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Gang Accusations: The Beast That Burdens Noncitizens

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THE BEAST THAT BURDENS NONCITIZENS

Mary Holper[†]

INTRODUCTION

A teenager from El Salvador attends a high school that is populated mostly by Latine youth. He finds his friends in a group of boys. He gets into a scuffle with another boy. Little does he know, with each of these interactions, he has been accruing "points" in a database that tracks gang membership and affiliation. The friendships earn him two points for each interaction, as his friends are "known" MS-13 gang members ("known" to the police, who maintain the database). The scuffle itself earns him eight points, as his aggressor is a "known" member of the 18th Street Gang, which is a rival to the MS-13. At ten points, he has earned himself the label of "gang associate."[1]

This teenager lives in Boston, where the stated purpose behind the creation of this gang database was not enforcement, but prevention and protection.[2] One might agree with the creation of such a database, given this benevolent purpose.[3] Yet, in other neighborhoods of Boston, teenagers in majority white schools do not have their relationships under a police microscope for the purpose of tagging them with membership in an

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[1] *See Rules & Procedures*, BOS. POLICE DEP'T, https://police.boston.gov/index.php/rules-procedures/ [https://perma.cc/2BPT-JG92].

[2] *Id.*; William B. Evans, former Bos. Police Comm'r and Bos. Coll. Chief of Police, Panel with Rachel Rollins et al. at Rappaport Center for Law and Public Policy, Boston College Law School (Apr. 3, 2019).

[3] *But see* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2253–55, 2287 (2019) (demonstrating that in the criminal pretrial-detention context, risk assessment tools have been shown to perpetuate both structural bias and inequality, and proposing the use of risk assessment to support at-risk populations, not punish them).

organized group of criminals.[4] When one questions how so many urban police forces, including Boston, came to "need" gang databases,[5] the backstory inevitably intersects with shameful practices in US history, such as the creation of urban neighborhoods of concentrated poverty, where police act as social workers while they surveil poor communities of color.[6]

The story of gang databases entails more than the creation and maintenance of a list of at-risk youth in order to either protect them from retaliation by other youth or to surveil them as they go about their lives. The gang database has also become an immigration enforcement tool, creating what Laila Hlass calls a "'school to deportation pipeline.'"[7] For example, what if the teenager described above now faces immigration detention and deportation? The printout from that gang database becomes the centerpiece of evidence supporting the government's argument that he is a danger to the community and thus undeserving of release during his removal proceedings.[8] At his final removal hearing, it also plays a key role in the government's argument against asylum. Namely, the government is able to argue he is not credible about any past persecution because he denies gang involvement, which is inconsistent with the gang database conclusions.[9] Even if credible, the government argues he does not deserve asylum in the exercise of discretion because he is affiliated with a dangerous street gang.

The racial injustices inherent in the creation of the gang database are exacerbated in the immigration context. Distinct aspects of immigration procedure have created a system in

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[4] *See* Yvette Cabrera, *Troubled Pasts Force Hard Choices for Some Undocumented Immigrants*, VOICE OC (last updated Dec. 8, 2020), http://voiceofoc.org/2016/02/troubled-pasts-force-hard-choices-for-some-undocumented-immigrants/ [https://perma.cc/RV8N-GW4C] ("When the standards are so incredibly low and they map on pretty closely to what it is just to be a person who grows up in a low-income, violence-impacted neighborhood, then we begin to have some challenges because we start to lump people into these categories.").

[5] *See, e.g.*, CHARLES M. KATZ & VINCENT J. WEBB, POLICING GANGS IN AMERICA 11–13 (2006) (examining rationale for police gang units and the growth and development of police gang units).

[6] *See infra* Section I.B.

[7] *See* Laila Hlass, *The School to Deportation Pipeline*, 34 GA. STATE UNIV. L. REV. 697, 719–20, 751–62 (2018) (describing the use of gang databases in immigration enforcement and recommending implicit bias training for adjudicators, the recognition of youth as a positive discretionary factor in immigration cases, providing children with representation in removal proceedings, and entirely excluding gang allegations from immigration proceedings because of their unreliable nature).

[8] *See id.* at 730 ("[G]ang allegations cast a long shadow on the accused and increase the chance that immigrant youth will be detained for long periods of time, be denied immigration benefits, and be deported.").

[9] *See infra* Section III.B (discussion of Ortiz v. Garland, 23 F.4th 1 (1st Cir. 2022)).

which gang allegations ensure near-certain detention and deportation. The burden allocation in bond hearings, which requires an immigration detainee to disprove dangerousness, creates a default presumption of detention, which cannot be overcome in the face of uncertain evidence that alleges gang affiliation.[10] The inapplicability of the formal rules of evidence in immigration proceedings allows judges to make decisions based on unreliable evidence that contains multiple levels of hearsay, a common feature of gang evidence.[11] The prioritization of administrative efficiency in making decisions regarding who is a danger, whether a person is credible, or whether a person is deserving of discretion, leads immigration judges to rely on shortcuts, such as evidence provided by other law enforcement agencies.[12] The massive amount of unchecked discretion allows implicit biases to thrive when judges must make quick decisions and are presented with evidence that confirms these biases—that a young man of color is a dangerous gang member.[13] The asylum rules that create a presumption of noncredibility for asylum seekers—and give an outsized role to any inconsistency,

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[10] *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 76 (2016) [hereinafter Holper, *The Beast of Burden*] (discussing history of burden allocation in immigration pretrial detention decisions and critiquing presumption of detention in the immigration context).

[11] *See generally* Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675 (2015) [hereinafter Holper, *Confronting Cops*] (critiquing reliance on police reports by immigration judges and explaining one foundation for this phenomenon, which is that the federal rules of evidence do not apply in immigration court); Abira Ashfaq, *"We Have Given Them this Power"; Reflections of an Immigration Attorney*, 9 NEW POL. Summer 2004, at 68 ("Technically the rules of evidence do not apply in immigration court; but it is still shocking how little they sometimes have to go by.").

[12] *See* Bijal Shah, *Administrative Subordination*, U. CHI. L. REV. (forthcoming) (manuscript at 20), http://ssrn.com/abstract=4392123 (describing how, in an effort to be more efficient, agencies rely on cheap, easy to obtain "information proxies," such as police reports).

[13] *See* Hlass, *supra* note 7, at 730 ("[W]ith 'unchecked discretion . . . comes implicit bias,' even though labels may be racially neutral.") (quoting Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 411 (2017)); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 332–33, 340 (2007) (describing ICE's "Operation Community Shield," which relied on state and local officers to develop their own lists of gang members and affiliates to share with ICE, and critiquing this form of enforcement because the lack of governing legal standards increases the risk that local enforcement officers will rely on racial profiling to identify gang members for deportation); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 119 (2010) (discussing prosecutorial discretion in the criminal justice system and stating that "[p]rosecutors are well aware that the exercise of their discretion is unchecked, provided no explicitly racist remarks are made, as it is next to impossible for defendants to prove racial bias"); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161 (2006–2007); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997). For scholarship discussing the lack of access to judicial review of discretionary decisions in immigration law, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 228–40 (2007).

regardless of whether it is material to the claim—allow a noncitizen's denial of gang membership to infect his credibility when he discusses past persecution or torture.[14] The lack of court-appointed counsel is an additional, ever-present problem, since the various legal arguments that challenge these aspects of the immigration system require an advocate versed in the complexities of immigration law, as well as its overlap with other areas of law.[15] This problem is exacerbated given that the noncitizen needs counsel at all phases of the case, and that counsel must be competent to advocate before both the agency and federal courts.[16] Even if the noncitizen has competent counsel, being detained while one fights meritorious legal arguments acts as a deterrent to raising meritorious legal arguments challenging the gang evidence.[17]

This article is the first to examine the issue of gang evidence through the lens of the law's use of presumptions and the corresponding burdens of proof at play in immigration proceedings. In immigration law, most burdens of proof fall on noncitizens.[18] These burden allocations allow adjudicators to readily accept the harmful presumption contained in the gang evidence—that urban youth of color are criminals and likely to engage in violent crime associated with gangs. This article brings together previous literature on immigration and criminal justice as it relates to gang evidence in order to explain how racist assumptions led to the creation of a gang database. It proposes that there should be an evidentiary presumption that gang evidence is not reliable in order to specifically instruct a judge to reject the existing societal presumption about urban youth of color and criminality. In this way, this article tracks

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[14] *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (credibility determination can be made "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor").

[15] *See* Hlass, *supra* note 7, at 761–62; *see also* Chacón, *supra* note 13, at 343 (noting that due to the "abysmal lack of access to counsel," noncitizens who are identified as gang members but actually have defenses to deportation may not be able to adequately represent themselves and thus will be unable to raise such claims).

[16] *See infra* Part III (discussion of Ortiz v. Garland, 23 F.4th 1 (1st Cir. 2022)).

[17] *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 109 (2019) [hereinafter Ryo, *Understanding Immigration Detention*] (describing how detention operates to deter people from pursuing valid forms of relief in immigration court, citing various ethnographic studies demonstrating that immigration detainees give up legitimate claims for relief to avoid having to suffer further detention); *see also* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024–43 (2017) (providing empirical research that demonstrates that immigration detainees perceive immigration detention as harsher than criminal incarceration, that legal rules are inscrutable by design, and that legal outcomes are arbitrary).

[18] *See infra* Part II, Section B.

common interests of critical race theory by explaining how US society has subordinated people of color in the creation of gang databases and seeks not only to understand how, but also to *change*, this bond between law and racial power.[19]

Others have proposed that the gang evidence be completely inadmissible in immigration proceedings.[20] This article takes a more practical approach that works from within the existing immigration procedure, where the formal rules of evidence do not apply—a feature that helps asylum seekers, such as our hypothetical teenager, to present corroborating statements in support of his claims.[21] Evidentiary presumptions and burden shifting are a common features of immigration law, whereas complete inadmissibility of evidence is unusual.[22] In addition, an evidentiary presumption requires analysis of the evidence by an immigration judge, thus giving courts a standard under which to review a judge's consideration of gang evidence.[23] Using the First Circuit Court of Appeal's 2022 decision in *Ortiz v. Garland* as an example, this article proposes a presumption of unreliability of gang evidence to address the current issues with gang accusations in immigration court.[24] The *Ortiz* case illustrates that evidentiary presumptions can be shifted broadly, rather than playing out on a case-by-case basis.

Part I explains the justifications for why gang databases exist, using the creation of Boston's Gang Database as an example. Following the lead of critical race theorists, this part asks whether there is a counter-account of the social reality in Boston that led to the creation of this database. Part I then discusses the forces that gave rise to the database's creation, including neighborhood segregation and subsequent diminishing social services, the rise of police acting as social workers and their surveillance powers, and the labeling of minorities as dangerous people who the government can then detain and deport. Part I also explains how local anti-gang efforts became part of a national immigration enforcement

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[19] CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al., eds. 1995) (emphasis in original).

[20] *See, e.g.*, Hlass, *supra* note 7, at 763; *see also* Katherine Conway, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, 67 AM. U. L. REV. 269 (2017) (discussing the implementation of additional procedures in immigration proceedings to increase the reliability of evidence); Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671, 681–82 (2015) (explaining the practice of using criminal convictions as a basis for deportation in immigration proceedings).

[21] *See infra* Section III.D.

[22] *See id.*

[23] *See id.*

[24] *See infra* Section III.B.

agenda. Part II discusses burdens of proof in the law, why burdens exist, and how burdens operate in immigration cases to validate harmful presumptions that a young man of color is a gang member, since nearly every burden lies with the noncitizen in immigration court. Finally, Part III proposes the creation of an evidentiary burden that gang evidence is unreliable in immigration cases and explains how that burden can counteract the harmful presumptions contained in the gang evidence. Part III also describes other areas in which the law corrects for biases, examines the First Circuit's *Ortiz* case as a roadmap for an evidentiary presumption shift, discusses other challenges to immigration law presumptions, and responds to possible critiques.

I. WHY GANG DATABASES EXIST

Boston's Gang Database is a list, maintained by the Boston police, of "individuals and groups that associate as a 'gang' and thus are likely to engage in or perpetrate criminal activity for the furtherance of the criminal organization" itself.[25] The Gang Database began as an enforcement tool of Operation Ceasefire, an initiative that sought to bring down violent crime in the city through surveillance techniques paired with bringing social services to the community.[26] All of these efforts were justified through the concept of "focused deterrence," where law enforcement focuses all of its resources on one set of individuals.[27] However, critical race theorists rightfully push back at these justifications and instead argue that these segregational policies are borne from fear that associates certain minority communities with criminality.[28] In Boston in particular, this has led to police playing an outsized role in surveilling and controlling the population, particularly with immigrant youth.[29]

This part begins with the justification for Boston's Gang Database, then critically examines the societal forces that gave

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[25] *Rules & Procedures*, *supra* note 1.

[26] *See id.*; BOS. GUN PROJECT & OPERATION CEASEFIRE, CASE STUDY 4 (2005), https://search.issuelab.org/resource/case-study-the-boston-gun-project-and-operation-ceasefire.html [https://perma.cc/B9Q3-HKYQ].

[27] *See infra* Section I.A.

[28] *See infra* Section I.B; Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 209 (2015) (discussing gang databases and stating that "[t]oday, a prime police target is poor, urban, minority youth, especially those allegedly linked to the scourge of gangs. Anticipating that these youth will become offenders, law enforcement seeks to gather as much information as it can about them").

[29] *See infra* Section I.C.

rise to these justifications, and finally, describes how these societal forces led to the creation of Boston's Gang Database.

A. The Justifications for a Gang Database: The "Boston Miracle"

"Focused deterrence" is a theory used to justify a database such as Boston's Gang Database.[30] The idea is that young men of color who live in high-crime neighborhoods bear the brunt of policing, even if they are innocent, because police are likely to assume they all are involved in crime.[31] Instead of wasting police resources and violating the civil liberties of all young men of color in that neighborhood, a specialized gang unit of the police can ascertain which young men are engaging in, or are likely to engage in, gang violence and only target those individuals for surveillance and regular questioning through "Field Interrogation Observation, Frisk, and/or Search practices" (FIOs).[32] These FIOs are deemed "constitutionally insignificant"[33]—not a violation of a person's Fourth Amendment rights to be free of unreasonable search and seizure—because they are "consensual encounters" in which those questioned are free to leave.[34] The FIOs are then documented by the Boston

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[30] Anthony Braga, *Focused Deterrence Strategies and the Reduction of Gang and Group-Involved Violence*, *reprinted in* MODERN GANG READER 475, 475 (Cheryl L. Maxson et al. eds., 4th ed. 2014) [hereinafter Braga, *Focused Deterrence Strategies*]; Christopher Winship & Anthony Braga, Opinion, *Reform Boston's Gang Database, Don't Dismantle It*, BOS. GLOBE (Feb. 24, 2022, 3:00 AM), https://www.bostonglobe.com/2022/02/24/opinion/reform-bostons-gang-database-dont-dismantle-it/?p1=Article_Inline_Text_Link [https://perma.cc/3KT3-BQYB].

[31] The authors of this op-ed, who were integral in the planning of Boston's Operation Ceasefire, analogize focused deterrence to asking applicants to check a box marking whether they have a criminal record when applying for employment. Winship & Braga, *supra* note 30. Because studies show that without the box, employers assumed that all other employers assumed that Black applicants had a criminal record, the box provided a way for employers to focus their bias against those who actually had such a record. *Id.*

[32] *Id.*; JEFFREY FAGAN ET AL., FINAL REPORT: AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 1–4 (2015), https://www.issuelab.org/resources/25203/25203.pdf [https://perma.cc/AGH5-LKM9].

[33] Commonwealth v. Narcisse, 927 N.E.2d 439, 443 (Mass. 2010) (describing FIOs as "consensual encounters" that are "constitutionally insignificant," such that a police officer may initiate without "any information indicating that the individual has been or is presently engaged in criminal activity").

[34] Commonwealth v. Warren, 58 N.E.3d. 333, 337 n.5 (Mass. 2016) (defining FIOs as "interaction[s] in which a police officer identifies an individual and finds out that person's business for being in a particular area") (quoting Commonwealth v. Lyles, 905 N.E.2d. 1106, 1108 n.6 (Mass. 2009)). Although the Boston Police Department rule governing FIOs states that the "FOIE Report is a mechanism to allow the Department to document and accumulate up-to-date information concerning known criminals and their associates," the rule allows officers to focus their reports on observations and encounters "without reasonable suspicion." Ortiz v. Garland, 23 F.4th 1, 8 n.6 (1st Cir.

Police in a database.[35] Those who study gang interventions have observed that "intelligence gathering and the development and maintenance of gang tracking systems and databases [i]s one of the most important functions carried out by specialized gang units" within police departments.[36]

According to defenders of Boston's approach, the city's "Operation Ceasefire" of the 1990s brought about what was described as the "Boston Miracle," in that it succeeded in bringing down the violent crime rate in the city.[37] The strategic elements of Operation Ceasefire included several enforcement strategies targeting firearms, as well as a "pulling levers" approach to deterring gang activity, whereby sanctions for gang activity were paired with social services to prevent youth from joining gangs or to encourage them to desist from gang membership.[38] Law enforcement and community service providers engaged in data analysis and determined that the problem consisted of "1,300 chronic offenders who, for the most part, were minority male gang members who hurt one another

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2022) (quoting BOSTON POLICE DEPARTMENT RULES & PROCEDURES, RULE 323, FIELD INTERACTION/OBSERVATION/ENCOUNTER REPORT, sec. 1 (July 2015)). As such, the FIO report does not only document *Terry* stops, where the police have reasonable suspicion that a "crime is afoot." FAGAN ET AL., *supra* note 32, at 1–2 & n.1; *Ortiz*, 23 F.4th at 8 n.6; *see also* Terry v. Ohio, 392 U.S. 1, 27 (1967) (holding that officers can conduct investigative stops and temporary detentions of citizens based on reasonable, individualized, and articulable suspicion that crime is afoot).

[35] The Boston Police maintain an FIO Database, as well as a separate Gang Database. *See* RAPPAPORT CTR. L. & PUB. POL'Y, THE BOSTON GANG DATABASE (June 2022) (statements of Adriana Lafaille, American Civil Liberties Union of Massachusetts).

[36] Vincent J. Webb & Charles M. Katz, *A Study of Police Gang Units in Six Cities*, *reprinted in* MODERN GANG READER 467, 470 (Cheryl L. Maxson et al. eds., 4th ed. 2014). The authors note that, in addition to intelligence gathering, the gang units they studied also focused on enforcement, suppression, investigations, and prevention. *Id.* at 469. "[I]t is suppression/enforcement that legitimizes the unit in the eyes of the public and the media, and gives them confidence that the unit is actively engaging in enforcement efforts directed at gangs and gang crime." *Id.* at 470. There are relatively few resources spent on criminal investigation, and gang units generally believed it was not their job to engage in prevention and education, but rather to do the "real job" of combating gang-related crime. *Id.* at 471–72.

[37] Anthony A. Braga et al., *Losing Faith: Police, Black Churches, and the Resurgence of Youth Violence in Boston*, 6 OHIO ST. J. CRIM. L. 141, 141–42 (2008) [hereinafter Braga et al., *Losing Faith*]. The evaluation evidence demonstrated a large reduction of the number of youth homicides in Boston, although some researchers have urged caution in drawing any strong conclusions about the program's effectiveness. Braga, *Focused Deterrence Strategies*, *supra* note 30, at 477. The researchers involved in Boston's Operation Ceasefire "did not collect the necessary pre-test and post-test data to shed light on the specific mechanisms responsible for the significant violence reductions associated with the Operation Ceasefire intervention." *Id.*

[38] ANTHONY A. BRAGA ET AL., U.S. DEP'T JUST., REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE 2–3 (2001), https://www.ojp.gov/pdffiles1/nij/188741.pdf [https://perma.cc/V494-WHNX] [hereinafter BRAGA ET AL., REDUCING GUN VIOLENCE].

along identifiable 'vectors' of gang rivalry."[39] The operation's working group engaged in persistent messaging to gang members that the violence would not be tolerated.[40] Law enforcement efforts were focused on those of whom the working group "knew" to be in gangs, arresting them for minor violations unrelated to gang activity, so that they would feel the pressure of enforcement due to their gang involvement.[41] The Gang Database facilitated law enforcement's ability to keep track of these gang members.[42]

Operation Ceasefire was implemented by a multiagency task force that was composed of police and social services agencies, as well as religious community leaders.[43] Although these various groups were unlikely allies, they came together to seek a solution to the number of homicides among youth in Boston at the time.[44] The key to both the community buy-in and success appeared to be that the strategy involved not just enforcement, but the provision of social services to at-risk youth.[45] Thus, "[i]f gang members wanted to step away from a violent lifestyle, the Ceasefire working group focused on providing them with the services and opportunities necessary to make the transition."[46] The authors of the program also believed that pairing tough criminal justice sanctions with social services would cause gang members to opt for legitimate work.[47]

Defenders of Boston's Gang Database and the focused deterrence theory have noted that being in the database does not merely "mark someone for law enforcement scrutiny and potential arrest"; rather, they argue that "suspected gang

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[39] *Id.* at 20, 22–24.

[40] *Id.* at 27–31.

[41] *Id.* at 27–28.

[42] *Rules & Procedures*, *supra* note 1.

[43] Braga et al., Losing Faith, *supra* note 37, at 147 ("Simultaneously, youth workers, probation and parole officers, and clergy offered gang members services and other kinds of help.").

[44] BRAGA ET AL., REDUCING GUN VIOLENCE, *supra* note 38, at 9–10.

[45] Braga et al., *supra* note 37, at 147–48. Not all communities followed the leadership of certain Boston clergy, who were primarily from evangelical churches. For example, Braga and his coauthors describe how the evangelical ministers who led the efforts, formulating what they termed a "Ten Point Coalition," did not reach the Cape Verdean community, which was mostly Catholic. *Id.* at 164.

[46] *Id.* at 147.

[47] *See* Braga, *Focused Deterrence Strategies*, *supra* note 30, at 479 ("When the risk to drug-dealing gang members increases, legitimate work becomes more attractive. In turn, when legitimate work is more widely available, raising risks will be more effective in reducing violence."); *see also* Lua Kamál Yuille, *Manufacturing Resilience on the Margins: Street Gangs, Property, & Vulnerability Theory*, 123 PA. ST. L. REV. 463, 463 (2019) (arguing that because gangs arise due to the unavailability or inaccessibility of traditional markets of capital, gangs should be understood as "mechanisms through which networked vulnerable subjects seek to create resilience in each other").

members are often referred to social services and other interventions that can positively impact their lives."[48] This explains why Roca, an organization that aligns itself with communities of color, has supported it. Roca provides relentless outreach, cognitive behavioral therapy, job training, and educational opportunities to at-risk youth in certain neighborhoods of Boston.[49] As a social support agency, it relies on the Boston Regional Intelligence Center, which houses the Gang Database, as a source for daily updates about new at-risk youth who are in need of their services.[50] Such coordination has existed since the early days of Operation Ceasefire, when youth outreach workers received updates from the Boston Police about which gang-involved youth were in need of social services.[51]

B. The Social Realities That Led to Creating a Gang Database

A critical race theory lens asks whether there is a counter-account of the social reality in Boston that led to the creation of a gang database.[52] Sheryll Cashin describes why certain neighborhoods have become places of concentrated poverty that are isolated geographically from white spaces.[53] She builds on several writings that explain how official government policies created all-Black neighborhoods that were economically depressed, from which it was nearly impossible to exit.[54] As

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[48] Kevin Cullen, *Ganging Up on the Gang Database*, BOS. GLOBE (Feb. 24, 2022, 6:33 PM), https://www.bostonglobe.com/2022/02/24/metro/ganging-up-gang-database/ [https://perma.cc/LK6M-2BC8].

[49] *Our Intervention Model*, ROCA, https://rocainc.org/how-we-do-it/our-intervention-model/ [https://perma.cc/7R5X-99ZH].

[50] Letter from Roca to Bos. City Council (Mar. 9, 2021) (on file with author).

[51] *See* BRAGA ET AL., REDUCING GUN VIOLENCE, *supra* note 38, at 11.

[52] CRITICAL RACE THEORY, *supra* note 19, at xiii ("The writings in this collaboration may be read as contributions to what Edward Said has called 'antithetical knowledge,' the development of counter-accounts of social reality by subversive and subaltern elements of the reigning order.").

[53] SHERYL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 4–8 (2021).

[54] Douglas Massey and Nancy A. Denton explain several factors that segregated Black communities: (1) industrialization in the north and environmental factors in the south that that prompted the Great Migration of rural Black people to northern cities, where they lived in poor tenement housing near factories; (2) white violence toward Black individuals who attempted to leave their neighborhoods; (3) restrictive covenants and residential segregation ordinances that, although found unconstitutional, persisted unofficially in real estate transactions; (4) blockbusting practices that scared low-income whites into selling their properties before the neighborhood turned Black; (5) white flight to the suburbs through post-World War II federal loan schemes; (6) redlining practices that were begun by the federal government and used by banks in mortgage lending; and (7) urban "redevelopment" programs that led to high-density public housing projects to house those displaced. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE

Cashin describes, isolated areas of poverty are where many Black descendants of slavery reside, in addition to a growing Latine and poor white population.[55] They have been, and continue to be, intentionally segregated from white spaces by various government programs.[56] The segregation is borne of fear; despite empirical evidence to the contrary, many people associate Blackness with criminality.[57] Once a poor, nonwhite community is walled off from wealthy neighborhoods, resource allocation becomes a project of providing more resources to those who already have the most. Cashin writes about how governments have overinvested in the already well-resourced white communities while disinvesting elsewhere.[58]

The manner in which governments *have* invested in areas of concentrated poverty, however, is in the form of police surveillance and incarceration of its residents. Michelle Alexander describes how the War on Drugs became a cash cow for urban police, encouraging them to continue drug enforcement in poor communities of color, even though white people in middle-class communities have higher rates of drug use and sale.[59] No political backlash occurred to the heavy-handed enforcement practices of police and prosecutors because the impacts were felt only in poor Black and brown communities.[60] Sheryll Cashin writes about the dramatically

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UNDERCLASS 17–57 (1993). Richard Rothstein argues that most of today's residential segregation falls into the category of open and explicit government-sponsored segregation, and thus, governments have the obligation to remedy it. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA xiv–xv (2017).

[55] CASHIN, *supra* note 53, at 7.

[56] *Id.* at 72 ("The past is not past. Racial steering in real estate markets, discrimination in mortgage lending, exclusionary zoning, a government-subsidized affordable housing industrial complex that concentrates poverty, local school boundaries that encourage segregation, plus continued resistance to integration by many but not all whites—all contribute to enduring segregation."). Cashin writes that "[t]he idea that descendants belong apart from everyone else is the often-unspoken-but-sometimes-shouted-out-loud norm animating most fair housing and school integration debates." *Id.* at 7.

[57] *Id.* at 101; *see also* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 71 (2019) ("Americans today see the Black body as larger, more threatening, more potentially harmful, and more likely to require force to control than a similarly sized White body, according to researchers. No wonder the Black body had to be lynched by the thousands, deported by the tens of thousands, incarcerated by the millions, segregated by the tens of millions.").

[58] CASHIN, *supra* note 53, at 5.

[59] ALEXANDER, *supra* note 13, at 72–84, 197.

[60] *Id.* at 124. Alexander also describes how Supreme Court decisions blessed these practices, quoting a dissent by Justice Stevens that the "Court has become a loyal foot soldier in the Executive's fight against crime." *Id.* at 62 (quoting California v. Acevedo, 500 U.S. 565, 600 (1991) (Stevens, J., dissenting)); *see also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 32 (2017) (describing how the Supreme Court has given the police "super powers" to focus all of their efforts on Black men). As Alexander writes, once labeled as criminals, communities of color faced several forms of legalized

different style of policing in Black and white neighborhoods.[61] Cashin cites a study conducted of Washington, DC arrests between 2013 and 2017, in which Black people were arrested at ten times the rate of whites.[62] A Department of Justice investigation of the Chicago Police Department heard from Black citizens in targeted neighborhoods, one of whom stated that "[t]hey patrol our streets like they are the dog catchers and we are the dogs."[63] Cashin describes how young men in poor neighborhoods are "presumed to be thugs—that is, presumed guilty—while others [are] presumed innocent."[64]

Other scholars have described this presumption of criminality for young men of color as a bedrock upon which the US criminal justice system was built.[65] According to Paul Butler, "[t]he most problematic practices of American criminal justice—excessive force by police, harsh sentencing, the erosion of civil liberties, widespread government surveillance, and mass incarceration—are best understood as measures originally intended for African American men."[66] As John Pfaff explains, when a white person commits a crime, prosecutors and police see it as an individual failing, yet "when a [B]lack person commits a crime it is viewed as an indication of the broader failings of [B]lack Americans in general."[67] This "fundamental attribution error"—where humans define people by their actions[68]—explains why "police appear to concentrate enforcement efforts in [B]lack neighborhoods with seemingly fewer social ills than other equally dangerous—or more dangerous—predominantly white neighborhoods."[69]

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discrimination, such as cutting off access to voting, housing, and employment, as well as creating a stigma that divided communities of color instead of uniting them against this new racial caste system. ALEXANDER, *supra* note 13, at 141–71.

[61] CASHIN, *supra* note 53, at 179.

[62] *Id.* at 172.

[63] *Id.* at 174.

[64] *Id.* at 175.

[65] Michelle Alexander summarizes post-Civil War history, including the start of Jim Crow laws, and states that "the current stereotypes of [B]lack men as aggressive, unruly predators can be traced to this period, when whites feared that an angry mass of [B]lack men might rise up and attack them or rape their women." ALEXANDER, *supra* note 13, at 28. She then chronicles the formal dismantling of the Jim Crow laws during the Civil Rights movement, and the seeds of the anticrime rhetoric that later came to associate Black men with criminality, all the while masking the creation of a system of mass incarceration behind race-neutral rhetoric. *See id.* at 35–58.

[66] BUTLER, *supra* note 60, at 17.

[67] JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 145–46 (2017).

[68] *Id.* at 146.

[69] *Id.* Pfaff locates the roots of mass incarceration in segregation between urban communities of color and white, middle-class communities. He agrees with Michelle Alexander "that the criminal justice system is driven by and exacerbates racial inequality" and claims that it "is increas[ing] prosecutorial toughness" that has led to

Scholars also have explained aggressive policing of poor neighborhoods of color as a manner of social control and spatial containment of populations that are deemed to pose a threat to the majority.[70] For example, Bernard Harcourt has described how military strategies used by colonial powers to suppress rebel minorities came to be used by the government in domestic crime control.[71] The targeted group to be suppressed shifted and changed, but always contained persons of color.[72]

Nor is the presumption of criminality with its aggressive policing to contain populations of color confined to the streets. Segregated schools, where the majority of the students are Black and Latine have a disproportionate share of school police officers, also known as "school resource officers," who regularly charge

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the drastic increase in prison populations for communities of color. *Id.* at 6, 50. Pfaff argues that the interlocking bureaucracies that make up "the criminal justice system" (legislatures, police, judges, juries) "do not interact with each other smoothly," so that an "unintended consequence of this poor design is that prosecutors have ended up with almost unfettered, unreviewable power to determine who gets sent to prison and for how long." *Id.* at 70 ("[O]ne decision by county prosecutors—the decision about whether to file felony charges against someone arrested by the police—seems responsible for a lion's share of the growth in prison admissions since crime started dropping in the early 1990s."). Pfaff situates the cause of such prosecutorial severity within racial segregation, because "[u]rban prosecutors are elected at the county level, where political power is concentrated in the wealthier, whiter suburbs, while crimes disproportionately occur in the poorer urban cores with higher populations of people of color." *Id.* At 7; *see also* WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 21, 30–32 (2011) (describing how counties that include major cities have a high percentage of suburban voters, for whom crime is an abstraction, but they exercise more power than in the past over urban justice, through the election of prosecutors and judges). Because residents of the "white, wealthier suburbs exert significant influence on who gets elected as district attorney," this ensures a physical and social distance between the prosecutor and the communities prosecuted. PFAFF, *supra* note 67, at 147.

[70] CASHIN, *supra* note 53, at 179; ALEXANDER, *supra* note 13, at 188 (describing how mass incarceration "is no longer concerned primarily with prevention and punishment of crime, but rather with the management and control of the dispossessed"); *id.* at 132 ("[T]he ghetto itself was constructed to contain and control groups of people defined by race."). Malcolm Feelely and Jonathan Simon, in 1992, described the emergency of a "new penology," in which governments have shifted from criminal law interventions that focus on the individual to those that manage and control dangerous groups. Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 451–52 (1992). They wrote that "[t]he new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups." *Id.* at 455.

[71] *See* BERNARD HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS 165–66 (2018). He describes three strategies of the "counterrevolution": (1) achieve "[t]otal information awareness of the entire American population" through mass data collection and surveillance; (2) "extract an active minority at home"—except that the "active minority" is "ill-defined" and the boundaries constantly shift, but always includes persons of color; and (3) "win the hearts and minds of Americans." *Id.*

[72] Harcourt writes about how the federal government engaged in a war against "active minorit[ies],"" which included the Black Panthers, drug dealers, gang members, and Muslims. *Id.* at 142–76.

students of color with trivial offenses.[73] Scholars have noted the irony of a policing theory grounded in the idea that persons of color are more inherently dangerous than white people.[74] As Ibrahim X. Kendi writes: "We, the young Black super-predators, were apparently being raised with an unprecedented inclination toward violence—in a nation that presumably did not raise White slaveholders, lynchers, mass incarcerators, police officers, corporate officials, venture capitalists, financiers, drunk drivers, and war hawks to be violent."[75]

The presumption of criminality for persons of color is a building block of both the US criminal justice system and US antipoverty programs. Elizabeth Hinton, in her book *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, traces the historical connection between the War on Poverty and the War on Crime.[76] She describes how the John F. Kennedy administration sought to lift the urban poor out of poverty by investing in various social programs, which aimed to provide resources to African Americans.[77] The good intentions of the Kennedy administration, however, were never rooted in a desire for true equality between the races.[78] Rather, they were framed as antidelinquency measures, because the federal government feared that a large mass of unemployed and frustrated Black youths in a city was "social dynamite" waiting to explode.[79] These radical new social programs would "defuse the 'social dynamite.'"[80] These social programs installed in poor communities during the Kennedy administration allowed for public welfare agents to keep youth under constant adult supervision.[81]

Hinton documents how the social programs of the Kennedy administration were converted into agents of crime control during the Lydon B. Johnson administration. Johnson's assistant secretary of labor, Daniel Patrick Moynihan, circulated

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[73] CASHIN, *supra* note 53, at 181.

[74] *See, e.g.*, Sahar Aziz, *State-Sponsored Radicalization*, 27 MICH. J. RACE & L. 125, 126–27, 135 (2021) (detailing how the FBI focuses its resources and efforts on Muslim targets, and manufactures cases against them, while rightwing, white nationalist groups are left alone, reflecting a "myopic view of racial violence [whites against non-whites] as outside the purview of preventive policing").

[75] KENDI, *supra* note 57, at 75.

[76] *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 3–4 (2016).

[77] *See id.* at 27–30.

[78] *See id.* at 31 (opining that "[a]lthough the federal government's new commitment to racial minorities and the poor started out with sincere intentions, the notions of [B]lack cultural pathology . . . concealed policymakers' own racism").

[79] *Id.* at 29–30.

[80] *Id.* at 29.

[81] *Id.* at 47.

an internal report entitled *The Negro Family: A Case for National Action*, which argued that a long history of racial discrimination, together with "cultural deprivation" had produced a "'tangle of patholog[ies]' in [B]lack urban families," which manifested itself in high rates of illiteracy, single-parent households, and delinquency.[82] The report supported an evolution of the War on Poverty to the War on Crime, in that its focus lay not with the structural barriers to opportunity that slavery and Jim Crow laws had produced. Rather, the report supported a belief that poor Black individuals themselves were personally responsible for their conditions and were prone to violence and crime.[83] "[F]lawed statistical data," which was first gathered in earnest during this period, demonstrated a high crime rate in poor Black neighborhoods.[84] In response to escalating civil disorder in urban areas, policymakers "grew increasingly pessimistic . . . about the ability of the War on Poverty to reach the most 'hard-core' youth"[85] and subsequently divested from the social welfare initiatives of the Kennedy administration.[86]

Into both the figurative and physical spaces vacated by antipoverty programs entered law enforcement.[87] As Hinton writes, "[f]or those neighborhoods lacking comprehensive rehabilitative or social welfare programs, when law enforcement and criminal justice institutions become the last public agencies standing, the police were the service that could be summoned when help was needed."[88] She documents the rise of community policing, which increased police presence in schools in poor neighborhoods, and encouraged police to engage with youth from poor communities through recreational programs.[89] New theories of policing asked police officers "to actively seek out potential criminals in low-income urban neighborhoods," instead of waiting to be called;[90] this "[p]reemptive contact between

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[82] *Id.* at 20.

[83] *See id.* at 20–21.

[84] *Id.* at 24.

[85] *Id.* at 21. Hinton describes how this data "overstated the problem of crime in African American communities," because the FBI's Uniform Crime Report failed to measure beyond the point of arrest. *Id.* at 24. Further, "arrest rates depended crucially on the extent of police force in a given community." *Id.*

[86] *See id.* at 21–22 (observing that "[t]he aims of the crime war began to change in the 1970s").

[87] *Id.* at 98 ("[N]eighborhood police stations were installed inside public housing projects in the very spaces vacated by community action programs . . . . [and] during Johnson's last years in office, [the federal government] consolidated War on Poverty programs in new community-based institutions that made possible the rapid entry of police and law enforcement functions in urban social welfare programs.").

[88] *Id.* at 9.

[89] *See id.* at 87–95.

[90] *Id.* at 97.

police and residents became routine."[91] All of these forces, Hinton describes, "shift[ed] power within domestic urban programs from social workers to law enforcement authorities" and in doing so, "introduced far more punitive forms of social control in neighborhoods that had experienced unrest or that seemed vulnerable to rebellion."[92]

President Johnson's Crime Commission assumed that parental support was lacking in poor Black communities, and thus that children were in need of alternative forms of supervision.[93] Youth Services Bureaus, which were established in poor communities to act as "institutional substitutes for parents,"[94] adopted a new approach to identifying those in need of social services—they relied on referrals from police departments.[95] Social workers from the bureaus would then refer the youth with whom they could not effectively manage from their programs to police departments and juvenile courts.[96] Hinton writes that "[b]ecause the bureaus were designed to prevent crime by identifying future criminals, in order to qualify for services in many cases, youth had to be designated by professionals and social workers as 'potentially delinquent.'"[97] Warnings that labeling youth as "in danger of becoming delinquent" would create a "self-fulfilling prophecy" went unheeded.[98] The Federal Bureau of Investigation's simultaneous efforts to eradicate the Black Panthers eliminated an important source of social services in poor neighborhoods.[99] Thus, by the 1970s, the rise of community policing efforts and the elimination of nonlaw enforcement sources of support created conditions

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[91] *Id.* at 99.

[92] *Id.*

[93] *Id.* at 101, 115.

[94] *Id.* at 117.

[95] *Id.* at 119.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 123.

[99] *Id.* at 205–06. Alejandro Alonso describes how in Los Angeles, after the Watts rebellion of 1965 (which protested police brutality), new political and social movements were formed, especially the Black Panther Party and the civil-rights oriented US Organization, which offered Black youths vehicles for building self-esteem and self-affirmation. Alejandro A. Alonso, *Racialized Identities and the Formation of Black Gangs in Los Angeles*, *reprinted in* MODERN GANG READER 230, 235–36 (Cheryl L. Maxson et al. eds., 2014). The federal government sought to eliminate the Black nationalist political groups that they viewed as subversive and COINTELPRO fabricated materials that created conflicts between the groups, and they ultimately became extinct. *Id.* at 237. Into this power vacuum stepped street gangs, whose activities early on replicated some of the Panthers' legacy, yet the gangs' activities devolved into criminality. *Id.* at 237–40. Alonso's description is consistent with Lua Kamál Yuille's argument that gangs provide "surrogate sources of identity solidarity," which "becomes a valuable resource because the gang fills gaps left by other socio-cultural institutions." Yuille, *supra* note 47, at 479.

where the police officer was "the best social worker" available in poor communities.[100]

C. Examining the "Boston Miracle"

In applying these counternarratives of the "Boston Miracle," for which the Gang Database is a central component, Cashin's insights explain why Boston's poor communities of color have been segregated into certain neighborhoods that lack adequate government-provided social services or employment opportunities.[101] Once segregated into these communities, police have played an outsized role in controlling the population,[102] reinforcing biases that men of color are dangerous.[103] As Hinton has explained, the government perceived groups of young men of color as needing control and supervision, so that a large mass of unemployed and frustrated youth of color did not become "social dynamite," ready to explode.[104]

A study published in 2015 documented the racial disparities in the Boston Police Department's FIO activity, which the authors described as "the tactical expression of . . . proactive policing in Boston."[105] One of the key findings of the report was racially disparate treatment of persons of color in FIO activity.[106] The authors wrote:

> Controlling for a variety of factors including race of residents, the logged number of crimes in Boston neighborhoods was the strongest predictor of the amount of FIO activity in Boston neighborhoods. However, the analyses revealed that the percentage of Black and Hispanic residents in Boston neighborhoods were also significant predictors of increased FIO activity after controlling for crime and other social factors. These racial disparities generate increased numbers of FIO reports in minority neighborhoods above the rate that would be predicted by crime alone. For instance, a neighborhood with 85 percent Black residents would experience approximately 53 additional FIO reports per month compared to an "average" Boston neighborhood.[107]

Police tactics have included surveillance and labeling—hence the creation of a list of people who are at risk of

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[100] HINTON, *supra* note 76, at 189.

[101] *See* CASHIN, *supra* note 53, at 7.

[102] *Id.* at 174–79; BUTLER, *supra* note 60, at 32; ALEXANDER, *supra* note 13, at 124–37.

[103] *See* PFAFF, *supra* note 67, at 145–47; BUTLER, *supra* note 60, at 17; KENDI, *supra* note 57, at 75.

[104] *See* HINTON, *supra* note 76, at 29–30.

[105] FAGAN ET AL., *supra* note 32, at 1.

[106] *Id.* at ii.

[107] *Id.* at i.

committing gang-related crime being one of the most important jobs of the specialized gang unit.[108] The 2015 report about the Boston Police FIO activity demonstrated that police were more likely to engage in repeat FIOs for a person once they were in the Gang Database, and were then more likely to search and frisk that person.[109]

The involvement of school police in the surveillance and control of communities of color is yet another feature of Boston's Gang Database.[110] This feature reflects beliefs that "cultural deprivation had produced a tangle of patholog[ies]" in Black urban families, tracking with gang researchers' early theories about gangs.[111] Hinton's explanation of how the police came to be the only (and therefore the most effective) social workers in poor communities of color also provides a lens that explains why an organization such as Roca supports Boston's Gang Database.[112] As a social support agency, Roca relies on the Boston Regional Intelligence Center, which houses the Gang Database, as a source of daily updates about new at-risk youth who are in need of their services.[113] As Cashin has noted, however, identifying at-risk youth and intervening in their lives does not require the involvement of law enforcement. For example, Cashin describes an organization in California with similar aims and strategies as Roca, but that operates completely free from law enforcement.[114]

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[108] *See* Webb & Katz, *supra* note 36, at 470.

[109] FAGAN ET AL., *supra* note 32, at i. The report also found that the Youth Violence Strike Force officers ("informally known as the gang unit") were associated with the highest numbers of FIO reports. *Id.* at 12, 14.

[110] *See* Jason Law, *Boston City Council Wants More Transparency with Police Gang Database*, BOS. 25 NEWS (June 15, 2021), https://www.boston25news.com/news/boston-city-council-wants-more-transparency-with-police-gang-database/VSPPLAAMSJBZTNHUZ5ZHK3XT2E/ [https://perma.cc/4F8N-R76T] (noting that Boston's Gang Database "went largely unnoticed until 2017, when an East Boston High School student was deported after a Boston school police officer labeled him—incorrectly his lawyer said—as an MS-13 member").

[111] *See* HINTON, *supra* note 76, at 20–30; ALEXANDER, *supra* note 13, at 45–46; Jane Wood & Emma Alleyne, *Street Gang Theory and Research: Where Are We Now and Where Do We Go From Here?*, AGGRESSION & VIOLENT BEHAV. 2, 8–10 (2010) (noting that early gang researchers in the United States pointed to how economic destabilization contributed to social disorganization, which "led to the breakdown of conventional social institutions such as the school, church, and most importantly, the family," and that these negative attributes were "culturally transmit[ted]" through families in poor inner-city areas, and other youth in the neighborhoods could "become delinquent by associating with . . . 'carriers' of criminal norms") (citations omitted).

[112] Letter from Roca to Bos. City Counsel, *supra* note 50.

[113] *Id.*

[114] *See* CASHIN, *supra* note 53, at 191–99. Cashin describes the work of the Office of Neighborhood Safety (ONS) in Richmond, California, which has had significant success in bringing down the crime rate. *Id.* at 194–96. The founder of ONS, DeVone Broggan, insisted that ONS operate completely independently of law enforcement. He hired youth with felony records and "intimate knowledge of the codes of the streets" as "neighborhood change agents," an employee classification within city government. *Id.* at

Entangling law enforcement and social services functions is said to be part of the "Boston Miracle," yet gang researchers have noted how service providers and law enforcement often work at cross purposes and do not trust each other, which can decrease the effectiveness of such joint interventions.[115]

Pfaff's argument that racism has led to harsher law enforcement against those who are not white is well documented in Massachusetts, given that police are more likely to stop and frisk those who are Black and Latine,[116] and that prosecutors are more likely to bring the most severe charges against them.[117] Cashin's, Butler's, and Kendi's observations about white people's fear of people of color explain why a liberal city like Boston can easily sanction a "watch list" (e.g., the Gang Database) that is composed of 4,700 individuals, over 90 percent of whom are Black or Latine.[118] This is especially troubling when one notes that the original list of problematic youth identified in Boston contained roughly 1,300 names; the list has nearly quadrupled since the 1990s.[119] No such database exists to watch

194. ONS provides twenty-four-seven support, including cognitive behavioral therapy; help navigating social services; substance abuse treatment, if needed; and opportunities for travel, internships, and job training for any youth who gives up the life of the street. *Id.* at 195.

115 Braga, *Focused Deterrence Strategies*, *supra* note 30, at 486; Irving A. Spergel et al., *The Comprehensive Community-Wide Gang Program Model: Success and Failure*, *in* MODERN GANG READER 451, 455–460 (Cheryl L. Maxson et al. eds., 4th ed. 2014).

116 *See, e.g.*, ACLU FOUND. OF MASS., BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007–2010 1 (2014), https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf [https://perma.cc/TR35-BQ2Z] (finding that Black people were subject to 63 percent of reported encounters where Boston police officers interrogated, stopped, frisked, or searched a civilian, even though only 24 percent of Boston's population is Black); *id.* ("[E]ven after controlling for crime, alleged gang affiliation, and other non-race factors, the number of police-civilian encounters was driven by a neighborhood's concentration of Black residents: as the Black population increased as a percentage of the total population, so did the number of police encounters.").

117 *See* ELIZABETH TSAI BISHOP ET AL., CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM 13 (Sept. 2020), https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf [https://perma.cc/UD25-8QCN] ("Black and Latinx people are overrepresented in the [criminal] caseload compared to their population in the state. White people make up roughly 74.3% of the Massachusetts population . . . [while accounting for] 58.7% of cases in our data set. [Meanwhile,] Black people make up just 6.5% of the Massachusetts population and . . . [account for] 17.1% of cases. Latinx people are [similarly overrepresented,] mak[ing] up 8.7% of the Massachusetts population . . . [but] 18.3% of the cases in [the sample]."); *id.* at 2 ("Our analysis shows that one factor—racial and ethnic differences in the type and severity of initial charge—accounts for over 70 percent of the disparities in sentence length.").

118 *See* Editorial Bd., Opinion, *The Boston Police Gang Database Gets Overdue Attention*, BOS. GLOBE (Jan. 24, 2022, 4:00 AM), https://www.bostonglobe.com/2022/01/24/opinion/boston-police-gang-database-gets-overdue-attention/ [https://perma.cc/DU6V-V437].

119 *See* BRAGA ET AL., REDUCING GUN VIOLENCE, *supra* note 38, at 20–24. Two of the academic authors of Boston's Operation Ceasefire have noted that the current size

problematic groups within majority-white communities in the Boston area.[120]

Harcourt's explanation of the counterrevolution provides a lens through which to see the Gang Database, since the Database's goal is to identify the active minority that the majority of the population should fear, and it uses various techniques to eradicate that minority.[121] At the same time, the "Boston Miracle" relied on community involvement and buy-in to root out this active minority.[122] The Boston program enlisted Black clergy as community leaders, yet these leaders alienated the Cape Verdean community in particular by accusing them (in a manner reminiscent of the "tangle of patholog[ies]" in the Moynihan report) of not providing adequate supervision of their youth.[123] As one critique of the Boston Gang Database put it, "[g]ang designations function like a caste: once a person has been branded a gang member, that label follows them in every interaction they have with law enforcement. It becomes the basis for more frequent stops and more aggressive policing."[124]

For noncitizens in particular, labeling someone a gang member becomes the manner in which the government most effectively eradicates the minority—through permanent banishment in the form of deportation and detention while the noncitizen fights against that deportation.[125] All the while, the government successfully convinces the law-abiding majority that we should be afraid of this dangerous minority and thankful that ICE has removed them from our communities.[126]

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of the gang database is too large, although they defend its existence. *See* Winship & Braga, *supra* note 30.

[120] *See* Wood & Alleyne, *supra* note 111, at 13–14 (critiquing how media accounts of gang activity ignore the activities of white gangs, and noting that gang activity by fraternity brothers is not of interest to gang units) (citing PEGGY SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (1990)).

[121] HARCOURT, *supra* note 71, at 127, 149.

[122] *See* Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 863, 865–66 (2019) (discussing gang databases as part of "watchlists" that are "innovations," but that the author describes as tactics of "secret police in a repressive regime," because they "[c]reat[e] lists of perceived criminal actors in the domestic context therefore serv[ing] as a kind of shorthanded proxy for criminality").

[123] Braga et al., *supra* note 37, at 163; HINTON, *supra* note 76, at 20.

[124] Letter from Charles Hamilton Houston Inst. Race & Just. at Harv. L. Sch. to Bos. City Council (Mar. 9, 2021) (on file with author).

[125] *See* Julianne Hing, *ICE Admits Gang Operations Are Designed to Lock up Immigrants*, NATION (Nov. 20, 2017), https://www.thenation.com/article/archive/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/ [https://perma.cc/Y4NC-VZTU].

[126] *See id.* ("ICE's operations [that arrest gang members] suggest that the agency conducts its operations 'more as a PR attempt to solidify support from their base than anything based on legitimate law-enforcement practice,' said Escobar. 'And just coincidentally, more than half of the people swept up are innocent folks that have no connection to the people they're targeting.'").

D. Immigration Enforcement Meets Gang Enforcement

The story of police efforts to disrupt gangs is incomplete without explaining how immigration enforcement agents jumped on the gang eradication bandwagon. Jennifer Chacón tells the story of how anti-gang efforts came to be part of immigration enforcement.[127] These efforts found their roots in federal legislation that facilitated the deportation and detention of so-called "criminal aliens."[128] The War on Crime and War on Drugs found its place in immigration law, creating ominous-sounding deportation and mandatory detention categories such as "aggravated felon[y]" (a term that was first introduced by the Anti-Drug Abuse Act of 1988).[129] The very first "aggravated felony" definition included only murder, drug trafficking, and firearms trafficking,[130] thus putting drug trafficking crimes "on par with murder as [a] basis for deportation."[131] Through various amendments during the 1990s, Congress created more categories of "criminal aliens," both by expanding the "aggravated felony" category and including other crime-based grounds for deportation and mandatory detention.[132] The result was a public discourse in which "migrants were linked with drug trafficking and other violent crimes, even in the absence of data to substantiate the link."[133] The immigration enforcement response was to target those who were "most commonly associated with both drug crimes and violent crimes: the noncitizen criminal street gang member."[134]

In 1992, the Immigration and Naturalization Service, the predecessor to Immigration and Customs Enforcement (ICE),[135] created the Violent Gang Task Force, which focused on using immigration law to assist local anti-gang activity.[136] Later, in 2005, ICE instituted Operation Community Shield,

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[127] *See* Chacón, *supra* note 13, at 324–35.

[128] *Id.* at 324.

[129] *Id.* at 321.

[130] *See* Anti-Drug Abuse Act of 1988 ("Drug Kingpin Act"), Pub. L. No. 100-690, tit. VII, § 7342, 102 Stat. 4181, 4469 (1988) (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a)).

[131] Chacón, *supra* note 13, at 322.

[132] *Id.* at 322–24; *see also* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006).

[133] Chacón, *supra* note 13, at 324.

[134] *Id.*

[135] The Immigration and Naturalization Services housed what is now broken into subagencies within the Department of Homeland Security: Citizenship and Immigration Services, Customs and Border Patrol, and ICE. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2192 (2002) (codified at 6 U.S.C. § 251 (2006)).

[136] Chacón, *supra* note 13, at 325.

with the stated goal of disrupting the activities of the MS-13 gang.[137] This gang became the focal point of immigration enforcement because it was branded as an "alien gang," despite the fact that MS-13's roots were in Los Angeles, California (its original members were refugees or children of refugees fleeing the civil wars in El Salvador who formed MS-13 to protect themselves against other street gangs in LA).[138] Operation Community Shield ultimately expanded to include all violent gang members nationwide.[139] ICE has continued its anti-gang efforts through various enforcement operations over the course of years.[140] As Laila Hlass has noted, ICE's increased use of technology—for example, mining social media accounts for evidence to support gang affiliation and surveil noncitizens—has facilitated a generation of such gang allegations.[141] ICE's enforcement actions are assisted by their ability to seamlessly access the gang databases of local police, often in violation of regulations governing such shared databases.[142]

It is logical to see how immigration enforcement became the manner in which gang members could easily be eradicated from the US population. Deportation and detention laws could be employed more easily than criminal laws, which require high burdens of proof, actual definitions, and operate within a system where the defendant is appointed a lawyer.[143] In the immigration system, ICE need only prove that the person is in the country illegally in order to deport them.[144] Even if the noncitizen has a good defense against deportation, because the deportation system does not appoint a lawyer, the noncitizen is unlikely to successfully employ such a defense.[145] With respect to detention

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[137] *Id.* at 327.

[138] *Id.* at 327–28.

[139] *Id.* at 329.

[140] *See* Hlass, *supra* note 7, at 714–15 (describing ICE's short-term efforts to target specific gangs, which took on names such as "Operation Matador" and "Project Nefarious").

[141] *Id.* at 716–20.

[142] *See* Thomas Nolan, *The Trouble with So-Called Gang Databases: No Refuge in the "Sanctuary,"* AM. CONST. SOC'Y (June 27, 2018), https://www.acslaw.org/expertforum/the-trouble-with-so-called-gang-databases-no-refuge-in-the-sanctuary/ [https://perma.cc/B5WC-CMR5]. Nolan explains that under 28 C.F.R. part 23, information is only allowed in a shared database (one that is accessible to ICE, a separate law enforcement arm from state law enforcement agencies) "if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." *Id*. He describes how the Boston Regional Intelligence Center's database collects information about associations and dress to support the gang allegation, so such information should not be accessible to ICE via a shared database. *Id*.

[143] Chacon, *supra* note 13, at 329–32.

[144] *Id*. at 332.

[145] *Id*. at 334; *see generally* Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 165 U. PA. L. REV. 1 (2015) (demonstrating,

pending deportation, ICE carries no burden[146]—a mere suggestion of gang membership is enough to argue that the noncitizen is dangerous.[147] Perhaps for this reason, federal legislation seeking to punish gang membership with deportation never got off the ground, as this would require an actual definition of gang membership[148] and associated burdens to prove such membership.

It is important to note that ICE relies on state and local law enforcement agencies to develop lists of gang members and share them for immigration enforcement purposes.[149] ICE typically does not do the work of finding the suspected gang members themselves.[150] It is hard to say, between the state enforcement agents and ICE, who is more responsible for the "dirty work" of racially profiling young men of color from certain neighborhoods for the penalty of detention and deportation.[151] Since ICE essentially has no barriers to enforcement—these young men are frequently illegally in the United States—nothing prevents them from selectively enforcing immigration law against them upon suspicion that they are dangerous gang members.[152] State and local prosecutors, seeking a means to eradicate these suspected gang members by means that cannot be done within the criminal justice system, can "walk[] away like bored lions leaving immigration hyenas to deal with [them]."[153]

This part has sought to provide critical background information about why our hypothetical teenager, in his deportation case, is facing a packet of evidence that labels him as a gang member. The ICE prosecutor, who is the proponent of this evidence, no doubt is aware that this evidence reinforces a societal perception that a young man of color is a gang member

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through empirical study, there is a significantly increased likelihood of success defending against deportation when an immigration detainee is represented by counsel).

146 *See infra* Part III, Section B.

147 *See* Emily Ryo, *Predicting Danger in Immigration Courts*, 44 LAW & SOC. INQUIRY 227, 245–46 (2019) [hereinafter Ryo, *Predicting Danger in Immigration Courts*].

148 *See* Chacón, *supra* note 13, at 330–33.

149 *Id.* at 329.

150 *Id.*

151 *See supra* Part I, Sections A–C.

152 Chacón underscores this point by referencing the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, in which the Supreme Court held that immigration agents are effectively free from any selective prosecution claims. *See* Chacón, *supra* note 13, at 341–42 (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999)).

153 Ashfaq, *supra* note 11, at 69 (describing how the FBI questioned a Middle-Eastern immigration detainee three times, but, after finding no terrorism charges that they could substantiate, "walked away like bored lions leaving immigration hyenas to deal with him").

and therefore a danger.[154] In a case like our hypothetical teenager, who has never been arrested for a gang-related crime, this is the only evidence of gang membership. Because this gang evidence is so key to ICE's deportation and detention case against the noncitizen, it is useful to examine how the burdens of proof interact with the gang evidence.

II. GANG EVIDENCE THROUGH THE LENS OF IMMIGRATION LAW'S BURDENS OF PROOF

Burden of proof plays an important role when evidence, such as gang printouts, are uncertain and controversial. Gang accusations are both uncertain (there is no one definition of a "gang" or "gang member") and controversial (criminality is assigned to noncriminal behavior of youth of color), so the assignment of the burden of proof is particularly important when an immigration judge evaluates this type of evidence. In nearly every aspect of a deportation case, the noncitizen carries the burden of proof. Thus, the burdens of proof in immigration law allow the racist assumptions built into gang evidence to work against the noncitizen.

This part discusses the purpose of burdens of proof in litigation, and how the burden on the noncitizen in immigration cases places an individual in the difficult situation of disproving unreliable evidence based on racist stereotypes.

A. The Role of the Burden of Proof in Litigation

In a 1992 book, *Burdens of Proof in Modern Discourse*, Richard Gaskins explains that the burden of proof is "law's response to ignorance," because it answers "what conclusions can be drawn from controversial or indeterminate evidence."[155] The burden of proof is intertwined with the notion of presumptions because evidence always passes through cognitive filters, which are colored by the social realities of the person hearing the evidence.[156] Importantly, the burden of proof amounts to more than mere "stage direction[]" as to who must

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[154] *See* Ryo, *Predicting Danger in Immigration Courts*, *supra* note 147, at 245–46 (citing, as an example of a psychological shortcut that immigration judges may use at an immigration bond hearing, the heuristic that a Central American male is a dangerous person because he is probably involved with a gang); *see also* Ashfaq, *supra* note 11, at 68 (describing how a government attorney could suggest a connection between a Middle Eastern man and terrorism, and that the immigration judge would accept these presumptions of a national security threat).

[155] RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 4, 22 (1992).

[156] *Id.* at 22–23.

speak first in a litigation setting; rather, it dictates who bears the burden of *persuasion* when the evidence is uncertain.[157]

Gaskins discusses theories of burdens of proof dating back to 1827, when Bishop Whatley wrote that every existing institution enjoys a presumption that favors the status quo, even if the institution could change for the better.[158] As such, the burden of proof lies with the person who demands a change.[159] He also discusses the critical legal studies (CLS) movement, which critiqued the American legal system for undermining the very liberty and equality it proposed to celebrate, while shifting the intellectual burdens of proof to defenders of the system.[160]

Gaskins explains that the Warren Court, through constitutional holdings, shifted the burden onto existing institutions to prove that they were doing their jobs.[161] The Warren Court's focus on procedural due process required multiple institutions of government to justify whether its procedures were fair enough to guarantee an absence of institutional bias in making various decisions that would impact individuals.[162] This "obstacle course" of criminal procedure became the ideal against which multiple government decisions were judged.[163] Even government institutions that were created with benevolent purposes were not presumed to act in the interests of those they intend to serve.[164] The due process principles articulated during the Warren Court reflected a distrust of government institutions; they could only satisfy their critics once their procedures

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[157] *Id.* at 3–4.

[158] *Id.* at 34–35.

[159] *Id.*

[160] *Id.* at 43.

[161] *Id.* at 45–46, 48–83.

[162] *Id.* at 76. Gaskins describes how procedural due process was a more "subtle tool of judicial activism" than substantive due process, but in fact could have enormous impact on substantive policy. *Id.* at 78. For example, he writes that "[d]epending on how high the reviewing court chooses to set the burden of proof, virtually any public or private authority can be forced to modify its actions once it falls under federal court jurisdiction." *Id.* at 76.

[163] *Id.* at 79–80 (quoting Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 13 (1964)).

[164] Gaskins writes, "[i]ronically, the central targets of distrust singled out under the due process model included some of the major goals of progressive reform from the preceding half century: the rehabilitative objectives of criminal corrections, the therapeutic efforts of juvenile courts and public mental health agencies, and, in general, the increase in state public welfare services." *Id.* at 81–82. He writes that there was an emphasis on "good intentions gone awry." *Id.* at 82. Quoting a public interest attorney, he writes, "[e]very program designed to help the dependent ought to be evaluated, not on the basis of the good it might do, but rather on the basis of the harm it might do." *Id.* at 88 (quoting WILLARD GAYLIN ET AL., PRISONERS OF BENEVOLENCE: POWER VERSUS LIBERTY IN THE WELFARE STATE 124 (1978)).

demonstrated that the decisionmaker was not influenced by any biases or uncertainties.[165]

B. Immigration Burdens of Proof

In our introductory story, where a hypothetical teenager confronts gang evidence against him in immigration court, he bears the burden of proof at nearly every turn. The only point at which the government definitively bears the burden of proof in these proceedings is when the government alleges that he is not a citizen.[166] When seeking relief from removal (i.e., asylum), he must prove that he is both eligible (meaning he has a well-founded fear of future persecution on the basis of a protected ground) and that he merits a favorable exercise of discretion.[167] That eligibility determination for asylum requires him to prove that he is credible; any evidence that shows he is not credible, even if unconnected to his claim, can disprove this.[168] In a bond case, where a noncitizen asks an immigration judge to release him during removal proceedings, agency case law currently requires him to bear the burden of proof,[169] although some courts have rejected this burden allocation.[170] However, from that point on, it is the teenager's burden to prove he is legally here in the United States or legally entitled to relief.[171] To put it in Gaskins' terms, all of the presumptions lie with the existing institutions—in this case, immigration authorities—that they are correct, and

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[165] *Id.* at 83.

[166] At the very outset of his case, it is the government's burden to prove that he is not a citizen of the United States. *See* 8 C.F.R. § 1240.8(c) (2023) ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent."). This is a fact that the government will easily be able to prove, as noncitizens often concede alienage in their initial arrests by ICE; only egregious ICE enforcement tactics that have called into question the fundamental fairness of those admissions will be suppressed once introduced in immigration court. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (holding that, while the exclusionary rule is available in such proceedings, it is only available where there has been an egregious violation of the Fourth Amendment).

[167] *See* 8 U.S.C. § 1229a(c)(4)(A).

[168] *Id.* § 1158(b)(1)(B)(iii) (credibility determination can be made "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor").

[169] *See In re* Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

[170] *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (holding that the Board of Immigration Appeals' interpretation of the burden allocation in immigration bond hearings under 8 U.S.C. § 1226(a) violates detainees' due process rights); Velasco-Lopez v. Decker, 978 F.3d 842, 855 (2d Cir. 2020) (finding that requiring a noncitizen to bear the burden of proof in a section 1226(a) bond hearing was unconstitutional in light of "unduly prolonged" immigration detention). *But see* Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in section 1226(a) immigration bond hearings).

[171] *See* 8 U.S.C. § 1229a(c)(4)(A).

the noncitizen must beg to remain in the United States and not to be detained.[172]

The theoretical underpinning of the burden of proof explains why most of these burdens are allocated in this way in the immigration system.[173] The party that seeks law's intervention must bear the burden of proof.[174] Thus, in civil cases, where a plaintiff brings the lawsuit, it is the plaintiff who bears the burden, because there is a presumption that the defendant has followed all applicable laws. When the government brings a criminal case, it must bear the burden because there is a presumption of innocence.[175] As Gaskins writes, "until fresh evidence persuades the observer to revise a prior hypothesis about the natural world, that hypothesis is allowed to stand."[176] In a similar manner, immigration law at first presumes that everyone is a citizen; thus, it is the government who must prove that the person they seek to deport is an "alien."[177] If that person is lawfully in the United States, it is the government that must prove that the noncitizen has violated their immigration status, typically through post-entry conduct, such as a criminal conviction, or that they never should have had status in the first place.[178]

When a noncitizen is found to be removable, they then become the one seeking the law's intervention so as to stay in the United States and therefore must bear the burden of proving both eligibility for relief and that they merit relief in the exercise of discretion.[179] Similarly, for a noncitizen seeking admission to the United States, the noncitizen seeks law's intervention and as such, must prove they are entitled to such admission.[180] As

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[172] *See* Ashfaq, *supra* note 11, at 67 (reflections of an immigration attorney representing detained clients seeking bond and critiquing the procedures by stating, "[f]reedom was his to take, not to beg for").

[173] *See* Holper, *The Beast of Burden*, *supra* note 10, at 112–17.

[174] *Id.*; GASKINS, *supra* note 155, at 23.

[175] GASKINS, *supra* note 155, at 23.

[176] *Id.*

[177] *See* 8 C.F.R. § 1240.8(c) (2023); Holper, *The Beast of Burden*, *supra* note 10, at 113–14.

[178] *See* 8 U.S.C. § 1229a(c)(3)(A) ("[T]he [government] has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.").

[179] *See id.* § 1229a(c)(4)(A) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien—(i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.").

[180] *See id.* § 1229a(c)(2) ("In the proceeding the alien has the burden of establishing—(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.").

explained in a separate article, this author previously critiqued the burden of proof in bond hearings as operating outside of this traditional framework because there is a presumption of freedom, and therefore it should be the government that bears the burden of proving that detention is necessary.[181]

C. How Immigration Burdens Interact with (Often Unreliable) Gang Evidence

Because existing immigration burdens would require our hypothetical Salvadoran teenager to prove that he is not a danger, is deserving of discretionary relief, and is credible, any government evidence suggesting he is a gang member would label him as a dangerous criminal and liar if he subsequently denies gang involvement. Yet, in the face of such evidence, he carries an impossible burden of proving he is *not* a gang member. Government evidence that comes backed by not one, but two institutions (the report is created by the Boston Police, and is then submitted as evidence by the Department of Homeland Security), carries even more persuasive value.[182] Further, printouts from the Gang Database read like an expert report, because they contain an opinion (this young person is a gang member), documented by inputs leading up to that opinion (he was seen with this "known gang member"; he was victimized by this "known rival gang member").[183] This adds a "scientific veneer" to a preordained conclusion that relies on racist stereotypes—namely, that a young Latino man from a poor neighborhood is engaged in gang-related crime, and we should protect society from him.[184] Because the Federal Rules of Evidence do not apply in immigration proceedings, the evidence is admitted notwithstanding the fact that it contains multiple

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[181] *See* Holper, *The Beast of Burden*, *supra* note 10, at 117. It should be noted that at least one appellate court and several district courts have determined that the Board's burden allocations in bond hearings violate the due process rights of immigration detainees. *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 39 (1st Cir. 2021); Diaz-Ceja v. McAleenan, 2019 U.S. Dist. LEXIS 110545, at *10 (D. Colo. July 2, 2019); Adejola v. Barr, 408 F. Supp. 3d 284, 287 (W.D.N.Y. 2019); Melie I. v. Dep't of Homeland Sec., 2019 U.S. Dist. LEXIS 95338, at *6–7 (D. Minn. Jan. 7, 2019); Darko v. Sessions, 342 F. Supp. 3d 429, 435–36 (S.D.N.Y. 2018). *But see* Miranda v. Garland, 34 F.4th 338, 365 (4th Cir. 2022).

[182] *See* GASKINS, *supra* note 155, at 34–35 (describing a "[p]resumption in favor of every existing institution") (emphasis omitted).

[183] *See supra* notes 1–9 and accompanying text.

[184] *Cf.* Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L. J. 45, 45 (2014) (describing ICE's risk assessment tools as adding "a scientific veneer to enforcement that remains institutionally predisposed towards detention and control"); Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 833–46 (2020).

levels of hearsay, which otherwise would have typically screened it out as unreliable.[185]

Yet, this is where the burden of persuasion matters, as it is hard to imagine evidence that is more indeterminate or controversial than a printout from a Gang Database. Gang Database evidence is indeterminate for two reasons. First, there is a lack of consensus around the definition of "gang." When gangs became of national concern in the 1990s, criminologists noted that despite two decades' worth of efforts to define the term, "'[a]t no time has there been anything close to consensus on what a gang might be—by scholars, by criminal justice workers, by the general public.'"[186] Gang researchers and policymakers agreed on one definition of "street gang" after dozens of meetings and workshops between 1997 and 2003.[187] However, gang researchers who discussed this important development also noted that media portrayals often misrepresent street gangs as far more organized than they actually are.[188] There are also multiple varying federal and state criminal statutes that attempt to define "gang" for the purposes of imposing sentence enhancements.[189] Because ICE relies on local police to share their gang lists, this necessarily means that there is no one meaning of "gang" for the purposes of national immigration enforcement.[190]

Without one set definition of "gang," law enforcement is permitted to arbitrarily apply anti-gang policies and laws against poor people of color.[191] This concern was reflected by the

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[185] *See* Holper, *Confronting Cops*, *supra* note 11, at 693. Courts deciding immigration cases have clarified that immigration judges must first determine that the evidence is reliable in order to comport with the noncitizen's due process rights. *See id*. at 693–96.

[186] *See* Richard A. Ball & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining "Gangs,"* 33 CRIMINOLOGY 225, 225 (1995) (citing Walter B. Miller, *Violence by Youth Gangs and Youth Groups as A Crime Problem in Major American Cities*, NAT'L INST. FOR JUV. JUST. & DELINQ. PREVENTION 115 (1975)). To underscore the problem with defining terms in criminology, the authors wrote, "[l]et me make the definitions and I'll win any argument." *Id*. (quoting Cheryl L. Maxson & Malcolm Klein, *Defining and Measuring Gang Violence*, *in* GANGS IN AMERICA 71 (1990)).

[187] Malcolm W. Klein & Cheryl L. Maxson, *A Brief Review of the Definitional Problem*, *reprinted in* MODERN GANG READER 3, 3 (Cheryl L. Maxson et al. eds., 4th ed. 2014) ("A street gang is any durable, street-oriented youth group whose involvement in illegal activity is part of its group identity.").

[188] *See* Malcolm W. Klein & Cheryl L. Maxson, *Gang Structures*, *reprinted in* MODERN GANG READER 137, 137 (Cheryl L. Maxson et al. eds., 4th ed. 2014) ("[I]n the majority of gangs, median individual membership lasts only about a year. This high level of turnover challenges any notion of a stable structure.").

[189] *See* Chacón, *supra* note 13, at 330–31, 332 n.78.

[190] *See* Hlass, *supra* note 7, at 329–30.

[191] *See*, *e.g.*, Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 281–84 (2010) (critiquing gang

Supreme Court's decision in *City of Chicago v. Morales*,[192] in which the plurality determined that Chicago's antiloitering ordinance, which was targeted at gang activity, was void for vagueness.[193] The arbitrary enforcement of an ambiguous word—"gang"—is further demonstrated by the Board of Immigration Appeals' (BIA or Board) rejection of asylum-seekers' claims that they would be persecuted as suspected or former gang members.[194] In these cases, the Board rejected the proposed social groups for lacking "particularity because it is too diffuse, as well as being too broad and subjective,"[195] and it is "difficult to formulate an 'accurate separation of members from non-members.'"[196] Thus, when seeking to define oneself as a suspected gang member in order to gain protection and legal status, the obvious amorphousness of gang membership blocks protection. Yet when such membership is wielded by the government to define a young man of color as undesirable or not credible, concerns about amorphous definitions fade away. This one vague word—"gang"—can be manipulated by immigration enforcement agents because it is devoid of meaning.

Second, even assuming an agreed upon definition of "gang," what evidence would definitely prove membership or affiliation in a gang?[197] Hand signals, a Chicago Bulls hat, Nike Cortez sneakers, and a "503" tattoo (the country telephone code for El Salvador, the country with the most ties to MS-13)[198] are all examples of group paraphernalia or identifiers.[199] But at what

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injunctions because they violate the Fifth Amendment's protection against laws that are void for vagueness).

[192] *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

[193] *See id*. at 56–64. The plurality explained two reasons why the ordinance was void for vagueness: to put persons who are subject to enforcement on notice of what the law prohibits and to discourage arbitrary enforcement by police. *Id*.

[194] Asylum seekers who fear persecution due to their past or suspected membership in a gang have been repeatedly rejected by the BIA. *See*, *e.g.*, *In re* W-G-R-, 26 I. &. N. Dec. 208, 221–22 (B.I.A. 2014) (rejecting a proposed particular social group defined as "former members of the Mara 18 gang in El Salvador who have renounced their gang membership"); *In re* E-A-G-, 24 I. & N. Dec. 591, 593 (B.I.A. 2008) (rejecting a proposed particular social group defined as "young persons who are perceived to be affiliated with gangs (as perceived by the government and/or the general public)").

[195] *In re W-G-R-*, 26 I. & N. Dec. at 221.

[196] *In re* A-O- (slip op. at 5) (B.I.A. May 18, 2022) (quoting Ahmed v. Holder, 611 F.3d 90, 94 (1st Cir. 2010) (on file with author).

[197] *See*, *e.g.*, Chacón, *supra* note 13, at 329–32.

[198] Jennifer Chacón clarifies, "MS-13 is often described as an "alien gang" based in El Salvador, but MS-13 is perhaps better understood as a product of the United States." *Id*. at 327–28.

[199] *See* Allison Manning, *How Violent Street Gang MS-13 Operates in Massachusetts*, BOSTON.COM (Jan. 29, 2016) https://www.boston.com/news/local-news/2016/01/29/how-violent-street-gang-ms-13-operates-in-massachusetts [https://perma.cc/J3ZM-ADHY]; Mary Holper & Claire Valentin, *Boston Police Has a Secret Point System That Turns Normal Teenage Behavior Into Gang Membership*, ACLU (Nov. 21, 2018),

point do these change, and how much can we trust a police officer who is responsible for keeping up with the latest "I'm a gang member" fashion? And what if wearing those clothes or displaying these hand signals is merely an indicator of a young person following fashion trends in their neighborhood or expressing "wannabe" behavior[200] without understanding the drastic consequences that can result?[201] Being seen with another "known" gang member is other evidence that proves affiliation.[202] Yet, when one questions how that friend is "known" as a gang member, the evidence becomes circular—your friend is a gang member because he is seen with you; you are a gang member because you are seen with him.

As evidenced in the story outlined in the introduction to this article, being a victim of a "rival" gang can also be evidence used to prove affiliation.[203] But the assumption underlying this evidentiary conclusion—that only gang members are victims of gang violence[204]—defies the purpose for which this evidence is introduced into removal proceedings, which is to prove that a person is dangerous to the rest of society.[205] But presumably,

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https://www.aclu.org/blog/immigrants-rights/boston-police-has-secret-point-system-turns-normal-teenage-behavior-gang [https://perma.cc/Q6J9-T5QY]. 503 is the country telephone code for El Salvador and has been explained as an outward symbol of the Mara Salvatrucha, or MS-13. *See* Maria Cramer, *Alleged MS-13 Member Accused of Murder Was Once Identified in Boston Gang Database*, BOS. GLOBE (Dec. 1, 2018), https://www.bostonglobe.com/metro/2018/12/01/alleged-member-accused-murder-was-once-identified-boston-gang-database/aB4dHthBXDADdLXi9rLtRJ/story.html [https://perma.cc/7LWP-2F2C].

[200] *See* Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs and Critical Race Feminism*, 11 LA RAZA L. J. 1, 6 (1999) ("On the periphery of each of these gangs is the 'wannabe', the aspirational or potential gang member. These may be only children who are pretending to be gang members, by wearing certain clothing and using gang hand signs, with no real intention to join the gang or they may be recruits who are or will become active in the gang.").

[201] Those who are most likely to suffer immigration consequences of gang membership or affiliation are youth, whose frontal lobes are not fully developed, such that they cannot fully appreciate the consequences of their actions. *See* Lapp, *supra* note 28, at 202–03 (discussing various ways in which the law accommodates age when determining accountability, because "poor impulse control is compounded by the fact that [children] are profoundly attuned to and influenced by their peers").

[202] *See*, *e.g.*, *Rules & Procedures*, *supra* note 1.

[203] *See*, *e.g.*, *id.*; Lapp, *supra* note 28, at 210 (recounting a story of how a "fifteen-year-old who was not in a gang ended up in a gang database after he was attacked while sitting on his front door steps talking with friends. Because the attackers were gang members, detectives assumed that the victim was as well, and registered him as an active gang member") (citing VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 77–78 (2011)).

[204] *See* Warren Fiske, *Are Most Murders "Gangbangers Killing Gangbangers, As Van Cleave Says?,"* POLITIFACT (Jan. 9, 2020), https://www.politifact.com/factchecks/2020/jan/09/philip-van-cleave/are-most-murders-gangbangers-killing-gangbangers-v/ [https://perma.cc/4LQR-57F6] (fact-checking politician's claim that homicides in Virginia and across the nation usually involve gang members killing each other and finding insufficient data to prove such a claim).

[205] *See* Hing, *supra* note 125.

society would have nothing to fear if the individual were not actually a gang member. Even a "self-admission," which might be considered the most reliable form of evidence,[206] falters when one learns that in California, an audit of the state's gang database revealed that twenty-eight children who were under one year old had "admit[ted] to being gang members."[207]

Even if it were easy to remove oneself from a gang database when there is an obvious mistake, or if one is no longer a gang member,[208] this would not fix the problem. Gang database evidence is not just indeterminate, it is also controversial because it assigns a presumption of criminality to noncriminal behavior.[209] That noncriminal behavior is a young person associating with a group of people; calling this group a "gang" renders that association sinister. Gang evidence primarily impacts youth of color, as evidenced in the Boston Gang Database, where more than 90 percent of those listed are Black or brown.[210] Gang database evidence tags poor youth of color as part of a dangerous group because of where they can afford to live,[211] which in turn impacts what schools they attend,[212] who

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[206] Self-admissions raise questions about whether an individual was coerced into making a self-incriminating statement. This is especially true when self-admissions primarily come from juvenile suspects, who are more likely to face the consequences of detention and deportation due to gang membership. *See* J.D.B. v. North Carolina, 564 U.S. 261, 271–74 (2011) (holding law enforcement must consider age when deciding whether an individual is in custody for purposes of providing a *Miranda* warning).

[207] *State Audit Affirms ACLU of California Concerns on Gang Database*, ACLU N. CAL. (Aug. 11, 2016), https://www.aclunc.org/news/state-audit-affirms-aclu-california-concerns-gang-database#:~:text=Los%20Angeles%20%2D%20A%20state%20audit,to%20privacy%20and%20fair%20treatment [https://perma.cc/R2FH-G3KE]; CAL. STATE AUDITOR, THE CALGANG CRIMINAL INTELLIGENCE SYSTEM: AS THE RESULT OF ITS WEAK OVERSIGHT STRUCTURE, IT CONTAINS QUESTIONABLE INFORMATION THAT MAY VIOLATE INDIVIDUALS' PRIVACY RIGHTS (2016), https://www.documentcloud.org/documents/3010637-CalGang-Audit.html [https://perma.cc/CNQ2-R34R].

[208] *See* Hlass, *supra* note 7, at 735 (describing how youth are placed in gang databases without notice or opportunity to challenge the categorization, and how gang databases are infrequently audited to purge the names of nonmembers).

[209] *See* Said, *supra* note 122, at 866 ("Creating lists of perceived criminal actors in the domestic context . . . serves as a kind of shorthanded proxy for criminality.").

[210] *See* Editorial Bd., *supra* note 118.

[211] *See* Said, *supra* note 122, at 830 (discussing geographic affiliation with "certain minority groups [who] are identified [by the government] as having a greater propensity toward a type of dangerous behavior"); Lapp, *supra* note 28, at 210 ("The broad criteria for inclusion in gang databases, and the discretion afforded to law enforcement in deciding whom to include, make it difficult for young people living in gang-heavy communities to avoid qualifying criteria."); *see also* CASHIN, *supra* note 53 (describing conditions of white supremacy that created "the ghetto" and the lack of services, public goods, infrastructure, and development that occurs within these nonwhite spaces).

[212] *See*, *e.g.*, Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES (June 9, 2016), https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html [https://perma.cc/3KCK-D55P] ("In 2014, the Civil Rights Project at the University of California, Los Angeles, released a report showing that New York City public schools are among the

they choose as friends (when friendship options are limited by geography), what fashion trends they choose to wear, and what "stupid teenager" posts they put up on their social media accounts.[213] Many of these factors are not under a teenager's control;[214] it is the bad luck of being born into a poor family that only can afford to live in a poor community that causes these negative impacts.[215] It is precisely because white suburban teenagers' friend groups, such as fraternities or sororities, carry no such sinister label that the "gang" label is so controversial.[216] Gang evidence has created a penalty for being a poor young person of color who engages in the normal, constitutionally protected behaviors of spending time with friends and dressing like those friends.[217]

The existence of the Gang Database is a product of racist structural forces and thus, a critical lens rejects any presumption of its reliability.[218] Assumptions that youth of color are dangerous and in need of institutional supervision and control because they currently have no adult supervision in their lives led government agents to create a list of at-risk youth composed primarily of Black and Latino men.[219] Little regard was given to whether placing such labels on youth would have criminogenic effects by telling them they were branded as criminals, even though they had not committed any crimes.[220]

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most segregated in the country. Black and Latino children here have become increasingly isolated, with 85 percent of [B]lack students and 75 percent of Latino students attending 'intensely' segregated schools—schools that are less than 10 percent white."); Nikole Hannah-Jones, discussing NYC Mayor De Blasio's defense of the property rights of affluent parents who buy into neighborhoods to secure entry into heavily white schools, reasoned that "the opportunity to buy into 'good' neighborhoods with 'good' schools that de Blasio wants to protect has never been equally available to all." *Id.*

[213] *See* Lapp, *supra* note 28, at 201 (discussing science of brain development in children, which requires childhood to be "a protected space separated from . . . the broader adult society").

[214] *See id.* at 236 ("It should not be forgotten that juveniles have less mobility than adults, making it 'more difficult for them to escape from a community in which harmful information has cast them in an unfavorable light.'") (quoting INST. JUDICIAL ADMIN., AM. BAR ASS'N, STANDARDS RELATING TO JUVENILE RECORDS AND INFORMATION SYSTEMS 2 (1979)).

[215] *See* Hlass, *supra* note 7, at 702. Some of my law students from privileged backgrounds have expressed outrage because they, as teenagers, flashed what they understood to be gang hand signals on social media and hung out with any friends they chose. As far as they knew, the [insert wealthy, mostly white suburb] police never tracked these behaviors and surveilled them because they believed them to be in a gang.

[216] *See* Wood & Alleyne, *supra* note 111, at 5.

[217] *See, e.g.*, Caldwell, *supra* note 191, at 276 (critiquing gang injunctions because they violate the First Amendment right to association).

[218] *See* GASKINS, *supra* note 155, at 43; *see generally supra* Part I.

[219] *See* HINTON, *supra* note 76, at 20–30; *see also* CASHIN, *supra* note 53, at 7; KENDI, *supra* note 57, at 75; Aziz, *supra* note 74, at 125; BUTLER, *supra* note 60, at 17–20.

[220] *See* HINTON, *supra* note 76, at 87–99; *see also* Lapp, *supra* note 28, at 234 ("According to labeling theory, stigmatic labels are self-fulfilling prophecies: when

Inserting police into their segregated schools to contribute names to the list further reinforced society's belief that they would sooner go to prison than college.[221] Placing that list in the hands of law enforcement to provide both social support and surveillance of potential criminals is a product of forces that divested poor communities of social services outside of law enforcement.[222] Giving law enforcement free rein to regularly stop and frisk men of color in poor neighborhoods, as the Boston Police have done through its FIO activity,[223] is a product of criminal procedure doctrine that is supposedly racially neutral but actually biased so as to produce a high crime rate in these neighborhoods.[224] Convincing a majority of citizens, either in the impacted communities or the greater Boston area, that they should fear a finite number of men of color is a product of militaristic strategies used against ever-shifting groups of color.[225] Confining this list to only residents in poor communities of color was made possible by forces that segregated, and continue to segregate, the city.[226]

III. FLIPPING THE PRESUMPTION OF RELIABILITY FOR GANG EVIDENCE

A doctrinal solution to the immigration system's reliance on racist gang evidence is to create a presumption in immigration cases that printouts from gang databases are unreliable. The law should create this presumption so as to instruct judges to conclude the exact opposite of what the gang evidence asks them to—that a young man of color is a dangerous gang member and likely to commit gang-related crime.[227] This legal doctrine would provide a counterweight to the negative

juveniles are identified as deviants or criminals, they are more likely to act like criminals. Delinquency databasing communicates to the juveniles subject to it that the state believes they already committed crimes that data collection will help solve, and that they will commit crimes in the future. Juveniles then internalize this label, which leads to marginalization and additional offending.").

[221] *See* CASHIN, *supra* note 53, at 181.

[222] *See* HINTON, *supra* note 76, at 87–95.

[223] *See supra* Section I.A (discussing racial disparities in Boston Police Department's FIO activity).

[224] *See* ALEXANDER, *supra* note 13, at 61–96; BUTLER, *supra* note 60, at 32.

[225] *See* HARCOURT, *supra* note 71, at 140–42.

[226] *See* CASHIN, *supra* note 53, at 175–81; *see also* Catherine Elton, *How Has Boston Gotten Away with Being Segregated for So Long?*, BOS. MAG., (Dec. 8, 2020, 11:26 AM), https://www.bostonmagazine.com/news/2020/12/08/boston-segregation/ [https://perma.cc/3KD6-2DE6]; MASSEY & DENTON, *supra* note 54, at 63–64 (reporting analysis of trends in [B]lack segregation and isolation in thirty metropolitan areas with the largest [B]lack populations between 1970 and 1980 and listing Boston as having "virtually no sign of progress in residential integration").

[227] *See* Ryo, *Predicting Danger in Immigration Courts*, *supra* note 147, at 245–46.

stereotype at play that is a product of historical racist practices, as described in Part I, which gave rise to this list of young men of color who are presumed to be criminals and thus in need of constant surveillance. The proposed presumption also tracks with the *Ortiz v. Garland* decision, in which an en banc panel of the First Circuit Court of Appeals rejected the Boston Police's gang evidence that was used against an asylum seeker.[228]

A. Using Legal Doctrines to Correct for Implicit Bias

Paul Butler has explained how legal doctrines have been utilized to reinforce the negative stereotype that a young Black man is a danger to society, granting the police "super powers" to use multiple tactics to control that danger.[229] This article proposes that the legal doctrine should do the opposite, which is to counteract negative stereotypes. As Richard Gaskins explains, this was proposed by the CLS movement and executed by the Warren Court when it shifted the burdens so existing government institutions had to prove they were doing their jobs.[230] Even if such institutions were acting with benevolent intentions, it would not create a presumption in favor of the government institution.[231] Rather than simply trusting the Boston Police and ICE that our hypothetical teenager is a gang member because he is on their list, those institutions must be questioned for relying on racist stereotypes that created the list in the first place. Instead of leaning into the presumption, the burden proposed in this article instructs adjudicators to lean *away* from the presumption of gang membership.

Critical race theorists have proposed legal doctrines to correct for unconscious biases against persons of color. For example, in a 1987 article, Charles R. Lawrence III proposed a new equal protection test for the judiciary to recognize race-based government action by evaluating "governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance."[232] In offering this proposal, he critiqued the Supreme Court's equal protection doctrine as "insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged," and as such, "the Court creates an imaginary

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[228] *See infra* Section III.B.

[229] *See* BUTLER, *supra* note 60, at 32.

[230] *See* GASKINS, *supra* note 155.

[231] *See id.* at 81–88.

[232] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987).

world where discrimination does not exist unless it was consciously intended."[233] He described psychological research about unconscious bias, and how every person is impacted by negative biases against racial minorities, which are taught at young ages through assimilation of values, often without explicitly biased messages.[234] Because of the existence of such cognitive bias, he advocated that the law should be "concerned when the mind's censor successfully disguises a socially repugnant wish like racism if that motive produces behavior that has a discriminatory result as injurious as if it flowed from a consciously held motive."[235] He offered this test because "[u]nderstanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication."[236]

In a similar spirit, this article proposes that a different legal doctrine—the burden of proof—be used to correct for the unconscious biases at play in the creation of a gang database that includes mostly young Black and Latino men. The database produces discriminatory results by virtue of the fact that it is populated mostly by those who are Black and Latine.[237] Thus, regardless of the benevolent motives for creating it, the outputs speak for themselves in terms of the list's impact on marginalized communities.[238] Nor are the motives free of racism. Defenders of gang databases describe their position in facially neutral language that has nothing to do with race.[239] For example, the database helps social services agencies identify at-risk youth. The database prevents the police from racially profiling all people of color and allows them to focus on just one set of suspicious people. The database brings down violent crime.[240] Yet each of these justifications "conveys a symbolic message to which the culture attaches racial significance."[241]

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[233] *Id.* at 324–25. Lawrence specifically identifies for critique the Supreme Court's decision in *Washington v. Davis*, in which the Court upheld the use of a written test for hiring police officers in the District of Columbia, even though Black applicants for police positions suffered discriminatory impact because of the requirement of a written test. *Id.* at 318, 369 (citing Washington v. Davis, 426 U.S. 229 (1976)). He also discusses at length the case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, in which the Court upheld a middle-class white suburb's rejection of zoning laws that would allow multifamily units. *Id.* at 347 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

[234] *Id.* at 337–38.

[235] *Id.* at 344.

[236] *Id.* at 325–26.

[237] *See supra* Section I.C.

[238] *See* Lawrence, *supra* note 232, at 344.

[239] *See supra* SectionI.A.

[240] *See id.*

[241] Lawrence, *supra* note 233, at 324.

These are the messages: poor young men of color are in need of constant supervision by police who act as services agents—because they are perceived as more likely to engage in violent crime.[242] But with a presumption in place to doubt gang evidence, each of these racist assumptions can be rejected by the law. Thus, the law can be used as a tool to implement "our collective responsibility for racism's eradication."[243]

Other scholars, also combining the disciplines of law and psychology, have explored implicit biases and how the legal system operates to correct for such biases.[244] The "unconscious racism" described by Lawrence in the late-1980s is now named "implicit bias." "Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes"; the literature often notes that they lead to "behavior[s] that diverge[] from a person's" stated beliefs.[245] The psychological literature describes these as heuristics, or shortcuts, which allow people to answer a harder question by substituting an easier one.[246] For example, an immigration judge making a credibility determination for an asylum seeker has no idea whether the events described as past persecution actually occurred; nor can the judge easily ascertain whether the asylum applicant is even a member of the group that is likely to face future persecution.[247] Similarly, an immigration judge deciding whether a noncitizen seeking bond is a danger to the community has no way of knowing whether that person, upon release, will commit crimes.[248] This is where the psychological shortcut can easily come into play, reaffirming the judge's implicit bias, reinforced through media, connecting a young Latino man to gang activity and therefore labeling him as

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[242] *See* HINTON, *supra* note 76, at 160–62; BUTLER, *supra* note 60, at 17–20 PFAFF, *supra* note 67, at 145–47.

[243] Lawrence, *supra* note 232, at 325–26.

[244] *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

[245] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) (emphasis omitted).

[246] *See* Jolls & Sunstein, *supra* note 244, at 973–74. Christine Jolls and Cass Sunstein describe implicit bias in terms of the two cognitive systems that humans possess. *Id.* at 973–75. "System I is rapid, intuitive, and error-prone; System II is deliberative, calculative, slower, and more likely to be error free." *Id.* at 974. The law can correct for decisions made using System I thinking by encouraging a "a System II override of the System I impulse." *Id.* at 975. In the context of gang evidence, an evidentiary presumption that rejects the conclusion drawn from a System I impulse is one way to create this System II override.

[247] *See* Dana Leigh Marks, *Who Me? Am Guilty of Implicit Bias?* 54 AM. BAR ASS'N JUDGES' J. 20, 21, 24 (2015).

[248] *See id.* at 21–25.

dangerous.[249] The immigration judge acts as society's protector, controlling a dangerous group of young men by keeping one of them in detention or deporting him.[250]

Jerry Kang and Kristen Lane, discussing policy and legal recommendations to correct for implicit bias, delineate different types of interventions.[251] They describe the critical difference between ex post corrections and ex ante corrections for implicit bias, stating that "[w]e generally enjoy greater flexibility to adopt ex ante interventions to prevent problems than to place legal liability or moral responsibility ex post."[252] They describe legal mechanisms to "[d]ebias[] the [c]ourtroom," such as specifically instructing the jury about implicit bias or programs of juror education prior to jury selection.[253] They also describe structural litigation, where "the legal problem is understood as the aggregation of myriad individual transactions" and general factfinding about discrimination overrides the individual experiences of one plaintiff.[254] The *Brown v. Board of Education* litigation is a historical example they cite where the harmful effects of segregation determined the outcome, rather than an

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[249] Emily Ryo describes how immigration judges rely on stereotypes and biases in making dangerousness determinations in bond hearings, because they must default to such psychological shortcuts when there is little time and incomplete information. *See* Ryo, *Predicting Danger in Immigration Courts*, *supra* note 147, at 245–46. She writes that "[i]n this context, social stereotypes of Central Americans as criminals and gang members might become highly salient." *Id.* at 245. Although Ryo could not empirically prove this connection, her empirical study of bond hearings demonstrated that Central Americans are more likely to be found dangerous than non-Central Americans. *Id.* at 245–46. Elizabeth Keyes discusses psychological shortcuts that immigration judges frequently employ in order to render discretionary decisions about noncitizens. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 207 (2012). For example, judges "rely[] on narratives . . . to bring order to [a] complex [set of] facts." *Id.* at 212. When the facts of a noncitizen's case diverge from an expected narrative that the judge has had repeated at her through news or other outside sources, "cognitive dissonance" occurs, where the judge confronts a narrative that is inconsistent with the expected narrative about a person. *Id.* Keyes also discusses how "availability heuristic[s]" operate to fill in the blanks for judges with the more easily-imagined stories about a person. *Id.* at 252. She recommends several changes to immigration procedures—such as slowing down the adjudication process and requiring that judges be independent from the executive branch—and also advocates that attorneys "[f]ight[] for [n]arrative [s]pace [within] the [c]ourtroom," while also "[c]reating [n]arrative [s]pace[s] [o]utside [of] the [c]ourtroom." *Id.* at 252, 255 (emphasis omitted).

[250] *See* PFAFF, *supra* note 67, at 146 (describing how crime committed by a young man of color is interpreted by police and prosecutors as "indications of deeper community-wide social pathologies that need to be 'controlled'" due to the psychological "fundamental attribution error," where humans define people they do not know by their actions).

[251] *See* Kang & Lane, *supra* note 244, at 492–504.

[252] *Id.* at 492.

[253] *Id.* at 500.

[254] *Id.* at 497.

individual clinical diagnosis of any one of the plaintiffs.[255] To apply this rationale to the reliance on gang evidence in immigration cases, a presumption that such evidence is unreliable is a structural change that corrects for the implicit bias likely at play in many immigration decisions.[256] It avoids the requirement that each individual against whom the evidence is offered disprove its reliability and rather starts with a presumption of unreliability.

An evidentiary presumption against the reliability of this specific evidence requires less work than all the hard work that judges must do to counteract implicit bias in their decision-making. As one immigration judge noted, immigration cases require judges to sort out complex facts and apply the law to those facts; most of these determinations invite implicit bias.[257] The immigration adjudication system is almost entirely devoid of mechanisms to "[d]ebias[] the [c]ourtroom,"[258] although scholars have suggested such corrections to immigration adjudications.[259] Immigration judges have no time to carefully deliberate,[260] nor do they have sounding boards to reason through their decisions; thus, they lack certain mechanisms to slow down the psychological shortcuts and harmful effects of

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[255] *See id.* at 497–98.

[256] In the case described below, *Ortiz v. Garland*, the First Circuit Court of Appeals, after critiquing the immigration judge's reliance on gang evidence, called into question the judge's questioning and subsequent credibility of Mr. Diaz Ortiz's manner of transportation around Boston. Ortiz v. Garland, 23 F.4th 1, 22–23 (1st Cir. 2022). The First Circuit described this questioning by the immigration judge as "a between-the-lines inquiry into Diaz Ortiz's gang affiliation, triggered by the notation on the August 1, 2018 police report that 'MS-13 gang members commonly carry large metal chains with locks to be used [i]n gang related assaults.'" *Id.*

[257] Marks, *supra* note 247, at 22–24.

[258] *See* Kang & Lane, *supra* note 244, at 500–01.

[259] *See, e.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Court*s, 45 NEW ENG. L. REV. 417, 428–41 (2011); Hlass, *supra* note 7, at 763; *see also* Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2–6, 31–42 (2007) (recommending that, in order to reduce the impact of implicit bias on judges' decisions, there be more time to make each decision in a deliberative manner, that judges be required to write opinions, that regular training and feedback be provided, that checklists to encourage methodical decision-making be created, and that decision-making in order to limit a judges' exposure to stimuli that will trigger intuitive thinking be reallocated).

[260] For example, immigration judges deny bond without a written opinion. *See* U.S. DEP'T JUST., EXEC. OFF. IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL ch. 9.3(e)(7). Only if the noncitizen appeals the bond denial does the judge provide a post hoc memorandum of law justifying the prior denial of bond. *See id.* ("Usually, the Immigration Judge's decision is rendered orally. Because bond hearings are generally not recorded, the decision is not transcribed. If either party appeals, the Immigration Judge prepares a written decision based on notes from the hearing."); *see also* Singh v. Holder, 638 F.3d 1196, 1208 (9th Cir. 2011) (reasoning that due process requires a contemporaneous recording of his bond hearing and that the immigration judge's "post hoc memorandum is inadequate").

implicit bias.[261] There is little (and sometimes no) judicial review over their decisions,[262] which involve complex legal and factual inquiries.[263] They also do not have true decisional independence, as they are employees of the Attorney General of the United States,[264] the nation's top prosecutor, and historical practices demonstrate that they can lose their jobs if they rule too often against the government.[265] Nor do we ask judges to regularly expose themselves to stereotype-busting people in order to weaken the psychological pull that draws one to make conclusions based on harmful stereotypes.[266]

Giving immigration judges pause when they are faced with one type of evidence is an easier task than correcting the many ways in which the immigration system is an implicit bias minefield. It substitutes one shortcut that is based on discriminatory bias toward certain litigants and replaces it with another shortcut, in the form of a legal bias against that conclusion. It is also a legal issue that is reviewable by appellate courts under current immigration law, unlike the rather ambiguous and often unreviewable discretionary decisions.[267] In this sense, it operates both ex ante (instructing a judge on how to make a decision, in order to avoid a remand) and ex post (an appellate court correcting for the error when the judge relied on the gang evidence).[268]

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[261] *See* Marouf, *supra* note 259, at 446–48.

[262] *See infra* notes 316–319 (describing bars to judicial review for discretionary and factual determinations when judges decide certain forms of relief, and the bar to judicial review of an immigration judge's discretionary decision to detain).

[263] *See* Marouf, *supra* note 259, at 437–41.

[264] *See id.* at 428–31.

[265] Stephen Legomsky describes how, during the presidency of George W. Bush, Attorney General John Ashcroft demoted members of the BIA to nonadjudicatory positions; a follow-up study demonstrated that the ax fell on those who most often ruled against the government. *See* Stephen Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370–76 (2016). He describes various other aspects of the immigration system that demonstrate how judges and Board members are not truly independent adjudicators. *Id.*

[266] *See* BUTLER, *supra* note 60, at 19–20.

[267] This author has previously described how an important legal question, of whether a police report is unreliable, often gets "swallowed up" in a discretionary decision. *See* Holper, *Confronting Cops*, *supra* note 11, at 702–04. This is because reviewing courts either found harmless error (since the noncitizen admitted some wrongdoing); there existed other negative discretionary facts; or circuit courts relied on congressional limitations to discretionary relief, refusing to parse out the legal question of whether the police report is reliable when it arises in the context of a discretionary decision. *Id.*

[268] *See* Kang & Lane, *supra* note 244, at 492.

B. Presuming That Gang Evidence is Unreliable: The Ortiz Case

A real world, effective example of how the presumption that gang evidence is unreliable can be found in a recent opinion by the First Circuit Court of Appeals. In *Ortiz v. Garland*,[269] a Salvadoran teenager, Mr. Diaz Ortiz, applied for asylum and lost because the immigration judge found him not credible as to his religious persecution claim.[270] He stated that because he was a Christian, he could not be a gang member; yet the judge found him not to be credible because the gang evidence demonstrated that he was a gang member.[271] The judge further found that he "did not merit a favorable exercise of discretion because of his gang membership."[272] The BIA upheld the judge's findings.[273] The First Circuit, sitting en banc,[274] held that the judge and Board failed to consider whether the gang evidence contained "reliable indicators of [Mr. Diaz Ortiz's] gang affiliation."[275] The court found no evidence to explain the basis for the Boston Police Department's point system used to verify gang affiliation—this was consequential because points could be earned for conduct that was "shockingly wide-ranging,"[276] encompassing conduct that was not criminal.[277] To support its holding, the court cited scholarly critique of gang databases for casting too wide a net.[278]

The *Ortiz* court found that the primary error by the judge and Board was "their embrace of the flimsy—indeed, arguably nonexistent—link between [field interrogation observations/encounters (FIOs)], with their assigned point values for largely unexceptional teen behaviors, and the conclusion that Diaz Ortiz is a gang member."[279] The court went so far as to name and reject the underlying stereotype apparent in Mr. Diaz Ortiz's gang evidence—that young Latino men gathered together creates a presumption of gang membership[280]—and cited evidence that

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[269] Ortiz v. Garland, 23 F.4th 1 (1st Cir. 2022).

[270] *Id.* at 12–13.

[271] *Id*.

[272] *Id*. at 13.

[273] *Id*. at 13–14.

[274] A panel of the First Circuit upheld the BIA's decision, and then granted Diaz-Ortiz's petition for rehearing en banc, vacating the panel's prior decision. *Id*. at 1, 14.

[275] *Id*. at 17–18.

[276] *Id*. at 17.

[277] *Id.* at 17–18.

[278] *Id*. (citations omitted).

[279] *Id.* at 21.

[280] Discussing the FIO reports contained in Mr. Diaz Ortiz's gang evidence, the court wrote, "the FIOs show no more than a teenager engaged in quintessential teenage behavior—hanging out with friends and classmates. These social encounters occurred in unremarkable neighborhood locations for this peer group: at a park, at

Boston Police engage in "racially disparate treatment" of persons of color in their FIO activity.[281]

To be sure, the First Circuit stopped short of establishing an exclusionary rule for gang evidence in immigration proceedings.[282] The court did, however, place certain burdens on the government as the proponent of the gang evidence. For example, the court held that it was "the government's obligation to demonstrate that [Mr. Diaz Ortiz's friends with whom he appeared in the FIO reports] were MS-13 associates through the gang package or other evidence."[283] Mr. Diaz Ortiz carried no burden to prove that they were *not* gang members; the court did not require him to prove that each of his friends' gang allegations were false.[284] Also, the First Circuit rejected the BIA's rationale that Mr. Diaz Ortiz should have taken legal action to remove himself from the Boston Gang Database in order to disprove the government's evidence.[285] Furthermore, the First Circuit refused to accept the government's argument that the evidence was reliable to prove the gang membership of Mr. Diaz Ortiz and his friends merely by virtue of its repetition by multiple police officers.[286] The court reasoned that the government should have shouldered the burden to produce a police officer to testify or submit a sworn statement as to these opinions.[287] Because the record "simply [left] unanswered whether any of Diaz Ortiz's neighborhood and school friends were in fact gang members or associates,"[288] the burden lay with the government to prove its way out of this uncertainty.

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school, in front of one of teenager's home, on the benches in an empty stadium. The record lacks any evidence as to why assigning points for these interactions was a reliable means of determining gang membership. Certainly, the fact that the young men were all Hispanic does not permit any inference that any, or all, of them were gang members." *Id.* at 19. The court faulted the Board for acknowledging the doubts about the gang database's reliability but responding "in circular fashion—relying on the questionable data about Diaz Ortiz's peers to deflect the criticism of the questionable data about Diaz Ortiz." *Id*. at 20.

[281] *Id.* at 19–20 (citing FAGAN ET AL., *supra* note 32, at 20).

[282] *Id.* at 21.

[283] *Id.* at 19 n.25.

[284] *Id.*

[285] *Id.* at 21–22. The court reasoned that "[p]utting aside the unrealistic assumptions that a slow and costly civil action is feasible for a respondent in immigration proceedings and that—even if successful—a judgment would have issued in time to make a difference in these removal proceedings, it defies logic to suggest that Diaz Ortiz's failure to pursue that course enhances the reliability of the information in the database." *Id.* at 22.

[286] *Id.* at 20 (rejecting the government's argument that "[a]t least seven different police officers on at least six different occasions indicated that they knew various individuals—Diaz Ortiz and the people he associated with—to be gang members").

[287] *Id.*

[288] *Id.* at 21. According to the court, "Diaz Ortiz testified that he did not know that he had been socializing with anyone associated with a gang, and the government's

Mr. Diaz Ortiz's case is certainly a success story in that he convinced the full First Circuit that the gang evidence in his case was not reliable enough to support the agency's conclusion. Yet, it is also a telling example of why a blanket presumption against gang evidence is necessary in the immigration system. There are three reasons why individual litigation on behalf of a single noncitizen, as what happened in Mr. Diaz Ortiz's case, is not the best resolution to address the systemic problem of unreliable gang evidence.

First, if the system continues to rely on individual litigation of these claims, only those who can afford counsel, or win the pro bono lottery, will see their claims fully litigated, due to the lack of court-appointed lawyers in immigration law.[289] Mr. Diaz Ortiz certainly "won the lottery" of obtaining not just *a* lawyer, but a *team* of pro bono lawyers who were willing to represent him in multiple phases of the case.[290] This included: (1) before the immigration judge at a bond hearing and a removal hearing; (2) in an appeal to the BIA of the removal decision;[291] (3) in federal district court in a habeas corpus petition that complained of the burden of proof in his bond hearing, and a subsequent habeas enforcement action;[292] and (4) in a petition for review to the First Circuit and a petition for rehearing en banc before the First Circuit.[293] Having counsel at each and every one of these phases was necessary for his success, as he could

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assertion that he must have known is based solely on the information in the database that is unreliable for the reasons we have discussed." *Id.* at 20–21.

[289] *See* Mary Holper, *The Great Writ's Elusive Promise*, CRIMMIGRATION (Jan. 21, 2020, 4:00 AM), http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise/ [https://perma.cc/VK6Y-XETL] (describing the difficulty for detainees to litigate both their removal cases and their challenges to detention through habeas corpus litigation, and stating that "[o]nly 2 percent of detainees get *any* pro bono help with their immigration cases, much less help litigating both cases") (first emphasis omitted). The *Hernandez-Lara* case is an example where a federal court recognized that immigration detainees suffer multiple disadvantages in bond hearings, due to the lack of advance notice of the government's position, access to documents, language capabilities, and counsel. *See* Miranda v. Garland, 34 F.4th 338, 376 (4th Cir. 2022). These disadvantages increase the risk of error in a bond hearing, which justified the placement of the burden of proof with the government, not the detainee. *Id.* The Fourth Circuit, on the other hand, reasoned that each one of these procedural problems with a bond hearing should be litigated separately to determine whether it created an "erroneous deprivation[ ] of liberty" for the individual detainee. *Id.* at 361.

[290] The law firm of DLA Piper and the Crimmigration Clinic/Harvard Immigration and Refugee Clinical Program have represented Mr. Diaz Ortiz in his case. *See Ortiz*, 23 F. 4th at 2. Multiple attorneys, law students, and paralegals have been involved in his representation. The law firm Ropes & Gray also represented the Political Asylum/Immigration Representation Project as amicus curiae, and several constitutional and immigration law professors were amicus curaie before the First Circuit. *Id.*

[291] *See Ortiz*, 23 F.4th at 1–3, 7 (describing procedural history before the agency).

[292] Ortiz v. Smith, 384 F. Supp. 3d 140, 142 (D. Mass. 2019).

[293] *See Ortiz*, 23 F.4th at 14.

have easily given up the opportunity to raise legal arguments had he, or his counsel who specialized only in immigration court representation, not been savvy enough to raise them before the agency,[294] or if his pro bono lawyers were not able, due to time or expertise, to represent him in extensive federal court litigation.

Second, the bars to judicial review of discretionary decisions and factual determinations in immigration law provide too many opportunities for federal courts to ignore immigration judges' reliance on gang evidence.[295] Mr. Diaz Ortiz ultimately prevailed in his arguments that the judge's negative credibility finding, which turned on the judge's acceptance of the gang evidence, was not based on substantial evidence.[296] Had he been seeking any other discretionary form of relief, such as adjustment of status, a waiver of inadmissibility, cancellation of removal, or voluntary departure, the immigration judge's factual decision would be unreviewable; the judge in that case also could insulate his decision from judicial review by labeling it as discretionary.[297] After all, the exact same gang evidence justified a different immigration judge's decision to keep him in detention throughout these proceedings; a federal district court refused to second guess this immigration judge's reliance on that evidence because of a jurisdictional bar to reviewing discretionary decisions to detain.[298]

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[294] *See, e.g.*, 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies before raising the issue before the circuit courts of appeals); Brito v. Garland, 22 F.4th 240, 252–56 (1st Cir. 2021) (holding that a class representative's argument that the immigration judge did not consider alternatives to detention during a bond hearing could not be raised under prudential exhaustion principles in a habeas corpus petition because they were not raised before the immigration judge).

[295] *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (precluding judicial review of "any judgment regarding the granting of relief [including cancellation of removal, waivers of inadmissibility, and adjustment of status] or any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security"); *see also* Patel v. Garland, 142 S. Ct. 1614, 1625–27 (2022) (interpreting 8 U.S.C. § 1252(a)(2)(B) to bar federal court jurisdiction of any finding of fact by an immigration court).

[296] *See Ortiz*, 23 F.4th at 22, 24.

[297] *See* 8 U.S.C. § 1252(a)(2)(B); *Patel*, 142 S. Ct. at 1625–27. Importantly, the Supreme Court's decision in *Patel* does not apply to factual determinations made within the context of an asylum claim. *See* 8 U.S.C. § 1252(b)(4)(D) ("[T]he Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion."); *Patel*, 142 S. Ct. at 1624 ("We express no view about what 'discretionary judgment' means in [8 U.S.C. §§ 1252(b)(4)(D) and 1226(e)].").

[298] *See* Ortiz v. Smith, 384 F. Supp. 3d 140, 143–44 (D. Mass. 2019) (concluding that the district court may not review the judge's weighing of the evidence because of 8 U.S.C. § 1226(e), which bars judicial review over the immigration judge's discretionary decision to detain); *see also* Martinez v. Clark, 36 F.4th 1219, 1228 (9th Cir. 2022) ("We hold that the determination of whether a particular noncitizen poses a danger to the community is a discretionary determination, which a federal court may not review.").

Third, in many cases, unreliable gang evidence will lead to detention, which acts as a deterrent to fighting the case through the appeals process, where a noncitizen may have more success in challenging the gang evidence. At the time Mr. Diaz Ortiz was ordered removed, he remained in detention, since his bond had been denied.[299] His case would not have reached a decision by the court of appeals had he simply chosen to give up after he was denied relief in immigration court, the choice that many noncitizens select in the face of prolonged immigration detention. Emily Ryo has described how detention operates to deter people from pursuing valid forms of relief in immigration court, citing various ethnographic studies demonstrating that immigration detainees give up legitimate claims for relief to avoid having to suffer further detention.[300] She cites the conditions of immigration detention, which includes verbal harassment and sometimes physical abuse, strip searches, overuse of segregation, and delayed and inadequate medical care.[301] Lengthy immigration detention is a reality that those accused of gang membership face.[302] The government no doubt is aware that this detention will deter them from fighting against deportation.[303] What is more, there is evidence that ICE deliberately seeks to have certain persons classified as gang

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Dan Kanstroom has discussed the difficulty in defining an exercise of discretion and argues that such a vague concept should not become the on-off switch for judicial review. *See generally* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

[299] *Ortiz*, 384 F. Supp. 3d at 142.

[300] Ryo, *Understanding Immigration Detention*, *supra* note 17, at 109 ("Examples of this type of deterrence effect abound in ethnographic accounts of immigration detention.").

[301] *Id*. at 104.

[302] *See* AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY 4 (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/Z6HA-EQUJ] ("Across the country, noncitizens who are detained while defending themselves against deportation in immigration court are routinely held for longer than six months."); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting) (stating that class members had been detained for periods ranging from six months to 831 days while pursuing asylum).

[303] *See* Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 38 (2022) ("This deterrent effect of detention is less likely to be publicly stated, since, as Emily Ryo notes, '[i]nsofar as detention deters behavior that is protected under the law, the system undermines the basic legitimacy of immigration law and immigration authorities.' It is certainly implicitly stated by the government, especially in response to challenges brought by detainees suffering prolonged detention. The government frequently has argued that a detainee holds the key to his own jail cell because he can always give up his claims for relief and agree to deportation in lieu of suffering more detention.") (quoting Ryo, *Understanding Immigration* Detention, *supra* note 17, at 109).

members in order to ensure their detention. In 2017, an ICE official publicly stated that it seeks to have certain noncitizens classified as gang members in order to ensure that the detainee will lose bond before an immigration judge.[304]

In sum, the *Ortiz* case provides a useful case example of how a court can second-guess the reliability of gang evidence by exposing the evidence for what it is—a house of cards based on racist past practices in US society.

C. Other Challenges to Immigration Law Presumptions

There are other analogous situations in immigration law where advocates are challenging the presumptions put in place by structural forces. The first example is litigation challenging the burden of proof allocation in immigration bond hearings.[305] Both the First Circuit and Second Circuits established a presumption in favor of noncitizens because of structural forces working against them. In both of these decisions, the courts held that under the Due Process Clause, the government, not the detainee, should bear the burden of proof in immigration bond hearings.[306] The courts applied the *Mathews v. Eldridge*[307] three-factor balancing test for procedural due process,[308] and in doing so considered factors that were relevant to many immigration detainees, even if not relevant to the detainee whose individual habeas petitions were at issue.[309] Because the First and Second Circuits were making constitutional holdings that were generally applicable to all immigration detainees whose bond hearings are governed by this statute, the courts considered noncitizens' general lack of counsel, lack of access to government documents, and English speaking capability in deciding that there was a risk of erroneous deprivation of liberty if the noncitizen bore the burden of proof.[310] This manner of reaching

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[304] *See Inside ICE's Controversial Crackdown on MS-13*, CBS NEWS (Nov. 16, 2017, 7:37 AM), https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan [https://perma.cc/3WTD-8EDN]; Hing, *supra* note 125.

[305] *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 23–24 (1st Cir. 2021); Velasco-Lopez v. Decker, 978 F.3d 842, 846 (2d Cir. 2020). *But see* Rodriguez Diaz v. Garland, 53 F.4th 1189, 1193 (9th Cir. 2022) (holding that due process does not require the government to bear the burden of proof in immigration bond hearings); Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022) (same).

[306] *See Hernandez-Lara*, 10 F.4th at 39; *Velasco-Lopez*, 978 F.3d at 854–55.

[307] Mathews v. Eldridge, 424 U.S. 319 (1976).

[308] Under the *Mathews* test, courts determine whether a procedural protection is necessary by balancing the private interest at stake, the "risk of erroneous deprivation," and the cost to the government. *Id.* at 321.

[309] *See Hernandez-Lara*, 10 F.4th at 31, 33; *Velasco-Lopez*, 978 F.3d at 854–55.

[310] *See Hernandez-Lara*, 10 F.4th at 30; *Velasco-Lopez*, 978 F.3d at 851. Notably, the Fourth Circuit and Ninth Circuit took a different approach. *See Miranda*,

a procedural protection for an entire group follows a similar pattern as the structural reform litigation to correct for biases that Kang and Lane describe, where general factfinding overrides the individual experiences of one plaintiff.[311]

In another analogous situation, immigration advocates have called for a presumption of unreliability of police reports.[312] They argue that police officers often lack firsthand knowledge of what occurred and rely on witnesses who may be motivated to lie or exaggerate.[313] The police do not fact check what is written in a police report.[314] Further, police reports are written in an adversarial system where the police and prosecution work against the accused, and thus the reports are written in anticipation of such litigation.[315] Also, "reliance on contact with the criminal legal system to decide whom to detain and deport imports the racial disparities and biases of that system into nearly all aspects of immigration decision-making. Police reports are a mechanism through which these racial disparities are transferred between the systems."[316] Such biases are inherent in the writing of police reports, because implicit biases are most likely to influence decisions when a situation is ambiguous.[317] The case for creating a presumption of unreliability for gang evidence parallels many of the reasons why such a presumption should apply to police reports. Crucially, as with police reports, the immigration system should not import from the criminal justice system the racial disparities of who is subject to surveillance as a gang member.[318]

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34 F.4th at 36; *Rodriguez Diaz*, 53 F. 4th at 1211–12. When considering those same factors, the Fourth Circuit determined that if the lack of access to counsel or access to documents created an unfair bond hearing, the noncitizen could raise those as a due process violation. *See Miranda*, 34 F.4th at 361. The Ninth Circuit similarly reasoned that for the case before them, in which the noncitizen had counsel, spoke English, and was able to gather documents, these factors were irrelevant to his due process claim. *See Rodriguez Diaz*, 53 F.4th at 1211–12.

311 *See* Kang & Lane, *supra* note 244, at 493–99.

312 *See* NAT'L IMMIGRANT JUST. CTR., PREJUDICIAL AND UNRELIABLE: THE ROLE OF POLICE REPORTS IN U.S. IMMIGRATION DETENTION AND DEPORTATION DECISIONS 1, 12 (2022), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2022-07/Prejudicial-and-Unreliable-policy-brief-FINAL_July-2022.pdf [https://perma.cc/TMP4-LLQZ]; Brief for University of California, Davis Immigration Law Clinic as Amici Curiae Supporting Petitioner, Pankim v. Barr, No. 20-16389 (9th Cir. July 6, 2021); *see also* Holper, *Confronting Cops*, *supra* note 11, at 685–88 (describing how police reports are generally unreliable because they are not intended to present a final adjudication of the merits of guilt, but rather are developed early on in the criminal litigation process).

313 NAT'L IMMIGRANT JUST. CTR., *supra* note 312, at 2–3.

314 *Id.* at 2.

315 *Id.* at 3.

316 *Id.* at 5.

317 *Id.*

318 *See id.* at 5, 8; *see also supra* Part I.

There are certainly differences between police reports and FIOs, which makes the arguments for a presumption of unreliability of gang evidence even stronger. For example, police reports document actual criminal conduct, whereas when the police write up an FIO, the conduct is often completely legal behavior, such as being at a park with other teenagers or wearing certain clothing. It is quite likely that the subject of an FIO would not dispute that the facts in the report were true; what is contested is the assumption that illegal behavior lurks behind the legal behavior that the police witnessed.[319] Another difference is that, often, a noncitizen has access to a police report in advance of an immigration hearing; the noncitizen knows that such evidence exists, can try to obtain it, and can prepare rebuttal evidence to the contents of the police report. If the criminal behavior, as described within a police report, is based on shaky evidence, the noncitizen can expose the weaknesses in the report. With gang evidence, not only is it unobtainable in advance of the hearing,[320] but one cannot know the strength of the assertions claimed therein without calling the maker of the document as a witness. And because the government rarely calls witnesses—and even if the noncitizen seeks to subpoena the maker of the gang evidence, immigration courts have no authority to enforce subpoenas[321]—the gang evidence acts as an untested expert opinion. One can imagine a litany of cross-examination questions that never get asked or answered: On what evidence is my client's friend a "known" gang member? On what evidence do you rest your assertion that MS-13 gang members wear Nike Cortez sneakers? On what evidence do you rest your assertion that the person who victimized my client at school was a "known" rival gang member? On what evidence do you rest your assertion that being victimized by an 18th Street gang member indicates MS-13 gang membership? Under what circumstances did my client "self-admit" to gang membership?

Thus, a presumption of unreliability of gang evidence is particularly convincing in light of other similar presumptions for which advocates have argued and some courts have adopted.

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[319] *See, e.g.*, Ortiz v. Garland, 23 F.4th 1, 19 n.25 (1st Cir. 2022) (describing how Mr. Diaz Ortiz did not dispute that he was seen with the other young men from the FIO reports, but that he was not aware that they were gang members).

[320] *See* Hlass, *supra* note 7, at 737 (describing how youth in immigration proceedings often do not know that there are gang allegations against them in advance of the hearing, where such allegations are alleged by the government); Hing, *supra* note 125 (describing as "[o]ne of the worst aspects of the gang database[s]" that a person cannot learn they are in the database, so they have no ability to challenge whether they are properly included).

[321] *See* Holper, *Confronting Cops*, *supra* note 11, at 727–28.

D. Does a Presumption Solve the Problem?

The legal realist would argue that presumptions matter little when a decisionmaker is predisposed to find a client dangerous, unworthy of discretion, or not credible because of gang evidence.[322] Biases that cause people to assume that youth in communities of color are prone to the violent behavior committed by gang members is, after all, what created the "need" for gang databases in the first place.[323] The legal realist's viewpoint is reinforced by immigration judges' and scholars' observations that the immigration system has few checks on adjudicators who make life-altering decisions in reliance on implicit biases.[324] But presumptions can still send a powerful message to adjudicators, even if the reality takes a while to catch up to the stated presumption.[325] In fact, a presumption that tells an adjudicator to think the exact opposite of what the evidence concludes is a powerful legal tool that can, at the very least, give adjudicators pause in future cases, especially if they have repeatedly received remand orders from appellate courts. Presumptions can also send a powerful message to ICE prosecutors, who would otherwise offer this evidence in court, to seek out stronger evidence in favor of its position and not rely on group categorizations that play on racist assumptions about people of color.[326]

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[322] *See* Holper, *Beast of Burden*, *supra* note 10, at 129; ALEXANDER, *supra* note 13, at 60 ("Rules of law and procedure, such as 'guilt beyond reasonable doubt' or 'probable cause' or 'reasonable suspicion,' can easily be found in court cases and law-school textbooks but are much harder to find in real life.").

[323] *See* Said, *supra* note 122, at 866–69; Lapp, *supra* note 28, at 209–12; *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351–52 (1988) ("Law . . . embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable.").

[324] *See, e.g.*, Marouf, *supra* note 259, at 428–41 (discussing various factors contributing to implicit bias in immigration courtrooms, which are the judges' lack of independence, limited opportunity for deliberate thinking, low motivation due to stress and burnout, the legal and factual complexity of cases, and limited appellate review); Marks, *supra* note 247, at 21–22.

[325] *See* Addington v. Texas, 441 U.S. 418, 431–33 (1979) (discussing and holding that the clear and convincing evidence standard meets the due process standard because it "inform[s] the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases"); *see also id.* at 425 (reasoning that the "standard of proof is more than an empty semantic exercise" because "[i]n cases involving individual rights . . . '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty'") (alteration in original) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

[326] As an example, a recent memo that provides guidance to ICE trial attorneys who represent the government before immigration courts and the BIA instructs them on the exercise of their prosecutorial discretion. KERRY E. DOYLE, U.S. DEP'T HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENFORCEMENT, GUIDANCE TO OPLA ATTORNEYS REGARDING THE

Critical theorists may also critique this article's proposed remedy as insufficient in that it creates a mere evidentiary presumption as a procedural tool, leaving in place and thus lending legitimacy to the entire deportation and immigration detention systems.[327] These theorists might also argue that such a procedural tool does not go far enough to abolish gang databases, which themselves are a product of structural racism,[328] and provide "a means [for the government] to preserve racial inequality."[329] Kimberlé Crenshaw has summarized the work of several critical theorists for whom a central theme is delegitimation, or "trashing," which seeks to ensure that subordinated persons are not trapped within the ideological limits of the law because it limits their options.[330]

Yet, as Crenshaw observed, the civil rights movement and its elimination of certain barriers to full participation in society for Black people was meaningful, even though it convinced neoconservatives that enough had been done to remedy past racial harms and that colorblindness was the only way forward.[331] She responds to the critical theorists who engage in "rights-trashing" by noting that "[p]eople can only demand change in ways that reflect the logic of the institutions they are challenging,"[332] and that powerless people can challenge existing institutions by exposing "contradiction[s] between the dominant ideolog[ies in such systems] and their reality."[333] Thus, "[b]y

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ENFORCEMENT OF CIVIL IMMIGRATION LAWS AND THE EXERCISE OF PROSECUTORIAL DISCRETION 1 (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [https://perma.cc/L88C-FE32]. In assessing whether the noncitizen is a threat to public safety, the memo states that ICE "attorneys should be mindful that inclusion in one or more gang databases is not determinative of whether a particular individual is, in fact, a gang member or associate." *Id.* at 5 n.9 (citing Ortiz v. Garland, 23 F.4th 1, 17–22 (1st Cir. 2022)). This is an improvement upon prior prosecutorial discretion memos, which listed "known gang members" as an adverse factor for the exercise of prosecutorial discretion, without detailing how conclusions should be drawn about who is a "known gang member[ ]." *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 94–98 (2015).

[327] *See, e.g.*, César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 282–83 (2017) (advocating for the abolition of immigration detention and drawing analogies to efforts to abolish the death penalty); *see also* Angelica Chazaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1043 (2021) (questioning the "common sense of deportation," in which all agree that deportation is a "necessary mechanism for enforcing immigration laws," and advocating for abolishing deportation).

[328] *See supra* Part I.

[329] *See* Hlass, *supra* note 7, at 697–98.

[330] In her article *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, Kimberlé Crenshaw summarizes scholarship by critical theorists Antonio Gramsci, Robert Gordon, Alan Freeman, Mark Tushnet, and Peter Gabel. Crenshaw, *supra* note 323, at 1350–56.

[331] *Id.* at 1348–49.

[332] *Id.* at 1367.

[333] *Id.*

seeking to restructure reality to reflect American mythology, Blacks relied upon and ultimately benefited from politically inspired efforts to resolve the contradictions by granting formal rights."[334] When powerless people expose such contradictions between the rhetoric of the system and how it operates, there is a "political or ideological need to restore an image of fairness that has somehow been tarnished."[335]

Crenshaw's insights are applicable to the government's presentation of gang evidence against noncitizens in immigration cases. Multiple law review articles and reports have exposed that our deportation and immigration detention systems, which profess to respect the due process rights of noncitizens, regularly ambush noncitizens with gang allegations without any prior notice.[336] In some cases, the gang allegations were falsely constructed to ensure immigration detention.[337] The behaviors of the teenagers described in such evidence is often innocent, protected by the constitutional right to freedom of association.[338] Teenagers cannot conform their behavior to avoid being categorized as a gang member because the definitions are indeterminate; the databases are not checked for accuracy; and the only way to ensure that one does not land in a database is to stop attending one's school, move out of one's neighborhood, cut off all communications with one's community, and become white.[339] Such violations of constitutional rights are to be exposed and corrected by using the tools of the legal system.[340] One of those tools is the burden of proof, which operates as more than a mere "stage direction[]," of who speaks first in litigation.[341] Rather, it dictates here that the government bears the burden of *persuasion* when they ask the judge to rely on gang

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[334] *Id.* at 1368.

[335] *Id.*

[336] *See, e.g.*, Hlass, *supra* note 7, at 737–38; Victor M. Flores, *Challenging Guilt by Association: Rethinking Youths' First Amendment Right to Associate and Their Protection from Gang Databases*, 107 CORNELL L. REV. 847, 862–63 (2022); N.Y. IMMIGR. COALITION & CUNY SCH. OF L. IMMIGRANT AND NON-CITIZEN RTS CLINIC, SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS (2018), https://www.nyic.org/2018/06/swept-up-in-the-sweep-report/ [https://perma.cc/E2WQ-WVND]; Conway, *supra* note 20, at 281; UNIV. CAL. IRVINE SCH. L. IMMIGRANT RTS. CLINIC, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 10 (2016), https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf [https://perma.cc/DH7K-MSXQ]; Hufstader, *supra* note 20, at 683–84.

[337] *See* Hing, s*upra* note 126.

[338] *See, e.g.*, Flores, *supra* note 336, at 880.

[339] *See* Hlass, *supra* note 7, at 706, 730–36; Holper & Valentin, *supra* note 199.

[340] *See* Crenshaw, *supra* note 323, at 1367.

[341] *See* GASKINS, *supra* note 155, at 3.

evidence, which points to an inherently uncertain conclusion about the person's behaviors.[342]

Another critique is that the presumption is a weak solution to a significant problem. For this reason, other scholars, such as Laila Hlass, have proposed that gang database evidence be inadmissible in all immigration proceedings.[343] This article rejects complete inadmissibility of gang evidence for two reasons. First, such a solution, while appealing, requires a complete overhaul of immigration law's loose evidentiary standards. It is well-settled that hearsay is admissible in immigration proceedings because the Federal Rules of Evidence do not apply.[344] This loose evidentiary standard often works in the favor of noncitizens who seek relief from deportation and carry the burden of proving the elements of their claims. A rule completely blocking one type of evidence can later be weaponized against asylum seekers and other applicants for immigration relief, who carry a burden of proof and frequently utilize hearsay evidence to prove their claims.[345] Whereas complete inadmissibility of evidence is uncommon in immigration law, presumptions are no stranger to this area of law.[346]

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[342] *Id.* at 3–4.

[343] *See* Hlass, *supra* note 7, at 763; Conway, *supra* note 20, at 276–77; Hufstader, *supra* note 20, at 674–75.

[344] *See, e.g.*, Yongo v. INS, 355 F.3d 27, 31 (1st Cir. 2004); Bustos–Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990); *In re* Grijalva, 19 I. & N. Dec. 713 (B.I.A. 1988). Although the Federal Rules of Evidence do not apply in removal proceedings, the Due Process Clause of the Fifth Amendment requires that evidence be probative and that its use be "fundamentally fair." *See, e.g.*, Pouhova v. Holder, 726 F.3d 1007, 1011 (7th Cir. 2013); Ezeagwuna v. Ashcroft, 325 F.3d 396, 405 (3d Cir. 2003); Felzcerek v. INS., 75 F.3d 112, 115 (2d Cir. 1996). As such, courts have often defaulted to the hearsay exceptions as a proxy for when evidence is fundamentally fair to admit. *See* Holper, *Confronting Cops*, *supra* note 11, at 694.

[345] For example, asylum seekers frequently rely on their own statements to establish the factual basis for past persecution or torture and the motives of the persecutor. *See, e.g.*, Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985) (describing the difficulty asylum seekers face in gathering documentary evidence to establish "specific or individual persecution or a threat of such persecution"); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution."). This author also has argued that. in keeping with the Confrontation Clause of the Sixth Amendment, the government should not be permitted to introduce police reports against noncitizens, but that noncitizens may introduce "police reports to the extent it would be useful in proving facts." Holper, *Confronting Cops*, *supra* note 11, at 727.

[346] *See* Tiffany J. Lieu, *Effectively Irrebuttable Presumptions: Empty Rituals and Due Process in Immigration Proceedings*, GEO. W. L. REV. (forthcoming) (on file with author).

Presumptions operate both for[347] and against[348] noncitizens. Presumptions are rebuttable by the party who seeks to disprove them.[349] Thus, this article proposes a change that employs the logic of the immigration system itself.[350]

Second, the immigration judge plays the role of both factfinder and decisionmaker on evidentiary objections in immigration court, as there is no jury.[351] If a rule was in effect that rendered all gang evidence inadmissible, an immigration judge would simply exclude the gang evidence. Yet, the judge would have to do psychological backflips to "unsee" the evidence. The gang evidence can then play a shadow role in her discretionary determination,[352] and, for most discretionary relief and detention decisions, no judicial review would be available.[353] If the gang evidence plays a shadow role in immigration judges'

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[347] For example, an asylum applicant "who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim." 8 C.F.R. § 1208.13(b)(1) (2023). The burden then shifts to the government to prove that the asylum seeker can safely relocate within the country of origin or that the applicant's personal circumstances or country conditions have changed such that it is safe for the applicant to return. *Id.*

[348] For example, an applicant for withholding of removal who has been convicted of a drug trafficking offense is presumed to have been convicted of a "particularly serious crime[]" that bars an applicant from this form of relief from removal. *See In re* Y-L-, A-G-, R-S-R-, 23 I. & N. Dec. 270 (A.G. 2002); *see also* Lieu, *supra* note 346 (discussing interpretations of the presumption that drug trafficking crimes are particularly serious crimes as an "irrebuttable presumption" that denies applicants due process of law).

[349] *See* Lieu, *supra* note 346, at 21.

[350] *See* Crenshaw, *supra* note 323, at 1367.

[351] *See generally* Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012) (comparing the common law jury system with the inquisitorial system and discussing how immigration procedures track onto the inquisitorial system, which sees the judge as both factfinder and decisionmaker). Kidane discusses the three roles of an immigration judge: "First, the immigration judge is supposed to 'conduct proceedings' presumably as a neutral adjudicator. Second, she is supposed to 'interrogate, examine and cross-examine' witnesses, supposedly to discover the truth. Third, she is given the discretion to grant or deny relief when she deems necessary." *Id.* at 702–03.

[352] *See* Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 368 (2020) (describing how discretion is used by immigration adjudicators to deny relief and recommending that Congress either "eliminate the discretionary component in statutory remedies that already include statutory requirements," or "create a rebuttable presumption in favor of noncitizens"); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 237 (2012) ("[T]here is significant research from the field of psychology demonstrating that narratives are how human beings make sense of complex information, and that the human mind avails of these narratives sub-consciously in ways that matter profoundly for decision-making.").

[353] *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (precluding judicial review of discretionary decisions in immigration proceedings); 8 U.S.C. § 1226(e) (precluding judicial review of discretionary decisions to detain); *see also* Holper, *Confronting Cops*, *supra* note 11, at 703–04 (describing how federal courts have refused to engage in legal questions regarding the hearsay contained within a police report, invoking statutory provisions precluding judicial review of discretionary decisions).

factual determinations when deciding various forms of relief—cancellation of removal, adjustment of status, waivers of inadmissibility, and voluntary departure—a 2022 Supreme Court decision renders that factual determination completely unreviewable by a federal court.[354] Thus, an immigration judge's decision that a noncitizen is in fact a gang member and for that reason must be denied relief would have no recourse for the federal courts to review this incorrect factual determination.[355] In contrast, when the judge is confronted with gang evidence and must employ a presumption, the judge must explain how the presumption factors into her decision.[356] The presumption creates "law to apply"[357] by articulating a legal standard for a court to review.[358]

To ensure that the presumption proposed by this article has any teeth in its application to removal proceedings, it is important that the "bursting bubble" theory of presumptions not apply (where the presumption is "burst" and thereafter erased upon the presentation of any evidence to the contrary).[359] Rather, the presumption this article proposes should actually shift both the burden of proof *and* burden of persuasion to the

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[354] *See also* Patel v. Garland, 142 S. Ct. 1614, 1627 (2022); *see also id.* (Gorsuch, J., dissenting) ("Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court may even hear the case. It is a bold claim promising dire consequences for countless lawful immigrants.").

[355] *See id.* (Gorsuch, J., dissenting).

[356] *See, e.g.*, Dor v. Garland, 46 F.4th 38, 49–50 (1st Cir. 2022) (remanding to the BIA for insufficiently explaining why it relied on the presumption that a noncitizen's drug trafficking conviction was presumptively a "particularly-serious-crime").

[357] In *Heckler v. Chaney*, the Supreme Court reviewed the Administrative Procedure Act's (APA) judicial review provisions, which precluded judicial review of "agency action[ ] [that is] 'committed to agency discretion by law.'" 470 U.S. 821, 827 (1985) (quoting 5 U.S.C. § 701(a)(2)). The Court determined that if Congress has "provided meaningful standards for defining the limits of that discretion, there is 'law to apply' . . . and courts may require that the agency follow that law." *Id.* at 834–35; *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 410–12 (1971) (discussing the legislative history of the judicial review provisions of the APA, where precluding judicial review of agency action was only intended when "statutes are drawn in such broad terms that in a given case there is no law to apply") (quoting S. REP. NO. 752, at 26 (1945)).

[358] *See* 8 U.S.C. § 1252(a)(2)(D) (providing for judicial review of questions of law in applications for adjustment of status, waivers of inadmissibility, cancellation of removal, and voluntary departure); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 63–65 (2009) (describing legislative history of Section 1252(a)(2)(D), in which Congress intended the scope of review of this savings clause to match that of traditional habeas corpus review in order to codify the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001)).

[359] *See* Lieu, *supra* note 346, at 21 n.78 (describing the "bursting bubble" theory of presumptions as one in which the "presumption disappears upon the appearance of any contradicting evidence by the other party"); *see also* United States v. Jessup, 757 F.2d 378, 382–83 (1st Cir. 1985) (describing "bursting bubble" theory of presumptions).

government.[360] In operation, the government could produce evidence printed out from a gang database, yet this stack of papers would be presumptively unreliable to prove any facts about the noncitizen. Thus, the government must do more work for the production of such evidence to have any value—introducing, for example, direct evidence of actual criminal behavior committed by the noncitizen engaging in criminal behavior as part of a group of people.[361] The gang printout then may become mere icing on a well-built cake demonstrating the noncitizen's participation in criminal acts by a group whose purpose is to engage in crime. The judge then must rule on actual acts committed by the noncitizen, and whether such acts actually occurred, without relying on the gang evidence as an easy shortcut to prove criminality.[362] What is key about this proposal is that the noncitizen carries no burden of *disproving* gang membership—such as by attempting to remove himself from the gang database or by proving that each of his friends is *not* a gang member.[363]

A final critique is that this proposal is too narrow, addressing the use of gang evidence in only one type of adjudication, rather than correcting for all of the harmful consequences of this evidence in other contexts. For example, gang evidence certainly creates harmful presumptions that have been documented to cause the denial of bail to many criminal defendants.[364] This article limits the proposal to the immigration context because it is immigration adjudicators who are most likely to see the gang database evidence in a setting where the opponent of the evidence is least able to challenge it.[365] This is because if the evidence arises in the criminal justice system,

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[360] *See* Lieu, *supra* note 346, at 21 n.78.

[361] *See* Ortiz v. Garland, 23 F.4th 1, 19–22 (1st Cir. 2022).

[362] It is important that the judge, in this inquiry, not simply rely on other shortcuts produced by criminal justice actors, such as police reports. *See* Shah, *supra* note 12, at 19–21. Rather, the judge must neglect the desire to use such shortcut evidence to service administrative efficiency, question whether the noncitizen actually committed certain acts, and if the commission of such acts should impact the outcome of the noncitizen's case. *See id.*

[363] *See Ortiz*, 23 F.4th at 19–22.

[364] *See* K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 631–32 (2011) (reporting a survey of "[s]ixty-four private and public defense attorneys practicing in over forty jurisdictions, twelve different states, and state and federal courts, [that] responded to questions about the frequency, impact, and accuracy of allegations of gang affiliation on bail decisions," and finding that "evidentiary hearings on the gang allegations were the exception, rather than the rule"). *But see* Vega v. Commonwealth, 189 N.E.3d 1197, 1210 (Mass. 2022) (reasoning that in a criminal pretrial detention hearing, a judge erred by relying on allegations contained in police reports that the defendant was a gang member as a basis for a dangerousness finding).

[365] *See* Chacón, *supra* note 13, at 343–44.

there would be a court-appointed advocate assigned and thus, it would be more likely for there to be an evidentiary hearing in which the reliability of such evidence could be challenged.[366] These procedural protections to ensure fairness and accuracy of decision-making by immigration adjudicators are not present in all deportation and immigration detention hearings. If an immigration advocate is not there to remind the judge of the responsibility to question the reliability of gang evidence, then the legal system must create a rule that instructs judges to do so. As former federal district court Judge Nancy Gertner noted:

> [T]he setting matters: It is one thing to use this kind of information [gang evidence] in a criminal case, when the target has a lawyer and a chance to challenge the evidence in a proceeding subject to the highest constitutional protections. It is another thing to use the information for deportation, with few constitutional protections, no lawyer, and today's extraordinary pressure to deport first, respect rights later. Errors that may surface in a criminal case are exposed too late in deportation proceedings; the immigrants are long gone.[367]

CONCLUSION

The racial injustices that gave rise to the creation of gang databases are amplified when gang evidence enters the immigration context. Gang evidence is a powerful weapon that the government can easily wield to detain and deport noncitizens. This article has examined gang evidence as used in the immigration context by seeking to explain the context in which such evidence came into being, and how that has led to accusations of gang affiliation in order to capitalize on a negative presumption of dangerousness, particularly for young men of color. While the creation and maintenance of gang databases is a large systemic problem that is itself seeing calls for abolishing such databases,[368] this article's focus is on one area of law where

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[366] *See, e.g.*, Letter from Rachel Rollins, Suffolk County District Attorney, to Bos. City Council (Mar. 9, 2021) (on file with author) ("[T]his evidence of gang or group affiliation is rarely used at trial. When it is presented to a jury it is, at times, done by agreement with the defense counsel but always after litigation in Court and authorized by an objective third party, the Judge."); *see also id.* ("[W]hen facts about a particular [gang] feud are deemed to be relevant, that information is presented through the testimony of an experienced investigator with first-hand knowledge of the feud and the parties involved. This is only done after a full hearing with the Court that evaluates the investigator's basis of knowledge and qualifications.").

[367] Nancy Gertner, Opinion, *Newton Judge and Lawyers Were Right to Be Concerned About ICE in the Courtroom*, BOS. GLOBE (Dec. 4, 2018), https://www.bostonglobe.com/opinion/2018/12/04/newton-judge-and-lawyers-were-right-concerned-about-ice-courtroom/pROp346z4l7N4NacNtNd6L/story.html [https://perma.cc/Q2G8-V9FT].

[368] *See, e.g.*, Letter from Charles Hamilton, *supra* note 124 (on file with author).

the consequences of such databases are felt by those who are relatively powerless to resist the harmful presumptions created by them. The proposal offered is a presumption that gang evidence is unreliable when an immigration adjudicator is confronted with such evidence. This burden shift presents a means of correcting a historical wrong: the creation of a gang database that consists primarily of young men of color.