Immigration Law's Missing Presumption

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The presumption of innocence is a foundational concept in criminal law but is completely missing from quasi-criminal immigration proceedings. This Article explores the relevance of a presumption of innocence to removal proceedings, arguing that immigration law has been designed and interpreted in ways that disrupt formulating any such presumption to facilitate deportation. The Article examines the meaning of "innocence" in the immigration context, revealing how historically racialized perceptions of guilt eroded the notion of innocence early on and connecting the missing presumption to persistent associations between people of color and guilt. By analyzing how a presumption of innocence is impeded at multiple decision points, from the investigations stage to detention, removal, and even post-conviction relief, the Article demonstrates the cumulative disadvantage that the system inflicts.

Finally, the Article argues that immigration law not only is missing its own presumption of innocence but also erodes the presumption of innocence in criminal law. The Article offers three examples of this phenomenon involving immigration law's treatment of pending charges, untested arrest reports, and unproven facts related to a crime. By shedding light on how immigration law undermines a presumption of innocence and reinforces racialized perceptions of guilt, this Article reveals a form of covert racial discrimination in the immigration code.

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INTRODUCTION

The maxim "innocent until proven guilty" appears in Supreme Court cases dating back to 1895.[1] Although the presumption of innocence does not appear in the U.S. Constitution, it is embedded in the principle of due process protected by the Fifth and Fourteenth Amendments.[2] The Supreme Court has described the presumption as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[3] Although the Court considers a presumption of innocence necessary for a fair criminal trial,[4] it is completely absent from quasi-criminal removal proceedings that can lead to deportation.

This Article examines how various components of immigration law collectively disrupt the notion that noncitizens may be innocent. From the investigation phase to detention and removal proceedings in immigration court, immigration law is designed to facilitate deportation, not to protect against erroneous decisions, no matter how catastrophic the consequences. This Article also goes one step further, arguing that immigration law erodes criminal law's well-established presumption of innocence.

In a criminal case, a defendant must be presumed innocent until the government proves each element of the alleged offense "beyond a reasonable doubt."[5] Although this entire concept is often described as the presumption of innocence, it actually includes two distinct components: first, the *burden of proof* is on the government, and, second, the *standard of proof* is "beyond a reasonable doubt."[6] The presumption of innocence refers to the burden and should not be collapsed with the standard of proof.[7] This is a critical distinction to understand, especially when taking a broad view of the presumption that extends to the pretrial period.[8]

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1. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). For a description of the historical origins of the presumption of innocence, see generally Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106 (2003).

2. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *In re* Winship, 397 U.S. 358, 364 (1970).

3. Nelson v. Colorado, 137 S. Ct. 1249, 1256 n.9 (2017) (quoting Medina v. California, 505 U.S. 437, 445 (1992)).

4. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

5. *Coffin*, 156 U.S. at 459.

6. Douglas Husak, *Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality*, 8 CRIM. L. & PHIL. 353, 355 (2014).

7. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 742 (2011) (arguing that "[t]he failure to recognize the importance of due process and the presumption of innocence pretrial allowed the Court to equate these principles with the prosecutor's burden of proof").

8. For articles embracing a broad view of the presumption that extends to the pretrial period and/or civil cases, see, for example, Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 595 (2018) (arguing that a presumption of innocence should be recognized in all civil proceedings, without abandoning the traditional "preponderance-of-the-evidence standard"); Baradaran, *supra* note 7, at 738; Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J.

As the level of government intrusion increases, so does the standard of proof that the government must satisfy. In applying this proportionality principle, it helps to conceptualize the presumption of innocence as a presumption of liberty.[9] In criminal cases, the standard of proof increases from "reasonable suspicion" for a stop, to "probable cause" for an arrest and an indictment, to "beyond a reasonable doubt" for a conviction.[10] Although the standard of proof varies, a presumption of innocence exists at each stage, placing some burden on the government.

In *Bell v. Wolfish*, the Court seemed to adopt a narrower view of the presumption of innocence, holding that it did not extend to the conditions of pretrial detention described in that case.[11] But *Wolfish* did not hold that the presumption of innocence never applies outside of a criminal trial. In fact, both before and after *Wolfish*, the Supreme Court has applied the presumption of innocence in other contexts. A foundational case, *In re Winship*, applied the presumption of innocence, as well as the "beyond a reasonable doubt" standard of proof, to a civil juvenile adjudication.[12] *Winship* suggests that the presumption may well have a role to play in quasi-criminal proceedings involving deportation,[13] which the Court has described as a "'drastic measure,' often amounting to lifelong 'banishment or exile.'"[14]

301, 327 (2021) (explaining that historically, the presumption of innocence "was not simply to accompany a rule of evidence at trial, but to ensure that a person was not labeled or treated as a criminal prior to adjudication"); Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 276 (2002) (noting that "the legal systems of Continental and Latin American countries, the state of Israel, and scholars throughout the world perceive the presumption of innocence as a comprehensive legal principle that is applicable at all stages of the criminal process"). Even if one holds the narrower view that the presumption of innocence applies only at trial, it is important to understand how the pretrial process affects the government's ability to obtain evidence that can be used to defeat that presumption at trial.

9. *See* Patterson v. New York, 432 U.S. 197, 224 (1977) (Powell, J., dissenting) (explaining that the presumption of innocence is a constitutional lesson "about the limits a free society places on its procedures to safeguard the liberty of its citizens"); Wilkinson III, *supra* note 8, at 603 (explaining that the presumption of innocence "essentially represents a presumption of *liberty*: it preserves an individual's right to continue to enjoy his freedom until a conviction has been obtained").

10. *See* Wilkinson III, *supra* note 8, at 607–08, 614; *see also* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 13, 17 (1964) (describing an "obstacle course" model of due process, which imposes various restraints that make it more difficult for the state to prove its case); Terry v. Ohio, 392 U.S. 1, 17, 24 (1968) (rejecting "a rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment" and adopting a reasonable suspicion standard for stops and frisks).

11. 441 U.S. 520, 533 (1979). The Court decided that restrictions on pretrial detainees constitute "punishment" only if they are imposed with punitive intent or if they are not rationally related to some nonpunitive purpose. *See id.* at 538. This was a lower standard than the one applied by the court of appeals and the district court, which had "relied on the 'presumption of innocence' as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity." *Id.* at 532.

12. 397 U.S. 358, 363, 368 (1970).

13. *See id.* at 368 n.6.

14. Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jordan v. De George, 341 U.S. 223, 231 (1951)); *see also* Wilkinson III, *supra* note 8, at 618 ("[T]here is no principled reason for depriving the civilly accused of the presumption's protection. There is nothing *sui generis* about criminal litigation that renders the presumption exclusively applicable to that field."). Even if one does not agree with extending the presumption of innocence to all civil litigation, as Judge Wilkinson proposes, it is worth noting that many of the arguments he makes apply even more forcefully in the immigration context due to its close ties to the criminal process.

More recently, in *Nelson v. Colorado*,[15] the Supreme Court also offered a more expansive understanding of the presumption than in *Wolfish*.[16] In *Nelson*, the Court struck down a Colorado statute that required individuals whose convictions had been reversed or vacated to file a civil lawsuit to recover costs, fees, and restitution paid pursuant to the conviction.[17] The Court reasoned that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[18] In reaching this conclusion, the Court rejected Colorado's argument that the presumption was inapplicable because it applied only to criminal trials, noting that this argument "misapprehends *Wolfish*."[19]

Although removal proceedings have been classified as civil, they have far more in common with criminal proceedings than traditional civil litigation, which commonly involves monetary disputes between private parties. As Juliet Stumpf has explained, "Both immigration and criminal law marshal the sovereign power of the state to punish and to express societal condemnation for the individual offender."[20] The governmental power flexed by immigration authorities involves not only the final act of deportation but also everything leading up to it: stops, arrests, searches, interrogations, the filing of immigration charges, and detention.[21] One of the main purposes of the presumption of innocence is to protect against the abuse of state power, precisely because it can inflict so much harm and stigma.[22]

But the overlap is even deeper, because criminal arrests, charges, and convictions can all directly trigger the deportation process.[23] That is why the Supreme Court recognized in *Padilla v. Kentucky* that deportation is "intimately related to

15. 137 S. Ct. 1249 (2017).

16. *See* Baradaran, *supra* note 7, at 743 (arguing that *Wolfish* "did not close the door to the presumption of innocence or due process rights ever applying pretrial, but simply stated that they did not apply during pretrial *confinement*"); Kitai, *supra* note 8 (noting that the narrow interpretation of the presumption of innocence in *Wolfish* conflicts with the broader view taken by "the legal systems of Continental and Latin American countries, the state of Israel, and scholars throughout the world [who] perceive the presumption of innocence as a comprehensive legal principle that is applicable at all stages of the criminal process").

17. 137 S. Ct. at 1254–55.

18. *Id.* at 1256.

19. *Id.* at 1255 n.8.

20. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379 (2006); *see also* Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2277 (2013) (arguing that deportation is punishment because it is "imposed as a societal imposition of blame; it is imposed to punish"); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012) (arguing that "[a] removal order is sufficiently punitive to trigger constitutional proportionality review" under the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause).

21. *See, e.g.*, Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a; INA § 287(a), 8 U.S.C. § 1357(a); Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting) (recognizing that noncitizens might spend years in immigration detention before ultimately winning their cases).

22. Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 123 S. AFR. L.J. 63, 71–72 (2006).

23. Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010); *see also* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1550 (2011) (explaining that

the criminal process" and constitutes "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[24] In fiscal year (FY) 2020, approximately half (49%) of the individuals removed from the United States had a prior criminal conviction.[25] Of these so-called "criminal" removals, approximately 34% had been convicted of an immigration-related offense, such as illegal entry or illegal reentry.[26]

The classification of deportation proceedings as civil rather than criminal dates back to cases interpreting Chinese exclusion laws enacted in the late 1800s. In *Fong Yue Ting v. United States*, the Court explained that a deportation order "is not a punishment for crime" but rather "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which . . . his continuing to reside here shall depend."[27] The Court applied the same reasoning to immigration detention in *Wong Wing v. United States*, which validated detention as a way to effectuate immigration laws, although it rejected imprisonment "at hard labor" without trial as unconstitutional punishment.[28]

Over a century later, the Supreme Court continues to rely on these antiquated precedents in classifying immigration detention and deportation as civil penalties rather than punishment.[29] While decisions such as *Wolfish* distinguish between "punitive" incarceration and "regulatory" detention in deciding if a penalty is

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criminal law violations can serve as a pretext for immigration enforcement, just as immigration enforcement can serve as a pretext for criminal investigations).

24. 559 U.S. at 364–65 (footnote omitted); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 733 (1893) (Brewer, J., dissenting) (taking the view that deportation *is* punishment); *id.* at 758–59 (Field, J., dissenting) (same); *id.* at 763 (Fuller, C.J., dissenting) (same).

25. OFF. OF IMMIGR. STAT., U.S. DHS, 2020 YEARBOOK OF IMMIGRATION STATISTICS 113 tbl.41, 115 n.1 (2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/G9TU-L6SA] (categorizing 118,357 out of 239,151 removals as involving "criminals").

26. ALAN MOSKOWITZ & JAMES LEE, U.S. DHS, IMMIGRATION ENFORCEMENT ACTIONS: 2020, at 12 tbl.8, https://www.dhs.gov/sites/default/files/2022-02/22_0131_plcy_immigration_enforcement_actions_fy2020.pdf [https://perma.cc/8STE-E7XD]. "Immigration" offenses were, by far, the largest crime category among removed individuals. The next highest category was "Dangerous Drugs" and pertained to 11.1% of removals. *Id.*; *see also* INA § 275(a), 8 U.S.C. § 1325(a) (criminalizing illegal entry); INA § 276(a)–(b), 8 U.S.C. § 1326(a)–(b) (criminalizing illegal reentry after removal, with heightened penalties of up to twenty years for individuals with certain convictions).

27. 149 U.S. at 730.

28. 163 U.S. 228, 236–37 (1896).

29. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1353 (2014) ("Despite the consistent description of immigration confinement as civil, the Court has never explicitly rationalized this determination."); 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 analytical and normative questions raised by the civil/criminal dichotomy in the deportation context."). Paulina Arnold provides a novel and compelling historical analysis arguing that immigration detention was initially part of a system of mass civil incarceration and that the Supreme Court's failure to include immigration detention in its constitutional regulation of civil incarceration during the 1960s and 1970s was "an accident of history, coinciding with immigration detention's temporary termination" for thirty years in 1954. Paulina D. Arnold, *How Immigration Detention Became Exceptional*, 75 STAN.

criminal or civil,[30] the Court has never fully explained why immigration detention and deportation fall on the regulatory side.[31] Instead, the Court has relied on the civil nature of the underlying proceeding and "*assume[d]* that [removal proceedings] are nonpunitive in purpose and effect."[32] In one line of cases, the Court has also focused on legislative intent in determining whether a penalty is civil or criminal, although the Court has not yet applied that reasoning in the immigration context.[33] At the end of the day, immigration detention and deportation serve the same basic purposes as criminal punishment—"deterrence, incapacitation, and retribution."[34]

Despite the similarities and contiguity between criminal and removal proceedings, noncitizens in removal proceedings lack many of the procedural rights of criminal defendants. The Fifth Amendment Due Process Clause requires removal proceedings to be fundamentally fair,[35] which necessitates a "full and fair hearing,"[36] including notice and an opportunity to present evidence and cross-examine witnesses.[37] Beyond that, however, many procedural protections familiar to the criminal process are missing: respondents do not have a right to counsel at government expense[38] or a right to be present at their own hearings;[39] the government does not always bear the burden of proof,[40] and the standard of proof is not "beyond a reasonable doubt;"[41] the rules of evidence do not apply;[42] *Miranda*

L. REV. 261, 267–69 (2023) (describing "immigration detention exceptionalism" as "a modern doctrine rather than a timeless classification").

30. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 537–38 (1979).

31. *See* García Hernández, *supra* note 29, at 1354.

32. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (emphasis added); *see also* Demore v. Kim, 538 U.S. 510, 523–27 (2003) (citing historical precedent but providing no reasoning in affirming "detention during deportation proceedings as a constitutionally valid aspect of the deportation process").

33. *See* United States v. Salerno, 481 U.S. 739, 747 (1987); Hudson v. United States, 522 U.S. 93, 99 (1997). Relying on this line of cases, Professor García Hernández has argued that immigration detention *does* constitute punishment. *See generally* García Hernández, *supra* note 29.

34. Tania N. Valdez, *Pleading the Fifth in Immigration Court: A Regulatory Proposal*, 98 WASH. U. L. REV. 1343, 1363 (2021); *see also* 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, 43–44 (2011); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 527–28 (2007) (arguing immigration law has incorporated elements of criminal enforcement, but not the corresponding procedural safeguards).

35. *See* Lam, 14 I. & N. Dec. 168, 170 (B.I.A. 1972); Ramirez-Sanchez, 17 I. & N. Dec. 503, 505 (B.I.A. 1980).

36. M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (citing M-D-, 23 I. & N. Dec. 540, 542 (B.I.A. 2002)).

37. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B).

38. *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A); INA § 292, 8 U.S.C. § 1362.

39. *See* INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A).

40. *See* INA § 291, 8 U.S.C. § 1361.

41. *See* 8 C.F.R. § 1240.8(a) (2021) ("A respondent charged with deportability shall be found to be removable if the [Immigration and Naturalization] Service proves by clear and convincing evidence that the respondent is deportable as charged."); Sandoval, 17 I. & N. Dec. 70, 83 (B.I.A. 1979).

42. *See* Y-S-L-C-, 26 I. & N. Dec. 688, 690 (B.I.A. 2015).

warnings normally are not required,[43] nor can otherwise illegally obtained evidence be suppressed;[44] and mentally incompetent individuals are allowed to stand trial.[45]

Given removal proceedings' close ties to the criminal process, there has been surprisingly little conversation to date between scholars writing about the presumption of innocence and those analyzing the rights of immigrants. This Article helps fill that gap. Immigration scholars have already examined an array of constitutional rights that are relevant to a broad view of the presumption of innocence. For example, they have argued that immigration custody determinations are inconsistent with a presumption of liberty;[46] urged that *Miranda* warnings should be provided in interrogations that elicit information about immigration status and nationality;[47] and discussed flaws in immigration warrants and detainers that may violate the Fourth Amendment.[48] They have also questioned the adequacy of immigration courts to adjudicate claims regarding constitutional violations during the investigative process.[49]

Building on such a rich body of scholarship, this Article argues that immigration law hinders a presumption of innocence through its very design, thereby losing sight of innocence and fueling racialized perceptions of guilt. Part I explores the meaning of "innocence" in removal proceedings, explaining how this concept includes factual, legal, and normative innocence. While factual innocence in the immigration context focuses on someone's actual legal status or conduct, legal innocence focuses on whether someone is statutorily removable and/or eligible for

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43. *See, e.g.*, Navia-Duran v. Immigr. & Naturalization Serv., 568 F.2d 803, 808 (1st Cir. 1977) ("We agree with the INS that *Miranda* warnings are not applicable in a deportation setting."); Avila-Gallegos v. Immigr. & Naturalization Serv., 525 F.2d 666, 667 (2d Cir. 1975) ("Since deportation proceedings are not criminal in nature, there was no necessity for *Miranda* warnings." (citation omitted)); Chavez-Raya v. Immigr. & Naturalization Serv., 519 F.2d 397, 402 (7th Cir. 1975) (finding that "*Miranda* warnings would be not only inappropriate but could also serve to mislead the alien").

44. *See* Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (plurality opinion) (holding that the exclusionary rule does not apply to removal proceedings); *Sandoval*, 17 I. & N. Dec. at 82–83 (same).

45. *See* INA § 240(b)(3), 8 U.S.C. § 1229a(b)(3) (simply requiring "safeguards" if "it is impractical by reason of an alien's mental incompetency for the alien to be present at the proceeding"); M-A-M-, 25 I. & N. Dec. 474, 481–82 (B.I.A. 2011) (giving immigration judges "discretion to determine which safeguards are appropriate" after deciding that the respondent is not mentally competent); Fatma E. Marouf, *Incompetent But Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929 (2014).

46. *See* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RSRV. L. REV. 75, 90–95 (2016); Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 171–74 (2016).

47. *See generally* Valdez, *supra* note 34; Linus Chan, *The Promise and Failure of Silence as a Shield Against Immigration Enforcement*, 52 VAL. U. L. REV. 289 (2018); Anjana Malhotra, *The Immigrant and* Miranda, 66 SMU L. REV. 277 (2013).

48. *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1742–43 (2018); Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 161–64 (2015).

49. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1623 (2010).

relief.[50] Factual and legal innocence are "conceptually similar and overlap[ping]" constructs.[51] Normative innocence, in turn, pertains to our moral sensibilities of innocence and may include individuals who are neither factually nor legally innocent. For example, children may be considered normatively innocent even if they are unlawfully present and removable, with no path to legal status.

Additionally, Part I reveals how racialized perceptions of guilt dating back to the Chinese exclusion laws of the late 1800s eroded the notion of innocence in immigration matters early on and impacted the burden of proof in deportation cases. Part I also discusses contemporary empirical studies to demonstrate persistent associations between people of color and guilt. This Part includes studies showing that racial disadvantage in the criminal system is cumulative, becoming more pronounced if one considers multiple decision points rather than just one decision point. Building on that concept of cumulative racial disadvantage, Parts II and III examine how the presumption of innocence is impeded at multiple decision points in the immigration enforcement system, from investigations to detention, removal, and even post-conviction relief.

Part II focuses on the investigative process. It begins by taking a fresh look at three seminal Supreme Court cases addressing reasonable suspicion and race (Mexican ancestry/appearance): *United States v. Brignoni-Ponce*,[52] *United States v. Martinez-Fuerte*,[53] and *INS v. Delgado*.[54] Viewing these cases through a new lens, the Article highlights how they ignore factual innocence, rendering invisible lawfully present individuals of Mexican ancestry. The majority opinions in these cases conceptualize "innocent" individuals as non-Hispanic whites and ignore the impact of the intrusive measures at issue on lawfully present individuals of Mexican descent. Factual innocence disappears like a needle in a haystack as the sheer scale of undocumented immigration overwhelms the Court.

Part II goes on to explain how other aspects of immigration investigations—including watered-down warrant requirements, improper search and seizure tactics, and interrogations with no warnings to prevent self-incrimination—raise constitutional concerns, yet the Supreme Court has refused to apply the exclusionary rule to removal proceedings.[55] The absence of a suppression remedy undercuts the possibility of establishing legal innocence based on the government's inability to meet its burden of proof; it allows the government to rely on even unlawfully obtained admissions and evidence to facilitate removal.

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50. *Cf.* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 419 (2018) (explaining that, in the criminal context, factual innocence refers to evidence that a defendant did not actually commit the alleged offense, while claims of legal innocence "arise when no valid criminal statute prohibited the defendant's conduct or supplied the basis for the defendant's sentence").

51. *Id.* at 420.

52. 422 U.S. 873 (1975).

53. 428 U.S. 543 (1976).

54. 466 U.S. 210 (1984).

55. *See, e.g.*, Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (plurality opinion).

Part III examines how a presumption of innocence is impeded after the investigation phase ends and removal proceedings are initiated. This Part discusses reversed and shifting burdens related to two critical decisions: detention and removal. The conventional view that the government bears the burden of proving removability by "clear and convincing" evidence actually applies only in limited circumstances.[56] It does not apply in custody determinations, where noncitizens seeking release from detention bear the burden of showing that they are neither a flight risk nor a danger to the community. Additionally, large categories of noncitizens bear all or part of the burden of proof in removal proceedings. In some cases where the noncitizen bears the burden, the standard of proof is "clearly and beyond a doubt," which has not even been defined.[57] The last Section of Part III turns to immigration law's treatment of post-conviction relief, explaining that burdens of proof are often mixed up in analyzing vacated convictions and that a circuit split has emerged regarding who bears the burden when a noncitizen tries to reopen a case after a conviction is vacated.

Together, Parts I through III show that immigration law has been both designed and interpreted in a way that impedes formulating a presumption of innocence. In Part IV, the Article pushes the argument even further, asserting that immigration law also erodes criminal law's well-established presumption of innocence. Part IV provides three examples of how immigration law does this. First, removal proceedings force respondents with pending criminal charges to testify about the facts surrounding the alleged offense if they want to avoid deportation. Second, immigration law allows judges to order removal based on untested arrest reports and unproven charges. When individuals are deported with pending charges, they are denied the opportunity to prove themselves innocent in their criminal cases. Third, courts have expanded the use of the "circumstance-specific approach" to analyzing convictions, which requires a fact-specific analysis, as opposed to the traditional categorical approach, which is a legal analysis focused on the elements of the statute of conviction. This shift allows immigration judges to order deportation based on factual findings related to a crime that were never established in the criminal case.

Finally, Part V addresses possible objections to strengthening immigration law's presumption of innocence. The Article concludes that the time has come to rethink immigration law's missing presumption of innocence. Kevin Johnson has observed that "hypertechnical immigration laws still discriminate on the basis of race in ways that frequently are hidden or obscured."[58] By shedding light on how immigration law undermines a presumption of innocence, this Article reveals a concealed form of racial discrimination built into the statutory structure that has been reinforced by over a hundred years of case law.

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56. *See* 8 C.F.R. § 1240.8(a) (2021).

57. *See* § 1240.8(b)–(c).

58. Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 679 (2000) (footnote omitted).

I. LOST INNOCENCE IN IMMIGRATION LAW

A. THE MEANING OF "INNOCENCE"

In arguing for a presumption of innocence in immigration law, it is first necessary to explain what "innocence" means in this context. U.S. citizens who are mistakenly placed in immigration proceedings are both factually and legally innocent because they are lawfully present and cannot be deported. Hundreds of U.S. citizens are caught up in the immigration system each year, particularly men of Mexican descent.[59] Children and individuals with mental disabilities are also at heightened risk of being deported despite having U.S. citizenship.[60] A runaway teenager with a fake ID, a naturalized veteran whose name was misspelled in immigration documents, and a man who "confessed" to being Mexican after being threatened with imprisonment are among the countless U.S. citizens who have been wrongfully detained or deported.[61]

Additionally, thousands of lawful permanent residents (plus others who have temporary legal status) are placed in removal proceedings each year.[62] They, too, can be factually and/or legally innocent. They can be wrongly subjected to removal proceedings if the charged deportability or inadmissibility ground(s) turn out not to apply to them.[63] For example, they may not have engaged in the conduct that is the basis of a charged ground (a form of factual innocence);[64] they may fall under one of the many statutory exceptions to deportability and inadmissibility grounds that exist (a form of legal innocence);[65] or a conviction that triggered removal proceedings may turn out not to be a deportable offense when analyzed under the categorical approach, a method of determining whether a prior conviction fits within a category of crimes mentioned in the Immigration

59. *See* Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 567, 573–74 (2013); Jorge Gavilanes, *Mistaking U.S. Citizenship*, 28 BYU J. PUB. L. 257, 257 (2013); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 629 (2011).

60. Robertson, *supra* note 59, at 575.

61. *Id.* at 574, 577–78.

62. Although neither DHS nor the Executive Office for Immigration Review (EOIR) reports the number of lawful permanent residents placed in removal proceedings, we know that over 2,000 lawful permanent residents were granted cancellation of removal each year between FY 2014 and FY 2018, and over 300 lawful permanent residents were granted a special type of waiver called 212(c) relief during each of those years. *See* EOIR, U.S. DOJ, STATISTICS YEARBOOK: FISCAL YEAR 2018, at 32 tbl.18, https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/YQ2G-UNKC]. For each granted case, there are doubtless many more that were denied.

63. Legal permanent residents are usually charged with deportability, not inadmissibility, because they have been "admitted" as permanent residents. However, in certain situations defined by statute, they are treated as seeking admission to the United States and could therefore be charged with an inadmissibility ground. *See, e.g.*, INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

64. *See* NORTON TOOBY & JOSEPH JUSTIN ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS 33 (2005) (explaining that out of fifty-one different grounds of deportation, twenty-six "are based on status or 'conduct,' rather than on a criminal conviction or other finding of a court or administrative tribunal").

65. *See* INA § 237, 8 U.S.C. § 1227 (deportability); INA § 212, 8 U.S.C. § 1182 (inadmissibility).

and Nationality Act of 1952 (INA).[66] Another example of legal innocence is where the statutory provision under which the individual was charged turns out to be unconstitutionally vague, such as the INA's "crime of violence" deportability ground.[67] In criminal cases, the presumption of innocence "allocate[s] the risk" of erroneous decisions in favor of protecting innocent individuals.[68] The presumption's absence in immigration law, however, does the opposite, exposing lawfully present individuals to the risk of erroneous deportation.

But the concept of innocence in this Article is not limited to individuals with lawful status who are not deportable. For individuals who are not lawfully present, legal innocence takes on heightened importance. In the same way that criminal defendants with successful affirmative defenses are ultimately acquitted of a crime, noncitizens applying for some type of relief from removal—such as asylum, withholding of removal, protection under the Convention Against Torture, various types of cancellation of removal, adjustment of status, or waivers of inadmissibility grounds—may be "innocent" in the sense that their presence in the United States is ultimately justified and authorized.[69] By creating ways for certain people to legalize their status and remain in the United States, Congress has indicated that not everyone without legal status is culpable.[70] Just as criminal defendants who have been convicted of an offense may still be "innocent of their

66. Under the categorical approach, courts compare the elements of the statute of conviction to the federal generic definition of the offense. If the statute of conviction is broader than the federal generic definition, there is no categorical match, and the conviction does not count for immigration purposes. If the statute of conviction is divisible, meaning that it sets out different means of committing an offense, then courts apply the modified categorical approach, under which they can consult only a limited set of documents to determine the offense of conviction: the charges, judgment of conviction, guilty plea, plea transcript, and jury instructions. If this record does not conclusively establish that the noncitizen was convicted of the elements of the federal generic offense, then the court must conclude that the noncitizen was *not* convicted of the offense. *See generally* Mathis v. United States, 579 U.S. 500 (2016) (describing and applying categorical approach); Mellouli v. Lynch, 575 U.S. 798 (2015) (same); Descamps v. United States, 570 U.S. 254 (2013) (same).

67. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018) (holding that one part of the "crime of violence" definition in immigration law was unconstitutionally vague); *see also* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1132–33 (2016) (arguing for broader application of the void for vagueness doctrine to immigration laws).

68. *See* Ashworth, *supra* note 22, at 73; Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 414 n.422 (1990) (explaining that "[t]o focus only on the innocent is to misunderstand the purpose of the presumption of innocence" and that "[t]he criminal system can eliminate false convictions only if it presumes *all* defendants are innocent").

69. Some forms of relief are mandatory, meaning they must be granted if the person qualifies, such as withholding of removal and protection under the Convention Against Torture. *See* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (statutory withholding of removal); 8 C.F.R. §§ 208.16–.18, 1208.16–.18 (2022) (Convention Against Torture). The other forms of relief mentioned above are all ultimately discretionary. *See* INA § 208, 8 U.S.C. § 1158 (asylum); INA § 240A, 8 U.S.C. § 1229b (cancellation of removal); INA § 245, 8 U.S.C. § 1255 (adjustment of status); INA § 212(a)(9)(B)(v), (a)(9)(C)(iii), (d), (g)–(i), 8 U.S.C. § 1182(a)(9)(B)(v), (a)(9)(C)(iii), (d), (g)–(i) (waivers of inadmissibility).

70. *See* Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 92 (2020) ("The existence of waivers and exceptions shows that calibrations exist across and within inadmissibility and deportability grounds; this challenges the singular notion of 'illegals.' Collapsing all forms of unlawfulness into one category risks collapsing all undocumented immigrants into one monolithic entity, ignoring the diversity in their identity dimensions.").

sentence,"[71] individuals who are legally removable may still be eligible for relief from removal and therefore "innocent" of the penalty of deportation.

Removal hearings may also be continued, administratively closed, terminated, or dismissed to allow U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security (DHS) that is separate from the immigration courts, to adjudicate an application that is not within the immigration court's jurisdiction.[72] For example, U visas for victims of certain crimes, T visas for victims of human trafficking, Violence Against Women Act (VAWA) self-petitions for battered spouses and children, and family petitions all fall within this category.[73] Individuals filing these applications may also be viewed as "innocent" in the sense that Congress created paths for them to legalize their status, and an order of removal can often be avoided.

It is also important to keep in mind that countless people in removal proceedings may have a path to legal status but lack the information, financial resources, evidence, language skills, or legal representation needed to pursue an application. Professors Ingrid Eagly and Stephen Shafer have shown that access to counsel alone makes a dramatic difference in whether one seeks relief from removal and whether the application is granted.[74] Professor Eagly has also found that the format of the hearing—whether it is by video or in person—affects the likelihood of seeking relief, because a video hearing leads to "depressed engagement with the adversarial process."[75] Failing to seek relief from removal therefore does not necessarily mean that someone has no path to status.

In the same vein, the extent of "innocence" in immigration cases cannot be measured by the percentage of people who request voluntary deportation or stipulate to deportation. In addition to the obstacles to applying for relief discussed above, immigration agents have been known to act in coercive ways that pressure people to give up their cases and agree to removal.[76] Prolonged detention in

71. Litman, *supra* note 50, at 421.

72. USCIS is part of DHS, while the immigration courts are part of DOJ. *See About the Office*, U.S. DOJ: EXEC. OFF. FOR IMMIGR. REV. (May 18, 2022), https://www.justice.gov/eoir/about-office [https://perma.cc/5EWS-XY5Z].

73. *See* INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (U visas); INA § 101(a)(15)(T), 8 U.S.C. § 101(a)(15)(T) (T visas); INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (VAWA self-petitions). Special Rule Cancellation of Removal also provides a way for an immigration judge to grant permanent residency to an individual who was abused by a U.S. citizen or legal permanent resident spouse or parent, or is the parent of a child who has been so abused. *See* INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2). An immigration court can also grant discretionary waivers for certain grounds of inadmissibility and deportability available to battered spouses and children. *See* INA § 212(g)(1), 8 U.S.C. § 1182(g)(1).

74. *See* INGRID EAGLY & STEPHEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 19 fig.9, 20 fig.10 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/WC8W-A2ED] (analyzing data from 2007 to 2012 and finding that 78% of non-detained individuals with representation *applied for relief*, compared to only 15% of non-detained individuals who were unrepresented, and 60% of non-detained individuals with representation had their cases *terminated* or were *granted relief*, compared to 17% of non-detained individuals who were unrepresented).

75. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937–38 (2015).

76. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 533 (2013); JENNIFER LEE KOH, JAYASHRI SRIKANTIAH &

conditions often identical to criminal incarceration is also itself a significant deterrent to pursuing relief or appealing wrongful denials of applications.[77] In the criminal context, commentators have long realized that defendants have many incentives to take a plea besides being factually guilty of an offense.[78] Similarly, in the immigration context, individuals may agree to removal or voluntary departure even if they are not legally removable or have a path to lawful status.

Finally, it is important to realize that, apart from factual and legal innocence, there is the concept of normative innocence, which applies to individuals "who have violated the law as a formal matter but who have not violated basic tenets of morality."[79] Even individuals with no path to legal status may not be considered morally culpable based simply on their unauthorized presence in the United States. Children are perhaps the most obvious category of normatively innocent individuals. The Supreme Court recognized undocumented children as "innocent" long ago in *Plyler v. Doe*, which protected the right to a basic education.[80] The policy of Deferred Action for Childhood Arrivals (DACA) established by President Obama reflects a similar conception of innocence, creating a reprieve from removal for individuals who were brought to the United States as children.[81] Yet unaccompanied and unrepresented children are routinely placed in removal proceedings and deported.[82] One could also argue that various other categories of undocumented individuals are not morally blameworthy. These might include people who have not committed crimes, came to the United States to join their families, or are contributing to the U.S. economy. Although society may disagree about which categories of people are morally innocent, it is difficult to dispute that the gap between normative innocence and merciful outcomes looms large in immigration cases.

KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS 12 (2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf [https://perma.cc/2RJD-PZZ6].

77. *See* Singh v. Holder, 638 F.3d 1196, 1204 (9th Cir. 2011) (recognizing that respondents should not have to choose between "remaining in detention, potentially for years, or leaving the country and abandoning their challenges to removability even though they may have been improperly deemed removable").

78. *See, e.g.*, John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 89 (1977) (discussing the increasing attention on "institutional and personal pressures that induce defendants to plead guilty").

79. Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1882 (2019).

80. 457 U.S. 202, 224, 230 (1982) (striking down as unconstitutional a Texas law that denied undocumented children the right to a basic education).

81. Memorandum from Janet Napolitano, Sec'y, U.S. DHS, to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012) (available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/9WTQ-4RUR]).

82. *See* Erica Bryant, Alyssa Snider & Becca DiBennardo, *No Child Should Appear in Immigration Court Alone*, VERA (Jan. 28, 2022), https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone [https://perma.cc/JD94-PJP8] (analyzing data between 2005 and 2017 and finding that over 90% of unrepresented unaccompanied minors either were ordered removed or accepted voluntary departure).

Prosecutorial discretion policies are often considered a way to mitigate the harm inflicted by the immigration system on normatively innocent noncitizens.[83] While such policies can play a powerful role, they also have serious shortcomings: they vary substantially from one presidential administration to another; may face prolonged legal challenges;[84] and depend on the ability and willingness of U.S. Immigration and Customs Enforcement (ICE) attorneys to balance equities fairly.[85] Recognizing a presumption of innocence, on the other hand, impacts the structure of the immigration system in a way that is not as easily susceptible to political manipulation and does not depend on an adversarial party's discretionary decision to show mercy.

The complexity of the meaning of "innocence" in immigration matters makes it all the more important to think about how people end up in removal proceedings and who bears the burden of proof. Before turning to those discussions, however, the role of race and ethnicity in perceptions of innocence must be acknowledged. The following Sections examine racialized perceptions of guilt from a historical perspective as well as through contemporary empirical studies.

B. RACIALIZED PERCEPTIONS OF INNOCENCE AND GUILT

In an area of law like immigration, where the vast majority of respondents are people of color, it is critical to observe how the structure of the law may be shaped by racialized perceptions of guilt, as well as how the law reinforces such perceptions. This Section first argues that Chinese exclusion laws, which reversed or shifted burdens of proof, played a crucial role in shaping racialized perceptions of guilt in immigration law. The Section then provides a brief overview of contemporary studies showing persistent associations between people of color and guilt.

1. Racialized Origins of Reversed Burdens in Chinese Exclusion Cases

Racialized perceptions of guilt influenced the structure of immigration legislation from its earliest days. The Chinese exclusion laws of the late 1800s were among the earliest acts by Congress to regulate immigration. Those laws either assumed guilt or utilized burdens of proof and evidentiary standards to make it much harder for Chinese individuals to enter the United States or avoid deportation, even if they were citizens or had lawful residence.

One of the first restrictive immigration laws was the Page Act of 1875, which prohibited the immigration of laborers from "China, Japan, or any Oriental country" if they were deemed to be coming "for lewd and immoral purposes."[86] In

83. *See* Lee & Ashar, *supra* note 79, at 1902–03.

84. *See* Texas v. United States, No. 21-CV-00016, 2022 WL 2109204, at *2 (S.D. Tex. June 10, 2022) (vacating a prosecutorial discretion memorandum issued by DHS Secretary Alejandro Mayorkas), *cert. granted*, 143 S. Ct. 51 (July 21, 2022).

85. *Cf.* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655–57 (2010) (arguing that prosecutors are "ill-suited to adequately consider relevant equitable factors" when deciding whether to charge petty crimes).

86. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

practice, the Page Act ended the immigration of almost all women from China. If Chinese women were single or could not explain what occupation they intended to pursue in the United States, they were assumed to be prostitutes; no actual proof of prostitution was required.[87]

Presumptions of guilt continued under subsequent Chinese exclusion laws. The Geary Act of 1892, which extended the original Chinese Exclusion Act of 1882, required Chinese laborers who were already in the United States to apply for a "certificate of residence" within one year.[88] Under the Geary Act, a person of Chinese descent who was found in the United States without a certificate of residence was "deemed and adjudged to be unlawfully within the United States."[89] The only way to refute this presumption was to show that a certificate had not been procured "by reason of accident, sickness or other unavoidable cause" and to prove residence within the United States at the time that the Act was passed with the testimony of "at least one credible *white* witness."[90] As the Court noted in *Fong Yue Ting v. United States*, "[i]f no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default."[91]

The question of whether the government had any burden to prove that an individual was Chinese in these deportation proceedings was raised in the lower courts. A Sixth Circuit decision from 1904 was the first to address this issue.[92] There, the district court had treated the case as criminal and excluded the petitioner's admission that he was Chinese.[93] The district court had also excluded the testimony of government witnesses as lacking expertise in "the science of ethnology" and the "study of racial distinctions."[94] The Sixth Circuit reversed, holding that the case was civil and that the government had established that Hung Chang was Chinese based simply on "the distinguishing characteristics of the Chinese—such as the color, the mode of dressing the hair, the language, and the garb."[95] "It is a case of 'res ipsa loquitur,'" the court concluded: "*[t]he tribunal judges by looking at the person.*"[96]

On the heels of the Chinese exclusion laws came the Immigration Act of 1917, also known as the Asiatic Barred Zone Act.[97] This Act excluded "Oriental Asians" from a geographical area that extended from the Middle East to

87. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 699 (2005); *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 458–59 (2005).

88. Geary Act of 1892, ch. 60, § 6, 27 Stat. 25, 25–26 (repealed 1943).

89. *Id.*

90. *Id.* (emphasis added).

91. 149 U.S. 698, 729 (1893) (upholding the burden of proof and the requirement of having at least one white witness, reasoning that the legislature has the power to "prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government").

92. *See* United States v. Hung Chang, 134 F. 19, 23 (6th Cir. 1904).

93. *Id.* at 22.

94. *Id.* at 21.

95. *Id.* at 25–26, 28.

96. *Id.* at 27 (emphasis added).

97. Immigration Act of 1917, 39 Stat. 874 (repealed 1952).

Southeast Asia, with exceptions for people of certain occupations.[98] Not only did this Act reaffirm that "Chinese entering or found in the United States" had "the burden of proving [their] right to enter or remain,"[99] but it also addressed burdens of proof at the investigations stage. The Act specified that an immigration officer's application for an arrest warrant had to "state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, *and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some supporting evidence*."[100] Thus, evidence was generally required to support a warrant, but an exception was carved out for "Chinese" cases.

Because the Supreme Court had held that Chinese individuals born in the United States had birthright citizenship,[101] placing the burden of proof on persons of Chinese descent meant that even citizens could be deported unless they proved their citizenship. The burden in such cases stoked "much difference of opinion in the lower courts."[102] A Ninth Circuit decision from 1917 held that an individual of Chinese descent had failed to meet his burden of establishing citizenship, reasoning that if he had "been in Los Angeles 20 years it should have been entirely possible for him to produce witnesses *other than those of his own race*."[103] The Seventh Circuit, on the other hand, rejected placing the burden of proof on the person asserting citizenship, stating that "[n]o rule of evidence may fritter [the right to citizenship] away."[104] The Fifth Circuit agreed with the Seventh, criticizing the government for advancing nothing "but suspicion founded on race prejudice" yet still taking pains to note that the evidence of citizenship included the testimony of a "white man."[105]

In 1923, the Supreme Court considered a case involving a non-Chinese individual named Bilokumsky, who argued that the government had the burden of establishing alienage in the deportation proceeding and that the evidence of alienage in his case had been illegally procured.[106] The Court confirmed a racial disparity in applications of the burden of proof. Although it rejected Bilokumsky's argument about the admissibility of the evidence, the Court agreed that the burden of proving alienage in his case rested upon the government, noting that "the

98. *See* BUREAU OF IMMIGR. & U.S. DEP'T OF LAB., IMMIGRATION LAWS: RULES OF MAY 1, 1917, at 53–54 (7th ed. 1922), https://www.loc.gov/item/22019016/ (Rule 8: "Geographically Excluded Oriental Aliens").

99. Immigration Act of 1917, § 19, *reprinted in* BUREAU OF IMMIGR. & U.S. DEP'T OF LAB., *supra* note 98, at 21 & n.1.

100. BUREAU OF IMMIGR. & U.S. DEP'T OF LAB., *supra* note 98, at 81 (emphasis added) (Rule 22, Subdivision 3: "Application for warrant of arrest").

101. *See* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (recognizing that the U.S.-born son of Chinese parents was a citizen despite Chinese exclusion laws).

102. Ng Fung Ho v. White, 259 U.S. 276, 283 & n.1 (1922) (citing cases on both sides of the circuit split).

103. Wong Chung v. United States, 244 F. 410, 412 (9th Cir. 1917) (emphasis added).

104. Moy Suey v. United States, 147 F. 697, 698 (7th Cir. 1906).

105. Gee Cue Beng v. United States, 184 F. 383, 384–85 (5th Cir. 1911).

106. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923).

statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country *applies only to persons of the Chinese race*."[107] Reversed burdens of proof in immigration cases therefore have their roots in racist laws and are intimately intertwined with the United States' shameful history of Asian exclusion.

Chinese exclusion laws were not repealed until 1943.[108] Those sixty-eight years since the passage of the Page Act of 1875 shaped the federal judiciary's attitude toward reversed and shifting burdens in immigration cases, normalizing a low or nonexistent burden of proof on the government at both the investigation and trial stages. The internment of Japanese Americans during World War II further reinforced a racialized presumption of guilt that was again upheld by the Supreme Court.[109] Approximately 112,000 Japanese Americans, including 70,000 U.S. citizens, were exiled to internment camps without any criminal charges or individualized determinations of guilt.[110]

In 1952, when Congress finally codified all immigration and naturalization laws into one comprehensive statute, it retained a discriminatory national-origins quota system that grouped everyone from the "Asia-Pacific Triangle" under one quota.[111] This Act also provided that "[i]n any deportation proceeding . . . against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States . . . ."[112] If this burden was not sustained, the person was "presumed to be in the United States in violation of law."[113] Congress finally eliminated national origin quotas in the Immigration Act of 1965, but it did not change the burden of proof.[114] In 1996, Congress set forth a more nuanced system regarding the burden in removal proceedings in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which is still the standard today.[115] But, as explained further in Part III, the current

107. *Id.* (emphasis added) (referring to Rule 8 of the Immigration Act of 1917, which established the Asiatic Barred Zone); *see also id.* at 157 ("Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation.").

108. *See* Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

109. *See* Korematsu v. United States, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting) (describing Japanese internment as resulting from an "erroneous assumption of racial guilt"), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); *id.* at 243 (Jackson, J., dissenting) (criticizing the majority's decision on the basis that "guilt is personal and not inheritable").

110. *See id.* at 242 (Murphy, J., dissenting).

111. *See* Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, §§ 201–202, 66 Stat. 163, 175–78; *see also* 99 CONG. REC. 1517 (1953) (considering it "eminently fair and sound for visas to be allocated in a ratio which will admit a preponderance of immigrants who will be more readily assimilable because of the similarity of their cultural background to that of the principal components of our population").

112. McCarran-Walter Act § 291, 66 Stat. at 235. The burden of proof was likewise placed on individuals seeking admission or naturalization. *Id.* at 234–35 (admission); *id.* §§ 316, 318, 66 Stat. at 243–44 (naturalization).

113. *Id.* § 291, 66 Stat. at 235.

114. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also* 111 CONG. REC. 21792 (1965) (statement of Rep. John Brademas) ("[The Act] will repeal the Asia-Pacific triangle which has too long been an insult to those of oriental ancestry.").

115. Pub. L. 104-208, sec. 304, § 240(c), 110 Stat. 3009-546, 3009-591 to -592.

system still places the burden on large categories of noncitizens in removal proceedings. Outside of the removal context, immigration policies have also continued to undercut innocence based on race and ethnicity. The detention of hundreds of Arab and South Asian men post-9/11 on suspicion of terrorism,[116] as well as former President Trump's so-called "Muslim ban,"[117] exemplify such policies.

2. Reinforcing Racialized Perceptions of Guilt

Although Chinese exclusion laws were repealed eighty years ago, racialized perceptions of guilt persist to this day. Our immigration laws may have been scrubbed of overtly discriminatory language, but their power to perpetuate bias remains.[118] Numerous studies performed over the last several decades have shown that white Americans associate people of color with criminality and guilt. The absence of a presumption of innocence in immigration law both reflects and reinforces such associations.

Racialized perceptions of dangerousness, criminality, and guilt appear in different types of studies. Some studies have examined how we view ambiguous behavior. For example, experimental studies dating back to the 1970s and 1980s analyzed perceptions of Black and white figures who performed identical ambiguous acts; the Black figures were perceived as more threatening.[119] More recent studies by Justin Levinson and his colleagues have shed light on the racialized perception of guilt. One of these studies asked mock jurors to evaluate ambiguous evidence and found that they were more likely to consider ambiguous evidence an indication of guilt for darker skinned suspects than for lighter skinned suspects.[120] Another study that involved designing an implicit association test found

116. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295 (2002); *see also* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1114 (1998) (discussing the harsh treatment of noncitizens of color).

117. The ban, which had several iterations, excluded individuals from certain predominantly Muslim countries in the Middle East and Africa. *See generally* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019).

118. More recent amendments to the INA, such as the REAL ID Act of 2005, provide another example of how burdens of proof can be used to exclude certain groups. The REAL ID Act, enacted as a response to 9/11, added extremely broad definitions of a "terrorist organization" and "terrorist activity" and shifted the burden to the noncitizen to show "by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i); *see also* INA § 212(a)(3)(B)(iv)(IV)(cc), (V)(cc), (VI)(cc), 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc), (V)(cc), (VI)(cc) (all applying the shifted burden to various definitions of "engag[ing] in terrorist activity," including soliciting funds for a "terrorist organization" and providing "material support" to a "terrorist organization").

119. *See e.g.*, H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCH. 590, 590 (1980); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 590 (1976).

120. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337 (2010).

a significant association between Blacks and "Guilty" compared to whites and "Guilty."[121]

Studies have also examined racialized perceptions of violence and crime. As Anna Roberts has explained, "[W]hen defendants are African American, unconscious associations are invoked between their race and concepts such as violence, weaponry, hostility, aggression, immorality, and—most damning of all—criminal guilt."[122] Non-Hispanic white Americans rate Hispanics and Blacks as more "violence-prone" than non-Hispanic whites.[123] Additionally, non-Hispanic whites overestimate the proportion of crimes committed by Hispanics and Blacks.[124] Even as children, Black boys are perceived as less innocent than white boys of the same age.[125] Media images that portray Blacks and Hispanics as criminal and violent contribute to these associations.[126] Some might argue that Black and Hispanic individuals actually do commit more crimes than white individuals, but the evidence does not support this contention.[127] Higher rates of arrest and incarceration among certain groups does not mean those groups actually commit crimes at higher rates.[128] For example, "people of color are more likely to be arrested for drug-possession crime than white people who engage in the same

121. *See* Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 201–04 (2010).

122. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 838 (2016) (footnote omitted); *see also* Justin D. Levinson, G. Ben Cohen & Koichi Hioki, *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. REV. 225, 260–64 (2021) (describing research on implicit racial associations).

123. *See* Steven E. Barkan & Steven F. Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52 SOC. PROBS. 300, 307 tbl.1 (2005) (finding that, on average, non-Hispanic whites rated their own group as 3.70 on a scale from 1 to 7, with 7 being the most prone to violence, while they rated Hispanics at 4.20 and Blacks at 4.48).

124. *See* Justin T. Pickett, Ted Chiricos, Kristin M. Golden & Marc Gertz, *Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites' Perceptions of Victimization Risk: Do Racial Stereotypes Matter?*, 50 CRIMINOLOGY 145, 160 tbl.2 (2012); Kelly Welch, Allison Ann Payne, Ted Chiricos & Marc Gertz, *The Typification of Hispanics as Criminals and Support for Punitive Crime Control Policies*, 40 SOC. SCI. RSCH. 822, 827 (2011) (finding that survey respondents estimated that Hispanics commit 27% of violent crimes even though they comprised only 14% of the general population and 17% of the prison population that year); Ted Chiricos, Kelly Welch & Marc Gertz, *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359, 370 (2004).

125. *See* Phillip Atiba Goff, Matthew Christian Jackson, Brooke Alison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PYSCH. 526, 529 (2014).

126. *See* Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 97–103 (2008).

127. *See* Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 524–25 (2009) ("Although there are data showing correlations between arrest rates and race, and incarceration rates and race," no data demonstrate "either a general or a circumstantial correlation between race and crime." (internal quotation marks omitted)).

128. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 628 (2014) (arguing that criminal law and procedure are "tools for socially regulating certain populations over time, as opposed to punishing individual instances of lawbreaking"); Alexandra Natapoff, *Misdemeanors*, *in* 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 71,

behavior, in part because of biased policing practices and in part because such crimes, when committed by poorer individuals, are more likely to be publicly observable."[129] A white person who is arrested for an offense may also be less likely to be prosecuted, convicted, or incarcerated due to perceived innocence.[130]

Increasingly, scholars examining racial disparities in the criminal system have recognized that racial disadvantage is cumulative.[131] Racial and ethnic disparities may be subtle at a single decision point in the criminal process, but they become much more pronounced when multiple decision points—such as pretrial detention, bail, dismissal, adjudication, and sentencing—are considered cumulatively.[132] Similarly, in thinking about the impact of race and ethnicity on perceptions of innocence in the immigration system, it is important to consider multiple decision points.

As explained in Parts II and III below, the U.S. immigration enforcement system impedes innocence at multiple points in the process. People are detained and questioned based partly or solely on race; search and seizure requirements are circumvented without any consequences; and decisions about detention, removal, and even the impact of post-conviction relief are often based on reversed or shifting burdens. By capturing the erosion of the presumption of innocence at each of these decision points, this Article highlights the cumulative disadvantage that the immigration system inflicts on predominantly Black and brown individuals.

II. IMPAIRING INNOCENCE IN IMMIGRATION INVESTIGATIONS

The erosion of the presumption of innocence begins long before removal proceedings are initiated. At the investigations stage, requiring the government to have individualized reasonable suspicion before stopping someone is supposed to prevent arbitrary interference with an individual's liberty. Before the intrusion

72 (Erik Luna ed., 2017) (explaining how race- and class-skewed arrest practices impoverish working people and the poor).

129. Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 148 (2021); *see also* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769–70 (2018) (finding that "black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and 'other offenses'").

130. *See, e.g.*, Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 527 (2009) ("When Blacks are unfairly 'taxed' in the criminal system with perceived criminality, Whites receive an undeserved 'credit' with a perceived innocence or worthiness of redemption.").

131. *See, e.g.*, Marisa Omori, *"Nickel and Dimed" for Drug Crime: Unpacking the Process of Cumulative Racial Inequality*, 60 SOCIO. Q. 287, 306 (2019); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 697 (2010).

132. *See, e.g.*, Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 515 (2014); Lisa Stolzenberg, Stewart J. D'Alessio & David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275, 279 (2013); Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Preadjudication Detention Matters*, 47 J. RSCH. CRIME & DELINQ. 391, 392–93 (2010).

becomes more extreme through an arrest or search, the government is expected to satisfy heightened probable cause and warrant requirements. However, as explained below, these requirements are greatly distilled in the immigration context. Three seminal Supreme Court cases that undercut the reasonable suspicion requirement use language ignoring the very existence of factual innocence. Additionally, watered-down warrant and interrogation requirements, combined with the Supreme Court's refusal in *INS v. Lopez-Mendoza* to apply the exclusionary rule in immigration cases, make it much harder to establish legal innocence.

A. IGNORING FACTUAL INNOCENCE IN INTERPRETING REASONABLE SUSPICION

While reasonable suspicion of *criminal* conduct is required for a stop-and-frisk by police, immigration officials must have reasonable suspicion that someone is "illegally in the United States" or has "engaged in an offense against the United States" in order to "briefly detain the person for questioning."[133] The information obtained through this questioning "may provide the basis for a subsequent arrest."[134] But the Supreme Court's willingness to tolerate intrusive and coercive questioning by immigration officials without any individualized suspicion has aided the arbitrary exercise of government power and eroded any presumption of innocence.

In three seminal Supreme Court cases addressing whether immigration officials must have reasonable suspicion of unlawful presence before engaging in certain intrusive acts, the Court showed minimal concern for protecting innocent individuals.[135] This Article offers a few reasons why innocence became invisible in these decisions. First, the Court grew so mesmerized by the sheer scale of undocumented immigration that it completely lost sight of individuals with potentially legal status. Second, the Court imagined "lawful" travelers to be white U.S. citizens who would not experience stress or fear in response to intrusive actions by immigration officials. Third, the Court racialized unauthorized status as "Mexican," thereby making it harder to see the millions of lawfully present Mexicans in the United States and to imagine how they might experience being stopped and questioned.

In *United States v. Brignoni-Ponce*, the Supreme Court held that race or ethnicity can be a factor that helps establish reasonable suspicion for the Border Patrol to stop a vehicle, although it cannot be the only factor.[136] In reaching this conclusion, the Court focused on the "10 or 12 million aliens illegally in the country"

133. 8 C.F.R. § 287.8(b)(2) (2021). The Ninth Circuit has held that the regulation's reasonable suspicion requirement "'was intended to reflect constitutional restrictions on the ability of immigration officials to interrogate and detain persons in this country,' thereby providing at least as much protection as the Fourth Amendment." Perez Cruz v. Barr, 926 F.3d 1128, 1137 (9th Cir. 2019) (quoting Sanchez v. Sessions, 904 F.3d 643, 651 (9th Cir. 2018)).

134. § 287.8(b)(3).

135. Immigr. & Naturalization Serv. v. Delgado, 466 U.S. 210 (1984); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

136. 422 U.S. at 884–87.

and "the public interest" in "effective measures to prevent the illegal entry of aliens at the Mexican border."[137] The Court also made negative generalizations about "these aliens," claiming that they "create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services."[138] Justice Douglas's concurrence, by contrast, recognized the harm to innocent individuals, but even he only mentioned the impact on "law-abiding *citizens*."[139] The need to protect innocent noncitizens was not foremost on his mind.

One year after deciding *Brignoni-Ponce*, the Court issued its decision in *United States v. Martinez-Fuerte*, which addressed the referral of motorists to secondary inspections at routine Border Patrol checkpoints.[140] There, the Court effectively eliminated the need for individualized reasonable suspicion, upholding the constitutionality of referrals to secondary inspection "*made largely on the basis of apparent Mexican ancestry*."[141] Once again, the Court stressed that "large numbers of aliens seek illegally to enter or to remain in the United States," adding that an estimated "85% of the illegal immigrants are from Mexico."[142] In analyzing the level of intrusion caused by the fixed checkpoint, the Court appeared to imagine "lawful travelers" as non-Hispanic whites, surmising that the checkpoint would not generate "concern or even fright."[143] The Court completely failed to appreciate how lawfully present Hispanics might experience fear and stress due to racial profiling, despite their legal status.

Writing in dissent, Justice Brennan, joined by Justice Marshall, pointed out that the "motorist whose conduct has been nothing but innocent" would "surely resent[] his own detention and inspection."[144] The dissent recognized that the Court's holding would leave immigration officials free to "target motorists of Mexican appearance," resulting in "discriminat[ion] against citizens of Mexican ancestry and Mexican aliens lawfully in this country."[145] The dissent also realized that the "delay and humiliation of detention and interrogation" would be "particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien."[146]

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137. *Id.* at 878.

138. *Id.* at 878–79.

139. *Id.* at 889–90 (Douglas, J., concurring in judgment) (emphasis added). In criticizing the Ninth Circuit's decision in *United States v. Bugarin-Casas*, 484 F.2d 853, 855 (9th Cir. 1973), which found that "riding low" contributed to reasonable suspicion for Border Patrol officers to stop the vehicle, Justice Douglas wrote: "The vacationer whose car is weighted down with luggage will find no comfort in these decisions; nor will the many *law-abiding citizens* who drive older vehicles that ride low because their suspension systems are old or in disrepair." 422 U.S. at 889–90 (emphasis added).

140. 428 U.S. 543 (1976).

141. *Id.* at 563 (emphasis added).

142. *Id.* at 551.

143. *Id.* at 558.

144. *Id.* at 571 (Brennan, J., dissenting).

145. *Id.* at 572.

146. *Id.* at 573.

Eight years later, in *INS v. Delgado*, the Supreme Court once again ignored the need to protect innocent individuals from intrusive investigations.[147] That case involved multiple factory sweeps, where a large number of armed immigration agents unexpectedly surrounded and entered garment factories in the Los Angeles area in search of undocumented workers.[148] They blocked the exits, systematically walked down the aisles of workers demanding to see documents, and removed people in handcuffs.[149] The agents had freely admitted that they "did not selectively question persons . . . on the basis of any reasonable suspicion that the persons were illegal aliens."[150] Yet the Supreme Court found no constitutional violation, holding that individualized reasonable suspicion was not required. The Court reached this conclusion by providing a sanitized description of the facts that pretended the workers were free to go about their business.[151]

Justice Brennan and Justice Marshall once again dissented, referring to the majority's characterization of the facts as sheer "fantasy."[152] The dissent noted that the "clear majority" of the workers were "lawful" and were subjected to the same "surprise questioning under intimidating circumstances by INS agents who have no reasonable basis for suspecting that they have done anything wrong."[153] Because of the need "to protect both American citizens and lawful resident aliens," the dissent believed that immigration enforcement efforts should be tailored "to focus only on those workers who are reasonably suspected of being illegal aliens."[154] The dissent lamented that the Court had "become so mesmerized by the magnitude of the [undocumented immigration] problem" that it "too easily allowed Fourth Amendment freedoms to be sacrificed."[155]

Lower courts are still struggling to define the circumstances where racial appearance is a permissible factor in an investigative stop by immigration officials. The Fifth Circuit has held, for example, that Latino appearance cannot help establish reasonable suspicion in places with a large Latino population.[156] But subsequent cases arising within the Fifth Circuit indicate that Border Patrol officers continue to argue that relying on racial appearance is permissible under *Brignoni-Ponce*.[157] Similarly, the Ninth Circuit has held that officers should not

147. 466 U.S. 210 (1984).

148. *Id.* at 212.

149. *Id.* at 229–30 (Brennan, J., concurring in part and dissenting in part).

150. *Id.* at 233.

151. *See id.* at 212–13 (majority opinion) ("During the survey, employees continued with their work and were free to walk around within the factory.").

152. *Id.* at 229 (Brennan, J., concurring in part and dissenting in part).

153. *Id.* at 233–34.

154. *Id.* at 235.

155. *Id.* at 239–40.

156. *See* United States v. Orona-Sanchez, 648 F.2d 1039, 1042 (5th Cir. 1981) ("Nor is there anything vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic.").

157. *See, e.g.*, United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 835–36 (W.D. Tex. 1999).

consider Hispanic appearance in areas with a "vast Hispanic populace,"[158] but the court has permitted Latino appearance to be a factor in an area with a sparse Hispanic population.[159] These cases leave unanswered questions about where the line is (or should be) drawn for considering race as a factor in immigration stops.

The Supreme Court decisions discussed above, combined with the dearth of lower court decisions constraining the use of race/ethnicity as a factor, facilitate racial profiling in immigration stops. Permitting immigration stops based partly or entirely on race/ethnicity undercuts the role that the reasonable suspicion standard is meant to play in protecting a presumption of innocence by acting as a check on unbridled government power.[160] Ignoring millions of lawfully present individuals of Mexican descent also perpetuates the explicit or implicit bias that certain groups will never be truly American.[161]

As the interference with individual liberty increases from stops to searches, seizures, and interrogations, the erosion of innocence continues.

B. STIFLING LEGAL INNOCENCE BY REJECTING THE EXCLUSIONARY RULE

In criminal proceedings, "[a]s modern standards emerged and burdens of production and persuasion shifted from the accused to the accuser, evidence of factual innocence became increasingly irrelevant."[162] Legal innocence—defined by "proof of legal guilt or its absence"—has replaced factual innocence as the relevant question.[163] Procedural issues, such as whether evidence should be suppressed, are highly relevant to legal innocence because without such evidence, the government may be unable to meet its burden of proof.[164] However, in *INS v.*

158. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc); *see also* United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992) (noting that thousands of law-abiding drivers on Southern California highways have a Hispanic appearance).

159. *See* United States v. Manzo-Jurado, 457 F.3d 928, 935 & n.6, 940 (9th Cir. 2006) (limiting the holding of *Montero-Camargo* to places "heavily populated" by Hispanics but finding that appearance, ethnicity, or inability to speak English did not alone establish reasonable suspicion of unlawful presence).

160. *See, e.g.*, CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA (2010) (arguing that racial profiling undermines a presumption of innocence).

161. *See* Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 157 (2012) (discussing studies in implicit social cognition that "reveal a very consistent and robust association between American identity and whiteness" (internal quotation marks omitted)); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCH. 447, 453 (2005); *see also* Thierry Devos & Leakhena Heng, *Whites Are Granted the American Identity More Swiftly than Asians: Disentangling the Role of Automatic and Controlled Processes*, 40 SOC. PSYCH. 192, 199 (2009) (corroborating the "American = White" effect); FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 266 (rev. ed. 2006) (explaining that approximately one million Mexicans were involuntarily "repatriated" during the 1930s, and estimating that 60% of them were U.S. citizens of Mexican descent).

162. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 (1995).

163. *Id.* at 332.

164. *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 367 (2011); Barkai, *supra* note 78, at 99 ("Through policy decisions to employ such concepts as the presumption of innocence, reasonable doubt, burden of proof, and the exclusionary rules of evidence, the criminal justice system has

Lopez-Mendoza, the Supreme Court refused to apply the exclusionary rule to immigration cases.[165] This means that even if reasonable suspicion, probable cause, and warrant requirements are violated, there is no real consequence, further undermining a presumption of innocence at the investigation stage.[166]

1. Constitutionally Suspect Warrants, Arrests, and Interrogations

In criminal cases, the judiciary alone is authorized to decide whether probable cause exists for a warrant to arrest an individual or to conduct a search, but immigration-related arrests normally require only an administrative warrant issued by ICE.[167] These warrants "are neither issued by a judge nor based on sworn testimony, and the statute and regulation that mention these warrants identify *no standard of proof* for their issuance."[168] As Christopher Lasch has argued, "The lack of judicial and constitutional safeguards for administrative arrest warrants arguably render[s] the federal government's reliance on them constitutionally suspect."[169]

Despite the low bar for obtaining an administrative warrant, ICE frequently engages in warrantless arrests, invoking exceptions to the warrant requirement. One commonly invoked exception applies if the officer has "reason to believe" that the person is in the United States unlawfully and is likely to escape before a warrant can be obtained.[170] Courts have interpreted the "reason to believe" standard for warrantless immigration arrests to be the equivalent of "probable cause" in the criminal context.[171] But courts remain reluctant to examine this prong of the test with any rigor, making it easy for immigration officers to later argue that an individual was likely to escape.[172]

In factory sweeps, ICE agents typically enter with a search warrant to look for records and then arrest dozens of workers in the process.[173] ICE has also been

been designed to ensure that as many factually innocent defendants as possible will be protected from conviction, even though those policy decisions result in some factually guilty defendants being found legally innocent.").

165. 468 U.S. 1032 (1984).

166. *See* INA § 287(a)(1)–(5), 8 U.S.C. § 1357(a)(1)–(5) (powers without warrant); 8 C.F.R. § 287.8 (2021) (standards for enforcement activities).

167. *See* Lasch et al., *supra* note 48, at 1728–29; 8 C.F.R. § 287.5(e) (2021) (power and authority to execute warrants); INA § 236(a), 8 U.S.C. § 1226(a).

168. Lasch et al., *supra* note 48 (emphasis added). Professor Lasch notes that "[u]ntil March 2017, DHS did not even require ICE officials to obtain an administrative warrant before issuing a detainer." *Id.* at 1743.

169. *Id.* at 1743.

170. INA § 287(a)(2), 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.8(c)(2).

171. *See, e.g.*, Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015); Tejada-Mata v. Immigr. & Naturalization Serv., 626 F.2d 721, 725 (9th Cir. 1980); Au Yi Lau v. Immigr. & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971).

172. *See, e.g.*, Contreras v. United States, 672 F.2d 307, 308 (2d Cir. 1982) ("Because of the difficulty of making an on-the-spot determination as to the likelihood of escape without any opportunity to verify information provided or to conduct a full-scale interview, 'an [INS] officer's determination will not be upset if there is any reasonable basis for it.'" (alteration in original) (quoting Marquez v. Kiley, 436 F. Supp. 100, 108 (S.D.N.Y. 1977))).

173. For example, a lawsuit regarding a 2018 raid of a meatpacking plant in Tennessee alleged that ICE agents entered with a warrant targeted at the plant's owner for suspected financial crimes but had

accused of arresting people without warrants pursuant to pretextual traffic stops or random sweeps in Hispanic communities.[174] A settlement reached in 2022 required ICE to send out a national policy on warrantless arrests, clarifying that agents must consider not only if there is probable cause that an individual is living in the United States without legal status but also if the person is likely to escape.[175] The settlement may not change the practice of immigration agents, however, because at least two circuit courts have held that failing to obtain a warrant without having reason to believe an immigrant is likely to escape does not justify suppressing evidence gained during the arrest.[176]

Even in the home, where Fourth Amendment protections are supposedly at their peak, immigration agents are able to arrest individuals without warrants or probable cause. When ICE agents go to a home with an arrest warrant for a particular individual, they ask about other occupants, corral them together, and demand identification.[177] As Kate Evans has noted, "Typically, residents do give ICE officers identification, which often reveals their immigration status, or they concede that they do not have legal authority to be in the United States in response to agents' questions."[178]

ICE also relies on its authority to conduct a "protective sweep" after entering a home. The Supreme Court has permitted police to do a "protective sweep" after making a lawful arrest in order to look in areas where someone could be hiding but only if the officer has reasonable suspicion that someone else is present and poses a danger.[179] Similarly, a protective sweep by immigration officers is only justified by "articulable facts warranting a reasonable belief there is a person posing a danger to officers [or] others on the scene."[180] But immigration agents use this power to question the legal status of any occupants they encounter; those

plans to arrest and detain "Hispanic workers." Suzanne Monyak, *Latino Workers May Proceed with Suit over ICE Raid*, CQ ROLL CALL (Aug. 12, 2022), 2022 WL 3333824. That raid resulted in the arrest of 104 Latino workers, including some who had legal status. *Id.*

174. Suzanne Monyak, *Settlement Requires ICE to Reissue Policy on Traffic Stop Arrests*, CQ ROLL CALL (Feb. 9, 2022), 2022 WL 392402.

175. *Id.*

176. *See* United States v. De La Cruz, 835 F.3d 1, 6 (1st Cir. 2016) ("[T]he failure to obtain an administrative arrest warrant as contemplated by 8 U.S.C. § 1357 [INA § 287], without more, does not justify the suppression of evidence."); United States v. Abdi, 463 F.3d 547, 556–57 (6th Cir. 2006) (reasoning that "nothing in the text of 8 U.S.C. § 1357 [INA § 287] provides an independent statutory remedy of suppression for failing to obtain an administrative warrant").

177. Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 520 (2011); Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1120 (2008).

178. Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 594 (2009) (arguing that residents in the household are illegally seized when ICE agents have no reason to suspect that they are in violation of immigration laws, rendering consent to answer questions invalid).

179. Maryland v. Buie, 494 U.S. 325, 334–36 (1990).

180. U.S. IMMIGR. & CUSTOMS ENF'T, ICE ACADEMY: ICE FOURTH AMENDMENT AND POLICY REFRESHER (2014), https://www.documentcloud.org/documents/4597717-Fourth-Amendment-Refresher.html [https://perma.cc/22HL-M2FX].

who refuse to answer or who are unable to demonstrate legal status may be deemed a flight risk and arrested without a warrant.[181]

Once an individual is arrested by immigration officials, *Miranda* warnings normally are not provided prior to questioning.[182] In *Miranda v. Arizona*, the Court stressed that the purpose of the right to remain silent and of the privilege against self-incrimination is to "require the government 'to shoulder the entire load'" and "produce the evidence against [the suspect] by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the suspect's] own mouth."[183] A failure to provide *Miranda* warnings renders statements made during a custodial interrogation inadmissible in a criminal trial.[184]

Because *Miranda* warnings are required before asking a question that is "reasonably likely to elicit an incriminating response,"[185] they may be necessary even in a civil investigation that could lead to a criminal investigation.[186] The Court's decision in *Mathis v. United States*, which required *Miranda* warnings to be given in a civil tax investigation,[187] is highly relevant to individuals questioned about their immigration status, because answers to questions about their nationality or place of birth can lead to criminal prosecution for immigration-related offenses,

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181. *See* Min K. Kam, Note, *ICE Ruses: From Deception to Deportation*, 122 COLUM. L. REV. 125, 155 (2022).

182. *See* Miranda v. Arizona, 384 U.S. 436, 471–73 (1966) (requiring certain warnings to be given before a suspect in custody is interrogated); *see also supra* note 43 and accompanying text; *infra* note 185 and accompanying text. Some courts have concluded that questioning by ICE does not constitute "interrogation." *See, e.g.*, United States v. Sanchez-Velasco, 956 F.3d 576, 582–83 (8th Cir. 2020) (concluding that routine biographical questioning of defendant while he was in custody at an ICE facility, after having been arrested for being unlawfully present in United States, was not "interrogation" for *Miranda* purposes, because the officer could not have known his questions were likely to elicit incriminating information regarding criminal charges eventually brought against defendant); Malhotra, *supra* note 47, at 294–302 (discussing "a circuit split on whether questioning detained suspects in dual civil-criminal immigration inquiries constitutes interrogation"). Courts have also generally excluded questioning by Customs and Border Protection (CBP) officers at the border and at fixed immigration checkpoints from *Miranda* requirements. *See, e.g.*, United States v. FNU LNU, 653 F.3d 144, 154–55 (2d Cir. 2011) (concluding that defendant was not in custody for *Miranda* purposes when questioned by CBP officer); United States v. Medina-Villa, 567 F.3d 507, 509–10, 520 (9th Cir. 2009) (concluding that defendant was not in custody even though border patrol agent prevented him from leaving the parking lot by blocking his car, approached with his gun drawn, and interrogated him about his immigration status); United States v. Kiam, 432 F.3d 524, 529 (3d Cir. 2006) ("While an alien is unquestionably in 'custody' until he is admitted to the country, normal *Miranda* rules simply cannot apply to this unique situation at the border."); United States v. Ozuna, 170 F.3d 654, 659 (6th Cir. 1999) (concluding that defendant was not in "custody" during one-hour questioning by immigration and customs officers at the border so *Miranda* warnings were not required).

183. 384 U.S. at 460; *see also* Quinn v. United States, 349 U.S. 155, 161–62 (1955) (describing the privilege against self-incrimination as "'a protection to the innocent . . . and a safeguard against heedless, unfounded or tyrannical prosecutions'" (quoting Twining v. New Jersey, 211 U.S. 78, 91 (1908), *abrogated on other grounds*, Malloy v. Hogan, 378 U.S. 1 (1964))).

184. *Miranda*, 384 U.S. at 492.

185. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

186. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (holding that the Fifth Amendment's privilege against self-incrimination allows an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings").

187. 391 U.S. 1, 4 (1968).

such as illegal entry and illegal reentry, which account for a majority of immigration convictions.[188] Nevertheless, courts have not extended *Miranda* to the immigration context.[189] As Professors Linus Chan and Tania Valdez have observed, admissions about alienage or legal status made during interrogations by immigration officials, police, or jail staff, without any warning about the right to remain silent, are routinely admitted in immigration court as evidence supporting the factual allegations and charges.[190]

2. No Suppression Remedy

Despite all of the concerns discussed above, illegally obtained evidence is not suppressed in immigration cases. In *INS v. Lopez-Mendoza*, the Supreme Court held that the exclusionary rule does not apply to removal proceedings and recognized possible exceptions only in cases involving "egregious" or "widespread" abuses.[191] Those exceptions, however, have rarely been applied,[192] and one circuit court (the Fifth Circuit) does not even recognize them.[193] Although commentators and litigants continue to make arguments based on these exceptions, there has been little success so far in such litigation.[194]

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188. *See* Malhotra, *supra* note 47, at 305–06; Chan, *supra* note 47, at 314; Valdez, *supra* note 34, at 1375 (arguing that "it is realistic to expect prosecution of federal immigration-related crimes if the five-year statute of limitations has not expired" and citing relevant data).

189. *See, e.g.*, Bustos-Torres v. Immigr. & Naturalization Serv., 898 F.2d 1053, 1056–57 (5th Cir. 1990) (holding that a failure to provide *Miranda* warnings results in the exclusion of any admissions by a noncitizen in a criminal trial but not a removal proceeding); Strantzalis v. Immigr. & Naturalization Serv., 465 F.2d 1016, 1018 (3d Cir. 1972).

190. Chan, *supra* note 47, at 293–94; Valdez, *supra* note 34, at 1375. DHS relies on such admissions to complete Form I-213 ("Record of Deportable/Inadmissible Alien") and to prepare the Notice to Appear, which is the charging document that initiates removal proceedings. If the respondent denies the charges in immigration court, DHS normally submits Form I-213 to substantiate the charges. *See* Valdez, *supra* note 34, at 1377–78.

191. 468 U.S. 1032, 1050–51 (1984) (plurality opinion) ("We hold that evidence derived from [peaceful arrests by INS officers] need not be suppressed in an INS civil deportation hearing.").

192. *See, e.g.*, Yanez-Marquez v. Lynch, 789 F.3d 434, 469–72 (4th Cir. 2015) (holding that a violation was not sufficiently egregious to merit suppression even when a warrant was executed during the nighttime, outside of the stated time limitations on the warrant, and immigration agents entered the home with guns drawn and pointed at the residents); Maldonado v. Holder, 763 F.3d 155, 159 (2d Cir. 2014) (stating that the egregiousness standard is "rarely satisfied"); Kandamar v. Gonzales, 464 F.3d 65, 70 (1st Cir. 2006) (observing that *Lopez-Mendoza* provides "only a 'glimmer of hope of suppression'" (quoting Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22 (1st Cir. 2004))); *cf.* United States v. Adams, 740 F.3d 40, 43 (1st Cir. 2014) ("The cases in which the Supreme Court has approved a suppression remedy for statutory violations are hen's-teeth rare . . . ."); Martinez Carcamo v. Holder, 713 F.3d 916, 923 (8th Cir. 2013) (finding that warrantless entry of a home without residents' consent was not sufficiently egregious to warrant exclusion of evidence).

193. *See* United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) (affirming the continued vitality of *United States v. Pineda-Chinchilla*, 712 F.2d 942 (5th Cir. 1983), even after *Lopez-Mendoza*).

194. *See supra* note 192; *see also* Stella Burch Elias, Note, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1113 (2008) (arguing that constitutional violations by immigration officers have become widespread but "[c]ourts of appeal have largely ignored the first, 'widespread violation' prong . . . of the *Lopez-Mendoza* holding"). *But see* Zuniga-Perez v. Sessions, 897 F.3d 114,

The blow dealt by *Lopez-Mendoza* falls most harshly on the millions of undocumented individuals who have not had prior contact with the immigration system or law enforcement. In removing these individuals, the government relies primarily on admissions of alienage.[195] Suppressing those admissions, if unlawfully obtained, could make a significant difference in establishing legal innocence. The Supreme Court failed to recognize the implications of its decision for this group, reasoning that the government could rely on "evidence gathered independently of, or sufficiently attenuated from, the original arrest."[196] Although that rationale may be relevant to individuals who entered the United States lawfully or who are already in government databases for another reason, such as a prior arrest, this rationale would not apply to the millions of undocumented individuals about whom the government has no independent information.[197]

While failing to grasp the impact of its decision on undocumented individuals, *Lopez-Mendoza* also rendered lawfully present individuals invisible by focusing on the so-called "crime" of unlawful presence.[198] The Court reasoned that applying the exclusionary rule would permit a "continuing violation" of immigration laws.[199] At that time, two circuit courts had already rejected the notion that certain immigration-related crimes, such as entering the United States unlawfully and eluding inspection by immigration officers, were continuing violations.[200] But even if the continuing violation rationale did apply to unlawfully present individuals, it would not apply to the thousands of lawful permanent residents and those with temporary legal status who are placed in removal proceedings each year.[201]

In order to justify eviscerating a rule that plays a prominent role in criminal proceedings, the Court also suggested that nearly everyone in the immigration system is guilty. Specifically, the Court stated that "[o]ver 97.5% [of respondents] apparently agree to voluntary deportation without a formal hearing" and that "very few challenge the circumstances of their arrests."[202] Writing in dissent,

119 (2d Cir. 2018) (overruling an immigration judge's denial of petitioners' motion to suppress evidence because they "made a sufficient showing of an egregious constitutional violation").

195. *See* Chan, *supra* note 47, at 293–94; Valdez, *supra* note 34, at 1375–78.

196. *Lopez-Mendoza*, 468 U.S. at 1043.

197. *See* Chan, *supra* note 47, at 293.

198. *See* 468 U.S. at 1046; *see also id.* at 1050 (finding that "application of the exclusionary rule in cases such as Sandoval-Sanchez'[s], would compel the courts to release from custody persons who would then immediately *resume their commission of a crime through their continuing, unlawful presen*ce in this country" (emphasis added)). While federal law criminalizes unlawful *entry* and *reentry*, INA §§ 275–276, 8 U.S.C. §§ 1325–1326, unlawful *presence* itself is only a civil violation, not a crime. *See* Arizona v. United States, 567 U.S. 387, 407 (2012).

199. *Lopez-Mendoza*, 468 U.S. at 1039.

200. *See* United States v. DiSantillo, 615 F.2d 128, 134–37 (3d Cir. 1980); United States v. Rincon-Jimenez, 595 F.2d 1192, 1193–94 (9th Cir. 1979). *But cf.* United States v. Cores, 356 U.S. 405, 405–06 (1958) (holding that the offense of being an "alien crewman who willfully remains in the United States" after the expiration of a conditional permit is a continuing violation). For a discussion of why unlawful presence should not be conceptualized as a continuing violation, see Kim, *supra* note 70, at 134–39.

201. *See supra* note 62.

202. *Lopez-Mendoza*, 468 U.S. at 1044.

Justice White pointed out that most criminal defendants take pleas, but that has never justified eliminating their procedural rights.[203] He was gravely troubled by the majority's failure to consider the impact of its decision on people "legally in the country."[204] Although the deterrence value of the exclusionary rule is debatable,[205] its absence in immigration cases reinforces assumptions of removability and eases the government's task of meeting the burden of proof in cases where it bears the burden.[206]

In sum, long before decisions are made about detention and deportation, any presumption of innocence has already withered. Weak reasonable suspicion, warrant, and interrogation requirements allow the government to arbitrarily interfere in an individual's liberty and obtain admissions of alienage that can be used against them in court. But that is not all. As explained below, reversed and shifting burdens of proof during custody determinations and at trial further undercut any presumption of innocence.

III. IMMIGRATION LAW'S BURDENS: DETENTION, REMOVAL, AND POST-CONVICTION RELIEF

The burden of proof is the concept most closely connected to a presumption of innocence. In criminal cases, the government always bears the burden of proving each element of the charged offense.[207] Criminal defendants normally bear the burden of proof only for affirmative defenses.[208] Similarly, in civil litigation, the "ordinary default rule" is that the plaintiff bears the burden of proving the

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203. *See id.* at 1054 (White, J., dissenting).

204. *See id.* at 1055.

205. *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (using behavioral and motivational theory to argue that the exclusionary rule does not deter police misconduct and may even make it worse).

206. *But see* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 633–34 (2011) (arguing that, even when evidence is excluded, "jurors are still giving prosecutors the benefit of evidence they were not allowed to use," which functions as "a means of lowering the prosecution's burden of proof"). Although the same concept applies to incriminating evidence, connections between exclusionary rules and burdens of proof are often more obvious when exculpatory evidence is at issue. *See, e.g.*, Thomas Webster, *The End Justifies the Means*? Montana v. Egelhoff *Intoxicates the Right to Present a Defense*, 73 CHI.-KENT L. REV. 425, 462 (1998) (arguing that blanket exclusionary rules that prevent consideration of exculpatory evidence "distort the adversarial process by lowering the prosecution's burden at trial"); Montana v. Egelhoff, 518 U.S. 37, 62 (1996) (O'Connor, J., dissenting) (reasoning that Montana's "blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element . . . frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state"); Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221, 222 (1984) (explaining how exclusionary rules that prevent criminal defendants from introducing evidence relevant to mental state, such as intoxication, "protect the prosecution from an increased practical burden of persuasion").

207. *E.g.*, Francis v. Franklin, 471 U.S. 307, 313 (1985), *modified*, Boyde v. California, 494 U.S. 370 (1990).

208. *See* Smith v. United States, 568 U.S. 106, 110 (2013) (explaining that "[t]he [s]tate is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense . . . negate[s] an element of the crime'" (quoting Martin v. Ohio, 480 U.S. 228, 237 (1987) (Powell, J., dissenting))).

elements of a claim while the defendant typically bears the burden for affirmative defenses.[209] Exceptions exist, such as when "elements can fairly be characterized as affirmative defenses or exemptions," but "[d]ecisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding . . . are extremely rare."[210]

In removal proceedings, however, what is a "rare" exception in other types of civil cases becomes the rule. Section III.A below explains how the burden of proof is placed entirely on respondents in custody determinations and also fully or partially on certain categories of noncitizens at trial.[211] Additionally, unlike criminal cases, where the standard of proof is uniformly "beyond a reasonable doubt," a complex array of standards of proof governs removal proceedings.[212] One of these standards, "clearly and beyond a reasonable doubt," has not even been defined. These convoluted burdens and standards create a system that is prone to error. Section III.B then shows how innocence is eroded even in the treatment of vacated convictions, where burdens of proof continue to sow confusion.

A. REVERSED AND SHIFTING BURDENS

Immigration cases typically involve two life-altering decisions: whether someone should be detained and whether that person should be removed from the country. The burden of proof is reversed in custody determinations, resting on the noncitizen. Additionally, the burden either rests fully or partially on certain categories of noncitizens at trial. In cases where the government *does* bear the burden of proof, that burden is usually easily satisfied with admissions obtained through the constitutionally suspect processes described above. Immigration law's legal framework thereby prioritizes facilitating removal orders over minimizing any risk of erroneous decisions.

1. The Reversed Burden in Custody Determinations

One of the most critical decisions impacting the outcome of an immigration case is whether the respondent should be detained during the proceedings. In criminal cases, the government normally bears the burden of showing that a defendant should be detained pretrial;[213] the Federal Bail Reform Act provides a presumption favoring pretrial release.[214] The Supreme Court has explained that

209. *E.g.*, Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56–57 (2005).

210. *Id.* at 57.

211. *See* 8 C.F.R. § 1240.8 (2021).

212. *See id.*

213. *See* Holper, *supra* note 46, at 126–28 (arguing that the burden in immigration custody determinations should rest on the government, as in criminal custody determinations); Gilman, *supra* note 46, at 192–93 (contrasting the immigration system's custody determination process with the criminal justice system).

214. 18 U.S.C. § 3142(b); *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 14–15 (3d ed. 2007) (Standard 10-5.1); Stack v. Boyle, 342 U.S. 1, 4 (1951) (recognizing that federal law "unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail").

"[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[215] The Court recognized that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[216] Along the same lines, scholars have argued that pretrial detention in criminal cases weakens the presumption of innocence.[217]

But in the immigration context, large categories of noncitizens are subject to mandatory detention without any individualized assessment of the need for detention.[218] An immigration judge may review whether someone is properly classified as falling into one of the mandatory detention categories, but if the judge determines that the classification is correct, the judge lacks jurisdiction to hold a bond hearing and decide if the person should be released.[219] DHS is allowed to release certain mandatory detainees on "parole" based on a showing of "urgent humanitarian reasons or significant public benefit,"[220] but the parole authority is entirely discretionary and fluctuates widely in its use.[221]

When detention is not mandatory, the burden is placed *on the noncitizen* to show why he or she should not be detained. The immigration regulations governing this initial custody determination made by DHS provide that the agency should only release an individual who "*demonstrate[s] to the satisfaction of the officer*" that he or she does not pose a danger or likelihood of absconding.[222] If the noncitizen asks an immigration judge for a custody redetermination hearing, the regulations and Board of Immigration Appeals (BIA) precedents once again place the burden on the noncitizen to prove that he or she is not a flight risk or

215. *Stack*, 342 U.S. at 4.

216. *Id.*

217. *See, e.g.*, Baradaran, *supra* note 7, at 776; *see also* RA Duff, *Pre-Trial Detention and the Presumption of Innocence*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 115, 120 (Andrew Ashworth et al. eds., 2013) (arguing that "[a]ny system of pre-trial detention . . . seems to be inconsistent with the [presumption of innocence]"); Wilkinson III, *supra* note 8, at 611 ("[P]retrial detention [is] not compatible with a presumption of innocence.").

218. *See* INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandatory detention of arriving aliens seeking asylum at a port of entry); INA § 236(c)(1), 8 U.S.C. § 1226(c)(1) (mandatory detention of aliens with certain criminal convictions); *see also* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 150 (2004) (criticizing mandatory detention as being "based on categorical determinations of dangerousness—without individual justification, administrative hearings, or constitutional review").

219. *See* Joseph, 22 I. & N. Dec. 799, 800–03 (B.I.A. 1999); 8 C.F.R. § 1003.19(h)(2)(ii) (2021).

220. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5(b) (2021).

221. For example, a district court granted a preliminary injunction in a case alleging that ICE's New Orleans Field Office had granted 75.5% of parole requests by asylum seekers in 2016 but denied 98.5% and 100% of parole requests in 2018 and the first seven months of 2019, respectively. Heredia Mons v. Wolf, No. 19-1593, 2020 WL 4201596, at *1 (D.D.C. July 22, 2020).

222. 8 C.F.R. § 236.1(c)(8) (2021) (emphasis added); *see also* Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 50 & n.23 (2014) (calculating a 91% detention rate for DHS's initial custody determinations); Gilman, *supra* note 46, at 176 (describing how regulations "imposed a presumption of detention").

danger to the community.[223] The INA itself does not address the burden of proof in bond hearings.[224]

Recently, a circuit split has emerged on this issue in cases involving prolonged, non-mandatory detention under INA § 236(a).[225] Through habeas petitions challenging discretionary detention as unconstitutionally prolonged, noncitizens have argued not only that they have a due process right to a new bond hearing but also that due process requires the government to bear the burden of proof at that hearing. The First and Second Circuits have issued precedents holding that due process requires the government to bear the burden of proof at a new bond hearing,[226] whereas the Third, Fourth, and Ninth Circuits have rejected this due process argument under the facts of the cases before them.[227] Other circuits will likely address this issue soon, because district court cases arising in the Seventh, Eighth, Tenth, and Eleventh Circuits have already held that the government should bear the burden of proof when a new bond hearing is granted based on prolonged detention.[228]

In 2021, the First Circuit considered a habeas petition brought by a noncitizen who had been detained for ten months.[229] One month into her detention, she received a bond hearing where she bore the burden of proof and was denied release on bond.[230] She filed a habeas petition with the federal district court arguing that the BIA's standard of proof, as applied in her case, violated due process.[231] The district court agreed and ordered a new bond hearing where the government had to prove danger or flight risk by clear and convincing evidence.[232] As the First Circuit recognized, "That shift in the burden proved pivotal, as the [immigration judge] released Hernandez on bond following her second

223. *See* 8 C.F.R. § 236.1(c)(8); Adeniji, 22 I. & N. Dec. 1102, 1112–13, 1116 (B.I.A. 1999); Guerra, 24 I. & N. Dec. 37, 38–39 (B.I.A. 2006); *see also* Gilman, *supra* note 46, at 176 (explaining that regulations adopted in 1997 "reversed the prior rule requiring release of a migrant absent an individual finding of significant flight risk or danger to the community").

224. *See* Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) ("On its face, the statute says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required.").

225. 8 U.S.C. § 1226(a).

226. *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 39 (1st Cir. 2021); Velasco Lopez v. Decker, 978 F.3d 842, 855 (2d Cir. 2020).

227. *See* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 280 (3d Cir. 2018); Miranda v. Garland, 34 F.4th 338, 366 (4th Cir. 2022); Rodriguez Diaz v. Garland, 53 F.4th 1189, 1203 (9th Cir. 2022).

228. *See, e.g.*, Hulke v. Schmidt, 572 F. Supp. 3d 593, 602–03 (E.D. Wis. 2021) (applying the logic of *Hernandez-Lara*, 10 F.4th at 41); Jaime M. v. Garland, No. 21-743, 2021 WL 5569605, at *5 (D. Minn. Nov. 1, 2021) (requiring the government to bear the burden of proof by clear and convincing evidence); Diaz-Ceja v. McAleenan, No. 19-cv-00824, 2019 WL 2774211, at *10 (D. Colo. July 2, 2019) (same), *appeal dismissed*, No. 19-1321, 2019 WL 8128251 (10th Cir. Nov. 5, 2019); J.G. v. Warden, Irwin Cnty. Det. Ctr., 501 F. Supp. 3d 1331, 1341 (M.D. Ga. 2020) (ordering "a second bond hearing with the burden of proof placed on the Government").

229. *Hernandez-Lara*, 10 F.4th at 25–26.

230. *Id.* at 24–25.

231. *See id.* at 25, 44.

232. *Id.* at 23.

hearing, after ten months of detention."[233] Applying the three-factor test for procedural due process challenges set forth in *Mathews v. Eldridge*, the First Circuit found that all three factors weighed in favor of placing the burden on the government.[234] With respect to the standard of proof, the First Circuit adopted a bifurcated approach, holding that the government must prove danger to the community by clear and convincing evidence or flight risk by a preponderance of the evidence.[235] Recognizing that "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern,"[236] the court reasoned that a higher standard was justified to prove danger due to the "heightened risk of prejudicial error."[237] The court further concluded that there was a lesser risk of error with respect to flight risk because the detained individual "possess[es] knowledge of many of the most relevant factors."[238]

In a similar case with even more compelling facts, the Second Circuit also placed the burden on the government, but the court applied the "clear and convincing" standard to both the flight risk and danger rationales for detention.[239] There, the petitioner had been in immigration detention for fourteen months while criminal proceedings were ongoing.[240] Although the petitioner had received a bond hearing after a few months in detention, bond was denied in part because of the pending criminal charges.[241] But ICE had refused to produce the petitioner for his criminal court appearances, thereby delaying the eventual dismissal of criminal charges.[242] Under these facts, the Second Circuit held that the petitioner was entitled to a new bond hearing where the government bore the burden of proving flight risk or danger by clear and convincing evidence.[243]

While the First and Second Circuit decisions provide hope for reevaluating the burden of proof in immigration bond hearings, they have two significant limitations. Both decisions involve the burden of proof at a new bond hearing that was ordered after prolonged detention. To date, no circuit court has changed the burden of proof at an initial bond hearing. Additionally, because both the First and Second Circuit cases involved "as applied" constitutional challenges, they do not guarantee that the burden will be placed on the government in other cases that arise within those circuits. In fact, the Second Circuit expressly stressed that its

233. *Id.*

234. *See id.* at 27–35 (applying Mathews v. Eldridge, 424 U.S. 319 (1976), and finding that Hernandez's liberty interest was significant, the current procedures created an unacceptable risk of error, and the government's interest, although "legitimate," was outweighed by Hernandez's private interest).

235. *Id.* at 41.

236. *Id.* at 31.

237. *Id.* at 40.

238. *Id.* The court noted that in the context of pretrial detention under the Bail Reform Act, "the government need only prove flight risk by a preponderance of the evidence in order to continue detention." *Id.*

239. *See* Velasco Lopez v. Decker, 978 F.3d 842, 856–57 (2d Cir. 2020).

240. *Id.* at 846–47.

241. *Id.* at 847.

242. *Id.*

243. *Id.* at 855–57.

decision did not "establish a bright-line rule" for when due process requires this shifted burden.[244]

Confronted with the same issue in recent years, the Third, Fourth, and Ninth Circuits have all refused requests for new bond hearings where the government bears the burden of proof in cases involving prolonged *discretionary* detention under 8 U.S.C. § 1226(a). In a case where the petitioner had been detained for fourteen months under § 1226(a), the Third Circuit found no authority to provide more process than required by the statute and regulations, concluding that due process did not require anything else.[245]

The Fourth Circuit likewise found that "the detention procedures adopted for § 1226(a) bond hearings provide sufficient process to satisfy constitutional requirements," noting that noncitizens are "due less process when facing removal hearings than an ordinary citizen," that noncitizens already receive notice and an opportunity to be heard, and that the government's "vital public interest" in immigration enforcement is facilitated by detention.[246]

In *Rodriguez Diaz v. Garland*, the Ninth Circuit agreed with the Third and Fourth Circuits,[247] but it had to grapple with its own complicated precedents on mandatory detention.[248] Applying the *Mathews* due process test, the Ninth Circuit acknowledged that the petitioner, who had been detained for fourteen

244. *Id.* at 855 n.13.

245. Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 275–77, 280 (3d Cir. 2018). By contrast, in a subsequent case involving prolonged *mandatory* detention under 8 U.S.C. § 1226(c), where the noncitizen has no statutory right to a bond hearing, the Third Circuit held that due process requires a bond hearing where the government must justify continued detention by clear and convincing evidence of flight risk or danger. German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 207, 213 (3d Cir. 2020). The court reasoned that "when someone stands to lose an interest more substantial than money, we protect that interest by holding the Government to a higher standard of proof," but it did not explain why the burden of proof was different in bond hearings challenging discretionary detention under 8 U.S.C. § 1226(a). *Id.* at 213–14 (citing Addington v. Texas, 441 U.S. 418, 424 (1979)).

246. Miranda v. Garland, 34 F.4th 338, 346, 361–62, 364–65 (4th Cir. 2022).

247. 53 F.4th 1189, 1193, 1205, 1210–12 (9th Cir. 2022) (involving a petitioner subject to non-mandatory detention under INA § 236(a), 8 U.S.C. § 1226(a)).

248. An earlier decision, *Singh v. Holder*, had held that the government bore the burden of proving flight risk or danger by clear and convincing evidence in a bond hearing challenging prolonged *mandatory* detention. 638 F.3d 1196, 1203–05 (9th Cir. 2011) (involving a bond hearing pursuant to Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008), which required bond hearings for noncitizens who were otherwise subject to mandatory detention under INA § 236(c), 8 U.S.C. § 1226(c), and who either obtained a stay of removal from the Ninth Circuit or whose cases had been remanded by the Ninth Circuit). The court in *Rodriguez Diaz* stressed that mandatory detention involved a different statutory provision than the discretionary detention at issue in the case and also reasoned that Singh had been "substantially upend[ed]" by intervening Supreme Court decisions rejecting a statutory basis for any bond hearing at all in cases involving mandatory detention. 53 F.4th at 1200–02; *see also id.* at 1196–98 (citing Jennings v. Rodriguez, 138 S. Ct. 830 (2018)); *id.* at 1201 (noting that in Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022), the Supreme Court had rejected a statutory interpretation of INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), that required a bond hearing to be provided in cases involving prolonged detention after a final removal order). The court emphasized that, unlike individuals subject to mandatory detention, the petitioner had been eligible for a bond hearing from the onset of his detention. *See id.* at 1211.

months, had a "reasonably strong private liberty interest"[249] but also stated that this interest is "lower than that of a detained U.S. citizen."[250] The court described the government's interests in protecting the public and executing removal orders as "interests of the highest order that only increase with the passage of time."[251] The court further found that nothing in the record suggested that placing the burden of proof on the government was necessary to minimize the risk of error, noting that the petitioner had been represented at his initial bond hearing, spoke English, and was able to gather evidence supporting his motion.[252] Although the court concluded that the *Mathews* factors weighed in the government's favor, the court did not "foreclose *all* as-applied challenges to [8 U.S.C.] § 1226(a)'s procedures."[253]

The reversed burden of proof that currently exists in most immigration custody determinations has a reverberating impact throughout the entire case: detention impedes collecting evidence and finding counsel, and unrepresented individuals are far less likely to submit applications and be granted relief.[254] Consequently, regardless of who bears the burden at trial, the reversed presumption in custody determinations can be detrimental. But when the burden also rests entirely or partially on the noncitizen at trial, the disadvantage is compounded.

2. The Reversed and Shifting Burdens at Trial

An unusual aspect of the burden of proof in removal proceedings is that it varies depending on how a noncitizen is charged by the government.[255] At the top of the Notice to Appear (the charging document that initiates removal proceedings), DHS checks one of three boxes for (1) arriving aliens; (2) aliens present without admission or parole; or (3) admitted aliens.[256] The relevant category determines the burden of proof. By deciding which box to check, DHS can therefore influence the burden of proof that is applied. As Immigration Judge Jack H.

249. *Rodriguez Diaz*, 53 F.4th at 1207.

250. *Id*. at 1213.

251. *Id*. at 1208.

252. *See id*. at 1211–12.

253. *Id*. at 1213 (emphasis added).

254. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32, 53 tbl.3 (2015) (finding that only 14% of detained noncitizens were represented by counsel and that unrepresented individuals are less likely to apply for and obtain relief); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 119 (2016) (finding that "the odds of being granted bond are more than 3.5 times higher for detainees represented by attorneys than those who appeared *pro se*"); *see also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 156–58 (2013) (describing how shifted burden reduces the government's incentive to gather evidence); Moncrieffe v. Holder, 569 U.S. 184, 201 (2013) (noting detained noncitizens "have little ability to collect evidence"); Peter L. Markowitz, Jojo Annobil, Stacy Caplow, Peter Z. Cobb, Nancy Morawetz, Oren Root, Claudia Slovinsky, Zhifen Cheng & Lindsay C. Nash, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) (finding that only 3% of unrepresented detained individuals have a successful outcome, defined as relief or termination).

255. *See* INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2); 8 C.F.R. § 1240.8 (2021).

256. U.S. DHS, FORM I-862, NOTICE TO APPEAR (Aug. 1, 2007), https://www.ice.gov/doclib/detention/checkin/NTA_I_862.pdf [https://perma.cc/9B2Q-4MJC].

Weil warned in a training for other judges, "[i]t is important . . . [for immigration judges] to review [DHS's] determination as they are *often incorrect*."[257] If neither the respondent nor the immigration judge notices that the wrong box is checked, the burden may be placed on the wrong party.

Among the three categories of noncitizens mentioned above, DHS solely bears the burden of proof for only one category: admitted aliens.[258] Individuals who have already been admitted to the United States are normally either lawful permanent residents or individuals who entered with temporary legal status, and they are charged with one of the deportability grounds in INA § 237.[259] In these cases, DHS must prove by "clear and convincing evidence" that the individual is deportable as charged.[260] DHS's burden requires proving both alienage (that the respondent is not a U.S. citizen) and that the charged deportability ground applies.[261] Because courts have described the "clear and convincing evidence" standard in different ways—sometimes referring to it as "clear, convincing, and unequivocal evidence"—even this standard has created confusion,[262] but it is at least a familiar intermediate standard between a "preponderance of the evidence" and "beyond a reasonable doubt."

By contrast, DHS has no burden at all when it comes to "arriving aliens."[263] An individual is considered an "arriving alien" if his or her removal proceedings are "commenced upon . . . arrival in the United States or after the revocation or expiration of parole."[264] Individuals who request asylum at a port of entry fall into this group of arriving aliens.[265] Someone in this category "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."[266] Not only does the burden fall entirely on the respondent in this category, but the burden is now "clearly and beyond a doubt," which appears to be higher than the "clear and convincing evidence" standard to

257. JACK H. WEIL, BURDENS OF PROOF IN REMOVAL PROCEEDINGS 1 (emphasis added), https://trac.syr.edu/immigration/reports/211/include/II-06-training_course_burden_of_proof.pdf [https://perma.cc/FS58-CSP5].

258. *See* 8 C.F.R. § 1240.8(a).

259. 8 U.S.C. § 1227 ("Deportable Aliens").

260. 8 C.F.R. § 1240.8(a).

261. *See* United States *ex rel*. Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("[A]lienage is a jurisdictional fact; and . . . an order of deportation must be predicated upon a finding of that fact." (citing United States v. Sing Tuck, 194 U.S. 161, 167 (1904))).

262. *See* Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 789 (2020) (arguing that "[t]he Supreme Court's failure to reconcile these ambiguous statements about the burden of proof . . . [has] created difficulties for courts dealing with citizenship cases"). In *Mondaca-Vega v. Lynch*, the Ninth Circuit, sitting en banc, held that the "clear and convincing evidence" and "clear, unequivocal, and convincing evidence" standards are the same in the context of a denaturalization hearing. 808 F.3d 413, 417, 421 (9th Cir. 2015) (en banc). Four judges rejected this interpretation. *Id*. at 429 (Smith, J., dissenting in part and concurring in part).

263. *See* 8 C.F.R. § 1240.8(b).

264. *Id*.

265. *See* INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 1.2 (2021).

266. 8 C.F.R. § 1240.8(b) (emphasis added); *see also* INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).

which DHS is held for "admitted aliens." As discussed further in Section III.A.3, the "clearly and beyond a doubt" standard has not been defined.

The third category involves individuals who are present in the United States without admission or parole.[267] Respondents in this category are normally charged under one of the inadmissibility grounds in INA § 212.[268] In layman's terms, this category mainly includes those who entered the country illegally and have no legal status.[269] However, this category also includes certain permanent residents who are returning from a trip abroad (for example, if they remained outside the country for over 180 days or committed a crime abroad).[270] Nearly half of the people placed in removal proceedings are deemed present in the United States without having been admitted or paroled.[271] Here, a burden-shifting approach is applied.

DHS initially bears the burden of establishing "alienage."[272] As explained above, this is usually easy for DHS to do because DHS typically relies on admissions made by the respondent during questioning by immigration officers.[273] DHS and the immigration judge are also allowed to directly question the respondent in court, and an adverse inference can be drawn from the refusal to answer.[274] In many cases, DHS meets its burden simply by submitting Form I-213 (Record of Deportable/Inadmissible Alien), which includes biographical data such as the noncitizen's name and place of birth. This form is prepared by the immigration officer who initially interrogates the noncitizen. While the information in the form is usually based on the respondent's own statements, it can also be obtained from other sources, including hearsay statements from third parties.[275] The officer who conducted the interrogation and signed the form hardly ever appears in immigration court to testify about its contents or be subject to cross-examination.[276] Instead, the Form I-213 is presumed to be inherently trustworthy.[277] Its contents are only questioned if the respondent can show signs of unreliability, such as incorrect information on the form

267. 8 C.F.R. § 1240.8(c).

268. 8 U.S.C. § 1182 ("Inadmissible Aliens").

269. *See* INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A).

270. *See* INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

271. *See Immigration Court Post-Trump Cases: Latest Data*, TRAC IMMIGR. (Mar. 21, 2017), http://trac.syr.edu/immigration/reports/462/ [https://perma.cc/RN7T-SJFH] (indicating that in FY 2016, 43.5% of removal proceedings were based upon entry without inspection).

272. *See* 8 C.F.R. § 1240.8(c).

273. *See supra* note 190 and accompanying text.

274. *See* Chan, *supra* note 47, at 289; Valdez, *supra* note 34, at 1375.

275. *See* Findley, 2017 WL 1130670, at *1–3 (B.I.A. Jan. 31, 2017); Valdez, *supra* note 34, at 1377–78. In *Findley*, the respondent objected to the reliability of the I-213 because it was mainly based on hearsay from his relatives, but the BIA rejected this argument, reasoning that "the Federal Rules of Evidence do not apply in immigration proceedings, and hearsay is admissible." 2017 WL 1130670, at *1–3.

276. *See* Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984) (acknowledging that the officer who prepared the Form I-213 "rarely must attend the hearing").

277. Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (holding that the Form I-213 is presumed to be "inherently trustworthy and admissible as evidence to prove alienage and deportability"). In *Barcenas*, the Board left open the factual question of whether the respondent could rebut the presumption by showing that the I-213 contains information that is incorrect or was obtained by coercion or duress. *See id*. at 611–12.

or that the information was obtained through duress or coercion.[278] In short, DHS is allowed to meet its burden of proving alienage by relying on a form the agency itself prepared and that is presumed to be accurate.[279]

Once alienage is established, the burden then formally shifts to the respondent to show "by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission."[280] However, if the respondent is seeking entry or adjustment of status to become a legal permanent resident, 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."[281] Here, Congress uses the phrases "clear and convincing evidence" and "clearly and beyond a doubt" within the same sentence, suggesting that they are different standards.

If removability is established, the respondent may be eligible to submit one or more applications for relief from removal. For these applications, the burden is on the respondent to establish "that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion."[282] The regulations provide that "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the *alien shall have the burden of proving by a preponderance of the evidence* that such grounds do not apply."[283] Preponderance of the evidence therefore appears as a third standard of proof relevant to removal proceedings and is applied only to applications for relief.

In 2021, the Supreme Court added another twist to applications for relief in *Pereida v. Wilkinson* by holding that the burden of proof plays a role in applying the categorical approach for analyzing convictions.[284] The categorical approach is a method of analysis that is triggered by the use of the word "conviction" in the statute; it is used to determine not only if a given conviction triggers a ground for deportability or inadmissibility but also if a conviction triggers a bar to relief from removal.[285] Before *Pereida*, the Supreme Court had suggested that the "analysis is the same in both contexts."[286]

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278. *Findley,* 2017 WL 1130670, at *1 (quoting Gomez-Gomez, 23 I. & N. Dec. 522, 524 (B.I.A. 2002)); United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) (stating that lack of *Miranda* warnings did not render statements inadmissible in deportation proceedings, even if they may be inadmissible in criminal proceedings, unless coercion or other improper behavior was shown).

279. *See, e.g.*, Aparicio-Brito v. Lynch, 824 F.3d 674, 685 (7th Cir. 2016) ("Because Aparicio-Brito has not overcome the presumptive reliability of the Form I-213, we hold that the [immigration judge] and BIA properly considered it as evidence of alienage.").

280. 8 C.F.R. § 1240.8(c) (2021).

281. *Id.* (emphasis added); *see also* Ferrans v. Holder, 612 F.3d 528, 531 (6th Cir. 2010) ("Because an alien seeking to adjust his status is in a position similar to that of an alien seeking entry into the United States, the alien bears the burden of establishing that he is 'clearly and beyond [a] doubt entitled to be admitted and is not inadmissible.'" (alteration in original) (quoting Matovski v. Gonzales, 492 F.3d 722, 738 (6th Cir. 2007))).

282. 8 C.F.R. § 1240.8(d); *see* S-Y-G-, 24 I. & N. Dec. 247, 251–52 (B.I.A. 2007); Jean, 23 I. & N. Dec. 373, 386 (A.G. 2002).

283. 8 C.F.R. § 1240.8(d) (emphasis added).

284. 141 S. Ct. 754, 762–64 (2021).

285. For a summary of the categorical approach, see *supra* note 66.

286. *See* Moncrieffe v. Holder, 569 U.S. 184, 191 & n.4 (2013). The issue in *Moncrieffe* was whether the petitioner's conviction made him deportable as an aggravated felon, but he was also seeking discretionary relief. *See id.* at 187.

The petitioner in *Pereida* was seeking cancellation of removal and had an inconclusive record of conviction.[287] He had been convicted under a criminal impersonation statute that was divisible, meaning it included several different means of committing the offense.[288] Three of those means constituted crimes involving moral turpitude, which would bar cancellation, but one did not.[289] Pereida argued that he should not be barred from relief given the inconclusive record. Because the categorical approach is a purely legal analysis, he argued that the burden of proof, which is a concept that applies only to factual questions, plays no role.[290] But the Court's decision introduced a "threshold factual question" about the crime of conviction that suddenly made the burden of proof relevant.[291] Because Pereida had not produced evidence about his crime of conviction, the Court concluded that he had failed to carry his burden.[292]

It is not always easy even for immigration lawyers and judges to navigate this maze of burdens and standards of proof. For example, one circuit court observed that "[t]his scheme does not apply with complete ease to an adjustment of status application."[293] The court mused that the petitioner's argument about the burdens of proof was "not altogether implausible and certainly merits clarification" but ultimately avoided the issue by concluding that the argument had been waived.[294] The convoluted and confusing nature of these burdens and standards of proof heightens the risk of error. The absence of clearly defined standards further exacerbates this problem.

3. The Undefined Burden: "Clearly and Beyond a Doubt"

Prior to 1996, "clearly and beyond a doubt" was the standard for inspection officers to detain someone for further questioning by a special inquiry officer (now called an immigration judge) in an exclusion proceeding.[295] That standard

287. 141 S. Ct. at 759.

288. *See id*.

289. *See id*. at 759–60, 763.

290. *See id*. at 762; *see also* Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) ("[T]he evidentiary standard of proof applies to questions of fact and not to questions of law.").

291. *See Pereida*, 141 S. Ct. at 763, 765.

292. *Id*. at 767. The Court further found that Pereida could submit a broad range of evidence to meet his burden, a departure from the limited documents constituting the record of conviction that can be considered under the modified categorical approach. *See id*.

293. Chaidy v. Holder, 458 F. App'x 506, 509 (6th Cir. 2012).

294. *Id*. at 510; *see also* Gonzalez-Mejia v. Lynch, 668 F. App'x 705, 706 (9th Cir. 2016) (remanding for the BIA to consider the petitioner's argument that "the agency erroneously applied the 'clearly and beyond a doubt' standard of proof in adjudicating his application for a 212(h) waiver of inadmissibility, when it should have applied the 'preponderance of the evidence' standard"); Crocock v. Holder, 670 F.3d 400, 403 n.3 (2d Cir. 2012) (noting that the petitioner had "confuse[d] the substantive standard for establishing admissibility with the evidentiary burden required to demonstrate that he has satisfied the applicable substantive criteria").

295. *See* 8 U.S.C. § 1225(b) (1995) ("Every alien (other than an alien crewman) . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer."), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L.

was introduced in 1903 and was never intended to be a standard of proof at trial.[296] The INA's current use of the "clearly and beyond a doubt" standard may well be a remnant of the old law that was carelessly transposed into a standard of proof in removal proceedings during the major immigration reforms of 1996.[297] If that is the case, it reflects the low level of importance placed on burdens and standards of proof in immigration proceedings.

Regardless of how the "clearly and beyond a doubt" standard came about, courts have not yet defined it. The few decisions that have addressed it have simply explained that it is higher than "preponderance of the evidence," but they have not compared it to "clear and convincing evidence" or "beyond a reasonable doubt."[298] Based on plain language, "beyond a doubt" appears to be an even higher standard than "beyond a reasonable doubt" because the word "reasonable" requires any doubt to be based on reason and common sense.[299] The absence of the word "reasonable" therefore would seem to suggest that *any doubt*, no matter how unreasonable, can undercut the respondent's case.

If this interpretation is correct, then an arriving alien in removal proceedings would be held to a higher burden of proof than the government in a criminal case. That conclusion, despite being supported by the plain language of the statute, would be a shocking outcome because the Supreme Court "has never required the 'beyond a reasonable doubt' standard to be applied in a civil case" and regards that "unique standard . . . as a critical part of the 'moral force of the criminal law.'"[300]

If, on the other hand, "clearly and beyond a doubt" means the same thing as "clear and convincing evidence," it is difficult to explain why Congress chose to use two different phrases within the same statutory provision in explaining the burden of proof on each party. Under the "meaningful variation" canon of statutory interpretation, a material change in a term or phrase used by Congress signals

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No. 104-208, 110 Stat. 3009-546. The IIRIRA deleted this language from the inspection section and introduced expedited removal without a hearing. IIRIRA sec. 302, § 235(b), 110 Stat. at 3009-579 to 3009-580.

296. Act of March 3, 1903, ch. 1012 § 24, 32 Stat. 1213, 1220; *see also* Pearson v. Williams, 202 U.S. 281, 283 (1906) (quoting the "clearly and beyond a doubt" language from the 1903 statute).

297. Among other things, IIRIRA deleted the INA's exclusion proceedings altogether, IIRIRA sec. 303, § 236, 110 Stat. at 3009-585, and made removal proceedings the sole procedure for determining admissibility and removability, IIRIRA sec. 304, § 239, 110 Stat. at 3009-587 to -588.

298. *See* Kirong v. Mukasey, 529 F.3d 800, 804 (8th Cir. 2008); Villarreal Salinas v. Limon, 549 F. Supp. 3d 624, 628 (S.D. Tex. 2021) (explaining that the "clearly and beyond a doubt" standard is higher than the preponderance of the evidence standard for proving citizenship in a lawsuit under 8 U.S.C. § 1503(a)); Singh v. Chertoff, No. C05-1454, 2005 WL 2043044, at *7 (N.D. Cal. Aug. 24, 2005) (explaining that the preponderance of the evidence standard for providing entitlement to asylum under 8 C.F.R. § 1240.8(d) is lower than the "clearly and beyond a doubt" standard).

299. *See, e.g.*, United States v. Harris, 974 F.2d 84, 85 (8th Cir. 1992); *see also* Victor v. Nebraska, 511 U.S. 1, 5 (1994) (explaining that "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof"); Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam) (finding that a jury instruction's definition of "reasonable doubt" violated due process where it required "substantial" and "grave" uncertainty).

300. California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam) (quoting Addington v. Texas, 441 U.S. 418, 428 (1979)).

a shift in meaning.[301] Additionally, the canon of *expressio unius* suggests that requiring certain burdens to be proven "clearly and beyond a doubt" necessarily excludes the "preponderance of the evidence" and "clear and convincing evidence" standards.[302]

But if "clearly and beyond a doubt" is distinct from "clear and convincing evidence," "preponderance of the evidence," and "beyond a reasonable doubt," then it constitutes a fourth burden of proof, which would contradict Supreme Court authority stating that there are only three burdens of proof.[303] In rejecting "clear, convincing, and unequivocal evidence" as a different standard than "clear and convincing evidence," the Ninth Circuit stressed that "[t]hree is enough. It defies reason to think that a fourth burden of proof could be meaningfully distinguished and distinctly applied."[304] The court called it a "hair-splitting exercise" to try to "discern[] a burden located in between clear and convincing evidence and proof beyond a reasonable doubt."[305]

The Supreme Court has observed that the standard of proof "serves to allocate the risk of error between the litigants"[306] and "[at a minimum] reflects the value society places on individual liberty."[307] The failure of Congress and the courts to even define the standard that is applied to arriving aliens and those charged with inadmissibility who are seeking admission suggests that a particularly low value is placed on the liberty interests of these groups.

While reversed and shifting burdens of proof, combined with convoluted and undefined standards of proof, should be sufficient to show how immigration law impedes a presumption of innocence, it does not end there. Innocence continues to be eroded even in immigration courts' treatment of vacated convictions and other kinds of post-conviction relief.

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301. *See* WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 678 (5th ed. 2014); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

302. *See* Novella v. Westchester County, 661 F.3d 128, 142 (2d Cir. 2011) ("Indeed—following both the presumption of consistent usage and meaningful variation, and the textual canon of *expressio unius est exclusio alterius*—the presence of that provision applicable to one type of pension makes clear that the omission of that provision in the part of the Plan governing another type of plan was deliberate." (citation omitted)).

303. *See Mitchell Bros.*, 454 U.S. at 93 ("Three standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution." (footnote omitted)); *Addington*, 441 U.S. at 423 (referring to "three standards or levels of proof for different types of cases").

304. Mondaca-Vega v. Lynch, 808 F.3d 413, 421–22 (9th Cir. 2015) (en banc).

305. *Id.* at 422.

306. *Addington*, 441 U.S. at 423.

307. *Id.* at 425 (alteration in original) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

B. THE BURDEN FOR VACATED CONVICTIONS (AND OTHER KINDS OF POST-CONVICTION RELIEF)

Noncitizens are increasingly seeking post-conviction relief as a way to avoid the harsh consequence of deportation. Under the INA, deferred prosecution or deferred adjudication agreements that require the defendant to enter a guilty or *nolo contendere* plea, or to stipulate to facts that would support a finding of guilt, are considered convictions, even if the plea is later set aside or dismissed.[308] Although the statute does not address quashed convictions, the BIA noted in *Pickering* that "no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state *rehabilitative* statute."[309] *Pickering* distinguished between two types of vacaturs. The BIA explained that when a conviction is vacated because of a *procedural or substantive defect* in the underlying criminal proceedings, it does not count as a conviction under the INA.[310] But a conviction that is vacated "for equitable, rehabilitation, or immigration hardship reasons" remains a conviction for immigration purposes.[311]

The Supreme Court's 2017 decision in *Nelson v. Colorado* arguably casts doubt on the BIA's approach to vacated convictions. *Nelson* had nothing to do with immigration, but it held that once a conviction is "erased" (by being vacated or reversed), the presumption of innocence is "restored."[312] The Court never mentioned the *reason* a conviction was vacated as relevant to restoring the

308. *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *see also* Mohamed, 27 I. & N. Dec. 92, 98 (B.I.A. 2017) (holding that a Texas pretrial intervention agreement qualified as a "conviction" under the INA where the respondent admitted facts sufficient to support the first prong of the INA's definition); Boggala v. Sessions, 866 F.3d 563, 569 (4th Cir. 2017) (holding that a North Carolina deferred prosecution qualified as a "conviction" under the INA where the respondent's stipulations were sufficient to support the first prong of the definition). *But see* Iqbal v. Bryson, 604 F. Supp. 2d 822, 826 (E.D. Va. 2009) (holding that a New York pretrial diversion agreement was not a "conviction" under the INA because "mere boilerplate language that appears to be used in all of New York's Pretrial Diversion Agreements is not case specific and thus cannot be deemed to recite sufficient facts to warrant a finding of guilt"). In addition to requiring a judgment of guilt, or facts sufficient to warrant such a finding, the INA's definition of "conviction" also requires that the judge has "ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

309. 23 I. & N. Dec. 621, 622 (B.I.A. 2003) (emphasis added) (citing Roldan, 22 I. & N. Dec. 512 (B. I.A. 1999)), *rev'd on other grounds*, Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006).

310. *See Pickering*, 23 I. & N. Dec. at 624. The Fifth Circuit has refused to follow *Pickering*, standing behind its pre-*Pickering* precedent that treats *all* vacated convictions as convictions for immigration purposes, even those vacated for legal reasons. *See* Renteria-Gonzalez v. Immigr. & Naturalization Serv., 322 F.3d 804, 814 (5th Cir. 2002) (holding that "a vacated conviction, federal or state, remains valid for purposes of the immigration laws"); Hernandez-Cardoza v. Holder, 559 F. App'x 277, 277–78 (5th Cir. 2014) (applying *Renteria-Gonzalez*'s holding post-*Pickering*).

311. Nath v. Gonzales, 467 F.3d 1185, 1188–89 (9th Cir. 2006) (citing *Pickering*, 23 I. & N. Dec. at 624).

312. 137 S. Ct. 1249, 1255 (2017); *see* Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (stating that after a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge").

presumption of innocence. The Court also deemed it "inconsequential" that the petitioners had "prevailed on subsequent review rather than in the first instance."[313]

But even if the BIA's approach does not conflict with *Nelson*, it has proved extremely problematic in practice because it encourages immigration judges to speculate about the "real" reason for a vacatur.[314] Immigration judges "frequently place the burden—either explicitly or implicitly—upon the immigrant and the attorney to prove that the court's decision to vacate a conviction was *not* done for immigration purposes," even though "[t]his approach runs contrary to the requirement that the *government* show removability by clear and convincing evidence."[315]

At least two circuit courts have had to reverse the BIA in published decisions for misapplying the burden of proof in cases involving vacaturs. In *Pickering v. Gonzales*, the Sixth Circuit upheld the BIA's bifurcated approach but nevertheless reversed, finding that the BIA had failed to require DHS to show deportability by clear and convincing evidence.[316] Similarly, the Tenth Circuit in *Cruz-Garza v. Ashcroft* criticized the BIA for approaching a case involving a vacated conviction "as if [the] petitioner bore the burden of disproving that his conviction qualified him for removal."[317]

When it comes to establishing eligibility for relief from removal, where the noncitizen bears the burden of proof, three circuit courts (the Eighth, Ninth, and Eleventh) have held that the noncitizen also bears the burden of proving the reason why a conviction was vacated.[318] Meanwhile, the Third Circuit in *Pinho v. Gonzales* adopted a more categorical approach to analyzing the reason for a vacatur in a case involving an application for adjustment of status.[319] The court in

313. *Nelson*, 137 S. Ct. at 1256.

314. *See* Pinho v. Gonzales, 432 F.3d 193, 212–13, 215 (3d Cir. 2005) (adopting a categorical approach for determining the reasoning for a vacatur to avoid "unseemly inquisitions" into the underlying reasons where the lower court had "openly expressed its suspicion" about the reasons).

315. Amany Ragab Hacking, *Plea at Your Peril: When Is a Vacated Plea Still a Plea for Immigration Purposes?*, 29 ST. LOUIS U. PUB. L. REV. 459, 468 (2010); *see also id.* at 468 n.71 ("In the proceeding the Service 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." (quoting 8 U.S.C. § 1229a(c)(3)(A) (2006))).

316. 465 F.3d 263, 269–71 (6th Cir. 2006) (noting that the BIA "relied on certain parts of the Petitioner's affidavit and notice of appeal" in finding that the vacatur was based on immigration hardship, "while minimizing or ignoring other parts").

317. 396 F.3d 1125, 1130, 1132 (10th Cir. 2005) (reversing the BIA and finding that the government had not satisfied its burden of proof based on the "vagaries of the evidentiary record" and the language of the Utah statute under which the conviction was vacated).

318. *See* Andrade-Zamora v. Lynch, 814 F.3d 945, 948–50 (8th Cir. 2016) (holding that the petitioner had not met his burden for cancellation of removal where the order vacating his conviction did not state why it was vacated); Lopez v. U.S. Att'y Gen., 662 F. App'x 764, 768 (11th Cir. 2016) (holding that the petitioner had not met his burden of proving eligibility for cancellation of removal where "the sole piece of evidence that he submitted demonstrating the vacatur of his 2001 conviction was silent as to the reasons for the vacatur"); Kim v. Garland, No. 21-70432, 2022 WL 2304229, at *1 (9th Cir. June 27, 2022) (holding that the petitioner bore the burden of proof based on Pereida v. Wilkinson, 141 S. Ct. 754 (2021)).

319. 432 F.3d at 215. Pinho had never been placed in removal proceedings. He applied affirmatively for adjustment of status with USCIS and then filed an appeal with the Office of Administrative Appeals. *See id.* at 197–98. But USCIS applies the same standard of proof used in removal proceedings. *See*

Pinho never mentioned the burden on the noncitizen in applications for relief, instead stating that "[i]t is the agency's burden . . . to establish the facts supporting inadmissibility 'by clear, unequivocal and convincing evidence.'"[320]

The inconsistencies among circuit courts become more pronounced in cases where a noncitizen seeks to *reopen* a removal case after a conviction has been vacated. In this situation, there is a circuit split regarding who bears the burden of showing the reason for the vacatur.[321] The Ninth Circuit has held that DHS bears the burden in the context of a motion to reopen where the underlying issue was whether the conviction made the respondent removable.[322] But the First and Eleventh Circuits, along with the BIA, have placed this burden on the noncitizen as the moving party.[323]

In the past several years, the BIA and Attorney General have expanded the reasoning of *Pickering v. Gonzales* to other types of post-conviction relief. In 2019, former Attorney General William Barr extended the reasoning of *Pickering* to "state-court orders that modify, clarify, or otherwise alter a [criminal] sentence," overruling several BIA precedents.[324] In 2022, the BIA further extended the reasoning of *Pickering* to *nunc pro tunc* orders (orders with retroactive effect) that modify or amend the subject matter of the respondent's conviction.[325] The BIA reasoned that "Congress did not intend 'aliens who have *clearly been guilty of criminal behavior*' to 'escape[] the immigration consequences normally attendant upon a conviction' based on the vagaries of State 'provisions for ameliorating the effects of a conviction.'"[326] These expansions of *Pickering* will likely lead to the

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Policy Manual: Chapter 10 – Legal Analysis and Use of Discretion, U.S. CITIZENSHIP & IMMIGR. SERV. (Apr. 11, 2023) (citing Bett, 26 I. & N. Dec. 437, 440 (B.I.A. 2014)), https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 [https://perma.cc/BZ65-9N65].

320. 432 F.3d at 204 (quoting Sandoval v. Immigr. & Naturalization Serv., 240 F.3d 577, 581 (7th Cir. 2001)).

321. Chavez-Martinez, 24 I. & N. Dec. 272, 273 (B.I.A. 2007) (recognizing that there is "a conflict among the Federal circuit courts of appeals regarding which party bears the burden of proving why a conviction has been vacated in the context of a motion to reopen").

322. *See* Reyes-Torres v. Holder, 645 F.3d 1073, 1077 (9th Cir. 2011) (holding that "the burden is on the government to prove that it was vacated '*solely* for rehabilitative reasons or reasons related to his immigration status'" (quoting Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006))).

323. *See* Rumierz v. Gonzales, 456 F.3d 31, 40–41 (1st Cir. 2006); Altamirano-Torres v. U.S. Att'y Gen., 353 F. App'x 386, 388 (11th Cir. 2009) ("As the moving party, [the petitioner] bore the burden of convincing the BIA that her motion should be granted. Hence, requiring her to show that the circuit court vacated her conviction for a procedural or substantive defect did not deny her due process."); *Chavez-Martinez*, 24 I. & N. Dec. at 274 (reasoning that BIA precedents place a "heavy burden" on a party seeking reopening and that the Sixth Circuit's decision in *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), did not involve a motion to reopen (quoting Coelho, 20 I. & N. Dec. 464, 472–73 (B.I.A. 1992)). The Seventh Circuit declined to address this issue in *Singh v. Sessions*, concluding that it was "unexhausted and waived." 898 F.3d 720, 724 (7th Cir. 2018).

324. Thomas, 27 I. & N. Dec. 674, 674 (A.G. 2019). The Attorney General reasoned that the precedents he overruled had "promote[d] inconsistency in the application of the country's immigration laws[] and fail[ed] to advance Congress's intent to attach immigration consequences to certain convictions and sentences." *Id.* at 675.

325. Dingus, 28 I. & N. Dec. 529, 534–36 (B.I.A. 2022).

326. *Id.* at 535 (alteration in original) (emphasis added) (quoting H.R. REP. NO. 104–828, at 224 (1996) (Conf. Rep.)).

same inconsistencies about who bears the burden of proof as *Pickering* itself caused.

Although *Pickering* and the decisions extending its analysis all reference the importance of uniformity as a rationale for distinguishing between different types of vacaturs, requiring the noncitizen to bear the burden of proving why a conviction was vacated is actually likely to result in inconsistencies. Detained and unrepresented noncitizens may well have a difficult time obtaining the records they need to show the reason for the vacatur, and if the burden of proof is placed on the noncitizen, decisions will turn, at least in part, on the ability of the noncitizen to obtain the necessary evidence and to understand the reason for the vacatur.[327] The uniformity argument is also unconvincing because the BIA has started looking past the language of the statute under which a conviction was vacated to the *intent of the legislators*, a recipe for inconsistent outcomes.[328]

In short, reversed or shifted burdens of proof undermine a presumption of innocence not only at the investigations stage but also when it comes to decisions about detention, removal, and the impact of post-conviction relief. The result of this cumulative disadvantage is an immigration system that reinforces racialized perceptions of guilt.

IV. ERODING CRIMINAL LAW'S PRESUMPTION OF INNOCENCE

Not only does immigration law disrupt a presumption of innocence in removal proceedings, but it also erodes criminal law's presumption of innocence. This Part provides three non-exhaustive examples of how immigration law does this. First, noncitizens in removal proceedings may need to testify about the circumstances surrounding pending criminal charges in order to try to obtain relief and avoid deportation. Second, immigration judges are allowed to draw negative inferences from arrest reports and unproven charges, effectively deeming respondents guilty of allegations that have been untested by the criminal process. This can lead to deportation before a noncitizen even has the chance to contest a pending criminal charge at trial. Third, the expansion of the "circumstance-specific approach" to analyzing convictions permits immigration judges to determine facts related to a criminal conviction that were never proven beyond a reasonable doubt.

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327. *Cf.* Hernandez-Lara v. Lyons, 10 F.4th 19, 30–31 (1st Cir. 2021) (recognizing that the government has "greater access" to law enforcement records than respondents in removal proceedings).

328. In 2018, for example, the BIA invited amicus briefing on California Penal Code § 1203.43, which allows a plea to be withdrawn where the defendant was granted post-plea deferred entry of judgment. CAL. PENAL CODE § 1203.43(b). The BIA's invitation asked amici to address whether the legislative history of § 1203.43 "reflect[s] that this statute was enacted for the purpose of providing courts with a mechanism to eliminate the immigration consequences of convictions." Amicus Invitation No. 18-06-27 (Amended), Bd. of Immigr. Appeals 1 (2018) (available at https://www.justice.gov/eoir/page/file/1074676/download [https://perma.cc/2EUZ-BURV]).

A. SELF-INCRIMINATION

Noncitizens in removal proceedings commonly have pending criminal charges. After a noncitizen is arrested by a local law enforcement agency, ICE can issue a detainer requesting to take custody of the individual.[329] A study by Katherine Beckett and Heather Evans found that "[n]early all (96.2 percent) of the individuals sought by ICE were subject to a 'transfer of custody' (to ICE) on their release from jail."[330] Additionally, they found that "nearly all (98.1 percent) of the people who left jail without having been charged with a crime but had an ICE detainer request were released to the custody of ICE."[331] These findings demonstrate that "being booked into jail has very serious consequences for people flagged by ICE even if they are not subsequently charged with a crime."[332]

Prosecutors who wish to pursue a criminal case after someone has been transferred to ICE custody may obtain a writ from the appropriate state or local judge ordering the noncitizen's appearance on a specific date.[333] The prosecutor or law enforcement agency must also arrange for the noncitizen's transportation to local custody.[334] Although ICE claims that it will "generally honor the writ of a state or local judge directing the appearance of a detainee in court," it acknowledges that "[t]here may be occasions when ICE may decide not to honor the writ."[335] If the prosecutor does not file a writ, or if ICE does not honor it, the criminal case remains pending while removal proceedings may take place.[336]

Having pending criminal charges, or a prior arrest that could still lead to charges, while in removal proceedings poses a unique threat to the presumption

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329. ICE issues detainers pursuant to 8 C.F.R. § 287.7 (2021). The INA discusses ICE's general arrest powers and mentions detainers for violations of laws relating to controlled substances but does not specifically mention detainers in other contexts. *See* INA § 236(a), 8 U.S.C. § 1226(a) (arrest powers); INA § 287(a), 8 U.S.C. § 1357(a) (warrantless arrest powers); INA § 287(d), 8 U.S.C. § 1357(d) (detainers for controlled substance violations); *see also* Gonzalez v. U.S. Immigr. & Customs Enf't, 975 F.3d 788, 798 (9th Cir. 2020) (recognizing that "§ 1357 is the only statutory provision that refers to immigration detainers").

330. Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC'Y REV. 241, 253 (2015). "By contrast, the majority (57.8 percent) of people not subject to ICE detainers were released on bail, bond, or personal recognizance prior to adjudication of their criminal case." *Id*.; *see also* Shanthi Prema Raghu, *Supporting the Criminal Defense Bar's Compliance with* Padilla*: It Begins with Conversations*, 9 SEATTLE J. FOR SOC. JUST. 915, 918 (2011) (explaining that "ICE will likely place a detainer on the individual in criminal custody, sometimes even prior to the[m] conducting an investigation").

331. Beckett & Evans, *supra* note 330.

332. *Id*. In FY 2020, ICE arrested 22,454 people with pending criminal charges and removed 15,187 people with pending criminal charges. U.S. IMMIGR. & CUSTOMS ENF'T, ERO ADMINISTRATIVE ARRESTS BY FIELD OFFICE (AREA OF RESPONSIBILITY) AND MONTH, https://www.ice.gov/doclib/news/library/reports/annual-report/ero-fy20-localstatistics.pdf [https://perma.cc/Z2G7-42L3]; *see also* U.S. IMMIGR. & CUSTOMS ENF'T, TOOL KIT FOR PROSECUTORS 8 (2011) [hereinafter TOOL KIT FOR PROSECUTORS], https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf [https://perma.cc/8D2C-V7YT] ("Many aliens enter ICE custody each year while they have pending criminal proceedings . . . .").

333. TOOL KIT FOR PROSECUTORS, *supra* note 332, at 8–9.

334. *Id*. at 9.

335. *Id*. at 9–10.

336. *See id*. at 9.

of innocence in criminal proceedings. ICE can deprive noncitizen defendants of the opportunity to prove themselves innocent of the criminal charges because they may be ordered deported before the criminal proceedings ever begin. Additionally, when removal hearings precede the criminal case, the risk of self-incrimination in the immigration proceeding threatens the presumption of innocence in the criminal case.

If a noncitizen with pending charges is seeking release on bond or relief from removal, the noncitizen will surely be asked about the facts and circumstances surrounding those charges. In both of these situations, the noncitizen normally has the burden of proof, so any refusal to testify about the circumstances will likely lead to the denial of bond or the application for relief. The immigration judge may draw an adverse inference from the refusal to testify, make a negative credibility finding, or simply find that the noncitizen has not met his or her burden of proof.[337] But testifying about the charged offense may be self-incriminating and used against the noncitizen in the criminal case. Noncitizens with pending charges are therefore in a double bind: they must choose between the threat posed by deportation and the risk of self-incrimination.[338]

Some courts have held that the Fifth Amendment privilege against self-incrimination applies in removal hearings where the noncitizen's testimony could expose him or her to future criminal prosecution.[339] But "[t]he only way the privilege can be asserted is on a question-by-question basis, and thus as to each question asked, the party has to decide whether or not to raise his Fifth Amendment right."[340] As a practical matter, this can be challenging for both represented and unrepresented individuals. Additionally, some courts have refused to find a protected liberty interest in discretionary relief, as required to support a due process argument.[341] In short, immigration proceedings threaten criminal law's

337. *See* Garcia-Aguilar v. Lynch, 806 F.3d 671, 676 (1st Cir. 2015) (noting that "an [immigration judge] may draw an adverse inference from an alien's invocation of the Fifth Amendment during removal proceedings" and that the immigration judge was permitted to conclude that petitioner's silence corroborated certain documentation); Hose v. Immigr. & Naturalization Serv., 180 F.3d 992, 993–94 (9th Cir. 1999) (en banc).

338. Similarly, refusing to explain the circumstances surrounding an arrest when applying to USCIS for an immigration benefit can result in a denial. *See* Ashfaque v. Barr, 793 F. App'x 517, 519 (9th Cir. 2019) (holding that USCIS was permitted to request an "explanation and a description of the *circumstances surrounding*" the petitioner's arrest and to deny the application when he failed to provide what was requested); *see also* Erica D. Rosenbaum, Note, *Relying on the Unreliable: Challenging USCIS's Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings*, 96 N.Y.U. L. REV. 256, 256 (2021) (discussing USCIS's practice of requesting and relying on "police reports, arrest records, and other documents underlying any contact an applicant has had with the criminal justice system, even when the charges were ultimately dropped or the applicant was acquitted").

339. *E.g.*, Wall v. Immigr. & Naturalization Serv., 722 F.2d 1442, 1443 (9th Cir. 1984).

340. Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000); *see also* Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1019 (9th Cir. 2006) (rejecting the argument that the immigration judge violated the petitioner's Fifth Amendment right by requiring that he assert the privilege after each question).

341. *See, e.g.*, Rivera v. Sessions, 903 F.3d 147, 150–51 (1st Cir. 2018).

presumption of innocence by making self-incrimination the price for trying to avoid deportation.

B. UNTESTED ARREST REPORTS AND UNPROVEN CHARGES

A second way that immigration proceedings undermine criminal law's presumption of innocence is by allowing judges to rely on arrest reports and unproven charges in making decisions about detention, removability, and relief from removal.[342] When an immigration judge decides to keep a noncitizen detained or denies relief on the belief that a noncitizen has committed a crime, despite the absence of a conviction, it upends the presumption of innocence in the criminal process.[343] Constraining how untested arrest reports can be used would help protect the presumption of innocence. This can be done by limiting the weight given to them, requiring the government to present the police officers as witnesses to testify in person about the facts asserted in the report, or requiring some type of corroborating evidence of criminal conduct related to the incident that led to an untested arrest report or a dropped charge.

In criminal cases, courts have recognized the danger of relying on the facts asserted in a police report. The Eighth Circuit, for example, acknowledged that "[w]hile police reports may be demonstrably reliable evidence of the fact that an arrest was made[,] they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true."[344] In an immigration case from 1978, the Fifth Circuit also found that police reports implicating an applicant in criminal activity, but which never resulted in prosecution due to lack of sufficient evidence, were not probative.[345] Although Federal Rule of Evidence 404 does not prohibit introducing evidence of prior arrests as character evidence, such evidence is strictly regulated, unlike in removal proceedings.[346]

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342. *See* Henry v. Immigr. & Naturalization Serv., 74 F.3d 1, 5–7 (1st Cir. 1996) (upholding the agency's reliance on facts contained in a police report even though the charges were still pending); Vera-Perez v. Garland, No. 20-73247, 2022 WL 883742, at *1 (9th Cir. Mar. 24, 2022) (denying relief based on pending and dropped charges); Mutua v. U.S. Att'y Gen., 22 F.4th 963, 969 (11th Cir. 2022) ("[T]he [immigration judge] was not precluded from considering Mutua's criminal conduct in its analysis even though Mutua was not convicted of the crime charged."), *cert. denied sub nom.* Mutua v. Garland, 142 S. Ct. 1674 (2022). *See generally* Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675 (2015) (arguing that the immigration system's admission of police reports in discretionary cases violates due process).

343. The presumption is likewise eroded when immigration judges deny relief based on their own evaluation of the factual circumstances surrounding convictions that were vacated for legal reasons or reversed on double jeopardy grounds. *See* Garces v. U.S. Att'y Gen., 611 F.3d 1337, 1344–45 (11th Cir. 2010) (stating that immigration officials may consider "the facts that led to [a] conviction" that was vacated for legal reasons); Alvarez v. Garland, 33 F.4th 626, 649 (2d Cir. 2022) ("Nor is there an arguable basis in law or fact for Alvarez to fault the [immigration judge's] consideration of his 2015 robbery conviction—reversed on double jeopardy grounds—as a negative factor weighing against cancellation.").

344. United States v. Johnson, 710 F.3d 784, 789 (8th Cir. 2013) (quoting United States v. Bell, 785 F.2d 640, 644 (8th Cir. 1986)).

345. Sierra-Reyes v. Immigr. & Naturalization Serv., 585 F.2d 762, 764 n.3 (5th Cir. 1978).

346. FED. R. EVID. 404; *see also* Michelson v. United States, 335 U.S. 469, 476 (1948) (recognizing that prohibiting character evidence "tends to prevent confusion of issues, unfair surprise and undue

Reliance on arrest reports and unproven charges is highly problematic because these allegations have not been tested by the criminal process.[347] In a criminal case, documents such as arrest reports are subject to evidentiary rules, including the hearsay rule.[348] These rules "are often justified by references to the promotion of accuracy in fact-finding"—they "promote the same ends as the presumption of innocence" by "demanding that steps are taken to reduce the fragility of fact-finding and to enhance accuracy at trials."[349] But in immigration court, the Federal Rules of Evidence do not apply, which means hearsay is admissible.[350] The officer who prepared the arrest does not normally testify in immigration court, and there is no opportunity for cross-examination; yet, an immigration judge may still believe the facts asserted in an arrest report over the respondent's testimony.[351] Indeed, if the respondent describes the circumstances surrounding an arrest differently from the arrest report, the judge might well make an adverse credibility determination, which then becomes the basis for denying relief.[352]

In relying on untested arrest reports and unproven charges, immigration judges cite *Thomas*, which held that arrests and charges that did not result in a conviction can be considered as negative factors in making discretionary

prejudice"); SEC v. Johnson, No. 05-36, 2008 WL 11408530, at *1 (D.D.C. Feb. 21, 2008) (noting that "it is clear that the current version of Rule 404(a) prohibits use of character evidence in civil cases" and explaining that the "Advisory Committee Notes also make it clear that even though there may have been a split in the case law, the original intent of the Rule was to prohibit the use of character evidence in civil as well as criminal cases"); Cont'l Cas. Co. v. Howard, 775 F.2d 876, 878, 879 n.1 (7th Cir. 1985) (not allowing insured to present character evidence in civil suit despite insurance company alleging that insured was an arsonist); Schafer v. Time, Inc., 142 F.3d 1361, 1370 (11th Cir. 1998) ("Evidence of a person's character is viewed with some suspicion under the law and generally is disfavored in the Federal Rules of Evidence."). Despite the limits imposed by Rule 404, some courts have applied the "character evidence" rationale in allowing reliance on arrest reports in immigration cases involving discretionary relief. *See* Arias-Minaya v. Holder, 779 F.3d 49, 54 (1st Cir. 2015); Wallace v. Gonzales, 463 F.3d 135, 139 (2d Cir. 2006) (per curiam).

347. *See* Holper, *supra* note 342; Philip L. Torrey, Judicial Competency in the Age of Incompetence: Closing the Gaps in Immigration Law's Categorical Analysis 3 (Sept. 10, 2018) (unpublished manuscript) (on file with author).

348. *See* FED. R. EVID. 801–802.

349. Ashworth, *supra* note 22, at 79; *see also* Torrey, *supra* note 347, at 4 (arguing that immigration judges extend themselves beyond their scope of expertise when they decide to evaluate the reliability of criminal evidence).

350. *E.g.*, Djadjou v. Holder, 662 F.3d 265, 276 (4th Cir. 2011). However, courts have "recognized that '[h]ighly unreliable hearsay might raise due process problems.'" *Id.* (alteration in original) (quoting Anim v. Mukasey, 535 F.3d 243, 257 (4th Cir. 2008)); *see also Anim*, 535 F.3d at 257 ("Multiple hearsay, where the declarant is steps removed from the original speaker, is particularly problematic because the declarant in all likelihood has been unable to evaluate the trustworthiness of the original speaker.").

351. Even without hearing from the officer, immigration judges tend to believe the facts asserted in a police report over the testimony of the respondent. *See, e.g.*, Lanzas-Ramirez v. U.S. Att'y Gen., 508 F. App'x 885, 888–89 (11th Cir. 2013) (per curiam) (crediting the immigration judge's conclusion "based on the arrest report and the police officer's deposition, that Lanzas-Ramirez did not testify truthfully about his actions during the 1989 incident").

352. *See* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1228 (2019) (observing that "minorities and criminal defendants . . . are immediately considered untrustworthy and are therefore not likely to be believed").

decisions.[353] The respondent in that case had convictions that were on appeal, and the BIA found the fact of conviction "to constitute significant evidence that [the respondent] has committed the crimes of which he has already been found guilty."[354] The BIA stressed that the proceedings had "advanced well beyond the point of arrest or the filing of a preliminary police report implicating [the respondent] in criminal activity."[355] Although the BIA instructed immigration judges to take into account "the nature" of the individual's "contact with the criminal justice system" and "the stage to which those proceedings have progressed," that part of the decision often falls to the wayside when judges apply this precedent.[356]

Just two weeks after *Thomas* was issued, the BIA decided *Arreguin De Rodriguez*, which rejected the immigration judge's reasoning that an old arrest for alien smuggling was a negative factor and reversed the denial of discretionary relief.[357] There, the BIA was "hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein."[358] The BIA gave "little weight" to the old arrest report because the respondent was never prosecuted and denied any wrongdoing at her immigration hearing, and there was no evidence corroborating the allegations in the report.[359]

Despite the tension between *Thomas* and *Arreguin De Rodriguez*, immigration courts and the BIA regularly rely on arrest reports and unproven charges in denying relief. In one case where the BIA cited the probable cause required for an arrest as an adequate reason to deny relief, the Ninth Circuit affirmed.[360] The Ninth Circuit distinguished *Arreguin De Rodriguez* on the basis that the respondent in that case had never been prosecuted.[361] In another case, the Ninth Circuit affirmed the BIA's reliance on dropped charges, concluding that there was no "innocent explanation for battering one's spouse or causing an accident while

353. 21 I. & N. Dec. 20, 23–25 (B.I.A. 1995) (en banc) (holding that "evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction" may be considered in adjudicating discretionary relief).

354. *Id.* at 25.

355. *Id.*

356. *Id.* at 24. As a practical matter, however, it is often difficult for a petitioner to show that an immigration judge failed to take the extent of contact with the criminal system into account. For example, in *Perez v. Barr*, the petitioner argued that the immigration judge should not have relied on police reports in denying his application for cancellation of removal because those arrests did not result in convictions. 927 F.3d 17, 20 (1st Cir. 2019). Although the petitioner stressed the importance of taking the stage to which the criminal proceedings had progressed into account, the First Circuit dismissed the appeal, reasoning that Perez had "point[ed] to nothing in the record that would indicate that the [immigration judge] did not do so here." *Id.* at 21.

357. 21 I. & N. Dec. 38, 42–43 (B.I.A. 1995).

358. *Id.* at 42.

359. *Id.*

360. Martinez-Corona v. Garland, No. 19-72569, 2021 WL 4868357, at *2 (9th Cir. Oct. 19, 2021).

361. *Id.*

driving drunk."[362] The court reasoned that, unlike Arreguin, the petitioner had "not denied wrongdoing or contested the facts in the arrest records."[363]

Testimonial evidence denying wrongdoing,[364] or some other type of evidence calling into question the facts asserted in a police report,[365] appears to be critical in arguing that a judge should not have relied on untested arrest reports or dropped charges. The problem with requiring respondents to provide such evidence about the circumstances surrounding an arrest is that it puts them in the position of having to provide potentially self-incriminating information in order to avoid deportation, a dilemma discussed above.

The Supreme Court's recent decision in *Patel v. Garland* exacerbates the issues caused by reliance on arrest reports and unproven charges by rendering all factual determinations in discretionary applications non-reviewable by a federal court.[366] This means that any factual errors about a respondent's criminal history that contribute to a denial of discretionary relief are not subject to judicial review. For example, if the BIA misstates the number of arrests, conflates an arrest with prosecution, or makes a mistake about the stage to which a charge progressed, none of those factual errors are even reviewable by a federal court.

C. EXPANSION OF THE "CIRCUMSTANCE-SPECIFIC APPROACH" TO CONVICTIONS

The third example offered here to demonstrate how immigration proceedings undermine criminal law's presumption of innocence involves the categorical versus circumstance-specific approach to analyzing convictions. For nearly a decade, the Supreme Court has held that the word "convicted" or "conviction" in the INA triggers the categorical approach.[367] When applying the categorical approach, "[a]n alien's actual conduct is irrelevant to the inquiry" because the court must "'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute."[368]

In interpreting certain provisions of the INA involving a conviction, however, the Supreme Court and circuit courts have decided that it is still appropriate to look at the specific circumstances of the offense. The number of INA provisions triggering this "circumstance-specific approach" has expanded in recent years. Factual issues that were never proven beyond a reasonable doubt in a criminal

362. Vera-Perez v. Garland, No. 20-73247, 2022 WL 883742, at *1 (9th Cir. Mar. 24, 2022). In *Vera-Perez*, the petitioner's arrests "bookended two DUI convictions," which led the BIA to find an "alcohol-related pattern shown by the arrests and convictions." *Id.*

363. *Id.*

364. *See* Avila-Ramirez v. Holder, 764 F.3d 717, 725 (7th Cir. 2014) (rejecting the BIA's reliance on untested arrests where the petitioner had denied wrongdoing and was found credible).

365. *See, e.g.*, Billeke-Tolosa v. Ashcroft, 385 F.3d 708, 712–13 (6th Cir. 2004) (rejecting reliance on dropped charges where a social worker had evaluated the petitioner and agreed that he did not commit the acts described in the criminal complaints).

366. 142 S. Ct. 1614, 1627 (2022).

367. *See* Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("'[C]onviction' is 'the relevant statutory hook.'" (alteration in original) (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 580 (2010))). For an explanation of the categorical approach, see *supra* note 66.

368. Mellouli v. Lynch, 575 U.S. 798, 805 (2015) (quoting *Moncrieffe*, 569 U.S. at 190–91).

case are therefore now being litigated in immigration court where the government has a lower burden of proof or where the noncitizen has the burden of proof. The circumstance-specific approach has become relevant in cases involving fraud or deceit,[369] marijuana possession,[370] domestic violence,[371] violation of a protective order,[372] failure to appear in a felony case,[373] and the ban prohibiting U.S. citizens who have been convicted of sexual offenses involving minors from filing visa petitions for family members.[374]

The Supreme Court first applied the circumstance-specific approach in its 2009 decision in *Nijhawan v. Holder*, which explained that this approach applies when the statute "refers to the specific circumstances in which a crime was committed," rather than to "generic crimes."[375] *Nijhawan* examined the INA's aggravated felony deportability ground,[376] which includes "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000."[377] In holding that the amount of the loss required a circumstance-specific approach, the Court stressed

369. *See, e.g.*, Nijhawan v. Holder, 557 U.S. 29, 36 (2009).

370. *See, e.g.*, Davey, 26 I. & N. Dec. 37, 39 (B.I.A. 2012); Dominguez-Rodriguez, 26 I. & N. Dec. 408, 410–14 (B.I.A. 2014) (applying *Davey* in the removal context); Cardoso de Flores v. Whitaker, 915 F.3d 379, 385 (5th Cir. 2019).

371. There is currently a circuit split with respect to the domestic violence ground of deportability. Under the INA, a "crime of domestic violence" must be a "crime of violence" as defined by 18 U.S.C. § 16, and the crime must have been committed by an individual who was in a domestic relationship with the victim. *See* INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). The Ninth Circuit has applied the categorical approach to the domestic relationship requirement. *See* Tokatly v. Ashcroft, 371 F.3d 613, 622–23 (9th Cir. 2004). The Fourth and Fifth Circuits, on the other hand, have applied the circumstance-specific approach, reasoning that the domestic relationship requirement is merely an attendant circumstance of the underlying conviction. *See* Hernandez-Zavala v. Lynch, 806 F.3d 259, 263 (4th Cir. 2015); Bianco v. Holder, 624 F.3d 265, 272 (5th Cir. 2010) (relying on United States v. Hayes, 555 U.S. 415 (2009)).

372. *See, e.g.*, Alvarez v. Garland, 33 F.4th 626, 641 (2d Cir. 2022); Reid v. Att'y Gen. U.S., 651 F. App'x 134, 135 (3d Cir. 2016) (per curiam); Szalai v. Holder, 572 F.3d 975, 983–86 (9th Cir. 2009) (per curiam) (Wu, J., concurring).

373. *See, e.g.*, Garza-Olivares, 26 I. & N. Dec. 736, 737, 739–40 (B.I.A. 2016) (applying the circumstance-specific approach to the aggravated felony deportability ground defined in 8 U.S.C. § 1101(a)(43)(T), which involves "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed"). The BIA divided this definition into five elements: "(1) a failure to appear (2) before a court, (3) pursuant to a court order, (4) to answer to or dispose of a charge of a felony, (5) where the felony was one for which a sentence of 2 years' imprisonment or more may be imposed." *Id.* at 739. The BIA held that the categorical approach applies to the first two elements, but the circumstance-specific approach applies to the remaining three elements. *Id.* at 739–40; *see also* Morales v. Sessions, 736 F. App'x 383, 384–86 (4th Cir. 2018) (following the BIA's approach under *Garza-Olivares*).

374. *See* INA § 204(a)(1)(A)(viii)(I), 8 U.S.C. § 1154(a)(1)(A)(viii)(I) (stating that an immediate relative petition may not be filed by "a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition . . . is filed"); Privett v. Sec'y, DHS, 865 F.3d 375, 382 (6th Cir. 2017) (relying on cases arising under the Sex Offender Registration and Notification Act (SORNA) in applying the circumstance-specific approach to determine if the offense involved a minor).

375. 557 U.S. 29, 36–38 (2009).

376. *Id.* at 32; *see* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

377. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

that the statute stated "the conduct involved *in*," rather than referring to "the elements *of*" an offense.[378] This seemingly minor grammatical difference commanded an entirely different analytical approach because "in" referred to the circumstances of the crime.[379] In *Moncrieffe v. Holder*, the Supreme Court provided additional guidance about when courts should use the circumstance-specific approach, explaining that it is "a limitation[] written into the INA itself" that shows Congress's "intent to have the relevant facts found in immigration proceedings."[380]

The Ninth Circuit recently applied the circumstance-specific approach to an exception in the controlled substance deportability ground for marijuana possession.[381] This exception applies to a "single offense *involving* possession for one's own use of 30 grams or less of marijuana."[382] The court held that the amount of marijuana involved in an offense required a circumstance-specific approach.[383] Relying on the petitioner's failure to contest the quantity of marijuana alleged in a police report, the court found that the government had met its burden of establishing deportability by clear and convincing evidence.[384]

Interestingly, the dissent in *Bogle* specifically referenced the presumption of innocence, arguing that affirming the BIA would "disregard Bogle's presumption of innocence as to any conduct beyond the scope of his plea."[385] The dissent explained: "Immigration authorities may not condemn a defendant using the clear and convincing standard when a prosecutor, in bringing and resolving charges, is required to consider that he must prove his case beyond a reasonable doubt."[386] The concerns raised by the dissent also included depriving the defendant of the deal struck in the plea bargain and adjudicating the facts of a crime in an immigration proceeding that lacks the same constitutional protections and evidentiary rules as a criminal case.[387]

Increasing application of the circumstance-specific approach will continue to undermine criminal law's presumption of innocence. Use of the circumstance-specific approach also implicates the arguments about self-incrimination and arrest reports discussed above because potentially self-incriminating testimony and arrest reports are precisely the type of evidence courts will consider in determining if a statutorily specified circumstance has been established by the facts.

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378. *Nijhawan*, 557 U.S. at 38–39 (internal quotation marks omitted).

379. *See id.* at 39–40. Additionally, the Court noted that a scarcity of state and federal offenses categorically matching the INA provision indicated that the INA was referring to specific circumstances because otherwise the statutory provision would be left "with little, if any, meaningful application." *Id.*

380. 569 U.S. 184, 202 (2013).

381. Bogle v. Garland, 21 F.4th 637, 646 (9th Cir. 2021).

382. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added).

383. *Bogle*, 21 F.4th at 646.

384. *Id.* at 649–51.

385. *Id.* at 660–61 (Pearson, J., dissenting).

386. *Id.* at 661.

387. *See id.*

The three examples discussed in this Part therefore work together to diminish criminal law's presumption of innocence.

V. OBJECTIONS TO RECOGNIZING A PRESUMPTION OF INNOCENCE

Various objections might be made to recognizing (or strengthening) a presumption of innocence in immigration law. One possible objection is that it would negatively impact administrative efficiency. With hundreds of thousands of people placed in removal proceedings each year,[388] shifting the burden of proof to the government in more cases, or making it harder for the government to rely on admissions in meeting its burden, would simply bog down the process and make it unmanageable. The Supreme Court's decision in *INS v. Lopez-Mendoza* reflects this concern, stressing that the government "operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions."[389]

In reality, however, a strengthened presumption of innocence is unlikely to interfere much with administrative efficiency.[390] For starters, the handling of immigration cases is already far from efficient, with a backlog of approximately 1.8 million pending cases by the end of FY 2022.[391] Additionally, the notion of a fast and streamlined process is at odds with the actual complexity of many immigration cases. The sentiment that "questions relating to deportability routinely involve simple factual allegations and matters of proof"[392] does not reflect reality. Acknowledging the complexity of immigration cases, including the constitutional and "crimmigration" issues that frequently arise, would help recalibrate expectations for how quickly cases should be processed. Expediting cases often comes at the expense of careful legal analysis and thorough factual development. It leads to errors that could be avoided if more protections were put into place—errors that lead to appeals. Strengthening the presumption of innocence at the investigation and removal stages could even improve both administrative and judicial efficiency by reducing the number of appeals filed with the BIA and federal courts.

Issues of administrative efficiency also beg the question of whether we should be deporting hundreds of thousands of people each year. Strengthening a presumption of innocence could pressure DHS to exercise prosecutorial discretion in more cases, including by not initiating so many removal proceedings. Just as criminal prosecutors in many states and localities have decriminalized certain low-level offenses, DHS could decide not to file immigration charges in cases where the only charge involves being present in the United States without legal status. An especially strong argument for prosecutorial discretion in such cases

388. *See* EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS (2022), https://www.justice.gov/eoir/page/file/1242166/download [https://perma.cc/2NBH-A85P].

389. 468 U.S. 1032, 1048 (1984).

390. *See id.* at 1060 (White, J., dissenting) ("[T]here is but a weak showing that administrative efficiency will be seriously compromised.").

391. *See* EXEC. OFF. FOR IMMIGR. REV., *supra* note 388.

392. *Lopez-Mendoza*, 468 U.S. at 1048 (quoting Sandoval, 17 I. & N. Dec. 70, 80 (B.I.A. 1979)).

can be made for individuals who have been present in the United States for a significant period of time or who have U.S. citizen children, as well as for minors themselves. DHS could also consider not initiating removal proceedings against lawful permanent residents. If they commit a crime, the government could simply let them serve their sentences and remain in the country like U.S. citizens.

Another possible argument against shifting the burden of proof to the government for all categories of noncitizens could be that we do not owe the same protections to individuals who are seeking entry (arriving aliens) or who entered illegally (and are therefore inadmissible) as we do to people who came legally (and are deportable). One challenge with this argument is that people charged with being inadmissible have often already been in the United States for an extended period of time and have established strong family and community ties. They may stand to lose as much if removed as people who are lawfully in the United States. Additionally, as noted above, lawful permanent residents who are returning to the United States after being abroad can also be charged with inadmissibility grounds.[393] There is no obvious reason why the burden should be shifted to permanent residents in this context but not when the permanent resident is charged with a deportability ground.

The strongest argument for not recognizing a presumption of innocence may involve the category of arriving aliens. This category typically has the weakest ties to the United States, and a substantial percentage are asylum seekers. For those who have come to the United States specifically to seek asylum, it may make little difference whether the government bears any burden because their alienage and nationality are disclosed as part of their asylum application, and they have the burden of showing eligibility for asylum. But placing the burden entirely on arriving aliens, while having a shifting burden for individuals who have entered illegally and are charged with inadmissibility, creates a perverse incentive to enter the country illegally instead of requesting admission at a port of entry.[394] Classifications of noncitizens are also prone to error, as discussed above, meaning that the disparate burdens of proof may be wrongly applied. Strengthening the presumption of innocence in all cases would reduce the risk of harm related to such classification errors.

Some might also argue that the federal government's near absolute, plenary power over immigration justifies the absence of a presumption of innocence in immigration proceedings because it allows Congress to create any rules it wants about burdens and standards of proof.[395] But the plenary power doctrine, which

393. *See supra* notes 268–70 and accompanying text.

394. Mandatory detention of arriving aliens, but not those who are apprehended after an illegal entry, similarly has the perverse effect of encouraging illegal immigration. *See* INA § 235(b), 8 U.S.C. § 1225(b).

395. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603–11 (1889) (relying on the federal government's plenary power over immigration in upholding the constitutionality of the Chinese Exclusion Act); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 46 (2004).

originated in Chinese exclusion cases, has been constrained by the right to procedural due process, at least when it comes to individuals within the United States.[396] And even if immigration law's missing presumption does not run afoul of due process, the plenary power doctrine has been forcefully criticized as one that "emerged in a racial context and developed as an explicitly racialized body of law."[397] The relevant question, then, is not whether Congress *can* undermine a presumption of innocence in immigration law but whether it *should*. In making this decision, Congress should recognize the impact of reinforcing stereotypes that certain racial and ethnic groups are unlawfully present and perpetual foreigners.

Finally, skeptics might argue that recognizing a presumption of innocence in immigration law would make no difference. One could point to disparities in the treatment of Black and brown defendants by the criminal justice system and argue that, despite the existence of a formal presumption of innocence, they are perceived as guilty.[398] Certainly, recognizing a presumption of innocence in immigration law would not even begin to cure these problems. But its absence still reinforces implicit associations between people of color and guilt.

Those who still doubt the relevance of a presumption of innocence to immigration cases may nevertheless care about how immigration law impedes criminal law's presumption of innocence. Some commentators have argued, with good reason, that the presumption of innocence for criminal defendants has already deteriorated to the point of becoming "more of an ideal than real."[399] Because over 90% of criminal cases are resolved by plea agreements and never go to trial, the government rarely has to prove the elements of a crime.[400] State statutes have also redefined elements of offenses into affirmative defenses, thereby shifting the

396. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (holding that indefinite detention after a final order of removal violates due process); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 102–05 (2006) (describing the procedural exception to the plenary power doctrine, which requires basic due process).

397. Carbado & Harris, *supra* note 23, at 1604.

398. *See, e.g.*, Zamir Ben-Dan, *When True Colors Come Out: Pretrial Reforms, Judicial Bias, and the Danger of Increased Discretion*, 64 HOW. L.J. 83, 141 (2020) ("The presumption of innocence is largely a myth; judges routinely presume accused persons, most of whom are African American or Hispanic, to be guilty of the crimes with which they are charged."); Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 408 (1994) ("It is misguided to believe that White folks can discard strongly held negative attitudes about Blacks when Whites act as police, jurors, lawyers, or judges in criminal cases with a Black criminal defendant. . . . Once we admit racial animus into the courtroom, we abandon the presumption of innocence standard that is supposedly central to our jurisprudential traditions."); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 153–55 (1994).

399. Brandon L. Garrett, Response, *The Myth of the Presumption of Innocence*, 94 TEX. L. REV. 178, 179 (2016); *see also* RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 226 (2011) (noting that, in practice, many jurors begin with a "presumption of guilt"); Laufer, *supra* note 162, at 336 (describing the presumption of innocence as mere "rhetoric").

400. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553, 2561 (2004) (explaining that defendants feel compelled to accept a plea bargain to avoid the more severe sentences associated with going to trial); Garrett, *supra* note 399, at 182

burden to the defendant.[401] Making matters worse, jury instructions regarding the "beyond a reasonable doubt" standard sow confusion, undermining the presumption.[402] Given the presumption's already tenuous position in criminal cases, further erosion through collateral immigration proceedings could be dismissed as inconsequential. On the other hand, one could take the view that every effort must be made to try to restore criminal law's presumption of innocence. From this perspective, even small steps to strengthen it by preventing further degradation through immigration proceedings are steps worth taking.

CONCLUSION

Immigration law's missing presumption of innocence functions as a form of covert racial discrimination in the immigration code. The time has come to rethink immigration law's design in order to fortify protections of factual, legal, and moral innocence. This Article has explained how a presumption of innocence is impeded at multiple decision points in the immigration process, from stops, arrests, searches, and interrogations at the investigative stage, to determinations about detention and removal, and the impact of post-conviction relief. The cumulative impact of this degradation reinforces racialized perceptions of criminality and guilt.

At the same time, immigration law diminishes criminal law's presumption of innocence by pressuring people to give potentially self-incriminating testimony in order to avoid deportation, relying on untested police reports and dropped charges in deciding who should be allowed to remain in the United States, and making factual findings about a crime that were never established in criminal court. This adds to the ever-growing evidence of bias against people of color in criminal proceedings by compromising the presumption of innocence in cases involving noncitizens.

Shedding light on these issues is the first step. Finding the political will to make changes is harder. But each branch of government has a role to play. Federal courts can take a harder look at decisions and doctrines that degrade the presumption of innocence in both immigration and criminal proceedings. Decisions rejecting a reversed burden of proof in immigration bond hearings are an important step in this direction, signaling that it is possible for courts to reexamine long-standing assumptions about who should bear the burden of proof.[403] Congress, of course, can also reconsider burdens of proof at all of the decision points mentioned above. And DHS can adjust relevant regulatory requirements, as well as increase the use of prosecutorial discretion to protect normative innocence. As the nation grapples with how to create a more racially just society, the role of immigration law in perpetuating racial biases should not be overlooked.

(observing that the focus of criminal proceedings is "on finality and on assuring convictions of the presumably guilty").

401. *See, e.g.*, John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1381–82 (1979).

402. *See* Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 342 (2020).

403. *See* Hernandez-Lara v. Lyons, 10 F.4th 19, 39 (1st Cir. 2021).