

Force Multiplier: An Intersectional Examination of One Immigrant Woman's Journey Through Multiple Systems of Oppression

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ABSTRACT

The immigrants' rights movement can assume an intersectional and cooperative approach to dismantling co-constitutive systems of oppression that conspire to punish, exclude, and exploit disfavored groups. Racial justice must be at the center of the movement, but so too must we understand the devastating role that gender, disability, and documentation status play in marginalizing immigrants and their communities. This article examines one immigrant woman's experiences in the Southeastern United States as she passed through the mental health care system, competency proceedings, criminal justice system, and the deportation pipeline to explicitly lay bare intertwining forms of systemic subjugation.

Mbeti Ndonga is a member of multiple disfavored groups. She is Black, living with serious mental health disabilities, and now undocumented following years as a permanent resident. She experienced an erosion of safety over time that resulted in her being twice detained in the notorious Irwin County Detention Center, once deported, and ultimately the victim of unconsented-to, harmful gynecological procedures by a doctor who is now at the center of a major federal investigation. A transversal investigation of her life as she interacted with multiple state and federal agencies reveals patterns of subordination that buttress one another and create a perpetual cycle of suffering. Mbeti's experiences, while unique to her, are revealing of the injustices faced by the many similarly situated immigrants who share her positioning.

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Just as oppression is intersectional, so can be the solution. Immigrant justice, racial justice, gender justice, and health justice share reform priorities that can serve one another. This article proposes four policy recommendations that unite these different movements' purposes. They range from alterations to our immigration court system that address serious due process deficiencies as applied to persons with mental health disabilities to ending cooperative agreements between ICE and local law enforcement. The recommendations are concrete, achievable, and offer opportunities for enduring change that would benefit the lives of all noncitizens.

ABSTRACT	1
INTRODUCTION.....	3
I. "HOW COULD THIS HAVE HAPPENED?" MBETI'S JOURNEY THROUGH MULTIPLE SYSTEMS AND INSTITUTIONS.....	4
A. House of Horror: Immigration Detention Centers—and One in Particular.....	5
B. Jails over Care: Law Enforcement's Disproportionate Treatment of Psychologically Distressed Persons and its Impact on Mental Health.....	11
C. Walls Closing in: How Criminal and Immigration History Intersect with Accessing Care	12
D. "Criminal Alien": How Mbeti's Convictions made her an ICE Priority for Detention and Deportation	14
E. Around and Around it Goes: Release from ICE, Return to ICE, Deportation, Return to the U.S., Another Arrest, and Back Once More in ICDC	19
F. "You Haven't Even Heard the Worst of it": Dr. Amin's Medical Abuse and ICE's Efforts to Silence the Women Speaking Out About it.	27
II. SITUATING MBETI WITHIN THE WIDER IMMIGRANT POPULATION.....	35
III. REIMAGINING MBETI'S STORY IN A QUEST TO FIND SOLUTIONS.....	39
A. Dispelling the Myth of the "Criminal Alien": How Racial Justice, Criminal Justice, and Immigrant Justice can Work Together to Support People in Mbeti's Position.	40
B. Integrating Disability Justice into Immigration Reform: The Need to Provide Counsel and Establish an Independent Judiciary.....	42
C. The Moral, Legal, and Fiscal Imperative to Abolish Immigration Detention.....	46
D. Meaningful and Accessible Mental Health Care	49
CONCLUSION.....	51

INTRODUCTION

Race interacts with gender, mental health challenges, and the criminalization of undocumented status such that it is virtually impossible for many immigrants to thrive in the United States. Black noncitizens¹ especially encounter barriers to accessing services, wealth, and security that collude to diminish their ability to flourish in this country. Implicit bias, disproportionate policing, and higher rates of detention contribute to this maelstrom, which in turn influence case outcomes as Black immigrants navigate our immigration system. Their prospects dim further when disability, lack of status, and gender are added to the equation. Movement lawyering can assume an intersectional and cooperative approach to understanding and dismantling the co-constitutive systems of oppression that punish, exclude, and exploit disfavored groups. We can then aggressively pursue changes in our laws and policies to resist—and reverse—the status quo.

The experiences of one immigrant woman—Mbeti Ndonga²—allow for an in-depth examination of the overlapping identity axes and their effects on immigrants’ access to security, dignity, and equal opportunity in the United States. Mbeti is a member of multiple disfavored groups: she is Black, an immigrant, a woman, living with serious mental health issues, and now undocumented following a life as a permanent resident. Mbeti’s narrative careens tragically through the mental health care system, the criminal justice system, the immigration courts, immigration detention, the federal courts, Congress, and our society’s treatment of women’s health and women’s bodies. Her path through these institutions is a constant erosion of safety and justice, punctuated with catastrophic events and heartbreaking circumstances. Multiple people and agencies failed to protect her—even after her experiences became publicly known—while others sought to punish and erase her.

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1. Black immigrants are an extremely diverse group who come to the United States from throughout the world, primarily Africa, the Caribbean, Central America, South America, and North America. See Juliana Morgan-Trostle, Kexin Zhang & Carl Lipscombe, NYU Sch. of L. Immigrant Rts. Clinic & Black All. for Just Immigr., *The State Of Black Immigrants* 7, 9 (2016), <https://stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf> [<https://perma.cc/KV53-C8X7>] (defining Black immigrant as “any person who was born outside the United States, Puerto Rico or other U.S. territories and whose country of origin is located in Africa or the Caribbean” but acknowledging that persons of African heritage “make up a significant percentage of the population of many countries outside Africa and the Caribbean,” including Guyana, Honduras, Nicaragua, and Brazil).
 2. Mbeti Victoria Ndonga is this author’s client before several federal government agencies that deal exclusively with immigration. Ms. Ndonga has consented to the writing of this article and the use of her full name. She was consulted throughout this article’s production regarding her personal history, the ways she is presented, and the article’s message concerning the treatment of Black noncitizen women and persons suffering from mental health disabilities. She has also spoken publicly of her experiences with several major news outlets including the L.A. Times, VICE News, and members of the Associated Press. Finally, she is a named plaintiff in the class action lawsuit *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. filed Nov. 9, 2020). Many of the facts the author discusses about the *Oldaker* case and Mbeti’s experiences are matters of public information.

Just as oppression is multi-faceted, so must be the solution. Immigrant justice, racial justice, gender justice, and health justice share many reform priorities that can benefit and serve one another. This article offers four policy recommendations that could have ameliorated the wrongdoing Mbeti and similarly situated undocumented immigrants experienced. First, providing counsel to all immigrants facing deportation cures significant due process concerns while mooting arguments used to justify detention. Providing counsel is economically feasible, and successful public defender models already exist. Second, immigration detention must be abolished; doing so does not require major overhaul of our immigration laws. Third, creating an independent immigration judiciary frees the courts from political control and partisan bias, and gives immigration judges the tools to directly protect immigrants like Mbeti who have mental health concerns. All communities will be safer if the current administration ends cooperative agreements between U.S. Immigration and Customs Enforcement (ICE) and local law enforcement. Fourth, guaranteeing mental health care for all persons regardless of immigration status supports multiple social justice movements.

Part I of this article engages in a transversal investigation of Mbeti's life as she interacted with different agencies and systems. It slows down certain pivotal moments in Mbeti's life to dissect how patterns of subordination buttress one another. Part II situates Mbeti in the wider immigrant population to show how the proposed recommendations that follow will impact a large number of individuals. Part III then asks what changes could have been in place to alter the outcome at each juncture, or could be in place moving forward to prevent the outcome's replication in others' lives. The four policy recommendations offer much-needed opportunities for enduring change.

Other scholarly pieces have turned a racial justice lens on immigration issues, or have separately sought discrete answers to problems in our immigration system as related to mental health. What makes Mbeti's story unique is that it provides a rich opportunity to explicitly show the interconnectivity between different modalities of oppression, as well as ways to stitch together interdisciplinary solutions. Her life story is a persuasive argument for this precise kind of change.

I. "HOW COULD THIS HAVE HAPPENED?" MBETI'S JOURNEY THROUGH MULTIPLE SYSTEMS AND INSTITUTIONS

Mbeti's trajectory cannot be encapsulated easily, as it contains many interlocking parts and subparts. Mbeti came to the United States from Kenya as a toddler and always considered herself an American. She became a lawful permanent resident when she was around thirteen years old. She was passionate about singing and shared that she once opened for BB King when she was a senior in high school—one of the proudest moments of her life. She was on her way to finishing college when she started experiencing mental health challenges. She would encounter law enforcement during a mental health crisis that would

trigger a perpetual cycle of suffering and institutional oppression, culminating in her experiencing medical abuse while in custody at the Irwin County Detention Center (ICDC) in rural Georgia.³ But Mbeti is more than those experiences: she is extremely resilient and a fierce advocate for herself. She engaged in protest while detained;⁴ she became a cooperating witness in the investigation by several federal agencies into medical abuse at ICDC; and she became a named plaintiff in a class action lawsuit against the Department of Homeland Security alleging First Amendment violations and retaliation by ICE.⁵

A. House of Horror: Immigration Detention Centers—and One in Particular

I first met Mbeti over the telephone in late September of 2020. She was detained in Ocilla, Georgia, a town three hours south of Atlanta with a population of around 3,500.⁶ Georgia-based advocates and organizers from Innovation Law Lab and Project South had reached out to several law clinics to seek assistance in interviewing women who had possibly been victims of medical neglect or even battery. Explosive allegations of gynecological abuse occurring at ICDC had just hit major media outlets.⁷ Dawn Wooten, a former nurse at ICDC, had

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3. See Greg Walters, Carter Sherman & Neda Toloui-Semnani, *'A Disturbing Pattern': ICE Detainees Were Pressured to Have Gynecological Surgery, Doctors Say*, VICE (Oct. 24, 2020, 6:13 PM), <https://www.vice.com/en/article/88a95x/ice-detainees-were-pressured-to-have-gynecologicalsurgery-doctors-say> [<https://perma.cc/R2JC-JSJK>]; Molly O'Toole, *19 Women Allege Medical Abuse in Georgia Immigration Detention*, L.A. TIMES (Oct. 22, 2020), <https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention> [<https://perma.cc/PCC8-EA97>].
 4. VICE News, *Woman Who Says ICE Gave Her Unwanted Gynecological Surgery Has Been Released*, YOUTUBE (Jan. 5, 2021), <https://www.youtube.com/watch?v=W-El6Ma5ao0> [<https://perma.cc/GG4V-KGMA>] (featuring Mbeti, who discusses one of her protest signs, which read "Death 2 Prejudice Health Care 4 Black Female here in GA USA! PAY! PAY! USA PAY. I live with pain Everyday!")
 5. See Consol. Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief and for Damages at 67, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020) [hereinafter *Oldaker Complaint*]. The lawsuit was filed on behalf of fourteen women who were detained at ICDC. *Id.* at 1. Each was subjected to non-consensual, medically unindicated, and/or invasive gynaecological procedures by Dr. Mahendra Amin, with the knowledge or participation of other Respondents (ICE, ICDC personnel). *Id.* In total, over forty women provided sworn statements. Press Release, Sirine Shebaya, Nat'l Immigr. Project of the Nat'l Laws. Guild, *Breaking: Legal Filing Reveals Growing Number of Women Experienced Medical Abuse in ICE Custody* (Dec. 22, 2020), https://www.nipnl.org/pr/2020_21Dec_oldaker-v-giles.html [<https://perma.cc/KR3N-LQSE>].
 6. Census Report Profile on Oscilla, GA, CENSUS REP., <https://censusreporter.org/profiles/16000US1357428-ocilla-ga/> [<https://perma.cc/6D34-EE5G>] (last visited Sept. 25, 2022).
 7. Caitlin Dickerson, *Inquiry Ordered Into Claims Immigrants Had Unwanted Gynecology Procedures*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/16/us/ICE->

come forward via a whistleblower report in which she detailed nonconsensual and overly invasive procedures, the falsifying and shredding of medical records, and inappropriate medical care.⁸ Members of Congress publicly analogized the reports coming out of ICDC to our nation's shameful history of forced sterilization.⁹ Such a reference was not outrageous, as eugenics through reproductive coercion exists today.¹⁰

We were eager to participate, thinking the project was discrete in scope but of potential value to women in one of the most geographically remote ICE detention centers in the U.S., with a ghastly reputation of unsanitary conditions, inedible food, and substandard medical care.¹¹ Together with our students, local organizers, and colleagues nationwide, we helped to investigate, expose, and litigate medical abuses at ICDC. For Mbeti, however, what happened at ICDC was the latest point in a crescendo of injustice.

Mbeti and I spoke over Skype—a rare accommodation afforded to attorneys specifically at this facility, owed to the 2018 lawsuit filed against the facility by the Southern Poverty Law Center (SPLC).¹² Most detention facilities only permit in-person attorney-client visits.¹³ Mbeti did not have counsel. She was once

hysterectomies-whistleblower-georgia.html [https://perma.cc/M2G4-24BB] (“The complaint details medical procedures ordered or undertaken by a physician who has treated patients detained at the Irwin County Detention Center, which is run by a private company, LaSalle Corrections, in Ocilla, Ga.”).

8. Letter from the Gov. Accountability Project & Project South to Members of the House Comm. on Homeland Sec., Senate Comm. on the Judiciary, and House Comm. on Oversight and Reform 6–7 (Sept. 17, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/ICE-ICDC-Whistleblower-Disclosure-to-Congress-091720.pdf> [https://perma.cc/2LNM-FDXV].
9. Letter from Members of Congress to Joseph V. Cuffari, Inspector General, Dep’t of Homeland Sec. (Sept. 15, 2020), <http://jayapal.house.gov/wp-content/uploads/2020/09/DHS-IG-FINAL.pdf> [https://perma.cc/QV7N-A9HE].
10. See Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, ABC NEWS (July 21, 2017), <https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256> [https://perma.cc/GAZ2-NR4A] (“Female inmates can also get the birth control implant Nexplanon, which prevents pregnancy for four years, for the same sentence reduction.”).
11. See generally PENN STATE L. CTR. FOR IMMIGRANTS’ RTS. CLINIC & PROJECT SOUTH, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS, 40, 44–45, 47–49 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [https://perma.cc/SCW3-ADYP]; U.S. DEP’T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF’T, COMPLIANCE INSPECTION FOR THE IRWIN COUNTY DETENTION CENTER OCILLA, GEORGIA 6 (2017).
12. See *S. Poverty L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 18-760 (CKK), 2020 WL 3265533, at *1–2 (D.D.C. June 7, 2020); Complaint at 33, 46, *S. Poverty L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 1:18-cv-00760 (D.D.C. Apr. 4, 2018) [hereinafter *S. Poverty L. Ctr. Complaint*].
13. Emma Winger & Eunice Cho, *ICE Makes It Impossible for Immigrants in Detention to Contact Lawyers*, ACLU UNION (Oct. 29, 2021), <https://www.aclu.org/news/immigrants-rights/ice-makes-it-impossible-for-immigrants-in-detention-to-contact-lawyers/> [https://perma.cc/AU87-5BX7] (“In many cases, detained immigrants cannot find lawyers because ICE facilities make it so difficult to even get in touch and communicate with attorneys in the first place.”)

represented by a private attorney, but she could not afford that attorney anymore and there were very few non-profit providers serving the region. The conversation detoured from Dr. Amin to details about her personal history, how she ended up in ICE custody (twice), her mental health, what happened to her when she was deported to Kenya, and why she returned to the United States. Mbeti was generous with the details of her life and a fantastic historian, displaying near-perfect accuracy with dates, names, and timelines. She wanted to talk about these parts of her life, she explained, because they were relevant to the specific harm she experienced with Dr. Amin.

ICDC is a privately run, for-profit facility operated by LaSalle Corrections.¹⁴ LaSalle Corrections has only been in existence since 2013, and yet has managed in its short history to gobble up ICE contracts throughout Texas, Louisiana, Georgia, and Arizona,¹⁵ profiting richly from the industry of incarceration.¹⁶ Despite having a beneficent-sounding motto (“Family. Caring. Community.”¹⁷), LaSalle Corrections has in reality long been plagued by allegations of physical force resulting in death,¹⁸ medical neglect resulting in

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14. *Our Locations*, LASALLE CORR., <https://lasallecorrections.com/locations/> [<https://perma.cc/774R-QUKU>] (last visited June 14, 2021).
 15. Cary Aspinwall & Dave Boucher, *They’re Gonna Kill Me’: Why Did A Man Die In Jail Near Fort Worth As Untrained Guards Watched?*, THE DALLAS MORNING NEWS (Nov. 18, 2018), <https://www.dallasnews.com/news/investigations/2018/11/18/theyre-gonna-kill-me-why-did-a-man-die-in-jail-near-fort-worth-as-untrained-guards-watched/> [<https://perma.cc/5TA4-FEVV>] (“In recent years, LaSalle has won contracts by bidding significantly less than competitors GEO Group and CoreCivic (the prison company formerly known as Corrections Corporation of America). The company has gotten a growing number of contracts in Texas to operate jails by promising to house inmates for as little as \$30 per person per day.”)
 16. See Monsy Alvarado, Ashley Balcerzak, Stacey Barcheger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis, Dan Keemahill, Rebecca Plavin, Jeremy Schwartz, Sarah Taddeo, Lauren Villagran, Dennis Wagner, Elizabeth Weise & Alissa Zhu, *‘These People Are Profitable’: Under Trump, Private Prisons Are Cashing In On ICE Detainees*, USA TODAY (Dec. 19, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/> [<https://perma.cc/V6QS-6HMT>] (“[W]hen President Trump took office, promising to crack down on immigrants[,] [LaSalle co-founder Bill] McConnell saw his next opportunity: the business of immigration detention. LaSalle Corrections quickly opened six more facilities in Louisiana. His detention centers hold more than 7,000 immigration detainees. . . . [T]he companies operating those centers have generated record-setting revenue since 2016.”); Matt Clarke, *LaSalle Corrections: A Family-Run Prison Firm*, PRISON LEGAL NEWS (Feb. 15, 2013), <https://www.prisonlegalnews.org/news/2013/feb/15/lasalle-corrections-a-family-run-prison-firm/> [<https://perma.cc/RVK6-LJJC>] (“The McConnell family has steadily expanded their business until now one in seven Louisiana prisoners is held in a LaSalle-owned or operated facility, including a quarter of all offenders incarcerated in parish prisons.”)
 17. LaSalle Corr., <https://lasallecorrections.com/> [<https://perma.cc/5NS8-2LTH>] (last visited Oct. 5, 2022).
 18. See, e.g., Aspinwall & Boucher, *supra* note 15 (“Video obtained by The Dallas Morning News shows [Andy DuBusk] shackled after guards used pepper spray on him in a cell. Jailers then placed him face down and piled on him, making it hard for him to breathe and contributing to his death at age 38, an autopsy found.”)

death,¹⁹ suicides,²⁰ overuse of solitary confinement,²¹ harsh and abusive treatment,²² surgeries performed without informed consent,²³ staffing failures,²⁴ unsanitary conditions,²⁵ and “lack of transparency and oversight.”²⁶ Augmenting

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19. See, e.g., Matthew Haag & Daniel Victor, *For-Profit Jail Is Accused of Ignoring Man's Pleas for Medical Help Before Death*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/texas-jail-death-video.html> [<https://perma.cc/VH4V-Y595>]; Aimee Ortiz, *For-Profit Jail Is Accused of Abuse After Death of Woman With H.I.V.*, N.Y. TIMES (Sept. 20, 2020), <https://www.nytimes.com/2020/09/17/us/lasalle-corrections-inmate-death.html> [<https://perma.cc/PXX2-DT7X>] (“The complaint filed on Wednesday argues that in the years leading up to 2019 LaSalle ‘engaged in a pattern, practice and custom of unconstitutional conduct toward inmates with serious medical needs.’”)
 20. See, e.g., Gaby Del Valle, *ICE Has Been Ramping Up Its Work with a Private Prison Company Connected to Horrific Allegations*, VICE (Oct. 29, 2019, 3:31 PM), <https://www.vice.com/en/article/ywa4v5/ice-has-been-ramping-up-its-work-with-a-private-prison-company-connected-to-horrific-allegations> [<https://perma.cc/SKQ2-59HR>] (“Earlier this month, a migrant held at LaSalle’s Richwood Correctional Center in Monroe died by suicide after being put in solitary confinement as punishment for participating in a hunger strike.”)
 21. See, e.g., *Federal Government Sued Over Intentional Cruelty at Georgia Immigration Center*, MEXICAN AM. LEGAL DEF. AND EDUC. FUND (June 11, 2021), <https://www.maldef.org/2021/06/federal-government-sued-over-intentional-cruelty-at-georgia-immigration-center/> [<https://perma.cc/3B7G-PQJA>] (“Immigration and Customs Enforcement (“ICE”) transferred her to the ICDC in June 2018 where she was immediately placed in solitary confinement in the segregated housing unit because she is transgender. She was left in her cell for about 22 hours a day, had very limited physical and mental stimulation, and was deprived of any meaningful human interaction.”)
 22. See, e.g., Tanya Eisner & Jason Trahan, *Video Shows For-Profit Jail Guards Slamming Father to the Ground. His Kids Want to Know Why He's Dead*, WFAA NEWS (Feb. 7, 2020), <https://www.wfaa.com/article/news/local/investigates/jailedtodeathlouisiana/287-93e49d0c-1d94-4a36-a5b4-87d38be54b58> [<https://perma.cc/CJ7T-DHDG>].
 23. See, e.g., Complaint from Project South et al. to Joseph V. Cuffari, Inspector Gen., Dep’t of Homeland Sec. et al. 18–20 (Sept. 14, 2020), <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> [<https://perma.cc/NH5S-RK94>].
 24. See, e.g., *id.* at 8; Tom Aswell, *Reports of Problems at Ruston's LaSalle Corrections Continue; Facilities' and Corporate Web Pages Go Dark*, LA. VOICE (Nov. 13, 2022), <https://louisianavoices.com/2020/11/13/reports-of-problems-at-rustons-lasalle-corrections-continue-facilities-and-corporate-web-pages-go-dark/> [<https://perma.cc/GSA8-SAWW>] (“The Ruston-based private prison company has been cited by authorities for failure to properly train its employees, for falsifying documents certifying that received training courses they never received, falsifying documents certifying that guards checked prisoners periodically when those prisoners ultimately died or had to be transferred to nearby hospitals after their physical conditions deteriorated after beatings or after being denied medications for conditions prison officials were aware of.”); Aspinwall & Dave Boucher, *supra* note 15 (“As LaSalle has amassed a growing empire of county jails, state prisons and immigration detention centers, it has been plagued by complaints about temporary workers and lax training, court records show.”)
 25. ACLU OF GA., PRISONERS OF PROFIT 17–19 (2012), https://www.prisonlegalnews.org/media/publications/georgia_aclu_prisoners_of_profit_im_migrants_and_detention_in_georgia_2012.pdf [<https://perma.cc/R4FN-788U>] (citing serious and systemic hygiene concerns, issues with access to food and medical care, delays in receiving medications, and inadequate mental health care).
 26. See John Moritz, *Private-Run Lockup Firm Considered in Arkansas Has Share of*

the injustice is that most of LaSalle Corrections' facilities are located in remote, rural parts of their respective states, making it infinitely more difficult for detainees to find lawyers.²⁷ Nationwide, only around 14 percent of detainees have counsel—though in the Southeast that number drops to around 6 percent.²⁸ In a 2018 lawsuit brought by SPLC against ICDC and two other detention centers for due process and attorney access violations, lawyers point out that ICDC had only one attorney-visitation room for 700 detainees.²⁹ Attorney access matters; case outcomes for represented detained respondents are improved by ten and a half times over cases without counsel.³⁰ Represented detainees are also more likely to secure release from detention.³¹ A non-detained immigrant's chance of winning their case is improved by around twenty times over cases heard where the noncitizen is detained.³²

The Wooten whistleblower complaint may have been nationally sensational, but it was far from the first effort to shine light on the medical atrocities being committed at ICDC. Local advocates and detainees themselves

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- Complaints*, ARK. DEMOCRAT GAZETTE (Sept. 29, 2019), [https://www.arkansasonline.com/news/2019/sep/29/private-run-lockup-firm-has-share-of-co/?news\[https://perma.cc/A7ZZ-CMB9\]](https://www.arkansasonline.com/news/2019/sep/29/private-run-lockup-firm-has-share-of-co/?news[https://perma.cc/A7ZZ-CMB9]) (“[P]rison officials said they were aware of issues with LaSalle, including lawsuits over the deaths of two diabetic inmates in recent years. Officials also acknowledged concerns that LaSalle, which plans to pay guards less than they receive at Correction Department facilities, will have trouble keeping a full staff.”)
27. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32, 38 (2015) (finding that only 14 percent of detained immigrants secured legal representation—a number that drops precipitously when the detainee is in a rural area such as Lumpkin, GA, with a representation rate of only 6 percent); see also AM. IMMIGR. COUNCIL, *Immigration Detention in the United States by Agency 4* (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/UAN8-CVBW] (finding that in 2015, 48 percent of detained noncitizens were held in “at least one facility at least 60 miles from the nearest nonprofit immigration attorney who practiced removal defense.”)
28. *Shadow Prisons: Immigrant Detention in the South*, S. POVERTY L. CTR. (Nov. 21, 2016), <https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south> [https://perma.cc/4T6A-C4VY] (“Only six percent of detainees in the Stewart (Lumpkin), Georgia, and Oakdale, Louisiana, immigration courts are represented by counsel. Nationally, the rate of representation for detained individuals is 14 percent.”)
29. S. Poverty L. Ctr. Complaint, *supra* note 12 at 38.
30. See Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc & Noelle Smart, VERA INST. OF JUST., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* 26 (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [https://perma.cc/3R8T-NNF3] (estimating that representation increases a detained noncitizen's success rate before the immigration courts in New York City by 1,100 percent).
31. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 124 (2016).
32. See Eagly & Shafer, *supra* note 27, at 49, 70; see also Karen Berberich & Nina Siulc, VERA INST. OF JUST., *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* (Nov. 2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf> [https://perma.cc/6K3Q-5UMB] (demonstrating that legal representation increases the likelihood of obtaining bond by three times).

had been endeavoring for years to call attention to instances of medical abuse and neglect that were occurring in the facility.³³ In 2017, Project South and the Penn State Law Center for Immigrants' Rights published the results of scores of interviews with ICDC detainees and deported individuals.³⁴ Interviewees spoke of a profound lack of medical care,³⁵ lack of mental health services, unsanitary conditions, and a lack of prenatal care.³⁶ In 2020, when a group of detained ICDC women uploaded a YouTube video in an attempt to shed light on substandard medical access,³⁷ they were retaliated against and placed in solitary confinement, where their communication privileges were revoked.³⁸

The doctor at the center of the whistleblower's allegations had already been investigated by the Department of Justice (DOJ).³⁹ Dr. Mahendra Amin was accused of performing medically unnecessary procedures in order to file false

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33. Azadeh Shahshahani & Shoba Sivaprasad Wadhia, *The Cruel But Usual Conditions Inside Two Georgia Immigration Detention Centers*, THE HILL (May 19, 2017), <https://thehill.com/blogs/pundits-blog/crime/334076-the-cruel-but-usual-conditions-inside-two-georgia-immigration?rl=1> [<https://perma.cc/L47T-DJ2X>] (“Stewart and Irwin are two of more than 200 detention facilities but in many ways exemplify the deepest flaws with the U.S. immigration detention system which in October 2016, held more than 40,000.”); Det. Watch Network, *Expose and Close: Irwin County Detention Center 1–3* (2012), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Irwin%20County.pdf> [<https://perma.cc/47TU-SYSA>].
 34. Penn State L. Ctr. for Immigrants' Rts. Clinic & Project South, *supra* note 11, at 1, 5.
 35. *See id.* at 48 (quoting a detainee who stated: “I had lumps in my chest and blood had begun discharging from my breast. When I requested medical care, sometimes no one would reply. I was not given medical care until ICE later approved it. When I reached out for medical help, I was placed in solitary confinement.”)
 36. *See* Nikhel Sus, Eli Lee, Azadeh N. Shahshahani, Priyanka Bhatt, Sirine Shebaya & Khaled Alrabe, Citizens for Resp. in Wash., PROJECT SOUTH & NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, *Deliberate Indifference: Records Show ICE's Systemic Failures at Georgia Detention Facility at the Center of Gynecological Abuse Investigations* 9 (2021), <https://projectsouth.org/wp-content/uploads/2021/06/ICE-ICDC-Report.pdf> [<https://perma.cc/48WN-35SA>] (“In one case, a woman reported experiencing a swollen abdomen and pain and numbness in her legs after undergoing a ‘gynecological surgery’ the preceding month. In the other, a pregnant woman reported not receiving ‘any type of prenatal care treatment’ at ICDC despite having ‘a history of failed pregnancies.’”)
 37. Rachel Taber, *Women Detained at Irwin County ICE Processing Center Fight for Their Lives Against COVID19*, YOUTUBE (Apr. 13, 2020), <https://www.youtube.com/watch?v=aQt6QbkWsLI> [<https://perma.cc/VMD5-45QZ>] (showing women that are holding Spanish-language signs that read “We Have The Right To Live” while they say that the facility is overcrowded with poor sanitation).
 38. Debbie Nathan, *Women in ICE Detention Face Reprisals for Speaking Up About Fears of COVID-19*, THE INTERCEPT (Apr. 28, 2020), <https://theintercept.com/2020/04/28/ice-detention-coronavirus-videos/> [<https://perma.cc/7CJG-5QLM>]; *see also* Priyanka Bhatt, Katie Quigley, Azadeh Shahshahani, Gina Starfield & Ayano Kitano, PROJECT SOUTH, *Violence & Violation: Medical Abuse of Immigrants Detained at the Irwin County Detention Center* 18–19 (Harvard Immigr. and Refugee Clinical Program et al. eds., 2021), https://projectsouth.org/wp-content/uploads/2021/09/IrwinReport_14SEPT21.pdf [<https://perma.cc/8XSJ-HTZZ>] (highlighting the testimony of individuals who experienced medical abuse at ICDC).
 39. Complaint, United States v. Hosp. Auth. Of Irwin Cnty., No. 7:13-cv-00097-HL (M.D. Ga. July 8, 2013).

claims between 2013 and 2015.⁴⁰ The DOJ alleged that Dr. Amin had a standing order at Irwin County Hospital to run certain tests on pregnant patients, without any medical evaluation and regardless of the woman's condition.⁴¹ That investigation was settled for \$520,000.⁴²

B. Jails over Care: Law Enforcement's Disproportionate Treatment of Psychologically Distressed Persons and its Impact on Mental Health

Mbeti started experiencing paranoia and depression in college, and was eventually diagnosed with schizoaffective disorder and bipolar disorder. She became entangled in the criminal justice system not long after her mental health diagnosis.

Mbeti's first encounter with law enforcement was in 2007, when she was pulled over by police.⁴³ Mbeti says she was unmedicated at the time and experiencing a mental health crisis. But she was also Black in the rural southeast, where racial profiling and targeting of Black and Brown people is well-documented.⁴⁴ She was arrested for "acting erratically" and being "uncooperative." Police, however, have a documented history of applying these and similar terms to people of color to justify their arrest and worse.⁴⁵

Mbeti's psychiatric distress increased once in police custody. Frustrated while trying to make a phone call she slammed the phone into the receiver—damaging it in the process. This was charged as a felony on the assertion that the phone was federal property. And so, on December 14, 2007, Mbeti faced two serious charges: "Obstruction/Hindering Law Enforcement Officers" (for

40. *Id.* at 27.

41. *Id.* at 15.

42. Hospital Authority of Irwin County Resolves False Claims Act Investigation for \$520,000, U.S. Dep't of Just. (Apr. 29, 2015), <https://www.justice.gov/usao-mdga/pr/hospital-authority-irwin-county-resolves-false-claims-act-investigation-520000> [<https://perma.cc/9M27-ZCT3>].

43. Criminal records on file with the author.

44. See *Racial Profiling In Louisiana: Unconstitutional And Counterproductive*, S. POVERTY L. CTR. (Sept. 18, 2018), <https://www.splcenter.org/20180918/racial-profiling-louisiana-unconstitutional-and-counterproductive> ("In 2016, for instance, black adults comprised only 30.6% of Louisiana's adult population but 53.7% of adults who were arrested and 67.5% of adults in prison. Overall, black adults are 4.3 times as likely as white adults to be serving a felony prison sentence in Louisiana"); Timothy Bella, *HBCU lacrosse team accuses police of racial profiling in search of bus*, WASH. POST (May 10, 2022, 4:30 PM), <https://www.washingtonpost.com/sports/2022/05/10/women-lacrosse-drug-search-race-delaware/>.

45. See Joshua Budhu, Méabh O'Hare & Altaf Saadi, *How "Excited Delirium" is Misused to Justify Police Brutality*, BROOKINGS INST. (Aug. 10, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/08/10/how-excited-delirium-is-misused-to-justify-police-brutality/> [<https://perma.cc/2FN8-96PL>]; Lisa Cacho & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOSTON REV. (June 29, 2020), <https://bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest/> [<https://perma.cc/22LW-A34B>]; Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 972–73, 954–55, 965 (2020).

disobeying the police during the traffic stop), and felonious “Interference with Government Property” (for damaging the phone).⁴⁶ She was convicted via “negotiation”—essentially, a plea deal—and sentenced to one to two years by the Superior Court of Fayette County. Mbeti now ponders how she was considered competent to negotiate this plea; she was so mentally unwell at the time that she had to be hospitalized in a psychiatric facility for four months following the sentencing.⁴⁷

Mbeti describes that she experienced a worsening of psychiatric and medical symptoms during her first incarceration, in particular a deepening depression and hopelessness.

C. Walls Closing in: How Criminal and Immigration History Intersect with Accessing Care

Two years later, Mbeti’s convictions were hobbling her ability to find employment. She was uninsured, untreated, and increasingly paranoid. She still enjoyed permanent resident status, but status alone does not confer access to services. As a nation, we fall woefully short on caring for those with mental health issues, with over half of those needing treatment not receiving it within at least one calendar year.⁴⁸

Lawfully present immigrants⁴⁹ are over twice as likely to be uninsured than citizens, while undocumented residents⁵⁰ are over four times as likely to be uninsured as citizens.⁵¹ A 2018 Kaiser Family Foundation study found that several factors contribute to this lack of access. First, noncitizens are more likely to be low income and therefore unable to afford private insurance or unlikely to find themselves employed in industries that offer insurance.⁵² Race figures in as well. Black immigrants have the highest unemployment rates among all

46. On file with the author.

47. Psychological report on file with the author.

48. *Id.*

49. Lawfully present immigrants include: individuals who are authorized to live in the United States either permanently or temporarily (legal permanent residents, persons admitted as refugees, persons granted asylum (“asylees”), persons granted status by an immigration judge, students, recipients of Deferred Action for Childhood Arrivals (DACA), persons with Temporary Protective Status (TPS), parolees for humanitarian reasons, and others).

50. Undocumented residents are foreign-born individuals present in the United States without authorization because they entered without inspection, they entered with authorization but their authorization expired or lapsed, or they were formally documented and then lost their status.

51. *Health Coverage of Immigrants*, KAISER FAM. FOUND. (Apr. 6, 2022), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/> [<https://perma.cc/W6UY-ECLB>] (“26% of lawfully present immigrants and about four in ten (42%) undocumented immigrants were uninsured compared to less than one in ten (8%) citizens.”).

52. *See id.* (“Nonelderly noncitizens . . . have lower incomes because they are often employed in low-wage jobs and industries that are less likely to offer employer-sponsored coverage. Given their lower incomes, noncitizens also face increased challenges affording employer-sponsored coverage when it is available or through the individual market.”).

immigrant communities while earning the lowest wages, despite being among the most educated.⁵³ A person's geography can hurt as well; Georgia residents with mental health issues are over four times as likely, compared to the national average, to be forced out of in-network mental health care by insurance companies, making treatment unattainable except by the wealthiest of those in need.⁵⁴

Documented noncitizens qualify for some federal services like Medicaid, however, their eligibility is subject to restrictions and time requirements that do not apply to citizens.⁵⁵ Mbeti was additionally afraid that her conviction rendered her ineligible for benefits or could expose her to ICE. Many noncitizens share her fear. Recent changes in immigration law, in particular the Trump era 2019 "public charge" rule,⁵⁶ acted as wealth tests. As a result of the public charge rule, many immigrants became afraid to seek benefits they were entitled to such as Supplemental Nutrition Assistance Program, housing assistance, and nonemergency Medicaid due to concerns that doing so would imperil future efforts to remain in the United States.⁵⁷

Mbeti remembers feeling anxious and desperate on the morning of January 25, 2010; she recounted that, without insurance or any prospect of employment, she felt she would never receive steady treatment for her mental health conditions. She says that as irrational as it sounds, she wanted to be locked up

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53. See Morgan-Trostle et al., *supra* note 1, at 13; Ann M. Simmons, *African Immigrants Are More Educated Than Most — Including People Born in U.S.*, L.A. TIMES (Jan. 12, 2018), <https://www.latimes.com/world/13frica/la-fg-global-african-immigrants-explainer-20180112-story.html> [<https://perma.cc/N46R-LB73>].
 54. See *Mental Health in Georgia*, NAT'L ALL. ON MENTAL ILLNESS (Feb. 2021), <https://www.nami.org/NAMI/media/NAMI-Media/StateFactSheets/GeorgiaStateFactSheet.pdf> [<https://perma.cc/SCJ2-MSTG>].
 55. Health Coverage of Immigrants, *supra* note 50; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.
 56. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (expanding the INA's inadmissibility public charge grounds to include any applicant who has received one or more public benefits, as defined in 22 CFR 40.41(c), for more than 12 months within any aggregate 36-month period).
 57. The 2019 public charge rule is no longer in effect, however, fear in immigrant communities combined with the glacial rate at which updates to our complex immigration system reach those communities means that hesitancy to access health care may linger for years to come. See Holly Straut-Eppsteiner, NAT'L IMMIGR. L. CTR., *Documenting Through Service Provider Accounts Harm Caused by the Department of Homeland Security's Public Charge Rule*, at iii–iv (2020), <https://www.nilc.org/wp-content/uploads/2020/02/dhs-public-charge-rule-harm-documented-2020-02.pdf> [<https://perma.cc/Z9W7-KSX4>] (“In many cases, ‘chilled’ populations are not themselves targets of the rule, demonstrating the widespread, spillover harm fear about public charge creates for immigrant communities and members of immigrant families, including those who are already lawful permanent residents or U.S. citizens, as well as for survivors of domestic violence, trafficking, or other serious crimes who are applying for U or T status.”); Ajay Chaudry, Claudia Babcock, Benjamin Zhu & Sherry Glied, *Immigrant Participation in SNAP in a Period of Immigration Policy Changes, 2017-2019*, at 4–6 (May 30, 2021) (working paper) (one file with the NYU Wagner School of Public Service Research Paper Series) (showing that immigrant participation in SNAP declined during the Trump administration).

again so she could get medication.⁵⁸ This statement was not off base; jails and prisons became surrogate mental health facilities after they were deinstitutionalized in the 1970s.⁵⁹ She was driving aimlessly when she spotted a police vehicle parked outside a diner. The intervening memories are foggy for her, but Mbeti knows she struck the unoccupied car several times. She was promptly arrested.

Like so many Black defendants,⁶⁰ Mbeti was not shown leniency in her criminal arraignment—despite the fact that her crimes did not result in injuries to any person, were only property-related, and were borne out of untreated mental health conditions. She was charged with the highest allowable crime associated with her conduct and given years of prison time for it despite her history of mental health institutionalization. Mbeti was convicted of felony “Interference with Government Property”⁶¹ and was sentenced to a term of imprisonment of five years.⁶²

D. “Criminal Alien”: How Mbeti’s Convictions made her an ICE Priority for Detention and Deportation

Mbeti’s two property offenses grievously implicated her immigration status and set off a catastrophic chain reaction. First, her conviction triggered removal proceedings on the grounds that she had committed “crimes involving moral turpitude”⁶³ and “crimes of violence.”⁶⁴ Second, she was subject to mandatory custody.

Mbeti’s specific ICE charges are just two examples of the many ways that criminal offenses imperil a noncitizen’s immigration status. Congress introduced

58. During a 2020 psychiatric evaluation that was performed while she was in ICE custody at ICDC, Mbeti stated, “I was not in my right mind [in January 2010] because I was stressed and depressed at the time so I wanted to go back to prison because it seemed easier to be in prison.” Dr. Sean Massie, Psy.D., Psychological Evaluation of Mbeti Victoria Ndonga (Feb. 17, 2020) (on file with the author).

59. See, e.g., RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM* 28 (1st ed. 2008); Christina Canales, *Prisons: The New Mental Health System*, 44 *CONN. L. REV.* 1725, 1732 (2012); Fox Butterfield, *Asylums Behind Bars: A Special Report.; Prisons Replace Hospitals for the Nation’s Mentally Ill*, *N.Y. TIMES* (Mar. 5, 1998), <https://www.nytimes.com/1998/03/05/us/asylums-behind-bars-special-report-prisons-replace-hospitals-for-nation-s.html> [<https://perma.cc/49E3-C9ME>].

60. See *infra* notes 86–88.

61. Ga. Code Ann. § 16-7-24 (2010).

62. Criminal records on file with the author. Mbeti served two years of the five-year sentence.

63. See Immigration and Nationality Act, 8 U.S.C. § 1227; Moral Turpitude, *Black’s Law Dictionary* (6th ed. 1990) (defining moral turpitude as “[an] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty”).

64. See Immigration and Naturalization Act § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that any noncitizen “who is convicted of an aggravated felony at any time after admission is deportable”); id. § 1101(a)(43)(F) (defining aggravated felony to include “a crime of violence . . . for which the term of imprisonment [is] at least one year”).

“crimes involving moral turpitude” as a new ground for deportation in 1996 with the passage of the “Illegal Immigration Reform and Immigrant Responsibility Act” (IIRIRA).⁶⁵ This category of crimes is as vague in actual definition as it has been wide-ranging in interpretation.⁶⁶ Congress has repeatedly expanded the scope of another of its crime-based deportation laws: the frightfully named “aggravated felony.”⁶⁷ Today the list of so-called “aggravated felonies” includes crimes that are neither aggravated nor felonies, such as simple battery⁶⁸ and theft.⁶⁹ Many status-generated crimes—such as entering the U.S. without authorization, working without a work permit, or driving without a license in a state that does not permit most immigrants to obtain a license—can brand a noncitizen a “criminal alien” because of the continuous expansion of that category.

Another IIRIRA creation was mandatory custody⁷⁰ without the possibility for release on bond during the pendency of proceedings,⁷¹ meaning Mbeti had little hope for release. Immigration detention is euphemized as “civil” (non-punitive) in nature⁷²—and yet it is substantially similar to criminal incarceration.⁷³ This was true for Mbeti; while detained at the Irwin County

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65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 303, 110 Stat. 3009-546, 585 (codified as amended in scattered sections of 8 and 18 U.S.C.) (referring to Immigration and Naturalization Act § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i)). With its passage, Congress added almost 100 new crimes that would subject a noncitizen to removal. *See id.*
66. *See* Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes § 6:2 (June 2022 ed.), Westlaw IMLC.
67. *See* 8 U.S.C. § 1101(a)(43), which defines “aggravated felony” within the Immigration and National Act and has been amended over time by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 8 U.S.C. § 1101(a)(43); Immigration Act of 1990, Pub. L. 101-649, § 501, 104 Stat. 4978, 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(e), 110 Stat. 1214, 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, § 321, 110 Stat. 3009-546, 627.
68. Immigration and Nationality Act § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (referring to 18 U.S.C. § 16).
69. *Id.* § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).
70. 8 U.S.C. § 1226(c)(1)(C) (“The Attorney General shall take into custody any alien who . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year”).
71. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1946–47 (2000).
72. *See* *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (“Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.”).
73. *See* Mary Bosworth & Emma Kaufman, *Foreigners in A Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 439 (2011) (“Given the similarities between the incarcerated populations, it is unsurprising to find that there is considerable resemblance between the policies governing prisons and immigration detention regimes, as well as overlap between the individuals and companies who run such institutions.”); *see* César Cuauhtémoc García Hernández, *Immigration Detention as*

Detention Center she wore an orange jumper, had scarce access to sunlight, was guarded by people in uniform, and enjoyed only fleeting moments to speak to loved ones on the telephone.

Mandatory custody without the possibility of bond has no parallel in any other civil proceeding.⁷⁴ Professor Alina Das acknowledges that defenders of laws like IIRIRA and others that weld criminality and deportation⁷⁵ may argue that criminal conduct—not racism—lead to the laws’ creation. But, she argues, “[i]f racist ideas lead to criminal labels, then those racist ideas justify the system, not criminality itself.”⁷⁶ The effect is clear. Racialized policing of Black individuals followed by overcharging of crimes conspire to result in higher rates of Black immigrants in detention. Black immigrants make up just 7.2 percent of the noncitizen population in the U.S.,⁷⁷ but comprise 20.3 percent of immigrants facing detention on criminal grounds.⁷⁸ Once detained, Black immigrants face harsher treatment by custodial agents.⁷⁹ Where immigrants are eligible for release on bond, Black immigrants see their bonds set higher than non-Black immigrants,⁸⁰ possibly because of a criminal conviction but also because immigration judges at times bring implicit bias into hearings.⁸¹ Detention inflicts hardships on all those hoping to remain in the United States: limited access to counsel,⁸² hearings that move on a much faster docket than those on the non-

Punishment, 61 UCLA L. REV. 1346, 1384 (2014); *see also* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEENS'S L.J. 55, 61 (2014) (noting the “precarious distinction” between immigration and criminal confinement).

74. ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 72–73 (2020).
75. Anti-Drug Abuse Act of 1988, § 7342, 8 U.S.C. § 1101(a)(43) (referring to 18 U.S.C. § 924(c)(2)) (establishing new grounds for deportation for low-level controlled substance offenses, including possession of small amounts of marijuana).
76. Das, *supra* note 74, at 30.
77. Morgan-Trostle et al., *supra* note 1, at 11.
78. *Id.* at 20.
79. Spencer Woodman, *U.S. Isolates Detained Immigrants from Majority-Black Countries at High Rate, Study Finds*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 21, 2020), <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/> [<https://perma.cc/Z6LV-25PE>] (citing University of California, Irvine study that found Black immigrants in detention are six times more likely to be held in solitary confinement).
80. *See Black Immigrant Lives Are Under Attack*, RAICES TEXAS, <https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/> [<https://perma.cc/MDP9-EVD3>] (last visited Oct. 6, 2022) (“Between June 2018 and June 2020, the average bond paid by RAICES was a whopping \$10,500. But bonds paid for Haitian immigrants by RAICES averaged \$16,700, 54% higher than for other immigrants. The result: Black immigrants stay in ICE jails longer because of the massive disparity in their bonds.”).
81. *See* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES’ J. 20 (2015).
82. *Supra* notes 27–28.

detained docket,⁸³ geographic isolation,⁸⁴ unfavorable circuit law,⁸⁵ and immigration judges with the worst grant rates in the country.⁸⁶ And paths for relief are statutorily more narrow for those with criminal convictions versus those without criminal convictions.

Labeling immigrants like Mbeti “criminal aliens” uses racist and xenophobic fearmongering to justify the deportation assembly-line.⁸⁷ Legal scholars argue that a history of racism is threaded throughout all our criminal and immigration laws. Engaging with that history is crucial to dismantling systems of oppression that impact noncitizens. Professor Das draws clear historic lines between racial animus and our most punitive deportation laws.⁸⁸ She writes: “Racism against immigrants has fueled and capitalized upon a public safety narrative to criminalize communities of color and justify harsh immigration policies against people with and without criminal records.”⁸⁹ With Black people exposed to higher rates of arrests, more significant criminal charges following arrest, higher likelihood of conviction, and harsher sentences once

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83. See *Immigration Court Processing Time by Outcome*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php [<https://perma.cc/94JK-XZC2>] (last visited Oct. 21, 2022) (showing that detained cases are resolved in several months, versus non-detained cases which take years on average to resolve); see also Emily R. Summers, *Prioritizing Failure: Using the “Rocket Docket” Phenomenon to Describe Adult Detention*, 102 IOWA L. REV. 851, 854 (2017).
84. NAT’L IMMIGRANT JUST. CTR., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 7 (2010), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf [<https://perma.cc/QC2E-J8SX>] (“NGOs and law firms that can provide pro bono counsel to immigrant detainees are most commonly located in metropolitan areas, but a significant number of detention facilities are located more than 100 miles from these cities.”).
85. See *Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/map> [<https://perma.cc/X9K6-BPQS>] (last visited Oct. 21, 2022) (showing that Texas and Louisiana hold the highest populations of detainees; these states fall under the jurisdiction of the Eleventh Circuit which is considered unfavorable for immigrants).
86. Jeremy Redmon, *Georgia’s Immigration Court Judges Among Toughest In Nation For Asylum*, THE ATLANTA J.-CONST. (July 25, 2019), <https://www.ajc.com/news/breaking-news/georgia-immigration-court-judges-among-toughest-nation-for-asylum/svQ2CmRGXS5Hgi2utVTmrO/> [<https://perma.cc/J26B-S9UL>] (“An Atlanta Journal-Constitution analysis of TRAC’s data shows Georgia’s two immigration courts — located in South Georgia and Atlanta — have the second and third highest average asylum denial rates in the nation at 95% and 94% for that same time-frame, respectively. Only the immigration court in Chaparral, N.M., had a higher average denial rate last year at 96%. The national average was 58%.”).
87. See Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2012) (cataloging developments in immigration law and immigration enforcement that have led to hyper-criminalization of noncitizens).
88. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018) (“Modern laws to identify, convict, incarcerate, detain, and deport immigrants rest on . . . racially oppressive foundations, which must be understood in order to be deconstructed.”)
89. Das, *supra* note 74, at 23.

convicted,⁹⁰ racism and anti-immigration sentiments harmonize and reinforce one another.

Immigrants suffer incalculably in detention, even when detained for brief periods and under “adequate” conditions.⁹¹ According to one international survey of detainees held in detention centers throughout the world, incarcerated individuals consistently reported increased anxiety, depression, somatization, panic, suicidal ideation, and PTSD.⁹² Prolonged detention seems to more adversely impact women, though the effects are largely understudied.⁹³

When a detainee (regardless of gender) has a history of trauma or suffers from preexisting mental health disabilities, the risk of harm rises precipitously.⁹⁴ Solitary confinement is a shuddersome and well-documented reality for those with mental health issues⁹⁵ despite evidence that it can result in acute, irreversible damage to the brain.⁹⁶ Mbeti recalls feeling elevated fear, confusion, and isolation during this first period of detention at ICDC. The worst was yet to come.

The Department of Homeland Security alleged that Mbeti was removable because of her crimes and was not entitled to release.⁹⁷ Congress had stripped immigration judges of the power to balance mitigating factors such as length of

90. *Id.* at 24.

91. Janet Cleveland, Rachel Kronick, Hanna Gros & Cécile Rousseau, *Symbolic Violence and Disempowerment as Factors in the Adverse Impact of Immigration Detention on Adult Asylum Seekers' Mental Health*, 63 INT. J. PUB. HEALTH 1001, 1005 (2018).

92. Martha von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY, Dec. 2018, at 1, 10.

93. *Id.* at 12.

94. *Id.* at 3.

95. Erika Voreh, *The United States' Convention Against Torture Ruds: Allowing the Use of Solitary Confinement in Lieu of Mental Health Treatment in U.S. Immigration Detention Centers*, 33 EMORY INT'L L. REV. 294, 287 (2019).

96. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333 (2006) (explaining that solitary confinement results in either “severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness”); Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 J. MARSHALL L. REV. 1433, 1447–51 (2014) (arguing that the infliction of solitary confinement—especially on vulnerable populations who have previously experienced trauma and instability such as asylum seekers—is an act of torture in violation of international human rights law). *See generally* Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010) (arguing that the costs of solitary confinement are clinically distressing, psychologically harmful, and extremely severe); Alex Kozinski, *Worse Than Death*, 125 YALE L.J. FORUM 230 (2016) (arguing that solitary confinement is the harshest form of punishment, above even death); NAT'L IMMIGR. JUST. CTR. & PHYSICIANS FOR HUM. RTS., *Invisible In Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention* 1 (2012), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2017-01/InvisibleInIsolationReport-September%202012.pdf> [https://perma.cc/F5QR-W5L3].

97. Charging document on file with the author.

time in the United States, family ties, or community support when deciding whether take away a permanent resident's status.⁹⁸ Mbeti fell in that category of noncitizens for whom there could be no exercise of discretion, even though she had been in the United States nearly all of her life, had all of her immediate family here, and had only committed crimes that resulted in property damage—acts that resulted directly from her mental health issues. The immigration judge ordered her deported.⁹⁹

E. Around and Around it Goes: Release from ICE, Return to ICE, Deportation, Return to the U.S., Another Arrest, and Back Once More in ICDC

Mbeti received a deportation order but was released from ICE detention on an order of supervision. ICE can place an individual on an order of supervision in lieu of actual deportation in a variety of circumstances, such as where a person has extensive family in the United States or when actual removal is not likely to happen in the immediate future.¹⁰⁰ Her situation was extremely precarious at that moment. The judge's decision had revoked her permanent resident status—rendering her “undocumented,” and therefore ineligible for many public benefits.¹⁰¹ Just prior to the instigation of removal proceedings against her, Mbeti had finally qualified for Supplemental Security Income benefits based on her mental health disabilities, since permanent residents are one of the few noncitizen groups covered by the law. Following the deportation order, she was no longer eligible for this benefit.¹⁰² The deportation order similarly disqualified

98. 8 U.S. Code § 1229b(a)(3) (barring “Cancellation of Removal” for any permanent resident in removal proceedings who has committed an “aggravated felony” as defined by 8 U.S.C. § 1101(a)(43); 8 U.S. Code § 1229b(a)(2) (statutorily precluding “Cancellation of Removal” for the same population if they committed any crime listed in 8 U.S.C. § 1182(a)(2), 8 U.S.C. § 1227(a)(2) or 8 U.S.C. § 1227(a)(4) within the first seven years of their having been admitted in the United States (referred to as the “Stop-Time Rule”)).

99. Removal order on file with the author.

100. 8 C.F.R. § 241.13(h)(1) (2006); *see also* Memorandum from John P. Torres, Acting Dir., Off. of Det. and Removal Operations, to Field Off. Dirs. (Mar. 27, 2006), https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf [<https://perma.cc/N49Z-LWNU>] (discussing a revision to the Detention and Removal Operations Policy and Procedure Manual, which is attached to the memorandum).

101. *Citizenship and Residency FAQs*, GA. MEDICAID, <https://medicaid.georgia.gov/citizenship-and-residency-faqs> [<https://perma.cc/G2QQ-QXCX>] (last visited Oct. 6, 2022) (“To obtain full Medicaid benefits in Georgia, you must be a Georgia resident and either a U.S. citizen or a legally residing noncitizen. Noncitizens (residing legally or illegally) can qualify for coverage for emergencies and labor and delivery services if income requirements are met.”).

102. *See* 8 U.S.C. § 1611 (making noncitizens who are not “qualified aliens” ineligible for Federal public benefits, with limited exceptions); 8 U.S.C. § 1641 (defining “qualified aliens” as a limited group that includes noncitizens who have lawful permanent residence status); *see also What Should I Know About Supplemental Security Income (SSI)?* GA. LEGAL AID, <https://www.georgialegalaid.org/resource/what-should-i-know-about-supplemental-security-income-ssi?ref=8Hdbq> [<https://perma.cc/6RDS-9GJG>] (last visited Oct. 6, 2022) (explaining the benefits and eligibility requirements of Supplemental Security Income).

her from access to healthcare. Under the Affordable Care Act, undocumented noncitizens are barred from participating in health insurance marketplaces.¹⁰³ Undocumented immigrants can access some care through federally qualified health centers (FQHCs), community-operated centers providing health care to low-income communities.¹⁰⁴ However, Fayette County in Georgia, where Mbeti resided following her removal order, had none.¹⁰⁵

As in most states, Georgia law does not permit undocumented residents to obtain a driver's license.¹⁰⁶ Living in rural Georgia without a license made it nearly impossible for Mbeti to get a job; it also made it difficult for Mbeti to get to one of the few county hospitals or neighboring county FQHCs that offered mental health services to uninsured, indigent individuals.

For a brief time, the mental health system in Georgia did work for Mbeti. Her family connected her with an assertive community treatment (ACT) team after her release, which offered her a positive but short-lived comprehensive mental health care experience. ACT, also known as the Training in Community Living program, is a supportive model of treatment that is managed by a multidisciplinary team of mental health professionals and paraprofessionals that focuses on medication compliance, counseling, rehabilitation, and integration in the job market.¹⁰⁷ Mbeti recalls feeling some hope during this time in her life. The ACT team checked in with her, assigned her a social worker, and helped her make some of her mental health appointments. Her hope would not last. The next time Mbeti had a mental health crisis, the police responded instead of her social worker.

The local police turned Mbeti directly over to ICE. They could do this because they had been deputized to investigate and enforce federal immigration

103. 42 U.S.C.A. § 18032(f)(3) (West 2010).

104. *Overcoming Immigrant Barriers to Coverage: Options for Health Care When Major Programs Don't Cut It*, NAT'L COUNCIL OF LA RAZA (2011), <https://www.unidosus.org/wp-content/uploads/2021/07/HealthCareHighBarrierNLR.pdf> [<https://perma.cc/AV4X-GVQ8>].

105. *Federally Qualified Health Centers (FQHC)*, GEORGIA DEP'T OF CMTY. HEALTH, STATE OFF. OF RURAL HEALTH (2021), <https://dch.georgia.gov/federally-qualified-health-centers-fqhcs-community-health-centers-chcs> [<https://perma.cc/SG6B-7M5V>].

106. *Information for Non-US Citizens*, GA. DEP'T OF DRIVER SERVS., <https://dds.georgia.gov/information-non-us-citizens#:~:text=Georgia%20law%20does%20not%20allow,Georgia%20license%20or%20Identification%20card> [<https://perma.cc/6MNZ-4Y6D>] (last visited Oct. 6, 2022) ("Georgia law does not allow non-US citizens, non-resident drivers to operate a motor vehicle if he or she does not have lawful status in the United States."); *see generally States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 11, 2022), <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> [<https://perma.cc/7TJD-3KMC>] ("Eighteen states and the District of Columbia have enacted laws to allow unauthorized immigrants to obtain driver's licenses.")

107. Mary Ann Test, *Continuity of Care in Community Treatment*, 2 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 15, 19–21 (1979); Paul A. Deci, Alberto B. Santos, D. Walter Hiott, Sonja Schoenwald & James K. Dias, *Dissemination of Assertive Community Treatment Programs*, 46 PSYCHIATRIC SERVS. 676, 676 (1995).

laws, owing to a program known as 287(g).¹⁰⁸ This practice is not unique to Georgia. Since 2002, ICE has been engaging local law enforcement across the country to perform federal immigration enforcement duties¹⁰⁹—effectively authorizing local police forces to do ICE’s job for them.¹¹⁰ Even a traffic officer can now investigate civil immigration violations, hold people suspected of immigration violations in order to provide ICE an opportunity to investigate the individual’s status, and set people on the path to deportation.¹¹¹ Other DHS programs like “Secure Communities” ensure that immigrants enter the deportation conveyor belt as soon as a state or local agency arrests them.¹¹²

The link between law enforcement and ICE denies noncitizens access to the services and protection law enforcement is intended to provide.¹¹³ Victims of (and witnesses to) crimes have faced arrest for immigration violations rather than protection by the criminal justice system.¹¹⁴ The program has a motley coalition of critics that spans immigrant advocates as well as members of law enforcement.¹¹⁵ Many point to innumerable and egregious instances of racial and

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108. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g); see *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF’T., <https://www.ice.gov/identify-and-arrest/287g> [<https://perma.cc/9A9N-49US>] (last visited Oct. 6, 2022).
109. See CONG. RSCH. SERV., IF11898, *The 287(g) Program: State and Local Immigration Enforcement* (2021), <https://crsreports.congress.gov/product/pdf/IF/IF11898> [<https://perma.cc/5RXQ-UATP>]; *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 108.
110. See *National Map of 287(g) Agreements*, IMMIGRANT LEGAL RES. CTR. (Dec. 6, 2021), <https://www.ilrc.org/national-map-287g-agreements> [<https://perma.cc/JG63-FQQP>] (showing agreements in 142 jurisdictions).
111. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 256 (2012) (“[Sheriff] Arpaio’s zealous workplace immigration raids and traffic checkpoint sweeps made the county the largest participant in the 287(g) program, responsible for tens of thousands of deportations of immigrants.”).
112. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF’T., <https://www.ice.gov/secure-communities> [<https://perma.cc/N2M4-F869>] (last visited Oct. 6, 2022).
113. See Nik Theodore, UNIV. OF ILL. AT CHI., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 1 (2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [<https://perma.cc/F5ZX-DH33>].
114. *Id.* at 6 (“Similarly, 45 percent of Latinos stated that they are less likely to voluntarily offer information about crimes, and 45 percent are less likely to report a crime because they are afraid the police will ask them or people they know about their immigration status.”).
115. See Craig E. Ferrell Jr., *Immigration Enforcement, Is It a Local Issue?* POLICE CHIEF (Feb. 2004), <https://www.policechiefmagazine.org/immigration-enforcement-is-it-a-local-issue/> [<https://perma.cc/CH42-SGV6>] (last visited Oct. 19, 2022); MAJOR CITIES CHIEFS, *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws By Local Police Agencies* 6 (2006), https://www.houstontx.gov/police/pdfs/mcc_position.pdf [<https://perma.cc/5JJA-XDXG>] (expressing concern that 287(g) undermines public order by interfering with the “trust, communication, and cooperation” between police and the immigrant community); U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-109, *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local*

ethnic profiling¹¹⁶ by overzealous municipal agents on the “hunt” for undocumented persons.¹¹⁷

Section 287(g) agreements and immigrants’ subsequent detention also harm U.S. citizens¹¹⁸ and create multi-generational impacts.¹¹⁹ Average households are plunged into poverty when a noncitizen provider is detained.¹²⁰ Children of detained noncitizens are at risk of being placed in the child welfare system,¹²¹

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- Enforcement of Federal Immigration Laws* 10 (2009), <http://www.gao.gov/new.items/d09109.pdf> [<https://perma.cc/U62Z-JGXM>] (finding myriad failures in the program such as a failure to comply with terms of memoranda of agreement between local law enforcement and ICE; a failure to focus on noncitizens who pose a threat to public safety or are a danger to the community; inadequate ICE training and oversight; and significant gaps in reporting processes); ACLU OF GA., *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Families Apart and Threatened Public Safety* 5–7 (Azadeh Shahshahani ed., 2009), https://www.aclu.org/sites/default/files/field_document/asset_upload_file306_41281.pdf [<https://perma.cc/C2VB-XCS3>]; Letter from Cory Booker, U.S. Sen., Mike Quigley, U.S. Rep., & Pramila Jayapal, U.S. Rep., to Hon. Alejandro Mayorkas, Sec’y, Dep’t of Homeland Sec. (Apr. 22, 2021), https://www.booker.senate.gov/imo/media/doc/senator_booker_seeks_to_rescind_287g_program.pdf [<https://perma.cc/EZ5U-SS4Y>] (urging DHS to terminate all 287(g) agreements).
116. ACLU OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) 5–8 (Azadeh Shahshahani ed., 2010), http://uncoverthetruth.org/wp-content/uploads/2010/04/ACLU_Gwinnett_Racial_Report.pdf [<https://perma.cc/57J9-UJD5>].
117. See ACLU OF N.C. LEGAL FOUND. & IMMIGR. & HUM. RTS. POL’Y CLINIC, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 8 (2009), <https://law.unc.edu/wp-content/uploads/2019/10/287gpolicyreview.pdf> [<https://perma.cc/VV52-PC9Y>] (describing 287(g) as a tool used to “purge towns and cities of ‘unwelcome’ immigrants”).
118. See Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 209–15 (2021) (discussing how immigrant detention policies harm mixed-status families and broadly contribute to the otherization of non-white individuals); Joanne Lin, *End It: 287(g) is Beyond Repair and Harms Local Communities Every Day*, ACLU BLOG OF RTS. (Apr. 5, 2010), <https://www.aclu.org/blog/end-it-287g-beyond-repair-and-harms-local-communities-every-day> [<https://perma.cc/5VW5-9HGU>].
119. See Ralph De La Cruz, ‘The Police Took Mommy’: How Reporting a Crime Nearly Resulted in Deportation for Florida Woman, FLA. CTR. FOR INVESTIGATIVE REPORTING (Jan. 31, 2011), <https://fcir.org/2011/01/31/the-police-took-mommy-how-reporting-a-crime-nearly-resulted-in-deportation-for-florida-woman/> [<https://perma.cc/T78P-T7YS>] (describing how a mother and wife to U.S. citizens was detained and nearly deported after she reported a crime to local police).
120. Julia Preston, *The True Cost of Deportation*, THE MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation> [<https://perma.cc/URV6-R369>] (finding that around 6.1 million U.S. citizen children have at least one undocumented family member, and that household income “plummets by as much as 45%” when that family member is taken away—in turn forcing “many families that once were self-sufficient [to] rely on social welfare programs to survive”).
121. See AM. IMMIGR. COUNCIL, U.S.-CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 4 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_childr

and many children are funneled into the foster-care-to-prison pipeline.¹²² Where the detained noncitizen is Black, the remaining family is more susceptible to being reported to child services.¹²³ Black children of immigrants are more likely to be placed in foster homes rather than given services to keep the family together.¹²⁴ Mbeti did not have children, but she was a caregiver to her infant nephew. Her child-caring role allowed the child's father, Mbeti's brother, to work.

Those who justify immigration detention claim it serves the twin goals of safeguarding communities while ensuring that immigrants appear for their court hearings.¹²⁵ Some even claim that the threat of detention acts as a “deterrent” to hypothetical immigrants contemplating coming to the United States.¹²⁶ These reasons are consistently contradicted by data. Longer and more punishing periods of detention have not resulted in a sustained reduction in asylum seekers arriving at the southern U.S. border.¹²⁷ 99 percent of non-detained asylum

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- en_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/S9GZ-PRG2] (finding that children in foster care where 287(g) is in place are 29% more likely to have “detained or deported parents compared to non-287(g) counties”).
122. See Shanta Trivedi, *Police Feed the Foster Care-To-Prison Pipeline by Reporting on Black Parents*, NBC NEWS (July 29, 2020), <https://www.nbcnews.com/think/opinion/police-feed-foster-care-prison-pipeline-reporting-black-parents-ncna1235133> [https://perma.cc/94RB-7RN6] (“A survey of foster care alumni showed that, by their 25th birthdays, 81 percent of males had been arrested, and 35 percent had been incarcerated.”).
 123. See Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS., 50, 57 (2019) (examining data that demonstrates that Black families are consistently investigated for mistreatment and neglect far above any other group, including being almost twice as likely to be investigated as a white family).
 124. SETH FREED WESSLER, APPLIED RSCH. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 17 (2011), <https://www.raceforward.org/research/reports/shattered-families> [https://perma.cc/5MXB-ACNQ] (“[R]esearch shows that child welfare departments are more likely to remove children of color (Black children in particular) from their parents rather than offering services to help them stay together”) (citing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001)); Trivedi, *supra* note 122 (citing two studies that found that even when Black families were given a lower risk assessment by child protective services, they were nevertheless “20 percent more likely to have their case opened for services, and 77 percent more likely to have their children removed instead of being provided with family-based safety services”).
 125. Boaz, *supra* note 118, at 215.
 126. See Maureen A. Sweeney, Sirine Shebaya & Dree K. Collopy, *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 GEO. IMMIGR. L.J. 291, 292–97 (2021). See generally Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* (Ctr. on Migration, Policy, & Soc’y, Working Paper No. 80, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1867366 [https://perma.cc/7URK-DQ7M].
 127. See Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 “Surge” of Central American Women and Children at the US-Mexico Border*, 5 J. ON MIGRATION & HUM. SEC. 137, 139 (2017) (discussing how the Obama administration’s heightened anti-immigration enforcement policies did not significantly change the numbers of Central American asylum seekers arriving each year).

seekers attend their court hearings,¹²⁸ and over 95 percent of all immigrants (asylum-seekers and otherwise) appear for their hearings if represented by counsel.¹²⁹ Overzealous detention practices not only directly harm individuals (including U.S. citizens), but they also fail to positively impact public safety outcomes.¹³⁰ In fact, communities are actually safer and have lower crime rates as immigrant population numbers increase.¹³¹

Detention is also exorbitantly expensive,¹³² with most funds funneled to for-profit private prisons.¹³³ Since the 1980s when mass incarceration of immigrants skyrocketed,¹³⁴ detention times have grown longer, conditions have deteriorated, and there is little accountability or oversight.¹³⁵

ICE would not show Mbeti any forgiveness this time around; it rescinded her order of supervision and deported her to Kenya on January 20, 2018.¹³⁶ Mbeti's brief stay in Kenya was fraught with terror, isolation, homelessness, and sexual violence.¹³⁷ She experienced a violent sexual assault by a stranger that resulted in her hospitalization.¹³⁸ Her family, fearful that she would die if left

128. *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), <https://trac.syr.edu/immigration/reports/588/> [<https://perma.cc/4ZCK-RKGF>].
129. AM. IMMIGR. COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf [<https://perma.cc/77CR-PW4M>]; see also Boaz, *supra* note 118, at 228 (noting that represented immigrants are more likely to be released from custody and appear at their removal hearings following release).
130. See *supra* notes 118–24.
131. Lauren E. Bartlett, *One of the Greatest Human Tragedies of Our Time: The U.N., Biden, and A Missed Opportunity to Abolish Immigration Prisons*, 43 MITCHELL HAMLIN L.J. PUB. POL'Y & PRAC., 37, 48 (2022).
132. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT BUDGET OVERVIEW FISCAL YEAR 2020, at 10 (2020), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf [<https://perma.cc/EH2J-53UJ>] (showing that the United States spends billions of dollars each year incarcerating immigrants).
133. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* 15 (2021).
134. See Melina Juárez, Bárbara Gómez-Aguñaga & Sonia P. Bettez, *Twenty Years after IIRIRA: The Rise of Immigrant Detention and its Effects on Latinx Communities across the Nation*, 6 J. ON MIGRATION & HUM. SEC. 74, 77 (2018).
135. *2009 Immigration Detention Reforms*, IMMIGR. & CUSTOMS ENF'T (Dec. 12, 2011), <https://www.ice.gov/factsheets/2009detention-reform> [<https://perma.cc/28WW-CM95>] (“The present immigration detention system is sprawling and needs more direct federal oversight and management. While ICE has over 32,000 detention beds at any given time, the beds are spread out over as many as 350 different facilities largely designed for penal, not civil, detention. ICE employees do not run most of these. The facilities are either jails operated by county authorities or detention centers operated by private contractors.”).
136. On file with author.
137. See Oldaker Complaint, *supra* note 5, at 72 (“Ms. Ndonga does not have anyone to receive her or anywhere to stay in Kenya, and she will likely not have access to appropriate healthcare.”)
138. See Gianna Toboni, Carter Sherman, Ana Sebescen & Nicole Bozorgmir, *Woman Says*

alone and unmedicated in a country she had not lived in since she was a toddler, arranged for her return to the United States that same summer.

Mbeti was back in the United States with her family but still unable to access vital care for her mental health. She was without status and moreover without authorization to be in the United States following her prior removal—a situation far worse than when she was on an order of supervision, where she could at least seek a work permit.¹³⁹ She decompensated drastically in early 2019, which exposed her to yet another arrest by local police. Local police again notified ICE. ICE took Mbeti back to ICDC.¹⁴⁰

An immigration judge found that Mbeti was “mentally incompetent.”¹⁴¹ The judge said that Mbeti had “had a habit of jumping in” and was “difficult to work with,”¹⁴² so he revoked her testimonial right and instead gave it to her mother—who was not in Kenya during the events that gave rise to Mbeti’s protection claim. Mbeti’s mother admitted on the witness stand that she did not know many details about what happened to Mbeti, nor why Mbeti might be afraid to live in Kenya. The judge thereafter denied her request for protection.¹⁴³

Mbeti was unrepresented from that moment on. She attempted to file her own series of appeals, motions to reopen, and requests for bond before the Board of Immigration Appeals,¹⁴⁴ as well as various federal causes of action challenging her detention and alleging civil rights violations.¹⁴⁵ The Board of Immigration Appeals, despite knowing that Mbeti had been adjudicated incompetent, did not appoint counsel to represent her; it instead dismissed her efforts as “untimely” and unfounded in the law.¹⁴⁶

Georgia ICE Facility Gave Her Unwanted Gynecological Surgery. Now She's Being Deported., VICE (Nov. 23, 2020, 4:27 PM), <https://www.vice.com/en/article/pkdgpk/woman-in-ice-gynecology-scandal-faces-deportation-almost-a-death-sentence> [<https://perma.cc/W368-VM4P>] (“When she landed in [Kenya], Ndonga was surprised by one feeling: relief. While living in an African country, she didn’t experience the same racism she had faced in the U.S. But then, she was raped by a driver while riding in his car, she said. Ndonga still struggles with symptoms of post-traumatic stress disorder.”).

139. See *Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 9, 2020), <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/employer-information/employment-authorization> [<https://perma.cc/LW47-Z872>] (indicating that an order of supervision qualifies a person for employment authorization).

140. Notice To Appear dated 04/18/2019 on file with the author.

141. See *Matter of M-A-M-*, 25 I. & N. Dec. 474, 479 (BIA 2011) (“[T]he test for determining whether an [individual] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.”).

142. Digital Audio Recording on file with the author.

143. Decision of the Immigration Judge on file with the author.

144. Mbeti’s pro se appeals, motions, and complaints on file with the author.

145. Mbeti’s habeas corpus actions and § 1983 civil rights complaints file with the author.

146. All BIA decisions relating to Mbeti’s pro se efforts on file with the author.

Had Mbeti been detained in the Ninth Circuit, she would have been assigned counsel before the Board at government expense rather than left to fight her case alone. That is because a class of detained noncitizens with serious mental health concerns successfully sued ICE and the immigration court system. The suit challenged the due process deficiencies inherent in prosecuting *pro se*, detained, mentally incompetent immigrants without the provision of appointed counsel.¹⁴⁷ The Central District of California’s injunction in *Franco-Gonzalez v. Holder* (often shorthanded to “the Franco protections”) which guarantees counsel¹⁴⁸ and bond hearings¹⁴⁹ for detained individuals adjudicated mentally incompetent, however, only applies to certain detained persons in California, Arizona, and Washington (which are under Ninth Circuit jurisdiction).¹⁵⁰

Detained noncitizens facing removal outside these three states do not enjoy the court-mandated *Franco* protections.¹⁵¹ Instead, these respondents are covered by a watered-down program that the Executive Office for Immigration Review (EOIR)—the component agency within the Department of Justice that oversees the immigration courts—voluntarily created in 2013 called the “Nationwide Policy.”¹⁵² The Nationwide Policy extends some of the *Franco* protections to detained individuals outside the Ninth Circuit.¹⁵³ Both the

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147. *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013).
148. Ord. Further Implementing this Ct.’s Permanent Injunction at *8, *Franco-Gonzalez v. Holder*, No. CV-10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) [hereinafter *Franco-Gonzalez Order*] (“EOIR shall have 21 days from the date of the [incompetency] determination to arrange for provision of a Qualified Representative.”).
149. *Franco-Gonzalez*, 2013 WL 8115423, at *1.
150. Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶ 143, *Franco-Gonzalez v. Holder*, No. CV 10-2211, 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011) [hereinafter *Franco-Gonzalez Complaint*].
151. See Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation’s Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 21 (2022).
152. See Memorandum from Brian O’Leary, Chief Immigr. J, Exec. Off. for Immigr. Rev., U.S. Dep’t of Just., to All Immigr. JJ. (Apr. 22, 2013) (announcing the Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions).
153. See *National Qualified Representative Program (NQRP)*, EXEC. OFF. FOR IMMIGR. REV. (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp> [<https://perma.cc/DZ2S-P4PX>]; see also GREG CHEN & JORGE LOWEREE, AM. IMMIGR. COUNCIL & AM. IMMIGR. L. ASS’N, POLICY BRIEF: THE BIDEN ADMINISTRATION AND CONGRESS MUST GUARANTEE LEGAL REPRESENTATION FOR PEOPLE FACING REMOVAL 2 (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_biden_administration_and_congress_must_guarantee_legal_representation_for_people_facing_removal.pdf [<https://perma.cc/S6BF-NJZ4>] (recognizing and advocating for the expansion of programs like the National Qualified Representative Program, which provides legal counsel to people with mental disabilities).

Nationwide Policy and *Franco*'s court-mandated program are administered by EOIR's National Qualified Representative Program (NQRP).¹⁵⁴

The Nationwide Policy has many gaps and failings. First, because the Nationwide Policy was created voluntarily, it can be voluntarily ended. It would take only a shift in executive branch priorities to extinguish the program altogether. Second, the Nationwide Policy only guarantees government-paid counsel for 90-days following the individual's release from ICE custody, alongside other funding limitations.¹⁵⁵ Third, while *Franco* class members are guaranteed counsel through the entire pendency of their removal proceedings through the appeals process,¹⁵⁶ respondents falling under the Nationwide Policy's purview have neither such guarantee.¹⁵⁷

Exacerbating the inherent limitations of the Nationwide Policy is that Nationwide Policy immigration judges are given weakened (and less frequent) training on the judicial competency process in comparison to their *Franco* counterparts.¹⁵⁸

The *Franco* immigration judges receive robust, periodic training on conducting competency hearings and best practices for proscribing safeguards once an incompetent respondent appears before them.¹⁵⁹ In contrast, many Nationwide Policy locations—including entire states with multiple detention centers—only have one provider contracted to represent detained individuals who have been adjudicated incompetent.¹⁶⁰

F. “You Haven’t Even Heard the Worst of it”: Dr. Amin’s Medical Abuse and ICE’s Efforts to Silence the Women Speaking Out About it.

A positive consequence of Mbeti's storm of *pro se* legal appeals and complaints is that they stalled yet another deportation to Kenya because her case

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154. *National Qualified Representative Program (NQRP)*, *supra* note 153; CHEN & LOWEREE, *supra* note 153; CONG. RSCH. SERV., IF12158, U.S. IMMIGRATION COURTS: ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS AND LEGAL ACCESS PROGRAMS (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12158/3> [<https://perma.cc/FS9T-GQET>].
 155. *See* Wilson, *supra* note 151, at 32–34 (examining nearly ten years of NQRP operational and programmatic documents obtained through two Freedom of Information Act Requests).
 156. *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051–58 (C.D. Cal. 2010) (mandating accommodation under the Rehabilitation Act in the form of providing “Qualified Representatives” for “*the entirety of their immigration proceedings*”) (emphasis added).
 157. Wilson, *supra* note 151, at 36–39 (identifying how *Franco* respondents are flagged and tracked throughout the pendency of their entire removal proceedings versus those respondents who fall under the Nationwide Policy).
 158. *Id.* at 39–42, 46 (analyzing internal EOIR training data that shows that Nationwide Policy IJs are trained differently—and less often—than their *Franco* counterparts, resulting in case processing delays and prolonged detention periods for Nationwide Policy respondents).
 159. *Id.* at 41 (showing through FOIA results that only 49% of active Nationwide Policy IJs received an “Initial Competency Hearing” and less than 5% attended a refresher training in identifying competency or conducting competency trainings).
 160. Michael Corradini, *National Qualified Representative Program*, VERA INST. OF JUST., <https://www.vera.org/projects/national-qualified-representative-program> [<https://perma.cc/M8MC-4BQ2>] (last visited Oct. 6, 2022).

was still considered “pending” before the Board of Immigration Appeals, and therefore not administratively final.¹⁶¹ Yet she languished in immigration detention for months—22 in total—and was still unrepresented. Mbeti had also become one of the many ICDC survivors of unnecessary, invasive, unconsented-to gynecological procedures by Dr. Mahindra Amin.¹⁶²

Mbeti was experiencing heavy menstrual bleeding and incapacitating cramps while at ICDC. She was referred to Dr. Amin twice: first on July 31, 2019 and again on August 16, 2019.¹⁶³ During the first visit, Dr. Amin told her that she had a cyst in her uterus “the size of a melon” and that she likely needed to undergo additional medical procedures.¹⁶⁴ He did not explain “what those procedures would be, why they were necessary, what less invasive options might be [available], or the benefits or risks of the procedures.”¹⁶⁵

During her second visit, Mbeti’s medical team prepped for her for surgery and placed her under general anesthesia, though she had no idea why.¹⁶⁶ She awakened with surgical incisions on her stomach but did not know their origin or purpose.¹⁶⁷ The procedure was especially violating to Mbeti because of the sexual assault she had recently survived in Kenya.¹⁶⁸ Following the procedure, she developed a surgical site infection that lasted months but received no follow-up care.¹⁶⁹ The feeling that her body was not her own reverberated for some time afterward.

Mbeti did not consent to this procedure. “Informed consent” is integral to the practice of medicine; it is an ethical imperative¹⁷⁰ and a legal requirement.¹⁷¹ A physician must explain what will happen during the procedure, why the

161. 8 C.F.R. § 1241.1 (2008) (instructing that an immigration judge’s order of removal does not become final until such time that a noncitizen has exhausted their appeal rights before the Board of Immigration Appeals, or their statutorily guaranteed appeal period has expired).

162. Oldaker Complaint, *supra* note 5, at 68–69.

163. *Id.*

164. *See id.* at 43; Molly O’Toole, *ICE is Deporting Women at Irwin Amid Criminal Investigation into Georgia Doctor*, *L.A. TIMES* (Nov. 19, 2020, 4:58 PM) <https://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor> [<https://perma.cc/HF7Y-M39L>].

165. Oldaker Complaint, *supra* note 5, at 69.

166. *See* Toboni et. al., *supra* note 138 (quoting Mbeti: “I didn’t know how much trouble I was in until that moment when [the nurse] said a hysterectomy, and I kind of looked over to the other lady that was in surgery with me. I was just expressionless, like, what’s happening to us? Like what’s going to happen to us? What did we get ourselves into?”).

167. Oldaker Complaint, *supra* note 5, at 69; *see also* Toboni et al., *supra* note 138 (“Asked at what point she first understood she’d had a surgery, Ndonga said, ‘When I woke up and saw the incisions’”).

168. Oldaker Complaint, *supra* note 5, at 69; Toboni et al., *supra* note 138.

169. *See* Oldaker Complaint, *supra* note 5, at 69.

170. *Informed Consent: Code of Medical Ethics Opinion 2.1.1*, AM. MED. ASS’N, <https://www.ama-assn.org/delivering-care/ethics/informed-consent> [<https://perma.cc/NS5E-VDFY>] (last visited Oct. 6, 2022).

171. *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) (establishing a physician’s duty to obtain a patient’s informed consent prior to beginning treatment).

procedure is recommended, and any effects, alternatives, or possible complications associated with it.¹⁷² There are legal consequences if a doctor fails to secure informed consent for a procedure.¹⁷³ “Consent” represents “the cornerstone of ethical medical and surgical practice because it enshrines respect for patients.”¹⁷⁴ It is a process, not merely a signature on a form. Through this process Mbeti should have been empowered to accept or decline Dr. Amin’s medical care.¹⁷⁵ Instead, Mbeti did not know she was going to be put under general anesthesia, and after she awoke, she had no idea what had happened to her.

Informed consent is particularly challenging in the context of immigration detention; language barriers, stress, lack of opportunity for a second opinion, and the inherent power imbalance between detainees and their custodians conspire to diminish a patient’s ability to meaningfully participate in medical decisions.¹⁷⁶ As Mbeti said when interviewed by the *LA Times* about her experiences with medical treatment while at ICDC: “I don’t have a choice in here.”¹⁷⁷

Doctors have an even higher duty of care when the patient has a significant psychiatric diagnosis.¹⁷⁸ Mbeti was receiving regular anti-psychotic medications and had been on suicide watch.¹⁷⁹ She was adjudicated “mentally incompetent” by the immigration judge prior to Dr. Amin’s treatment of her. The attorney representing the Department of Homeland Security during Mbeti’s competency

172. *Id.*

173. *Matthies v. Mastromonaco*, 733 A.2d 456, 463 (N.J. 1999) (establishing that a failure to obtain informed consent amounts to medical negligence).

174. James L. Bernat & Lynn M. Peterson, *Patient-Centered Informed Consent in Surgical Practice*, 141 *ARCHIVES SURGERY* 86, 87 (2006).

175. See GINNY L. RYAN, KRISTYN BRANDI & THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS COMM. ON ETHICS, ACOG COMMITTEE OPINION NO. 819: INFORMED CONSENT AND SHARED DECISION MAKING IN OBSTETRICS AND GYNECOLOGY, at e34 (2021), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology.pdf> [<https://perma.cc/MD2G-YRJH>].

176. Eugenia Pyntikova, *Mental Illness in Immigration Detention Facilities: Searching for the Rights to Receive & Refuse Treatment*, 25 *GEO. IMMIGR. L.J.* 151, 170 (2010); see also RYAN ET AL., *supra* note 175, at e35–e36 (explaining that cultural and language barriers may lead to ambiguity and confusion when communicating medical information which may complicate informed consent).

177. O’Toole, *supra* note 164 (discussing her horror if she later discovered that she could not have children because of the procedure she underwent by Dr. Amin).

178. PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBS. IN MED. & BIOMEDICAL & BEHAV. RSCH., *MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP* 169–75 (1982); see also Loren H. Roth, Alan Meisel & Charles W. Lidz, *Tests of Competency to Consent to Treatment*, 134 *AM. J. PSYCHIATRY* 279, 279–80 (1977) (detailing various tests of competency to consent to treatment).

179. Irwin County Detention Center medical records on file with the author.

inquiry¹⁸⁰ actually requested that competency hearing, and even submitted psychiatric records in anticipation of the same.¹⁸¹

By the time we spoke to Mbeti in September of 2020, she still had not seen her gynecological medical records despite making multiple requests with the facility. It had been 14 months since she had been forced to undergo the invasive surgical procedure at the hands of Dr. Amin. We obtained those records in October 2020. A medical review team composed of nine board-certified gynecologists and two advanced practice nurses scrutinized over 3,200 pages of medical records of nineteen women alleging medical abuse.¹⁸² Their initial findings revealed a pattern of unindicated and nonconsensual diagnostic procedures and surgeries.¹⁸³ Specifically, the medical review team determined that “Dr. Amin subjected women to aggressive and unethical gynecological care. . . . Dr. Amin quickly scheduled surgeries when non-surgical options were available, misinterpreted test results, performed unnecessary injections and treatments, and proceeded without informed consent.”¹⁸⁴ On October 26, 2020, Dr. Ted Anderson and Dr. Haywood Brown testified to this medical abuse before a closed session of Democratic members of the Senate.¹⁸⁵ The hearings provoked

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180. See *In re M-A-M-*, 25 I. & N. Dec. 474, 479–83 (BIA 2011) (providing the first ever guidance for immigration judges to identify possible incompetence, evaluate a respondent’s competence, and proscribe safeguards where required to comport with fundamental fairness); see also Memorandum from Brian O’Leary, *supra* note 152 (mandating that immigration judges conduct competency hearings for detained, unrepresented individuals where the judge has a bona fide doubt as to the respondent’s ability to meaningfully participate in their own removal proceeding).
181. On file with the author.
182. TED ANDERSON, HAYWOOD L. BROWN, SARAH COLLINS, CARON JO GRAY, JULIA GEYNISMAN-TAN, GERI D. HEWITT, MARGARET MUELLER, ANDREA SHIELDS, GEOFFREY SCHNIDER, MICHELLE COLLINS & SUZANNE MCMURTRY BAIRD, EXECUTIVE SUMMARY OF FINDINGS BY THE INDEPENDENT MEDICAL REVIEW TEAM REGARDING MEDICAL ABUSE ALLEGATIONS AT THE IRWIN COUNTY DETENTION CENTER 1, 5 (2020), <https://www.scribd.com/document/481646674/Executive-Summary-of-Medical-Abuse-Findings-About-IrwinDetention-Center#download> [<https://perma.cc/GD2M-W588>]; see Letter from Jeffrey A. Merkley, U.S. Sen., et al. to Tony H. Pham, Senior Off. Performing the Duties of the Dir., Dep’t of Homeland Sec., et. al (Nov. 19, 2020), https://www.warren.senate.gov/imo/media/doc/STOP%20Removal%20of%20potential%20witnesses%20at%20ICDC_%20Bi-Cameral%20Letter.pdf [<https://perma.cc/B5WX-JRMS>].
183. ANDERSON et al., *supra* note 182.
184. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 117TH CONG., MEDICAL MISTREATMENT OF WOMEN IN ICE DETENTION 10 (2022), <https://www.hsgac.senate.gov/imo/media/doc/2022-11-15%20PSI%20Staff%20Report%20-%20Medical%20Mistreatment%20of%20Women%20in%20ICE%20Detention.pdf> [<https://perma.cc/9KLW-7MGN>].
185. *Id.* at 63–65; *Closed Session Briefing Before The Democratic Caucus of the United States Senate 2* (Oct. 26, 2020) (on file with author).

a formal Congressional investigation into medical abuse at ICDC by the House Oversight Committee and Homeland Security Committee.¹⁸⁶

It was through this independent review that Mbeti understood for the first time, as explained by a doctor, what had happened to her body while she was under anesthesia.¹⁸⁷ She wanted to know, would she be able to have children? This was a question she may have asked 14 months earlier before undergoing the procedure had she had the opportunity.

Many of the detained women—including Mbeti—started speaking publicly about their experiences with Dr. Amin.¹⁸⁸ They also agreed to provide testimony to federal investigators looking into possible wrongdoing. Survivors started coming forward from all over the world—some who had been released from detention years earlier, others who had been deported long ago.¹⁸⁹ They were predominantly women of color and had encountered ICE for a constellation of reasons: Some were in abusive relationships where the abuser called the police, some were seeking asylum, and others, like Mbeti, entered the deportation pipeline following an encounter with law enforcement.¹⁹⁰ Many were mothers of U.S.-citizen children or had spouses, parents, and siblings who were lawfully present in the U.S.¹⁹¹ In swift succession, the women detained at ICDC who spoke out about their experiences were expeditiously deported or slated for imminent removal.¹⁹² Mbeti was one of them.

Mbeti had an initial interview about her medical abuse with federal investigators from the Department of Justice and the Department of Homeland

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186. Matthew Choi, *House Dems Subpoena ICE Detention Facility Over Allegations of Medical Abuse*, POLITICO (Nov. 25, 2020), <https://www.politico.com/news/2020/11/25/ice-detention-facility-subpoena-440681> [<https://perma.cc/TPV3-D2ZF>].
187. Oldaker Complaint, *supra* note 5, at 69.
188. Michelle Hackman & Alicia A. Caldwell, *Pattern of Unnecessary Gynecological Treatments Identified at Georgia ICE Facility*, WALL ST. J. (Oct. 27, 2020), <https://www.wsj.com/articles/pattern-of-unnecessary-gynecological-treatments-identified-at-georgia-ice-facility-11603803379> [<https://perma.cc/D9QK-W72N>].
189. John Washington & José Olivares, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, THE INTERCEPT (Oct. 27, 2020), <https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/> [<https://perma.cc/NJ2N-ZFC8>].
190. See Oldaker Complaint, *supra* note 5, at 67–68; O’Toole, *supra* note 164.
191. See BHATT ET AL., *supra* note 38, at 3.
192. See Amy Goodman, “They Wanted to Take My Womb Out”: Survivor of Medical Abuse in ICE Jail Deported After Speaking Out, DEMOCRACY NOW (Oct. 26, 2020), https://www.democracynow.org/2020/10/26/ice_irwin_detention_center_invasive_surgeries [<https://perma.cc/SEK7-T6P9>]; Adolfo Flores, *ICE Is Trying to Deport Immigrant Women Who Witnessed Alleged Misconduct by a Gynecologist, Attorneys Say*, BUZZFEED NEWS (Nov. 11, 2020), <https://www.buzzfeednews.com/article/adolfoflores/ice-deporting-gynecologist-witnesses> [<https://perma.cc/HEQ9-QZSZ>]; Nomaan Merchant, *US Departs Migrant Women Who Alleged Abuse by Georgia Doctor*, AP NEWS (Nov. 11, 2020), <https://apnews.com/article/us-deports-migrant-women-georgia-doctor-b6a5fc1e2d4a822eb3767f9a858ea670> [<https://perma.cc/P4RN-R7GJ>]; see also Oldaker Complaint, *supra* note 5, at 1–2 (detailing the retaliation Petitioners faced for speaking out about abuse they suffered, including deportation or threats to deport Petitioners).

Security. Within hours, ICE informed Mbeti that a hold on her deportation had been lifted.¹⁹³

ICE has a policy of not pursuing the removal of potential witnesses, victims, and plaintiffs in criminal or civil matters,¹⁹⁴ and yet one by one the women at ICDC were at risk of retaliatory deportation. Advocates were increasingly concerned that ICE’s decision to deport cooperating witnesses in an active investigation amounted to an obstruction of justice, not only by literally removing the evidence (the women’s bodies and testimony), but also by chilling the will of other potential witnesses who wanted to come forward. These removals shocked members of Congress as well, who called for ICE to cease the removal of women who were cooperating with the investigation.¹⁹⁵

I filed an emergency request for Mbeti’s release the night we learned that her hold had been lifted. The request was based on the unconstitutionally long period of time Mbeti had been in ICE custody following her removal order.¹⁹⁶ The following day I filed a second request, this time predicated on the possibility that Mbeti would face serious harm or death if she contracted COVID-19 due to several comorbidities.¹⁹⁷ ICE immediately denied both requests, stating that Mbeti “would pose a flight risk and threat to public safety” if released,¹⁹⁸ and that her removal had been set for early December.¹⁹⁹

Mbeti was desperate to be released. Her father’s health was not well, and she was now watching helplessly as the story of medical battery at ICDC—and now ICE retaliation against the survivors, including herself²⁰⁰—unfolded in national and international media. Release seemed like a dim prospect; she had already been detained nearly 600 days. This was an extraordinarily long time, even by U.S. immigration detention standards. In 2019, the average period of

193. Oldaker Complaint, *supra* note 5, at 22 (“Moreover, Federal and ICDC Respondents attempted to deport Petitioners Oldaker, Ndonga, and Reyes Ramirez soon after they spoke out about the abuse they suffered or made known that they were willing to speak out. *Petitioner Ndonga, for example, was informed by ICE that it had lifted a hold on her deportation within hours of her speaking with investigators from DOJ, DHS OIG, and FBI*”) (emphasis added).

194. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t, to All Field Off. Dirs., All Special Agents in Charge & All Chief Couns. (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> [<https://perma.cc/S4KX-U7B8>] (“[I]t is . . . against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties”).

195. Letter from Jeffery A. Merkle et. al, *supra* note 182.

196. On file with the author. This request was made pursuant to the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which placed constitutional limits on how long a person can be detained post-final order of removal.

197. On file with the author. This request was made pursuant to the preliminary injunction issued by the Central District of California in *Frailhat v. U.S. Immigr. & Customs Enforcement*, No. 5:19-cv-01546-JGB-SHK, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020).

198. Email from the Atlanta Field Office on file with the author.

199. Email from the Atlanta Field Office on file with the author.

200. Goodman, *supra* note 192; Flores, *supra* note 192; Merchant, *supra* note 192.

detention was 55 days.²⁰¹ For those fighting their removal before an immigration judge, the average period of detention rises to roughly 180 days.²⁰² For detainees suffering from mental health issues, the time stretches even further in large part because they do not have counsel.²⁰³ Navigating labyrinthine immigration laws can be challenging even for skilled practitioners; for Mbeti, it was nearly impossible.

Yanira Oldaker was detained alongside Mbeti. Her story is more widely known than Mbeti's for several reasons. First, the retaliation Yanira experienced was equally swift but more dramatic: not long after Yanira's name became known to ICE as a victim and witness, her commissary account was "zeroed out" and she was scheduled for a flight to Mexico.²⁰⁴ Second, a cinematic, eleventh hour emergency lawsuit staved off Yanira's removal as she was literally sitting on the tarmac awaiting her flight.²⁰⁵ And third, as the lead plaintiff Yanira became the literal and figurative face of the class action lawsuit *Oldaker v. Giles*. The lawsuit was brought by fourteen detainees who had been subject to similar medical abuse while in ICE custody.

The uproar was effective. ICE paused the deportations of those not yet deported.²⁰⁶ Over the ensuing weeks, advocates successfully sought the release of every plaintiff and witness held at ICDC.²⁰⁷ Mbeti was released in mid-December 2020. By April 2021, zero women remained detained at ICDC. In May 2021, DHS announced it would terminate its contract with ICDC.²⁰⁸ In

201. AM. IMMIGR. COUNCIL, *supra* note 27.

202. *Id.*

203. Pyntikova, *supra* note 176, at 167 (attributing longer periods of detention among this population to not having counsel and because immigration judges, who are unsure how to proceed, set the case for multiple master calendars).

204. Oldaker Complaint, *supra* note 5, at 30–31.

205. Adam Gabbatt, 'He Hurt Me': Migrants Who Accused ICE Gynecologist of Abuse Speak Out, THE GUARDIAN (Nov. 21, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/nov/21/congress-ice-gynecologist-abuse-allegations-petition> [<https://perma.cc/366Q-5MAE>]; see Gianna Toboni, Carter Sherman, Ana Sebescen, Nicole Bozorgmir & Neda Toloui-Semnani, ICE Tried to Deport Yet Another Potential Witness in the Gynecology Scandal, VICE (Nov. 10, 2020, 7:53 PM), <https://www.vice.com/en/article/wx85k5/ice-tried-to-deport-yet-another-potential-witness-in-the-gynecology-scandal> [<https://perma.cc/SFF7-VBXL>]; Jasmine Aguilera, More Than 40 Women File Class Action Lawsuit Alleging Medical Misconduct by ICE Doctor at Georgia Detention Center, TIME (Dec. 22, 2020, 2:55 PM), <https://time.com/5924021/women-lawsuit-irwin-detention-ice/> [<https://perma.cc/8842-3G53>].

206. Colin Dwyer, U.S. Agrees to Pause Deportations for Women Alleging Abuse At ICE Facility, NPR NEWS (Nov. 24, 2020, 3:43 PM), <https://www.npr.org/2020/11/24/938456423/u-s-agrees-to-pause-deportations-for-women-alleging-abuse-at-ice-facility> [<https://perma.cc/X3RH-YLJJ>].

207. See Press Release, Nat'l Immigr. Project of the Nat'l Laws. Guild, Last Petitioner in Georgia Gynecological Abuse Class Action Secures Release from ICE Custody (Jan. 22, 2021), https://nipnl.org/pr/2021_22Jan_oldaker-v-giles.html [<https://perma.cc/YE3S-R79E>].

208. See Press Release, Dep't of Homeland Sec., ICE to Close Two Detention Centers (May 20, 2021), <https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers>

December 2021, four congressional committees, including the Committee on Homeland Security and the Subcommittee on Border Security, Facilitations, & Operations, urged the Georgia Composite Medical Board to open a full investigation into Dr. Amin.²⁰⁹

The *Oldaker* litigation on behalf of the ICDC women did not materialize out of thin air. It was the result of years of advocacy, exposure, and hard work by local organizers and attorneys—and most crucially, the women of ICDC themselves.²¹⁰ The tragedy is that horrific treatment while in ICE custody is not rare. Azadeh Shahshahani, the Legal & Advocacy Director at Project South located in Atlanta, points out that other local detention centers are equally inhumane but lack ICDC’s notoriety.²¹¹ For example, one of the facilities where the last of the ICDC women was transferred to has one of the highest death rates in the United States.²¹² As recently as 2017, the Stewart Detention Center had no psychiatrist on staff, and the Inspector General described its medical staffing shortages as “chronic.”²¹³ Groups such as the Detention Watch Network have come out in force to point out that ICDC is “emblematic of how the immigration detention system as a whole is inherently abusive, unjust and fatally flawed beyond repair.”²¹⁴

[<https://perma.cc/6MM7-XDMH>]; Maria Sacchetti, *ICE To Stop Detaining Immigrants at Two County Jails Under Federal Investigation*, WASH. POST (May 20, 2021, 10:00 AM), https://www.washingtonpost.com/immigration/ice-detentions-county-jails-halted/2021/05/20/9c0bdd1e-b8de-11eb-a6b1-81296da0339b_story.html [<https://perma.cc/7JAE-85ZZ>].

209. Letter from Bennie G. Thompson, Chairman, Comm. on Homeland Sec., et. al. to Hon. Alejandro Mayorkas, Sec’y of Homeland Sec. (Dec. 3, 2021), <https://homeland.house.gov/imo/media/doc/Letter-DHS%20ICDC%20Update.pdf> [<https://perma.cc/W2JK-HCET>].
210. See, e.g., HUM. RTS. WATCH, *DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION* (2009), <https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states> [<https://perma.cc/37BP-347F>].
211. See Charles R. Davis, *ICE Transfers Women Out of Detention Center That Became Infamous Over Allegations of Forced Sterilization*, BUS. INSIDER (May 3, 2021, 11:29 AM), <https://www.businessinsider.com/ices-irwin-county-detention-center-transfers-remaining-women-lawyer-says-2021-4> [<https://perma.cc/D5J4-8VFA>].
212. See Tina Vásquez, *ICE Is Now Detaining Women At One Of The Nation’s Most Deadly Facilities*, PRISM (Feb. 2, 2021), <https://prismreports.org/2021/02/02/ice-now-detaining-women-at-one-of-nations-most-deadly-facilities/> [<https://perma.cc/37UK-XP7L>].
213. Elly Yu, *Exclusive: An ICE Detention Center’s Struggle with ‘Chronic’ Staff Shortages*, WABE (May 31, 2018), <https://www.wabe.org/exclusive-an-ice-detention-centers-struggle-with-chronic-staff-shortages/> [<https://perma.cc/9HFT-LU5D>] (“According to the [Department of Homeland Security Office of Inspector General], Stewart’s health services administrator noted ‘chronic shortages of almost all medical staff positions.’ As of February 2017, the facility had no psychiatrists and about one in four registered nurse positions were vacant. Stewart’s health administrator . . . also noted the lack of mental health treatment centers in the local area.”).
214. Press Release, Det. Watch Network, *After Years of Advocacy, No Immigrant Women Are Currently Detained at the Irwin County Detention Center* (Apr. 29, 2021), <https://www.detentionwatchnetwork.org/pressroom/releases/2021/after-years-advocacy->

Elected officials have done little to address our broken immigration and detention system. President Biden promised on the campaign trail to end private immigration detention; however, his January 26, 2021, executive order directing the elimination of federal contracts with privately operated detention centers only applied to institutions holding criminal detainees.²¹⁵ ICE detainees are outside the order's ambit.²¹⁶ Put another way, ICDC may be closing, but the mass incarceration of immigrants shows no sign of ending. Unless and until we abolish all immigration detention and pursue other major systemic changes, horrors like what happened to the women of ICDC can happen again.

II. SITUATING MBETI WITHIN THE WIDER IMMIGRANT POPULATION

One risk of sharing a client's individual story as a vehicle for discussion is that critics can argue that the individual's lived experience is merely anecdotal or not widely replicated outside of themselves. In this Part, I look beyond Mbeti to place her within the wider immigrant populations of which she is a member. Doing so not only illustrates how many similarly situated persons may have been exposed to similar treatment within our systems, but also how many might be impacted by the proposed changes outlined below in Part III.

Publicly available annual reports provide aggregate data on immigrant populations in a given year. The data, however, categorizes individuals by "country of birth" rather than by race.²¹⁷ The same is true for data-viewing tools such as the ones created by the Transactional Records Access (TRAC) out of Syracuse University, which permits users to organize immigration data by age, gender, citizenship, detention location, and so on.²¹⁸ A person's country of origin does not capture their race. Honduras, for example, has a population of over 10 million²¹⁹ and yet the Garifuna population (descendants of African-Caribbean

no-immigrant-women-are-currently-detained-irwin-county [https://perma.cc/CR3C-PWHC].

215. See Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021).
216. Christina Vukovich, *The Executive Order Loophole: Private Prisons and ICE*, ACLU OF OHIO (Oct. 7, 2021, 9:00 AM), <https://www.acluohio.org/en/news/executive-order-loophole-private-prisons-and-ice> [https://perma.cc/LZ9L-JVC5].
217. See DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., 2020 YEARBOOK OF IMMIGRATION STATISTICS, at iii–iv (2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/4M6G-L9VM] (providing statistics on permanent resident populations, naturalizations, and admissions all by country of birth, residence, or citizenship).
218. *Immigration and Customs Enforcement Detention*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/detention/> [https://perma.cc/Y4EX-5BB3] (last visited Sept. 29, 2022).
219. *Honduras Population 2022 (Live)*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/honduras-population> [https://perma.cc/4X88-YZHS] (last visited Sept. 29, 2022).

exiles from St. Vincent) numbers around 43,000.²²⁰ Complicating this issue is that race and Blackness are defined differently across the diaspora.²²¹

The Black Alliance for Just Immigration (BAJI), together with NYU School of Law's Immigrant Rights Clinic, performed a careful examination of data obtained from the American Community Survey, the 2014 Yearbook of Immigration Statistics published by DHS, and TRAC to calculate the number of Black immigrants in the United States.²²² They concluded that there are around 5 million foreign-born Black individuals in the United States,²²³ which represents 8.7 percent of the overall immigrant population.²²⁴

The BAJI study also carefully examined raw data collected by the immigration court database, combined with ICE's published reports on detention populations, and tools on TRAC to gain insights into the number of Black immigrants in detention.²²⁵ They found that of the entire detained population in removal proceedings in the year 2014 (which totaled 128,872), Black immigrants made up almost 5 percent, or 6,223.²²⁶ Black immigrants were significantly more likely to be facing removal on criminal grounds.²²⁷ Nearly one in every five detained persons in removal proceedings, or 17.4 percent, was Black.²²⁸ Detained Black immigrants remain in detention longer than any other group, and are six times more likely to be placed in solitary confinement.²²⁹

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220. *Garifuna*, MINORITY RTS. GRP. INT'L (May 2018), <https://minorityrights.org/minorities/garifuna-2/#:~:text=Gar%C3%ADfuna%20are%20the%20third%20largest,coast%20in%20the%20eighteenth%20century> [https://perma.cc/57CR-PXGR].
221. See ALEJANDRO SANCHEZ-LOPEZ, MANUEL PASTOR, VÍCTOR SÁNCHEZ, BENJAMIN NDUGGA-KABUYE & CARL LIPSCOMBE, USC CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION & BLACK ALL. FOR JUST IMMIGR., *THE STATE OF BLACK IMMIGRANTS IN CALIFORNIA* 7 (Opal Tometi ed., 2014) (recognizing that “race and Blackness can be defined differently across the diaspora, and oftentimes immigrants come from a context that does not align with how race is perceived in the United States.”).
222. MORGAN-TROSTLE ET AL., *supra* note 1, at 6.
223. *Id.* at 10.
224. *Id.* at 11.
225. *Id.* at 7.
226. *Id.* at 26.
227. *Id.*
228. *Id.*
229. Peniel Ibe, *Immigration Is a Black Issue*, AM. FRIENDS SERV. COMM.: NEWS & COMMENT. (Feb. 16, 2021), <https://www.afsc.org/blogs/news-and-commentary/immigration-black-issue> [https://perma.cc/WQ97-Z4N7] (“Advocates recorded that the lengthiest recorded ICE detentions in 2019 were of Black African migrants. Black immigrants are also six times more likely to be sent to solitary confinement than other groups.”).

One in four people with serious mental health disabilities²³⁰ have been arrested by the police,²³¹ and 10–20 percent of incarcerated individuals live with mental health disabilities.²³² An arrest that may only lead to probation for a citizen can trigger months or years of immigration detention, and ultimately, deportation for a noncitizen.²³³

Arresting individuals with serious mental health concerns²³⁴ creates a cycle of incarceration that harms not only the directly impacted individual, but also their families and communities.²³⁵ Most crimes committed by persons with mental health issues are minor in nature (vagrancy, trespassing, public urination, or property damage) but lead to incarceration rather than hospitalization.²³⁶ Encounters with police are far more fatal for those with serious mental health concerns than for those without—up to 16 times more so.²³⁷ Prisons and jails are ill-equipped to properly care for and treat those with serious mental health

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230. E. FULLER TORREY, LISA DAILEY, H. RICHARD LAMB, ELIZABETH SINCLAIR & JOHN SNOOK, TREATMENT ADVOC. CTR., TREAT OR REPEAT: A STATE SURVEY OF SERIOUS MENTAL ILLNESS, MAJOR CRIMES AND COMMUNITY TREATMENT 8 (Sept. 2017), <https://www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf> [https://perma.cc/KGX7-NTC3] (“This term is defined differently in different studies but almost always includes those diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder or major depression with psychotic features.”).
231. *Mental Health in Georgia*, *supra* note 53.
232. *See* TORREY ET AL., *supra* note 229, at 28.
233. *See* Morawetz, *supra* note 70, at 1939.
234. E. FULLER TORREY, AARON D. KENNARD, DON ESLINGER, RICHARD LAMB & JAMES PAVLE, TREATMENT ADVOC. CTR. & NAT’L SHERIFFS’ ASS’N, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 8, 13 (2010) [hereinafter TORREY ET AL., MORE MENTALLY ILL PERSONS IN JAILS AND PRISONS] (placing the U.S.’s hospitalization to incarceration ratio of the seriously mentally ill at a level not seen since 1840); *Prisons See More Inmates Requiring Mental Health Care*, GWINNETT DAILY POST (Jan. 25, 2016), https://www.gwinnettdaily.com/archive/prisons-see-more-inmates-requiring-mental-health-care/article_969866d5-9f8c-5b2e-bc15-0f01829c4c40.html [https://perma.cc/7LV9-ZB49] (“‘The schizophrenic and chronically ill mental population just exploded and we found ourselves being the hospital,’ [Dr. Dana] Tatum said.”).
235. *See* R. L. Elliott, Editorial, *Jailing Mentally Ill for Minor Offenses Helps No One*, THE ATLANTA J.-CONST., Apr. 4, 2002, at A16.
236. E. FULLER TORREY, JOAN STIEBER, JONATHAN EZEKIEL, SIDNEY M. WOLFE, JOSHUA SHARFSTEIN, JOHN H. NOBLE & LAURIE M. FLYNN, NAT’L ALL. FOR THE MENTALLY ILL & PUBLIC CITIZEN’S HEALTH RSCH. GRP., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 46-48 (1992) [hereinafter TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL] (surveying prisons and jails throughout the United States and finding that the most common offenses leading to the jailing of mentally distressed people were assault/battery, theft, disorderly conduct, alcohol and drug-related charges, and trespassing).
237. DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [https://perma.cc/TPP5-7DWH] (concluding through examining official and unofficial reports that “a minimum of 1 in 4 fatal police encounters ends the life of an individual with severe mental illness.”).

disabilities,²³⁸ resulting in precipitously higher rates of inmate placement in solitary confinement,²³⁹ victimization by other inmates,²⁴⁰ and self-harm and suicide.²⁴¹ Prolonged periods of improper or incomplete care have extremely detrimental effects on inmates with serious mental health concerns.²⁴²

Data relating to the number of immigrants in removal proceedings who suffer from mental health concerns is difficult to find. Some insights can be gained into the question, however, by looking at ICE statistics relating to mental health care. In 2020, ICE’s Health Service Corps performed 69,985 “mental health interventions.”²⁴³ This number does not tell us how many discreet individuals had an intervention, but in confidential memos the Division of Immigration Health Services estimated that around 15percent of its detained population had serious mental health concerns.²⁴⁴ Applying that figure to today’s detention numbers (current estimates place the detained population at around

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238. Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, MARSHALL PROJECT (Nov. 21, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons?ref=hp-1-100%20> [<https://perma.cc/H3CJ-9QWA>] (uncovering that staffing shortages resulted in the converting of mental health care professionals to inmate escorts and corrections officers, and the downgrading of individuals’ mental health classifications to save money); OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS 34 (2017), <https://oig.justice.gov/reports/2017/e1705.pdf> [<https://perma.cc/R2MK-MVH6>] (“We found that the [Bureau of Prisons] cannot accurately determine the number of inmates who have mental illness, including inmates in [Restrictive Housing Units], because institution staff do not always document inmates’ mental disorders.”).
239. AZZA ABUDAGGA, SIDNEY WOLFE, MICHAEL CAROME, AMANDA PHATDOUANG & E. FULLER TORREY, PUB. CITIZEN’S HEALTH RSCH. GRP. & TREATMENT ADVOC. CTR., INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF’S PERSPECTIVES 11–12 (2016), <https://www.treatmentadvocacycenter.org/storage/documents/jail-survey-report-2016.pdf> [<https://perma.cc/6Q6K-3GRT>] (surveying jails around the U.S., nearly 70% of which reported segregating individuals with serious mental health disabilities).
240. TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL, *supra* note 235, at 58–60.
241. TORREY ET AL., MORE MENTALLY ILL PERSONS IN JAILS AND PRISONS, *supra* note 233, at 10 (referencing studies showing that approximately half of all inmate suicides are committed by persons suffering from serious mental health disorders).
242. TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL, *supra* note 235, at 62–64 (providing testimonials from impacted individuals and their families regarding a severe psychiatric and medical deterioration during periods of incarceration).
243. U.S. IMMIGR. & CUSTOMS ENF’T, ICE HEALTH SERVICE CORPS FISCAL YEAR 2020 ANNUAL REPORT 11 fig.3 (2020), <https://www.ice.gov/doclib/ihsc/IHSCFY20AnnualReport.pdf> [<https://perma.cc/9M5J-MDZ3>].
244. Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment*, WASH. POST (May 13, 2008), https://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html [<https://perma.cc/2LL8-7A3B>].

50,000),²⁴⁵ it is possible that 7,500 people currently in immigration detention have serious mental health disabilities.

Between 2013 and January 2020, the NQRP provided court-appointed counsel to over 2,000 detained immigrants with mental health concerns.²⁴⁶ The problem with this information is that it applies to a very specific set of data points. First, the noncitizens provided counsel through the NQRP must have been detained;²⁴⁷ second, they must have been adjudicated “mentally incompetent” by an immigration judge following a Judicial Competency Inquiry.²⁴⁸ Those who are not detained are not reflected in the NQRP’s statistics; nor does this statistic capture those left outside the competency hearing process because the IJ did not find *indicia* of incompetence, and therefore did not conduct a competency hearing in the first place. This data does tell us, at a bare minimum, that the number of similarly situated detainees in removal proceedings with serious mental health concerns numbers in the thousands—and likely much higher.

III. REIMAGINING MBETI’S STORY IN A QUEST TO FIND SOLUTIONS

The recommendations below, if implemented, will positively impact the lives of many immigrants, from Black noncitizens experiencing racialized criminalization and higher rates of detention and removal proceedings, to all noncitizens (detained and non-detained) with serious mental health disabilities. Implementing these recommendations are vital; if not for the national spotlight on the human rights crisis at ICDC and the flurry of litigation filed in its wake to stop the removal of potential and cooperating witnesses, Mbeti would have been deported to Kenya long ago.

Mbeti is out of detention on an order of supervision. But life is not easy for her. We speak several times a week whenever she can borrow a phone or get ahold of a burner. Sometimes she will call from a psychiatric center where she is receiving temporary emergency care. The lawsuit has brought her unwelcome attention in her local community. “It feels like I have a scarlet letter on me,” she said recently. She is undocumented, uninsured, experiencing housing insecurity, and only intermittently medicated. She lost her disability benefits and driver’s license. She cannot get a job. She does not have a social worker. She does not know what the future holds.

245. DET. WATCH NETWORK, IMMIGRATION DETENTION 101, <https://www.detentionwatchnetwork.org/issues/detention-101> [https://perma.cc/SB6H-8568] (last visited Oct. 6, 2022).

246. Corradini, *supra* note 160.

247. Wilson, *supra* note 150, at 31.

248. EXEC. OFF. FOR IMMIGR. REV., PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 3 (2013), <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf> [https://perma.cc/HE3U-Y2DQ] (“The judge asks a series of questions to determine whether there is ‘reasonable cause’ to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find that the respondent is competent or incompetent to represent him- or herself.”).

Reflecting on Mbeti's life, I wonder what may have changed the landscape in which she found herself at each stage. The "what went wrongs" were so many, and so varied. After all, I chose to tell Mbeti's story precisely because her life trajectory through multiple systems contained so many overlapping and intersectional injustices. Her arc was always downward, a seemingly irreversible Matthew effect²⁴⁹ up until when she became part of the Oldaker litigation.

In Part III, let us reimagine Mbeti's life, only this time asking at each pivotal stage: what may have modified the outcome? How realistic is the modification? What agency, branch of government, or individual could execute the desired modification? How can we as advocates support the change?

Just as we walked step-by-step through Mbeti's actual life to illustrate how systems failed and punished her, I would like to now reconceptualize her life in a search for ways to support and empower her. The process enables us to envision solutions while acknowledging that social justice happens on a continuum rather than all at once or by one singular action. We cannot literally undo Mbeti's experience. But embracing theories of change, prioritizing dignity, and pursuing practical adaptations in law and policy can bring about durable improvements—and hopefully prevent replication of her experience in the future.

A. Dispelling the Myth of the "Criminal Alien": How Racial Justice, Criminal Justice, and Immigrant Justice can Work Together to Support People in Mbeti's Position.

The mythology of the "criminal alien" holds many in its thrall. The "good" versus "bad," "deserving" versus "unworthy" dichotomy replicates in all systems—and especially in the space where the criminal justice system meets the immigration system. Even self-identified liberals continue to embrace the nomenclature, wielding it to categorize which immigrants deserve to be represented by a defense attorney and which do not.²⁵⁰

When I argued that she was not a danger to the community, Mbeti's deportation officer snorted in disbelief in October 2020. "She's never committed an act of violence against any person," I said. He laughed derisively and responded that she was an *aggravated felon*.²⁵¹ He laughed for some time thereafter, like I had told him the funniest joke in the world.

249. Also referred to as the "Cumulative Advantage/Disadvantage Theory," whereby those with advantage become exponentially advantaged over time, while those with disadvantage become exponentially disadvantaged over time. See Robert K. Merton, *The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property*, 79 *ISIS* 606, 606–07 (1988).

250. See DAS, *supra* note 73, at 9–12.

251. See *supra* notes 66–67 and accompanying discussion. The irony of the term "aggravated felony" is that many crimes that constitute aggravated felonies under the Immigration & Nationality Act are neither aggravated, nor felonies. Examples include simple theft, simple battery, filing a false tax return, failing to appear in court. And yet, despite the often trial and nonviolent nature of many so-called "aggravated felonies," the term is frequently used by

As I reflect on Mbeti's interactions with Georgia police officers, I revisit the instances where they turned her over to ICE and changed her life forever. I have discovered no evidence that she was ever charged with a crime following her last arrest because, as far as anyone knows, she had not committed one. And yet, the decision to involve ICE rather than a medical professional was structurally justified through the criminal alien narrative. Mbeti was a "danger to the community" and always would be.

Ferretting out, containing, and extracting so-called "dangers to the community" finds perfect synergy and a self-fulfilling prophecy when state and local laws, law enforcement, federal agencies, Congress, and the executive branch work together. We see and understand the interlocking parts of the chain of oppression: status-generated laws continually generate more "criminal aliens;" over-policing and targeting of Black communities create opportunities to convert Black and Brown noncitizens into a "criminal aliens;"²⁵² information and resource-sharing between ICE and local law enforcement through programs like Secure Communities and Section 287(g) conveniently usher the newly-branded "criminal alien" directly into ICE's hands.²⁵³ Congress repeatedly expands the definition of "deportable offense."²⁵⁴ Indefinite detention pairs perfectly with a strict deportation agenda because detention makes it harder for the "criminal alien" to get a lawyer and win their case.

The immigrant justice movement must continue to see racial justice as central to its mission and vice versa if either hope to interrupt mutually enforcing systems of subordination. Too often movements experience a "siloing" of their issues; the immigrant justice movement, for example, might say that so-called criminal aliens are not criminals in the "true sense, as many status-generated convictions (such as illegal entry or driving without a license) are incident to an individual's documentation status rather than their culpability. Immigration attorneys inadvertently enable this narrative when we argue, for example, that a client's convictions are not "depraved"²⁵⁵ because they do not carry the same culpability as "true crimes".

Siloing can occur on an advocacy level: proponents for criminal justice reform call for greater use of expungements for drug-related crimes,²⁵⁶ and for alternatives to incarceration such as increased use of diversion programs and pre-plea arrangements (enrollment in a rehabilitation or drug program in lieu of jail

ICE officials to justify negative discretionary determinations (such as release on bond, or permission to remain in the United States under a stay of removal).

252. DAS, *supra* note 73, at 84.

253. *See supra* notes 107–11.

254. *See* HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, 7–8, 32 (2021), <https://sgp.fas.org/crs/homsec/R45151.pdf> [<https://perma.cc/B3E9-RJG5>] (discussing how Congress has repeatedly expanded the categories of criminal activity that will subject a noncitizen to removal proceedings).

255. *See supra* note 62 (discussing Congress' creation of "crimes involving moral turpitude").

256. J.J. Prescott and Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [<https://perma.cc/K6YQ-93YM>].

time, counseling, or continued education, for example).²⁵⁷ These two reforms are critical. But neither will do much good for immigrants. Expunged convictions never go away for immigration purposes, while the Immigration and Nationality Act defines “conviction” in a manner that still views pre-trial adjudications and negotiations as actual convictions.

How can the racial justice and immigrants’ rights movements work together more effectively? We must envision ways to build coalitions and solidarity for the crucial work of challenging systemic oppression, without excluding one another. For example, we can unite to advocate that expungements have the same practical effect for immigrants as they do for citizens. We must also urge the repeal of laws that disproportionately impact immigrants and their communities. Such efforts serve both movements. The Black Alliance for Just Immigration is one example of an organization that seeks change through racial, social, and economic movement work, through scholarship and direct advocacy, and by directly supporting Black and immigrant communities by providing direct services and education.²⁵⁸

Both movements must urge President Biden to follow through on his campaign promise to end information and resource sharing between ICE and law enforcement by immediately ending these agreements. The President pledged to disentangle immigration enforcement from law enforcement, and yet as recently as January 21, 2022, U.S. Department of Homeland Security Secretary Alejandro Mayorkas lauded and urged continued cooperation between the two.²⁵⁹ Such a reversal on the part of the Biden administration erodes trust, undermines public safety, and creates multi-generational effects that impact not just immigrants of color, but all communities of color.

B. Integrating Disability Justice into Immigration Reform: The Need to Provide Counsel and Establish an Independent Judiciary.

Two adjustments to our immigration court system would go far in mitigating the disaster that was Mbeti’s competency case. First, we need to end the patchwork provision of counsel for detained, mentally incompetent respondents nationwide²⁶⁰—with its irregular IJ training on competency²⁶¹ and serious limitations outside the Ninth Circuit²⁶²—and instead provide universal counsel for all immigrants. And second, we need an independent judiciary for immigration judges

257. See generally *ACLU Policy Priorities for Prison Reform*, ACLU, <https://www.aclu.org/other/aclu-policy-priorities-prison-reform> [<https://perma.cc/LG4U-4WWA>] (last visited Oct. 3, 2022).

258. *Who We Are*, BLACK ALL. FOR JUST IMMIGR., <https://baji.org/who-we-are/> [<https://perma.cc/6Z3H-KKZ8>] (last visited Oct. 3, 2022).

259. Press Release, Nat’l Immigr. Proj. of the Nat’l Laws. Guild, DHS Secretary Mayorkas Comments to U.S. Mayors Betray Administration’s Commitment to Disentangle Local Police from Immigration Enforcement (Jan. 21, 2022), https://www.nationalimmigrationproject.org/pr/2022_21Jan_Mayorkas-sanctuary-remarks.html [<https://perma.cc/ACC2-WMK6>].

260. See *supra* notes 146–58.

261. See *supra* note 158 and accompanying text.

262. See *supra* notes 152–58 and accompanying text.

Turning a mental health justice lens on Mbeti’s proceedings reveal that EOIR utterly failed Mbeti as a disabled person, and violated her right to a fundamentally fair proceeding. Under the Rehabilitation Act, federal agencies have an affirmative obligation to ensure people like Mbeti have meaningful access to services and programs.²⁶³ EOIR falls under the Department of Justice, and must therefore comport with the requirements of the Rehabilitation Act. The Supreme Court recognized this duty in *Tennessee v. Lane* when it emphasized that agencies must make accommodations for disabled individuals to ensure their fundamental right of access to the courts under due process protections.²⁶⁴

The 2013 class action lawsuit *Franco-Gonzalez v. Holder* constituted a leap forward insofar as disability rights was concerned for noncitizens facing removal. Prior to *Franco*, only a small, opaque cluster of regulations—and one published Board decision²⁶⁵—provided guidance on how immigration courts should handle cases of respondents living with mental health concerns.²⁶⁶

On April 23, 2013, Judge Dolly Gee issued a partial judgment and permanent injunction that held that the Rehabilitation Act compelled EOIR to provide counsel to all detained, *pro se* respondents with an attorney to represent them in their entire removal proceedings, at government expense, following an incompetency adjudication.²⁶⁷ The *Franco* injunction and EOIR’s voluntary expansion of the *Franco* (the Nationwide Policy)²⁶⁸ are both extremely limited in scope²⁶⁹—and neither apply to Mbeti’s circumstance. While she was detained, she had counsel during her removal proceeding. The presence of counsel automatically placed her outside the NQRP.²⁷⁰

263. 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (1984) (applying the Rehabilitation Act to the Department of Justice).

264. *Tennessee v. Lane*, 541 U.S. 509 (2014).

265. *In re M-A-M-*, 25 I. & N. Dec. 474, 474 (BIA 2011).

266. See 8 C.F.R. § 103.8(c)(2)(ii) (2011) (providing that service of a Notice to Appear upon an incompetent noncitizen is only proper where effectuated in person upon someone with whom the individuals resides, and a near relative, guardian, committee or friend); 8 C.F.R. § 1240.10(c) (2021) (instructing that IJs cannot accept an admission of removability from a *pro se*, unaccompanied respondent who lacks competence); 8 C.F.R. §§ 1240.4, 1240.43 (2003) (permitting waiver of a respondent’s presence where, for reasons of mental incompetency, it is impracticable for the respondent to be present); Immigration and Nationality Act § 240(b)(3), 8 U.S.C. § 1229a(b)(3) (“the Attorney General shall prescribe safeguards to protect the rights and privileges” of noncitizens with serious mental health concerns).

267. *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013).

268. See *supra* notes 151–53 and accompanying text.

269. Neither *Franco* nor the Nationwide Policy offer guarantees for most individuals in non-detained proceedings (of which there are roughly 1.8 million pending cases before EOIR per the Syracuse University *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/LFG4-ENXZ>] (last visited Nov. 7, 2022), to any individuals in “expedited removal” (Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. 104-208 (1996), 110 Stat. 3009-546 § 302), or to any detained individuals in EOIR’s “Institutional Hearing Program” (created in 1998 to comply with the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which instructed the Attorney General to “begin any deportation proceeding [against removal noncitizens] as expeditiously as possible after the date of the conviction”), to name a few.

270. See *supra* note 150–52 and accompanying text.

Mbeti's competency hearing before the immigration judge and her subsequent *pro se* status before the BIA was a complete failure by our immigration court system. First, the immigration judge bungled the provision of "safeguards" by inappropriately supplanting Mbeti's testimony with that of a person who lacked personal knowledge her experiences.²⁷¹ In *Matter of M-A-M*, the Board recommended a non-exhaustive series of safeguards that might be appropriate given a particular respondent's needs, such as waiving a respondent's physical appearance, involving a family member or friend in the proceedings, or administratively closing proceedings altogether until such time that a respondent was restored to competence.²⁷² Such safeguards are mere suggestions, and are not appropriate for every respondent. The immigration judge's accommodations following Mbeti's incompetency determination did not match Mbeti's specific needs and limitations. She was never incompetent to relay her own experiences in Kenya. Had Mbeti been able to tell her own story she may have won her case.

Second, Mbeti should never have been without counsel during her many misfiled appeals, bond requests, and motions to reconsider before the Board. The BIA was aware that Mbeti had been adjudicated "incompetent to proceed without safeguards."²⁷³ The Board could have appointed counsel but was not *required* to because Mbeti was outside the Ninth Circuit and therefore outside the ambit of the "Franco protections."²⁷⁴ Had Mbeti been in the Ninth Circuit, the BIA would have had to, at a minimum, remand her case back to the IJ to determine whether additional safeguards (such as appointed counsel) were required, now that she was unrepresented.²⁷⁵

The two-tiered competency system for those detained in the three states in the Ninth Circuit versus those who are not results in wildly disparate treatment. This is a clear due process violation. Worse still, the voluntary arm of the appointed-counsel program (the Nationwide Policy) is susceptible to changes in executive power because EOIR falls under the executive branch. It would only take an unsympathetic EOIR Director, who is appointed by the Attorney General yet not subject to confirmation hearings, to decide that detained immigrants with mental health challenges are not worthy of appointed counsel. With a snap of the fingers, an already weak Nationwide Program comes to an end. Providing counsel to all sidesteps the need to reform or shore up the NQRP.

Providing counsel to all respondents serves EOIR in other ways as well, outside of addressing holes in the competency system. The ever-ballooning case backlog²⁷⁶ needs a multi-pronged solution of which counsel can play an important

271. See *supra* notes 140–41.

272. *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (BIA 2011).

273. See *supra* notes 140–45.

274. See *supra* notes 146–58.

275. Franco-Gonzalez Order, *supra* note 147, at *10 ("In the case of an unrepresented immigration detainee with an appeal pending before the Board who has not previously been determined to be a Class member, when *documentary, medical, or other evidence indicating that such individual falls under Section I.A.3.b comes to the Board's attention, the Board shall order a remand to the Immigration Judge with instructions to apply the procedures set forth in Section III.B of this Order*") (emphasis added).

276. *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche*

part. Providing counsel promotes judicial economy through the smooth administration of justice. There is wide consensus among judges that cases move more efficiently where counsel is present.²⁷⁷ On average represented respondents seek fewer continuances,²⁷⁸ create fewer delays through misfiling of evidence or applications, and understand what is expected of them in court.²⁷⁹ Fewer continuances means swifter resolution which reduces costs for the courts and ICE.²⁸⁰ It also would ensure a cleaner development of the record, as respondents like Mbeti would not be left alone to file a flurry of court documents and allegations that were unfounded in the law and which diverted court resources.

Regional universal representation programs like that in New York City have proven their economic feasibility.²⁸¹ Simply put, it is cheaper to provide immigrants with legal defense than it is to have them languish *pro se* before the courts. Professor Matthew Boaz provides a detailed analysis of court statistics and existing public-defender models that proves that appointed counsel for all immigrants could be funded handily by ending immigration detention.²⁸² If it costs \$127 a day on average to detain one person and there are over 50,000 people detained on an average day in the U.S.,²⁸³ ending detention would free up billions of dollars annually and could be redirected to providing counsel—in turn saving yet more federal dollars through the promotion of administrative economy.

Finally, providing counsel to all immigrants facing removal serves ICE's interests. If future court attendance is truly one of ICE's chief concerns,²⁸⁴ the data unequivocally shows that the most effective means of ensuring court compliance is to provide counsel to each and every immigrant in removal proceedings.²⁸⁵

Reform advocates have for years called for an independent judiciary for immigration judges. Such reform would have direct benefits for respondents such as Mbeti who have mental health concerns. Immigration judges were previously

of Cases, TRAC IMMIGR. (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/> [<https://perma.cc/2JKD-3L7Y>].

277. See Dara Lind, *A New York Courtroom Gave Every Detained Immigrant A Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer> [<https://perma.cc/C3D2-97WC>] (“In 2007, Judge Robert Katzmann of the Second Circuit Court of Appeals — which at the time was getting about 2,000 immigration appeals per year — delivered a lecture explaining that without effective counsel in immigration court, he and his judges weren’t getting a legal record they could rule on.”); see LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 56, app. 3 at 56 (June 7, 2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> [<https://perma.cc/F8TK-DCN7>].
278. See generally David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1827 (2016).
279. Ingrid Eagly & Steven Shafer, *Measuring in Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 861 (2020).
280. Eagly & Shafer, *supra* note 27, at 9 (“When immigrants are detained, lengthy judicial processes are costly not just for the courts, but also for detention officials who must pay for the immigrants’ housing costs during the pendency of the case.”).
281. See STAVE ET AL., *supra* note 30, at 5–6.
282. See Boaz, *supra* note 118 at 17–19, 23–24.
283. DET. WATCH NETWORK, *supra* note 244.
284. See *supra* note 124 and accompanying text.
285. Eagly & Shafer, *supra* note 279, at 860–61 (finding that people with legal representation received far fewer *in absentia* orders).

permitted to close a case against a respondent who had been adjudicated mentally incompetent and where the immigration judge felt that it was unfair to proceed until such time that the respondent was restored to competency.²⁸⁶ It is unclear from the record of Mbeti's second removal hearing whether the immigration judge contemplated closing the proceedings against her. Even if the judge had considered closing her case, his authority to do so had just been revoked in a unilateral, political maneuver by then-Attorney General Jeff Sessions.²⁸⁷ That same discretion would be restored two years later in another unilateral maneuver, this time by Attorney General Merrick Garland²⁸⁸—though too late to benefit Mbeti.

Immigration judges' decisions should not be cabined law, not political winds. Proposed legislation already exists to establish an Article I "United States Immigration Court" to replace EOIR as the principal adjudicatory forum, thereby severing it from the executive branch. The proposed legislation, championed by Representative Zoe Lofgren of California, is endorsed by the National Association of Immigration Judges, the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association.²⁸⁹ Among the many structural issues judicial independence would cure, it would return decisions like administrative-closure, termination, release, and other discretionary decisions firmly back in the hands of judges. This in turn would empower immigration judges to provide safeguards to respondents with serious mental health issues appearing before them.

Congress must pass the proposed legislation to inoculate the immigration courts from politics, and bring the immigration court system to a status that reflects our firmly held principles of justice.

C. The Moral, Legal, and Fiscal Imperative to Abolish Immigration Detention

Mbeti's story affirms the urgent necessity of ending ICE's inhumane and illegitimate policy of detaining immigrants. The policy's issues and ill effects abound. Detention is illegitimate because it does not support its stated purposes, inflicts suffering, and is legally indefensible. The threat of detention does not act as a deterrent for those coming to the United States, as the number of migrants—especially asylum seekers—has continued to rise;²⁹⁰ communities are less safe;²⁹¹ U.S. citizens suffer multi-generational effects where one or both caregiver is

286. See Amelia Wilson, Natalie H. Prokop & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 358–63 (2015).

287. See, e.g., *In re Castro-Tum*, 27 I. & N. Dec. 271, 271 (A.G. 2018) (revoking IJs' authority to administratively close cases in a decision by Attorney General Jeff Sessions).

288. *In re Cruz-Valdez*, 28 I. & N. Dec. 326, 329 (A.G. 2021).

289. Letter from Robert Carlson, Pres., Am. Bar Ass'n, et al. to U.S. House of Reps. & U.S. Sen. (July 11, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/update-final-organizational-letter-independent-immigration-court-7-11-19.pdf [https://perma.cc/PG4D-V55P].

290. *Supra* note 126 and accompanying text.

291. *Supra* notes 129–30.

removed from the home;²⁹² the federal government has lost control and oversight the nation's sprawling network of detention centers, and those inspections that do occur reveal substandard conditions and care;²⁹³ immigrants do not need detention to attend their hearings, as the vast majority, especially those with representation, present themselves to the immigration court;²⁹⁴ immigrant detention is deeply rooted in racism.²⁹⁵ We see its illegitimacy on full display at ICDC, but also in detention centers all throughout the U.S. And yet we seem to accept detention as an endemic part of the immigration ecosystem.

Ending detention would address one of the major due process issues exposed through Mbeti's experience as she interacted with the immigration courts as a person with serious mental health concerns. When I managed the NQRP nationwide as an Attorney Advisor with EOIR from 2016–2018, one of the greatest challenges in implementing the program throughout the United States was identifying attorneys and legal service providers who had the capacity, proximity, and expertise to accept NQRP contracts in the remote, rural areas where most detention centers are located.²⁹⁶ Detention centers' remoteness severs individuals from counsel,²⁹⁷ in turn rendering it nearly impossible for EOIR to fulfil its obligation under the Rehabilitation Act²⁹⁸ and its own stated policy. The state of Georgia perfectly illustrates the limitations of the Nationwide Policy. Georgia has nine ICE detention contracts (including ICDC)²⁹⁹ and three immigration courts,³⁰⁰ but only one NQRP legal service provider.³⁰¹ The imbalanced reach of the Nationwide Policy militates toward the abolition of immigration detention.

Calls to end detention are not new, though seldom is there a clear proposal as to how exactly that abolition could be achieved. Ending detention does not have to be a herculean feat, and it would not need Congressional support. The Biden administration has the ability to cancel all ICE contracts immediately. Canceling these contracts would dispossess ICE of its discretionary power to detain any noncitizen who does not have legal status in the United States,³⁰² and instead forces the agency to employ less harmful alternatives. On the campaign trail, President Biden promised to defund ICE detention, and to completely terminate contracts with for-profit corporations.³⁰³ And yet, he is expanding both.³⁰⁴ We

292. *Supra* notes 118–23.

293. *Supra* note 134 and accompanying text.

294. *Supra* notes 127–28.

295. *Supra* notes 86–89.

296. *See* NAT'L IMMIGRANT JUSTICE CTR., *supra* note 84.

297. *See id.*

298. *See supra* note 262 and accompanying text.

299. *Mapping U.S. Immigration Detention*, *supra* note 84.

300. *Operational Map*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir-operational-status/operational-status-map?P%5B0%5D=field_location_address%253Aadministrative_area%3AGA [<https://perma.cc/Q65Y-LS2P>] (last visited Oct. 5, 2022).

301. Corradini, *supra* note 160.

302. 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States”).

303. *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, <https://joebiden.com/immigration/> [<https://perma.cc/NQ7A-2NN2>] (last visited Oct. 4, 2022).

304. Press Release, Detention Watch Network, The Biden Administration is Expanding Private

must call upon the Biden Administration to reverse this decision and honor his pledge to his constituents.

The Biden administration should defund ICE detention because it is expensive. Again and again studies show that community-based programs, alternatives to detention, family case management programs, and even paying for an attorney for each immigrant in removal proceedings is cheaper and more effective at meeting detention’s purported goals.³⁰⁵ Detention is punitive, injurious, expensive, and unjustifiable by all standards. Some might argue that the INA’s provision that created “mandatory custody” of certain noncitizens as a major roadblock to abolishing detention, as detention is a requirement.³⁰⁶ Congress can repeal Section 236(c) of the INA—but such a move is not actually necessary to end immigration detention. The term “mandatory detention” is often used interchangeably with mandatory custody,³⁰⁷ despite that “detention” does not appear in the language of the statute.³⁰⁸ Custody assumes many forms—of which actual detention is merely the most restrictive. In 2015 the United States Commission on Civil Rights recommended that DHS reduce family immigration detention in favor of community based support case management, which it promoted as not only more humane than detention, but cost-efficient.³⁰⁹ Alternatives to detention such as supervision check-ins or ankle monitoring devices not only exist, but ICE employs them regularly.³¹⁰ ICE chooses to detain certain persons who fall under 236(c) but does not in fact have to.

Immigration detention is unjustifiable when viewed from all angles. Every day the brutality of ICE detention grinds down families, communities, and people.

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- Immigration Detention (Sept. 29, 2021), <https://www.detentionwatchnetwork.org/pressroom/releases/2021/biden-administration-expanding-private-immigration-detention> [<https://perma.cc/6QSY-CSRZ>].
305. See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2148 (2017); Boaz, *supra* note 118; see *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf [<https://perma.cc/ZM3W-9NP4>] (last visited Oct. 4, 2022).
306. See CONG. RSCH. SERV., IF11343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION (2022), <https://crsreports.congress.gov/product/pdf/IF/IF11343#:~:text=While%20immigration%20officials%20generally%20have,criminal%20or%20terrorism%2D%20related%20grounds> [<https://perma.cc/AM5W-U396>] (“While immigration officials generally have broad discretion to decide whether to detain aliens during the pendency of removal proceedings, INA § 236(c) requires the detention of aliens removable on specified criminal or terrorism related grounds.”) (emphasis added).
307. See *id.*
308. See 8 U.S.C. § 1226(c)(1)(C); Katie Mullins, “Mandatory Detention”? Why the Colloquial Name for INA § 236(c) is a Misnomer and How Alternatives to Detention Programs Can Fulfill its Custody Requirement, 72 NAT’L LAW. GUILD REV. 34, 37–39 (2015).
309. U.S. COMM’N ON CIV. RTS., WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 141 (2015), https://reliefweb.int/sites/reliefweb.int/files/resources/Statutory_Enforcement_Report2015.pdf [<https://perma.cc/PSM2-3FWS>].
310. U.S. IMMIGR. & CUSTOMS ENF’T., *Detention Oversight*, <https://www.ice.gov/detain/detention-oversight> [<https://perma.cc/J5C9-AY75>] (last visited Oct. 6, 2022).

Advocacy surrounding ICDC resulted in its closure, but also showed us how it can be done elsewhere.

D. Meaningful and Accessible Mental Health Care

At the outset of her mental health conditions, Mbeti needed meaningful and affordable psychiatric care. A full analysis of the complex field of health care reform is beyond the scope of this article. But what is clear is that Mbeti's access to that care was curtailed at multiple points, and as a result of different sources of exclusion. Immigrants are insured at lower rates than U.S. citizens.³¹¹ Black people, especially Black women, are also disproportionately uninsured.³¹² When Mbeti went from documented to undocumented, her access was all but extinguished.³¹³ Her lack of care then intersected with three major areas of her life: education, arrest history, and immigration status.

Mbeti is a calm, linear, and introspective person when correctly and consistently medicated. Her parents were well educated and wanted her to go far in the United States. Mbeti firmly believes that but for her untreated conditions she would have completed her education. She is probably correct, as she is ambitious, creative, and hardworking. There are ways that we can imagine that having a degree would have benefited Mbeti: a steady income, access to areas of the job market that provide stability and private health insurance should she have chosen it, opportunities to leave rural Georgia for a metropolitan region with robust treatment options. Instead, her mental health disrupted her educational pursuits, ultimately ending them.

Mbeti may not have been able to avoid her initial encounter with local law enforcement in 2007. She was Black and driving in the south, where implicit bias and racial profiling make her an automatic target. Police pretextually use labels such as “uncooperative,” “erratic” and “resistant” to justify the arrest of people of color, and we cannot know what transpired during the traffic stop itself. Had she been medicated, though, Mbeti firmly believes that she would not have damaged the jailhouse phone which gave rise to her first felony conviction. What can probably be said with greater certainty is that Mbeti, if properly treated, would not have damaged an unoccupied police vehicle with a shovel that gave rise to her second felony conviction. By her own rendition of events she was feeling anxious and hopeless, and believed that the only way to save herself was to be incarcerated.

Immigrants should not be excluded from benefits because they lack permanent resident status—a status that already has many carve-outs and exclusions based on a person's criminal history, manner of entry into the U.S., or immigration history. Black women should not be disproportionately uninsured because they are in occupations that do not provide insurance, or are less able to afford private insurance. Undocumented persons should not be *de facto* denied coverage because their state laws diminish their income-earning ability through restrictive documentation laws. The asymmetry of our health care system that

311. See *supra* notes 48–51, 54–56.

312. See *supra* note 52 and accompanying text.

313. See *supra* notes 100–01.

privileges those with perfectly aligned characteristics (citizen, employed, wealthy, etc.) is indefensible and must be dismantled.

We need a robust mental health care infrastructure supported by federal funding that ensures that all persons—documented or undocumented, insured or uninsured, and regardless of employment status, color, or economic ability—can receive long-term care. Congress has the power to repeal laws that exclude immigrants from receiving federal health benefits such as SSI. Medicaid, which only covers undocumented noncitizens for emergency care, should be expanded to include all individuals regardless of immigration status. Finding state-level alternatives to federal action on health care might be more effective. States have begun to be innovative in developing ACA analogues that extend marketplaces to undocumented residents within their state. California is inching closer to passing legislation that would create a universal health care system through single-payer public financing,³¹⁴ which would use state funds to expand its Medicaid and ACA program to cover Californians who would be eligible, but for their immigration status.³¹⁵

Investing in mental health will pay for itself, as fewer individuals in crisis will need expensive emergency care that strains hospitals and governments. Most of the nation’s uncompensated emergency healthcare costs are generated by uninsured, undocumented immigrants.³¹⁶ Providing healthcare for all constitutes not only a humanitarian obligation but a financial one. State lawmakers concerned about the costs associated with an ACA analogue can, at a minimum, grant immigrants’ ability to access basic tools like drivers’ licenses so that they can pursue a greater range of employment—and possibly achieve insured status on their own.

Decriminalization of mental health disabilities is a reform measure that can take place through disciplined, careful rethinking of intervention priorities. An increasing number of states now allow a criminal defendant’s mental, developmental and intellectual disabilities to be viewed as a mitigating factor during sentencing,³¹⁷ while pretrial services and alternative programs help divert individuals from incarceration altogether.³¹⁸ Sustained support in the form of medication compliance, housing assistance, money management, counseling, rehabilitation, and job training will go a long way in preventing the decompensation of many individuals. If a distressed person needs emergency intervention, a social worker or mental health professional should engage the individual rather than law enforcement. ACT involvement in Mbeti’s life was working and would have continued to work had it been given the chance. Mbeti

314. Emily Hoeven, *Single-Payer Health Care Clears Big Hurdle in California*, CAL MATTERS (Jan. 21, 2022), <https://calmatters.org/newsletters/whatmatters/2022/01/california-single-payer-health-care-vote/> [<https://perma.cc/4L7Y-XN2Y>].

315. *What Is Single-Payer?*, HEALTHCARE FOR ALL CAL., <https://healthcareforall.org/> [<https://perma.cc/69DD-B5WK>] (last visited Oct. 6, 2022).

316. Vinita Andrapalliyal, “*Healthcare for All*”? *The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 UCLA L. REV. DISCOURSE 58, 66–67 (2013).

317. See e.g., S. 1315, 2021 Gen Assemb., 2021 Sess. (Va. 2021) and H. 2047, 2021 Gen Assemb., 2021 Sess. (Va. 2021).

318. See e.g., *Alternative to Incarceration (ATI) Programs*, N.Y. STATE, https://www.criminaljustice.ny.gov/opca/ati_description.htm [<https://perma.cc/9Y3J-D9DE>] (last visited Oct. 6, 2022).

firmly believes that her life was on the right course during the times she was connected to ACT.

These alterations will not only save local police resources, but will divert many individuals from the criminal justice system and into treatment and care. The cost of policing, arresting, detaining, and deporting noncitizens³¹⁹ like Mbeti far exceeds the cost of providing early intervention and care to impacted individuals.³²⁰ Investing in preventative, sustained support offers a path to keep communities safer while safeguarding the human rights and dignity of those with serious mental health concerns.

CONCLUSION

Mbeti's story lays bare how oppressive systems interconnect and reinforce one another. It also provides a unique vehicle to envision interconnecting solutions.

As for Mbeti herself, she needs immediate, concrete relief. That relief is possible. Mbeti and the women of ICDC are owed damages; settling the Oldaker and Federal Torts Claims Act litigation could bring them that financial stability. Second, Mbeti meets the qualifications for a visa based on her having been the victim of a crime; investigators into ICDC and Dr. Amin could sign this certification and put Mbeti on the path to regaining status.

ICE has boasted of a "force multiplier" effect that benefits its mission. At the time this term was used, it referred to improvements in technology, cross-agency information and resource sharing, and coordinated enforcement efforts coming together to supercharge the deportation machine. But ICE's force is multiplied by much more than that. It is multiplied by racial animus, corporate greed, willful disregard, and cruelty.

We have force too. Uniting our purposes across racial justice, immigrant justice, criminal justice reform, gender justice, and health justice multiplies that force—and makes it indomitable.

319. See Rafael Carranza, *How Much Does it Cost to Deport One Migrant? It Depends*, THE REPUBLIC (May 1, 2017, 9:08 AM), <https://www.azcentral.com/story/news/politics/immigration/2017/04/28/deportation-costs-illegal-immigration/99541736/> [<https://perma.cc/5QFN-BMJF>] ("ICE spent an average of \$10,854 per deportee during the fiscal year that ended in September, according to ICE spokeswoman Yasmeen Pitts O'Keefe. 'This includes all costs necessary to identify, apprehend, detain, process through immigration court, and remove an alien,' she said in an interview.").

320. See generally Paul Gionfriddo, Theresa Nguyen & Nathaniel Counts, *Reducing Health Care Costs Through Early Intervention On Mental Illnesses*, HEALTH AFFAIRS (Jan. 25, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160125.052822> [<https://perma.cc/D7CP-EJ84>].