

Volume 67 | Issue 1

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2016

# The Beast of Burden in Immigration Bond Hearings

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## Recommended Citation

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# THE BEAST OF BURDEN IN IMMIGRATION BOND HEARINGS

Mary Holper<sup>†</sup>

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## INTRODUCTION

*“In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.”*<sup>1</sup>

This term, in the case of *Jennings v. Rodriguez*,<sup>2</sup> the Supreme Court will consider whether mandatory detention applies to noncitizens whose removal proceedings have become prolonged. Should the Court grant

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<sup>†</sup> Associate Clinical Professor, Boston College Law School. I would like to thank Daniel Kanstroom, Juliet Stumpf, Alina Das, Denise Gilman, Phil Torrey, Kari Hong, Michael Tan, Sharon Beckman, Ray Madoff, Mark Spiegel, Judy McMorrow, David Olson, Fred Yen, Christopher Robertson, Mark Brodin, Jonathan Bard, and Sarah Sherman-Stokes for their helpful comments. I also would like to thank Jonathan (Yoni) Bard, Casey Riley, and Rebecca Mitchell for their excellent research assistance, and Dean Vincent Rougeau for his research support.

1. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).  
2. *Petition for Writ of Certiorari, Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

these detainees a right to a bond hearing, it will decide who should bear the burden of proof at that hearing. Currently, the approximately 60,000 detainees per year who are eligible for a bond hearing<sup>3</sup> must bear the burden of proving that they are not a danger to the community or a flight risk. The government, which took away their liberty, need not justify why they should remain detained. Yet, in the removal proceedings in which these bond hearings take place, the government must prove removability by clear and convincing evidence.<sup>4</sup> It is the government that seeks law's intervention in both contexts,<sup>5</sup> yet it only needs to justify its deportation decision, not its detention decision.

In this Article, I examine the burden of proof in bond proceedings. I apply theories for why burdens of proof exist in the law to demonstrate why the government should bear the burden of proof. I also argue that in order to ensure that such detention comports with Due Process, the government must prove, by clear and convincing evidence, that a detainee is dangerous and a flight risk. This presumption of freedom previously existed, yet was eviscerated by the former Immigration and Naturalization Service in a 1997 regulation and the Board of Immigration Appeals in a 1999 decision. Although the idea that the detainee must bear the burden of proof in bond hearings has become the norm, this Article seeks to explain how this burden shift occurred and, in doing so, exposes this troubling aspect of today's bond hearings.

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3. See Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pre-Trial Immigration Detention* 3 (U. of Texas Sch. of Law, Pub. Law & Legal Theory Research, Paper No. 644, 2016), <https://ssrn.com/abstract=2737416> [<https://perma.cc/G6YK-7UA8>] (describing 60,000 as a “conservative estimate”).
  4. See *Woodby v. INS*, 385 U.S. 276, 286 (1966) (“[N]o deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”). In 2009, the Supreme Court described the standard as “clear and convincing evidence,” due to a statutory codification of the standard as “clear and convincing.” *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009); see also 8 U.S.C. § 1229a(c)(3)(A) (providing “clear and convincing” evidence standard); *Mondaca-Vega v. Holder*, 718 F.3d 1075, 1083 (9th Cir. 2013), *aff'd on reh'g*, *Mondaca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015) (“[W]e hold that the two formulations of the government’s burden in removal proceedings that have appeared in our cases both require the same intermediate quantum of proof.”); accord *Addington v. Texas*, 441 U.S. 418, 432–33 (1979) (holding that for civil commitment, the state must prove mental illness and dangerousness by clear and convincing evidence, but that the use of the term “unequivocal” is not constitutionally required). For the purposes of this Article, I will use “clear and convincing” evidence as the standard for deportability.
  5. See RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 23 (Yale Univ. Press 1992) (writing that under traditional legal theory, the party who seeks the law’s intervention is the party who bears the burden of proof).

This Article examines a problem that is understudied in the scholarship. Many have examined the constitutionality of mandatory detention, the product of a 1996 statute whereby certain classes of detainees, primarily those who are removable for criminal conduct, may be held with no bond hearing.<sup>6</sup> Alina Das has discussed why placing the burden of proof on the detainee is problematic as an institutional design because pro se detainees often do not have access to the information needed to prove they are not a danger or a flight risk.<sup>7</sup> Denise Gilman has argued that the burden allocation in bond hearings is unconstitutional. She has focused her critique on how the immigration detention system has failed to incorporate the movement away from monetary bonds and toward empirical study of risk factors in the criminal pretrial detention system.<sup>8</sup> This scholarship does not, however, discuss why the burdens of proof between deportation and detention do not align, nor how theories behind the burden of proof allocation justify a government-borne burden of proof in bond hearings.<sup>9</sup> Still others have

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6. See, e.g., Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 604 (2010) (arguing that “the current framework for mandatory detention is unfair and inefficient”); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 150 (2004) (“[R]ather than addressing some of the very real injustices of the post-9/11 detention sweep, the executive branch is instead staking claim to even broader authority to detain noncitizens based on categorical determinations of dangerousness—without individual justification, administrative hearings, or constitutional review.”); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006–07 (2002) (exploring due process limitations on detention); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 535 (1999) (suggesting that “relevant government officials make individualized, case-by-case determinations, after the person has had a fair opportunity to be heard[.]”).
  7. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 156–58 (2013); see also Heeren, *supra* note 6, at 604 (contending that the current approach to mandatory detention does not accurately assess whether a person is a flight or security risk).
  8. See Gilman, *supra* note 3, at 28–38. Gilman also has argued that the U.S. immigration bond determinations are not in compliance with international human rights law. See Denise L. Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, FORDHAM INT’L L.J. 244, 294 (2013).
  9. Frances Kreimer, critiquing certain features of the immigration detention system, briefly argues that the placement of the burden of proof on the detainee stands in stark contrast to procedures for pretrial detainees. See Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1519–22 (2012) (critiquing certain features of the immigration system in comparison to features of the criminal pretrial system). Others have

argued that immigration detention itself is punishment,<sup>10</sup> critiquing our “civil” detention system as not truly “civil” at all.<sup>11</sup> In this Article, rather than questioning the Supreme Court’s classification of immigration detention as civil, I use these decisions to argue that, to be consistent with decisions concerning civil detention, the government should bear the burden of proof in bond proceedings.

The burden of proof in bond hearings has started to receive some attention from courts.<sup>12</sup> Advocates have spent two decades fighting for the right to a bond hearing; thus, as in the scholarship, mandatory

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critiqued the burden and standard of proof in so-called “Joseph” hearings, where a detainee must show that the government is substantially unlikely to prevail in its classification of a noncitizen as a mandatory detainee. *See, e.g.,* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1872 (2011) (comparing procedures for immigration detainees, which are less protective than those used for Guantanamo detainees’ cases, and arguing that the government should bear the burden of proof at a Joseph hearing); Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in “Joseph” Hearings After Demore v. Kim*, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 54 (2006) (arguing that the burden of proof in Joseph hearings violates Due Process); Joseph, 22 I. & N. Dec. 799, 807 (B.I.A. 1999).

10. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1358 (2014) [hereinafter *Immigration Detention as Punishment*] (making a formalist, rules-based argument that immigration detention is punishment by rooting his argument in immigration detention’s legislative history); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (articulating functionalist critique that immigration detention has been converted “into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes”). César Cuauhtémoc García Hernández also has questioned how U.S. society has unnecessarily naturalized immigration detention as a norm. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015).
11. *See, e.g.,* Mark Noferi, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533 (2014) (finding that “civil” detention in the United States increasingly shares similar qualities to the criminal system).
12. The Boston College Immigration Clinic, which I direct, recently brought a habeas case challenging the allocation of burden of proof in bond proceedings, raising some of the arguments addressed in this Article. *Quinones v. Smith*, 1:16-CV-10427-GAO (D. Mass. May 2016). That case was dismissed without reaching the substance of the merits. *See id.* (granting motion to dismiss for lack of Article III standing). In addition, in litigation concerning whether the mandatory detention statute at 8 U.S.C. § 1226(c) precluded bond hearings when detainees were held in prolonged pretrial detention, the Ninth Circuit Court of Appeals has placed the burden of proof on the government during bond hearings provided for detainees whose removal proceedings have extended beyond six months. *See infra* Part II.C.

detention has been the primary dragon to slay.<sup>13</sup> Thanks to numerous successful court challenges, many detainees have won the right to a bond hearing before an immigration judge.<sup>14</sup> We are now at a time when courts are considering the procedures and substance of bond hearings.<sup>15</sup> It is unsurprising that the Court, when it accepted certiorari in *Jennings v. Rodriguez* chose a case involving both the reach of the mandatory detention statute and a procedural aspect of those hearings, namely, the burden of proof.<sup>16</sup> For this reason, this Article is particularly timely.

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13. Several courts of appeals, considering whether mandatory detention was constitutional, determined that it violated Due Process. *See, e.g.*, *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (“Fourteen months of incarceration pendente lite of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights as in criminal proceedings, together lead us to conclude that the circumstances of Welch’s detention constitute punishment without trial.”); *Hoang v. Comfort*, 282 F.3d 1247, 1260 (10th Cir. 2002) (holding that the mandatory detention of the defendant violated his due process right to an individual determination of flight risk and danger to the community); *Kim v. Ziglar*, 276 F.3d 523, 539 (9th Cir. 2002) (same); *Patel v. Zemski*, 275 F.3d 299, 314 (3d Cir. 2001) (same). *But see* *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (rejecting a constitutional challenge to 8 U.S.C. § 1226(c) by a lawful permanent resident). The Supreme Court disagreed and upheld mandatory detention against a Due Process challenge in 2003. *See Demore v. Kim*, 538 U.S. 510, 531 (“Detention during removal proceedings is a constitutionally permissible part of that process.”).
14. *See, e.g.*, *Rodriguez v. Robbins*, 804 F.3d 1060, 1074 (9th Cir. 2015), *cert. granted*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (holding that immigration judges must provide periodic hearings for detainees held more than twelve months); *Castañeda v. Souza*, 810 F.3d 15, 19 (1st Cir. 2015) (holding that if a detainee is not released immediately from state custody into immigration custody, mandatory detention under 8 U.S.C. § 1226(c) does not apply).
15. For example, in the case of *Lavrinenko v. Horgan*, No. 1:14-CV-10799 (D. Mass. 2015), *appeal dismissed*, No. 14-1627 (1st Cir. 2015), the American Civil Liberties Union (ACLU) litigated the adequacy of bond procedures. The case did not reach resolution in the First Circuit Court of Appeals because the client was released on bond. *See Immigration Detention*, ACLU MASSACHUSETTS, <https://aclum.org/our-work/aclum-issues/immigrants-rights/immigration-detention/> [https://perma.cc/S4HG-BSFP] (discussing the ACLU’s involvement in *Lavrinenko* and similar cases). In another case, the ACLU is litigating the burden of proof in “Joseph” hearings, where a detainee must prove that the government is substantially unlikely to prevail on its mandatory detention charge. *See* Complaint at 18–19, *Gayle v. Napolitano*, No. 3:12-cv-02806-FLW, 2013 WL 1090993 (2013) (challenging the “standard and procedures for determining whether an individual in removal proceedings is subject to mandatory detention”); *see also* *Gayle v. Johnson*, 81 F. Supp. 3d 371, 404–05 (D.N.J. 2015) (deciding summary judgement claims).
16. *See* Petition for Writ of Certiorari, *supra* note 2, at 9.

This Article proceeds in three parts. Part I explains how the Board of Immigration Appeals (Board) originally held that there should be a presumption of liberty, and that the government must prove dangerousness and flight risk to justify detention. Only for certain categories of removable noncitizens, such as those removable for certain criminal convictions and terrorism, did Congress write in a legislative presumption against liberty, explicitly placing the burden of proof on the detainee. In 1997, however, the former Immigration and Naturalization Service (INS) wrote a regulation placing the burden on the detainee in initial custody determinations made by the INS (this decision is now made by the Immigration and Customs Enforcement Agency (ICE) within the Department of Homeland Security (DHS)). In 1999, the Board extended the burden-shifting of this regulation to bond hearings, where an immigration judge reviews that initial custody determination. In Part II, I briefly describe other areas of civil detention, where, in order to survive a Due Process challenge, the burden of proof must be on the government. Part II also discusses key immigration detention cases decided by the Supreme Court to demonstrate that there is nothing special about immigration detention to justify a detainee-borne burden of proof. In Part III, I examine the misaligned burdens of proof and argue that if the government must prove removability by clear and convincing evidence, then the government also must prove a need to detain during that removal process. I apply theories of why burdens of proof exist in the law to argue that in bond hearings, the government must bear the burden by clear and convincing evidence.

## I. AN UNSUPPORTED BURDEN SHIFT

Historically, the statutes authorizing immigration detention did not clarify who bore the burden of proof.<sup>17</sup> Neither did the regulations implementing these statutes.<sup>18</sup> In 1976, the Board filled in the statutory

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17. The Internal Security Act of 1950 contained the following language:

Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500, with security approved by the Attorney General; or (3) be released on conditional parole.

Pub. L. No. 831, § 23(a), 64 Stat. 1010, 1011 (1950). When Congress passed the Immigration and Nationality Act of 1952, the provision governing detention was former 8 U.S.C. § 1252, which provided:

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole.

Pub. L. No. 414, § 242(a), 66 Stat. 208, 208–09 (1952).

18. *See, e.g.*, 8 C.F.R. § 242.2(b) (1958) (authorizing the district director to “detain an alien in, or release him from, custody”). In 1963, the INS amended the regulation to adopt language that is substantially similar to the regulation governing immigration judges today: “a district director . . . may exercise the authority contained in section 242 of the Act to continue or detain an alien in, or release him from, custody, to determine whether an alien shall be released under bond, and the amount thereof, if any . . .” Orders to Show Cause and Warrants of Arrest, 28 Fed. Reg. 8279, 8280 (Aug. 13, 1963) (codified at 8 C.F.R. § 242). In 1969, the regulation was further amended to authorize the special inquiry officer—the predecessor to the immigration judge—to review custody determinations made by the district director. *See* Toscano-Rivas, 14 I. & N. Dec. 523, 526 (B.I.A. 1973) (reviewing regulatory history). The new regulation similarly provided that both the District Director and special inquiry officer “may exercise the authority contained in section 242 of the Act to continue or detain a respondent in, or release him from, custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any.” 8 C.F.R. § 242.2(b) (1970). Subsequently, after the position of special inquiry officer was replaced by the immigration judge in 1973, 38 Fed. Reg. 8590 (Apr. 4, 1973), the regulations were amended to transfer the same authority over custody determinations to the immigration judge. The new regulation authorized the district director to determine whether a noncitizen “is to be continued in custody” or released on bond or conditions of supervision, 8 C.F.R. § 242.2(a) (1983), and further provided for immigration judge review of that determination:



void, deciding *In re Patel*,<sup>19</sup> which established a presumption against detention. The Board wrote, “[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk.”<sup>20</sup> The Board reaffirmed this presumption in numerous cases.<sup>21</sup> Although the Board in *Patel* was not long on analysis when it set forth its presumption of freedom in bond determinations, one can certainly see the constitutional backdrop to the presumption of freedom.<sup>22</sup> Earlier Board decisions that dealt with detention once a noncitizen had been ordered deported provided stronger Due Process rhetoric behind a presumption of freedom.<sup>23</sup>

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After an initial determination [by the INS District Director], and at any time before a deportation order becomes administratively final . . . an immigration judge may exercise the authority contained in section 242 of the Act to continue or detain a respondent in, or release him from custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any.

8 C.F.R. § 242.2(b) (1983).

19. 15 I. & N. Dec. 666 (BIA 1976).
20. *Id.* at 666 (citation omitted).
21. *See, e.g.*, Andrade, 19 I. & N. Dec. 488, 489 (B.I.A. 1987) (reaffirming the holding in *Patel*); Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979) (same); Spiliopoulos, 16 I. & N. Dec. 561, 563 (B.I.A. 1978) (same).
22. *See infra* Part II (analyzing civil detention cases).
23. *See, e.g.*, Kwun, 13 I. & N. Dec. 457, 464 (B.I.A. 1969) (“In our system of ordered liberty, the freedom of the individual is considered precious. No deportable alien should be deprived of his liberty pending execution of the deportation order unless there are compelling reasons and every effort should be made to keep the period of any necessary detention at a minimum.”); Au, 13 I. & N. Dec. 133, 137–38 (B.I.A. 1968) (“The statute makes it clear that the detention power was designed for use, where needed, to make the alien available for hearing and, if ordered, for deportation. Denial of bail has been sustained by the courts only where it has been demonstrated that the alien is not a good risk security-wise . . . or bail-wise.” (citation omitted)).

A. *Burdens of Proof for the “Presumptively Unbailable” Detainees*

In a series of amendments to the Immigration and Nationality Act (INA),<sup>24</sup> Congress created what I call “presumptively unbailable” detainees.<sup>25</sup> The early mandatory detention statutes were the first provisions of the INA to address the burden of proof for custody purposes. The Anti-Drug Abuse Act of 1988 created a new concept—the “aggravated felony,” then defined to include only murder, drug trafficking, and firearms trafficking—and carved out special provisions mandating the detention of any alien who had been convicted of such an offense.<sup>26</sup> By using the term “aggravated felony,” which, according to one Board member, “manages to mislead, to alarm, to distort, and to dehumanize,”<sup>27</sup> Congress set the stage for presuming all such persons to be dangerous.<sup>28</sup> Because Congress also made “aggravated felony” a ground for deportation, it set the stage for presuming flight risks of these noncitizens (because a noncitizen who was certainly deportable was less likely to appear for a hearing).<sup>29</sup>

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24. For an excellent discussion of the history of how and why Congress adopted these various statutes, see Margaret Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* 344 (David A. Martin & Peter H. Schuck eds., Foundation Press 2005). César Cuauhtémoc García Hernández also has chronicled the legislative history of immigration detention, demonstrating how the war on drugs and the war on crime infiltrated the immigration detention policies of the 1980s and 1990s. García Hernández, *Immigration Detention as Punishment*, *supra* note 10.
25. Mark Noferi has discussed a related “noncitizen presumption,” which refers to the presumption that noncitizens who committed certain crimes are more dangerous than citizen detainees. See Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, in *IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME* 217 (Maria João Guia, Robert Koulisch & Valsamis Mitsilegas eds., 2016). He explains that this presumption exists for expressive, not empirical reasons; namely, “blaming the gatekeeper”—responding to the public’s belief that immigration officials have failed their gatekeeping function—and that the “U.S. socially constructs noncitizens as ‘invitees’ per a property law analogy,” so there is categorically no tolerance of immigrants’ crimes. *Id.* at 218.
26. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4470 (1988) (adding a new INA § 242(a)(2) providing that the Attorney General must take into custody aliens convicted of an aggravated felony upon completion of the sentence and “shall not release such felon from custody”).
27. De La Cruz, 20 I. & N. Dec. 346, 359 (B.I.A. 1991) (Heilman, Board Member, dissenting).
28. See *Demore v. Kim*, 538 U.S. 510, 518 (describing a 1986 study that showed “criminal aliens” were more likely to commit more crimes before being removed).
29. See *id.* at 521 (citing to studies presented to Congress that “criminal aliens” were less likely to appear for their hearings). In 1996, Congress made relief for long-term residents convicted of an aggravated felony impossible. See INS

In 1990, Congress changed the law to direct the Attorney General to release lawful permanent residents (LPRs) upon determining “that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.”<sup>30</sup> Although the statutory text was silent on the issue, the Board read this provision to establish a presumption against the release of such a noncitizen, unless he rebutted this presumption by showing his eligibility for release.<sup>31</sup> The Board reasoned that it would be “unreasonable to conclude that the statute requires the Service to take into custody an alien convicted of an aggravated felony, and then requires the *Service* to attempt to demonstrate that the alien ‘is not’ a threat to the community and ‘is likely’ to appear for any scheduled hearings.”<sup>32</sup>

A further amendment in 1991 expanded the category of persons entitled to individual review to include any alien who had been lawfully admitted—whether temporarily or permanently—thus leaving only entrants without inspection subject to the detention mandate. The

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v. St. Cyr, 533 U.S. 289, 294–97 (2001) (chronicling the history of relief under former INA § 212(c)); 8 U.S.C. § 1229b(a)(3) (stating that cancellation of removal for lawful permanent residents is not available if convicted of aggravated felony).

30. Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 4978, 5049 (amending former INA § 242(a)(2)). Although one can say Congress changed the law to respond to the district courts’ findings that it was unconstitutional as applied to LPRs—*see, e.g.*, Kellman v. Dist. Dir., 750 F. Supp. 625, 628 (S.D.N.Y. 1990) (holding as unconstitutional the INA provision denying the defendant a meaningful bail determination); Probert v. INS, 750 F. Supp. 252, 257 (E.D. Mich. 1990) (same); Paxton v. INS, 745 F. Supp. 1261, 1266 (E.D. Mich. 1990) (same); Leader v. Blackman, 744 F. Supp. 500, 509–10 (S.D.N.Y. 1990) (same); Agunobi v. Thornburgh, 745 F. Supp. 533, 537 (N.D. Ill. 1990) (same)—in reality this change was introduced to permit Robert Probert, a Canadian hockey player for the Detroit Red Wings, to be released on bond during his deportation proceedings notwithstanding his cocaine conviction. Taylor, *supra* note 24, at 350; *id.* at 371 n.42 (citing *Bail Hearing for Robert Probert?*, TORONTO STAR F2 (Nov. 20, 1991)) (noting that the amendment was “sought on Probert’s behalf” by Michigan representative John Conyers)).
31. *See* De La Cruz, 20 I. & N. Dec. 346, 350 (B.I.A. 1991) (“We find that the statutory scheme and language of section 242(a)(2) creates a presumption against the release of any alien convicted of an aggravated felony from Service custody unless the alien demonstrates that he is an alien lawfully admitted for permanent residence, is not a threat to the community, and is likely to appear for any scheduled hearings.”).
32. *Id.* (emphasis in original). Board member Heilman strongly disagreed with this reading of the legislative history. Drawing on the legislative history and judicial interpretations of the nearly identical language in the federal Bail Reform Act of 1984, he believed that while the detainee could bear the initial burden of production, the burden of persuasion should rest with the government. *Id.* at 352–60 (Heilman, Board Member, dissenting).

amended provision also clearly put the burden of proof on the non-citizen to establish his eligibility for release.<sup>33</sup> Thus, the statute imposed a presumption in favor of detention for aggravated felons and assigned the burden of proof to the noncitizen to show eligibility for release in the case of a lawfully admitted noncitizen facing removal due to an aggravated felony conviction. The custody hearings of all other noncitizens were governed by the rule in *Matter of Patel*.<sup>34</sup>

In 1996, Congress passed a major overhaul to the immigration statute with a pair of laws—the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>35</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>36</sup> Both of these laws contained provisions related to immigration detention. With AEDPA, Congress eliminated the Attorney General’s authority to release from detention most noncitizens charged with criminal grounds of removal.<sup>37</sup> However, later that year, Congress, realizing that there would not be enough

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33. See Ellis, 20 I. & N. Dec. 641, 643 n.2 (B.I.A. 1993) (noting that 1991 amendments clarified the burden of proof issue). Thus, § 1252(a)(2)(B) provided that:

The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Former 8 U.S.C. § 1252(a)(2)(B) (1994), *amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1733, 1751.

34. See Valdez-Valdez, 21 I. & N. Dec. 703, 706 (B.I.A. 1997) (“Prior to April 1996, custody determinations for aliens deportable on nonaggravated felony grounds were governed by the general bond provisions found in section 242(a)(1) of the Act, under which it was presumed that an alien would not be detained or required to post bond unless there was a finding that the alien is a threat to the national security or a poor bail risk.” (citing Patel, 15 I. & N. Dec. 666 (B.I.A. 1976))); Ellis, 20 I. & N. Dec. at 642 (explaining that “[i]n standard bond proceedings . . . an alien, whom the Service in its discretion has arrested and taken into custody, generally should not be detained or required to post bond pending a determination of deportability except on a finding that he is a threat to the national security or is a poor bail risk,” but that bond redetermination requests by “an alien convicted of an aggravated felony” are governed by former INA § 242(a)(2) (citing Patel, 15 I. & N. Dec. 666 (B.I.A. 1976))); De La Cruz, 20 I. & N. Dec. at 349–50 (same).

35. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

36. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

37. AEDPA § 440(c).

detention beds for all of those now subject to mandatory detention,<sup>38</sup> in IIRIRA temporarily restored some discretionary authority to the Attorney General to release such noncitizens under the Transition Period Custody Rules during the period those rules were in effect.<sup>39</sup> Much like the 1990 and 1991 amendments to the detention statute, the Transition Period Custody Rules provided that the Attorney General could release a noncitizen subject to mandatory detention “only if” he was convicted of an aggravated felony or deportable on certain enumerated criminal grounds, and placed the burden on the noncitizen to prove that he was not a danger or a flight risk.<sup>40</sup>

With IIRIRA, Congress passed the permanent “mandatory detention” statute that exists today, 8 U.S.C. § 1226(c).<sup>41</sup> Those who are removable for several criminal offenses—aggravated felonies, crimes involving moral turpitude, firearms offenses, and drug crimes, among others—are now ineligible for an individual consideration of their dangerousness and flight risk.<sup>42</sup> While the moniker “mandatory detention” is certainly a true and accurate description of the harshness of this statute, that label is not technically correct. There is one possible way for an immigration judge to release a detainee even if he fits within the enumerated grounds of removability; that is if the Attorney General decides that release from custody is necessary for witness protection<sup>43</sup>

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38. See Taylor, *supra* note 24, at 353 (noting that Congress had failed to realize “that the INS simply did not have sufficient bed space to carry out the new detention mandate”).
39. See IIRIRA § 303(b)(3) (providing guidelines for when the Attorney General could release noncitizens).
40. The language of the Transition Period Custody Rules read that the Attorney General could release a noncitizen subject to mandatory detention only if:
- (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or
  - (ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.
- IIRIRA § 303(b)(3)(B).
41. See IIRIRA § 303(a) (providing for mandatory detention).
42. See 8 U.S.C. § 1226(c) (2012) (requiring that the Attorney General take any alien who commits an aggravated felony, a crime of moral turpitude, a firearms offense, a drug crime, or another enumerated crime into custody).
43. The Attorney General must decide, pursuant to 18 U.S.C. § 3521, “that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate

“and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.”<sup>44</sup> Like the 1990 and 1991 statutes and the Transition Period Custody Rules, Congress, when legislating about the presumptive poor bail risk of a class of detainees, expressly placed the burden of proof for the (albeit limited) class of those who could get a bond hearing.

AEDPA also included detention provisions for the Alien Terrorist Removal Court, in which noncitizens can be removed on national security grounds. Following the pattern begun in the 1990 statute, these provisions allow for some detainees to seek release, but place the burden on them to prove they are not a danger or a flight risk.<sup>45</sup>

The brief statutory history of the “presumptively unbailable” detainees has demonstrated how Congress knowingly placed the burden of proof in bond hearings only on certain categories of detainees. To clarify, I do not endorse the label I am assigning to these detainees; I agree with many scholars that a conviction for one of these crimes does not *actually* render someone dangerous.<sup>46</sup> I also agree that we should

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of a witness, potential witness, or person cooperating with such an investigation.” 8 U.S.C. § 1226(c)(2) (2012).

44. 8 U.S.C. § 1226(c)(2) (2012).

45. 8 U.S.C. § 1536(a)(2) provides:

(2) Special rules for permanent resident aliens

(A) Release hearing

An alien lawfully admitted for permanent residence shall be entitled to a release hearing before the judge assigned to hear the removal hearing. Such an alien shall be detained pending the removal hearing, unless the alien demonstrates to the court that the alien-

(i) is a person lawfully admitted for permanent residence in the United States;

(ii) if released upon such terms and conditions as the court may prescribe (including the posting of any monetary amount), is not likely to flee; and

(iii) will not endanger national security, or the safety of any person or the community, if released.

8 U.S.C. § 1536(a)(2) (2012).

46. *See, e.g.,* Noferi, *supra* note 25, at 233 (“[A] criminal conviction is not necessarily a ‘reliable indicator’ of dangerousness—particularly minor convictions, many of which trigger mandatory immigration detention.”). There is also significant debate about whether a judge can even predict dangerousness. *See, e.g.,* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 696 (2009) (“[P]reventive detention rests on a prediction about future behavior, and no one can predict the future. Decision makers all too often fall back on stereotypes and prejudices as proxies for dangerousness. Humility about our predictive abilities should counsel against preventive detention.”). Scholars

not be presuming dangerousness about anyone based on a legislative category of their crime without an individualized determination of the facts of their case.<sup>47</sup> I further agree that the term “aggravated felony” has grown into a “colossus,”<sup>48</sup> so presuming dangerousness about anyone who has an aggravated felony conviction is highly problematic. What is worse, now the “presumptively unbailable” category is not even limited to those convicted of an aggravated felony.<sup>49</sup> These expansions leave one to wonder how narrowly-drafted the mandatory detention

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have argued that, while predictions of future dangerousness are rampant in criminal law, “generations of scientists have explained that such predictions cannot meet the standards of science.” Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 68 LAW & CONTEMP. PROBS. 301, 308 (2006).

47. See, e.g., Taylor, *supra* note 24, at 344 (noting that requiring an individual determination of dangerous before detention has been applied by the Supreme Court in other contexts); Cole, *supra* note 46, at 717 (“The Court’s reasoning in *Kim* is flawed, as it proffers no good reason for discarding the requirement of individualized need before subjecting a human being to preventive detention.”).
48. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484 (2007) (describing the amended definition of aggravated felony as a “colossus” after “a series of amendments have added crime after crime to the list”). Amendments since 1988 have added “crimes of violence,” theft, receipt of stolen property, fraud, forgery, and obstruction of justice, to name a few offenses that now meet the twenty-one part definition. See e.g., Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003) (adding peonage, slavery, involuntary servitude, and trafficking in persons); IIRIRA of 1996, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3009–546, 3009–627 (1996) (adding sexual abuse of a minor and rape); AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277–78 (1996) (adding bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321–22 (1994) (adding theft, receipt of stolen property, burglary, trafficking in fraudulent documents, RICO, certain prostitution offenses, fraud or deceit, tax evasion, and human smuggling); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (1990) (adding “crimes of violence”). With IIRIRA in 1996, Congress also reduced the length of sentence necessary to trigger the aggravated felony definition from five years to one year, IIRIRA, § 321(a)(3)–(4), 110 Stat. at 3009–627, while at the same time redefining a sentence to include any suspended sentence. *Id.* at § 322(a)(1)(B), 110 Stat. at 3009–628.
49. See 8 U.S.C. § 1226(c) (2012) (mandatory detention for those removable for multiple convictions, convictions of an aggravated felony, convictions of drug offenses, firearms offenses, crimes of moral turpitude with a sentence of more than one year, convictions of involvement with terrorism, and convictions on other miscellaneous crimes).

statute really is,<sup>50</sup> especially when one compares it to the federal Bail Reform Act, which one court described as “a narrowly-drafted statute with the pretrial detention provision addressed to the danger from a small but identifiable group of particularly dangerous defendants.”<sup>51</sup>

Leaving those issues aside for the moment, what appears to be true is that Congress saw those detainees as a danger and/or flight risk and legislatively placed the burden of proof on them to prove otherwise. Not all detainees, however, fit within a “presumptively unbailable” category—many of those detained have been convicted of no crime,<sup>52</sup> or, if they have been convicted, their offenses do not fit within a “presumptively unbailable” category. How does the burden allocation operate for those detainees?

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50. *See Demore v. Kim*, 538 U.S. 510, 558 (2003) (Souter, J., concurring in part and dissenting in part) (“Detention [under 8 U.S.C. § 1226(c)] is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor.”). *But see id.* at 526 (majority opinion) (describing the detention policy in 8 U.S.C. § 1226(c) as “narrow”).
51. *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (citation and internal quotations omitted); *see also United States v. Salerno*, 481 U.S. 739, 747 (1987) (“The Bail Reform Act [BRA] carefully limits the circumstances under which detention may be sought to the most serious of crimes.”). Of course, amendments to the BRA have operated to expand those that Congress initially deemed to be that “small but identifiable group of particularly dangerous defendants.” *Himler*, 797 F.2d at 160 (citation omitted). For example, while the original drafting of the BRA in 1984 allowed for a presumption of dangerousness in cases of drug trafficking, crimes of violence, offenses for which the sentence is life imprisonment or death, or certain repeat offenders, today, offenses involving drug trafficking, terrorism, carrying a firearm in the commission of a crime of violence, and offenses involving minor victims (from sexual abuse to offenses involving child pornography) all create the rebuttable presumption of dangerousness. See 18 U.S.C. § 3142(e)(3) (providing conditions for the rebuttable presumption). Nonetheless, the BRA appears to have been much more carefully drafted, against the backdrop of much discussion around the constitutionality of its provisions, than the mandatory detention provisions. *See Taylor*, *supra* note 24, at 348–54 (detailing the legislative history leading up to the passage of 8 U.S.C. § 1226(c) and stating, “[i]n sum, Congress did not enact the statute that mandated detention without bond for Hyung Joon Kim and other non-citizen offenders with anything close to the careful consideration depicted in the *Demore* decision”).
52. *See, e.g., Fatahi*, 26 I. & N. Dec. 791, 794–95 (B.I.A. 2016) (upholding immigration judge’s denial of bond based on dangerousness for a detainee who had no criminal record, but who used a suspicious passport); *Guerra*, 24 I. & N. Dec. 37, 41 (B.I.A. 2006) (upholding immigration judge’s denial of bond for a detainee who had been charged with drug trafficking, but had not been convicted).



*B. Burdens of Proof for the Non “Presumptively Unbailable” Detainees*

As a follow-up to the 1996 laws, when the will to detain as many noncitizens as possible was at its highest,<sup>53</sup> the former INS engaged in rulemaking to flip the presumption of freedom for its initial custody determinations for *all* detainees—not just the “presumptively unbailable.”<sup>54</sup> The INS acknowledged the change, but explained the rule change in the following terms:

Several commenters stated that § 236 of the proposed rule as written is a reversal of long established procedure that provides that a noncriminal alien is presumptively eligible for release. The Service has been strongly criticized for its failure to remove aliens who are not detained. A recent report by the Department of Justice Inspector General shows that when aliens are released from custody, nearly 90 percent abscond and are not removed from the United States. The mandate of Congress, as evidenced by budget enhancements and other legislation, is increased detention to ensure removal. Accordingly, because the Service believes that the regulation as written is consistent with the intent of Congress, the interim rule has not modified the proposed rule in this regard.<sup>55</sup>

There are several flaws in the INS’s explanation for the rule change.<sup>56</sup> The supposed consistency with a Congressional “mandate” is

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53. See Taylor, *supra* note 24, at 346–54 (detailing political backdrop to mandatory detention statute); see also Gilman, *supra* note 3, at 14 (“When mandatory detention became the law for certain groups of migrants, custody determination proceedings for release-eligible migrants changed their character as well. Essentially, all migrants were assimilated to criminal subjects for detention purposes, including those who had no criminal history at all . . .”).

54. The substance of § 1236.1(c)(8) was first proposed in January 1997, 62 Fed. Reg. 444, 484 (Jan. 3, 1997), and promulgated as 8 C.F.R. § 236.1(c)(2) (1998) that March. 62 Fed. Reg. 10,312, 10,360 (Mar. 6, 1997) (interim rule). Paragraph (c)(2) was re-designated as (c)(8) in the final rule released in May 1998. 63 Fed. Reg. 27,441, 27,449 (May 19, 1998). The final regulation reads:

Any officer authorized to issue a warrant of arrest may, in the officer’s discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.

8 C.F.R. § 236.1(c)(2) (1998).

55. 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997).

56. For example, the Inspector General report that the INS cites does not even address the detention of noncitizens in removal proceedings, but rather discusses the detention and deportation of noncitizens with final orders of removal, who present an entirely different level of flight risk as a result.

questionable. To the extent the INS's reference to "other legislation" refers to IIRIRA and AEDPA, those statutes created mandatory detention without a possibility of release for new categories of "presumptively unbailable" detainees, but changed nothing about the detention scheme for all other detainees (apart from raising the minimum bond from \$500 to \$1,500).<sup>57</sup> If anything, the sweeping changes that IIRIRA and AEDPA made to detain more "presumptively unbailable" detainees without a bond hearing, coupled with Congress' simultaneous decision to leave the scheme for all other detainees essentially intact, suggest that Congress intended to leave *Patel's* presumption against detention in place.<sup>58</sup> It is also unclear why the mere fact of "budget enhancements" and increased detention bed space would demonstrate Congress' intent to depart from the longstanding presumption against detention at bond hearings for those who are not "presumptively unbailable." The more likely explanation is that the budget enhancements were simply intended to accommodate the agency's new and expanded detention mandates, and particularly its obligations under 8 U.S.C. § 1226(c), the new mandatory detention statute. Also quite troubling is the lack of any constitutional analysis. The INS treated the presumption of freedom as one of those agency policy choices that can be changed on a whim (or, to withstand an arbitrary and capricious challenge, with some explanation of its shift in policy).<sup>59</sup>

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Thus, the Inspector General found upon review of "656 case files for aliens who were not detained when final deportation orders were issued to them," only "72 aliens (11 percent) left the country; 45 were formally deported and 27 others left the country of their own accord." U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, IMMIGRATION AND NATURALIZATION SERVICE, Rep. No. I-96-03, DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED, (1996), <http://www.justice.gov/oig/reports/INS/e9603/#REMOVAL%20OF%20NON> [<https://perma.cc/E2E6-EHN8>]. What is probably a better explanation of INS's intense focus on this report is that the exposure of this report to the press revealed an embarrassing statistic about the INS's "near total inability to remove deportable criminal aliens." Taylor, *supra* note 24, at 347, 351 (citing *Demore v. Kim*, 538 U.S. 510, 518 (2003)).

57. Compare 8 U.S.C. § 1226 (2012) with former 8 U.S.C. § 1252 (1995) (both statutes allow the Attorney General to release an alien under bond and to prescribe the conditions of the bond, but the 1995 statute requires that the minimum bond be no less than \$500 and the 2012 statute requires the minimum bond be no less than \$1,500).
58. This would be consistent with the Board's holdings in several cases. See cases cited *supra* note 34.
59. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position . . . . And of course the agency must show that there are good reasons for the new policy.").

The Board, of course, could have engaged in a constitutional analysis when it considered what the burden of proof should be in discretionary bond hearings.<sup>60</sup> However, in *Adeniji*,<sup>61</sup> the Board held that when an immigration judge reconsiders the government's initial decision to detain pursuant to 8 U.S.C. § 1226(a), the burden of proof is on the detainee.<sup>62</sup> The Board's primary support for this allocation of the burden came from the 1997 regulation promulgated by the INS that is described above.<sup>63</sup> The Board fully acknowledged that this regulation did not apply to immigration judges, but only to initial custody determinations made by the then-INS.<sup>64</sup> However, the Board stated that this regulation "is binding on us and pertains directly to removal proceedings under the IIRIRA."<sup>65</sup> That the Board—situated within Executive Office for Immigration Review, the adjudicative body—would find itself governed by the enforcement agency's agenda is troubling, especially when that same enforcement agency had once become so maddened with immigration judges reducing their bonds that they plotted to remove all immigration judge review of their officers' detention decisions.<sup>66</sup> This blind following of the INS's poorly-reasoned

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60. Although it is correct that the Board, as an administrative agency, cannot engage in constitutional analysis, in fact the Board does engage in such analysis in order to avoid an unconstitutional reading of a statute or a regulation. *See, e.g.*, Valdez-Valdez, 21 I. & N. Dec. 703, 710–14 (B.I.A. 1997) (using Supreme Court Due Process retroactivity analysis to determine which statute applies to a subset of detainees); *see also* Adeniji, 22 I. & N. Dec. 1102, 1123 (B.I.A. 1999) (Rosenberg, Board Member, dissenting) ("While the Board may not decide the constitutionality of a statute, we do have the duty to render our decisions in a manner that will avoid constitutional questions."). Indeed, Board member Heilman, arguing that the Board should read the 1990 version of the mandatory detention statute to include a presumption of release, did not specifically reference the constitution, but wrote that the "'aggravated felony' bond provision is almost embarrassing in its indifference to the most elementary considerations which have been traditionally associated with detention in American law." De La Cruz, 20 I. & N. Dec. 346, 359 (B.I.A. 1991) (Heilman, Board Member, dissenting); *see also id.* at 356 ("[T]here is every reason to find that section 242(a)(2)(B) of the Act should be interpreted as applying the general American presumption in favor of release, pending trial, or as in the immigration context, pending a deportation hearing.").

61. 22 I. & N. Dec. 1102 (B.I.A. 1999).

62. *Id.* at 1113.

63. *See id.* at 1112 (referring to 8 C.F.R. § 236.1(c)(8)).

64. *Id.*

65. *Id.* at 1113.

66. INS General Counsel told the attendees at the American Immigration Lawyers Association Annual Conference in 1985 that his personal agenda was to eliminate all bond appeals to immigration judges, leaving bond decisions exclusively to the discretion of district court judges. Janet A.

regulation would be akin to a magistrate judge, in a criminal bail hearing, deciding she had to follow the police's policies about who to detain.<sup>67</sup>

The Board justified following this regulation's allocation of the burden of proof because it reflected the test set forth in *Drysdale*—a case that interpreted the 1991 statute for “presumptively unbailable” detainees.<sup>68</sup> Perhaps this was a reasonable fix for Mr. Adeniji, who would have been covered by one of the “presumptively unbailable” detention statutes had they been worded differently.<sup>69</sup> Perhaps this is why his lawyer conceded that the burden should be on him, and that the test

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Gilboy, *Administrative Review in a System of Conflicting Values*, 13 LAW & SOC. INQUIRY 515, 541–42 (1988) (citing Speech by Maurice C. Inman, Jr., General Counsel, INS, 1985 American Immigration Lawyers Association Annual Conference, June 4–9, 1985, Boston, Mass. (Cassette #10, Recent Developments at the Justice Department, Convention Seminar Cassettes, 250 Royal Ave., Simi Valley, Cal.)). “About a half a year later, a new [proposed] rule aimed at limiting [IJ] and [Board] bail authority [over bond] appeared as part of the Department of Justice's Semi-annual Regulatory Agenda. The rule proposed that release without bond would be authorized only by the INS [and not the IJ or Board]. This rule was never published for comment.” *Id.* at 542 (citing 50 Fed. Reg. 44,296 (1985)) (citations omitted). To be sure, not all employees of INS were in favor of harsher detention. For example, several former INS employees signed an amicus brief in *Demore v. Kim*, supporting Mr. Kim in his argument that mandatory detention violated Due Process. See Taylor, *supra* note 24, at 343 (noting that the INS officials viewed mandatory detention as “unfair and inefficient”).

67. See *De La Cruz*, 20 I. & N. Dec. 346, 359–60 (B.I.A. 1991) (Heilman, Board Member, dissenting) (“Unlike the criminal justice system, the initial decision to jail a person is made by the very law enforcement agency which ordered the arrest. There is no impartial magistrate or judge involved at that stage. The hearing before the immigration judge offers the first opportunity for an alien to appear before an impartial trier of fact.”).
68. *Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999) (“This test is certainly akin to the ‘threat to the community’ test contained in [*Drysdale*] which the parties agree should apply in the case of this respondent.”); *Drysdale*, 20 I. & N. Dec. 815, 815 (B.I.A. 1994) (providing “a presumption against the release . . . of any alien convicted of an aggravated felony” unless he meets certain conditions).
69. Due to the fact that he had been released prior to October 8, 1998, the current version of the statute—mandatory detention under 8 U.S.C. § 1226(c)—did not apply to him. *Adeniji*, 22 I. & N. Dec. at 1122. Yet, because of the notoriously poorly-worded INA, neither did the Transition Period Custody Rules (the rules that were intended to govern until the INS acquired enough bed space for all of those subject to mandatory detention). See *id.* at 1110–11 (“We have doubts whether Congress intended [a savings clause for the Transition Rules] at all, let alone what its precise terms might have been.”). Since he fell through the cracks of a shifting legal landscape, the Board had no choice but to apply the discretionary detention statute, 8 U.S.C. § 1226(a), to his case.

should be the *Drysdale* test.<sup>70</sup> But to apply the test that governed the “presumptively unbailable” to those who had always been presumed free was a grave byproduct of the *Adeniji* decision.<sup>71</sup> Following prior cases, the Board could have decided that all non-“presumptively unbailable” detainees would have their bond hearings governed by *Matter of Patel’s* presumption of freedom,<sup>72</sup> which would have limited *Adeniji’s* holding to its facts. Yet the Board repeatedly reaffirmed that the burden of proof is on the detainee in bond hearings before the immigration judge.<sup>73</sup> Now it has become such an ingrained part of immigration detention law that one can easily forget that a presumption of freedom ever existed.

The principle of *Chevron* deference<sup>74</sup> would suggest that the Board, faced with an arguably unclear statute, has spoken, and thus courts should defer to it. From an administrative law standpoint, however, *Adeniji* is problematic because the Board did not even mention *Patel’s* longstanding presumption against detention, much less explain the

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70. Mr. Adeniji’s lawyer, the late Michael Maggio, was a famous immigration attorney, known for his zealous advocacy. Although I do not know for sure, I can speculate that he conceded to the burden of proof issue in order to get DHS to concede that mandatory detention did not apply to him. After all, getting a bond hearing where your client must bear the burden of proof is a significant win when compared to getting no bond hearing. See Gilman, *supra* note 3, at 13 (“Scholars and advocates alike have condoned bond proceedings in juxtaposition to the much-maligned mandatory detention framework.”).
71. Board Member Lory Rosenberg, dissenting in *Adeniji*, did not appear to have foreseen that the Board would later apply its reasoning to all 1226(a) detainees. See *Adeniji*, 22 I. & N. Dec. at 1125 (Rosenberg, Board Member, dissenting) (“As I read the majority opinion, the Board now requires a respondent who has been convicted of a criminal offense or other prohibited activity contrary to national security interests, but who is not subject to mandatory detention, to establish that he or she does not pose a danger to persons or property and is not likely to abscond.”). But see Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (holding that, in a case where the detainee was not convicted of any crime, “[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond”).
72. See cases cited *supra* note 34.
73. See, e.g., Fatahi, 26 I. & N. Dec. 791, 795 n.3 (B.I.A. 2016) (“We have consistently held that aliens have the burden to establish eligibility for bond while proceedings are pending.”); Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) (“The alien bears the burden of proving that his release would not pose a danger to property or persons.”); Guerra, 24 I. & N. Dec. at 38 (“An alien . . . must establish . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”); D-J, 23 I. & N. Dec. 572, 574 (A.G. 2003) (“[R]espondent has failed to demonstrate adequately that he does not present a risk of flight . . .”).
74. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

shift.<sup>75</sup> From a constitutional law standpoint, the Board's decision violates what one Board member has described as "the general American presumption in favor of release, pending trial, or as in the immigration context, pending a deportation hearing."<sup>76</sup> This general American presumption against detention is discussed in the next Part.

## II. DUE PROCESS AND THE BURDEN OF PROOF IN CIVIL DETENTION

Since the immigration authorities began detaining noncitizens during the deportation or exclusion process, there have been challenges to the legality of such detention.<sup>77</sup> The Supreme Court has never considered immigration detention to be punitive incarceration.<sup>78</sup> Rather, immigration detention has always been deemed "civil," mostly because it is embedded within a process—deportation—that itself has never been considered to be punishment.<sup>79</sup> Should immigration detention be

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75. This would be a classic arbitrary and capricious agency decision, since the agency can change its mind, but must explain why it is doing so. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not . . . depart from a prior policy *sub silentio* . . . . And of course the agency must show that there are good reasons for the new policy."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedures Act.").
76. De La Cruz, 20 I. & N. Dec. 346, 356 (B.I.A. 1991) (Heilman, Board Member, dissenting).
77. *See generally* DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 19 (Cambridge Univ. Press 2012) (noting that Chinese immigrants used the federal courts to attempt to block new federal legislation); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 37 (Univ. North Carolina Press 1995) (same).
78. In his article entitled *Immigration Detention as Punishment*, César Cuauhtémoc García Hernández makes a compelling argument against this doctrine. *See generally* García Hernández, *supra* note 10 (challenging, specifically, the assumption that immigration detention is a form of civil confinement).
79. *See id.* at 1351–52 (discussing the Supreme Court's position); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."). Several scholars have critiqued the doctrine that deportation is itself not punishment. *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1464 (2011) ("[T]he Supreme Court has rarely, if ever, seriously considered the basic

considered punishment, Due Process would require the procedural protections of a criminal trial to justify taking away a person's liberty.<sup>80</sup>

This section begins with a description of how the Supreme Court has treated Due Process challenges to civil detention. What appears to be true throughout the history of the Court's civil detention jurisprudence is that the Court always has required the government to bear the burden of proof. Thus, the Court has required that civil detention be the "exception," not the norm.<sup>81</sup>

A. *Supreme Court on Burdens in Civil Detention*

When can the government take away a person's liberty without a criminal conviction and the corresponding protections of a criminal trial? David Cole has outlined the Court's jurisprudence on civil detention, finding that all civil detention schemes that have withstood Due Process challenges<sup>82</sup> fit into one of three categories: 1) the detainee is in either criminal or immigration proceedings and poses a danger or a flight risk; 2) the detainee is dangerous because of a harm-threatening mental illness that impairs his ability to control his dangerousness; or 3) the detainee is an enemy alien during a declared war.<sup>83</sup> As recognized by the Supreme Court, civil detention is an extraordinary form of government restraint and must be carefully limited.<sup>84</sup> Where the Court

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analytical and normative questions raised by the civil/criminal dichotomy in the deportation context."); Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 24 (2011) (noting the Court's long-held precedent that deportation is not a criminal sanction); Beth Caldwell, *Banished for Life: Deportation of Juveniles Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2277 (2013) (characterizing the "doctrinal interpretation of deportation as non-punitive").

80. *See* *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("[I]t would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial.").
81. *See* *United States v. Salerno*, 481 U.S. 739, 755 (1987) (allowing for pretrial detention in "carefully limited" circumstances).
82. Cole notes that, "[w]hile preventive detention has most often been analyzed through the lens of due process, the Fourth Amendment also imposes limits on the practice." Cole, *supra* note 46, at 712. He also writes that "[t]he Suspension Clause guarantees the availability of the most important practical safeguard against arbitrary detention: judicial review." *Id.* at 714.
83. *Id.* at 707–08; Cole, *supra* note 6, at 1012–13.
84. *See* *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *Addington v. Texas*, 441

has reviewed the constitutional adequacy of civil detention and the proceedings leading to such detention, it has placed significant weight on the burden of proof assignment in determining whether Due Process has been violated.

An illustrative example is the Supreme Court's 1987 decision in *U.S. v. Salerno*,<sup>85</sup> which upheld as constitutional the federal Bail Reform Act's preventive detention scheme.<sup>86</sup> In upholding pretrial detention based on dangerousness, the Court found important, among other procedural protections, that the government bore the burden of proving dangerousness.<sup>87</sup> The *Salerno* Court held that due process allowed pretrial detention based on dangerousness because "the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community . . . ."<sup>88</sup> Also important to the *Salerno* Court was that Congress had drawn the statute narrowly, meaning that prosecutors could only justify pretrial detention based on dangerousness when certain crimes were charged. These crimes—crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders—were ones that Congress studied and found to categorically indicate dangerousness.<sup>89</sup> As the Court wrote, "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."<sup>90</sup> Thus, not only did the government bear the burden of proof at these bail

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U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

85. 481 U.S. 739 (1987).

86. *Id.* at 752; see also Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 124 (2011) (describing "the most notable feature of the 1984 Act" as "its creation of a preventive detention option based on danger to 'any other person or the community'—something that had not existed previously").

87. See *Salerno*, 481 U.S. at 750 ("In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."). The Court found that the procedural protections available under the BRA "are specifically designed to further the accuracy of that determination." *Id.* at 751. These procedures included the right to court-appointed counsel, present witness, cross-examine the government's witnesses, written findings of fact, immediate appellate review, and the enumeration of several statutory factors that the judicial officer must consider. See *id.* at 751–52 (listing procedural safeguards).

88. *Id.* at 751.

89. *Id.* at 747, 750.

90. *Id.* at 750 (citing S. REP. NO. 98-225, at 6–7 (1983)).



hearings, but Congress already had done some work to narrow the pool of pretrial detainees to the ones it believed to be most dangerous.

One can compare the outcome in *Salerno* with the Court's 1992 decision in *Foucha v. Louisiana*,<sup>91</sup> where the Supreme Court held that a Louisiana statute allowing for continued confinement of the mentally ill after a finding of not guilty by reason of insanity violated Due Process. Critical to the Court's analysis was that "the statute places the burden on the detainee to prove that he is not dangerous."<sup>92</sup> The Court compared the Louisiana statute to the Bail Reform Act it examined in *Salerno*, and found that the Louisiana statute was not carefully limited in the same manner as the Bail Reform Act.<sup>93</sup> Mr. Foucha was not entitled to an adversarial hearing where the government would prove by clear and convincing evidence that he was dangerous to the community.<sup>94</sup> Although there was a hearing, the state had to prove nothing; indeed, the only evidence the state put forward was a description of his behavior while detained and a doctor's inconclusive testimony that he would not "feel comfortable in certifying that he would not be a danger to himself or to other people."<sup>95</sup> This testimony, the Court held, was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."<sup>96</sup> With respect to his behavior while detained, the Court found that the state had not explained why it could not use the ordinary criminal process to deal with any criminal conduct.<sup>97</sup> The Court's decision in *Foucha* demonstrates how important the burden of proof allocation is in the Due Process analysis when the government seeks to detain someone without resorting to the criminal process. Although the procedural protections given by the Louisiana statute were similar to those in *Salerno* (right to a hearing, court-appointed counsel, and judicial review),<sup>98</sup> the burden of proof allocation was different; this made all of the difference.

Similarly, in its 1979 decision in *Addington v. Texas*,<sup>99</sup> the Court held that the government, to justify civil commitment, must prove

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91. 504 U.S. 71 (1992).

92. *Id.* at 81–82.

93. *Id.* at 81.

94. *Id.*

95. *Id.* at 81–82.

96. *Id.* at 82.

97. *Id.*

98. *See id.* at 106, 114 (Thomas, J., dissenting) (describing procedures available to Mr. Foucha).

99. 441 U.S. 418 (1979).

mental illness and dangerousness by clear and convincing evidence.<sup>100</sup> The Court found that the preponderance of the evidence standard was insufficient to comport with Due Process because it was improper to ask “the individual . . . to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”<sup>101</sup> Because the stakes were so high—an individual’s loss of liberty—it was necessary to increase the burden of proof on the government in order to “impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.”<sup>102</sup> The *Addington* decision, although dealing only with the appropriate standard of proof (neither party argued that the government should not bear the burden of proof), provides yet another example of how critical the burden of proof allocation is to the Due Process analysis when the government seeks to take away an individual’s liberty.

*B. Is There Something Special About Immigration Detention?*

The Court has justified detention’s role in facilitating removal,<sup>103</sup> but, as David Cole has noted, the Court always has treated immigration detention like other civil detention—requiring the government to justify detention because of dangerousness or flight risk.<sup>104</sup> Even in the face of the plenary power, which gives the political branches ultimate authority over whom to exclude and detain without intervention by the

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100. *Id.* at 427, 433.

101. *Id.* at 427.

102. *Id.*

103. *See* *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (noting that aliens awaiting deportation proceedings have the opportunity to hurt the United States); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (finding difficulty in carrying out deportation proceedings without the ability to hold the alien).

104. Cole, *supra* note 6, at 1011–21; *see also* Cole, *supra* note 46, at 717–18 (noting that while the Court has not ruled out preventive detention entirely, it only upholds the practice for limited reasons, notably where there are inadequate means to address an individual’s flight risk and dangerousness).

judiciary,<sup>105</sup> the Court, when considering a Due Process challenge,<sup>106</sup> has required the government to justify the deprivation of a noncitizen's liberty.<sup>107</sup> For the purpose of this analysis, I focus on cases that do not

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105. *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”); *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889); *Cole*, *supra* note 6, at 1011–21, 1038.
106. In *The Japanese Immigrant Case*, the Supreme Court decided that noncitizens could claim the protections of the Due Process Clause in deportation proceedings. 189 U.S. 86, 100 (1903). The Court has repeatedly stated that all “persons,” regardless of whether they are citizens, are entitled to Due Process protections. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that due process still applies to aliens who entered the country unlawfully).
107. *See, e.g., Zadvydas*, 533 U.S. at 695 (“[T]hat power [the plenary power] is subject to important constitutional limitations.”); *see also Cole*, *supra* note 6, at 1038 (arguing that defenders of unchecked detention as part of the deportation process “have confused the power to deport with the power to detain”); *see also id.* at 1016 (“[A]t the very height of deference to plenary immigration power, the Court in *Wong Wing* applied to immigration detention the same principle that it has subsequently applied in other civil detention cases: an absolute prohibition of the use of civil detention for punitive ends.” (citing *Wong Wing*, 163 U.S. 228 (1896))). A notable exception is the Court’s holding that the Due Process Clause does not apply to those who are seeking admission to the U.S. In the 1953 decision in *Shaughnessy v. United States ex rel. Mezei*, the Court permitted the indefinite detention of a noncitizen against a Due Process challenge. 345 U.S. 206, 215 (1953). Mr. Mezei had been a lawful permanent resident, but had extinguished all of his rights when he left the U.S. without authorization or a reentry permit and spent nineteen months “behind the Iron Curtain;” thus, he was treated as though he was “stopped at the border,” which meant that he had no constitutional rights to assert in the face of his detention. *See id.* at 214–15 (finding Mezei’s absence to be a break in continuous residence and that he was therefore assimilated to the status of one who was first arriving in the U.S.); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). The only rights he could claim were statutory, and Congress had not given him the statutory right to be free from detention. *See id.* (distinguishing Mezei’s contention as a “matter of privilege” as opposed to a “vested right”). Because of *Mezei’s* “entry fiction,” persons who are subject to this form of detention “are legally positioned as outside the national territory” and therefore are “beyond the reach of the Due Process Clause and its presumption of liberty.” César

involve the detention of noncitizens during a time of war,<sup>108</sup> as that would invoke an entirely different Due Process rationale for civil detention and is not at issue when a court decides the typical discretionary bond case under 8 U.S.C. § 1226(a).<sup>109</sup>

In the 1952 case *Carlson v. Landon*,<sup>110</sup> the Court considered the constitutionality of the denial of immigration bail for several noncitizens who were deportable as communists under the 1950 Internal Security Act.<sup>111</sup> *Carlson*, which is probably one of the Court's harshest immigration detention cases, affirms what was a presumption against detention for the vast majority of those subject to deportation. After justifying detention as part of the deportation process, the Court goes on to say "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail . . . ."<sup>112</sup> The Court allowed for detention of this particular class of detainees, however, because the detainees fit within a category of persons that

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Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 *How. L.J.* 869, 880 (2014). The *Mezei* decision suffers from serious flaws, which others have noted. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *HARV. L. REV.* 1362, 1393–94 (1953) (stating that "the Constitution always applies when a court is sitting with jurisdiction in habeas corpus" but that "the requirements of due process must vary with the circumstances"); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 *GEO. IMMIGR. L.J.* 365, 374 (2002) (characterizing as "wildly out of step with modern constitutional law" the *Mezei* Court's affirmance of *Knauff's* holding that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"). Courts can resolve the burden of proof question in bond hearings without resolving the issue of the so-called "arriving aliens," because the discretionary bond statute at issue, 8 U.S.C. § 1226(a), does not apply to the detention of those who have not been admitted to the U.S. Rather, it is 8 U.S.C. § 1225(b) that governs their detention; so that issue can be left for another day. See *infra* note 250.

108. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding the Attorney General's detention and deportation of a German noncitizen under the Alien Enemy Act after a finding of dangerousness); see also Klein & Wittes, *supra* note 86, at 102–11 (describing the history of detaining noncitizens during times of war).

109. See, e.g., Cole, *supra* note 46, at 707–08 (outlining the three justifications for civil detention, one of which is detention during war); see also WILSHER, *supra* note 77, at 1 ("Wars created 'enemy aliens' who were dealt with under the government's war powers and according to customary international law with its reciprocal arrangements for prisoner exchange.").

110. 342 U.S. 524 (1952).

111. *Id.* at 537–38.

112. *Id.* at 538.

Congress had described, by statute, to be presumptively dangerous.<sup>113</sup> Congress had essentially done the government's work to justify the dangerousness of communists and anarchists by passing the Internal Security Act, which allowed for their deportation. The Court allowed the government to cite to that statute to justify its detention decision;<sup>114</sup> in fact, when describing the statutory scheme, the Court wrote that it mandated the Attorney General to "justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity."<sup>115</sup>

In the 1993 case of *Reno v. Flores*,<sup>116</sup> the Court rejected a Due Process challenge to an INS regulation that prevented unaccompanied juveniles from being released to a sponsor of their choice if there was no available parent or legal guardian.<sup>117</sup> The case, by its very terms, did not concern the type of physical restraint inherent to detention.<sup>118</sup> The *Flores* Court noted *Patel's* longstanding presumption of freedom, but wrote "in enacting the precursor to [the then-existing detention statute] 8 U.S.C. § 1252(a), Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General."<sup>119</sup> The *Flores* majority cited to a supposed reversal of the presumption of release by citing *Carlson*, yet the *Flores* Court did not acknowledge *Carlson's* express language that the "purpose to injure could not be imputed generally to all aliens subject

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113. *Id.* at 534–35. Although the noncitizens had been found to not be a flight risk, the Court also suggested that one could presume flight risk in their cases, due to their membership in the Communist Party, which made "[d]eportation [] more likely." *Id.* at 541 n.35.

114. *See id.* at 541 (dismissing the need for the Government to provide additional evidence other than Communist Party membership).

115. *Id.* at 543; *see also id.* at 544 ("The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings.").

116. 507 U.S. 292 (1993).

117. *Id.* at 296–97, 302–06.

118. *See Flores*, 507 U.S. at 302 ("The 'freedom from physical restraint' invoked by respondents is not at issue in this case."). Instead, *Flores* dealt with "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.* In fact, the Court was very careful to refer to the challenged government action as "legal custody," not "detention," since the children were not detained in correctional institutions, but non-secure facilities licensed to provide shelter, foster, or group care to dependent children. *Id.* at 298. So "shackles, chains, or barred cells" were not at issue, like in the case of adult detention. *Id.* at 302.

119. *Id.* at 306.

to deportation . . . .<sup>120</sup> Also, committing the determination of release to the discretion of the Attorney General, the government action the Court upheld in *Carlson*, can still be done while maintaining the presumption of release. That was the state of affairs when the Board decided *Matter of Patel*—the presumption of release existed, yet the Attorney General had discretion to decide who should be released against the backdrop of this presumption.<sup>121</sup> Indeed, it would be odd for the Supreme Court, in 1952, to “reverse” a presumption of release that the Board stated in 1976, twenty-four years later. Thus the *Flores* case, due to both its misguided statement about a supposed reversal of the presumption of freedom and its painstaking efforts to *not* invoke the right to be free from physical confinement, cannot be read to mean that adult noncitizens in jail have a diminished right to be free.<sup>122</sup>

In 2001, in *Zadvydas v. Davis*,<sup>123</sup> the Court considered the constitutionality of a statute that the INS interpreted to permit indefinite detention of noncitizens who were ordered removed, but remained indefinitely detained because they were either stateless or their governments refused to repatriate them.<sup>124</sup> The Court stated, “government detention violates [the Fifth Amendment Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections or, in certain special and ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”<sup>125</sup> The *Zadvydas* Court made two important statements regarding the burden of proof. First, al-

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120. See *Carlson v. Landon*, 342 U.S. 524, 538 (1952).

121. See 15 I. & N. Dec. 666, 666 (B.I.A. 1976).

122. Indeed, when the Supreme Court decided a Due Process challenge to adult immigration detention in *Zadvydas v. Davis*, the majority opinion did not even mention *Flores*. See generally 533 U.S. 678, 682–702 (2001). Justice Scalia, dissenting in *Zadvydas*, cited *Flores* for the proposition that when considering a Due Process challenge, the Court should begin with a “careful description” of the substantive right claimed. *Id.* at 702 (Scalia, J., dissenting) (quoting *Flores*, 507 U.S. at 302). Justice Scalia, instead of describing the petitioners’ claims in *Zadvydas* as a right to be free from physical restraint, stated that “it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right.” *Id.* at 703; see also *id.* at 720 (Kennedy, J., dissenting) (“The due process analysis must begin with a ‘careful description of the asserted right.’” (quoting *Flores*, 507 U.S. at 302)).

123. *Id.* at 678.

124. *Id.* at 684–85.

125. *Id.* at 690 (citations omitted).

though there was a regulation allowing for a deportation officer to review the detainee's custody, the Court emphasized the constitutional inadequacy of a custody review procedure where "the alien bears the burden of proving he is not dangerous."<sup>126</sup> Second, the Court did not agree with the government's arguments that mandatory detention is the rule while discretionary release is the narrow exception.<sup>127</sup> Rather, the Court observed that unlike 8 U.S.C. § 1226(c) (the mandatory detention statute), the statute at issue was not carefully crafted to apply to only those deemed "presumptively unbailable," but also to "ordinary visa violators," and had no obvious termination point.<sup>128</sup> The Court resolved the constitutional issue by avoiding it, instead interpreting the post-order custody review statute as not permitting detention beyond six months.<sup>129</sup> However, its rhetoric about the constitutionality of immigration detention suggested that the Court would require the government to provide special justification for its immigration detention decisions, as it had required of the government in other civil detention contexts.<sup>130</sup>

As to this issue of whether deportation was foreseeable, however, the *Zadvydas* Court *did* place the burden on the detainee to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."<sup>131</sup> In response, the government would have to respond with evidence sufficient to rebut that showing.<sup>132</sup> This allocation of the burden of proof in what would seem like the watershed case for the Due Process right to be free from immigration detention, at first glance, appears to be inconsistent with the civil detention cases where the government always had to bear the burden of proof.<sup>133</sup> However, this burden allocation appears to place the burden of production on the detainee, but the ultimate burden of persuasion

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126. *Id.* at 692.

127. *Id.* at 697.

128. *Id.*

129. *Id.* at 699–701.

130. *See Cole, supra* note 6, at 1017–21 (discussing the *Zadvydas* Court's constitutional concerns if indefinite detention of aliens known as "lifers" were authorized by immigration law); Taylor, *supra* note 24, at 364.

131. *Zadvydas*, 533 U.S. at 701.

132. *Id.*

133. *See e.g., Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992) (placing the burden on the detainee to prove he is not dangerous is not sufficient to defeat an individual's liberty interest under the Constitution); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (concluding that the state is required to justify confinement by more than a preponderance of the evidence because of the gravity of the potential outcome on the individual).

on the government.<sup>134</sup> Also, it is important to note what types of presumptions the *Zadvydas* Court allowed. A presumption of dangerousness or flight risk was constitutionally suspicious, the Court reasoned.<sup>135</sup> A presumption that most noncitizens, once subject to a final order of removal, could be deported, would not be as problematic;<sup>136</sup> thus, it would be fair to require the detainee to at least initially come forward with some evidence to show that he could *not* be deported.

In the 2003 decision *Demore v. Kim*,<sup>137</sup> the Court, in a 5–4 decision, upheld the mandatory detention statute, 8 U.S.C. § 1226(c), against a Due Process challenge. The Court cited language dating back to the eras of the Chinese Exclusion Acts and the Cold War to reason that detention is a necessary part of the removal process.<sup>138</sup> The Court held that Congress could categorically deem certain persons to be a danger—those I refer to as “presumptively unbailable”—and not give them an individualized hearing with respect to dangerousness or flight risk.<sup>139</sup> Relying on *Carlson*, the Court in *Demore* reasoned that denial of bail was permissible “by reference to a legislative scheme” that presumed

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134. In this sense, it is similar to the presumptions at play in the Bail Reform Act, where the detainee, if he is charged with a presumptively dangerous crime under 18 U.S.C. § 3142(e), must bear the burden of production. It is then the government that must bear the burden of persuasion that the detainee is a danger. *See, e.g.*, *United States v. Jessup*, 757 F.2d 378, 380–81 (1st Cir. 1985) (determining that, in construing the Bail Reform Act of 1984, “Congress did not intend to shift the burden of persuasion to the defendant but intended to impose only a burden of production”); *U.S. v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985) (same); *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985) (same); *United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986) (same).

135. *See Zadvydas*, 533 U.S. at 692 (discussing the “sole procedural protections” available to detainees, which include an administrative proceeding in which the detainee bears the burden of proof, and reasoning that it may be constitutionally impermissible to grant an administrative agency unreviewable authority to make decisions implicating fundamental rights such as detention).

136. *Cf. Medina v. California*, 505 U.S. 437, 449 (1992) (concluding that the presumption of competence does not violate Due Process Clause).

137. 538 U.S. 510 (2003).

138. *Id.* at 523–25 (first citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); then citing *Carlson v. Landon*, 342 U.S. 524 (1952)).

139. *See id.* at 531 (finding that detention is “constitutionally permissible” during removal proceedings). *But see id.* at 541 (Souter, J., concurring and dissenting) (“The Court’s holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process.”).



their flight risk and dangerousness (in *Carlson*, the legislative scheme at issue presumed dangerousness of communists and anarchists; in *Demore*, it was criminals and terrorists).<sup>140</sup> Indeed, the Court was careful to describe the reports from which Congress based its presumptions.<sup>141</sup> As in *Carlson*, the Court allowed the government to carry its burden of proving dangerousness and flight risk by reference to a Congressional categorization of certain types of offenders as dangerous or a flight risk.

To many scholars, *Demore* stands as a blow to the principles of individualized determination that the Due Process Clause expounds.<sup>142</sup> The decision, however, can be read quite narrowly—as upholding the constitutionality of mandatory detention for a particular class of detainees, the “presumptively unbailable,” whose detention was necessary for the “limited period”<sup>143</sup> of his removal proceedings (which the Court believed would conclude within a month).<sup>144</sup> When read this way, the *Demore* decision is no different than the Court’s prior constitutional decisions regarding civil detention<sup>145</sup>—especially when Justice Kennedy, providing the fifth vote, focused partially on the availability of an individualized hearing regarding whether someone was properly in the mandatory detention category.<sup>146</sup>

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140. *Id.* at 524–25.

141. *See id.* at 518–21 (referring to several studies that Congress relied on).

142. *See Cole, supra* note 46, at 716–17 (“The Court’s reasoning in [*Demore v. Kim*] is flawed, as it proffers no good reason for discarding the requirement of individualized need before subjecting a human being to preventive detention.”). Margaret Taylor describes the case in terms of legal realism, since it was decided in a post-September 11<sup>th</sup> world, which provides a striking contrast to *Zadvydas*, which was decided before September 11<sup>th</sup>, 2001. Taylor, *supra* note 24, at 345.

143. *Demore*, 538 U.S. at 531.

144. *See id.* at 529 (citing to Executive Office for Immigration Review statistics calculating that, in 85% of the cases in which noncitizens are detained pursuant to 8 U.S.C. § 1226(c), “removal proceedings are completed in an average time of 47 days and a median of 30 days”).

145. *See, e.g., United States v. Salerno*, 481 U.S. 739, 747 (1987) (upholding pretrial detention for a narrow class of persons whose charged offenses Congress deemed to make them a danger to the community).

146. *See Demore*, 538 U.S. at 531–32 (Kennedy, J., concurring) (citing Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999)) (describing procedures, laid out in the Board’s decision in *Matter of Joseph*, whereby a mandatory detainee can seek review by an immigration judge about whether he is properly included in a mandatory detention category, and stating that “due process requires individualized procedures to ensure there is at least some merit to the [INS]’s charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing”); *see also id.* at 514 n.3 (“Because respondent conceded that he was deportable because of a conviction that triggers § 1226(c) and thus sought no *Joseph* hearing, we

What is an important distinguishing point for the burden of proof analysis is the type of detention that was *not* at issue in *Demore*—the detention of noncitizens under 8 U.S.C. § 1226(a), the discretionary bond statute. Because *Demore* only addressed a Due Process challenge to those whom the majority deemed to have conceded were covered by 8 U.S.C. § 1226(c)<sup>147</sup>—the “presumptively unbailable”—the Court did not address what procedures would withstand a Due Process challenge for the *non*-“presumptively unbailable” detainees,<sup>148</sup> such as “ordinary visa violators.”<sup>149</sup>

C. *The Supreme Court’s Next Chapter: Jennings v. Rodriguez*

Following *Demore*, several courts of appeals decided that the decision was very limited, applying only to the subset of noncitizens described in 8 U.S.C. § 1226(c) and only for the “brief period” necessary for removal proceedings.<sup>150</sup> When asked how “brief” that period should be,

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have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c).”). Justice Kennedy also focused on the short length of detention, noting that “a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.” *Id.* at 532 (Kennedy, J., concurring) (citing *Zadvydas v. Davis*, 533 U.S. 678, 684–86); *see also* Cole, *supra* note 46, at 717 (describing *Demore* as an outlier for upholding preventive detention without the usual showing necessary, but that “even there the crucial fifth vote stressed the importance of at least some kind of individualized determination.”).

147. Whether Mr. Kim actually conceded that he was removable during his removal hearings was a point of disagreement between the majority and the dissent. *See Demore*, 538 U.S. at 522–23; *id.* at 532 (Kennedy, J., concurring) (determining that Mr. Kim did not seek relief in the form of a *Joseph* hearing, where he could argue he was not properly included in a mandatory detention category). *But see id.* at 541 (Souter, J., concurring and dissenting) (reasoning that the majority was mistaken that he “conceded” removability).
148. Indeed, had the Court permitted a bond hearing in *Demore*, it could have fallen back on the statutory mandate in 8 U.S.C. § 1226(c), which expressly places the burden of proof on the few detainees who can be released. Of course, the Court would then have had to assess the constitutionality of this statutory burden allocation. *See Foucha v. Louisiana*, 504 U.S. 71, 81–82 (1992) (assessing the constitutionality of the statutory burden allocation in a Louisiana statute mandating confinement for mentally ill offenders deemed demonstrably dangerous to the community).
149. *See Zadvydas*, 533 U.S. at 697 (noting the broad application of the statute at issue to “ordinary visa violators” in distinguishing it from statutes that require the detention of criminal noncitizens).
150. *See, e.g., Reid v. Donelan*, 819 F.3d 486, 493–94 (1st Cir. 2016) (holding that “categorical and mandatory detention” is constitutional if the duration is brief and reasonable); *Rodriguez v. Robbins*, 804 F.3d 1060, 1079–80 (9th Cir. 2015) (noting that its decision is consistent with the Court’s decision in *Demore*

several courts found that six months was a reasonable period of time for mandatory detention to last under 8 U.S.C. § 1226(c).<sup>151</sup> The Ninth Circuit Court of Appeals, in a series of cases that culminated in the 2015 decision in *Rodriguez v. Robbins*,<sup>152</sup> recognized a class of detainees in mandatory detention, guaranteeing a bond hearing for each detainee once mandatory detention reached six months.<sup>153</sup> The Court, following *Demore*, held that mandatory detention under § 1226(c) was constitutional, but that once detention became prolonged, principles of constitutional avoidance required it to apply the discretionary bond authority at § 1226(a), not the detention mandate at § 1226(c).<sup>154</sup>

In prior cases leading up to *Rodriguez*, the Ninth Circuit had placed the burden of proof on the government during these bond hearings provided for detainees whose removal proceedings extended beyond six months;<sup>155</sup> the *Rodriguez* court continued that burden allocation on the government.<sup>156</sup> In the first decision concerning the burden of proof for a prolonged mandatory detention case, *Tijani v. Willis*,<sup>157</sup> the Ninth

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because of the brevity of the detention); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (holding that there is an implicit temporal limitation in 8 U.S.C. § 1226(c)); see also *Demore*, 538 U.S. at 513, 521, 523 (describing how 8 U.S.C. § 1226(c) only applies to “a subset of deportable criminal aliens” and for only the “brief period” necessary for removal proceedings).

151. See *Rodriguez*, 804 F.3d at 1079–80 (collecting cases).

152. 804 F.3d 1060 (9th Cir. 2015). There were several decisions leading up to the Ninth Circuit’s 2015 decision; the 2015 case was the third appeal. *Id.* at 1065.

153. *Id.* at 1074, 1081.

154. *Id.* at 1068; see also *Rodriguez v. Robbins*, 715 F.3d 1127, 1138–39 (9th Cir. 2013) [hereinafter *Rodriguez II*] (holding that 8 U.S.C. § 1226(a) is inapplicable after a prolonged detention). The Court similarly found that for those “arriving aliens” detained under 8 U.S.C. § 1225(b), the statute authorized a brief period of mandatory detention; after six months of detention, however, 8 U.S.C. § 1226(a) would apply. *Rodriguez*, 804 F.3d at 1070, 1082–83; *Rodriguez II*, 715 F.3d at 1144. Additionally, the court held that for those detainees in discretionary detention under 8 U.S.C. § 1226(a), the government must provide a bond hearing every six months. *Rodriguez*, 804 F.3d at 1085, 1089.

155. See, e.g., *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 950–51 (9th Cir. 2008) (holding that prolonged pre-removal order detention without adequate procedural protections would raise serious constitutional concerns, so therefore reading the mandatory detention statute to provide a bond hearing at six months and at such bond hearing, placing burden of proof on the government); see also *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (holding that for a *Casas-Castrillon* bond hearing, government must prove by clear and convincing evidence that detainee is a danger and a flight risk).

156. *Rodriguez*, 804 F.3d at 1087; *Rodriguez II*, 715 F.3d at 1144.

157. 430 F.3d 1241 (9th Cir. 2005).

Circuit, in a very short opinion, placed the burden of proof on the government without any analysis.<sup>158</sup> Judge Tashima, concurring, supported this burden allocation by citing to decisions in other civil detention contexts,<sup>159</sup> summarizing them by stating: “when a fundamental right, such as individual liberty, is at stake, the government must bear the lion’s share of the burden.”<sup>160</sup> Subsequent decisions relied on *Tijani*’s placement of the burden of proof on the government without significant discussion.<sup>161</sup>

In June 2016, the Supreme Court accepted certiorari of the *Rodriguez* decision.<sup>162</sup> The Solicitor General’s petition for certiorari explains the regulations and Board decisions that I have outlined in this Article pertaining to the burden of proof.<sup>163</sup> However, in contrast to the argument in this Article, that the former INS and Board essentially rewrote the constitutionally-sound presumption against detention set forth in *Matter of Patel*, the Solicitor General complains that the Ninth Circuit has undone the handiwork of the late 1990s immigration detention scheme. The petition for certiorari complains that “[t]he Ninth Circuit has rewritten the statutory and regulatory framework governing detention of aliens in removal proceedings . . . The court has turned that scheme on its head, requiring the *government* to prove—*by clear and convincing evidence*—that the alien is a flight risk or a danger to the community . . . .”<sup>164</sup>

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158. *Id.* at 1242.

159. *Id.* at 1245 (Tashima, J., concurring) (citing *Addington v. Texas*, 441 U.S. 418 (1979); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Foucha v. Louisiana*, 504 U.S. 71 (1992)).

160. *Id.* at 1245. In that decision, Judge Tashima was primarily discussing the burden of proof placed on mandatory detainees to prove that they are not properly included in a mandatory detention category. *Id.* at 1243–47. For these hearings, referred to as “*Joseph*” hearings, mandatory detainees, in order to have a bond hearing, must prove that the government is substantially unlikely to prevail on its arguments that the detainee is properly included in a mandatory detention category. *Joseph*, 22 I. & N. Dec. 799, 806 (B.I.A. 1999). Judge Tashima wrote that the “*Joseph* standard is not just unconstitutional, it is egregiously so. The standard not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable.” *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

161. *See Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008) (adopting the burden of proof allocation established in *Tijani*); *Cf. Singh v. Holder*, 638 F.3d 1196, 1203–06 (assuming the government bears burden of proof and discussing why the standard of proof should be clear and convincing evidence in *Casas-Castrillon* bond hearings).

162. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

163. Petition for Writ of Certiorari, *supra* note 2, at 3–6.

164. *Id.* at 9 (emphasis in original).

It is yet to be seen whether the Court will return to the *Matter of Patel* days when the presumption of freedom was the norm. It is possible that the Court will not even address this issue; it could, for example, decide that the *Rodriguez* class members have no right to a bond hearing, which would render a decision about the burden of proof moot. The Court also could decide that the burden of proof should rest with the government only because the detainees are in prolonged detention—so there is something special about the lengthy nature of their detention that requires the government to justify it.<sup>165</sup> This would leave all of the detainees with initial bond hearings under 8 U.S.C. § 1226(a), the discretionary detention statute, bearing the burden of proof under the relevant Board case law.<sup>166</sup> This would be both unconstitutional and inconsistent with the statute’s placement of the burden on the government for removability decisions.

### III. THE BURDEN OF PROOF IN BOND HEARINGS: THE OUTLIER

In this section, I examine theories behind why burdens of proof exist in the law and apply these theories to the various burdens of proof in immigration law. I aim to show that when one applies these theories to immigration law’s burdens, the detainee-borne burden of proof in bond proceedings is the one outlier.

To put the burden assignments in context, let us consider a hypothetical case. Roberto is arrested during an ICE raid of a factory where he works. In his removal case, Roberto wishes to assert his right to remain silent so as to hold ICE to its burden of proving alienage.<sup>167</sup>

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165. This would be consistent with the idea that prolonged detention is more like the indefinite nature of civil commitment, which the Supreme Court has held requires the government to justify by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 433 (1979); *see also* *Diouf v. Napolitano*, 634 F.3d 1081, 1091–92 (9th Cir. 2011) (“When the period of detention becomes prolonged . . . greater procedural safeguards are . . . required . . . [because] the private interests at stake are profound.”). However, in another civil detention context, the Court upheld the much more brief pretrial detention because the government bore the burden of proof. *United States v. Salerno*, 481 U.S. 739, 751 (1987).

166. *See* *Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006) (placing the burden on an alien in a custody determination to establish to an Immigration Judge and Board that he or she is not dangerous, is not a threat to national security, and is not a flight risk); *Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999) (holding that an alien must not be released if he or she would be a danger to people or property).

167. *See* 8 C.F.R. § 1240.8(c) (2014) (“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.”). The Board has held that although judges can draw an adverse inference from silence, this does not meet the government’s burden of proving alienage by clear and

The only evidence of alienage ICE has is his admission of foreign birth when he was arrested, which he will argue should be suppressed, as his Fourth Amendment rights were egregiously violated when ICE took this statement (ICE forced a confession under duress).<sup>168</sup> His bond case, however, will typically happen first, since he strongly desires to be released while he seeks to vindicate his rights in removal proceedings. In the bond hearing, to meet his burden to disprove dangerousness or flight risk, he is forced to give evidence of his identity, which includes an admission of alienage. Although the bond and removal records are technically separate, the government could submit this evidence of alienage from the bond record into the removal record.<sup>169</sup> One might

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convincing evidence. Guevara, 20 I. & N. Dec. 238 (B.I.A. 1990); *see also* Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L. J. 599, 602 (1990) (arguing that respondents in deportation proceedings cannot be compelled to testify and that this silence cannot support an order of deportation); *id.* at 603 (“[T]here is no doubt that the privilege [against self-incrimination] may be asserted in this context, where the testimony sought might result in criminal prosecution in addition to deportation.”); *id.* at 626–29 (chronicling the legislative history behind the requirement that the government first prove alienage in a deportation case).

168. *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); *Navia-Duran v. INS*, 568 F.2d 803, 807 (1st Cir. 1977) (suppressing noncitizen’s confession of alienage when confession was coerced by INS agent).
169. 8 C.F.R. § 1003.19(d) states that “[c]onsideration by the Immigration Judge of an application or request of a respondent regarding custody or bond shall be separate and apart from, and *shall form no part of*, any deportation or removal hearing or proceeding. *Id.* (emphasis added); *see also* U.S. DEP’T. OF JUST., EXECUTIVE OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 9.3(a) (2013) (“Bond proceedings are separate from removal proceedings.”). However, there is another regulation, 8 C.F.R. § 1240.7(a), which allows the receipt into evidence of an “oral or written statement” made by the respondent or another person during “any investigation, examination, hearing, or trial.” *Id.* The Immigration Judge Benchbook reconciles these regulations by advising immigration judges that it is permissible to use such prior statements made in a bond proceeding so long as “the evidence is reintroduced and received in the deportation or removal hearing.” UNITED STATES DEP’T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK EVIDENCE INTRODUCTORY GUIDE, (Mar. 3 2016), [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Evidence\\_Guide.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Evidence_Guide.pdf) [<https://perma.cc/48FG-AK6R>]. The Ninth Circuit Court of Appeals, however, did not permit an immigration judge to use her notes from a bond hearing in the removal hearing because 8 C.F.R. § 1003.19(d) precluded any evidence from a bond hearing from being used in a removal hearing. *Joseph v. Holder*, 600 F.3d 1235, 1240 (9th Cir. 2010). The court did not need to resolve the meaning of 8 C.F.R. § 1240.7(a) because the judge did not rely on prior written statements and, because no transcript existed of the bond hearing,

wonder, what is the point of requiring the government to prove removability when it can simply detain Roberto, thus dangling his physical freedom over his head and forcing him to prove the government's removability case?

A. *Why Burdens of Proof Exist*

Richard Gaskins wrote in his 1992 book, *Burdens of Proof in Modern Discourse*,<sup>170</sup> “the underlying issue is about presumptions: what conclusions can be drawn from controversial or indeterminate evidence.”<sup>171</sup> Gaskins wrote that in traditional legal theory, the party who seeks law's intervention is the party who bears the burden of proof (in civil cases, the plaintiff; in criminal cases, the government).<sup>172</sup> Evidence scholar Lawrence Solum, responding to Gaskins' book, has written that, because burdens of proof deal with uncertainty in the evidence, ideally the burden of proof is allocated to “maximize[] the likelihood that the decision will be accurate.”<sup>173</sup> Solum argues that where accuracy cannot be achieved via a burden allocation, the burden of proof should be allocated to fulfill some other end, such as fairness.<sup>174</sup> This observation is similar to evidence scholar Ronald Allen's statement that: “When there is reason to prefer errors to be skewed against a class of litigants . . . the burden of persuasion changes to reflect our preferences.”<sup>175</sup>

Applying Gaskins' traditional theory of burden of proof allocation, one can see why, in the deportability context, the burden of proof is on the government. The government is the party that seeks the law's intervention—to deport someone who otherwise has the right to be here.<sup>176</sup>

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she did not rely on prior oral statements. *Id.* at 1241; *see also* Adeniji, 22 I. & N. Dec. 1102, 1126 (B.I.A. 1999) (Rosenberg, Board Member, dissenting) (“The underlying purpose of [8 C.F.R. § 1003.19(d)] is not to limit the information an Immigration Judge may consider in redetermining bond, but to ensure that evidence presented in the far more informal bond hearing does not taint the ultimate adjudication of the charges of removability . . .”).

170. GASKINS, *supra* note 5.

171. *Id.* at 22.

172. *Id.* at 23.

173. Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 701 (1994).

174. *Id.*

175. Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 634 (1994).

176. *See* GASKINS, *supra* note 5, at 23 (“Traditional legal commentary has been comfortable placing burdens on the party seeking the law's intervention: on the plaintiff in civil cases and on the prosecution in criminal trials.” (citation omitted)).

This rationale is reflected in the Court's *Woodby* decision, which justified a heightened burden of proof for deportation,<sup>177</sup> stating, "[t]his Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."<sup>178</sup> Since the government is the one upsetting the status quo, compelling the noncitizen to leave his life in the U.S., and seeking the law to assist with this, it is the government that should bear the burden of proof when an immigration judge is dealing with indeterminate evidence.<sup>179</sup>

In *Woodby*, the government sought to deport a permanent resident.<sup>180</sup> Our hypothetical detainee Roberto, however, has no such right to remain; according to ICE, he entered the country without inspection. But how do we know this? How do we know that he is not a citizen of the United States? If he does not provide evidence of his foreign birth, the only evidence of alienage the government can use is a statement that may not be very reliable, as it was taken under enough duress to warrant suppression.<sup>181</sup> Does evidence that he speaks Spanish or appears of Latino heritage prove that he is not a citizen?<sup>182</sup> The United States

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177. *See* *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (“But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.”).

178. *Id.* at 285.

179. *See* 8 U.S.C. § 1229a(c)(3)(A) (2012) (“[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.”). Similarly, in *Schneiderman v. United States*, the Court wrote “the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by judicial decree, and to deprive him of the priceless benefits that derive from that status.” 320 U.S. 118, 122 (1943) (requiring the government to prove denaturalization by clear and convincing evidence).

180. *Woodby*, 385 U.S. at 280.

181. *See, e.g.,* *Navia-Duran v. INS*, 568 F.2d 803, 807 (1977) (reasoning that a coerced statement obtained by an INS agent, which was the sole evidence of alienage, was unreliable and should be suppressed).

182. Significant debate about what makes a person appear to be undocumented arose following the enactment of Arizona’s “show me your papers” law, which “require[d] state officers to make a ‘reasonable attempt . . . to determine the immigration status’ of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.’” *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012) (quoting *Ariz. Rev. Stat. Ann.* § 11–1051(B) (West 2012)). *See, e.g.,* Robert Lovato, *Arizona’s Immigrants Under ‘Reasonable Suspicion,’* *THE NATION* (June 26, 2012), <https://www.thenation.com/article/arizonas-immigrants-under-reasonable-suspicion/> [<https://perma.cc/7KPJ-JMUY>] (suggesting that by upholding Arizona’s “reasonable suspicion” provisions, the Supreme Court generated



does not require citizens to carry proof of their citizenship,<sup>183</sup> and immigration law has long placed the burden of proving alienage on the government.<sup>184</sup> Thus, the immigration law reflects a societal presumption of citizenship. The government must justify seeking law's intervention to send away someone they have not yet proven is an "alien."<sup>185</sup>

In contrast, when a noncitizen seeks a benefit such as citizenship or relief from removal, the burden of proof is on him,<sup>186</sup> as he is now seeking law's intervention to alter the status quo—to allow him to stay once found removable or allow him to become a citizen. This contrast between the differing burdens of proof is reflected in the Supreme Court's 1967 decision in *Berenyi v. District Director, Immigration and Naturalization Service*,<sup>187</sup> where the Court upheld a decision denying an application for naturalization. The Court wrote:

When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by "clear, unequivocal, and convincing evidence." But when an alien seeks to obtain the privileges and benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the

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potential for wide-scale racial profiling); Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> [https://perma.cc/87VS-EL6W] ("Opponents have called it an open invitation for harassment and discrimination against Hispanics regardless of their citizenship status.").

183. See *Do We Need a National ID Card?*, WASH. TIMES (Dec. 21, 2004), <http://www.washingtontimes.com/news/2004/dec/21/20041221-084703-1397r/> [https://perma.cc/3B4Q-7P5R] (discussing how many Americans are against the idea of a national identity card "because we do not want big brother government to monitor us (we all know the potential horrors from the Gestapo and sci-fi movies)").

184. Examining the legislative history of the Immigration Act of 1924, which first required the government to bear the burden of proving alienage in deportation proceedings, Daniel Kanstroom cites to the sponsor's statements that such a burden placement was consistent with the "basic principles of the United States guaranteeing everybody, when accused of any crime, the right of a supposition of innocence until they are proven guilty." Kanstroom, *supra* note 167, at 626–29 (quoting 65 Cong. Rec. 6252 (1924)).

185. See 8 C.F.R. § 1240.8(c) (2007).

186. See 8 U.S.C. § 1229a(c)(4)(A) (2012) (placing the burden of proof on the noncitizen in application for relief from removal); 8 U.S.C. § 1429 (2012) (placing the burden of proof on applicant for naturalization).

187. 385 U.S. 630 (1967).

Government to endow him with all the advantages of citizenship.<sup>188</sup>

Similarly, when a noncitizen seeks admission to the United States, he must prove that he is “clearly and beyond doubt entitled to be admitted.”<sup>189</sup> He is seeking law’s intervention to alter the status quo—to allow him entry into the United States. There are, however, some returning lawful permanent residents who are deemed by law to be “seeking an admission” because they have left the country for too long, been convicted of certain crimes, or engaged in illegal activity after departing the U.S.<sup>190</sup> For these returning permanent residents, the government bears the burden of proving that they are “seeking admission.”<sup>191</sup> In this admission decision, it is the government that seeks law’s intervention to alter the status quo—a lawful permanent resident would otherwise have the right to travel freely in and out of the United States, and return to his life in the United States.<sup>192</sup> Thus, it is the government

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188. *Id.* at 636–37 (citations omitted).

189. 8 U.S.C. § 1229a(c)(2)(A) (2012).

190. 8 U.S.C. § 1101(a)(13)(C) (2012). Other reasons why a lawful permanent resident may be deemed to be “seeking an admission” is if he abandoned his status or is attempting to enter the U.S. without authorization. *Id.*

191. While the noncitizen bears the initial burden of production, DHS bears the burden of persuasion. *See* Huang, 19 I. & N. Dec. 749, 754 (B.I.A. 1988) (once returning LPR presents “colorable claim” to returning LPR status, government bears burden of proving abandonment by clear, unequivocal, and convincing evidence); *see also* Matadin v. Mukasey, 546 F.3d 85, 90–91 (2d Cir. 2008) (following *Huang’s* burden of proof allocation, notwithstanding 1997 amendment to definition of “admission”); *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir. 2003) (same). The Supreme Court, when it held that returning LPRs placed in exclusion proceedings have procedural Due Process rights, did not decide what process was due to the returning LPR. *See* Landon v. Plasencia, 459 U.S. 21, 32, 37 (1982) (remanding the case for consideration of the due process question). The Court did note, however, that “the BIA has followed the practice of placing the burden on the Government when the alien is a permanent resident alien.” *Id.* at 35.

192. *See* 8 U.S.C. § 1101(a)(13)(C) (2012) (“An alien lawfully admitted for permanent residence in the United States *shall not* be regarded as seeking an admission into the United States for purposes of the immigration laws *unless* the alien . . .” (emphasis added)); *Pena*, 26 I. & N. Dec. 613, 618 (B.I.A. 2015) (“[W]e conclude that a returning lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act cannot be regarded as seeking admission to the United States.”); *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring and dissenting) (“LPRs['] . . . lives are generally indistinguishable from those of United States citizens.”).

that bears the burden of proving that the permanent resident is reduced to the status of an “arriving alien.”<sup>193</sup>

For those who are seeking admission, naturalization, or relief from removal, the burden of proof allocation also reflects a societal preference—that entry into the United States community should not be open to all.<sup>194</sup> The United States has long jealously guarded its national community, allowing only those Congress deems worthy of admission to become lawful permanent residents or citizens.<sup>195</sup> That an outsider should have to bear the burden of proving admission to that national community reflects this societal preference.

Similarly, a noncitizen who has entered without inspection and thus not been admitted to the U.S., even if he has lived in the U.S. for a long time, must prove that he is clearly and beyond a doubt entitled to be admitted.<sup>196</sup> In this context, the government has started the removal process, altering the status quo, and thus must first prove that he is an “alien,” notwithstanding his physical presence in the United States.<sup>197</sup> Once the government meets this burden, then the noncitizen must prove that he may be admitted to the United States. He must prove

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193. See 8 C.F.R. § 1.2 (2012) (defining “arriving alien” as an “applicant for admission”); see also 8 U.S.C. § 1101(a)(13)(C) (2012) (defining when a LPR may be deemed to be “seeking an admission”).

194. All relief from removal, with the exception of voluntary departure, entitles a noncitizen to remain in the United States, and many forms of relief lead to permanent residence. See, e.g., 8 U.S.C. §§ 1229b(a) (providing that cancellation of removal for LPRs cancels removal, entitling beneficiary to remain in the United States); 1229b(b) (prescribing that cancellation of removal for non-LPRs leads to adjustment of status to permanent residence); 8 U.S.C. § 1229c (codifying that voluntary departure permits noncitizen to depart voluntarily in lieu of being subject to removal proceedings).

195. See SALYER, *supra* note 77 (chronicling Chinese Exclusion Act and other early United States immigration statutes restricting immigrants based on desirability); see also David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 181 (1983) (“For much of our history—when the continent was emptier—almost the only persons who pushed the idea of limits and spoke in worried tones about the ‘hordes’ who might enter were those with other, hidden agendas.”).

196. See 8 C.F.R. § 1240.8(c) (“Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.”).

197. See *id.* (“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.”).

that, as an outsider, he is deserving of membership in the national community.

*B. Justifying the Government's Burden*

The “seeking law’s intervention” theory behind the allocation of the burden of proof justifies placing the burden of proof on the government when it seeks to detain someone during removal proceedings.<sup>198</sup> In a typical bond case, the evidence is indeterminate—no one can predict whether a person will commit a crime in the future or return to court,<sup>199</sup> yet the immigration judge must evaluate the evidence in front of her and reach a decision. In the context of detention pending deportation, it is the government that seeks law’s intervention—to take away the liberty of a noncitizen who otherwise has the right to freely live in this country, since his removability has not been determined.<sup>200</sup> Thus, it is the government that should justify law’s intervention.

Following Solum’s discussion about allocating the burden of proof to maximize the likelihood of an accurate decision,<sup>201</sup> in an immigration bond hearing, one may argue that it is the government that has access to the information that would provide the clearest picture of the relevant facts to ascertain dangerousness or flight risk.<sup>202</sup> The government can easily access criminal records from various states, whereas the detainee (who is often pro se, but even if he is represented)<sup>203</sup> has

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198. See GASKINS, *supra* note 5, at 23 (“Traditional legal commentary has been comfortable placing burdens on the party seeking the law’s intervention: on the plaintiff in civil cases and on the prosecution in criminal trials.”).

199. See, e.g., Das, *supra* note 7, at 146 (suggesting that the government is unable to accurately evaluate the future behavior of a noncitizen awaiting deportation proceedings); Cole, *supra* note 46, at 696 (same); Legomsky, *supra* note 6, at 545 (same).

200. See 8 U.S.C. § 1231(a)(1)(B) (2012) (describing when a removal order becomes administratively final). *But cf.* Demore, 538 U.S. at 577–78 (Breyer, J., concurring and dissenting) (reasoning that a noncitizen’s concession that he is deportable earlier in the proceedings “seems to me the rough equivalent of the entry of an order of removal” (citing *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001))).

201. See Solum, *supra* note 173, at 701 (noting that “when we deal with ignorance, our decision about where to place the burden of proof must be made on some ground other than maximizing the likelihood that the decision will be accurate (meaning correct in the sense that it is the decision that would have been reached had there been no uncertainty)”).

202. Das, *supra* note 7, at 156–58 (suggesting that placing the burden of proof on the migrant is problematic from an institutional design perspective, because the migrant does not have access to necessary information and immigration authorities need greater incentives to develop the relevant information).

203. My own practice representing detainees in bond hearings provides ample examples of the difficulties of obtaining documents to prove that a detainee is not a danger or a flight risk. Typically, because a detainee’s liberty is at

difficulty accessing these records. Although it is arguably the detainee who has better access to rehabilitation records or mitigating information, here, too, one sees that within the confines of detention it is extremely difficult to produce such information.<sup>204</sup> In the case of those who have been admitted to the U.S. on a visa, the government has easy access to their visa applications; detainees can get this information via a Freedom of Information Act request but will receive the response in about one month, typically after the bond hearing.<sup>205</sup> Thus, it is the government that should bear the burden of producing documents.

The burden of *production* is the lesser problem, especially because in the typical bond case, the government comes forward with some evidence to prove dangerousness and flight risk.<sup>206</sup> The government normally produces criminal records, police reports, and I-213 documents (the Record of Inadmissible/Deportable Alien, which I have called the

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stake and thus DHS, the judge, and the detainee demand a quick hearing, an attorney will ask for one or two weeks to prepare for a bond hearing. During this time, the attorney must obtain police reports and dispositions of criminal convictions, which are in multiple courts, some in different states; every court and police department has different policies about how to obtain these records. Obtaining documents to mitigate the gravity of the criminal record—*i.e.*, through obtaining medical records proving mental illness or a history of childhood or domestic abuse, letters from probation officers, or letters from the community—also presents challenges, since some of these records require special authorizations signed by the detainee and bureaucratic waits to obtain them. Even obtaining community letters can be difficult, as community members may not initially trust the lawyer to reveal information, or, if not in the immediate vicinity of the lawyer, may not have access to fax machines or scanners to immediately send support letters.

204. See Das, *supra* note 7, at 157–58 (describing difficulties for detainees to access evidence despite an assumption that they have better access to evidence of positive equities such as evidence of length of residency, family ties, and employment history); Heeren, *supra* note 6, at 604 (“The burden of proof in the proceeding is placed on the party with the least resources—the detainee—who is usually unrepresented and lacking the legal education necessary to comprehend the esoteric nuances of immigration law. Detainees often have difficulty making a phone call, let alone conducting legal research or gathering evidence.”).

205. U.S. CITIZENSHIP AND IMMIGR. SERVICES, CURRENT AVERAGE FOIA REQUEST PROCESSING TIMES, (2016) <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-request> [<https://perma.cc/BE6K-5QK7>].

206. During January of 2016, Boston College Law student Jonathan Bard observed thirty-three bond hearings in the Boston Immigration Court. During each of these bond hearings, the government presented evidence to prove dangerousness, flight risk, or both. Email from Jonathan Bard, to author (Aug. 15, 2016) (on file with author).

“police report of immigration law”).<sup>207</sup> Thus, placing the burden of production on the government would do little to reduce the unfair burden allocation. The larger problem is the detainee bearing the burden of *persuasion*.<sup>208</sup> Should the government bear the burden of persuasion in a bond hearing, the necessary related question is the standard of proof.<sup>209</sup>

The standard of proof in bond hearings should be clear and convincing evidence. The lower “preponderance of the evidence” standard that is normally used in civil cases should not apply,<sup>210</sup> given the liberty interest at stake,<sup>211</sup> the use of this standard of proof in other areas of civil detention,<sup>212</sup> and the use of this standard of proof in other areas of immigration law, such as proving deportability<sup>213</sup> and denaturalization.<sup>214</sup> In 1966, when the Supreme Court decided *Woodby*, it compared deportation to denaturalization, expatriation, or other civil

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207. See Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 695 (2015) (describing the use of I-213 forms in immigration courts).

208. See *United States v. Jessup*, 757 F.2d 378, 381 (1st Cir. 1985) (“Where the burden of persuasion lies may make a practical difference to a magistrate or judge genuinely uncertain on the basis of what the parties have presented.”); see also *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the ‘burden of persuasion,’ *i.e.*, which party loses if the evidence is closely balanced, and the ‘burden of production,’ *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding.”); Solum, *supra* note 173, at 691 (describing the difference between the burden of production, which is “the requirement that a party raise an issue,” from the burden of persuasion, which is “the requirement that one party satisfy a standard of proof on an issue after it has been raised”).

209. *Id.* at 691–92 (describing the burden of persuasion as having two components: the risk of non-persuasion, or “the consequence that flows if a burden of persuasion is not met,” and the standard of proof, or “the quality of convincingness”).

210. See *Woodby*, 385 U.S. at 285 (noting that, while “a deportation proceeding is not a criminal prosecution . . . it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case”).

211. See *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011) (“Because it is improper to ask the individual to ‘share equally with society the risk of error when the possible injury to the individual’—deprivation of liberty—is so significant, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection.” (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979))).

212. See *supra* Part II.A.

213. *Woodby v. INS*, 385 U.S. 276, 286 (1966).

214. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

cases such as fraud, which had the clear and convincing evidence standard of proof.<sup>215</sup> The Court wrote:

The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.<sup>216</sup>

As compared to the permanent banishment that often accompanies deportation, detention, especially detention that is intended to be brief,<sup>217</sup> simply does not seem as drastic. However, deprivation of liberty would seem to be as drastic as deportation, especially when one considers how long removal proceedings can *actually* last (a report written by DHS in 2009 found that in roughly 2,100 cases per year, detention during removal proceedings can last one year or more).<sup>218</sup> Moreover, detention, even for a short duration, is a drastic deprivation of one's rights; as David Cole has said, "few state actions are more serious than locking up a human being."<sup>219</sup> This is why, in the words of the Supreme Court, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."<sup>220</sup>

If the government must bear the burden of proving, by clear and convincing evidence, that a detainee is dangerous, some of their

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215. *Woodby*, 385 U.S. at 285–86.

216. *Id.* at 286 (citation omitted).

217. Writing to uphold mandatory detention in *Demore*, Justice Rehnquist cited statistics that led the Court to believe that a typical removal hearing where the person is in detention "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore v. Kim*, 538 U.S. 510, 530 (2003) (citations omitted).

218. DORA SCHRIRO, DEP'T OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009), <https://www.ice.gov/doclib/about/offices/odp/p/pdf/ice-detention-rpt.pdf> [<https://perma.cc/8N8Z-4JUA>].

219. Cole, *supra* note 6, at 1008; *see also* Cole, *supra* note 46, at 696 ("Locking up human beings is one of the most extreme preventive measures a state can undertake; it should be reserved for situations where it is truly necessary.").

220. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *see also id.* at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.").

evidence—particularly police reports and I-213 documents, many of which contain double hearsay (the maker of the document rarely appears in immigration court)—may not meet the clear and convincing evidence standard.<sup>221</sup> Indeed, appellate courts have opined that police reports and I-213 documents cannot prove, by clear and convincing evidence, the existence of facts for removability determinations.<sup>222</sup> What the government would need is more probative evidence, and the judge would need to scrutinize this evidence more carefully.<sup>223</sup> This burden of persuasion allocation would make the government do some more work to justify detention, perhaps by calling in police officers to testify, corroborating facts like gang membership through witness testimony and the like.<sup>224</sup>

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221. *See generally* Holper, *supra* note 207 (describing the “police report” problem, where the government relies on unreliable hearsay evidence to prove facts in immigration cases and discussing how some courts have begun to question such reliance).
222. *See* Olivas-Motta v. Holder, 746 F.3d 907, 918–19 (9th Cir. 2013) (Kleinfeld, J., concurring) (reasoning that an immigration judge’s reliance on a police report to prove facts relevant to deportability for a criminal conviction was erroneous because it was not “reasonable, substantial, and probative” evidence that a noncitizen was deportable and did not satisfy the “clear and convincing evidence” standard; he also stated that “police reports are not especially useful instruments for finding out what persons charged actually did”); Prudencio v. Holder, 669 F.3d 472, 483 (4th Cir. 2012) (discussing the “very real evidentiary concerns” that a factual inquiry allows when deciding deportability; these concerns include “allow[ing] immigration judge[s] to rely on documents of questionable veracity as ‘proof’ of an alien’s conduct. These documents, such as police reports and warrant applications, often contain little more than unsworn witness statements and initial impressions.”); *see also* Pouhova v. Holder, 726 F.3d 1007, 1012–13 (7th Cir. 2013) (finding that an I-213 used to prove a smuggling ground of deportability was not reliable evidence and listing reasons why the I-213 might be unreliable, such as when it contains information known to be incorrect, was drafted carelessly or maliciously, mischaracterized material information, was obtained by coercion or duress, or the information was obtained by someone other than the noncitizen who is the subject of the form); Garces v. U.S. Att’y Gen., 611 F.3d 1337, 1350 (11th Cir. 2010) (reasoning that “the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking”).
223. *See* Singh v. Holder, 638 F.3d 1196, 1205 (9th Cir. 2011) (“Under a clear and convincing evidence standard, the BIA might conclude that Singh’s largely nonviolent prior bad acts do not demonstrate a propensity for future dangerousness, in view of evidence showing that his drug use, which was the impetus for his previous offenses, has ceased.”).
224. Alina Das writes that in the criminal context, “the placement of a high burden of proof upon the government strengthens the government’s incentive to acquire and use information to meet its burden—particularly because the default option (that the defendant is acquitted) in the absence of this effort is, at least *ex ante*, undesirable to the government.” Das, *supra* note 7, at 156–57 (citing Matthew C. Stephenson, *Information Acquisition and*



Under Ronald Allen’s theory, when the burden allocation will not solve the unknown facts, as in a typical bond hearing, it is generally allocated to fulfill some societal preference.<sup>225</sup> Our society’s preference is *against* the physical confinement of a human being,<sup>226</sup> so any error should be skewed against the government in detention decisions. Also, from a fairness perspective, the government should bear the burden of proof.<sup>227</sup> Otherwise, we are presuming someone is a danger—i.e., they will commit more crimes if they are released, yet our society generally presumes “that individuals have [free will] to conform their conduct to the law.”<sup>228</sup> Similarly, presuming flight risk means that an individual will not do as they are told and return to court. Thus, presuming dangerousness is much more harmful as a legal presumption than, for example, presuming competency in a criminal case.<sup>229</sup> Or, to use the *Zadvydas* case as an example, presuming that a detainee under an order of deportation can in fact be deported is fair, but presuming that he will commit more crimes or fail to return to court is not fair.<sup>230</sup>

### C. Responding to Critics

A number of questions arise concerning the arguments I have set forth in this Article. Would requiring the government to meet a heightened burden to prove detention expose us to more terrorist attacks, as we cannot detain those who “would have opportunities to hurt the United States during the pendency of deportation

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*Institutional Design*, 124 HARV. L. REV. 1422, 1448 (2011) (“A prosecutor who believes a defendant to be guilty is more likely to invest heavily in evidence gathering if she knows she must prove her case beyond a reasonable doubt than if she knows she must prove her case only by a preponderance of the evidence.”)).

225. See Allen, *supra* note 175, at 634.

226. See De La Cruz, 20 I. & N. Dec. 346, 356 (B.I.A. 1991) (discussing the “general American presumption in favor of release, pending trial, or as in the immigration context, pending a deportation hearing”); *supra* Part II.

227. See Solum, *supra* note 173, at 701 (“[W]e should assign the burden of proof to create incentives that will reduce future uncertainty . . . . [W]e should assign the burden of proof to prevent unfairness . . . .”).

228. Cole, *supra* note 46, at 696.

229. See, e.g., *Medina v. California*, 505 U.S. 437, 446 (1992) (concluding that the presumption of competence does not violate the Due Process Clause).

230. See *supra* notes 131–136 and accompanying text. Similarly, using the *Flores* case as an example, presuming that a noncitizen child could only be released to certain adults is fair, but presuming dangerousness and flight risk is unfair. See *supra* notes 116–122 and accompanying text.

proceedings?”<sup>231</sup> For one, the persons about whom the government knows the least—those who are just coming to the United States<sup>232</sup>—would not benefit from a government-borne burden of proof in bond hearings because their detention is governed by a different statute, 8 U.S.C. § 1225(b), which currently does not permit any bond hearing before an immigration judge.<sup>233</sup> Because of the “entry fiction,” they arguably cannot claim the protections of Due Process that I have set forth in this Article, although many critics believe that they should not be beyond the reach of the Constitution<sup>234</sup> and David Cole has offered a much narrower reading of the Supreme Court cases establishing the entry fiction.<sup>235</sup> There are lawful permanent residents whose detention is governed by 8 U.S.C. § 1225(b); however, those are the LPRs whom the government charges as “arriving aliens” due to some criminal conduct or abandonment of status.<sup>236</sup> Because the government bears the burden of proving that they should be stripped of permanent resident status by clear and convincing evidence,<sup>237</sup> the government also should

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231. See *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (suggesting that detention prior to deportation is necessary to prevent injury to the U.S. pending the proceeding).

232. See *Das*, *supra* note 7, at 146 (“The information gap is arguably widest in situations involving ‘arriving alien[s]’ at the border, when the federal government may have little or no information about the prospective immigrant.”).

233. See 8 U.S.C. § 1225(b) (2012) (describing the process of inspection for noncitizens seeking admission into United States). *But cf.* Legomsky, *supra* note 6, at 539 (arguing that arriving aliens “do not pose any systematically greater threat to the public safety than does anyone else who is suspected of failing to meet our immigration criteria”).

234. See *supra* note 106 (citing authority finding that the due process clause constrains governmental action in the context of immigration detention).

235. David Cole has argued that the Court’s decision in *Knauff v. Shaughnessy*, which is the foundational case for the entry fiction, “does not stand for the sweeping proposition that aliens beyond our borders have no rights, or even no due process rights, but establishes only the narrower claim that because non-citizens have no liberty or property interest in entry they have no right to object to the procedures used to exclude them.” Cole, *supra* note 6, at 1031–33. He writes that the *Mezei* Court, “[v]irtually without analysis . . . extended the right-privilege distinction that governed in *Knauff* to the distinct issue of indefinite detention.” *Id.* at 1033; see also *Zadvydas*, 533 U.S. at 690–92, 696, 699 (interpreting statute to avoid Due Process concerns for a detainee under a final order of removal and stating that the individual released from detention does not gain a right to reside in the United States, but merely the right to be free of restraint on his liberty).

236. See 8 U.S.C. § 1101(a)(13)(C) (2012) (stating when a noncitizen will not be regarded as attempting to gain admission to United States).

237. See *supra* note 191 (detailing the burden of proof allocation).

bear the burden of proving their detention during these proceedings by clear and convincing evidence.<sup>238</sup>

For those who are deportable due to visa overstays or post-entry activity, the government knows who they are because they were screened prior to their arrival (often twice—once at a visa interview, and a second time at the port of entry to the U.S.).<sup>239</sup> Any relevant information about post-entry conduct is usually available to the government (i.e. in the form of criminal records or records from state custody).<sup>240</sup>

The discretionary bond statute *does* apply, however, to those about whom the government may know little—those who entered without

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238. Whether the government should bear the burden of proof for those who are in *prolonged* detention under 8 U.S.C. § 1225(b) is one of the issues that the Supreme Court may consider in *Jennings*, should the Court decide that such detainees have a right to bond hearing. The Ninth Circuit found that there was a constitutional issue with respect to those detained under 8 U.S.C. § 1225(b) because some of those detainees may be lawful permanent residents who are deemed to be “seeking entry” if they have committed certain crimes or been away from the U.S. for too long, among other reasons. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1082–84 (9th Cir. 2015) (construing 8 U.S.C. § 1225(b) as requiring a bond hearing after six months); 8 U.S.C. § 1101(a)(13)(C) (2012) (listing the conditions under which an alien may be regarded as “seeking an admission into the United States”); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that a long-term permanent resident who left the country for a brief period and was placed in exclusion proceedings upon return was entitled to Due Process protections). Should the *Jennings* Court interpret 8 U.S.C. § 1225(b) as permitting a bond hearing where the government bears the burden of proof to avoid the constitutional concerns for returning LPRs, this statutory interpretation would extend to those who have never been admitted to the U.S. *See Clark v. Martinez*, 543 U.S. 371, 382–86 (2005) (holding that a statute may not be interpreted two different ways even if the constitutional concerns only apply to one group).

239. A notable exception are those persons from a visa waiver country; they are inspected at the port of entry, although not by a U.S. consular official prior to coming to the U.S. *See* 8 U.S.C. § 1187 (2012) (describing the visa waiver program). Refugees, in contrast, pass through multiple levels of screening prior to their admission to the U.S. *See* Amy Pope, *Infographic: The Screening Process for Refugee Entry Into the United States*, THE WHITE HOUSE (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states> [<https://perma.cc/QYQ4-95JH>] (explaining the screening process).

240. *Cf.* Peter H. Schuck, *INS Detention and Removal: A “White Paper,”* 11 GEO. IMMIGR. L. J. 667, 672 (1997) (“When an alien initially comes into INS custody . . . the agency probably knows little or nothing about him. Moreover, the agency cannot readily obtain reliable information about him unless he has previously been criminally convicted or was otherwise in the custody of some government agency.”).

inspection and therefore are not deemed to be “arriving aliens.”<sup>241</sup> The few steps they take into the interior of the U.S. means that they have a right to a bond hearing, governed by 8 U.S.C. § 1226(a).<sup>242</sup> While it is true that the entrant without inspection is an applicant for admission, and thus bearing the burden of proof, it is still the government that initially bears the burden of proving alienage in the removal case.<sup>243</sup> Thus, under my argument, the government should justify their detention by clear and convincing evidence. Would requiring the government to prove dangerousness and flight risk allow the release of a potential terrorist or violent criminal, who has not been screened for entry? For these noncitizens, if there is a real terrorism concern, DHS can seek to use the provisions for detention under 8 U.S.C. § 1226A,<sup>244</sup> which appear to never have been used (probably because the government-friendly detention provisions of immigration law have been sufficient).<sup>245</sup> If the concern is post-entry conduct such as crime, again the government can use evidence available to it to present to the judge why this detainee is a danger or a flight risk.

Should we be concerned about using a heightened standard for proving a *prospective* act when, in a typical evidentiary trial, we are

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241. See 8 C.F.R. § 1.2 (2016) (defining “arriving alien”); 8 C.F.R. §§ 1240.8(b)–(c) (2016) (distinguishing between “[a]rriving aliens” and “[a]liens present in the United States without being admitted or paroled”).

242. See 8 C.F.R. § 1003.19(i)(2) (2016) (describing the circumstances of an automatic stay); see also X-K-, 23 I. & N. Dec. 731 (B.I.A. 2005) (holding that a noncitizen in expedited removal but who is not an “arriving alien” may request a bond hearing once she passes her credible fear interview).

243. 8 U.S.C. § 1229a(c)(3)(A) (2012); 8 C.F.R. § 1240.8(c).

244. Congress added 8 U.S.C. § 1226a with Section 412 of the USA PATRIOT ACT, Pub. L. 107-56, § 412(a), 115 Stat. 350 (2001). Section 1226a allows for a noncitizen certified as a terrorist to be taken into custody and held until removed from U.S.; the certification may take place where the Attorney General has reasonable grounds to believe that a noncitizen is deportable on the basis of a wide variety of conduct. The certification must be reviewed every six months by the Attorney General and the noncitizen can submit evidence to rebut certificate; the Attorney General also must file a report with Congress every six months on the number of persons held and what happened to them. *Id.* at 350–52.

245. See WILSHER, *supra* note 77, at 239 (discussing how the USA Patriot Act’s detention powers have not been used); David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate: Testimony Before the National Commission on Terrorist Attacks Upon the United States, December 8 2003*, 18 GEO. IMMIGR. L.J. 305, 314 (2004) (same); David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1778 (2004) (same); Taylor, *supra* note 6, at 149–50 (same).

using evidence to prove past acts (like in a criminal case)?<sup>246</sup> Predicting future behavior is very problematic, which is why scholars have critiqued legal standards that require either side to make predictions about dangerousness.<sup>247</sup> However, notwithstanding these concerns, the law has set forth several places where predictions about dangerousness must be made, such as civil commitment and pretrial detention in criminal cases.<sup>248</sup> The pretrial detention scheme is very similar to the bond context in that judges must make predictions about future behavior in a short timeline, when the investigation of the case is still underway and the need for quick resolution can justify fewer procedural requirements.<sup>249</sup> If the government must prove dangerousness by clear and convincing evidence in the pretrial criminal context,<sup>250</sup> there is nothing special about the fact that a person is detained for immigration reasons that makes him more of a danger to the community. In fact, these opposite burdens lead to an anomalous situation where the same

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246. *See* *United States v. Perry*, 788 F.2d 100, 114 (3d Cir. 1986) (“In a criminal trial the factfinder is required to reconstruct past events. . . . In contrast the dangerousness determination involves a prediction of the detainee’s likely future behavior. Such a prediction explores not the external world of past events but the inner territory of the detainee’s intentions. By its very nature such a prediction is a far more speculative and difficult undertaking than the reconstruction of past events.”).
247. *See, e.g.,* *Beecher-Monas & Garcia-Rill*, *supra* note 46, at 308 (“[G]enerations of scientists have explained that such predictions cannot meet the standards of science.”).
248. *See, e.g.,* *Foucha v. Louisiana*, 504 U.S. 71, 86 (“[I]n civil commitment proceedings the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence.”); *United States v. Salerno*, 481 U.S. 739, 749–51 (holding that dangerousness can warrant pretrial detention).
249. *Compare* *Chirinos*, 16 I. & N. Dec. 276, 277 (B.I.A. 1977) (“Our primary consideration in a bail determination is that the parties be able to place the facts *as promptly as possible* before an impartial arbiter. To achieve this objective we not only countenance, but will encourage, informal procedures so long as they do not result in prejudice. . . . Obviously, this informality cannot carry over to a deportation hearing.”), *with* *United States v. Smith*, 79 F.3d 1208, 1209–10 (D.C. Cir. 1996) (permitting prosecution at pretrial dangerousness hearing to use proffers of facts because “to require the Government to produce its witnesses against him would complicate the hearing to a degree out of proportion to the liberty interest at stake—*viz.* the interest in remaining free until trial, for what is by statute a period of limited duration”).
250. *See* 18 U.S.C. § 3142(f) (2012) (“The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.”); *Salerno*, 481 U.S. at 751–52 (“The government must prove its case by clear and convincing evidence.” (citing 18 U.S.C. § 3142(f))).

detainee is found not dangerous in a federal pretrial detention hearing, only to be released into ICE custody and found to be dangerous in a bond hearing because he now bears the burden of proof.<sup>251</sup>

The analogy to the criminal pretrial detention context is not perfect, however, given that the flight risk concerns are different. Immigration relief is hard to win, especially when the noncitizen bears the burden of proof;<sup>252</sup> thus, one can argue that these noncitizens have an incentive to flee, especially when the government does not have the resources to find and deport them.<sup>253</sup> In contrast, in a criminal case, the government bears the burden of proving beyond a reasonable doubt that they committed a crime, making the pretrial defendant more likely to win if he appears.<sup>254</sup> However, the consequences of a failure to appear are quite severe in an immigration case, given the *in absentia* removal order that usually results,<sup>255</sup> which prohibits the detainee from seeking many forms of relief in the future<sup>256</sup> and places the noncitizen in a higher enforcement priority category.<sup>257</sup>

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251. This was the chain of events that occurred in a bond hearing of a client of the Boston College Law School's Immigration Law Group Bond Project.

252. See 8 U.S.C. § 1229a(c)(2) (2012) (describing when the burden of proof is on the noncitizen).

253. See Written Testimony of Stephen Legomsky Before the United States House of Representatives Committee on the Judiciary (Feb. 25, 2015), [https://lofgren.house.gov/uploadedfiles/legomsky\\_testimony.pdf](https://lofgren.house.gov/uploadedfiles/legomsky_testimony.pdf) [<https://perma.cc/MN63-HKUQ>] (“Congress knows that there are about 11 million undocumented immigrants living in the U.S., and it knows that the resources it is appropriating enable the Administration to go after fewer than 400,000 of them per year, less than 4% of that population.”); see also Schuck, *supra* note 240, at 671 (“[T]he INS can deploy few effective sanctions other than removal to induce them to comply with its proceedings and orders.”).

254. See *In re Winship*, 397 U.S. 358, 364 (1970) (requiring proof beyond a reasonable doubt to be found guilty of a crime).

255. 8 U.S.C. § 1229a(b)(5)(A) (2012).

256. See, e.g., 8 U.S.C. § 1182(a)(6)(B) (2012) (stating that failure to appear for a removal hearing without reasonable cause renders noncitizen inadmissible for five years); 8 U.S.C. § 1229(a)(b)(7) (2012) (stating that failure to appear for removal hearing after notice bars a noncitizen from relief including cancellation of removal, adjustment of status, voluntary departure, change of nonimmigrant status, or registry for ten years).

257. See MEMORANDUM FROM JEH CHARLES JOHNSON, SECRETARY OF THE U.S. DEP'T OF HOMELAND SEC., POLICIES FOR APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/87E9-AKNF>] (listing as “Priority 3” for detention and deportation those with final orders of removal).

The comparison between the pretrial criminal detention hearing at issue in *Salerno* with its heightened burden of proof<sup>258</sup> and immigration bond hearings really is an “apples-to-apples” comparison when one considers that many immigration bond hearings begin and end with a dangerousness finding. The Board, in *Matter of Urena*,<sup>259</sup> instructed judges to consider dangerousness first during a bond hearing; only if a judge finds a detainee not dangerous can she consider flight risk.<sup>260</sup> The constitutional right to be free from detention requires the government to justify detention prior to a criminal trial based on clear and convincing evidence of dangerousness;<sup>261</sup> so, too, should the noncitizen’s constitutional right to be physically free pending a removability finding require a heightened, government-borne burden of proving dangerousness.<sup>262</sup>

Another question is whether it is truly the government seeking law’s intervention in the detention context—after all, it is the *detainee* who requests the bond hearing and is seeking review of a government decision to detain.<sup>263</sup> He puts himself in the shoes of an appellant, asking

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258. Unlike dangerousness, which must be proven by clear and convincing evidence, the government need only prove flight risk by preponderance of the evidence. 18 U.S.C. § 3142(f) (2012); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1986) (“The statute does not establish the quantum of proof by which the government must establish this risk of flight. We adopt the position taken by the other circuits that congressional silence means acquiescence in the traditional preponderance of the evidence standard.”). *But see* *United States v. Motamedi*, 767 F.2d 1403, 1406–07 (9th Cir. 1985) (adopting a “clear preponderance” standard for flight risk and justifying higher standard of proof for dangerousness than for flight risk).

259. 25 I. & N. Dec. 140 (B.I.A. 2009).

260. *Id.* at 141–42.

261. *See supra* Part II.A (discussing the Supreme Court and burdens on civil detention).

262. In 1997, Peter Schuck wrote a White Paper to the INS regarding detention and removal, stating that “facile analogies to the criminal justice system . . . may misconceive the rather different character of immigration enforcement.” Schuck, *supra* note 240, at 680. One of these unique features of the immigration enforcement regime was “the different constitutional standards applicable to removable aliens compared to . . . U.S. citizens.” *Id.* David Cole, however, has argued that with respect to the right to be free from physical detention, the Court always has followed the same Due Process analysis it applies to U.S. citizens. *See* Cole, *supra* note 46, at 717 (discussing when the Supreme Court has upheld preventive detention); *see also supra* Part II.

263. *See* 8 C.F.R. § 1003.19(b) (2016) (describing required application procedures for an initial bond redetermination and appeal); *see also* Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016) (describing bond applicant as “[a]n alien who seeks a change in custody status”).

a judge to review the initial decision to detain.<sup>264</sup> That a detainee does not have an automatic right to review of his initial detention decision is another problematic feature of the regulations governing immigration detention, since in the criminal justice system, the government may not detain a person without expeditiously bringing him before a magistrate to justify that detention.<sup>265</sup> If one goes back to the initial decision to detain, it is the government who upsets the noncitizen's right to live freely in the U.S., especially because when ICE makes the initial detention decision, it is basing its right to detain on charges of removability that have not been reviewed by a neutral judge<sup>266</sup> (unlike the probable cause hearing in the criminal context).<sup>267</sup>

There is also the legal realist perspective—that the burden of proof and standard of proof make little difference, and thus any correction made by a court will have very little impact in the real world of bond hearings. Indeed, some of the evidence that I have critiqued as not passing the clear and convincing evidence standard is similar to what courts have allowed prosecutors to present in pretrial dangerousness hearings.<sup>268</sup> However, my proposal seeks to require the government to

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264. See 8 C.F.R. § 236.1(d) (2016) (describing the appeals process following a custody decision).

265. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”). The regulation provides for a determination of custody by an ICE officer within forty-eight hours of arrest (except for emergency or extraordinary circumstances); however, this regulation does not provide for expeditious review by an independent immigration judge. 8 C.F.R. § 287.3(d) (2016).

266. See 8 C.F.R. § 287.3(b) (2016) (“If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry . . . .”); see also García Hernández, *supra* note 107, at 882 (comparing criminal justice and immigration process, where the government can “merely lodge an accusation that a person has violated the law”); De La Cruz, 20 I. & N. Dec. 346, 359–60 (B.I.A. 1991) (Heilman, Board Member, dissenting) (“Unlike the criminal justice system, the initial decision to jail a person is made by the very law enforcement agency which ordered arrest. There is no impartial magistrate or judge involved at that stage. The hearing before the immigration judge offers the first opportunity for an alien to appear before an impartial trier of fact.”).

267. See *Gerstein*, 420 U.S. at 114–16 (reasoning that to continue detention after initial arrest, the detached judgment of a magistrate judge is necessary and that the prosecutor's finding of probable cause is insufficient to protect Fourth Amendment rights).

268. See, e.g., *United States v. Smith*, 79 F.3d 1208, 1209–10 (D.C. Cir. 1996) (permitting prosecution to prove dangerousness by proffer and not allowing defendant confrontation rights at pretrial dangerousness hearing); *United States v. Delker*, 757 F.2d 1390, 1396–98 (3d Cir. 1985) (same).



prove dangerousness in a bond hearing by clear and convincing evidence; courts can later sort out what “clear and convincing evidence” means.<sup>269</sup> Courts can look to examples from the removability context where the type of evidence the government presents in their bond cases—namely, police reports and I-213 documents—does not meet a “clear and convincing evidence” standard.<sup>270</sup>

The Court recognized the legal realism concerns when it required the government to prove mental illness and dangerousness by clear and convincing evidence in *Addington*.<sup>271</sup> The Court reasoned that “the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country.”<sup>272</sup> However, the Court recognized that the “standard of proof is more than an empty semantic exercise”<sup>273</sup> because “[i]n cases involving individual rights . . . [t]he standard of proof [at a minimum] reflects the value society places on individual liberty.”<sup>274</sup>

## CONCLUSION

In this Article I have set forth why detainees should not bear the burden of proving that they are a danger and a flight risk during their bond hearings in immigration court. There are multiple ways to return to the days of *Matter of Patel*, when there was a presumption of freedom.

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269. Courts have the discretion to question the prosecutor’s proffers in pretrial dangerousness hearings. *See, e.g., Delker*, 757 F.2d at 1395 (“If the court is dissatisfied with the nature of the proffer, it can always, within its discretion, insist on direct testimony.” (quoting *United States v. Edwards*, 430 A.2d 1321, 1334 (D.C. Cir. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982))). Also, not every court has allowed proffers in dangerousness hearings. *See, e.g., United States v. Brunette*, 839 F. Supp. 2d 449, 453 (D. Mass. 2012) (finding that prosecutor’s proffer of facts to prove dangerousness had not “been prove[n] by any evidence, much less clear and convincing evidence”).

270. *See supra* note 222 (discussing immigration judges’ use of police reports and I-213 documents).

271. *See Addington v. Texas*, 441 U.S. 418, 431–33 (1979) (discussing and holding that the clear and convincing evidence standard “meet[s] 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”).

272. *Id.* at 424–25.

273. *Id.* at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part) *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972)).

274. *Id.*

Congress, the Board, or ICE could fix this problem. Indeed, in 2013, the Senate, as part of a comprehensive immigration reform bill, would have shifted the burden of proof back to the government in bond hearings.<sup>275</sup> The Board or Attorney General Lynch could write a published decision, reversing *Matter of Adeniji* and its progeny and restoring the presumption of freedom in *Patel*. DHS also could rewrite its 1997 regulation to return to a presumption of liberty.<sup>276</sup>

A judicial remedy appears to be the more imminent solution, since the Court may consider this issue in *Jennings* this term. There are various ways for the Court to correct this erroneous burden placement. From an administrative law angle, the Court could decide that the agency's decision in *Matter of Adeniji* is arbitrary and capricious, since it represents an unexplained agency shift from the presumption of freedom in *Matter of Patel*.<sup>277</sup> The Court also could use statutory interpretation tools to hold that that Congress, when it last amended the discretionary detention statute, intended to incorporate *Patel's* presumption of freedom.<sup>278</sup> Or, tools of statutory interpretation suggest

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275. Noferi, *supra* note 11, at 560–61. The bill did not pass the House of Representatives; Representative Grassley, objecting to the bill, complained that it would impose “new, onerous burdens on the government when it detains undocumented immigrants, including those who have committed serious crimes and are aggravated felons.” See S. REP. NO. 113-40, at 174. Clearly, Representative Grassley did not realize that aggravated felons and many others deportable for criminal conduct would have their detention governed by 8 U.S.C. § 1226(c), not this provision, which would have amended 8 U.S.C. § 1226(a). Nor is it correct to describe this burden allocation as “new,” since it existed in the days of *Matter of Patel*. See 15 I. & N. Dec. 666, 666 (B.I.A. 1976).

276. The American Bar Association Commission on Immigration developed the ABA Civil Immigration Detention Standards to provide DHS with a guide for transitioning to a civil detention system that befits its civil detention authority; one of the ABA's recommendations was that “[n]oncitizens should not be presumed to be dangerous or prone to flight in the absence of credible information establishing objective risk factors.” A.B.A., ABA CIVIL IMMIGRATION DETENTION STANDARDS 8 (2012).

277. See *supra* note 75 (discussing applying the arbitrary and capricious standard to *Matter of Adeniji*).

278. The discretionary bond statute, 8 U.S.C. § 1226(a), did not change at all when it was adopted in 1997, except to increase the minimum bond amount. Under traditional principles of statutory interpretation, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); see also *Negusie v. Holder*, 555 U.S. 511, 546 (2009) (stating the previous proposition from *Lorillard*). Thus, by preserving the language of former 8 U.S.C. § 1252(a) and re-enacting it as 8 U.S.C. § 1226(a), Congress presumably meant to adopt the Board's presumption against detention established in *Patel*. 15 I. & N. Dec. at 666.

that because Congress, in the mandatory detention statute at 8 U.S.C. § 1226(c), specifically placed the burden of proof on the detainee, it intended to not place the burden of proof on the detainee in decisions governed by the discretionary bond statute, 8 U.S.C. § 1226(a).<sup>279</sup> The Court also could engage in constitutional avoidance,<sup>280</sup> reading the cases laid out in Part II of this Article to determine that for the discretionary bond statute, 8 U.S.C. § 1226(a), to withstand a Due Process challenge, the government must justify detention by clear and convincing evidence. Or, the Court could apply *Mathews v. Eldridge*<sup>281</sup> to find that an additional procedure—requiring the government to bear the burden of proof—satisfies its procedural Due Process balancing test.<sup>282</sup>

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279. *See Nken v. Holder*, 556 U.S. 418, 430 (2009) (citation omitted) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *see also id.* at 430–31 (noting that this is “particularly true” when the provisions at issue were “enacted as part of a unified overhaul” of the statute).

280. This would be consistent with what Hiroshi Motomura has termed “phantom constitutional norms,” whereby courts have undermined the plenary power through statutory interpretation. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 549 (1990).

281. 424 U.S. 319 (1976).

282. *See id.* at 335 (holding that procedural Due Process balancing test requires a court to evaluate the private interests at stake, the risk of erroneous deprivation, and the government’s interest, including costs to the government). There is a significant private interest at stake, since detention is a drastic deprivation of one’s rights. *See, e.g., Cole*, *supra* note 46, at 696 (“Locking up human beings is one of the most extreme preventive measures a state can undertake; it should be reserved for situations where it is truly necessary.”). The risk of erroneous deprivation is also high in the bond setting. *See Das*, *supra* note 7, at 145 (“Detention decisions are thus prone to what commentators describe as Type I errors (or ‘false positives’), where the system results in the detention of someone who should instead be released . . . .”); Legomsky, *supra* note 6, at 547 (describing how false positives in the context of detention generate needless costs, including “the deprivation of individual liberty, the inability to work, socialize, or travel, the isolation from friends, family, and community, the reciprocal losses of those from whom the detainees are cut off, the economic losses for those detainees who would otherwise have been permitted to work, and the increased public costs of providing detention, paying public assistance to the detainee’s dependents in some cases, and foregoing the income tax revenue that the detained person’s employment would have generated”); *see also Cole*, *supra* note 46, at 696. (“When a judge releases an individual who in fact poses a real danger of future harm, and the individual goes on to inflict that harm, the error will be emblazoned across the front pages. When, by contrast, a judge detains an individual who would not have committed any wrong had he been released, that error is invisible—and, indeed, unknowable.”). Finally, as to the governments’ interests, the burden allocation ensures that the right people—those proven to be a danger or a flight risk—are detained at the government’s

The Supreme Court has the opportunity to examine the burden of proof allocation when it decides *Jennings v. Rodriguez* this term. Hopefully the Court will restore *Patel's* presumption of freedom for the many detainees seeking discretionary bond under 8 U.S.C. § 1226(a). This decision would comport with Due Process and align the burdens of proof for both detention and deportation. Only then will immigration bond hearings begin to reflect the Court's statement that "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception."<sup>283</sup>

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expense. Also, the burden of proof is not as costly as other procedures, such as court-appointed counsel or additional hearings. *See Santosky v. Kramer*, 455 U.S. 745, 766–68 (1982) (deciding under the *Mathews v. Eldridge* balancing test that requiring the state to adopt a higher standard of proof for termination of parental rights proceedings would not create any real administrative burdens on the state because, compared to other procedures like providing court-appointed counsel or providing additional hearings, requiring the government to meet a higher burden of proof is not particularly costly).

283. *United States v. Salerno*, 481 U.S. 739, 755 (1987).