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ARTICLE: THE INTERSECTION OF RACE, BOND, AND "CRIMMIGRATION" IN THE UNITED STATES IMMIGRATION DETENTION SYSTEM

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Text

The United States ("U.S.") Supreme Court's recent decision in *Jennings v. Rodriguez*[1] has potentially opened another avenue for people of color to become entangled in the U.S.' predatory immigration system, through the denial of bail hearings. Denial of periodic bond hearings ensures that many detainees in immigration facilities will be held indefinitely until these detainees' cases are adjudicated. In *Jennings*, the Court held that detained aliens do not have a right to periodic bond hearings even if they are detained for prolonged periods of time, due to the language of the mandatory and discretionary detention statutes at §§ 1225(b)(1)-(2) and §§ 1226(a),(c) of the Immigration and Nationality Act. [2] This holding perpetuates the U.S.' tradition of immigration laws having an overwhelmingly negative effect of mass incarceration and criminalization on people of color. [3]

Immigration laws fall under the plenary power of the federal government, wherein only the Executive and Legislative branches have the power to make immigration policies. [4] Therefore, the federal government is free

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1 *Jennings v. Rodriguez, 138 S. Ct. 830 (2018)*.

2 *Id.* (holding that U. S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under the mandatory detention statutes at *8 U.S.C §§ 1225(b)(1)* and (b)(2) and the discretionary detention statute at § 1226(a)).

3 *See generally* Kevin Johnson, *The Intersection of Race and Class in U.S. Immigration Laws and Enforcement*, 72 L. AND CONTEMP. PROB. 1 (2009).

4 *Id.* at 7.

to use this plenary power to engage in blatant racism by creating laws that exclude, deport, and punish immigrants. [5]Regardless of whether the current administration is focused on strict immigration laws, the demographics of detention centers depict a clear, disparate impact on people of color. [6]Each administration, new legislative body, and judiciary cause more harm to the immigrant community, and especially to people of color. This is done by pushing their own agendas and interpreting immigration laws as they stand, rather than seeking and implementing immigration reform.

Since the creation of U.S. immigration laws, people of color have been disparately impacted by predatory immigration laws and policies. [7]The effect of predatory immigration laws on people of color mirrors the effects of the criminal justice system; however, more protections are given to those trapped in the criminal justice system. The *Jennings* decision has the potential to promote and deepen the effects of predatory immigration laws on people of color.

Here, we analyze the interaction of race, mass incarceration through bond denial, and the criminalization of people of color persistent throughout U.S. immigration law.

i. History of Basing Immigration Benefits on "Whiteness"

What society identifies as race is not scientific, but instead, is the result of social structures, historical truths, and attitudes that have shaped society's way of thinking, resulting in some racial groups advancing at the expense of others. [8]This advancement is a result of privileges obtained based on markers of race. These markers of race mean nothing until they are given meaning, and then that meaning is attached to social constructions and laws that allocate these privileges based on the racial markers. [9]U.S. immigration laws were born out of this manifestation of racism.

In 1790, the Naturalization Act excluded all non-whites from obtaining citizenship. [10]This marked the birth of an immigration system that favored white people over people of color, which has persisted through legislation and jurisprudence. [11]Following the Naturalization Act of 1790, the legislature doled out several early immigration laws that discriminated against immigrants if they were not considered white. The judiciary also decided numerous cases that perpetuated racism, expressly outlining that Asians were not white. [12]For example, in *Takao Ozawa v. United States*, the Supreme Court in 1922 denied a Japanese American citizenship because he was not white as defined by the naturalization statute and the prevailing science at the time. [13]Further, during the

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5 Eli J. Kay-Oliphant, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 700-01 (2005) (discussing the misuse of the plenary power doctrine in American immigration policies).

6 *Id.*

7 *Id.* at 15.

8 *Race-The Power of an Illusion, Episode 3: The House We Live In*, PBS (2003), http://www.pbs.org/race/000_About/002_04-about-03.htm (discussing the intersection of immigration laws and race, and also depicts how immigration laws were created out of racism).

9 *Id.*

10 Warren J. Blumenfeld, *Immigration Laws as Official 'Racial' Policy*, HUFFINGTON POST (July 19, 2014, 11:00 AM), https://www.huffingtonpost.com/warren-j-blumenfeld/immigration-laws-as-offic_b_5601240.html.

11 Kay-Oliphant, *supra* note 5.

12 *The House We Live In, supra* note 8.

13 Takao Ozawa v. United States, 260 U.S. 178, 198 (1922).

period after the 1790 Naturalization Act, the legislature enacted the Johnson-Reed Act of 1924, which created quotas of Asian-Americans. [14]This essentially barred them from immigration benefits until 1952, perpetuating our modern concept of race by substituting "whiteness" as a marker of eligibility for citizenship. [15]In *United States v. Bhagat Singh Thind*, the Court decided that an Indian Sikh man, scientifically determined to be white, was still not racially eligible for citizenship because he was not what the common white man would consider to be white [16]This case was decided three months after *Ozawa* and shows that the laws governing immigration continue to "move the line" of what it means to be eligible for U.S. immigration benefits based on race.

In 1965 efforts were made to reform the immigration system; however, U.S. immigration laws still found ways to discriminate against people of color. [17]For example, policies such as the preference visas were implemented. [18]The preference visa system is a method of distributing a limited amount of immigrant visas and employment visas per year. [19]In the preference visa system, there are various annual limits on the number of immigrants to the U.S. from certain countries. [20]Visa waivers and shorter wait times are available for European countries, which perpetuate discrimination in unfairly stacking the laws against certain races. [21]Immigrants of Filipino and Mexican nationality are just a few that are negatively impacted by this policy as they must wait in excess of twenty-four years for a visa in certain visa categories. [22]In an effort to remedy this problem, the legislature enacted the 1986 Immigration Reform Act, but still included extra visas for some--mostly European countries. [23]A look at the current visa bulletin shows that the preference visa system still fails people of color as most of the caps listed on the Department of State's December 2018 visa bulletin refer to the number of visas available to Central American Countries, Asia, Mexico and the Philippines. [24]

ii. Convergence Between Predatory Criminal Laws and Immigration Laws

To fully understand how predatory immigration laws create another pipeline that promote discrimination towards people of color, we must look at the parallels to the criminal justice system. The U.S. incarceration rates have

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14 Johnson-Reed Act of 1924, ***43 Stat. 153*** (1924) (replaced by Immigration and Nationality Act of 1965).

15 John DiPippa, *Book Review -- Whiteness of a Different Color*, 36 ARK. LAW. 17 (2001) (reviewing MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR (1998)).

16 *United States v. Bhagat Singh Thind, 261 U.S. 204, 207 (1923)*.

17 David Cook-Martin & David Scott FitzGerald, *How Legacies of Racism Persist in U.S. Immigration Policy*, SCHOLARS STRATEGY NETWORK (June 20, 2014), *http://www.scholarsstrategynetwork.org/brief/how-legacies-racism-persist-us-immigration-policy*.

18 *See 8 U.S.C. § 1153* (2012).

19 *See 8 U.S.C. § 1153* (2012); *see also* U.S. Dep't of State, *Visa Bulletin for December 2018*, (Nov. 8, 2018), *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-december-2018.html*.

20 U.S. Dep't of State, *Visa Bulletin for December 2018*, (Nov. 8, 2018), *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-december-2018.html*.

21 *Id.*

22 *Id.*

23 Immigration Reform and Control Act, *Pub.L. 99-603*, *100 Stat. 3359* (1986); *see also* U.S. Dep't of State, *Visa Bulletin for December 2018*, (Nov. 8, 2018), *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-december-2018.html*.

24 U.S. Dep't of State, *supra* note 20.

increased by 500% over the last forty years, making it the leader in incarceration with 2.2 million people currently in our nation's prisons and jails. [25]It is well established that the American criminal justice system disproportionately affects people of color as well. [26]Blacks and Hispanics represent thirty-two percent of the population in the U.S., [27]yet they account for over sixty percent of the prison population nationwide. [28]Naturally, this reality casts a shadow on immigration law in the form of what is known as the "crimmigration" system. Crimmigration is the term that represents the convergence between immigration and criminal laws in the U.S. [29]Crimmigration "is a product of the growing criminalization of immigration violations on the one hand, and the expansion of criminal grounds for removal on the other." [30]

In 2013, President Barack Obama, in his attempt to focus immigration enforcement resources on individuals with criminal records, sought to justify a detention and removal campaign that oversaw the deportation of 438,421 immigrants. [31]This was an attempt to effectuate a focus on "felons not families." [32]This act of the administration snowballed into devastating results for those immigrants entangled in the crimmigration system. Since the criminal justice system already disproportionately affects people of color, it follows then, that targeting immigrants with criminal records creates a disparate impact on people of color, becoming a compound issue. The Department of Homeland Security does not provide data based on the demographics of noncitizens in detention facilities. However, using black immigrants as a sample, data shows that although black immigrants only account for 5.4% of unauthorized immigrant population in the U.S., and 7.2% of the total non-citizen population, they made up 10.6% of all immigrants in removal proceedings between 2003 and 2015. [33]Black immigrants represent a disproportionate number of immigrants facing deportation in immigration court on criminal grounds. [34]Further, despite only representing 7.2% of the non-citizen population, black immigrants make up 20.3% of immigrants facing deportation on criminal grounds. [35]Therefore, black immigrants disproportionately represent the number of detained immigrants with criminal histories. [36]

Additionally, Section 287(g) of the Immigration and Nationality Act authorizes the Department of Homeland Security's 287(g) Program's Jail Enforcement Teams to partner with state and local law enforcement agencies,

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[25] THE SENTENCING PROJECT, *Fact Sheet: Trends in U.S. Corrections*, https://sentencingproject.org/wpcontent/uploads/2016/01/Trends-in-US-Corrections.pdf (last visited April 11, 2019).

[26] *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited May 9, 2018).

[27] *Id.*

[28] *Fact Sheet: Trends in U.S. Corrections- Racial Disparity*, THE SENTENCING PROJECT (June 2018), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

[29] Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 119 (2016).

[30] *Id.*

[31] Juliana Morgan-Trostle & Kexin Zheng, *The State of Black Immigrants, Part II: Black Immigrants in the Mass Criminalization System*, THE STATE OF BLACK IMMIGRANTS 12 (2016), http://www.stateofblackimmigrants.com.

[32] *Id.*

[33] *Id.* at 20.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 16.

[37]to interview arrestees regarding their immigration status. [38]This arrangement creates a proverbial pipeline for people of color to be discarded into the crimmigration system because, "although African Americans and Hispanics make up approximately 32% of the U.S. population, they comprised 56% of all incarcerated people in 2015." [39]To put this all in perspective, a white person is five times less likely to be incarcerated in the criminal justice system, [40]therefore a white non-citizen is less likely to have a criminal record, and thus less likely to be funneled into the crimmigration pipeline.

Despite the convergence of the criminal and immigration system, a non-citizen with a criminal record is not afforded the same protections he was granted under the criminal justice system. Immigration law is classified as civil and not criminal law; therefore, detainees in immigration detention centers do not have a right of access to a court-appointed attorney, a free phone call, or a speedy trial. The U.S. criminal justice system provides more safeguards than the immigration system. For example, in the criminal justice system, law enforcement must have reasonable suspicion to pull someone over. [41]Such a protection is not afforded to non-citizens in the immigration system. In *United States v. Brignoni-Ponce*, the Supreme Court stated that racial profiling is acceptable as part of a border patrol officer's reason for pulling someone over. [42]This illustrates how certain inalienable rights provided to citizens are not available to aliens. This trend moves the proverbial needle farther away in terms of what it means to be an "admitted" [43]immigrant in the U.S.

iii. *Jennings v. Rodriguez* and its Effects on Bond Determination for Detained Immigrants

The *Jennings* plurality decision provides a snapshot of the nation's current view of immigration law through our jurisprudence and legislature. [44] *Jennings* established that U.S. immigration law does not give detained aliens the right to periodic bond hearings during the course of their detention and could not be plausibly interpreted as implicitly placing a six-month limit on detention. [45]In criminal proceedings, pursuant to the *Eighth Amendment of the U.S. Constitution*, defendants are protected from unnecessary pre-trial incarceration and are afforded a right to bail that is not excessive. [46]However, the Court in *Jennings* decided that detainees are

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37 Immigration and Nationality Act of 1964 § 287(g), *8 U.S.C. § 1101* (2014).

38 Morgan-Trostle & Zheng, *supra* note 30.

39 *Criminal Justice Fact Sheet, supra* note 25.

40 *Criminal Justice Fact Sheet, supra* note 25.

41 *Terry v. Ohio, 392 U.S. 1 (1962)* (requiring police officers to have reasonable suspicion to stop a suspect).

42 *United States v. Brignoni-Ponce, 422 U.S. 873 (1975)*. Here, the Court decided that Border Patrol officers stopping a vehicle solely based on the "apparent Mexican ancestry" of vehicle occupants amounts to violation of protection from unreasonable searches and seizures. However, the Court also said that officers need only have a reasonable suspicion that occupants of the vehicle are undocumented immigrants to constitutionally make such a stop and that such a suspicion can be based partly, but not entirely, on the occupants' apparent Mexican ancestry.

43 Immigration and Nationality Act, 8 U.S.C. § 101(a)(13) (2014) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer").

44 *Jennings v. Rodriguez, 138 S. Ct. 830 (2018)*.

45 *Id.*

46 *U.S. Const. amend. VIII* ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

not entitled to periodic bond hearings. [47]Despite pretrial detention being a cause of the spike in the rate of incarceration in the U.S., [48]defendants are afforded the opportunity to await trial as a free person. [49]That is not the case for non-citizens entangled in the crimmigration system, as the *Jennings* opinion highlights. The crimmigration system promotes mass incarceration of non-citizens, who are required to be detained until their cases are adjudicated. [50]

The U.S. is the leader of criminal detention in the world, which is exacerbated by the denial of bond hearings in the immigration context. [51]The U.S. also has the largest immigration detention infrastructure in the world and detains approximately 380,000 to 442,000 persons per year. [52]It is estimated that taxpayers spend two billion dollars per year on immigration detention. [53]The denial of bond hearings dramatically increases the number of people held in detention facilities while awaiting adjudication of their cases. The issue is that bond is not a right for the immigrant but is granted at the discretion of Immigration and Customs Enforcement (ICE). [54]Therefore, thousands of immigrants are funneled into detention centers while awaiting relief or deportation.

Consequently, there has been a vast spike in detained immigrants. In the 2017 fiscal year ICE projected an average daily detention population of roughly 31,000. In the 2018 fiscal year, ICE reports a daily population of 40,726 with projections for a detention population of 51,379. [55]This spike represents an expansion of sixty-five percent in just one year. [56]Further, private prison companies are profiting from these numbers in detainees because they hold about seventy-one percent of the average daily population of US jails. [57]

Interestingly, most of the immigrants detained due to mandatory detention statutes are marked as "non-criminal", [58]having been detained for reasons other than having a criminal record. An average of seventy-one percent of detainees were subject to "mandatory detention" in the first fiscal month of 2018. [59]On average, fifty-one

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47 *Jennings v. Rodriguez, 138 S. Ct. 830 (2018)*.

48 Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018).

49 *Id.*

50 *Jennings v. Rodriguez, 138 S. Ct. 830 (2018)*.

51 *Fact Sheet: Trends in U.S. Corrections- Racial Disparity*, THE SENTENCING PROJECT (June 2018), *https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf*.

52 *NYLPI Report On Medical Neglect In Immigrant Detention Facilities Inspires Senators To Demand A Response From The Trump Administration*, NYLPI (June 5, 2017), *https://www.nylpi.org/nylpi-report-on-medical-neglect-in-immigrant-detention-facilities-inspires-senators-to-demand-a-response-from-the-trump-administration/*.

53 Ryo, *A Study of Immigration Bond Hearings, supra* note 28, at 118.

54 Ryo, *A Study of Immigration Bond Hearings, supra* note 28, at 121.

55 Garret Epps, *How the Supreme Court is Expanding the Immigrant Detention System*, THE ATLANTIC (Mar. 9, 2018), *https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224/*.

56 *Id.*

percent of the daily population that month were marked as "non-criminal," and were classified as posing "no threat." [60]

For those detainees with a criminal record, the relevant legal factor that determines whether a detainee will get bond is whether the detainee poses a danger to society or is a flight risk based on the detainees' prior criminal history. [61]Although *Jennings* does not address the standard used to determine bond, there are several rationales as to why such emphasis would be placed on a noncitizens criminal history as a major determinant in whether they receive bond. First, there is the sheer volume of cases that pour into an immigration judge's courtroom. [62]Moreover, there is a significant shortage of law clerks and language interpreters in immigration courts. [63]Additionally, the computers and other technological equipment used to record the bond hearings are in such disrepair that immigration judges have reported equipment failures as one of the reasons why a non-citizen's criminal background is a deciding factor in whether the detainee obtains bond. [64]They state that this is because the system is so overworked and does not have the necessary resources to properly determine whether bond should be granted. [65]Second, an immigration judge's focus to place exclusive significance on criminal history in bond decisions could relate to riskaversion. [66]Judges face significant pressure and might find it "less professionally risky to focus on prior criminal histories and to err on the side of detaining non-citizens with multiple or serious criminal convictions", even if the conviction is not be a violent offense. [67]Third, detainees wear government issued uniforms that are brightly colored and are similar to those worn by criminal inmates in jail. [68]Detainees appearing before an immigration judge are usually wearing this uniform and are routinely shackled for transport. [69]Therefore, a detainee attending a proceeding in shackles and a jumpsuit could be already perceived by the court as a criminal, whereas in criminal proceedings, they may be allowed to wear a suit. These contextual factors in immigration bond hearings might reinforce perceptions of criminality of immigrant detainees and affect whether a non-citizen is granted bond. [70]

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[57] Tara Tidwell Cullen, *ICE Released its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NATIONAL IMMIGRATION JUSTICE CENTER, http://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive- immigration-detention-data-yet (last visited May 10, 2018).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Ryo, *A Study of Immigration Bond Hearings, supra* note 28, at 120.

[62] *Id.* at 146.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 147.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

Access to counsel significantly affects whether a person will be granted bond. The odds of a detainee who is represented by an attorney being granted bond is 3.5 times higher than those who appeared pro se. [71]However, a non-citizen is not guaranteed assistance of counsel, [72]and most go before an immigration judge without representation. [73]In fact, in a recent national study conducted by Eagly and Shafter of over 1.2 million immigration removal cases decided between 2007 and 2013, "only thirty-seven percent of non-citizens had legal representation." [74]This same study found that those non-citizens who have representation are more likely to seek remedies and receive the remedies they seek. [75]

Further, numerous studies have shown that "racial disparities in bond decisions are significant and have been stable over time." [76]Considering that obtaining bond is already an uphill battle for detainees, the *Jennings* decision stands to affect non-citizens of color in devastating ways, because now bond hearings may not be a possibility for those awaiting adjudication of their case.

§ 1225(b) of Title 8 in the U.S. Code authorizes the mandatory detention of certain classes of undocumented immigrants. [77] *Jennings* established that the challenged statutes do not give detained aliens the right to periodic bond hearings during the course of their detention and could not be plausibly interpreted as implicitly placing a six-month limit on detention. In *Jennings*, a class of non-citizens, some of whom had been in detention centers for years awaiting adjudication of their case, challenged mandatory detention statutes and claimed that those statutes do not authorize prolonged detention without an opportunity for a bond hearing. [78]The non-citizens further claimed that if the statutes do authorize "prolonged" detention without bond hearings, then the statutes violate the Due Process Clause of the Fifth Amendment. [79]

The first challenged statute states that a respondent awaiting a determination on a credible asylum case is subject to mandatory detention. [80]The second challenged statute states that a respondent is subject to mandatory detention while in removal proceedings if an immigration officer has determined the respondent does not have a clear entitlement to admission to the U.S. [81]The third challenged statute states that a respondent may be detained while awaiting a pending decision on whether they are to be removed from the U.S. [82]The final

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71 *Id.* at 143.

72 *8 U.S.C. § 1229a (b)(4)(A)*.

73 Ryo, *A Study of Immigration Bond Hearings, supra* note 28, at 124.

74 *Id.*

75 *Id.*

76 *Id.* at 125 (quoting Free (2002: 206-10) and Free (2004) outlining racial disparities in bond decisions).

77 *8 U.S.C. § 1225(b)(1)(B)(iii)(IV)* (2012).

78 *Jennings v. Rodriguez, 138 S. Ct. 830 (2018)*.

79 *Id.*

80 *8 U.S.C. § 1225(b)(1)(B)(iii)(IV)* (2012) (emphasis added) (stating that "any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

81 *8 U.S.C. § 1225(b)(2)(A)* (2012) (stating that Aliens covered by § 1225(b)(2) in turn "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled" to admission).

82 *8 U.S.C. § 1226(a)* (2012).

challenged statute mandates when an alien with a criminal background must be detained. [83]The Court reasoned the mandatory detention statutes do not give detained aliens the right to periodic bond hearings because the language in the statutes are "unequivocal" and based on the literal interpretation of the words used; the legislature intended that periodic bond hearings be precluded. [84]The Court further reasoned that the mandatory detention statutes impliedly limit the amount of time a respondent will be detained and as such, the statutes do not perpetuate indefinite detention. [85]

Alarmingly, *Jennings* did not consider the enormous backlog the immigration legal system currently faces. One of the mandatory detention statutes depends on the adjudication of asylum claims by those found to have "credible fear" of persecution or torture. [86]In the 2016 fiscal year alone, 65,218 defensive asylum applications were filed by detained immigrants seeking relief from deportation. [87]In the same year, 115,399 affirmative asylum applications were filed by immigrants seeking asylum upon entry into the U.S. [88]Of both those numbers combined, only 20,455 were granted asylum. [89]On average, immigrants with an immigration court case who were "ultimately granted relief--such as asylum--by March 2018 waited more than 1,000 days on average for that outcome." [90]These statistics display the magnitude of the caseload asylum officers, immigration officers and immigration judges face. Therefore, it is highly unlikely that a respondent subject to mandatory detention would have his asylum case adjudicated in a timely manner. A respondent subject to mandatory detention under these circumstances, is likely to be detained for months or years before having their case adjudicated. Further, people of color represent a majority of the asylum applications that are filed each year. [91]The majority of those detained while awaiting adjudication of asylum cases are people of color. [92]Hence, the effect the *Jennings* decision will be that the population of asylees awaiting adjudication will disproportionately represent people of color.

In *Jennings*, Justice Alito, who wrote the plurality opinion of the court, opined that "[d]etention during those proceedings gives immigration officials time to determine [whether] an alien's status without running the risk of the

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83 *8 U.S.C. § 1226(c)* (2012).

84 *Jennings, 138 S. Ct. 830, 833 (2018)* (reasoning that §§ 1225(b)(1) and (b)(2) use the unequivocal mandate "shall be detained," and that the term "for" in §§ 1225(b)(1) and (b)(2) does not mandates detention only until the start of applicable proceedings).

85 *Id.*

86 *Questions & Answers: Credible Fear Screening*, USCIS.GOV, *https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening* (last updated, July 15, 2015). For individuals seeking asylum based on credible fear, there must be a "significant possibility" that the applicant will show the Immigration Judge that the applicant has been persecuted or has a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion if returned to their country.

87 Jie Zong, Jeanne Batalova, and Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Feb. 8, 2018), *https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states*.

88 *Id.*

89 *Id.*

90 American Immigration Council, *Asylum in the United States*, (May 14, 2018), *https://www.americanimmigrationcouncil.org/research/asylum-united-states*

alien either absconding or engaging in criminal activity before a final decision has been made." [93]Again, the Court fails to take the state of the current immigration system into consideration. The "risk" Justice Alito refers to, of a non-immigrant engaging in criminal activity, is a misplaced and baseless alarmist tactic that has been perpetuated through jurisprudence, the law and now the media. This stereotype would have us believe immigrants have a predisposition to commit crime and as such present a "risk" to law abiding citizens. [94]Studies show non-citizens are less likely than the U.S. born citizens "to be repeat offenders" and "immigrant youths who were students in U.S. middle and high schools. . . and are now young adults have among the lowest delinquency rates of all young people." [95]

As aforementioned, most of those detained, were identified as "non-criminal," and as posing "no threat" [96]and only a minute portion of those detained in immigration detention centers are high threat criminals. [97]These statistics reveal that a majority of the detainees are non-criminal. Further, Justice Alito's assertion, that keeping non-immigrants detained is in furtherance of protecting citizens against the "risk" of detainees committing crimes, is unsupported and contradicted by studies that show a lower rate of recidivism of non-citizens compared to citizens. [98]

iv. *Jennings* Dissent by Justice Breyer: The Voice of Reason.

In his passionate dissent to the *Jennings* plurality opinion, Justice Breyer's interpretation of the statute focused on the injustice that would result if the mandatory detention statutes are interpreted to not allow periodic bond hearings for detained noncitizens. [99]One of his concerns was the length of detention that some of the appellees faced. [100]In his dissent he outlined that "[t]he record shows that the Government detained some asylum seekers for 831 days (nearly 2A 1/2 years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days--before they won their cases and received asylum." [101]He explained that some of the appellees, who had been detained for two or three years, would have received bail hearings a long time ago had they been taken into custody within the U.S. rather than at the border. [102]His interpretation would require bail

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91 Jie Zong, Jeanne Batalova, and Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states.

92 *Id.*

93 Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) (stating that "congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings").

94 *The House We Live In, supra* note 8 (stating that non-citizens immigrants and lower classes were thought to have innate qualities of their race and a predisposition for commission of certain crimes).

95 *Id.*

96 *Id.*

97 *Id.*

98 Christopher Ingraham, *Two charts demolish the notion that immigrants here illegally commit more crime*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/?noredirect=on&utm_term=.3c713b872845.

99 Jennings v. Rodriguez, 138 S. Ct. 859 (2018).

100 Id. at 860.

101 *Id.*

hearings presumptively after six months of confinement. [103]He further reminded the Court that although detained non-citizens technically are not admitted into the U.S., this is a "legal fiction" that should not justify withholding basic rights from people. [104]As such, his interpretation of the statute would follow the Supreme Court's "longstanding practice of construing a statute 'so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" [105]This constitutional argument, however, was not considered by the majority because the Court found the Ninth Circuit's ruling faulty on statutory interpretation grounds, and therefore did not need to reach a decision on the constitutionality arguments. [106]

Justice Breyer then went on to interpret the words "shall" and "detain" as well, finding that the phrase "shall be detained" does not mean detained without bail. [107]He reasoned that the word "detain" in this context could refer to "a comparatively long period of time" which could coexist with bail. [108]He further pointed out that precedent treats the word "detain" as consistent with bail. [109]In support, he cited that the Board of Immigration Appeals also treated the word "detain" as consistent with bail, like the Court's decision in *Zadvydas v. Davis*, finding that "the words 'may be detained' were consistent with requiring release from long-term detention." [110]Justice Breyer went on to point out that Congress did not mention long term detention without bail in the statutes as it had done in other cases where long term detention was anticipated and therefore, "Congress does not unambiguously authorize long-term detention without bail by failing to say when detention must end." [111]Justice Breyer then points out that while another statute, § 1225(b)(1)(B)(iii), provides that certain aliens be detained until removed, that statute refers to immigrants who do not have a credible fear of persecution, unlike the respondents in the *Jennings* case. [112]Overall, Justice Breyer reasoned that Congress' intent was not to refuse bail where prolonged confinement is an issue. [113]As Justice Breyer pointed out in his dissent:

> It is clear that the Fifth Amendment's protections extend to "all persons within the territory of the United States. . ." But the Government suggests that those protections do not apply to asylum seekers or other arriving aliens because the law treats arriving aliens as if they had never entered the United States; hence they are not held within its territory. This is, of course, false. All of these noncitizens are held within the territory of the United States at an immigration detention facility. [114]

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102 *Id. at 860*.

103 *Id. at 851*.

104 *Id. at 862*.

105 *Id. at 859*.

106 *Id. at 834*.

107 *Id. at 870*.

108 *Id.*

109 *Id. at 870-871*.

110 *Id. at 871*.

111 *Id.*

112 *Id. at 871-872*.

113 *Id.*

114 *Id. at 862*.

The issue in *Jennings* was whether the mandatory detention statutes could be plausibly interpreted to have required periodic bond hearings. [115]Because statutory interpretation requires careful parsing of the words used in enumerating the statute, it is understandable that the majority focused on those words. However, the issue of the *necessity* of bond and bond hearings for detainees was lost on the majority. The majority spent more time defining the words "for" and "shall" than focusing on the underlying reasons why this case was before the Court to begin with. Further, the dissent stated that two-thirds of the detainees seeking asylum receive the relief they seek, including forty percent of those who had prior criminal sentences, bolstering the necessity of bond hearings. [116]Prior to this decision, non-citizens already faced significant challenges in terms of outside factors (such as the clogged and inefficient immigration court system; the use of their prior criminal history to determine bond; and the racial disparity in granting bond) that determine whether they will be eligible to receive bond. [117]Now that door seems to be closed.

v. Judicial Complacency Instead of Reform

Justice Alito's plurality opinion in the *Jennings* decision mentions the constitutional avoidance canon, which allows a court to ignore interpretations of a statute that is susceptible to multiple interpretations, if those interpretations result in "serious constitutional doubts". [118]In referencing this canon, Justice Alito stated that "a court relying on that canon still must interpret the statute, not rewrite it." [119]However, this shows complacency because simply interpreting immigration laws as they stand, without considering their constitutionality and formulating solutions based on fair interpretations, remains the problem with the immigration system. For the last five decades, the U.S. has reverted to following laws created in the 1960s instead of actively reforming them. If merely interpreting a statute could stand instead of using judicial activism to strike it down, "separate but equal" laws would still be an American reality. Each branch of government is tasked with managing the balance of power, which is the beauty of the design of American democracy. Therefore, just as the courts have been the voice of reason in striking down Jim Crow Laws, implementing integration in schools, [120]outlining a woman's right to choose, [121]and deciding the legality of gay marriage, [122]immigration reform should not be any different. "Injustice anywhere is a threat to justice everywhere." [123] **vi. Solutions**

In terms of seeking solutions for the criminalization of immigrants who have had the misfortune of being tangled up in the crimmigration system, Justice Breyer, in his *Jennings* dissent, stated that:

> If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes, *18 U. S. C. § 3142*; worse than convicted criminals appealing their convictions, § 3143(b); worse than civilly committed citizens. . .; worse than identical noncitizens found elsewhere within the United States. .

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115 *Id. at 834*.

116 *Id. at 860*.

117 Ryo, *A study of Immigration Bond Hearings, supra* note 28, at 123.

118 *Id., at 836*.

119 *Id.*

120 *See Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)*.

121 *See Rowe v. Wade, 410 U.S. 113 (1973)*.

122 *See* Obergefell v. Hodges, 576 US _ (2015).

123 Martin Luther King, Jr., *Letter from Birmingham Jail*, AFRICAN STUDIES CENTER - UNIVERSITY OF PENNSYLVANIA, (Apr. 16, 1963), *https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html*.

. ; and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them) their detention without bail is arbitrary. [124]

Here, Justice Breyer highlights the negative effects of unfair bond laws imposed in the immigration system. He explained that at the simplest level, an "alien" is a person and to hold him without bail would be to deprive him of bodily liberty. [125]Since bail is "basic to our system of criminal law", [126]and a detainee's criminal history is often the major determining factor in whether he even gets a bond hearing under discretionary detention statutes, [127]the same should be true under mandatory detention laws. The *Jennings* Court referenced the constitutional avoidance canon in reversing the Ninth Circuit's ruling. [128]The Court stated that the Ninth Circuit's use of constitutional avoidance was incorrect because "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." [129]The Court found that the statutes were clear and that the Ninth Circuit misapplied the canon of constitutional avoidance because its interpretations of the three provisions at issue were implausible. The Court instructed the Ninth Circuit to review the constitutional issue, however, the majority's tone suggests that the constitutionality of the detainees' indefinite detention is of no import at all. [130]The solution then would be to avoid the use of literal interpretation of statutes which could be otherwise interpreted. [131]

Another solution the dissent provides is to avoid the Court's decision in *Demore v. Kim*, which considered the likely amount of time that a detainee stands to be in jail without bail. [132]In *Kim*, the Court held that "the Government could constitutionally hold non-citizens who had committed certain crimes, had completed their sentences, and were in removal proceedings" without bail. [133]However, in *Kim*, the Court's decision was informed by the assumption that a detainee would likely be kept for a short period of time as necessary to complete proceedings. [134]Justice Breyer notes in his *Jennings* dissent that, in terms of bond in current immigration proceedings, the Court is dealing with "prolonged detention, not the short-term detention at issue in *Kim*. "Hence *Kim*, itself a deviation from the history and tradition of bail and alien detention, cannot help the Government." [135]Therefore, in order to prevent detainees being held for exorbitant amounts of time, courts should consider whether an immigrant would be subject to prolonged detention without having the opportunity to have a bond hearing.

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124 *Id. at 865-866*.

125 *Id. at 861*.

126 *Id. at 862*.

127 Ryo, *A study of Immigration Bond Hearings, supra* note 28, at 120.

128 *Jennings, 138 S. Ct. at 836*.

129 *Id. at 842* (quoting *Clark v. Martinez, 543 U.S. 371, 385 (2005)*).

130 Epps, *Expanding the Immigrant Detention System, supra* note 54.

131 *Jennings, 138 S. Ct. at 860*.

132 *Demore v. Kim, 538 U.S. 510 (2003)*.

133 *Jennings, 138 S. Ct. at 868* (restating the holding in *Demore v. Kim, 538 U. S. 510 (2003)*).

134 *Id.*

135 *Id. at 869*.

The courts could also implement safeguards to ensure that detainees are not held for unreasonable lengths of time. [136]The European Union's immigration policies state that detention must only be used "as a last resort, for the shortest period possible, and can only be maintained as long as the state authorities are diligently pursuing removal." [137]This safeguard of a maximum time limit on detention gives judges a foolproof way to order release, which would in turn prevent indefinite detention. [138]It also moves the process along faster by mandating that regardless of the stage of a detainee's case, once a certain amount of time has passed, "individuals detained under the Directive must be released." [139]Although this could obviously "result in a default minimum detention period", [140]the pros would outweigh the cons simply by reflecting on the detainees in the *Jennings* and the exorbitant amount of time they remained detained without a bail hearing. [141]

Another safeguard could be following the example of the United Kingdom ("UK") since the aforementioned solution may not be palatable for the current administration. [142]Like the U.S., the UK does not have a maximum limit on detention but instead employs a reasonableness test that determines whether a non-citizen's detention is just. [143]Under this test, reasonableness is based on four principles:

> The power to detain can only be used for the purpose of deportation and the state must actually intend to deport the person at issue; (2) the detention can only last for a period that is reasonable in all the circumstances; (3) if it becomes apparent that deportation will not occur within a reasonable period, the power to detain can no longer be exercised; and (4) the state must act with "reasonable diligence" to effect deportation. [144]

Implementation and use of similar principles to determine whether a person should be detained, would relieve the pressure on immigration judges--that seemingly force them into only considering a detainee's criminal record and whether they would be a flight risk--in deciding whether to grant bond.

vii. Conclusion

The *Jennings* decision on bond hearings marks a new era in immigration law enforcement with mass incarceration of non-citizens and undocumented immigrants. The issue of race in the determination of this case may not be directly addressed, but it is likely to have devastating effects on Black and Hispanic unauthorized immigrants because they comprise fifty-six percent of all incarcerated people in the criminal justice system.

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136 Justine N. Stefanelli, *Jennings v. Rodriguez Highlights Need for Detention Time Limits*, CRIMMIGRATION.COM (Mar. 16, 2018, 12:30 AM), http://crimmigration.com/2018/03/16/jennings-v-rodriguez-highlights-need-for-detention-time-limits.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Jennings, 138 S. Ct. at 860* ("The classes before us consist of people who were detained for at least six months and on average one year and some asylum seekers for 831 days (nearly 2 1/2 years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days--before they won their cases and received asylum. The record also showed that the Government detained one noncitizen for nearly four years after he had finished serving a criminal sentence, and the Government detained other members of this class for 608 days, 561 days, 446 days, 438 days, 387 days, and 305 days--all before they won their cases and received relief from removal").

142 Stefanelli, *Need for Detention Time Limits, supra* note 35.

143 *Id.*

144 *Id.* (known as the Hardial Singh principles; see R (Hardial Singh) v. Governor of Durham Prison [1983] EWHC 1 (QB).

[145]There are parallels between the criminal justice and the immigration systems, as these groups are disproportionately represented in the crimmigration system because they are so heavily represented in the criminal justice system. [146]Therefore, the Court authorizing further punitive interpretations of immigration laws by not requiring periodic bond hearings further penalizes people of color in America.

Whiteness has continued to be a marker for a person's success in the U.S., whether in the form of flagrant discrimination, or in the form of institutional discrimination, such as in the immigration detention system. The U.S. is described by many as a melting pot. The reality is that "people of color could be used as the fire for the pot but not melted to be in the pot." [147]In terms of immigration law, the name used to refer to non-citizens (human beings) is "aliens." [148]The use of this term in our immigration laws is reminiscent of Jim Crow laws in the post reconstruction era. [149]The Jim Crow separate but equal era was a way of othering [150]people of color. The use of the word "alien" disseminates that concept by othering non-citizens. Referring to non-citizens as "aliens" perpetuates and echoes the *less-than* narrative on immigrants that has been prevalent since the 1800s, where black people were treated as *subhuman* and *inferior* to white people. [151]In the same way, the Court's inaction in *Jennings* to protect a basic right of a person located in the U.S., albeit in a detention facility, to be able to make a case for his or her release when detained by the government, is an alarming flashback.

People of color continue to be disparately impacted by predatory immigration laws and policies. The effect of predatory immigration laws on people of color mirror the effects of another system that preys upon them: the criminal justice system. The *Jennings* decision perpetuates and deepens the effects of predatory immigration laws on people of color by deciding that mandatory detention statutes are to be interpreted as not entitling detained non-citizens to periodic bond hearings. [152]As Justice Breyer's dissent in *Jennings* reminds us, the last time the U.S. successfully claimed that persons held within the U.S. were without constitutional protection was slavery. [153]

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145 *Criminal Justice Fact Sheet, supra* note 25.

146 Ryo, *A Study of Immigration Bond Hearings, supra* note 28, at 119.

147 *Race- The Power of an Illusion, Episode 3: The House We Live In*, (PBS 2003), http://www.pbs.org/race/000_About/002_04-about-03.htm (quoting Eduardo Bonilla-Silva, sociologist). The film discusses how Immigration laws were created out of racism.

148 Immigration and Nationality Act of 1964, 8 U.S.C. § 1101 (2014).

149 *Jim Crow Laws, American Experience*, PBS, https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/ (last visited Apr. 5, 2018) (Jim Crow laws represented a "formal, codified system of racial apartheid that dominated the American South for three quarters of a century beginning in the 1890s.").

150 Othering is a "set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities." John A. Powell, Menendian, Stephen, *The Problem of Othering: Towards Inclusiveness and Belonging*, (last visited Dec. 21, 2018), http://www.otheringandbelonging.org/the-problem-of-othering/.

151 *Id.*

152 *Jennings, 138 S. Ct. at 833*.

153 *Jennings, 138 S. Ct. at 862* (dissent stating "[n]o one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection.").

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