Rosenbaum's article. *See supra* note 22.

muster.[88] The Supreme Court has historically applied a different standard to noncitizens when assessing what constitutional rights, if any, they may have, because of the plenary powers doctrine.[89] As a result, historically the law has not afforded noncitizens the same protections as criminal defendants, including due process protections under the Fifth Amendment to the U.S. Constitution.[90] The Court has, however, been willing to diverge from this path when immigration policy goes beyond its designated administrative function.[91] The Fifth Amendment provides that all *persons* are entitled to the due process rights of life, liberty, and property.[92] As criminal law and immigration law become increasingly intertwined and the U.S. government detains greater numbers of noncitizens for longer periods of time without opportunity for parole or bond, the current constitutional framework has proven inadequate.[93]

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88. *See generally* Hernández, *supra* note 53; *see also* Rosenbaum, *supra* note 22, at 144.

89. Noncitizens appear before immigration judges under the Executive Office for Immigration Review within the U.S. Department of Justice. They can appeal to the Department of Justice, the Department of Homeland Security, or by federal courts. *See* Hernández, *supra* note 53, at 1466.

90. *See* U.S. CONST. amend. V. Though beyond the scope of this Comment, it is worth noting here that the Sixth Amendment right to counsel is similarly not afforded to noncitizens. The Immigration and Nationality Act provides that noncitizens "shall have the privilege of being represented, at no expense to the Government, by counsel of the [noncitizen's] choosing who is authorized to practice in such proceedings." *See* 8 U.S.C. § 1229a(b)(4). In reality, few ever get such access: 37% of all noncitizens and 14% of detained noncitizens were represented by counsel in 2016. *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNCIL SPECIAL REPORT (Sept. 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/GR9M-2N9D]; *see also* Padilla v. Kentucky, 559 U.S. 356 (2010).

91. *See* Wong Wing v. United States, 163 U.S. 228 (1896) (holding that civil detention for punitive purposes would violate the U.S. Constitution); *see also* Shaughnessy v. Mezei, 345 U.S. 206 (1953) (holding that immigration detention is "temporary harborage"); Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that a noncitizen with a final order of removal could not be detained indefinitely following the ninety-day removal period); Denmore v. Kim, 538 U.S. 510 (2003) (holding that mandatory detention is allowable only when it is brief).

92. *See* U.S. CONST. amend. V.

93. *See generally* Hernández, *supra* note 53; *see also* Rosenbaum, *supra* note 22, at 144; Korthuis, *supra* note 20.

A. The Substantive Due Process Deficit

The United States's policy on the detention of noncitizens is unconstitutional on both substantive and procedural due process grounds.[94] The substantive due process inquiry asks what the government's interest is in detaining noncitizens and whether the policy employed fits that interest.[95] To the extent that the government's objective in detaining noncitizens is to punish or deter—and all indicators suggest that it is—that interest is illegitimate.[96] The case law is clear that detention of noncitizens is justified solely for the administrative purpose of facilitating admissibility decisions.[97] As early as 1896, the Supreme Court in *Wong Wing v. U.S.* held that detention of noncitizens for punitive purposes is unconstitutional.[98] The *Wong Wing* decision broke from the line of cases from the Chinese exclusion era, during which Congress and the courts consistently denied constitutional protections to Chinese laborers living in the United States.[99] The Court in *Wong Wing*, held that detaining noncitizens for the purpose of punishment—specifically, imprisonment at hard labor—violates their Fifth Amendment liberty interest.[100] The Court's holding in *Wong Wing* is still controlling and could be applied to modern day noncitizens who are facing long-term detention intended to deter or punish them.[101]

Like the 19th-century Chinese laborers whom the government punished with hard labor for no offense other than their desire to live peacefully in the United States, the U.S. government is punishing modern-day noncitizens for trying to immigrate to the United States.[102] Under the *Wong Wing* standard, the government's interest in punishing people for attempting to immigrate to the United States does not pass even the lowest level of review, rational basis.[103] The deterrence and punishment rationales

94. *See generally* Hernández, *supra* note 53; *see also* Rosenbaum, *supra* note 22, at 144; Korthuis, *supra* note 20.

95. *See generally* Korthuis, *supra* note 20.

96. *Id.*

97. *See* Wong Wing v. United States, 163 U.S. 228 (1896) (holding that civil detention for punitive purposes violates the U.S. Constitution); *see also* Shaughnessy v. Mezei, 345 U.S. 206 (1953) (holding that immigration detention is "temporary harborage").

98. *See Wong Wing*, 163 U.S. 228.

99. *See* Gulasekaram & Ramakrishnan, *supra* note 29.

100. *See Wong Wing*, 163 U.S. 228.

101. *See generally* Korthuis, *supra* note 20.

102. *See generally id.*

103. *See Wong Wing*, 163 U.S. 228. The highly deferential rational basis standard requires only that the government action in question be rationally related

for detaining noncitizens are not legitimate government interests.[104] Therefore, subjecting noncitizens to prolonged detention without opportunity for parole or bond is unconstitutional on substantive due process grounds.[105]

B. The Procedural Due Process Deficit

The procedural due process inquiry asks whether the process that the government employs for detaining noncitizens violates their liberty interest.[106] The Supreme Court has been grappling with this question in recent decisions.[107] In the early 2000s, the Court held in *Zadvydas v. Davis* and *Denmore v. Kim* that prolonged detention without opportunity for parole or bond in certain circumstances denies noncitizens adequate due process.[108] Although the Supreme Court has not ruled definitively on whether the United States' current detention policy as a whole violates noncitizens' due process rights, all indications suggest that it does.[109] The Court's decisions in *Zadvydas* and *Denmore* were narrow, applying only to the specific categories of noncitizens who were affected by prolonged detention in those cases.[110] Nonetheless, the holdings suggest that procedural due process protections could be available to noncitizens more broadly because the Court acknowledges that noncitizens have such rights.[111] Given the recent surge in long-term detention of noncitizens without opportunity for parole or bond, legal scholars suggest that the Court should issue a broader ruling to make clear that current practices with respect to all categories of noncitizens are unconstitutional on procedural due process grounds.[112]

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to some legitimate government interest. Legal scholars have argued that courts should subject current ICE detention practices to strict scrutiny because the government discriminates on the basis of national origin by disproportionately subjecting noncitizens from Mexico and Central America to detention. That analysis is unnecessary, however, because the government's current practices do not even pass rational basis review. *See generally* Rosenbaum, *supra* note 22.

104. *See Wong Wing*, 163 U.S. 228.

105. *Id.*

106. *See generally* Korthuis, *supra* note 20.

107. *See* Zadvydas v. Davis, 533 U.S. 678 (2001); *see also* Denmore v. Kim, 538 U.S. 510 (2003).

108. *See Zadvydas*, 533 U.S. 678; *see also Denmore*, 538 U.S. 510.

109. *See generally* Korthuis, *supra* note 20.

110. *Id.*

111. *Id.*

112. *Id.*

C. The Jennings *Court's Missed Opportunity*

In 2018, the Supreme Court had an opportunity to decide the constitutionality of prolonged detention of noncitizens in *Jennings v. Rodriguez*, but it neglected to do so.[113] The *Jennings* plaintiffs were a class of noncitizen detainees who argued that prolonged, indefinite detention without the opportunity for a bond hearing is a violation of the Fifth Amendment's due process clause.[114] The Ninth Circuit agreed and relied on the canon of constitutional avoidance, which allows the courts to interpret a statute in a constitutionally permissible way when more than one interpretation is plausible and one of the options is unconstitutional to avoid a finding that the statute as a whole is unconstitutional.[115] Applying constitutional avoidance, the Ninth Circuit interpreted the statute to dictate that the *Jennings* plaintiffs were entitled to a bond hearing within six months of being detained.[116] The Ninth Circuit analogized the case to *Zadvydas*, in which a noncitizen's home country rejected his readmission after the U.S. government had ordered him removed, leaving him with nowhere to go and therefore facing indefinite detention in the United States.[117] The *Zadvydas* Court held that the government may detain a noncitizen who it has already ordered removed beyond the statute's 90-day removal period, but not beyond a period "reasonably necessary" to secure removal, presumptively six months.[118]

The *Jennings* Court overturned the Ninth Circuit's ruling, rejecting its constitutional avoidance rationale on the basis of statutory interpretation alone.[119] Writing for the majority, Justice Alito distinguished the *Jennings* plaintiffs' claim from *Zadvydas* because the statutes in question were different.[120] The statute in *Zadvydas* applies to noncitizens who have already been ordered removed and states that noncitizens in those circumstances *may* be detained.[121] By contrast, the statutes in *Jennings* apply to noncitizens who are awaiting a final decision on their request to stay in the United States, and those statutes state that such noncitizens *shall*

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113. *See generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
114. *Id.* at 836.
115. Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015); *Jennings*, 138 S. Ct. at 836.
116. *Jennings*, 138 S. Ct. at 836.
117. *Rodriguez*, 804 F.3d at 1074; *see generally* Zadvydas v. Davis, 533 U.S. 678 (2001).
118. *Jennings*, 138 S. Ct. at 834; *see generally Zadvydas*, 533 U.S. 678.
119. *Jennings*, 138 S. Ct. at 835.
120. *Id.*; *see* 8 U.S.C. § 1231; *cf. id.* §§ 1225(b)(1)(A)(i), 1226(a), 1226(c).
121. *Jennings*, 138 S. Ct. at 835; *see also id.* § 1231.

be detained.[122] Justice Alito's holding relied solely on statutory analysis—focusing on the words "may" and "shall"—and failed to address the *Jennings* plaintiffs' due process claims.[123]

D. A Distinction Without a Difference

In his dissent, Justice Breyer asserted that the majority's interpretation in *Jennings* would likely render the statute unconstitutional.[124] Justice Breyer wrote that the Fifth Amendment applies to noncitizens because it applies to all persons.[125] Further, holding a noncitizen indefinitely without bond deprives that person of their liberty.[126] In fact, without a bond proceeding, there is no *process* at all.[127] Furthermore, Justice Breyer wrote that freedom from bodily restraint has always been at the core of the liberty that the Due Process Clause protects, dating back to the Magna Carta from which it derived.[128] Justice Breyer found no reason to treat bond differently in immigration law than in criminal law:

> The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself.[129]

Justice Breyer's dissent raises the possibility that a future iteration of the Court could find current immigration detention practices unconstitutional on due process grounds.[130] These constitutional considerations should compel Louisiana to reexamine ICE's detention practices in the state.

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122. *Jennings*, 138 S. Ct. at 835; *see also id.* §§ 1225(b)(1)(A)(i), 1226(a), 1226(c).

123. *Jennings*, 138 S. Ct. at 852.

124. *Id.* at 859 (Breyer, J., dissenting).

125. *Id.* at 861 (Breyer, J., dissenting).

126. *Id.* (Breyer, J., dissenting).

127. *Id.* (Breyer, J., dissenting).

128. *Id.* (Breyer, J., dissenting) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

129. *Id.* at 865 (Breyer, J., dissenting).

130. *See generally id.* (Breyer, J., dissenting).

E. Louisiana's Role Reconsidered

A perfect storm of factors makes Louisiana a desirable location for ICE to house detainees.[131] Governor Edwards' criminal justice reform package opened up more prison space in Louisiana, which allows ICE to detain noncitizens at lower cost in Louisiana than in other states.[132] Louisiana parishes originally increased their detention capacity because overcrowding and poor conditions at state prisons pushed the state to contract with local parishes to house prisoners convicted of criminal acts.[133] When the state government began releasing some of those prisoners, the parishes lost a reliable revenue stream.[134] Those same parishes turned to ICE contracts to fill the void.[135]

In addition to the monetary reasons why ICE is moving detainees to Louisiana, legal scholars have identified a recent practice of ICE known as "forum shopping," whereby the agency moves detainees to locations where ICE is more likely to receive favorable outcomes from local immigration and circuit court judges.[136] Legal scholars cite the Fifth Circuit in particular as a circuit more favorable to ICE.[137] Additionally, Louisiana has few immigration attorneys available to defend against ICE cases, and the ones who are in Louisiana live mostly in cities far from the remote parishes where ICE detainees are held.[138] As a result,

131. Merchant, *supra* note 16.

132. *Id.*

133. *See* 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/UQ8M-PKPL].

134. *Id.*

135. Merchant, *supra* note 16.

136. *See generally* Roger C. Grantham Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings*, 53 GA. L. REV. 281 (2018) (finding that regional differences between immigration judges allow ICE to forum shop by transferring detainees to detention centers in the regions where immigration judges who are likely to issue rulings favorable to ICE).

137. *See* Adrienne Pon, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 786 (2019) (finding that the law is less favorable to immigrants in the Fifth Circuit).

138. *See* Noah Lanard, *Inside the Court Room Where Every Asylum Seeker Gets Rejected*, MOTHER JONES (Sept./Oct. 2019), https://www.motherjones.com/crime-justice/2019/07/inside-the-courtroom-where-every-asylum-seeker-gets-rejected/ [https://perma.cc/7EA5-Y3E6]; *see also* Pon, *supra* note 137, at 757

unrepresented noncitizens are less likely to win their cases.[139] These factors suggest that ICE chooses to detain noncitizens in Louisiana because noncitizens will most likely lose their asylum cases here.[140] In the absence of action from Congress or the Supreme Court, Louisiana has the opportunity to lead federal actors to adopt a fairer and more equitable immigration system, consistent with the principles of the U.S. Constitution.[141]

III. IMMIGRATION FEDERALISM AND RETHINKING LOUISIANA'S ROLE

Federalism provides a framework for considering what Louisiana's role in immigration detention currently is and what it should be.[142] Specifically, immigration detention involves interaction between federal, state, and local actors.[143] The federal government determines who it will detain, for what reasons, and for how long.[144] Localities enter into contracts with ICE to detain noncitizens in Louisiana.[145] State government itself has not had a role in these arrangements; however, given the constitutional issues discussed above, it should.[146] Legal scholarship on immigration federalism provides some context for considering state participation in ICE detention policies.[147]

A. Modern Conceptions of Federalism

Immigration law has historically been the province of the federal government; however, some jurisprudence has recognized the legitimate role of states using their police power in immigration law.[148] In recent

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(2019) (finding that Louisiana is the state receiving the largest number of transfers, approximately 19% of all transfers).

139. *See* Lanard, *supra* note 138; *see also* Pon, *supra* note 137.

140. *See generally* Grantham, *supra* note 136.

141. Louisiana would join other states that have taken similar action in doing so. *See* Adams, *supra* note 15.

142. *See generally* Gulasekaram & Ramakrishnan, *supra* note 29.

143. *Id.*

144. *Id.*

145. Merchant, *supra* note 16.

146. *See supra* Part II; *see also* Gulasekaram & Ramakrishnan, *supra* note 29.

147. *See generally* Gulasekaram & Ramakrishnan, *supra* note 29.

148. *See supra* Part I.A; *see also* Su, *supra* note 27, at 183 (citing Ohio v. Deckenbach, 274 U.S. 392, 394 (1927) (upholding a local ordinance that forbids noncitizen immigrants from running billiard and pool rooms)); Terrace v. Thompson, 263 U.S. 197, 223 (1923) (upholding a state law that prevented certain immigrants from having any interest in land because of the strong state interests

years, the role of the states has increased to the point at which legal scholars have carved out a new field of "immigration federalism."[149] This field situates immigration law in the context of a broader discussion about the role of federalism in modern society.[150] Legal scholars have historically framed federalism as a tension between "dual sovereigns," in which independent federal and state actors compete for power.[151] In reality, state and federal actors are more like codependent equals, sometimes cooperating, sometimes pushing separate agendas, but never actually independent.[152] This new conception of federalism—"Federalism 3.0"[153]—posits that federalism is best understood through an examination of the state implementation of federal policy objectives.[154] Under this framework, the focus shifts from Congress and the courts to administrators at the state and federal level.[155] Scholars of Federalism 3.0 look past traditional constitutional case law to assess what is actually happening on the ground.[156] Under this framework, states have the power to push their own policy agendas not only by being cooperative, but also

involved); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420–21 (1948) (finding state interest insufficient to justify forbidding noncitizen immigrants from receiving commercial fishing licenses).

149. Su, *supra* note 27 (citing Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (signaling the federal government's eagerness to embrace sub-federal activity on the issue)); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635–36 (1997). *See generally* Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (offering a reformulation of the presumptions of federalism in the context of immigration); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (advocating for a more robust state role in the formation of immigration policy).

150. Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087 (2014).

151. Gerken, *supra* note 28, at 1698.

152. *Id.* at 1700.

153. This distinguishes modern federalism from the two major debates over federal-state relations in the 20th century: the New Deal legacy, or Federalism 1.0, and the Civil Rights Movement, or Federalism 2.0. *See id.* at 1696.

154. *Id.* at 1700 (suggesting that federal-state relations look more like the implementation of the Affordable Care Act, with its messy negotiations between the Obama administration and the states, than the Court's one-off decision in *National Federation of Independent Bus. v. Sebelius*, 567 U.S. 519 (2012)).

155. *Id.* at 1701.

156. *Id.* at 1702–04.

uncooperative.[157] This is particularly true of immigration law, where there is an increasing rate of cooperation between state and federal actors.[158]

B. Immigration Federalism 3.0

Collaborative efforts between state and federal administrative agencies have become increasingly important in the immigration context.[159] In the absence of congressional guidance in recent years, the executive branch has taken on a leadership role in developing federal immigration policy.[160] Likewise, the states have become increasingly important partners in implementing the executive branch's agenda.[161] This setup arose for two reasons: (1) the federal government sought to co-opt state actors in an attempt to prevent the states from taking unilateral action that could be contrary to federal policy goals, and (2) as a practical matter, the federal government often needed state resources and cooperation to implement its policy agenda.[162] For example, in response to state efforts to engage in immigration enforcement, the federal government created the 287(g) grant program.[163] The 287(g) program provides federal funding and training to local law enforcement agencies that in return cooperate with federal immigration officials by sharing information about people in their custody.[164] The program has the effect of fending off states' interest in going rogue by incorporating them into the federal network of immigration enforcement.[165] It also leverages state resources to achieve federal policy goals.[166] Federal and state actors welcome the collaboration to the extent that their objectives are the same.[167] Granted, states have also exploited

157. *Id.*
158. *See generally id.*; *see also* Rodríguez, *supra* note 149.
159. *See generally* Gulasekaram & Ramakrishnan, *supra* note 29.
160. *Id.*
161. *Id.*
162. *Id.* at 143.
163. The 287(g) program has been the subject of criticism for reasons that are beyond the scope of this Comment, but it is worth noting. Specifically, critics note that it harms relationships between local police and immigrant communities and deters noncitizens from reporting criminal activity. *Id.* at 146; *see also* 8 U.S.C. § 1357(g).
164. Gulasekaram & Ramakrishnan, *supra* note 29, at 147.
165. *Id.* at 162; *see, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (finding that federal law preempted certain sections of an Arizona law that increased the power of local law enforcement to enforce federal immigration law).
166. Gulasekaram & Ramakrishnan, *supra* note 29, at 162.
167. *Id.*

this codependency by practicing uncooperative federalism when the federal government seeks to implement policies they oppose.[168]

Codependency between federal and state administrative agencies is a catalyst for state resistance to federal policies with which the state disagrees.[169] In the absence of congressional action, states and localities have taken on the role of questioning the legality or legitimacy of certain federal actions.[170] Further, states and localities have emerged as leaders in resisting federal action that runs contrary to their citizens' popular opinion.[171]

One example is the local response to paroled and unauthorized noncitizens from Central America and the Caribbean during the 1970s and 1980s.[172] At that time, states and localities pushed back against federal efforts to deport noncitizens, forcing the federal government to reconsider its prosecutorial stance, which ultimately led Congress to provide relief for large groups of unauthorized noncitizens.[173] The program was not applied equally: Cuban noncitizens received different treatment than Haitian noncitizens, and states passed early versions of sanctuary ordinances to assure undocumented people that the locality will not enforce federal immigration laws against them.[174] This trend grew in the 1980s, when civil and political unrest in Central America led to an increase in noncitizens from the Northern Triangle region coming to the United States.[175] In response, state and local jurisdictions enacted sanctuary ordinances to prevent federal enforcement officials from removing Central American noncitizens from the United States.[176] Congress eventually conferred legal status on them in response to mounting political pressure.[177] Today, sanctuary cities are again emerging as a means to resist federal immigration policy that certain state and local governments oppose.[178]

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168. *Id.* at 163 (citing Jessica Bullman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009)).

169. *Id.* at 164.

170. *Id.*

171. *Id.* at 166.

172. *Id.* at 129.

173. *Id.*

174. *Id.* at 130.

175. *Id.* at 131.

176. *Id.*

177. *Id.* at 132 (pointing to the 1986 Immigration Reform and Control Act and other relief measures).

178. Specifically, sanctuary cities are refusing to turn noncitizens in their custody over to ICE officials. New Orleans is one such city. *See* John Hudak et

C. Federalism and Political Subdivisions

Although some immigration federalism scholars lump state and local activity together as if it were a single, cohesive unit, others recognize the distinct roles of the two.[179] Legal scholars emphasize the role of local government in cooperative arrangements in the immigration context.[180] Many of the policies affecting immigrants are local in nature, from enforcement to integration of immigrant communities into schools, hospitals, and other institutions.[181] Political subdivisions within states address immigration differently, depending on local politics and policy priorities.[182] Such is the case of noncitizen detainees in Louisiana, where the federal government contracts directly with local parishes to obtain prison space.[183] The result is that detention of noncitizens in Louisiana has grown exponentially without the input of the governor or state lawmakers.[184] Thus, the Louisiana legislature should intervene to stop local parishes from contracting directly with the federal government to detain noncitizens because ICE detention practices are likely unconstitutional on due process grounds.[185]

Other states have grappled with prolonged detention of noncitizens: lawmakers in California, Michigan, and Illinois enacted legislation to stop localities from contracting directly with the federal government to detain noncitizens.[186] Louisiana lawmakers can use these states' reactions as a model for how to push back against ICE's unconstitutional practices.[187] California Governor Gavin Newsom signed legislation in October 2019 preventing localities from entering into future ICE detention contracts in order to address human rights concerns and to end what he characterized as overincarceration of asylum seekers and refugees.[188] ICE issued a

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al., *Trump Threatened Sanctuary Cities and They Shrugged—Here's Why*, BROOKINGS IMMIGRATION BLOG (May 1, 2019), https://www.brookings.edu/blog/fixgov/2019/05/01/trump-threatened-sanctuary-cities-and-they-shrugged-heres-why/ [https://perma.cc/3WKP-M9BQ].

179. *See* Su, *supra* note 27; Rodríguez, *supra* note 149.

180. Rodríguez, *supra* note 149, at 637.

181. *Id.*

182. *Id.*

183. Merchant, *supra* note 16.

184. *Id.*

185. *See supra* Part II.A. & B.

186. Adams, *supra* note 15.

187. *Id.*

188. *See Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 11, 2019), https://www.gov.ca.gov/2019/10/11/governor-newsom

statement in response, suggesting that the California legislation will force the agency to move asylum seekers away from their families and attorneys in California to places like Louisiana. ICE, however, was already increasing its detention capacity in Louisiana months before the California legislation appeared.[189] The reality is that even without the loss of detention space in California—which at the time of the California ban was approximately 4,000 detainees—ICE needed more detention space because of its policy of detaining more noncitizens.[190]

D. The Case for Uncooperative Federalism in Louisiana

Immigration detention presents a major, unanswered legal question: whether the historic framework in which ICE detainees enjoy fewer constitutional protections than criminal defendants is justifiable.[191] With the advent of crimmigration in the 1980s and 1990s, and the federal government's current practice of using ICE detention for the purposes of punishment and deterrence, the answer to this question is no.[192] The punishment and deterrence rationales fail to pass constitutional muster on substantive due process grounds.[193] Further, the government's policy of issuing across-the-board denials of noncitizens' requests for bond or parole raises procedural due process concerns as well.[194] Louisiana should therefore reject ICE's unconstitutional practices of immigration detention by practicing uncooperative federalism.[195] As a practical matter, ICE detention in Louisiana is also undesirable for public policy reasons: it undermines the objectives of the state's criminal justice reform, presents economic concerns, and violates human rights.[196]

-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california/ [https://perma.cc/P3DR-WUQZ].

189. *See ICE statement on California AB32 restricting immigration detention facilities in the state*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 11, 2019), https://www.ice.gov/statements/ice-statement-california-ab32-restricting-immigration-detention-facilities-state [https://perma.cc/4X3L-P3M8]. *But see also* Merchant, *supra* note 16.

190. *See ICE statement on California AB32 restricting immigration detention facilities in the state*, *supra* note 189. *But see also* Merchant, *supra* note 16.

191. Korthuis, *supra* note 20.

192. *Id.*

193. *Id.*

194. *Id.*

195. Gerken, *supra* note 28, at 1702–04.

196. Merchant, *supra* note 16.

1. Noncitizen Detention Undermines the State's Criminal Justice Reform Efforts

The recent influx of 8,000 ICE detainees to Louisiana is contrary to public policy because it undermines the state's efforts to reduce its prison population.[197] Governor Edwards enacted criminal justice reform in 2017 with strong bipartisan support, and his reelection in 2019, in the face of criticism by his opponents for being soft on crime, is evidence of popular support for his agenda on criminal justice reform.[198] The main objective of criminal justice reform legislation in Louisiana was to reduce the state's incarceration rate.[199] Further, the legislation mandates that the government reinvest savings from the program to reduce recidivism so as to further reduce the prison population.[200] The expansion of ICE detainees in the state is an unintended consequence of the state's successful criminal justice reform.[201] This expansion can be attributed at least in part to the practice of "forum shopping," which is specifically designed to deny noncitizens due process by moving them to a location where they are likely to lose their case.[202] Louisiana should not support federal immigration policies which are intended to subvert basic human rights.[203] Having the second largest population of ICE detainees undermines Louisiana's primary objective of shedding its status as the state with the largest rate of incarceration overall.[204] This second place status is not a distinction that Louisiana should embrace.[205]

2. ICE Detention Is Not A Sustainable Economic Plan

The Louisiana Legislature should also consider the effects of ICE detentions on the state's economy. The sudden movement of 8,000 detained people to the state will have large effects on local infrastructure—including medical, legal, transportation, and economic systems—in ways

197. *Id.*
198. Daniel Strauss, *Louisiana election shows limits of 'old tough-on-crime Stuff*,' POLITICO (Nov. 24, 2019, 6:58 AM), https://www.politico.com/news/2019/11/24/john-bel-edwards-criminal-justice-reform-louisiana-072952 [https://perma.cc/66JC-GY7D].
199. *Criminal Justice Reform*, *supra* note 13.
200. *Id.*
201. Merchant, *supra* note 16.
202. *See generally* Pon, *supra* note 137.
203. *See supra* Part III.C.
204. *See supra* Part III.C.
205. *See supra* Part III.C.

that are not yet apparent.[206] Louisiana parishes have been eager to enter ICE contracts because they generate revenue for local communities.[207] This windfall is particularly enticing for local parishes that lost state revenue when the governor's criminal justice reform legislation decreased the need for prison space.[208] One Winn Parish sheriff compared the local prison closing with an automobile plant closing in terms of its potential impact on local jobs.[209] This reality raises questions as to whether prisons are the best industry to sustain local Louisiana communities.[210] If ICE loses its need to detain people here—which is possible given the recent federal policy change that requires people to stay in Mexico while they await a decision on their asylum application—then local parishes could lose funding for their prisons again.[211] The legislature should come up with a more sustainable means for addressing the economic pressure that local parishes face as a result of lost revenue from state prisoners.[212] Specifically, the state can work with local parishes to reinvest the money currently generated by ICE contracts into sustainable and productive endeavors such as education, healthcare, and career development programs.[213]

3. Human Rights Concerns

Finally, current ICE detention practices raise concerns over human rights.[214] The federal government is currently detaining noncitizens in

206. For a discussion of challenges to local governments associated with immigration detention, see Adams, *supra* note 15.

207. Merchant, *supra* note 16.

208. *Id.*

209. *Id.* (quoting Winnfield Sheriff Cranford Jordan as saying, "It would be devastating . . . . You'd see people moving, bankruptcy. It would be like an automobile plant closing").

210. *Id.*

211. *See generally* Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html [https://perma.cc/K5GS-D6KE].

212. Merchant, *supra* note 16.

213. For a more detailed description of this proposal, see CHICAGO COMMUNITY BOND FUND, MONEY FOR COMMUNITIES, NOT CAGES: THE CASE FOR REDUCING THE COOK COUNTY SHERIFF'S JAIL BUDGET (Oct. 2018), https://chicagobond.org/wp-content/uploads/2018/10/money-for-communities-not-cages-why-cook-county-should-reduce-the-sheriffs-bloated-jail-budget.pdf [https://perma.cc/MT3Y-XFUQ].

214. *See UNHRC Revised Guidelines*, *supra* note 11.

unprecedented numbers.[215] There are backlogs in immigration courts, coupled with federal government policies denying parole and bond, which has led to long-term detentions for many noncitizens.[216] On average, the federal government detains these noncitizens for six months to a year, though it detains many for several years.[217] Ultimately, many of the detainees are successful in their claims and therefore stay in the country.[218] This reality calls into question the rationale for prolonged detention of noncitizens.[219] The government's current detention policies have resulted in a system in which people like Hernández Diáz, who came to the United States seeking asylum from Cuba, are treated like criminals, languishing in prison while they await a court date.[220] Hernández Diáz came to the United States in an attempt to escape persecution in his home country and killed himself while he awaited his asylum hearing in prison in the United States.[221] The U.N. recommends against detention of noncitizens precisely because people like Hernández Diáz are too vulnerable to sustain the stress of incarceration.[222]

Supporters of current ICE detention practices argue that the government should detain noncitizens while vetting them for admissibility into the United States to ensure the safety of the community.[223] Immigration officials already consider two factors to determine bond eligibility, specifically, risk of flight and danger to the community.[224] The fact that the government increasingly denies bond or parole to detained noncitizens without consideration of these factors suggests that the

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215. Merchant, *supra* note 16. For the deterrence and punishment rationales for prolonged detention of immigrants, see *supra* Part I.D.

216. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting).

217. *Id* at 860 (Breyer, J., dissenting).

218. *Id.* (Breyer, J., dissenting).

219. *Id.* (Breyer, J., dissenting).

220. Armus, *supra* note 1.

221. *Id.*

222. *See UNHRC Revised Guidelines*, *supra* note 11.

223. *See* REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PLATFORM (2016), https://prod-cdn-static.gop.com/static/home/data/platform.pdf [https://perma.cc/YXJ7-XBP8] (suggesting that security considerations should be of primary concern to the government when it considers whether to admit refugees and asylees).

224. *See* 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) (2020). This regulatory standard also applies to custody determinations by immigration judges at bond hearings. *See* Matter of Adeniji, 22 I. & N. Dec. 1102, 1112 (BIA 1999), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018).

security rationale is not its primary concern.[225] To the contrary, the federal government's rhetoric and policy objectives make clear that the real objective in detaining noncitizens for prolonged periods of time is to punish and deter them.[226] Given the due process issues with this approach, the need to prevent current ICE detention practices is clear.[227]

IV. A NECESSARY SOLUTION: GIVE THE POWER TO CONTRACT TO THE STATE

Louisiana has an interest in being the primary decisionmaker when it comes to ICE detention contracts in the state because its citizens will ultimately feel the impact of this influx of ICE detainees.[228] Under the current system, ICE effectively cuts the state out of the decision-making process by contracting directly with local parishes.[229] This setup circumvents the political process and prevents the state from looking holistically at the problems with ICE detention practices to decide whether it is a system worth supporting.[230] Louisiana is not the first state to grapple with an influx of ICE detention contracts and with questions of what to do about them.[231] For reasons similar to those Louisiana faces, other states have implemented options for ending ICE detention contracts.[232] For example, California, which has a population of 4,000 detainees, enacted legislation in October 2019 to prevent localities from contracting with ICE for the purpose of detaining noncitizens.[233] This legislation prevents localities from entering into future contracts with ICE or extending existing contracts.[234] It grants the state the authority to determine whether to enter into agreements with ICE.[235] The state would then have the ability to negotiate with the federal government to address its concerns and refuse to continue contracting with ICE if those concerns go unaddressed.[236]

225. *See generally* Korthuis, *supra* note 20.
226. *Id.*
227. *Id.*
228. *See supra* Part III.C.
229. *See supra* Part III.C.
230. *See supra* Part III.C.
231. Adams, *supra* note 15.
232. *Id.*
233. Michigan and Illinois also adopted similar legislation. *Id.*
234. Note that because the California legislation is so new, it is relatively untested; however, its objectives are the same as those discussed here. *See* S.B. 94, 2017-18 Leg., Reg. Sess. (Cal. 2017) (adding Section 1670.9 of the California Civil Code).
235. *See supra* Part III.C.
236. *See supra* Part III.C.

A. Legislative Proposal

The Louisiana legislature should adopt a modified version of California's Senate Bill No. 94, adding the new legislation to the Louisiana Revised Statutes, Title 15, Criminal Procedure.[237]

Specifically, the legislature should add a new section R.S. 15:1615, regarding contracts for civil immigration detention:

> (i) A city, parish, city and parish, or local law enforcement agency that does not, as of [date], have a contract with the federal government or any federal agency or a private corporation to house or detain noncitizens for purposes of civil immigration custody, shall not, on and after [date], enter into a contract with the federal government or any federal agency or a private corporation, to house or detain in a locked detention facility noncitizens for purposes of civil immigration custody.
>
> (ii) A city, parish, city and parish, or local law enforcement agency that, as of [date], has an existing contract with the federal government or any federal agency or a private corporation to detain noncitizens for purposes of civil immigration custody, shall not, on and after [date], renew or modify that contract in a manner that would expand the maximum number of contract beds that may be utilized to house or detain in a locked detention facility noncitizens for purposes of civil immigration custody.

Paragraph (i) prevents cities and parishes from entering into new contracts with ICE to detain noncitizens. Further, paragraph (ii) prevents them from extending existing contracts. Principles of contract law would prevent the state from ending contracts already in existence; however, this proposed legislative solution would effectively end ICE contracts with Louisiana parishes when current contracts expire, which would be within five years in most cases.[238]

B. Policy Objectives

The intent of this legislative proposal is to shift the power to contract with ICE from local parishes to the state.[239] The legislation would prevent localities from entering into any new contracts with ICE or extending

237. S.B. 94, 2017-18 Leg., Reg. Sess. (Cal. 2017).
238. Clark, *supra* note 3.
239. *See supra* Part III.C.

existing contracts.[240] It would not preclude the state from entering into contracts with the federal government to house noncitizens; instead, the legislation simply transfers the decision-making authority from local subdivisions to the state.[241] This concentration of power in one single entity gives the state bargaining power to work with the federal government to address concerns with federal immigration policies.[242] The legislation would also provide the state with the opportunity to stop contracting with the federal government if its concerns go unaddressed.[243]

Notably, this legislation would not impact all ICE contracts with localities, just contracts to detain noncitizens.[244] The proposed statute would not affect other federal-state partnerships, such as cooperative arrangements between federal and local law enforcement agencies for the purposes of immigration enforcement.[245] Nor does it preclude the possibility that the state will choose to continue to contract with ICE for the purposes of detention, should the federal government improve upon its current detention practices to the state's satisfaction.[246] It simply places the decision-making authority into the hands of the state rather than local parishes.[247]

C. Expected Results

Enactment of this proposed legislation affords Louisiana the opportunity to reject its current role as the state with the second largest population of ICE detainees.[248] Ideally, this action will force federal policymakers to reckon with the due process issues associated with current ICE detention practices and will lead to positive change.[249] Even if the federal government is not inspired to change its policies and chooses to go elsewhere to house its detainees, the legislation will be effective to the extent that it will remove Louisiana from the equation.[250] The legislation also leaves open the possibility that Louisiana will continue to house ICE

240. *See infra* Part IV.B.
241. *See supra* Part III.C.
242. *See supra* Part III.C.
243. *See supra* Part III.C.
244. *See generally* S.B. 94, 2017-18 Leg., Reg. Sess. (Cal. 2017).
245. *Id.*
246. *See supra* Part III.C.
247. *See generally* S.B. 94, 2017-18 Leg., Reg. Sess. (Cal. 2017).
248. *See supra* Part III.B.
249. *See supra* Part III.B.
250. *See supra* Part III.B.

detainees should the federal policy change for the better.[251] This arrangement gives the state greater bargaining power in its interactions with the federal government.[252]

Localities may oppose the legislation on the grounds that ICE detention contracts are a source of revenue for them.[253] Although it is true that under the Home Rule Doctrine, Louisiana gives great deference to localities in decisions about how to govern themselves, the Doctrine would not apply in this case.[254] The Home Rule Charter in the Louisiana Constitution explicitly states that it is "[s]ubject to and *not inconsistent with* [the Louisiana] constitution."[255] Furthermore, both state and local officials are beholden to the same citizenry such that a state legislature decision to end ICE detention contracts would necessarily include input from the affected localities.[256]

For the same reasons that ICE detention practices are problematic under the U.S. Constitution, they are problematic under the Louisiana Constitution.[257] The Louisiana Constitution provides the same due process protections to *persons* as the U.S. Constitution.[258] Therefore, housing ICE detainees is unconstitutional under the state constitution for the same reasons that it is unconstitutional under the U.S. Constitution.[259] ICE detention practices are therefore inconsistent with the Louisiana Constitution, and the Home Rule Charter does not apply to this proposal.[260]

Additionally, Louisiana private prison companies that benefit from their ability to contract with ICE may oppose this new legislation.[261] The proposed language precludes localities from entering into ICE contracts on behalf private prison companies; however, it does not stop ICE from

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251. *See supra* Part III.B.
252. *See supra* Part III.B.
253. *See supra* Part III.C.
254. *See* LA. CONST. art. VI, § 5 ("Home Rule Charter"); *see also* LA. REV. STAT. § 33:106 (2018).
255. LA. CONST. art. VI, § 5 (emphasis added).
256. *See supra* Part III.C.
257. *See* LA. CONST. art. I, §§ 2, 13.
258. *Id.*
259. *Id.*
260. *Id.*
261. *See* Will DuPress, *Williamson County agreement with ICE detention center ends Thursday*, NBC-KXAN (Jan. 31, 2019), https://www.kxan.com/news/local/williamson-county/williamson-county-agreement-with-ice-detention-center-ends-thursday/ [https://perma.cc/RL8D-3RMS].

contracting with private prison companies directly.[262] Even though the legislative proposal would not prevent private entities from entering into these contracts, the state has some bargaining power with private contractors.[263] The same private contractors that house ICE detainees maintain contracts with the state to house state prisoners.[264] Therefore, private prison companies have incentives to maintain good relationships with the state and are likely be amenable to discussions with state officials about concerns with ICE detention contracts.[265]

This legislative proposal will shift the power to contract with the federal government to house ICE detainees from local parishes to the state.[266] This shift consolidates power within the state and provides greater opportunity for the state to negotiate with the federal government over policies it opposes, with the ability to stop cooperating if the federal government fails to address those concerns.[267] It does not preclude the state from entering into future contracts with ICE for purposes other than detention.[268] Nor does it prevent the state from contracting with ICE to detain noncitizens in the future should federal government policies improve.[269] It simply places the state in a stronger bargaining position to have its concerns addressed.[270] With this legislation, the state will have the ability to advocate for improved federal immigration policies that protect noncitizens' constitutional rights, such as a policy to release asylum seekers on parole or bond while they await a final decision on their asylum application.[271]

CONCLUSION

The decision to detain noncitizens in Louisiana is a policy one that should be made at the state level, not on an ad hoc basis through contracts

262. Problems arose with a proposal in Williamson County, Texas. The local government there chose to end its contract with a private prison company to house ICE detainees following reports of abuse and neglect at the facility; however, the facility contracted with ICE and was able to continue operations. *See id.*

263. Clark, *supra* note 3.

264. *Id.*

265. *Id.*

266. *See supra* Part III.C.

267. *See supra* Part III.C.

268. *See supra* Part III.C.

269. *See supra* Part III.C.

270. *See supra* Part III.C.

271. *See supra* Part III.C.

between the federal government and local parishes.[272] Because ICE detention practices are unconstitutional on due process grounds, the state legislature should enact a law to prevent local parishes from entering into future agreements with ICE to detain noncitizens or from renewing existing contracts.[273] This Comment's proposed legislative solution will achieve that goal.[274] The legislation will move decision-making authority about ICE detention contracts to the state government, giving the state the ability to negotiate with the federal government about policies it does not support and to choose not to participate if those concerns are not addressed.[275]

272. *See supra* Part III.C.
273. *See supra* Part III.C.
274. *See supra* Part IV.B.
275. *See supra* Part III.C.