



# **Tulane University**

---

## **LAW SCHOOL**

### **The School to Deportation Pipeline**

Laila Hlass

34 GEORGIA STATE UNIVERSITY LAW REVIEW \_\_\_\_ (2018)

Tulane University School of Law  
Public Law and Legal Theory Working Paper Series

Accepted Paper No. 18-1

March 2018

This paper can be downloaded without charge from the  
Social Science Research Network electronic library at:

<http://ssrn.com/abstract=3132754>

## THE SCHOOL TO DEPORTATION PIPELINE

Laila Hlass\*

### Abstract

*The United States immigration regime has a long and sordid history of explicit racism, including limiting citizenship to free whites, excluding Chinese immigrants, deporting massive numbers of Mexican immigrants and U.S. citizens of Mexican ancestry, and implementing a national quotas system preferencing Western Europeans. More subtle bias has seeped into the system through the convergence of the criminal and immigration law regimes. Immigration enforcement has seen a rise in mass immigrant detention and deportation, bolstered by provocative language casting immigrants as undeserving undesirables: criminals, gang members, and terrorists. Immigrant children, particularly black and Latino boys, are increasingly finding themselves in the crosshairs of a punitive immigration system, over-policing within schools, and law enforcement, all of which can be compounded by racial biases and a lack of special protections for youth in the immigration regime. The confluence of these systems results in a trajectory that has been referred to as “the school to deportation pipeline.”*

*Gang allegations in immigration proceedings are an emerging practice in this trajectory. Using non-uniform and broad guidelines, law enforcement, school officials, and immigration agents may label immigrant youth as gang-affiliated based on youths’ clothes, friends, or even where they live. These allegations serve as the basis to detain, deny bond, deny immigration benefits, and deport youth in growing numbers. This Article posits that gang allegations are a natural outgrowth of the convergence of the criminal and immigration schemes, serving as a means to preserve racial inequality. This Article further suggests excluding the consideration of gang allegations from immigration adjudications because their use undermines fundamental fairness. Finally, this Article proposes a three-pronged approach to counter the use of gang allegations, including initiatives to interrupt bias, take youthfulness into account, and increase access to counsel in immigration proceedings.*

---

\* Professor of Practice, Tulane University Law School. For helpful insights and conversations at various stages of this project, thanks to Amna Akbar, Sameer Ashar, Jason Cade, Adam Feibelman, Michele Gilman, Johanna Kalb, Lindsay M. Harris, Daniel Kanstroom, Sarah Sherman-Stokes, Andrew I. Schoenholtz, and Erica K. Wilson. This paper benefited from presentations at the Southeastern Junior/Senior Workshop and the NYU Clinical Law Review Writers’ Workshop.

## Table of Contents

Introduction .....	3	
I. Gang Allegations: Crimmigration's Next Frontier .....	9	
A. <i>Criminalizing Immigrants</i> .....	11	
B. <i>Creating a New 'Criminal Alien'</i> .....	17	
II. Children at the Crosshairs of the Crimmigration Convergence .....		22
A. <i>Over-policing Youth of Color</i> .....	23	
B. <i>Implicit and Explicit Bias</i> .....	25	
III. Gang Allegations in the Immigration System .....	30	
A. <i>Identifying Gang Members and Associates</i> .....	31	
B. <i>Alleging Gang Association in Immigration Proceedings</i> .....	35	
C. <i>Deciding Cases After a Gang Determination</i> .....	38	
IV. Vacuum of Protections for Immigrant Children .....	42	
V. Suggested Safeguards .....	49	
A. <i>Excluding Gang Allegations and Evidence</i> .....	49	
B. <i>Interrupting Bias</i> .....	52	
C. <i>Accounting for Youthfulness</i> .....	55	
D. <i>Accessing Counsel</i> .....	57	
Conclusion .....	58	

## Introduction

*José was swept away one morning—law enforcement agents tore apart his dad’s house and took José into custody. They interrogated him about kids in his neighborhood, a recent crime, and whether he was in a gang. He answered their questions as best he could. Although the police did not charge him with any crime, they also did not let him go. Instead, the police directly handed José over to agents of Immigration and Customs Enforcement (ICE). At his immigration court bond hearing weeks later, José learned for the first time that he was accused of being a gang member. The ICE prosecutor’s proof of José’s alleged gang affiliation consisted of a document showing that his name appears in a gang-member database and presenting social media pictures in which José made a peace sign or was wearing his school colors or a popular sports team hat. Based upon this showing, the Immigration Judge decided José was too dangerous to be released upon bond. As a result, José stayed in detention for months during the entirety of his immigration court proceedings. Because a family court had determined that José had been neglected and abandoned by his mother, he was eligible to pursue a statutory path to lawful immigration status called Special Immigrant Juvenile Status. When the day of his immigration hearing finally arrived, however, the ICE prosecutor opposed José’s application. The prosecutor argued that José was a “gang associate,” submitting as evidence a school incident report in which a school official stated that José was seen hanging out with a student who admitted to being in a gang and that another student claimed hearing from someone else that José was in a gang. Although José had never been disciplined or even asked about the accusation, the school safety officer sent this incident report to a regional law enforcement intelligence database accessible to immigration agents. The immigration judge relied upon this school incident report to find that José was a “gang associate,” and therefore, he denied the application for Special Immigrant Juvenile Status on discretionary grounds and ordered José deported from the United States.<sup>1</sup>*

Attorney General Jeff Sessions has called the southwest border “ground zero” for the war on drugs and immigration, invoking images of gangs who purportedly “flood our country with drugs and leave death and violence in their wake.”<sup>2</sup> President Trump announced his intention to deport “bad hombres” and claimed Mexican immigrants are “rapists” who are “bringing drugs” and “crime” to the United States.<sup>3</sup> This discourse is not new. Over the last thirty years, politicians

---

<sup>1</sup> This narrative is based on the case of an immigrant youth, who has given permission to share his story. “José” is a pseudonym.

<sup>2</sup> Jeff Sessions, U.S. Attorney Gen., Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2016) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed> [<https://perma.cc/NG8G-2CTB>])).

<sup>3</sup> Donald Trump, Presidential Candidate, Presidential Announcement Speech (June 16, 2015) (transcript available at <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/9EB8-TYSF>]); *Transcript of the Third Debate*, N.Y. TIMES, (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/us/politics/third-debate-transcript.html> [<https://perma.cc/BQY8-3HQB>].

and commentators have frequently linked the regulation of immigration—particularly of Latinos—to fighting the war on drugs and crime. In the 1990s, for example, President Bill Clinton said that to “combat an unholy axis of new threats from terrorists, international criminals, and drug traffickers” the nation must crack down on “gangs and guns and drugs, . . . bar violent juveniles from buying guns for life,” and hire “1,000 new border patrol agents.”<sup>4</sup>

As the war on drugs became a ballooning dragnet capturing poor communities of color,<sup>5</sup> the war on immigrants has followed suit. The past three decades of immigration enforcement have seen a rise in mass immigrant detention and deportation, bolstered by provocative language casting immigrants as undeserving undesirables:<sup>6</sup> criminals, gang members, and terrorists. Immigration laws have become more draconian with broader categories of civil violations, crimes, and terrorism triggering deportation and fewer pathways to lawful status. For the individuals and their families affected by these laws, the consequences are harsh and often disproportionate. This is equally true for immigrant youth, who have few age-related protections in the immigration context. Immigrant children, and particularly youth of color, increasingly find themselves in the crosshairs of both unforgiving immigration enforcement and aggressive law enforcement. In both systems, racial biases compound the problem by increasing the likelihood that immigrant youth will find themselves entangled in the criminal and juvenile justice systems, pushed out of schools, and facing negative immigration consequences. Together, these elements form “the school to deportation pipeline.”<sup>7</sup>

Gang allegations involving noncitizen youth are a new key component of the school to deportation pipeline.<sup>8</sup> Immigration enforcers have escalated raids intended to apprehend

---

<sup>4</sup> William J. Clinton, President of the U.S., Address Before a Joint Session of Congress on the State of the Union (Jan. 27, 1998) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=56280> [<https://perma.cc/P59S-Z5WA>]).

<sup>5</sup> See Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 411 (2017) (discussing the war on drugs).

<sup>6</sup> See generally KEVIN R. JOHNSON, *THE ‘HUDDLED MASSES’ MYTH: IMMIGRATION AND CIVIL RIGHTS* 28 (Temple Univ. Press 2003) (ebook); Susan Musarrat 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, 298 (2002); Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOW. L.J. 899, 925 (2014); Rebecca Sharpless, *“Immigrants Are Not Criminals”: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUSTON L. REV. 691, 730–31 (2016).

<sup>7</sup> Maritza Perez, Q&A: *Seizing the Moment to Tackle the School-to-Prison-to-Deportation Pipeline*, OPEN SOC’Y FOUND. (Sept. 7, 2016), <https://www.opensocietyfoundations.org/voices/seizing-moment-tackle-school-prison-deportation-pipeline> [<https://perma.cc/PLZ2-YQ6W>].

<sup>8</sup> For the purposes of this Article, youth is used broadly to include children—those under the age of twenty-one under the Immigration and Nationality Act (INA).

immigrant teenagers suspected of gang affiliation.<sup>9</sup> Meanwhile, the immigration agency<sup>10</sup> has instructed adjudicators to deny immigration benefits in cases involving gang allegations, apparently without due consideration of the reliability or veracity of the suspicions.<sup>11</sup> Although gang membership is not a statutory basis for deportation, enforcers can use allegations of gang activity to support discretionary denials of benefits or relief from removal.<sup>12</sup> Moreover, the mere suspicion of gang affiliation, as a practical matter, can lead to the initiation of removal proceedings for noncitizen youth even if they have no criminal history.<sup>13</sup>

---

<sup>9</sup> See Sarah Gonzalez, *MS-13 Gang Crackdown Relies on ‘Questionable’ Evidence from Schools*, WNYC (Aug. 7, 2017), [http://www.wnyc.org/story/ms13-gang-police-crackdown-schools/?utm\\_source=tw&utm\\_medium=social&utm\\_content=wnyc](http://www.wnyc.org/story/ms13-gang-police-crackdown-schools/?utm_source=tw&utm_medium=social&utm_content=wnyc) [https://perma.cc/PUL5-MDU6].

<sup>10</sup> This Article uses the term “immigration agency” throughout as a shorthand for the joint efforts of several Executive Branch agencies, including law enforcement, who are involved with the implementation and execution of immigration policies in the United States. These agencies include, for example, Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), as well as the legacy Immigration and Naturalization Service, among others.

<sup>11</sup> First Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Injunctive and Declaratory Relief at 1, 10–11, 17–18, *Gomez v. Session*, No. 3:17-cv-03615-VC (N.D. Cal. Aug. 11, 2017) [hereinafter First Amended Petition & Complaint] (discussing false claims); Jennifer Medina, *Gang Databases Criticized for Denying Due Process May Be Used for Deportations*, N.Y. TIMES (Jan. 10, 2017, 9:10 PM), [https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&_r=0) [https://perma.cc/773S-ZA36] (describing how gang databases have been criticized for being racially disproportionate and overinclusive, noting that, “[y]ou’re really going to sweep up the most vulnerable people, and you have to imagine how many people are going to be railroaded into the system without due process”); Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> [https://perma.cc/H5BR-3GMD].

<sup>12</sup> See Immigration and Nationality Act, 8 U.S.C. § 1227 (2012) (outlining deportability grounds). However, under proposed legislation H.R. 3697, immigration officials could deport an individual if they know or have “reason to believe” someone is a gang member. H.R. 3697, 115th Cong. (1st Sess., 2017).

<sup>13</sup> Joel Rose & Sarah Gonzalez, *Despite Escaping to the U.S., These Brothers Are Still Terrorized by the MS-13 Gang*, NPR (Aug. 16, 2017, 5:04 AM), <http://www.npr.org/2017/08/16/543830343/ms-13-creates-fear-from-central-america-to-the-u-s> [https://perma.cc/5D5H-VCWZ] (stating that immigration authorities can “detain [immigrant children] and ask as a court to deport them, even if the kids haven’t been charged with a crime”); see also Gonzalez, *supra* note 9 (Attorney Bryan Johnson describes how his clients who have “no criminal history” have been targeted as gang members by the immigration agency).

Of particular importance, the immigration statute does not define gang membership or gang association,<sup>14</sup> and law enforcement agencies at federal and state levels use different meanings for these terms.<sup>15</sup> Nevertheless, a young person may be branded, often for life, with the gang affiliate label based solely upon the assessment of a single school safety officer, immigration agent, or police officer.<sup>16</sup> Frequently these determinations turn on little more than an observation of the young person's clothes, friends, family members, or even the housing complex or neighborhood in which they live.

The upshot is that a young person may be placed in a national network of gang databases based on scant evidence and without notification or opportunity to contest the designation.<sup>17</sup> If that youth is a noncitizen, the gang marker then filters into immigration proceedings where the mere perception of criminality<sup>18</sup> can sound a death knell for the youth's future in the United States.<sup>19</sup> If immigration adjudicators choose to credit the allegations, as many do, devastating consequences are likely to follow. Specifically, the young person will likely be refused the opportunity to post bond, subjected to detention for the pendency of removal proceedings, and, ultimately, denied any immigration benefits that he or she would otherwise be entitled to, resulting in the issuance of a deportation order.<sup>20</sup>

---

<sup>14</sup> See 8 U.S.C. § 1101 (Supp. 2014) (providing definitions).

<sup>15</sup> Neither law enforcement nor the scholars agree on a uniform gang definition. See *National Youth Gang Survey Analysis*, NAT'L GANG CTR., <https://www.nationalgangcenter.gov/Survey-Analysis> [<https://perma.cc/BXR4-PEMC>] (last visited Aug. 13, 2017) ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies . . ."); C. Ronald Huff, *Preface* to *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES*, at vii (Scott Cummings & Daniel J. Monti eds., 1993) (noting that no comprehensive definition of "gang" has been put forward).

<sup>16</sup> Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 341–42 (2007).

<sup>17</sup> See *infra* Part III.

<sup>18</sup> Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 105–06 (2002).

<sup>19</sup> See First Amended Petition, *supra* note 11, at 20 (describing a U.S. Department of Homeland Security (DHS) memorandum which instructs that a youth accused of gang membership "should not be afforded any type of immigration services, relief, benefit, or otherwise released from custody pending the outcome of removal proceedings").

<sup>20</sup> *Id.*; see DEBORAH LEE ET AL., ILRC PRACTICE ADVISORY: UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008, at 2 (Immigrant Legal Res. Ctr., 2009), [https://www.ilrc.org/sites/default/files/resources/235\\_tvpra\\_practice\\_advisory.infonet.pdf](https://www.ilrc.org/sites/default/files/resources/235_tvpra_practice_advisory.infonet.pdf) [<https://perma.cc/Y7SL-JWZJ>] (describing additional privileges given to child immigrants which would not be afforded based on the DHS memorandum).

Although much recent immigration scholarship has focused on the convergence of criminal and immigration law,<sup>21</sup> few articles have examined the particular implications for immigrant youth<sup>22</sup> facing the school to deportation pipeline as a result of gang allegations.<sup>23</sup> This Article begins to fill that gap. I show that once suspicions of gang activity enter the picture, they exert nearly outcome-determinative consequences at every stage of the immigration enforcement process—in particular, the arrest, detention, and adjudication stages. In large measure, serious procedural deficiencies in the removal process render these obstacles insurmountable. Moreover, for immigrant juveniles of color, this no-way-out dynamic is compounded by the systematic over-policing of black and Latinx youth<sup>24</sup> and the explicit and implicit biases that can influence

---

<sup>21</sup> See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135 (2009) [hereinafter *Managing Migration*]; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 613 (2012) [hereinafter *Overcriminalizing*]; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control And National Security*, 39 CONN. L. REV. 1827, 1831 (2007) [hereinafter *Unsecured Borders*]; Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 550 (2004); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1284 (2010); César Cuahémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 251 (2017) [hereinafter *Abolishing Immigration*]; César Cuahémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013) [hereinafter *Creating Crimmigration*]; César Cuahémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1451 (2015) [hereinafter *Naturalizing Immigration*]; Daniel Kanstroom, *Criminalizing the Undocumented: Irony Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 640 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment*, 113 HARV. L. REV. 1890, 1891 (2000); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107 (2012); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 368 (2006).

<sup>22</sup> While immigrants of any age could be accused of gang affiliation, recent enforcement efforts have focused on youth. See, e.g., Julia Edwards Ainsley, *US Immigration Raids to Target Teenaged Suspected Gang Members*, REUTERS (July 21, 2017, 3:55 PM), <https://www.reuters.com/article/us-usa-immigration-raids-exclusive/exclusive-u-s-immigration-raids-to-target-teenaged-suspected-gang-members-idUSKBN1A62K6> [<https://perma.cc/LZ89-7R5Z>] (describing recent raids focusing on teenagers suspected of gang affiliation); Gonzalez, *supra* note 9 (describing recent gang crackdown on high school students in Long Island, New York).

<sup>23</sup> But see Chacón, *supra* note 16, at 319–20; Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671, 682 (2015).

<sup>24</sup> See *infra* Part II.A.

adjudications.<sup>25</sup> Indeed, the focus on gang allegations arose out of a period of overtly racist discourse regarding “criminal aliens” and immigrant children of color. Taken together, these factors suggest that the use of weak gang affiliation criteria to prioritize enforcement, and to justify discretionary denials of relief from removal, may also have racially disproportionate effects.<sup>26</sup>

To be sure, the problem of gang violence in this country is a serious one. It is a problem that requires sustained attention to the complex (and diverse) sociological and neurological reasons that young people decide to associate with gangs or, as the case may be, disengage from them.<sup>27</sup> Those concerns, however important, are beyond the scope of this Article. Instead, the goal of this Article is to shed light on the practical realities faced by immigrant youth caught in the school to deportation pipeline, where entrenched biases and insufficient procedural safeguards virtually guarantee their removal based on gang affiliation, no matter how flimsy the evidence supporting that label.<sup>28</sup>

This Article proceeds in five parts. First, the Article details how the growing reliance on gang allegations in the removal system is a function of the political salience of “criminal aliens” in justifying the perpetuation of a ravenous immigration enforcement machine. Second, the Article describes how immigrant youth are particularly vulnerable to gang allegations due to the over-policing of children of color and the biases within the criminal and juvenile justice systems, school settings, and the immigration apparatus. Third, the Article describes how gang allegations infiltrate and exert commanding influence on the immigration enforcement system’s workings at multiple stages. Fourth, the Article describes how the lack of adequate procedural safeguards exacerbates the challenges that juveniles—many of whom have also experienced significant trauma and poverty—face as they try to confront allegations of gang involvement at each point in the process.

---

<sup>25</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 140 (1st. ed. 2011); David L. Faigman, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012); Fatma Marouf, *Implicit Bias in Immigration Courts*, 45 NEW ENG. L. REV. 417, 423 (2011).

<sup>26</sup> See Gonzalez, *supra* note 9; Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017), <https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants#.jmpx7G02U> [<https://perma.cc/L3CC-69JS>]; *ICE Releases Brentwood Student Accused of MS-13 Affiliation*, NEWS 12 LONG ISLAND (Aug. 8, 2017, 7:35 PM), <http://longisland.news12.com/story/36090140/ice-releases-brentwood-student-accused-of-ms-13-affiliation> [<https://perma.cc/RRY3-2M55>].

<sup>27</sup> See generally CAROLINE GLESSMAN ET AL., NAT’L COUNCIL ON CRIME AND DELINQUENCY, YOUTH IN GANGS: WHO’S AT RISK 8 (2009); *Youth Violence Myths and Realities: A Tale of Three Cities: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. 25 (2009) (testimony by Dr. Barry Krisberg, President, National Council on Crime and Delinquency).

<sup>28</sup> This Article also does not address important questions regarding the proportionality of the practice of lifelong gang labeling in light of adolescent brain developmental research finding juvenile’s immaturity and underdeveloped responsibility and in light of research that most gang members disengage from gang activity within two to three years. See VICTOR M. RIOS, HUMAN TARGETS: SCHOOLS, POLICE, AND THE CRIMINALIZATION OF LATINO YOUTH 21 (2017).

Ultimately, in Part V, the Article argues that gang allegations, in their current form, are simply too prejudicial and too unreliable to justify negative discretionary decisions at every point in the process. Without sufficient safeguards, their use violates fundamental fairness in immigration proceedings. Accordingly, I suggest three reforms that together would help to ameliorate the unfairness that results from reliance on gang allegations: (1) the adoption of procedures that work to “interrupt” the biases of decision-makers; (2) the enactment of agency guidance instructing decision-makers to take youthfulness into account as a positive discretionary factor; and (3) increasing access to counsel.

### I. Gang Allegations: The Next Frontier of “Crimmigration”

Criminal law has come to bear on immigration law for more than a century, with even the first federal immigration statutes banning the entry of “foreigners” with criminal convictions.<sup>29</sup> The past few decades have seen a rapid and staggering convergence of the criminal and immigration regimes, termed “crimmigration.”<sup>30</sup> This movement has spawned a mammoth deportation and immigrant incarceration apparatus, with increasingly severe penalties for immigrants who have any contact with law enforcement.<sup>31</sup> The immigration and criminal systems have become deeply intertwined, with substantial subject-matter overlap and shared law enforcement personnel and duties,<sup>32</sup> as immigration law enforcement seek to mimic the “theories, methods, perceptions, and priorities” within criminal law enforcement while rejecting the corresponding bundle of procedural rights available in the criminal context.<sup>33</sup>

Recently, as the immigration system has churned through and deported millions of immigrants, the immigration agency has sought to create a new category of criminal alien by using

---

<sup>29</sup> Stumpf, *supra* note 21, at 380. See Page Act of 1875, ch. 141, sec. 5, 18 Stat. 477 (repealed 1974) (regulating immigration of those convicted of “felonious crimes”). For a broad history of these trends, see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 1–90* (2007) and HIDETAKA HIROTA, *EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2015).

<sup>30</sup> McLeod, *supra* note 21, at 113. Allegra McLeod characterizes this convergence as “shared personnel, priorities and resources” resulting in civil immigration law enforcement and adjudication increasingly resembling and overlapping with criminal law enforcement. *Id.*

<sup>31</sup> See Stumpf, *supra* note 21, at 381 (noting the increase in “immigration-related acts that carry criminal consequences”).

<sup>32</sup> McLeod, *supra* note 21, at 113–14. As part of this convergence, state and local law enforcement are regularly delegated immigration enforcement duties; the federal immigration agency cross-designates officers to serve as criminal prosecutors; immigration law is more punitive; immigrants are increasingly detained in jails and prisons; and criminal law contact triggers immigration consequences more frequently. *Id.*

<sup>33</sup> Legomsky, *supra* note 21, at 472.

computer-generated lists of young people suspected of gang association or membership.<sup>34</sup> No longer is a criminal conviction necessary. Now, a single person—such as a school official, a local law enforcement officer, or an immigration agent—can, with little oversight, designate an immigrant youth as a suspected gang member or associate using broad and vague criteria that implicate cultural and geographic characteristics.<sup>35</sup> Aided by a technological revolution within the immigration regime, gang accusations may surface from social media surveillance and be shared through local, state, and federal law enforcement databases and information systems instantaneously.<sup>36</sup> Once immigration agencies have access to these allegations, they may use the information—often unbeknownst to the immigrant youth—when making all manner of immigration decisions, including detention, refusal to set a bond, denial of immigration benefits applications, and deportation.<sup>37</sup> Children, who have almost no special safeguards in immigration proceedings, are increasingly susceptible to being initially detained, refused a bond, denied immigration protection, and deported based on gang allegations.

Gang allegations have occurred in the backdrop of public commentary linking immigrants, including youth, with violent crime, drugs, and even terrorism.<sup>38</sup> This is no coincidence. As Yolanda Vásquez writes, crimmigration developed as a new tactic “to maintain racial inequality and ‘colorblind white dominance’” as the Latinx population steadily grew and explicit discrimination was restricted.<sup>39</sup> As President George H. W. Bush signed the Immigration Act of 1990, he declared the immigration law created “swift and effective punishment for drug-related and other violent crime” fulfilling goals of the “war on drugs and violent crime.”<sup>40</sup> Gang

---

<sup>34</sup> SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, UNIV. CALIF. SCH. OF L. IMMIGRANT RTS. CLINIC, MISLABELED ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES 1 (Sameer Ashar & Annie Lai, eds., 2016), <http://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> [<https://perma.cc/DZ9M-SLTT>]. Gang allegations “are stored in computer databases that are networked to other agencies, including . . . [ICE] and the Department of Homeland Security.” *Id.*

<sup>35</sup> See *infra* Part II.

<sup>36</sup> See Roger Clarke, *Information Technology and Dataveillance*, 31 COMM. OF THE ASS’N OF COMPUTER MECHANICS 498, 504–05 (1988); Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 41 (2014); Alexander Smith, *U.S. Visitors May Have to Hand Over Social Media Passwords: DHS*, NBC NEWS (Feb. 8, 2017, 7:51 AM), <http://www.nbcnews.com/news/us-news/us-visitors-may-have-hand-over-social-media-passwords-kelly-n718216> [<https://perma.cc/23HM-ULMW>].

<sup>37</sup> Kalhan, *supra* note 36, at 53.

<sup>38</sup> For discussion of how immigration policy serves as a means of social control over certain groups, see generally *Unsecured Borders*, *supra* note 21; Kanstroom, *supra* note 29, at 131–60; Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005).

<sup>39</sup> Yolanda Vásquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L. J. 599, 606–07 (2015).

<sup>40</sup> Statement by President George Bush Upon Signing S. 358, 26 WEEKLY COMP. PRES. DOC. 1946 (Nov. 29, 1990).

allegations, crimmigration's next frontier, can be better understood in the context of the immigration system's history of racial bias; the disproportionate impact policies have had on black and Latinx immigrants;<sup>41</sup> and the way immigration law has been repurposed as a proxy for achieving criminal law enforcement goals.<sup>42</sup> This section will first detail the criminalization of immigrants and the groundwork that made the creation of a new criminal alien, the gang suspect, possible. Next, this section details the immigration agency's focus on gangs and the technological revolution that enabled the sharing of massive amounts of investigative notes regarding gang suspects.

#### A. *Criminalizing Immigrants*

The crimmigration convergence is characterized by the rapid expansion of bases for deportations, classes of federally prosecuted immigration crimes, and jails holding immigrants,<sup>43</sup> as well as dominating decisions regarding prosecutorial discretion and recent presidential executive action. As the share of deportations based on criminal grounds remains low in recent years, the immigration agency has turned its focus to suspected gang members.

The crimmigration expansion has resulted in mass removals of Latinos—most significantly, poor Latinos from Mexico, Guatemala, Honduras, and El Salvador; for example, in 2015, 95% of removals were individuals from Mexico, Guatemala, El Salvador, and Honduras.<sup>44</sup> This has occurred just as the immigration system has emulated the “severity revolution” within the criminal justice system.<sup>45</sup> Deportations of lawful permanent residents were pretty rare until the 1980s and 1990s, when Congress significantly broadened criminal grounds of deportability by creating a class of so-called aggravated felons and adding classes of deportability for drug addiction, minor drug offenses, and failure to comply with special registration provisions.<sup>46</sup> In the

---

<sup>41</sup> Vásquez, *supra* note 39, at 602–04; *see also* *Naturalizing Immigration*, *supra* note 21, at 1485.

<sup>42</sup> *See* *Managing Migration*, *supra* note 21, at 138. This is a trend Jennifer Chacón has termed “Managing Migration Through Crime.” *Id.* at 137.

<sup>43</sup> For a detailed history, *see* *Naturalizing Immigration*, *supra* note 21, at 1467–74.

<sup>44</sup> U.S. DEP’T OF HOMELAND SEC., THE U.S. IMMIGRATION SYSTEM BY THE NUMBERS: 2015 IMMIGRATION ENFORCEMENT ACTIONS 1 (2017), [https://www.dhs.gov/sites/default/files/publications/Graphics\\_ENF\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Graphics_ENF_2015.pdf) [<https://perma.cc/2PLP-656Q>] [hereinafter *The U.S. Immigration System*]; *see also* Vásquez, *supra* note 39, at 654.

<sup>45</sup> Miller, *supra* note 38, at 83.

<sup>46</sup> Stumpf, *supra* note 21, at 383–84; *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, sec. 7342, § 101(a), 102 Stat. 4181, 4469 (1988) (expanding the definition of “aggravated felony” to include murder and illicit trafficking of drugs, firearms, and destructive devices); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104–208, secs. 213–215, 110 Stat. 3009, 571–72 (1996) (adding crimes and lowering the sentence requirement of removable violent crimes to one year); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, sec. 440, § 106, 110 Stat. 1214, 1277 (1996)

decade following 1996, the number of immigration prosecutions almost quadrupled.<sup>47</sup> Over time, immigration violations have become the most common federally prosecuted crimes in the U.S., making up about half of federal arrests.<sup>48</sup> The overwhelming majority of the 333,341 noncitizens removed had no criminal convictions; of those who did, the top crime was immigration-related, such as illegally re-entering the United States after being deported.<sup>49</sup>

Hyperincarceration is a hallmark of the crimmigration enforcement regime,<sup>50</sup> and the vast majority of the detained are Latinx.<sup>51</sup> In the 1980s, the United States held only about thirty people in immigrant detention on a given day, but that number has exploded to up to 45,000 immigrants

---

(expanding the “aggravated felony” definition to include gambling, alien smuggling, and passport fraud). At the same time, Congress criminalized more migration-related acts, such as the hiring of unauthorized immigrant workers and entering or reentering the U.S. without legal basis, as well as increased the severity of criminal sanctions applied to those acts. *See* Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99–603, § 274A, 100 Stat. 3359, 3359 (1986); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476–81 (2007) (describing increasing criminalization of migration actions).

<sup>47</sup> *See Graphical Highlights: DHS Criminal Enforcement Trends*, TRAC IMMIGR., <http://trac.syr.edu/tracins/highlights/v04/dhstrendsG.html> [<https://perma.cc/9BBX-TWHX>] (last visited Jan. 2, 2018) (showing that the number of prosecutions increased from under 10,000 in 1996 to more than 40,000 in 2004).

<sup>48</sup> MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2013-2014, at 1 (Mar. 2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf> [<https://perma.cc/D24Z-7MRT>]. There were 81,881 federal immigration arrests made in 2014—one-half of all federal arrests. *Id.*

<sup>49</sup> *The U.S. Immigration System*, *supra* note 44 (noting that immigration-related crimes made up a third (33.1%) of non-citizen convictions followed by drug (17.3%) and traffic offenses (13.3%)).

<sup>50</sup> *See* Sharpless, *supra* note 6.

<sup>51</sup> JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 1, 3 (2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf) [<https://perma.cc/LFF8-YH4G>]. Latinos comprised more than 90% of those in immigration detention in 2012. *Id.*

currently held on any given day.<sup>52</sup> In the past decade, ICE's detention budget has more than doubled, increasing from \$864 million in 2005 to more than \$2 billion in 2012.<sup>53</sup> In 2015, ICE detained 352,882 people.<sup>54</sup> Because 65% of immigrants are held in private, for-profit jails,<sup>55</sup> detaining immigrants has become a multi-billion-dollar business.<sup>56</sup>

Beyond the formal legal changes leading to a massive expansion of deportation and immigrant incarceration, policies regarding informal prosecutorial discretion have also trended towards criminalization of immigrants. Prosecutorial discretion is the general authority law enforcement agencies wield in deciding whether to exercise their enforcement powers against an individual.<sup>57</sup> Prosecutorial discretion influences decisions about which violations and populations

<sup>52</sup> Compare *Immigration Detention Map & Statistics*, CIVIC, <http://www.endisolation.org/resources/immigration-detention/> [<https://perma.cc/5AEP-NAMS>] (last visited Jan. 2, 2018), with S. POVERTY LAW CTR., *SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH* 5 (2016), [https://www.splcenter.org/sites/default/files/leg\\_ijp\\_shadow\\_prisons\\_immigrant\\_detention\\_report.pdf](https://www.splcenter.org/sites/default/files/leg_ijp_shadow_prisons_immigrant_detention_report.pdf) [<https://perma.cc/C566-MGAR>] [hereinafter *SHADOW PRISONS*]. The first mandatory detention provision started the mass incarceration trend for immigrants. See generally Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988). Then, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) greatly enlarged the definition of “aggravated felony” and the classes of immigrants subject to mandatory detention. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (1996). IIRIRA expanded the increasingly bloated aggravated felony definition and mandatory detention. Pub. L. 104-208, 110 Stat. 3009, 546 (1996) (codified at 8 U.S.C. § 1226 (2012)).

<sup>53</sup> Chris Kirkham, *Private Prisons Profit from Immigration Crackdown*, *Federal and Local Law Enforcement Partnerships*, HUFFINGTON POST (June 7, 2012, 3:06 PM), [http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement\\_n\\_1569219.html](http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html) [<https://perma.cc/6L74-Q3BD>]. Similarly, private companies' profits from ICE have boomed. In 2012, CCA took in \$208 million from ICE contracts, compared to \$95 million in 2005, and GEO Group took in \$216 million, compared to \$33.6 million in 2005. *Id.*

<sup>54</sup> U.S. DEP'T OF HOMELAND SEC., *ANNUAL FLOW REPORT, DHS IMMIGRATION ENFORCEMENT: 2016*, at 3 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf> [<https://perma.cc/H69R-ZHZE>] [hereinafter *ANNUAL FLOW REPORT 2016*].

<sup>55</sup> HOMELAND SEC. ADVISORY COUNCIL, *REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES* 6 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [<https://perma.cc/622Q-BEMS>].

<sup>56</sup> *SHADOW PRISONS*, *supra* note 52, at 3. In fact, CCA spokesman Mike Machak has conceded “that immigrant detention ‘has been an important part of our business since our inception.’” Kirkham, *supra* note 53.

<sup>57</sup> U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., *FACT SHEET: PROSECUTORIAL DISCRETION GUIDELINES* 1 (2000).

to target; which individuals to question and arrest; whether to detain, set a bond, monitor with an ankle bracelet or release a noncitizen; whether to initiate deportation; and whether to administratively close or terminate a case.<sup>58</sup>

During his tenure, President Barack Obama took two approaches to using discretion, with the concept of the “criminal alien” central to both. First, he created deportation priorities, purportedly focusing enforcement on immigrants with criminal offenses and those who pose a threat to safety.<sup>59</sup> Second, he established a category of individuals who would be temporarily allowed to stay through Deferred Action for Childhood Arrivals (DACA), a program for high achieving young people who came to the U.S. before age sixteen; however, the DACA program expressly excluded young people with a significant misdemeanor, three misdemeanors, a felony, or those who pose a safety or security risk.<sup>60</sup> Young people who applied and were approved for DACA received “deferred action,” a category of prosecutorial discretion that may allow grantees to work legally and be temporarily protected from deportation.<sup>61</sup> When discussing his immigration priorities, President Obama famously stated he would focus deportation forces on “[f]elons, not families.<sup>62</sup> Criminals, not children. Gang members, not a mom who’s working hard to provide for

---

<sup>58</sup> Shoba Sivaprasad Wadhia, *Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243–44 (2010).

<sup>59</sup> Memorandum from Jeh Charles Johnson, Sec’y Dep’t Homeland Sec., to Thomas S. Winkowski, Acting Dir. U.S. Immigration & Customs Enf’t, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/FY87-QVP4>].

<sup>60</sup> *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/C475-8TYD>] (last updated Oct. 6, 2017). When the DACA program was established in 2012, it required applicants to prove that they (1) were under the age of thirty-one as of June 15, 2012; (2) came to the United States before reaching the age of sixteen; (3) had continuously resided in the United States since June 15, 2007; (4) were physically present in the United States on both June 15, 2012, and at the time of making a request for DACA; (5) had no lawful status on June 15, 2012; (6) were currently in school, had graduated, had obtained a certificate of completion from high school, had obtained a general education development (GED) certificate, or were an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and (7) had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors and did not otherwise pose a threat to national security or public safety. *Id.*

<sup>61</sup> Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 67–68 (2013) (providing a thorough examination of DACA).

<sup>62</sup> Christie Thompson, *Deporting ‘Felons, Not Families,’* MARSHALL PROJECT (Nov. 21, 2014, 5:22 PM), <https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families#.tngZG6Mru> [<https://perma.cc/SZ4B-LS5Z>].

her kids.”<sup>63</sup> President Obama made street gangs a top priority group for deportation,<sup>64</sup> and the immigration agency began to track the deportation of those with gang convictions in 2015.<sup>65</sup>

The Trump administration’s immigration executive orders and policies are similarly preoccupied with deepening the crimmigration regime. He has proposed creating mass immigration jails at the border,<sup>66</sup> expanding the deputization of local law enforcement as federal immigration agents,<sup>67</sup> ramping up the hiring of immigration deportation agents,<sup>68</sup> calling for increased criminal prosecution of immigration violations,<sup>69</sup> and creating Victims of Immigration Crime Engagement,<sup>70</sup> an office to generate publicity regarding crimes committed by immigrants.<sup>71</sup> Breathtaking in scope,<sup>72</sup> the executive orders not only propose further criminalization of immigrants but also attempt to punish pro-immigration people and cities.<sup>73</sup> Many have written

<sup>63</sup> *Transcript: Obama’s Immigration Speech*, WASH. POST (Nov. 20, 2014), [https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340\\_story.html?utm\\_term=.3aa1ad5d3e4d](https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html?utm_term=.3aa1ad5d3e4d) [<https://perma.cc/JC52-QY34>].

<sup>64</sup> See ANNUAL FLOW REPORT 2016, *supra* note 54, at 5 (including as highest priority for enforcement resources those people who were “convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a) or aliens not younger than [sixteen] years of age who intentionally participated in organized criminal gang to further the illegal activity of the gang (street gang)”).

<sup>65</sup> U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT, DHS IMMIGRATION ENFORCEMENT: 2015, at 5 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202015.pdf> [<https://perma.cc/6RFR-SDCE>].

<sup>66</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793, § 5, 8794–95 (Jan. 25, 2017) (including “Border Security & Immigration Enforcement Improvements”).

<sup>67</sup> *Id.* at § 10, 8795.

<sup>68</sup> *Id.* at § 8, 8795; Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 7, 8800 (Jan. 25, 2017) (including “Enhancing Public Safety in the Interior of the United States”).

<sup>69</sup> Exec. Order No. 13,767, 82 Fed. Reg. at 8795–96 § 11.

<sup>70</sup> *Victims of Immigration Crime Engagement (VOICE) Office*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/voice> [<https://perma.cc/3HDE-QTQW>] (last visited Oct. 31, 2017).

<sup>71</sup> Exec. Order No. 13,768, 82 Fed. Reg. at 8801 § 13. See *VOICE*, *supra* note 70.

<sup>72</sup> Federal courts have found that several parts of these orders likely are unconstitutional. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017), *reconsideration denied*, 853 F.3d 933 (9th Cir. 2017) (en banc), and *reconsideration denied*, 858 F.3d 1168 (9th Cir. 2017) (en banc).

<sup>73</sup> Exec. Order No. 13,768, 82 Fed. Reg. at 8799 § 9. The punishing of sanctuary jurisdictions indicates the administration’s desire to strip federal funds from certain jurisdictions designated by DHS because the jurisdiction limits information sharing with federal immigration agencies regarding unauthorized immigration. The penalizing “Facilitators” provision states the DHS is directed to levy fines and penalties against not only undocumented immigrants but those

about how Trump's deportation "priorities" ultimately became universal enforcement because criminal aliens are broadly defined to include anyone who entered the United States without permission, and anyone who has overstayed a visa may be viewed as a potential threat to public safety and national security.<sup>74</sup> Furthermore, the Trump administration has made news with detention of DACA grantees because of the administration's expanding definition of criminality,<sup>75</sup> including allegations of gang association.<sup>76</sup> Meanwhile, legislators have begun working on a set of immigration bills to "turn millions of Americans into criminals overnight."<sup>77</sup>

---

who facilitate their presence. Read broadly, this could mean family members of the undocumented, the churches they attend, and immigration attorneys who serve them. *Id.* at § 6.

<sup>74</sup> AM. IMMIGRATION LAWYERS ASS'N & AM. IMMIGRATION COUNCIL, SUMMARY AND QUESTIONS/ANALYSIS OF EXECUTIVE ORDER "ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES" (2017), <http://www.aila.org/File/DownloadEmbeddedFile/70515> [<https://perma.cc/WRP2-MM6P>] (analyzing the executive order and finding the priorities "have the effect of making every undocumented immigrant in the United States a priority for removal," because they include those who merely committed an act that could be charged as a crime, such as entry without inspection, and because it asserts anyone who violates a visa may be a risk to public safety or security, which is also a priority).

<sup>75</sup> See, e.g., Jessica Colotl, *If We Are Deported, Who Benefits?*, POLITICO MAG. (June 8, 2017), <http://www.politico.com/magazine/story/2017/06/08/daca-deportations-president-trump-jessica-colotl-215217> [<https://perma.cc/J7RY-ECVH>]. DACA grantee Jessica Colotl, who, in 2010, had been arrested, plead not guilty, and had the charge dismissed, was granted deferred action under DACA in 2013, with knowledge of the incident that occurred in 2010. *Id.* The U.S. government renewed her DACA status in 2015, again with knowledge of the incident that occurred in 2010. *Id.* In 2017, however, the immigration agency, under President Trump and his administration's broad definition of criminal aliens, denied her renewal application, even though no new criminal incidents had occurred. *Id.*

<sup>76</sup> Natalie Delgadillo, *Could Gang Affiliation Be Used to Round Up DACA Recipients?*, CITY LAB (Feb. 17, 2017), <https://www.citylab.com/politics/2017/02/is-gang-affiliation-being-used-to-round-up-daca-recipients/517212/> [<https://perma.cc/53QG-XBEC>].

<sup>77</sup> Ryan Devereaux, *Republican Immigration Bill Threatens to Turn Millions of People Into Criminals Overnight*, INTERCEPT (May 18, 2017, 5:51 PM), <https://theintercept.com/2017/05/18/republican-immigration-bill-threatens-to-turn-millions-of-people-into-criminals-overnight/> [<https://perma.cc/2EJD-7BBJ>]. HR 3697, the Criminal Alien Gang Act, would allow the immigration agency to deport people based merely on a "reason to believe" they have been involved in gang activities, would permit the use of secret evidence, would provide little or no opportunity to challenge gang designations, would expand mandatory deportation grounds, and would bar certain relief to individuals accused of gang membership. See Criminal Alien Gang Member Removal Act, H.R.3697, 115th Cong. (2017); see also Letter from Faiz Shakir, Director, Am. Civil Liberties Union, to Representative (Sept. 12, 2017), [https://www.aclu.org/sites/default/files/field\\_document/2017-12-9\\_aclu\\_vote\\_rec\\_in\\_opposition\\_to\\_hr\\_3697\\_criminal\\_alien\\_gang\\_removal\\_act\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/2017-12-9_aclu_vote_rec_in_opposition_to_hr_3697_criminal_alien_gang_removal_act_final.pdf) [<https://perma.cc/5DNL-YSGP>].

## B. Creating a New ‘Criminal Alien’

Instructed by consecutive administrations to consume more and more “criminal aliens,” the rapacious immigration deportation apparatus remains perpetually hungry for more targets. Gang allegations provide a new and expansive framework to detain, deny benefits to, and deport a wide swath of criminal aliens. The immigration agency’s foray into antigang efforts has produced a proliferation of gang allegations, aided and abetted by a technological revolution within the agency, allowing for surveillance and data sharing on a massive scale.

Although the use of gang accusations in immigration proceedings is a fairly recent development, the immigration agency has delved into antigang efforts since the 1990s.<sup>78</sup> During 1996–1997, the immigration agency’s Violent Gang Task Force program assisted in the arrest of 4,400 immigrants, the vast majority of whom were Mexican.<sup>79</sup> Gang enforcement activities continued through the 1990s, and after September 11, 2001, the government focused even more on coordinating state and federal law enforcement immigration efforts and created the immigration enforcement agency ICE.<sup>80</sup>

Over time, ICE has expanded its gang operations. In 2005, ICE initiated “Operation Community Shield,” a law enforcement initiative to combat gangs.<sup>81</sup> Initially, Operation Community Shield focused on the gang Mara Salvatrucha (MS-13) after an ICE threat assessment identified MS-13 as one of the largest violent gangs with mostly foreign-born membership, subject to ICE’s authority.<sup>82</sup> ICE trumpets its “successes” under Operation Community Shield, which, since the origin of the operation in 2005, include 40,000 arrests—involving “more than 550 known and suspected gang leaders”—through a number of more short-term efforts.<sup>83</sup> These short-term

---

<sup>78</sup> Chacón, *supra* note 16, at 324–27 (describing the history of early collaborations). However, even earlier, the Immigration and Naturalization Service (INS) targeted the Mafia quite specifically. See DANIEL KANSTROOM, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, in IMMIGRATION STORIES 113, 117 (Martin and Schuck, eds., 2005).

<sup>79</sup> Chacón, *supra* note 16, at 325.

<sup>80</sup> Miller, *supra* note 38, at 91–93; *History of ICE*, IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/history> [<https://perma.cc/PUQ7-NQAN>] (last visited Oct. 31, 2017).

<sup>81</sup> *A Decade of Success*, IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/community-shield> [<https://perma.cc/5FQJ-S82V>] (last visited Jan. 3, 2018).

<sup>82</sup> *MS-13 Gang: The Story Behind One of the World’s Most Brutal Street Gangs*, BBC NEWS (Oct. 31, 2017), <http://www.bbc.com/news/world-us-canada-39645640> [<https://perma.cc/NCE7-4B5T>]; Press Release, U.S. Dep’t of Homeland Sec., ICE Arrests 375 Gang Members and Associates in Two-Week Enforcement Action (Mar. 10, 2006), <https://www.hsdl.org/?abstract&did=476905> [<https://perma.cc/46KT-FWXC>].

<sup>83</sup> Press Release, U.S. Immigration & Customs Enf’t, 39 Charged in Probe Targeting Gang-led Meth and Firearms Trafficking Rings (May 10, 2017), <https://www.ice.gov/news/releases/39-charged-probe-targeting-gang-led-meth-and-firearms-trafficking-rings> [<https://perma.cc/CD28-SY4T>]. See IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 81.

efforts include Project Devil Horns,<sup>84</sup> Project Southern Tempest,<sup>85</sup> Project Nefarious,<sup>86</sup> Operation Barbed Wire,<sup>87</sup> Project Southbound,<sup>88</sup> Operation Crystal Palace,<sup>89</sup> Project Shadowfire,<sup>90</sup> and Project Wildfire.<sup>91</sup> As part of the five-week operation called Project Shadowfire, led by ICE's Homeland Security Investigations unit (HSI), ICE arrested 1,133 people and claimed that more than 900 were transnational criminal gang members and associates; while 1,001 were charged with criminal offenses, 132 were arrested for immigration violations.<sup>92</sup> ICE also claims to have arrested forty-five gang members and affiliates in the New York region within a thirty-day span during Operation Matador, which was announced in the summer of 2017.<sup>93</sup>

---

<sup>84</sup> HSI-led criminal investigation of a local chapter of the transnational Mara Salvatrucha or MS-13 street gang known as "20th Street MS." *See* IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 81.

<sup>85</sup> Press Release, U.S. Immigration & Customs Enf't, 678 Gang Members and Associates Arrested During Project Southern Tempest (Mar. 1, 2011), <https://www.ice.gov/news/releases/678-gang-members-and-associates-arrested-during-project-southern-tempest> [<https://perma.cc/4AXZ-9JK5>].

<sup>86</sup> Press Release, U.S. Immigration & Customs Enf't, 637 Gang Members and Associates Arrested During Project Nefarious (Apr. 25, 2012), <https://www.ice.gov/news/releases/637-gang-members-and-associates-arrested-during-project-nefarious> [<https://perma.cc/3GNA-6678>].

<sup>87</sup> This collaborative initiative with the U.S. Department of Treasury, Office of Foreign Asset Controls led to designation of MS-13 as a Transnational Criminal Organization (TCO) pursuant to Executive Order (EO) 13581, signed by President Obama on July 25, 2011. This important designation provides the Treasury Department with the authority to target TCOs for economic sanctions. Exec. Order No. 13581, 3 C.F.R. 260 (2011).

<sup>88</sup> Press Release, U.S. Immigration & Customs Enf't, HSI Arrests 638 Gang Members During Month-long Operation (Apr. 30, 2014), <https://www.ice.gov/news/releases/hsi-arrests-638-gang-members-during-month-long-operation> [<https://perma.cc/Q4PJ-X5YP>].

<sup>89</sup> A pair of investigations conducted by the HSI San Diego Gang Investigations Group purportedly resulted in 82 arrests and the seizure of more than 110 firearms, approximately 25 pounds of methamphetamine, and nearly \$100,000 in U.S. currency between 2010 and 2014. *See* IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 81.

<sup>90</sup> Press Release, U.S. Immigration & Customs Enf't, ICE Arrests More Than 1,100 in Operation Targeting Gangs (Mar. 28, 2016), <https://www.ice.gov/news/releases/ice-arrests-more-1100-operation-targeting-gangs#wcm-survey-target-id> [<https://perma.cc/GP6M-DDMW>].

<sup>91</sup> Press Release, U.S. Immigration & Customs Enf't, ICE Arrests 976 Gang Members and Associates During 'Project Wildfire' Surge (Apr. 8, 2015), <https://www.ice.gov/news/releases/ice-arrests-976-gang-members-and-associates-during-project-wildfire-surge> [<https://perma.cc/YP5H-KV7R>].

<sup>92</sup> *See* Press Release, *supra* note 83.

<sup>93</sup> Press Release, U.S. Immigration & Customs Enf't, Operation Matador Nets 39 MS-13 Arrests in Last 30 days (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days> [<https://perma.cc/3MJA-RV48>].

Along with proliferating operations, ICE's scope of investigations has mushroomed. The target on MS-13 and immigrants has given way to include all gangs—prison and street—with a majority of targets being United States citizens.<sup>94</sup> The task force's reach has extended beyond the United States, evidenced by HSI referring to its activities as a “global initiative,” with plans to host global annual conferences involving federal and state prosecutors, investigators, prison officials, and military personnel from throughout Mexico, Guatemala, El Salvador, and Honduras.<sup>95</sup> The former Deputy Assistant Director of Operations for HSI commented, “You have to apply the scorched earth methodology to gang enforcement—really zero tolerance.”<sup>96</sup>

Alongside the immigration agency's growing focus on gang activity has been the rapid spread of surveillance and “dataveillance” technologies, enabling gang allegations, which may arise from data mining social media and spread through rapid data sharing among various local and federal law enforcement agencies.<sup>97</sup> Anil Kalhan calls this massive escalation of collection, storage, and dissemination of detailed personal information in the immigration context an “immigration surveillance state.”<sup>98</sup>

Today's network of pre-entry and post-entry control over immigrants has dwarfed the former systems in size, scope, and speed. Authorities no longer track noncitizens only at entry and exit.<sup>99</sup> Over the past few decades, the immigration agency's technology has become more sophisticated and interconnected to federal, state, and local agencies' information systems, making surveillance of noncitizens within the United States pervasive. In the late 1980s, the immigration agency and the U.S. Department of State's (State Department) technology for tracking immigrants was nascent and scattershot,<sup>100</sup> requiring State Department officials to manually enter magnetic

---

<sup>94</sup> Press Release, U.S. Immigration & Customs Enf't, ICE-led Gang Surge Nets 1,378 Arrests Nationwide (May 11, 2017), <https://www.ice.gov/news/releases/ice-led-gang-surge-nets-1378-arrests-nationwide> [<https://perma.cc/C848-FE44>].

<sup>95</sup> *Id.*; Press Release, U.S. Immigration & Customs Enf't, ICE, Department of State Kick Off International Anti-Gang Conference (June 2, 2015), <https://www.ice.gov/news/releases/ice-department-state-kick-international-anti-gang-conference> [<https://perma.cc/LH6M-R6R3>].

<sup>96</sup> Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, INTERCEPT (Aug. 11, 2016, 10:34 AM), <https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/> [<https://perma.cc/HYT7-FXJ9>].

<sup>97</sup> Clarke, *supra* note 36, at 503. Roger Clarke offered the term “dataveillance” to conceive of the emerging surveillance mechanisms, promoted by spread of computer-based technology. *Id.* at 501.

<sup>98</sup> Kalhan, *supra* note 36, at 27.

<sup>99</sup> See Clarke, *supra* note 36, at 503.

<sup>100</sup> See *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 101th Cong. 11 (1989) (statement of Richard Williams, Associate Director for Visa Services, Department of State). To ensure “criminal aliens” were banned from entering the U.S., State Department officials used the Automated Visa Lookout System (AVLOS), a depository containing names of “criminal aliens” collected from other systems, including the immigration agency's National Automated

tapes with the names of “criminal aliens” monthly.<sup>101</sup> The immigration agency relied on calls from local law enforcement to notify it of immigrants in the criminal justice system.<sup>102</sup> Collaboration between state and federal law enforcement dramatically increased in the 1990s.<sup>103</sup> In 1994, the then-existing Immigration and Naturalization Service created the Law Enforcement Support Center (LESC), a clearinghouse where law enforcement could inquire about the immigration status of individuals in their custody.<sup>104</sup> From 1996 to 2012, the number of LESC inquiries leapt from 4,000 to more than 1.3 million.<sup>105</sup>

After September 11, 2001, Congress infused \$150 million into improving data technology<sup>106</sup> and directed federal law enforcement to engage in further data sharing across agencies as part of the Enhanced Border Security and Visa Entry Reform Act.<sup>107</sup> President Bush announced the law would “mak[e] our borders more secure and make our borders smart” to keep out criminals, smugglers, and terrorists.<sup>108</sup> As part of these efforts, the immigration agency began entering hundreds of thousands of civil immigration records into the National Crime Information Center (NCIC), a database maintained by the Federal Bureau of Investigation (FBI) and established to enable federal, state, local, tribal, territorial, and other law enforcement agencies to exchange crime-related records.<sup>109</sup> The NCIC has expanded enormously from only being used to identify individuals with formal criminal charges or outstanding warrants to include noncriminal and informal records, such as information on suspected gang membership.<sup>110</sup> NCIC manages twenty-one separate databases, individually referred to as “files,” which are searchable by a cooperating law enforcement agency and lack juvenile notice requirements.<sup>111</sup>

---

Immigration Lookout System (NAILS), and data from intelligence and law enforcement agencies, including the Drug Enforcement Agency (DEA), the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), ATF, Interpol, and the U.S. Marshals Service. *Id.* at 10–11.

<sup>101</sup> *Id.* at 11.

<sup>102</sup> *Criminal Aliens*, *supra* note 100, at 24 (statement of Jack Shaw, Assistant Commissioner for Investigations, Immigration and Naturalization Service).

<sup>103</sup> Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L. J. 1105, 1116–19 (2013). Congress created the Criminal Alien Assistance Program to investigate and determine immigration status of individuals in Department of Justice custody. *Id.* at 1116–17.

<sup>104</sup> *Id.* at 1117.

<sup>105</sup> *Id.* at 1117–18.

<sup>106</sup> Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (codified as amended in 8 USC § 1712).

<sup>107</sup> *Id.*

<sup>108</sup> Statement by President George W. Bush Upon Signing H.R. 3525, 38 WEEKLY COMP. PRES. DOC. 820 (May 14, 2002).

<sup>109</sup> Kalhan, *supra* note 103, at 1122.

<sup>110</sup> *Id.* at 1124.

<sup>111</sup> GARCIA-LEYS ET AL., *supra* note 34, at 11.

Since 2005, the FBI has also coordinated federal, state, and local law enforcement intelligence through the National Gang Intelligence Center (NGIC).<sup>112</sup> It is not clear if the NGIC maintains its own database, but the FBI states that “databases of each component agency are available to NGIC, as are other gang-related databases.”<sup>113</sup> Many local, state, and federal law enforcement agencies do have gang tracking data systems, many of which are interconnected.<sup>114</sup> In fact, almost one hundred law enforcement agencies use GangNet, a private software program, including ICE; FBI; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), as well as fourteen states, the District of Columbia, and numerous local governments.<sup>115</sup> The program includes information about suspected gang affiliates, including suspected gang allegiance, address, physical description, identifying marks and tattoos, photographs, and nationality.<sup>116</sup> Regional databases often offer thousands of records of suspected gang members and associates and allow authorized users to read and update the records and to download files and photographs.<sup>117</sup>

Until very recently, ICE operated its own gang database called ICEGangs, based on the GangNet software, but due to inefficiencies and cost, ICE reverted to using existing case management databases, including Investigative Case Management system, Enforcement Integrated Database, and FALCON.<sup>118</sup> ICEGangs appeared to be connected to a number of state gang databases, including the notorious CalGang,<sup>119</sup> perhaps the largest gang database, which suffered heavy criticism after an audit found toddlers listed as gang members.<sup>120</sup> ICE and the U.S. Citizenship and Immigration Services (USCIS) appear to have access to a host of gang databases, although the extent to which these databases are regularly used is unclear.<sup>121</sup> Recently, President Trump’s immigration adviser, Kansas Secretary of State Kris Kobach, signaled the

---

<sup>112</sup> IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: UNDERSTANDING ALLEGATIONS OF GANG MEMBERSHIP/AFFILIATION IN IMMIGRATION CASES 5 (2017), [https://www.ilrc.org/sites/default/files/resources/ilrc\\_gang\\_advisory-20170426.pdf](https://www.ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170426.pdf) [<https://perma.cc/29UY-WSHW>].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 4.

<sup>115</sup> *Id.*; see also Mara H. Gottfried, *Gang Database: Just How Accurate, How Fair?*, TWIN CITIES PIONEER PRESS (Nov. 12, 2015, 10:04 PM), <http://www.twincities.com/2009/09/19/gang-database-just-how-accurate-how-fair/> [<https://perma.cc/6FJH-BE5S>].

<sup>116</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 4.

<sup>117</sup> U.S. DEP’T OF JUSTICE, GANG PROSECUTION MANUAL 10 (2009), <https://www.nationalgangcenter.gov/Content/Documents/Gang-Prosecution-Manual.pdf> [<https://perma.cc/5AKG-8ALU>].

<sup>118</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 4.

<sup>119</sup> U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE ICEGANGS DATABASE 4 (2010), [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ice\\_icegangs.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_icegangs.pdf) [<https://perma.cc/VL3S-4G8J>].

<sup>120</sup> *Beware of Gangster Babies: Calif. Database Slammed*, CBS NEWS (Aug. 15, 2016, 9:31 AM), <http://www.cbsnews.com/news/calgang-california-gang-database-slammed-listing-babies-privacy-concerns/> [<https://perma.cc/QFL4-D5YE>].

<sup>121</sup> Hufstader, *supra* note 23, at 683–84.

administration is looking to deport immigrants accused of gang membership or association without convictions.<sup>122</sup>

Some information collected and shared within gang databases may be mined from immigrants' social media accounts. Increasingly, reports are surfacing of immigrants being confronted with social media pictures and accusations that their clothing is "gang dress," that their social media "friends" are gang members or associates, and that their picture poses are gang hand signs.<sup>123</sup> Using social media is not new; in an early USCIS memorandum, the agency stated that social media provides "an excellent vantage point . . . to observe the daily life of beneficiaries and petitioners."<sup>124</sup> Yet data mining of social media accounts has become more pervasive within immigration enforcement recently.<sup>125</sup> In February 2017, then-U.S. Department of Homeland Security (DHS) Secretary John Kelly suggested requiring social media passwords and handles from individuals broadly,<sup>126</sup> as U.S. Border Patrol (Border Patrol) began regularly demanding passwords for phones and social media accounts from individuals attempting to enter the United States as visitors at U.S. airports.<sup>127</sup> Meanwhile, advocates have reported the rapid expansion of immigration agencies utilizing social media pictures as evidence in an attempt to impeach or undermine immigrants' cases, particularly in the gang allegation context.<sup>128</sup>

## II. Children at the Crosshairs of the Crimmigration Convergence

Children are particularly vulnerable to becoming entangled in the ever-expanding crimmigration complex because of over-policing in the juvenile and criminal systems and biases

---

<sup>122</sup> Ali Winston, *Obama's Use of Unreliable Gang Databases for Deportations Could Be a Model for Trump*, INTERCEPT (Nov. 28, 2016, 12:24 PM), <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/> [https://perma.cc/2BUY-CQ9S].

<sup>123</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 6.

<sup>124</sup> Memorandum on Social Networking Sites and Their Importance to FDNS, U.S. Citizenship & Immigration Services 1, [https://www.eff.org/files/filenode/social\\_network/dhs\\_customsimmigration\\_socialnetworking.pdf](https://www.eff.org/files/filenode/social_network/dhs_customsimmigration_socialnetworking.pdf) [https://perma.cc/8DNB-3FQ5] ("Generally, people on these sites speak honestly in their network because all of their friends and family are interacting with them via IMs (Instant Messages), Blogs (Weblog journals), etc.").

<sup>125</sup> Tony Romm, *U.S. Government Begins Asking Foreign Travelers About Social Media*, POLITICO (Dec. 22, 2016, 5:23 PM), <http://www.politico.com/story/2016/12/foreign-travelers-social-media-232930> [https://perma.cc/W4D6-4P8R]. In December 2016, immigration agents began asking travelers in the U.S. visa waiver program to optionally enter usernames for platforms like Facebook, Instagram, and LinkedIn. *Id.*

<sup>126</sup> Smith, *supra* note 36.

<sup>127</sup> See Kaveh Waddell, 'Give Us Your Passwords,' ATLANTIC (Feb. 10, 2017), <https://www.theatlantic.com/technology/archive/2017/02/give-us-your-passwords/516315/> [https://perma.cc/J47K-EY6L].

<sup>128</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 13.

against Latinx youth. These factors come to a head with the emerging phenomena of gang allegations where law enforcement have broad discretion to designate young people as associates and members of gangs, using vague criteria and relying on cultural and geographic indicators, with disproportionate racial consequences.

#### A. *Over-policing Youth of Color*

Antigang measures fall disproportionately on youth of color. The vast majority of individuals tracked in police department-maintained gang databases are Latino, African-American, and, to a lesser extent, Asian men.<sup>129</sup> For example, an audit of CalGang, the California state gang database, found roughly two-thirds of the individuals in the system were Latino, one-third were black, and less than 2% were white.<sup>130</sup> In fact, one out of every forty boys and men of color between ages fifteen and thirty-four living in California is documented as a gang member according to CalGang.<sup>131</sup> These racially disproportionate consequences have been attributed to over-policing of Latinx and African-American communities and using broad and vague criteria, which implicate cultural and geographic characteristics, with little oversight.<sup>132</sup> Racially disproportionate disciplinary action in school and law enforcement surveillance can lead to disproportionate arrests, delinquency findings, and criminal convictions. Any of these contacts typically can lead to an immigration arrest, detention, and deportation. Essentially, the juvenile and criminal justice systems serve as an assembly line leading to deportation.

Racial disparities persist at every level of the criminal and juvenile justice systems, from investigation, arrest, detention, and disposition or conviction to post-disposition or sentencing.<sup>133</sup> Because criminal and juvenile law enforcement contact can lead directly to immigration arrests, these disparities echo through the immigration regime.

Racial disparities in school discipline may contribute to delinquency disparities, as well as disparities within the criminal justice regime. Minority youth make up a disproportionate number of adolescents disciplined by schools.<sup>134</sup> A 2017 study of secondary-level recent immigrant students and their teachers found that youth of color are disproportionately affected by increased policing inside and outside the school system.<sup>135</sup> As rates of suspension and expulsion have

---

<sup>129</sup> Beres & Griffith, *supra* note 34, at 948.

<sup>130</sup> *Id.*

<sup>131</sup> GARCIA-LEYS ET AL., *supra* note 34.

<sup>132</sup> *Id.*; Hufstader, *supra* note 23, at 693.

<sup>133</sup> NAT'L RES. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 221–22 (2013) (“In sum, with few exceptions, data consistently show that youth of color have been overrepresented at every stage of the juvenile justice system, that race/ethnicity are associated with court outcomes, and that racial/ethnic differences increase and become more pronounced with further penetration into the system through the various decision points.”).

<sup>134</sup> *Id.* at 226.

<sup>135</sup> SaunJuhi Verma, Duke Austin & Patricia Maloney, *The School to Deportation Pipeline: The Perspectives of Immigrant Students and Their Teachers on Profiling and Surveillance Within the School System*, 673 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 209, 209 (2017).

increased dramatically, zero-tolerance policies in schools have disproportionately impacted racial and ethnic minority youth, with Latinx youth 1.5 times more likely to be suspended than whites.<sup>136</sup> Normal student behaviors, including delayed school arrivals and waiting around school property, are perceived as deviant activities.<sup>137</sup> Nationally, more than 70% of students involved in school-related arrests or referred to law enforcement by schools are Hispanic or African-American.<sup>138</sup>

Black and Latinx youth confront particular hardships in the juvenile justice system, including overrepresentation, more severe treatment than white youth for similar offenses, unnecessary entry and entrenchment into the system, and overbroad implementation of antigang laws.<sup>139</sup> Substantial studies show youth of color are more likely than white youth to be stopped, arrested, and subsequently referred to court by police due to a number of factors, including increased police deployment and surveillance.<sup>140</sup> In the juvenile system, Latinx youth are 16% more likely than their white counterparts to be adjudicated delinquent, 28% more likely to be detained, and 43% more likely to be admitted to adult prison.<sup>141</sup> Black youth are 2.6 times as likely to be adjudicated delinquent and 3.5 times as likely to be detained as white youth, and though they make up only 17% of the youth population, they constitute 58% of the youth committed to state adult prison.<sup>142</sup> Black youth with no priors are 9 times as likely to be committed to state facilities as white youth, and Latinx youth are 5 times more likely to be committed to state facilities than white youth.<sup>143</sup> Furthermore, the more contact they have with the system, the more harshly they are treated.<sup>144</sup> One in 36 Hispanic males are in prison, compared to just 1 in every 106 white males, and, for black males, this number rises to 1 in 15 men.<sup>145</sup> Black men are nearly 6 times more likely to be incarcerated than white men, and Latino men are 2.3 times more likely to be incarcerated

---

<sup>136</sup> NAT'L RES. COUNCIL, *supra* note 133, at 111–12.

<sup>137</sup> Verma et al., *supra* note 135, at 224.

<sup>138</sup> NAT'L RES. COUNCIL, *supra* note 133, at 111–12.

<sup>139</sup> CTR. FOR CHILD LAW & POLICY, RED PRACTICE MANUAL: INTRODUCTION AND CHAPTER 1: BEGINNING OR RESTARTING WORK TO REDUCE RACIAL AND ETHNIC DISPARITIES 14–15, 18 (2015), <http://www.cclp.org/wp-content/uploads/2016/06/Introduction-and-Chapter-1-Beginning-or-Restarting-Work-to-Reduce-Racial-and-Ethnic-Disparities.pdf> [<https://perma.cc/MBH9-RLHR>].

<sup>140</sup> See NAT'L RES. COUNCIL, *supra* note 133, at 111–12.

<sup>141</sup> *Id.* at 222 n.7.

<sup>142</sup> *Id.* at 218, 222.

<sup>143</sup> CTR. FOR CHILD. LAW & POL'Y, *supra* note 139, at 19–20.

<sup>144</sup> Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 406 (2007) (“[O]ne study of racial disparity in Georgia’s juvenile justice system found that African American youth received more severe dispositions because they tend to have more prior police contacts than their white counterparts.”).

<sup>145</sup> JENNIFER WARREN, THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2008/one20in20100pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2008/one20in20100pdf.pdf) [<https://perma.cc/MZ4P-2UFS>].

than white men.<sup>146</sup> Most notable is that disparities are not necessarily uniform throughout the juvenile justice process—when there is more discretion, disparities are more common.<sup>147</sup>

### B. *Implicit and Explicit Bias*

Although multiple reasons for this overrepresentation undoubtedly exist, bias surely plays a role. Studies have found implicit or unconscious bias regularly among whites, as well as a strong “white preference.”<sup>148</sup> One study suggests that, although little evidence exists that police are overtly biased, more subtle forms of bias may come into play, so when police have inadequate information for decision-making regarding arrests, they may rely on stereotypes or other generalized perceptions.<sup>149</sup> Relatedly, bias may lead to perceiving children to be older and more culpable. A study by Professor Philip Goff and colleagues established individuals perceive black and Latinx children as years older than their actual age.<sup>150</sup> Like African-Americans, Latinx youth were stereotyped as criminal and violent<sup>151</sup> and were rated as more culpable than whites.<sup>152</sup> Furthermore, the study found African-American and Latinx youth are perceived as more gang-involved and more threatening than whites.<sup>153</sup>

Migrant youth are seen through a lens of race, immigration status, and age and, therefore, are subject to social construction as “criminal aliens,” as well as dangerous youth. Racialized and demeaning language often mark discourse in the immigration realm. For example, Latinx have been referred to as “‘hordes of immigrants’ that ‘scurry over the border,’ ‘infecting’ U.S. culture.”<sup>154</sup> Despite studies showing lower levels of criminal involvement in immigrant

---

<sup>146</sup> THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/J8VD-M996>].

<sup>147</sup> NAT’L RES. COUNCIL, *supra* note 133, at 233.

<sup>148</sup> CTR. FOR CHILDREN’S LAW & POLICY, *supra* note 139, at 22–23.

<sup>149</sup> NAT’L RES. COUNCIL, *supra* note 133, at 232.

<sup>150</sup> Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 535 (2014), <http://www.apa.org/pubs/journals/releases/psp-a0035663.pdf> [<https://perma.cc/MK3V-CK6B>]. A recent report found similarly that black girls are perceived as less innocent and more adult-like than their white peers, especially in the age range of five to fourteen. REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEORGETOWN CTR. ON POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 1 (2017), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf> [<https://perma.cc/YPW3-SHF2>].

<sup>151</sup> Goff et al., *supra* note 150, at 530.

<sup>152</sup> *Id.* at 532.

<sup>153</sup> NAT’L RESEARCH COUNCIL, *supra* note 133, at 227.

<sup>154</sup> Goff et al., *supra* note 150, at 528.

populations than native-born,<sup>155</sup> Representative Lamar Smith has claimed “illegal aliens<sup>156</sup> coming across the border seem to be prone to more violent kinds of crime, more drug-related types of crime,”<sup>157</sup> trying to directly link migrants who cross the Mexico–U.S. border, mostly Mexican and Central Americans, with violence. The phenomenon is, of course, not confined to Latinx.

Meanwhile, identities of immigrant youth are constructed with layers of illegality, stereotyping them both as potential “criminal aliens,” as well as dangerous youth.<sup>158</sup> This identity is shaped in part by immigration laws, which have always been deeply influenced by racism and nativism, formally and informally,<sup>159</sup> dovetailing with a long-standing history of societal coupling of race and crime.<sup>160</sup> As scholar César Cuauhtémoc García Hernández has explained, “Because contemporary immigration law has become interwoven with criminal law, the potentially undeserving are the potential ‘criminal aliens’ lying in our midst. These people, criminal law enforcement institutions have so readily announced, are race and class outsiders—people of color and poor people.”<sup>161</sup>

Prominent examples of formal racism in the immigration system include: the Naturalization Act of 1790, which limited U.S. citizenship to free whites;<sup>162</sup> the Chinese Exclusion Act, a moratorium on Chinese immigration;<sup>163</sup> massive campaigns to deport Mexican immigrants and U.S. citizens of Mexican ancestry in the 1930s and again in the 1950s with Operation Wetback;<sup>164</sup> and a national quotas system referencing Western Europeans.<sup>165</sup> In litigation over the legality of the Chinese Exclusion Act, the Supreme Court of the United States upheld the law,

<sup>155</sup> Richard Pérez-Peña, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html> [<https://perma.cc/6N8A-9936>].

<sup>156</sup> Paul Colford, *‘Illegal Immigrant’ No More*, ASSOCIATED PRESS (Apr. 2, 2013), <https://blog.ap.org/announcements/illegal-immigrant-no-more> [<https://perma.cc/SE33-WJFD>].

<sup>157</sup> *Criminal Aliens*, *supra* note 100, at 36.

<sup>158</sup> *Id.* at 1.

<sup>159</sup> See generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L. J. 1111 (1998); see also Keyes, *supra* note 6; Stumpf, *supra* note 21, at 418 (“[T]he criminal becomes ‘the alien other,’ an underclass with a separate culture and way of life that is ‘both alien and threatening.’”).

<sup>160</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

<sup>161</sup> César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 361 (2012).

<sup>162</sup> An Act to Establish an Uniform Rule of Naturalization, ch. 3 § 1, 1 Stat. 103 (1790) (repealed 1795).

<sup>163</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

<sup>164</sup> Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 10 (2005).

<sup>165</sup> Johnson, *supra* note 159, at 1127–28 (1998).

finding Chinese “immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”<sup>166</sup> Decades later, during discussion of a bill to limit Japanese immigration, Attorney General of California Ulysses Webb testified in support of the restriction, squarely fitting his remarks within the framework of white supremacy: “[I]t is utterly impossible, by legislation or otherwise, to compel the white race to accept the black race or the brown race or the yellow race . . . . This is a Government of the white race.”<sup>167</sup> Laws that targeted Mexicans used similar racist rhetoric, excluding Mexicans, “[o]wing to the fact that but few of the race speak English, that they live in isolated communities, that in their work on railroads they are largely segregated, and that they seldom intermarry with other peoples.”<sup>168</sup> Formal racism in immigration law persisted through quotas based on national origin through 1965, discriminating against Asian, Latinx, and African immigrants, while privileging western and northern European immigrants.<sup>169</sup>

While the Immigration and Nationality Act of 1965 (INA) removed national origins quotas, informal racism crept into the immigration system through the development of the “criminal alien” and the vast expanse of criminal grounds of deportability. As Elizabeth Keyes describes, “[t]he over-policing of communities of color and disparate rates of arrests and convictions of people—particularly men—of color means that this intersection of the criminal and immigration systems reintroduces race powerfully into immigration enforcement.”<sup>170</sup> For example, during a discussion about the Immigration Act of 1990, Congressman Lamar Smith proclaimed that “tens of thousands of criminal aliens are being allowed to stay in the United States so, in effect, we are unleashing an army of criminal aliens on American citizens.”<sup>171</sup> Much testimony repeated these themes. Senator Lindsey Graham declared that the “[f]ederal government must make sure that dangerous aliens are

---

<sup>166</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

<sup>167</sup> *Japanese Immigration Legislation: Hearing on S. 2576 Before the Comm. on Immigration*, 68th Cong. 41 (1924) (statement of Ulysses S. Webb, Att’y Gen. of California); *see also id.* (testimony of Mr. V.S. McClatchy):

The yellow and brown races do not intermarry with the white race, and their heredity, standards of living, ideas, psychology, all combine to make them unassimilable with the white race. If we are to restrict immigration, therefore, it is plainly proper that we should deny first entrance to that element which is hopelessly unassimilable because under our laws it may never enjoy the privilege of American citizenship.

*Id.* at 4.

<sup>168</sup> WILLIAM DILLINGHAM, U.S. IMMIGRATION COMM’N, IMMIGRANTS IN INDUSTRIES, S. DOC. NO. 633, PT. 25, 3 JAPANESE AND OTHER IMMIGRANT RACES IN THE PACIFIC COAST AND ROCKY MOUNTAIN STATES at 449 (2d Sess. 1910).

<sup>169</sup> Johnson, *supra* note 159, at 1127–28, 1130; Keyes, *supra* note 6, at 905–06.

<sup>170</sup> Keyes, *supra* note 6, at 911. Scholar Kevin Johnson has noted that a “war on noncitizens of color focusing on their immigration status, not race, as conscious or unconscious cover, serves to vent social frustration and hatred. Hatred for domestic minorities is displaced to an available, more publicly palatable, target for antipathy.” Johnson, *supra* note 159, at 1116.

<sup>171</sup> *Criminal Aliens*, *supra* note 100, at 6.

not on the streets.”<sup>172</sup> A criminal court judge professed that “the illegal drug felon and other criminal aliens flood our court . . . flood our county jails, they flood our probation department . . . they flood our parole authorities.”<sup>173</sup>

Immigrant children of color are not only subject to mythologizing as potential criminal aliens due to their race and immigration status, but they also confront another layer of oppression because of their age. Pathologizing of normal youth behavior has been widely documented in the criminal and juvenile context, with less written in the immigrant youth context.<sup>174</sup>

In his infamous and widely debunked article *The Coming of the Super-Predators*, John J. DiIulio Jr. attempted to strip youth of color of their childhood by imagining young, “morally impoverished” African-American boys as “natural” dangers, innately violent and deviant.<sup>175</sup> In this same article, DiIulio also refers to an emerging danger of “youth street gangs,” claiming there are 200 Latinx gangs in Los Angeles.<sup>176</sup> As Mary Romero writes, “[c]haracterization of this population as superpredators is socially constructed through a racial lens—the lens that reflects the images of White middle class youth as ‘our’ children and Latino adolescent males as violent, inherently dangerous[,] and endangering.”<sup>177</sup> During the 1990s, much attention and policy-making were focused on this fabricated superpredator youth, with President Clinton claiming, “[W]e can take the streets back of our country from juvenile violence and crime, from murder, from lost lives . . . . Our anti-gang and youth violence strategy essentially rests on . . . targeting violent gangs and juveniles with more prosecutors and tougher laws.”<sup>178</sup>

Many continue to strip immigrant children of color of their youth and provide justification for not protecting them. According to one Border Patrol officer at the Texas–Mexico border, “these are not *our* children.”<sup>179</sup> Similarly, Proposition 187 drafter Barbara Coe purported:

You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact . . . . You’re not dealing with a lot of shiny face, little kiddies . . . . You’re dealing with Third World cultures who come in,

---

<sup>172</sup> 136 CONG. REC. S17118 (daily ed. Oct. 26, 1990) (statement of Sen. Graham).

<sup>173</sup> *Criminal Aliens*, *supra* note 100, at 83 (statement of Hon. David Carter, Assistant Presiding Judge, Criminal Division, Superior Court, Orange County, CA).

<sup>174</sup> *But see* Karla McKanders, *America’s Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197, 214 (2015).

<sup>175</sup> John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00AM), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> [<https://perma.cc/NH5V-ECF7>].

<sup>176</sup> *Id.*

<sup>177</sup> Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U.L. REV. 1081, 1084 (2001).

<sup>178</sup> Administration of William J. Clinton, Remarks in Roundtable Discussion on Juvenile Crime in Boston, MA, at 210 (Feb. 19, 1997).

<sup>179</sup> McKanders, *supra* note 174, at 213 (quoting LAUREN HEIDBRINK, MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE: CARE AND CONTESTED INTERESTS 49, 173 (2014)).

they shoot, they beat, they stab[,] and they spread their drugs around in our school system. And we're paying them to do it.<sup>180</sup>

Violence and gang imagery is particularly prescient to American construction of black and Latinx youth identity. As Mary Romero documents, the “most widely distributed representation of Latinx youth today is as a gang member.”<sup>181</sup> This stereotype follows youth of color in every setting they inhabit, from schools to neighborhoods to the immigration system, making them more vulnerable to being pathologized. After conducting a recent multicity, qualitative study of secondary-level recent immigrant students and their teachers, scholars SaunJuhi Verma, Duke Austin, and Patricia Maloney concluded that “state and school policing practices are integral for forming and reproducing processes of racialization for immigrant students of color and that such practices are key mechanisms in immigrant students entering the school to deportation pipeline in U.S. schools.”<sup>182</sup>

---

<sup>180</sup> Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 657 (1995).

<sup>181</sup> Romero, *supra* note 177, at 1090, 1096 (“Film portrayal of Latino males is saturated with images of gangs, prisoners, drug dealers, wife abusers and other violent characters.”).

<sup>182</sup> Verma et al., *supra* note 135, at 210.

### III. Gang Allegations in the Immigration System

Gang allegations in the immigration context are on the rise. Such allegations have been the subject of congressional hearings,<sup>183</sup> news stories,<sup>184</sup> a prominent research report,<sup>185</sup> a recent practice advisory,<sup>186</sup> and civil rights litigation.<sup>187</sup> Although ICE claimed in August 2016 that the

---

<sup>183</sup> Michael E. Miller, *Senate Panel Grills Federal Officials on Undocumented Minors*, *MS-13*, WASH. POST (June 21, 2017), [https://www.washingtonpost.com/local/social-issues/senate-panel-grills-federal-officials-on-undocumented-minors-ms-13/2017/06/21/5835962c-5675-11e7-a204-ad706461fa4f\\_story.html? \[https://perma.cc/XKH9-UNEB\]](https://www.washingtonpost.com/local/social-issues/senate-panel-grills-federal-officials-on-undocumented-minors-ms-13/2017/06/21/5835962c-5675-11e7-a204-ad706461fa4f_story.html? [https://perma.cc/XKH9-UNEB]).

<sup>184</sup> E.g., Julia Ainsley, *Exclusive: U.S. Immigration Raids to Target Teenaged Suspected Gang Members*, REUTERS (July 21, 2017, 3:55PM), [https://www.reuters.com/article/us-usa-immigration-raids-exclusive/exclusive-u-s-immigration-raids-to-target-teenaged-suspected-gang-members-idUSKBN1A62K6 \[https://perma.cc/7H7R-92NU\]](https://www.reuters.com/article/us-usa-immigration-raids-exclusive/exclusive-u-s-immigration-raids-to-target-teenaged-suspected-gang-members-idUSKBN1A62K6 [https://perma.cc/7H7R-92NU]); Sarah Gonzalez, *Trump Administration Accused of Falsely Saying Immigrant Teens Have Gang Ties*, NPR (Aug. 11, 2017, 10:49PM), [http://www.npr.org/2017/08/11/542960660/trump-administration-accused-of-falsely-accusing-immigrant-teens-of-gang-ties \[https://perma.cc/8MR6-M3YM\]](http://www.npr.org/2017/08/11/542960660/trump-administration-accused-of-falsely-accusing-immigrant-teens-of-gang-ties [https://perma.cc/8MR6-M3YM]); Sarah Gonzalez, *Advocates Warn of a School-to-Deportation Pipeline*, WNYC (Aug. 1, 2017), [https://www.wnyc.org/story/advocates-warn-school-deportation-pipeline/ \[https://perma.cc/W8YE-Q2XB\]](https://www.wnyc.org/story/advocates-warn-school-deportation-pipeline/ [https://perma.cc/W8YE-Q2XB]); Sarah Gonzalez, *MS-13 Gang Crackdown Relies on ‘Questionable’ Evidence from Schools*, WNYC (Apr. 7, 2017), [http://www.wnyc.org/story/ms13-gang-police-crackdown-schools/?utm\\_source=tw&utm\\_medium=social&utm\\_content=wnyc \[https://perma.cc/RM7R-DKNY\]](http://www.wnyc.org/story/ms13-gang-police-crackdown-schools/?utm_source=tw&utm_medium=social&utm_content=wnyc [https://perma.cc/RM7R-DKNY]); *ICE Releases Brentwood Student Accused of MS-13 Affiliation*, NEWS 12 LONG ISLAND (Aug. 8, 2017) [http://longisland.news12.com/story/36090140/ice-releases-brentwood-student-accused-of-ms-13-affiliation \[https://perma.cc/RRY3-2M55\]](http://longisland.news12.com/story/36090140/ice-releases-brentwood-student-accused-of-ms-13-affiliation [https://perma.cc/RRY3-2M55]); Aviva Stahl, *How Immigrants Get Deported for Alleged Gang Involvement*, VICE (Aug. 12, 2016 10:02 AM), [https://www.vice.com/en\\_us/article/yvedev/how-immigrants-get-deported-for-alleged-gang-involvement \[https://perma.cc/F2K5-KKUZ\]](https://www.vice.com/en_us/article/yvedev/how-immigrants-get-deported-for-alleged-gang-involvement [https://perma.cc/F2K5-KKUZ]); Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, INTERCEPT (Aug. 11, 2016, 10:34 AM), [https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/ \[https://perma.cc/9KUQ-TAAY\]](https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/ [https://perma.cc/9KUQ-TAAY]); Ali Winston, *Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members*, INTERCEPT (Feb. 17, 2017, 6:12 PM), [https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/ \[https://perma.cc/CNG5-AEBK\]](https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/ [https://perma.cc/CNG5-AEBK]) [hereinafter Winston, *Vague Rules*].

<sup>185</sup> GARCIA-LEYS ET AL., *supra* note 34.

<sup>186</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112.

<sup>187</sup> See, e.g., First Amended Petition & Complaint, *supra* note 11.

agency arrested more than 40,000 alleged gang members over the past decade, no public records detail how many gang-related deportations it has executed.<sup>188</sup>

These allegations may influence immigration officers when making arrest and custody decisions and immigration officer adjudicators when making decisions regarding certain relief, such as DACA or asylum; these allegations may also influence immigration judges when deciding whether to grant a bond or to grant a defense to deportation, such as lawful permanent residence, asylum, or other discretionary relief. In addition to harms associated with subjective criteria for gang membership association,<sup>189</sup> gang allegations cast a long shadow on the accused and increase the chance that immigrant youth will be detained for long periods of time, be denied immigration benefits, and be deported. This section tracks gang criteria and associated harms, how gang accusations infiltrate the immigration system, and how immigration decisions are implicated by such allegations.

#### A. *Identifying Gang Members and Associates*

Operating within an opaque system without much oversight, vague gang identification criteria leads to unreliable and racially disproportionate results. As one juvenile justice scholar notes, with “unchecked discretion . . . comes implicit bias,” even though labels may be racially neutral; thus, “legal formalism may be used to deny the realities of race.”<sup>190</sup> As one law enforcement officer described, “You have to walk a fine line, because we do target particular kids. While there are white, Asian, etcetera, gang members, we just do not run into them. We primarily deal with blacks and Hispanics.”<sup>191</sup>

Wide variance exists between state and various federal definitions of *gangs*, and no legal definition of *gang members* or *associates* appears within immigration law.<sup>192</sup> In a leading 1927 study, Frederic Thrasher defined gangs as an “interstitial group, originally formed spontaneously and integrated through conflict.”<sup>193</sup> Common criteria include having three or more members aged twelve to twenty-four, sharing an identity often linked to a name or symbols, self-identification and recognition of others as a gang, a level of organization, and involvement in a high level of

---

<sup>188</sup> Winston, *supra* note 122.

<sup>189</sup> G. DAVID CURRY ET AL., CONFRONTING GANGS: CRIME AND COMMUNITY 154 (3d 2013) (“It should be readily apparent that there can be a lot of variation in these criteria, and they may be applied subjectively.”).

<sup>190</sup> Birckhead, *supra* note 5, at 419.

<sup>191</sup> CHARLES M. KATZ & VINCENT J. WEBB, POLICING GANGS IN AMERICA 211 (2006) (“If you have 15 black kids hanging out on a corner and 15 white kids also hanging out on a corner, the blacks are more likely to be questioned.”); *see also* Second Amended Complaint at 57, 72–73, Winston v. Salt Lake City, No. 2:12-cv-01134 TS-PMW (D. Utah June 17, 2013).

<sup>192</sup> *See* 8 U.S.C. § 1101 (Supp. 2014) (providing definitions); *see also* G. DAVID CURRY ET AL., *supra* note 189; *Frequently Asked Questions About Gangs*, NAT’L GANG CTR., <https://www.nationalgangcenter.gov/About/FAQ> [<https://perma.cc/38E9-QJKW>] (last visited Jan. 3, 2018) (“There is no single, generally accepted definition of a ‘gang.’”).

<sup>193</sup> Chacón, *supra* note 16, at 317.

criminality.<sup>194</sup> Localities also have varied definitions for *gang members*, *gang associates*, and *gang-related crimes*. Although some law enforcement entities require that multiple criteria be met before identifying someone as a gang member,<sup>195</sup> an associate may be loosely defined as not meeting the definition of a gang member but still demonstrating “strong indications that [the] individual has a close relationship with a gang.”<sup>196</sup> ICE has recently indicated that an agent may designate someone as a gang member if the individual satisfies certain criteria, such as having a tattoo or being identified by a “reliable source.”<sup>197</sup>

Similarly, federal and state gang databases do not have uniform, or necessarily clear, indicia for inclusion in the database.<sup>198</sup> During either the course of investigating a particular crime or conducting a field interview (a purportedly consensual interaction with law enforcement, often in areas with high densities of gang members), law enforcement may obtain information later inputted into a gang database.<sup>199</sup> Law enforcement in many regions can simply check a box on an index card, called a field interview card, to allege gang membership, which is put into an information system shared directly with ICE.<sup>200</sup>

---

<sup>194</sup> NAT’L GANG CTR., *supra* note 192. According to a survey of law enforcement, committing crimes together was the most important characteristic followed by having a name, wearing colors or symbols, hanging out together, claiming territory, and having leaders. *National Youth Gang Survey Analysis: Defining Gangs and Designating Gang Membership*, NAT’L GANG CTR., <https://www.nationalgangcenter.gov/Survey-Analysis/Defining-Gangs#anchordcog> [<https://perma.cc/A54P-JSK2>] (last visited Jan. 3, 2018). A 2009 ICE policy memorandum defines gangs as “a formal or informal group, club, organization or association of three or more persons that has as one of its purposes the commission of criminal activity either in the United States or outside the United States has committed two or more criminal acts on separate and distinct occasions, and the members of which may share a common identifying sign, symbol, or name.” U.S. IMMIGRATION AND CUSTOMS ENF’T, ICEGANGS DATABASE: DATA ENTRY AND USE 2 (2006), <https://www.documentcloud.org/documents/3467677-ICEGang-Classification-Policy.html> [<https://perma.cc/NE2G-UK8G>] [hereinafter ICEGANGS DATABASE].

<sup>195</sup> Youth Violence Strike Force, Special Order Number 93-42, Boston Police Memorandum, at 1 (Oct. 26, 1993) (on file with author).

<sup>196</sup> *Id.* at 3.

<sup>197</sup> Press Release, *supra* note 93.

<sup>198</sup> NAT’L GANG CTR., *supra* note 15; CURRY ET AL., *supra* note 189, at 153 (“[W]ith thousands of local police departments, there is considerable variation in what information is stored, the definitions applied to that information, who can access the information and how the information for the gang database can be used.”).

<sup>199</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 5. Field Identification cards are often input into local databases to include the individual’s name, physical description, address, phone numbers, scars, marks or tattoos, vehicles, and associates with whom the individual has been in contact. *Id.* Information might also derive from an in-custody interview or gang-related conviction. *See id.* at 10; GANG PROSECUTION MANUAL, *supra* note 117.

<sup>200</sup> GARCIA-LEYS ET AL., *supra* note 34, at 8.

The most common reason law enforcement designates someone as a gang member in a database is for displaying gang symbols, followed by associating with or being arrested with someone who has been identified as a gang member.<sup>201</sup> According to a recent survey, almost 95% of law enforcement “very often” or “sometimes” designated someone as a gang member because of gang symbols, and 91.6% designated an individual because the individual associated with or was arrested with a gang member.<sup>202</sup> Other common criteria for inclusion in a database are admitting gang membership, being identified as a gang member by a reliable source, dressing in gang-style clothing, having gang tattoos, hanging out in gang territory, and maintaining contact with known gang members.<sup>203</sup> Some jurisdictions, such as California,<sup>204</sup> require the satisfaction of multiple criteria.<sup>205</sup> For individuals who do not meet requirements, law enforcement can often add “gang affiliate” into the system merely upon suspicion that the individual is involved in criminal activity and affiliated with a documented gang member.<sup>206</sup>

The broad and subjective criteria can lead to misclassification and racial profiling of youth of color based on how they look and where they live. On the front end, this is also compounded by law enforcement over-policing,<sup>207</sup> focusing on certain neighborhoods,<sup>208</sup> and pervasively stopping youth of color.<sup>209</sup> On the back end, it is made worse by lack of oversight over gang identification and databases.<sup>210</sup> As one community safety advocate notes, “When the standards are so incredibly low and they map on pretty closely to what it is just to be a person who grows up in

<sup>201</sup> NAT’L GANG CTR. SURVEY, *supra* note 194.

<sup>202</sup> *Id.*

<sup>203</sup> Beres & Griffith, *supra* note 34 at 949–50. A 2009 ICE memorandum says if someone is self-admitting or convicted for gang-related activity or association, that factor alone makes the individual eligible for entry into their old database. ICEGANGS DATABASE, *supra* note 194, at 102. Otherwise, at least two of the following criteria must be met to qualify for entry into the database: the individual must (1) have gang tattoos, (2) frequent “notorious” gang areas, (3) display gang signs/symbols, (4) be identified by a reliable source, (5) be identified by an untested informant, (6) be arrested with other gang members two or more times, (7) be identified by a jail or prison, (8) be identified through obtained written or electronic correspondence, (9) be wearing gang style clothing or having other gang indicia, and (10) be identified through documented reasonable suspicion. *Id.*

<sup>204</sup> ELAINE M. HOWELL, CAL. STATE AUDITOR, NO. 2015-130, THE CALGANG CRIMINAL JUSTICE SYSTEM 15 (2016). California criteria include admitting to gang membership, associating with known gang members, being identified by someone else as a gang member, and exhibiting gang clothing, tattoos, or behavior. *Id.*

<sup>205</sup> See, e.g., GARCIA-LEYS ET AL., *supra* note 34, at 11. NCIC center criteria—gang dress, presence in gang area—also demands at least one of the following additional criteria: self-admission, arrests for gang activity, or allegations of membership by informant. *Id.*

<sup>206</sup> HOWELL, *supra* note 204, at 11; see also NAT’L GANG CTR., *supra* note 192.

<sup>207</sup> Beres & Griffith, *supra* note 34, at 949.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 949–50, 956.

a low-income, violence-impacted neighborhood, then we begin to have some challenges because we start to lump people into these categories.”<sup>211</sup>

Criteria such as being in “gang” areas and interacting with gang members or associates correspond to simply living in certain communities.<sup>212</sup> As one civil rights attorney noted, someone could be identified as a gang member by playing basketball at a recreation center where suspected gang members are present.<sup>213</sup> The lack of uniformity of criteria and oversight exacerbates racial profiling and unreliability. For example, some students have reported that school officials have mislabeled verbal arguments between fellow students as gang fights and identified those students as gang members even though they were not part of a gang.<sup>214</sup>

Criteria such as wearing “gang clothing” or having tattoos can, likewise, be more indicative of fitting into a predominant culture. Law enforcement may decide popular sports gear is associated with a local gang<sup>215</sup> but that indicia may be old; the clothing may belong to a family member, or it may simply be an expression of popular culture.<sup>216</sup> Allegations may arise upon evidence such as “wearing a baggy white t-shirt and standing in the courtyard of one’s apartment[,] if an officer believes that indicates gang clothing and presence in a gang area.”<sup>217</sup> For example, detained DREAMER Daniel Ramirez Medina has been accused of gang membership in part because of a tattoo that read “La Paz BCS,” which law enforcement assumed was related to gangs, but he reports it represents the initials of his birthplace: La Paz, the capital city of Baja California Sur.<sup>218</sup> Even criteria such as jail segregation is prone to error because it may build on prior faulty information, and as with most gang allegations, there is little or no oversight, due process, or

<sup>211</sup> Yvette Cabrera, *Troubled Past Force Hard Choices for Some Undocumented Immigrants*, VOICE OF OC (Feb. 28, 2016), <http://voiceofoc.org/2016/02/troubled-pasts-force-hard-choices-for-some-undocumented-immigrants/> [<https://perma.cc/MZ97-9TJM>].

<sup>212</sup> See CURRY ET AL., *supra* note 189, at 154; Beres & Griffith, *supra* note 34, at 949.

<sup>213</sup> Kate Morrissey, *Some Worry That Flawed Gang Database Will Be Used for Immigration Enforcement*, SAN DIEGO UNION-TRIB. (Jan. 6, 2017, 2:00 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-cal-gang-20170106-story.html> [<https://perma.cc/T53A-8RW3>].

<sup>214</sup> Cabrera, *supra* note 211.

<sup>215</sup> GARCIA-LEYS ET AL., *supra* note 34, at 5.

<sup>216</sup> *Id.* at 5–6.

<sup>217</sup> *Id.* at 7.

<sup>218</sup> Nina Shapiro, *Lawyers for Detained ‘Dreamer’ Claim Feds Altered Note to Boost Gang Accusation*, SEATTLE TIMES (Feb. 17, 2017, 1:19 PM), <http://www.seattletimes.com/seattle-news/lawyers-for-detained-dreamer-claim-government-misconduct/> [<https://perma.cc/E6KG-DGAP>]. Similarly, some law enforcement would mark individuals as self-admitting if they say they are from a certain neighborhood, which has a name that happens to be identical to a gang. Cabrera, *supra* note 211. Caitlin Dickerson, *What is DACA? Who Are the Dreamers? Here Are Some Answers*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/us/daca-dreamers-shutdown.html> [<https://perma.cc/W64Q-XWZP>] (“DACA recipients are often referred to as Dreamers, after a similar piece of legislation called the Dream Act, which was introduced in 2001 and would have given its beneficiaries a path to American citizenship.”).

required corroboration.<sup>219</sup> For example, detained DREAMER Ramirez Medina was segregated because of an initial ICE allegation.<sup>220</sup> Segregation decisions are not necessarily made by individuals with training relating to gang identification and, in the context of immigration detention, may be made by private prison companies with no proper training.<sup>221</sup>

Often databases are subject to very little oversight of information integrity.<sup>222</sup> Most commonly, law enforcement agencies mark individuals as gang members or associates in a database for the purposes of investigation.<sup>223</sup> Since the purpose is investigatory, often the individual is not given any notice they have been placed in a database, nor are they provided a means to challenge the designation.<sup>224</sup> As a result of this lack of transparency, listed information may be old or erroneous,<sup>225</sup> a problem which is compounded by the failure to purge many databases of names of suspected gang members after prescribed periods of time.<sup>226</sup> Lack of oversight and review can also result in databases riddled with administrative mistakes.<sup>227</sup> For example, in an audit of California’s gang database, forty-two purported “gang members” were under the age of one-year-old; even more ridiculous, twenty-eight of those forty-two babies were entered into the gang database because they were self-admitting.<sup>228</sup>

The nature of databases—as they grow larger and larger—and their ability to share information across local and federal databases instantly, invariably lead to inaccurate, outdated, or irrelevant records which then can be shared and reproduced.<sup>229</sup>

#### B. *Alleging Gang Association in Immigration Proceedings*

As local and federal law enforcement have turned to tracking suspected gang activity, they have increasingly stored and shared information through gang database software used by other regional, state, and federal law enforcement agencies.<sup>230</sup> ICE may access these databases to use allegations against migrant youth in ICE immigration proceedings.<sup>231</sup> ICE also independently

---

<sup>219</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 8.

<sup>220</sup> See Request for Immediate Hearing on Conditional Release at 1, *Medina v. U.S. Dep’t of Homeland Security*, Case No. 2:17-CV-00218-RSM-JPD (W.D. Wash., Feb 24, 2017); Shapiro, *supra* note 217.

<sup>221</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 8.

<sup>222</sup> GARCIA-LEYS ET AL., *supra* note 34, at 1.

<sup>223</sup> *Id.* at 7.

<sup>224</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 6.

<sup>225</sup> GARCIA-LEYS ET AL., *supra* note 34, at 5–6.

<sup>226</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 6.

<sup>227</sup> *Id.*

<sup>228</sup> HOWELL, *supra* note 204, at 3.

<sup>229</sup> Kalhan, *supra* note 36, at 65.

<sup>230</sup> See *supra* Part I.

<sup>231</sup> Privacy Act of 1974, 75 Fed. Reg. 9233, 9234 (Mar. 1, 2010); U.S. DEP’T OF HOMELAND SEC., *supra* note 119 (“The ICE Gangs database supports information sharing on gang members and activities among participating law enforcement agencies.”).

collects intelligence, which serves as a foundation for gang allegations.<sup>232</sup> Gang allegations may arise from a number of different sources—school officials;<sup>233</sup> local and state law enforcement records and databases;<sup>234</sup> jails, detention centers;<sup>235</sup> Office of Refugee Resettlement (ORR) facilities;<sup>236</sup> criminal or delinquency proceeding records;<sup>237</sup> immigration interviews and applications;<sup>238</sup> and ICE investigations, including social media surveillance.<sup>239</sup>

---

<sup>232</sup> U.S. DEP’T OF HOMELAND SEC., *supra* note 119.

<sup>233</sup> GANG PROSECUTION MANUAL, *supra* note 117, at 10 (“Gang investigators should, therefore, regularly obtain up-to-date yearbooks to have at their disposal and should also maintain a close working relationship with school officials or resource officers regarding specific gang activity and/or membership on campus.”).

<sup>234</sup> Privacy Act of 1974, 75 Fed. Reg. at 9234; U.S. DEP’T OF HOMELAND SEC., *supra* note 119.

<sup>235</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 8. This may include those created by private prison companies operating criminal and immigration jails like CCA and GEO group. *Id.*

<sup>236</sup> OFFICE OF REFUGEE RESETTLEMENT, *Children Entering the United States Unaccompanied: Section 1* (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.4> [<https://perma.cc/L9RV-YA2J>]. ORR places children in secure facilities if a child “[h]as reported gang involvement or displays gang affiliation while in care [or] [h]as self-disclosed violent criminal history or gang involvement prior to placement in ORR custody that requires further assessment.” *Id.*

<sup>237</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 3. This may include probation reports that include charge, convictions, or adjudications for crimes that are viewed as “gang-related”—like tagging or vandalism—or gang enhancements. *Id.*

<sup>238</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERV., FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE (2017); U.S. CITIZENSHIP AND IMMIGRATION SERV., PETITION FOR U NONIMMIGRANT STATUS (2017). For example, Form I-821D, Application for DACA, asks if the applicant has ever been a member of gang. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS 4 (2017). Forms I-485, Application for Lawful Permanent Residence and I-918, Application for U Nonimmigrant Status, ask if the applicant been a member of a group that used weapons, provided, or transported weapons. U.S. CITIZENSHIP AND IMMIGRATION SERV., APPLICATION TO REGISTER PERMANENT RESIDENCE (2017); U.S. CITIZENSHIP AND IMMIGRATION SERV., PETITION FOR U NONIMMIGRANT STATUS (2017). In Form I-589, Application for Asylum, Withholding of Removal and CAT, the application asks if the applicant helped an organization where the applicant or other person transported, possessed, or used weapons, as well as any associations the applicant has ever had with any group. U.S. CITIZENSHIP AND IMMIGRATION SERV., APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2017).

<sup>239</sup> Max Rivlin-Nadler, *ICE Is Making Its Massive Data Collection Effort Secret As It Labels More and More Immigrants ‘Gang Members,’* INJUSTICE TODAY (Oct. 3, 2017), <https://injusticetoday.com/ice-is-making-its-massive-data-collection-effort-secret-as-it-labels-more-and-more-immigrants-gang-d324f2889b6> [<https://perma.cc/8U2Z-TCRW>]. For example, the ICE police report Form I-213 associated with immigration arrest includes a narrative portion

Gang allegations may arise against immigrants at virtually any point during their immigration case, often without their knowledge. During arrest or immigration enforcement activities, ICE, U.S. Customs and Border Protection (CBP), or other immigration law enforcement may allege gang membership as part of the arrest, by indication either on the ICE police report or other internal documentation.<sup>240</sup> The determination may be made because of a youth's appearance, including style of dress or tattoos, or something the agent reports the youth said.<sup>241</sup> Allegations made during enforcement and arrest often will influence the immigration agency's decision regarding whether to detain an immigrant or deny a bond, as well as how to classify the immigrant's security level for detention purposes.<sup>242</sup>

Once a youth is detained, even if ICE has not alleged gang membership, the jail facility may decide that the youth should be segregated due to gang membership.<sup>243</sup> All of these decisions lack transparency, so the young person would likely not know the allegation has been made.<sup>244</sup> This determination can be critical because immigrants detained during immigration deportation proceedings are much less likely to be able to obtain counsel and much more likely to be deported.<sup>245</sup>

In addition to allegations at the arrest and custody stages, an immigrant applying for an immigration benefit before USCIS may face a gang allegation during the application process or in a post-adjudication review.<sup>246</sup> Depending on the procedural posture, USCIS may have authority to grant certain types of relief like asylum, lawful permanent residence, and citizenship, but gang allegations may arise and, ultimately, be fatal to the claim.<sup>247</sup> Additionally, USCIS maintains sole jurisdiction over the DACA program. This application specifically asks if the immigrant is or has ever been a gang member.<sup>248</sup> USCIS reviewed those granted DACA relief in 2015, and forty-nine individuals were targeted for either gang allegation or criminal behavior.<sup>249</sup>

After being arrested and detained, some young people will present their claims before an immigration court. In court, the ICE prosecutor could raise the allegation of gang membership

---

where officers often choose to note a person's tattoos and suspected gang affiliations. U.S. DEP'T OF HOMELAND SEC., FORM I-213, RECORD OF DEPORTABLE/INADMISSIBLE ALIEN (2007), <http://www.virginiaraymond.com/wp-content/uploads/2015/10/I-213-Record-of-Deportable-Inadmissible-Alien.pdf> [<https://perma.cc/AGL5-D7VF>].

<sup>240</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 8.

<sup>241</sup> *Id.* at 3.

<sup>242</sup> *Id.* at 7, 11.

<sup>243</sup> *Id.* at 7–8.

<sup>244</sup> Very little discovery takes place in immigration court and parties may have to resort to Freedom of Information Act (FOIA) requests. Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1571 (2014).

<sup>245</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 47 (2015).

<sup>246</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 3–4.

<sup>247</sup> *See id.* at 7–8, 11.

<sup>248</sup> FORM I-821D, *supra* note 238.

<sup>249</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 11.

either at a bond hearing, where a judge will decide if the immigrant will remain in detention, or at a merits hearing, where the immigration judge will decide whether to grant an immigration benefit that would serve as a defense to deportation.<sup>250</sup> In decisions regarding bond and immigration benefits, particularly those before an immigration judge, immigrants are more likely to become aware of the allegation because adjudicators, unlike law enforcement making custody determinations, must state the reason for denying bond or the immigration benefit.<sup>251</sup> Furthermore, in a hearing before a judge, the ICE prosecutor will generally proffer evidence to the immigration judge when making the allegation, whereas an immigration officer adjudicating the benefit may have information in the respondent's file that is never shared.<sup>252</sup>

The type of evidence used in immigration proceedings to support gang allegations varies from case to case. Some examples include pictures from social media where youth are simply wearing a specific color like blue or red; law enforcement investigatory notes stating gang association without explaining the basis; and evidence a youth was segregated in detention due to gang suspicion.<sup>253</sup> Attorneys have reported being confronted with boilerplate reports—produced from HSI—containing vague references to underlying evidence without including the referenced evidence, such as photographs from social media and law enforcement investigatory notes.<sup>254</sup> Often, immigration judges will accept allegations as fact without recognizing issues of unreliability, over-inclusiveness, and racial disparities in underlying gang databases and identification protocols.<sup>255</sup> Allegation acts almost as a legal presumption. Advocates report more success in proving rehabilitation rather than challenging allegations.<sup>256</sup>

### C. Deciding Cases After a Gang Determination

Once an adjudicator has found the immigrant youth is a gang member or associate, two relevant legal standards are often implicated: “dangerousness,” in a hearing to determine bond before an immigration judge, and “discretion,”<sup>257</sup> which must be evaluated to grant various immigration benefits and occurs before either an immigration judge or a USCIS adjudicator.<sup>258</sup>

---

<sup>250</sup> See *id.* at 1, 8–9.

<sup>251</sup> *Id.* at 12.

<sup>252</sup> Wadhia, *supra* note 58, at 274–76, 294.

<sup>253</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 6.

<sup>254</sup> See, e.g., Winston, *Vague Rules*, *supra* note 184; Yvette Cabrera, *New ICE Tactic Raises Questions About Due Process*, THINKPROGRESS (Oct. 6, 2017, 8:27AM), <https://thinkprogress.org/ice-targets-gangs-6775356473a8/> [<https://perma.cc/3P6D-GQWD>].

<sup>255</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 11; Wadhia, *supra* note 58, at 276–77.

<sup>256</sup> See Cabrera, *supra* note 254; WARREN, *supra* note 145, at 19.

<sup>257</sup> See Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TULANE L. REV. 703, 705, 709, 711–12, 715, 717 (1997); see also IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 11.

<sup>258</sup> Wadhia, *supra* note 58, at 284, 299; U.S. CITIZENSHIP AND IMMIGR. SERV., 7 POLICY MANUAL (Aug. 23, 2017), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter9.html> [<https://perma.cc/VKZ6-S7EJ>] [hereinafter POLICY MANUAL]. Benefits that

This section will first describe the implications of finding gang association or membership in a bond hearing before an immigration judge. Next, it will describe the implications of finding gang association or membership in an adjudication of an immigration benefit, either before an agency adjudicator or an immigration judge.

In the first category of cases, for bond determination, an immigrant should not be detained unless the immigrant presents a threat to national security or constitutes a flight risk.<sup>259</sup> So-called criminal aliens must prove they are not a threat to national security, that their release would not pose a danger to property or persons,<sup>260</sup> and that they are likely to appear for future court proceedings.<sup>261</sup> Although ICE or CBP makes an initial decision regarding whether to detain an immigrant at the arrest stage, an immigration judge has the authority to review a bond determination.<sup>262</sup> Immigration judges must determine if immigrants are threats to national security, dangers to the community, or flight risks.<sup>263</sup>

During the bond hearing, the ICE prosecuting attorney may then raise an allegation of gang membership or association to persuade the judge to deny bond or to set a prohibitively high bond.<sup>264</sup> Factors considered in bond proceedings include the following: having a fixed address; the length of residence in the U.S.; family ties to the U.S., particularly if the family can confer immigration benefits; employment history; immigration record; attempts to escape authorities; prior failed court appearances; and criminal record.<sup>265</sup>

---

are discretionary include asylum, adjustment of status, and naturalization, and depending on the procedural posture, the adjudication may be done by USCIS, or an immigration judge. CHARLES A. WIEGAND, III, *FUNDAMENTALS OF IMMIGRATION LAW* 113 (2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/03/03/fundamentals\\_of\\_immigration\\_law\\_-\\_feb\\_2016.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/03/03/fundamentals_of_immigration_law_-_feb_2016.pdf) [<https://perma.cc/K97G-JD7L>]. Deferred Action against Childhood Arrivals is a type of prosecutorial discretion, which can be granted only by officials within the immigration agency. *See, e.g.*, Memorandum from John Morton, Dir. U.S. Immigration & Customs Enf't to All Field Dir., All Special Agents in Charge, All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, at 2–3 (Jun. 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/C57N-EJYZ>].

<sup>259</sup> *Matter of Fatahi*, 26 I. & N. Dec. 791, 792 (B.I.A. Aug. 3, 2016); *Matter of Patel*, 15 I. & N. Dec. 666, 667 (B.I.A. May 7, 1976).

<sup>260</sup> *Matter of Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. Nov. 17, 2009). *But see* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 80 (2016) (arguing it is the government's burden to first prove an immigrant's dangerousness).

<sup>261</sup> *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. Sept. 28, 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. Dec. 3, 1999).

<sup>262</sup> Immigration and Nationality Act of 1952 § 236, 8 U.S.C. § 1226 (2012).

<sup>263</sup> *Guerra*, 24 I&N Dec. at 40.

<sup>264</sup> IMMIGRANT LEGAL RES. CTR., *supra* note 112, at 8.

<sup>265</sup> *Guerra*, 24 I&N Dec. at 40; *Patel*, 15 I&N Dec. at 667.

Increasingly, advocates are reporting ICE making “surprise” gang allegations in bond hearings, with no warning and little evidence, yet with devastating results.<sup>266</sup> Detained immigrants find themselves in an expedited process, leaving pro se immigrants and attorneys representing immigrants little time to prepare.<sup>267</sup> Bond hearings are often held days or just a few weeks after a request is made,<sup>268</sup> and it is common practice for evidence to be presented on the day of a hearing.<sup>269</sup> Some advocates report, once a gang allegation is raised, immigration judges are uninterested in testimony contesting the allegation. In one case, an immigration judge refused to hear the respondent’s testimony in a bond hearing, and he denied bond stating that he was sure the testimony would be that the respondent was not a gang member, which would not change his decision.<sup>270</sup> An attorney who has faced these allegations against clients in bond hearings stated that evidence of the allegation is often sparse or nonexistent: “There’s no information on where [the immigration agency] found that out, why they believe that, when they considered them to be a gang member. It just says they are a gang member.”<sup>271</sup>

Outside of bond hearings, the procedure often involves a judge deciding whether someone has a defense to deportation and can be granted an immigration benefit<sup>272</sup> or, in a USCIS adjudication, an officer deciding whether an immigrant’s application for status should be granted.<sup>273</sup> Many immigration benefits require a positive exercise of discretion.<sup>274</sup> For example, when seeking asylum due to fear of persecution based on a protected ground such as religion, nationality, race, political opinion, or social group, immigrants must not only prove each element, but also that they deserve to be granted the benefit. Similarly, for most immigrants seeking lawful

---

<sup>266</sup> GARCIA-LEYS ET AL., *supra* note 34, at 10.

<sup>267</sup> ERIN QUINN, IMMIGRANT LEGAL RES. CTR., REMOVAL DEFENSE: DEFENDING IMMIGRANTS IN IMMIGRATION COURT 1–5 (1<sup>st</sup> ed. 2015).

<sup>268</sup> FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, GETTING A BOND: YOUR KEYS TO RELEASE FROM DETENTION 6 (2013), <http://firrp.org/media/Bond-Guide-2013.pdf> [<https://perma.cc/N6BY-EMA7>].

<sup>269</sup> *Id.*

<sup>270</sup> This narrative is based on the author’s experience regarding a case in bond court.

<sup>271</sup> Cabrera, *supra* note 211.

<sup>272</sup> Sara Wise & George Petras, *Step by Step: How the U.S. Deports Undocumented Immigrants*, USA TODAY (Nov. 12, 2017, 9:48 PM), <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/> [<https://perma.cc/APZ7-9854>].

<sup>273</sup> AM. IMMIGRATION COUNCIL, USCIS DATA ON APPLICATION AND PETITION PROCESSING TIMES: INACCURATE, OUTDATED, AND OPAQUE (AUG. 22, 2016), <https://www.americanimmigrationcouncil.org/research/uscis-data-application-and-petition-processing-times> [<https://perma.cc/4XZG-XAGK>].

<sup>274</sup> Some examples where a judge must make a determination of discretion include voluntary departure; cancellation of removal; asylum (not withholding of removal or protection under the Convention Against Torture); adjustment of status; and waivers of inadmissibility or deportability. CHARLES A. WIEGAND, III, *supra* note 258.

permanent residence<sup>275</sup> because of an approved family petition, approved Special Immigrant Juvenile application, or other basis, they must not only prove they meet the required elements, but also demonstrate that they merit an exercise of discretion.<sup>276</sup>

When negative factors are not present, relief is usually granted.<sup>277</sup> Under case law, positive discretionary factors include (1) family ties within the United States; (2) residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age); (3) evidence of hardship to the respondent and family if deportation occurs; (4) service in this country's Armed Forces; (5) a history of employment; (6) the existence of property or business ties; (7) evidence of value and service to the community; (8) proof of genuine rehabilitation if a criminal record exists; and (9) other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives).<sup>278</sup> Some other less significant factors that may be considered include whether the immigrant was granted either an early release from prison or parole or low bond, in related criminal proceedings; the immigrant's ability to pay, although not dispositive; and DHS difficulties in executing a final order of deportation.<sup>279</sup> For decisions before USCIS, guidance indicates factors should include immigration status and history, family unity, length of residence in the United States, business and employment, community standing, and moral character.<sup>280</sup> For circumstances in which unusual or outstanding equities are required, "an alien who demonstrates unusual or outstanding equities, as required, merely satisfies the threshold test for having a favorable exercise of discretion considered in his [or her] case; such a showing does not compel that discretion be exercised in his [or her] favor."<sup>281</sup>

---

<sup>275</sup> Lawful permanent residence or adjustment of status cases that require discretion include those based on INA 245(a) adjustment (including family and employment based as well as the Diversity Visa Program); Human Trafficking Victim Adjustment; Crime Victim Adjustment; Asylum Adjustment; Cuban Adjustment; Former Soviet Union, Indochinese, or Iranian Parolees; and Diplomats or High Ranking Officials unable to Return Home. POLICY MANUAL, *supra* note 258. Cases not involving discretion include: Nicaraguan Adjustment and Central American Relief Act of 1997; Refugee Adjustment; Haitian Refugee Immigration Fairness Act of 1998; Persons Born Under Diplomatic Status; Presumption of Lawful Admission; and American Indian Creation of Record. *Id.*

<sup>276</sup> WIEGAND, III, *supra* note 258.

<sup>277</sup> See *Matter of Arai*, 13 I. & N. Dec. 494, 496 (B.I.A. Mar. 4, 1970) (describing how adjustment of status is usually granted when no adverse discretionary factors were present).

<sup>278</sup> *Matter of Marin*, 16 I. & N. Dec. 581, 585 (B.I.A. Aug. 4, 1978); *Matter of C-V-T*, 22 I. & N. Dec. 7, 11 (B.I.A. Feb. 12, 1998). Furthermore, officers should consider any positive or negative factors, evaluate the case-specific considerations for each factor, and assess whether the balance warrants a favorable exercise of discretion while avoiding the use of numbers, points, or any other analytical tool that suggests quantifying factors. POLICY MANUAL, *supra* note 258.

<sup>279</sup> See U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCH BOOK, INTRODUCTORY GUIDES: BOND 7.

<sup>280</sup> POLICY MANUAL, *supra* note 258.

<sup>281</sup> *Matter of Buscemi*, 19 I. & N. Dec. 628, 634 (B.I.A. Apr. 13, 1988).

Once gang allegations are made, the result is often denial of the immigration benefit because of discretion or national security inadmissibility.<sup>282</sup>

#### IV. Vacuum of Protections for Immigrant Children

Children are confronting gang allegations in immigration proceedings, which have almost no youth-specific safeguards, despite the fact children are generally understood by their “principal characteristics of . . . age . . . and innocence.”<sup>283</sup> In fact, the United Nations Convention on the Rights of Children states, “[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care.”<sup>284</sup> Yet, migrant children are treated as miniature adults in the immigration system and do not generally benefit from perceptions of innocence.

The crimmigration convergence, with its bloated enforcement and dataveillance infrastructure, has set the stage for the use of gang allegations to target youth in immigration proceedings, where young people are marked not just for a criminal conviction or arrest, but simply the perception of criminality. Youth are particularly vulnerable to these allegations within immigration proceedings, where adjudicators have broad discretion and the mere perception of criminality can result in marking a child as legally “dangerous” and undeserving of granting immigration protection. This section will describe the adultification<sup>285</sup> of children in immigration proceedings and how children are confronted by gang allegations in a vacuum devoid of protections leading to their detention and, often, their deportation.

Children are treated almost the same as adults in immigration proceedings.<sup>286</sup> Even babies are subject to deportation.<sup>287</sup> Under immigration law, regardless of age, children must represent themselves if they cannot otherwise obtain an attorney,<sup>288</sup> even though significant evidence has

---

<sup>282</sup> See, e.g., Lee et al., *supra* note 20, at 9; Winston, *supra* note 184.

<sup>283</sup> Goff et al., *supra* note 150, at 527.

<sup>284</sup> G.A. Res. 44/25, Convention on the Rights of the Child, art. 1 (Nov. 20, 1989), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [https://perma.cc/278G-MA4G].

<sup>285</sup> For purposes of this Article, ‘adultification’ refers to adults’ generalized perception of migrant children as more adult, without reference to their individual behaviors.

<sup>286</sup> See 8 U.S.C. § 1101(b)(1)(Supp. 2014) (defining children under immigration law); 8 C.F.R. § 1236.3 (2003) (defining juveniles as individuals under the age of eighteen); Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 250 (2017). Only a few youth-specific protections are carved out by statute and regulation, although the one significant difference is the arrest and detention of children under the age of eighteen, particularly those that are unaccompanied. See 8 C.F.R. § 1236.3; 8 C.F.R. § 236.3 (2002).

<sup>287</sup> See, e.g., Brian Murray, *Representing a Baby in Removal Proceedings*, MURRAY OSORIO: BLOG (May 21, 2015), <http://www.murrayadvocates.com/removal-defense/representing-a-baby-in-removal-proceedings/> [https://perma.cc/G5QG-V55E].

<sup>288</sup> 8 U.S.C. § 1229a(b)(4)(A)(2012); 8 C.F.R. § 238.1(b)(2011). Yet, if a child is incompetent, like an adult, there may be a competency hearing to determine if other safeguards should be put in place. See *Matter of M-A-M-*, 25 I. & N. Dec. 474, 478 (B.I.A. May 4, 2011).

shown access to counsel is critical in avoiding deportation and obtaining immigration protection.<sup>289</sup> Most juveniles are not able to obtain lawyers to defend them in court, and most unrepresented juveniles are deported.<sup>290</sup> The immigration agency defends this status quo, purporting that children can adequately represent themselves. Assistant Chief Immigration Judge Jack H. Weil, who was in charge of training immigration judges and has particular oversight of vulnerable populations in immigration, stated, “I’ve taught immigration law literally to three year olds and four year olds.”<sup>291</sup>

Substantively, children confront essentially the same immigration legal regime as adults, with only a few laws distinguishing child-specific immigration relief or safeguards.<sup>292</sup> For example, laws allow children, like other family members, to migrate through family immigration petitions filed by U.S. citizens or lawful permanent residents seeking to keep their families together.<sup>293</sup> Children are permitted, like adults, to seek any form of immigration benefit for which

---

<sup>289</sup> For example, in one study, the odds were fifteen times greater that immigrants with representation, as compared to those without, would seek relief from deportation, and those represented immigrants were five-and-a-half times more likely to obtain relief. Eagly & Shafer, *supra* note 245, at 76 (“Tellingly, over a six-year period only 2% of immigrants without counsel prevailed in their cases.”). In a study of those seeking asylum, access to counsel was found to be perhaps the most critical, statistically, for success. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2010) (“[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”).

<sup>290</sup> *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/> [<https://perma.cc/6E9S-QMHJ>].

<sup>291</sup> Deposition of Hon. Jack H. Weil at 69, *J.E. F.M. v. Lynch*, No. C14-1026 TSZ (W.D. Wash. Oct. 15, 2015), <https://www.aclu.org/legal-document/jefm-v-lynch-deposition-honorable-jack-h-weil> [<https://perma.cc/N2DE-F4S7>].

<sup>292</sup> Children who are under 18 and unaccompanied have further protections which are described in detail throughout this section.

<sup>293</sup> 8 U.S.C. § 1151(b)(2) (2012); 8 U.S.C. § 1153(a)(1)–(3) (2012); *see generally* U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, ch. 9, § 502.2 (2017), <https://fam.state.gov/fam/09FAM/09FAM050202.html> [<https://perma.cc/7SNK-JVBN>] (explaining family-based IV classifications).

they are eligible,<sup>294</sup> but almost no special carveouts exist for children.<sup>295</sup> One unique law for children—Special Immigrant Juvenile Status—enables a pathway to lawful permanent residence for those children who are abandoned, abused, or neglected.<sup>296</sup>

Procedurally, in immigration adjudications—whether before an immigration agency adjudicator or before an immigration judge—children fundamentally face the same system as adults. In applications before immigration officers, children bear a responsibility to bring their own interpreter, or their application may be considered abandoned.<sup>297</sup> In deportation proceedings

---

<sup>294</sup> As a note, USCIS can decline to process a child’s asylum application if the child’s parent opposes it and the agency determines the child does not have the capacity to seek asylum on his own behalf. Memorandum from Bo Cooper, INS Gen. Counsel to Doris Meissner, INS Comm’r (Jan. 3, 2000), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Archive%201998-2008/2000/ins\\_counsel\\_elian\\_gonzalez.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Archive%201998-2008/2000/ins_counsel_elian_gonzalez.pdf) [<https://perma.cc/8JZR-CG7H>] (finding that USCIS need not “process . . . applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents’ wishes”).

<sup>295</sup> However, laws exist to allow children to obtain citizenship automatically from parents and protect them from losing access to immigration benefits simply because of the extended time applications may take to process. Survivors of human trafficking under the age of eighteen face less stringent requirements than their adult counterparts. Child Citizenship Act, Pub. L. 106–395, 114 Stat. 1631 (2000); *see also* *Citizenship Through Parents*, U.S. CUSTOMS AND IMMIGR. SERV., <https://www.uscis.gov/us-citizenship/citizenship-through-parents> [<https://perma.cc/7PLU-G7DM>] (last updated Nov. 10, 2015); Memorandum from William R. Yates, Associate Dir. for Operations U.S. Citizenship and Immigration Services, to Reg’l Dir. et al (Aug. 17, 2004), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/cspavtpa081704.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/cspavtpa081704.pdf) [<https://perma.cc/5X9P-WB2E>]; INA § 101(a)(15)(T)(i)(III)(cc); 8 C.F.R. § 214.11(a) (2017) (establishing that youth under eighteen are excepted from the requirement to reasonably assist law enforcement). Lastly, there are some protections for youth-related crimes and delinquency. Generally, individuals seeking to enter the U.S. or to obtain lawful permanent residence are barred if they have committed a crime involving moral turpitude, but under the juvenile offense exception, youth are still eligible as long as the crime occurred when they were a juvenile and more than five years prior to the date of application of entry or the benefit. 8 U.S.C. § 1182 (a)(2)(A)(ii)(I)(Supp. 2013); U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, ch. 9, § 302.3-2(B)(7)(a) (2017). Generally, sons and daughters of human traffickers who benefited from the activity in the last five years are barred from entering the U.S. or obtaining lawful permanent residence, but an exception exists for those who were children when they benefited. 8 U.S.C. § 1182(a)(2)(H)(ii), (iii). Lastly, juvenile delinquencies are not considered convictions for the purposes of determining eligibility for immigration benefits. *Matter of Ramirez-Rivero*, 18 I. & N. Dec 135, 137 (B.I.A. Oct. 5, 1981).

<sup>296</sup> 8 U.S.C. § 1101(a)(27)(J) (2012).

<sup>297</sup> 8 C.F.R. § 208.9 (2011) (establishing that children under the age of 18 who are determined to be unaccompanied are not required to provide their own interpreter).

before immigration judges, children face an experienced prosecutor.<sup>298</sup> Children must follow evidentiary rules, comply with service regulations, and bear the burden of proving their eligibility for relief, which can involve completing complex immigration forms, drafting affidavits, and providing supporting evidence to establish required legal elements.<sup>299</sup> For example, a youth seeking the protection of lawful permanent residence as a special immigrant juvenile must complete a series of complicated procedures involving a state court, the immigration agency, and at times, the immigration court. As one advocate remarked, it would be “preposterous” for a child to navigate the process of seeking protection on her own.<sup>300</sup> First, the child would have to obtain a state court order that places the youth in the custody of a person or entity; that finds reunification with a parent is not viable due to abandonment, abuse, or neglect; and that finds the child’s best interests are not served by returning the youth to his or her home country. Often this process would involve filing a petition in state court. Next, USCIS’s Form I-360 must be completed and submitted to ICE with supporting evidence, including the aforementioned state court order, along with proof of age and identity.<sup>301</sup> If approved, the young person is designated as a special immigrant juvenile but must then assemble a larger packet to seek legal permanent residence. This submission includes at least two more immigration forms amounting to twenty pages,<sup>302</sup> a specific medical form after an appointment with an immigration agency-authorized doctor, two photographs, a hefty fee or fee waiver form, and proof of I-360 approval.<sup>303</sup>

One modest move to offer more substantive and procedural protections for children occurred in 2008, when Congress carved out some benefits for the smaller subset of unaccompanied children under eighteen.<sup>304</sup> Children who are both under eighteen and not accompanied by a parent have special protections in a few areas including asylum, voluntary departure,<sup>305</sup> special immigrant juvenile status,<sup>306</sup> and greater access to counsel.<sup>307</sup> In the asylum

---

<sup>298</sup> See Eagly, *supra* note 21, at 1330.

<sup>299</sup> See generally MICHELLE N. MENDEZ, REPRESENTING CLIENTS IN IMMIGRATION COURT (4th ed. 2016).

<sup>300</sup> Hlass, *supra* note 286, at 285.

<sup>301</sup> KIDS IN NEED OF DEFENSE, CHAPTER 4: SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 20, 23–24, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf> [<https://perma.cc/SWL8-PZYR>].

<sup>302</sup> I-485 is eighteen pages, and G-325A is two pages. See APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS, *supra* note 238; U.S. CITIZENSHIP AND IMMIGRATION SERV., FORM G-325A, BIOGRAPHIC INFORMATION (2015).

<sup>303</sup> KIDS IN NEED OF DEFENSE, *supra* note 301, at 25–27.

<sup>304</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457, 122 Stat. 5044.

<sup>305</sup> *Id.* The Trafficking Victims Protection Reauthorization Act of 2008 provides that these children shall be eligible for Voluntary Departure under INA § 240B at no cost to the child. *Id.*

<sup>306</sup> *Id.* (expanding eligibility for relief and expanding waivers and exceptions). See 8 U.S.C. § 1255(l)(1)(C)(iii) (2012); Lee et al., *supra* note 20, at 1, 6.

<sup>307</sup> 8 U.S.C. § 1232(c)(5)(Supp. 2013). “To the greatest extent practicable,” the Secretary of Health and Human Services should provide pro bono legal services to these children. *Id.*

area, generally individuals who seek asylum while in deportation proceedings must present their claim before the immigration judge.<sup>308</sup> Under the Trafficking Victims Protection Reauthorization Act of 2008, unaccompanied youth under eighteen who are in deportation proceedings, which are purportedly nonadversarial, may initially seek asylum before an asylum officer<sup>309</sup> rather than before the immigration court.<sup>310</sup> Additionally, a number of bars to asylum do not apply to these children, notably the one-year filing deadline,<sup>311</sup> as well as the safe third country bar, which prevents asylum seekers from obtaining asylum protection in the U.S. if they first entered a specified safe third country with which the U.S. has a bilateral agreement.<sup>312</sup> Furthermore, unaccompanied children who are living in ORR facilities because they have not been reunited with family or friends are also not required to provide their own interpreters.<sup>313</sup>

In the immigration court context, judges are bound by only a few child-specific regulations<sup>314</sup> and one memorandum relating to a smaller subset of unaccompanied children. The scope of child-appropriate accommodations in the memorandum are limited. According to guidance, children are permitted to sit and testify next to an adult or friend, have a booster seat, and bring a toy into the courtroom.<sup>315</sup> Judges are encouraged to remove their robes, allow for

---

<sup>308</sup> See Lee et al., *supra* note 20, at 7.

<sup>309</sup> 8 C.F.R. § 208.9(b) (2011) (“The asylum officer shall conduct the interview in a nonadversarial manner . . . . The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.”).

<sup>310</sup> See 8 U.S.C. § 1232; see generally Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations, U.S. Citizenship and Immigr. Servs., on Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions to Field Leadership (Mar. 24, 2009), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf) [<https://perma.cc/7DCA-P3U8>]; see also Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to All Asylum Office Staff 2 (Mar. 25, 2009), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/uac\\_filings\\_5f25mar09.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/uac_filings_5f25mar09.pdf) [<https://perma.cc/6HEX-P2E9>].

<sup>311</sup> 8 U.S.C. § 1158(a)(2)(E) (2012).

<sup>312</sup> See Sylvia Thomson, *El Salvador Women at the Heart of Legal Challenge to Safe Third Country Agreement*, CBC NEWS: CANADA (July 8, 2017, 5:00 AM), <http://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228> [<https://perma.cc/3WEV-UCUF>]. Currently, only Canada is a safe third country, and the validity of our bilateral agreement with Canada is currently being challenged in the Canadian courts. *Id.*

<sup>313</sup> 8 C.F.R. § 208.9(g) (2011) (requiring asylum applicants to bring their own interpreter).

<sup>314</sup> See 8 C.F.R. § 1240.10(c) (2015). Judges are specifically permitted by regulation to waive the presence of the minor child if a legal guardian can attend the hearing in the child’s place. *Id.* They are also prohibited from accepting pleadings of deportability from an unrepresented child under the age of 18 unless the child is accompanied by a relative or friend. *Id.*

<sup>315</sup> Memorandum from Off. Chief Immigration Judge to All Immigration Judges et al., on Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration

extended or more frequent breaks, use child-sensitive questions, explain court processes, and make proper credibility assessments, understanding that inconsistencies are not always proof of dishonesty.<sup>316</sup> Judges are encouraged to accommodate scheduling needs of children, permit telephonic appearances, and potentially conduct cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month.<sup>317</sup> However, the guidance makes clear that its purpose is solely to encourage creating a child-appropriate hearing environment and that concepts of the “best interest of the child” will not influence substantive matters.<sup>318</sup>

Regulations and guidance affording children special protections by immigration agents are both scarce and often superficial. Even worse, those that do exist generally focus solely on children under eighteen, and some limit protection to minors without a parent. At the arrest stage, immigration officers are required to give children a form I-770—a paper that explains that they are being arrested and that they have a right to a phone call, a right to find an attorney, and a right to appear before an immigration judge.<sup>319</sup> If the child being arrested is under fourteen, immigration agents are required to read the form to the child.<sup>320</sup> Regulations exist regarding the detention of children under eighteen, particularly those who are unaccompanied.<sup>321</sup> In terms of guidance, ICE

---

Court Cases Involving Unaccompanied Alien Children 5 (Sept. 16, 2004), <https://www.immigrantjustice.org/sites/default/files/EOIR%2520guideline%2520on%2520Children%2520in%2520immigration%2520court.pdf> [<https://perma.cc/XQ95-SRAN>].

<sup>316</sup> Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges et al. on Operation Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 5–7 (May 22, 2007), <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf> [<https://perma.cc/VG8C-2CHL>].

<sup>317</sup> *Id.* at 5–6.

<sup>318</sup> *Id.* at 4.

<sup>319</sup> 8 C.F.R. § 236.3(h) (2003); 8 C.F.R. § 1236.3(h) (2003); *see also* HELEN LAWRENCE ET AL., STRATEGIES FOR SUPPRESSING EVIDENCE AND TERMINATING REMOVAL PROCEEDINGS FOR CHILD CLIENTS app. 2.A–2.B (2015), [https://cliniclegal.org/sites/default/files/strategies\\_for\\_supressing\\_evidence\\_and\\_terminating\\_removal\\_proceedings\\_for\\_child\\_clients\\_with\\_appendices.pdf](https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf) [<https://perma.cc/46KG-G4HZ>] (sample of I-770).

<sup>320</sup> 8 C.F.R. § 236.3(h); 8 C.F.R. § 1236.3(h).

<sup>321</sup> Homeland Security Act 2002, Pub. L. 107-296, sec. 462, 116 Stat. 2135, 2203 (reorganizing responsibilities for juvenile aliens and making ICE’s ERO responsible for housing juvenile aliens apprehended with family members and transporting juveniles to longer term detention facilities). ICE has promulgated detention standards which reflect different treatment of children under eighteen, particularly those who are unaccompanied. IMMIGRATION AND CUSTOMS ENF’T, HOLD ROOMS IN DETENTION FACILITIES 116 (2013), [https://www.ice.gov/doclib/detention-standards/2011/hold\\_rooms\\_in\\_detention\\_facilities.pdf](https://www.ice.gov/doclib/detention-standards/2011/hold_rooms_in_detention_facilities.pdf) [<https://perma.cc/5YPP-AJEC>]. However, complaints regarding detention of juveniles abound. *See, e.g.*, Letter from Ashley Huebner, National Immigrant Justice Center, to Megan H. Mack, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Security, et al. (June 11, 2014),

has issued juvenile protocols, which do not suggest child-sensitive approaches to handling children's cases, but merely instruct ICE officers on how to comply with statutory and regulatory obligations regarding arrest and detention of children under the age of eighteen.<sup>322</sup>

Although USCIS has not issued publicly available, agency-wide guidance regarding children, a subdivision of USCIS—the Asylum Office—has issued some more robust protections. In stark contrast to the rest of the immigration system, the asylum division has issued guidance, which has been in place since 1998, for adjudicating children's asylum claims based on children's "unique vulnerability."<sup>323</sup> Asylum officers are encouraged to create a "child-friendly" environment by: (1) allowing the presence of a "trusted adult" during the asylum interview; (2) encouraging the use of officers who have specialized training and cultural and language similarity; (3) expediting children's adjudications; (4) considering interview practices to build trust; (5) using "child-sensitive" questioning and active listening; (6) allowing consideration of evidence provided by people including family, community, teachers, and medical personnel, as well as available documentary evidence of similarly situated children; (7) cautioning asylum officers from misinterpreting credibility; (8) encouraging consideration of potential independent claims of children listed as derivatives of parents; and (9) educating officers about resources produced by the agency regarding current information on the legal and cultural conditions children face in

---

<http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> [<https://perma.cc/X8D7-YF33>].

Complaints include children being physically and sexually abused, being forced to sleep on floors without a mattress, being held in painfully freezing rooms, not being properly served legal papers, not being read their rights, being questioned by the same officers who arrested them, and being questioned in a language they do not understand. *Id.* In the juvenile justice system, states are unlawfully providing confidential information to ICE, leading ICE to forcibly interrogate youth. Apart from these changes, ICE can parole juveniles subject to expedited removal, although this would "generally be justified only on a case-by-case basis for 'urgent humanitarian reasons' or 'significant public benefit,' provided the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(b) (2011). Section (b)(3) describes the release and parole of juveniles. *Id.*

<sup>322</sup> *Juvenile Protocol Manual*, Immigr. and Naturalization Serv. Off. of Field Operations (Mar. 12, 2007),

[https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/juvenileprotocolmanual2006.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf) [<https://perma.cc/CFA9-YEPG>].

<sup>323</sup> Memorandum from Jeff Weiss, Acting Dir., U.S. Dep't of Justice Office of Int'l Affairs, on Guidelines for Children Asylum Claims to Asylum Officers, et al. 2 (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [<https://perma.cc/5MSE-Q83J>]. Note that these guidelines predominantly apply to children under the age of eighteen, although children between the ages of eighteen and twenty-one should benefit from protections relating to scheduling and derivative determinations. *Id.* at 1. Asylum officers are also cautioned that eighteen- to twenty-one-year-olds may exhibit a "minor's recollection" of past traumatic events if they occurred while under the age of eighteen. *Id.* at 5.

various countries.<sup>324</sup> Furthermore, the memorandum describes how asylum officers should use a child-sensitive approach to determine various legal standards, implying that experiences could qualify children to meet requirements even if those same experiences may not meet standards for the purpose of adult qualification.<sup>325</sup>

## V. Suggested Safeguards

Gang allegations in the immigration context exacerbate existing biases against—and the dearth of protections for—migrant youth in immigration proceedings. Therefore, gang allegations and evidence of gang association should be excluded from immigration proceedings because they are highly prejudicial, compound racial disparities, and lack reliability. In the absence of statutory, regulatory, or administrative guidance banning gang allegations, this Article proposes three ways to address this form of bias against migrant youth in immigration proceedings.<sup>326</sup> First, education regarding implicit bias has been a proven strategy for decreasing the effect of such bias.<sup>327</sup> Therefore, immigration adjudicators should be trained regarding bias and, specifically, how it affects immigrant youth.<sup>328</sup> This type of education could combat biased assumptions about a youth’s “dangerousness,” which leads to disproportionate detention and denial of bonds. Secondly, youth should be recognized as a positive discretionary factor that can directly undercut a negative discretionary factor of gang association or membership. Lastly, providing representation for children in immigration proceedings can further fundamental fairness.

### A. *Excluding Gang Allegations and Evidence*

Gang allegations have no place in immigration proceedings because their disproportionate racial effects are compounded at every stage of identification, allegation, and adjudication. Because of these layers of racial bias and the unreliability of gang allegation evidence, the use of gang allegations in immigration proceedings raises questions of fundamental fairness.

---

<sup>324</sup> See *id.* at 5–16.

<sup>325</sup> *Id.* at 17. For example, although children must prove persecution, qualifying the harm a child suffers “may be relatively less than that of an adult.” *Id.* at 19.

<sup>326</sup> Although political realities make it unlikely that the executive branch, as structured, will undertake efforts to decrease bias, future administrations may be interested in implementing such changes. See Ali Winston, *Obama’s Use of Unreliable Gang Databases for Deportations Could Be a Model for Trump*, INTERCEPT (Nov. 28, 2016, 12:24 PM), <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/> [https://perma.cc/2BUY-CQ9S].

<sup>327</sup> Faigman et al., *supra* note 25, at 1185.

<sup>328</sup> A key entry point would be education of prosecutors and agents of ICE, as well as customs and border protection law enforcement. It does not appear that they are being trained. Chris Rickerd, *Letter to the Editor: Bias in Immigration Judges*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/07/opinion/bias-in-immigration-judges.html> [https://perma.cc/7FFH-YVBJ].

Generally, evidence in immigration proceedings must be probative and fundamentally fair.<sup>329</sup> The strict rules of evidence do not apply.<sup>330</sup> Immigration judges have broad authority to accept almost any evidence in the record as long as it is relevant to an issue in the case and consistent with a fair hearing.<sup>331</sup>

Despite this expansive standard, documents and statements must be examined for indicia of reliability.<sup>332</sup> Evidence lacking trustworthiness may raise due process concerns and violate the fundamental fairness test.<sup>333</sup> Judges use a fact-intensive, case-by-case inquiry to determine reliability and admissibility; using this approach, immigration judges often admit evidence, over questions of reliability, although perhaps affording it less weight.<sup>334</sup> However, some immigration courts have found certain types of evidence should be excluded, such as unreliable internet sources,<sup>335</sup> evidence obtained as a result of certain due process violations,<sup>336</sup> and affidavits from persons not available for cross-examination when no reasonable efforts were made to secure their presence.<sup>337</sup> Although regulations make clear evidence that reasonably indicates the existence of

---

<sup>329</sup> Matter of Lam, 14 I. & N. Dec. 168, 172 (B.I.A. July 5, 1972) (“The sole criterion in appraising documentary evidence lawfully obtained is whether it has probative value and whether its use is consistent with a fair hearing.”).

<sup>330</sup> Matter of Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. Oct. 4, 1984).

<sup>331</sup> 8 C.F.R. §§ 1240.7(a), 1240.46(c) (2003).

<sup>332</sup> Banat v. Holder, 557 F.3d 886, 893 (8th Cir. 2009) (finding “the report in this case was glaringly deficient in providing the most basic indicia of its circumstantial probability of reliability”).

<sup>333</sup> See *id.* at 890; see also *Alexandrov v. Gonzales*, 442 F.3d 395, 405 (6th Cir. 2006) (noting “[h]ighly unreliable hearsay might raise due process problems”) (quoting *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004)).

<sup>334</sup> See Matter of D-R-, 25 I. & N. Dec. 445, 460–61 (B.I.A. Apr. 6, 2011); see also *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006); *Chen v. Gonzales*, 434 F.3d 212, 218 (3d Cir. 2005); Matter of J. R. Velasquez, 25 I. & N. Dec. 680, 680 (B.I.A. Jan. 24, 2012) (admitting evidence of criminal records); *Wadud*, 19 I. & N. Dec. at 187–88; Matter of Kwan, 14 I. & N. Dec. 175, 177 (B.I.A. July 13, 1972) (admitting a memorandum because respondent was afforded an opportunity to examine it); *Lam*, 14 I. & N. Dec. at 169–71.

<sup>335</sup> *Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (remanding so the BIA can justify its credibility determination given the immigration judge’s reliance on Wikipedia); *Bing Shun Li v. Holder*, 400 F. App’x 854, 857 (5th Cir. 2010) (affirming and writing “only to express [the court’s] disapproval of the [immigration judge’s] reliance on Wikipedia and to warn against any improper reliance on it or similarly unreliable internet sources in the future”).

<sup>336</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984); AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW 7–16 (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/motions\\_to\\_suppress\\_in\\_removal\\_proceedings\\_a\\_general\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_to_suppress_in_removal_proceedings_a_general_overview.pdf) [<https://perma.cc/E65L-MZNS>].

<sup>337</sup> *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989); see also *Cinapian v. Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009); *Olabanji v. INS*, 973 F.2d 1232, 1234–35 (5th Cir. 1992)

a criminal conviction is admissible,<sup>338</sup> some courts have excluded police or arrest reports where the officer or other corroborating evidence is not available.<sup>339</sup>

Gang allegations and related evidence implicate critical issues of admissibility because the accusations are highly prejudicial and may be uncorroborated or based on an untrustworthy source. For example, gang allegation evidence may include social media photographs, without foundation for how the photographs were obtained or what actually can be divined from them. Other times, the evidence may simply be an ICE police report referencing gang allegations generated by a gang database or other unknown source. Because there is little oversight for gang databases and no consistent or clear boundaries defining gang membership or association, this evidence is inherently unreliable. In fact, many law enforcement offices, including ICE, may make a determination of gang affiliation based solely on one source or on subjective, racially charged criteria, such as where the individual lives, with whom the individual associates, and what clothing the individual wears. Due to these reliability issues as well as the disproportionate racial impact, gang allegations should be excluded from immigration proceedings.

---

(“This court squarely holds that the use of affidavits from persons who are not available for cross-examination does not satisfy the constitutional test of fundamental fairness unless the INS first establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing.”) (quoting *Hernandez-Garza*, 882 F.2d at 948). *But see* *Pouhova v. Holder*, 726 F.3d 1007, 1015 (7th Cir. 2013) (finding even where the government makes reasonable, but unsuccessful efforts to produce witness, the court does not “see why making an unsuccessful effort to locate a witness renders the unreliable hearsay evidence any more reliable or its use any fairer than without such effort”); *see also* IMMIGRANT DEF. PROJECT, PRACTICE NOTE: CHALLENGING EVIDENCE OF GANG-RELATED ACTIVITY AT IMMIGRATION COURT BOND HEARINGS (2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/Practice-Note-8-3-17-gang-bond-hearings-1.pdf>.

<sup>338</sup> 8 C.F.R. § 1003.41(d) (2018). *See also* *J. R. Velasquez*, 25 I. & N. Dec. at 680.

<sup>339</sup> *Olivas-Motta v. Holder*, 746 F.3d 907, 918 (9th Cir. 2013) (Kleinfeld, J., concurring) (noting the defects of police reports and that “police reports are not generally ‘reasonable, substantial, and probative evidence’ of what someone did”); *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) (finding “[a]bsent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence . . .”); *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (noting that rap sheets are products of “agencies whose jobs are to seek to detect and prosecute crimes” and thus “do not necessarily emanate from a neutral, reliable source”); *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003) (finding “[b]ecause the factual narratives contained in [probation reports] are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate” and thus are “not a highly reliable basis for a decision of such importance as deportation”); *Matter of Arreguin De Rodriguez*, 21 I. & N. Dec. 38, 42 (B.I.A. May 11, 1995) (“[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.”); *see also* IMMIGRANT DEF. PROJECT, *supra* note 337.

## B. Interrupting Bias

If gang allegations and related evidence are not excluded from immigration proceedings, immigration adjudicators should consider ways to interrupt bias that exists within the immigration system. Significant research by cognitive and social psychologists shows that human beings often are driven by unconscious “attitudes and stereotypes . . . about social categories, such as genders and races.”<sup>340</sup> These biases are referred to as “implicit biases” and can be tested with the well-known Implicit Association Test (IAT).<sup>341</sup> According to extensive data from IATs, implicit bias is pervasive, enormous in scope, disconnected from explicit biases, and forecasts certain real-world actions.<sup>342</sup> When the brain processes large volumes of information quickly, it tends to rely on experiences rather than on unique details of the current situation, which can lead to falling back on stereotypes about race, age, country of origin, religion, or gender.<sup>343</sup>

One leading article about implicit bias in courtrooms found several ways to decrease bias and break the link between bias and decision-making. First, bias has been shown to decrease when individuals are exposed to counter-typical individuals who undercut stereotypes.<sup>344</sup> Second, even when bias exists, research has shown individuals can break the link between bias and their behavior.<sup>345</sup> The authors suggest decision makers could break the link between bias and adjudications by: (1) increasing decision makers’ motivation to decrease bias and question their own objectivity; (2) improving conditions of decision-making; and (3) collecting basic data about decision-making.<sup>346</sup>

### 1. Adjudicator Trainings Regarding Implicit Bias and Gang Allegations

Trainings can assist with a few of the interventions suggested by experts. Trainings could potentially decrease bias by teaching judges strategies to employ counter-typical associations to decrease their own biases. Trainings can also help break the link between bias and behavior by helping adjudicators question their own objectivity and increase motivation to decrease bias. With education, judges and immigration officers may realize implicit bias is a real and pervasive issue.<sup>347</sup> Experts suggest training judges early—for example, during new judge orientation—when judges are probably most receptive to receiving such information.<sup>348</sup>

---

<sup>340</sup> Faigman et al., *supra* note 25, at 1128.

<sup>341</sup> IATs can be found online, where researchers collect vast data. *See* Project Implicit, HARVARD, <https://implicit.harvard.edu/implicit/takeatest.html> [<https://perma.cc/N9GL-X3H2>] (last visited Jan. 4, 2018).

<sup>342</sup> Faigman et al., *supra* note 25, at 1130–31.

<sup>343</sup> *See* KAHNEMAN, *supra* note 25.

<sup>344</sup> Faigman et al., *supra* note 25, at 1169–70.

<sup>345</sup> *Id.* at 1172–79.

<sup>346</sup> *Id.*

<sup>347</sup> *See id.* at 1171.

<sup>348</sup> *Id.* at 1176.

Currently, new immigration judges have been provided vague guidelines regarding behavior toward respondents, according to materials from recent new immigration judge training.<sup>349</sup> Judges were taught to “[t]reat [a]ll parties [w]ith [r]espect,” “[d]o [n]ot let the robe go to your head,” “[y]ou get what you give,” and to be timely.<sup>350</sup> Nothing specific in the materials related to implicit bias or the special vulnerabilities of youth. However, in August 2016, immigration judges were trained for the first time regarding implicit bias.<sup>351</sup> The future of these trainings is unclear because new judge trainings have been cancelled for upcoming years.<sup>352</sup> Scrapping training for new judges is not new. Although national immigration judges’ trainings were held in August 2015, they were the first in five years because of lack of funding.<sup>353</sup>

Training of new judges should be reinstituted, and the training should cover bias. Similarly, immigration officer adjudicators should receive bias training. Furthermore, the bias training should focus on topics that do not immediately raise hackles, by focusing first on other categories of decision-making errors and cognitive biases or less threatening biases. Adjudicators should also be required to take the IAT.<sup>354</sup> Several current and former immigration judges expressed doubts that bias training could address problems in the court, but such training is desperately needed.<sup>355</sup>

---

<sup>349</sup> See *EOIR Training Materials for New Immigration Judges*, TRAC IMMIGR., <http://trac.syr.edu/immigration/reports/211/> [<https://perma.cc/2AXW-6JYK>] (last visited Jan. 4, 2018).

<sup>350</sup> JUDGE REX J. FORD, COURTROOM CONTROL, [http://trac.syr.edu/immigration/reports/211/include/V-24-training\\_course\\_courtroom\\_control.pdf](http://trac.syr.edu/immigration/reports/211/include/V-24-training_course_courtroom_control.pdf) [<https://perma.cc/QVN9-3HCC>]; JUDGE REX J. FORD, PREPARING AND CONDUCTING MASTER CALENDAR HEARINGS, [http://trac.syr.edu/immigration/reports/211/include/I-02-training\\_course\\_master\\_calendar.pdf](http://trac.syr.edu/immigration/reports/211/include/I-02-training_course_master_calendar.pdf) [<https://perma.cc/RZ7N-DT8H>] (noting in the training that “[r]espect goes both ways”).

<sup>351</sup> See Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html> [<https://perma.cc/X42Z-28BZ>].

<sup>352</sup> Sarah Sherman-Stokes, *Immigration Judges Were Always Overworked. Now They’ll Be Untrained, Too.*, WASH. POST (July 11, 2017), [https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644\\_story.html](https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644_story.html) [<https://perma.cc/4R2C-ZAPU>].

<sup>353</sup> Molly Hennessy-Fiske, *As Immigration Judges’ Working Conditions Worsen, More May Choose Retirement*, L.A. TIMES (Aug. 18, 2015, 6:47 PM), <http://www.latimes.com/nation/la-na-immigration-judges-20150818-story.html> [<https://perma.cc/48CQ-UDLM>].

<sup>354</sup> Faigman et al., *supra* note 25, at 1176–77.

<sup>355</sup> Dickerson, *supra* note 351.

## 2. Improving Conditions for Decision-Making

Experts also suggest that improving decision-making conditions by allowing people to engage in “effortful, deliberative processing” can break the link between bias and behavior.<sup>356</sup> In immigration court,<sup>357</sup> children are confronted with gang allegations in a system one retired judge called “total chaos”<sup>358</sup> due to exploding court backlogs.<sup>359</sup> Therefore, children face limited procedural protections with virtually no youth-specific safeguards<sup>360</sup> in a system that is increasingly broken.<sup>361</sup> Judges, who may be suffering from burnout and even post-traumatic stress,<sup>362</sup> must make culturally-charged, discretionary decisions very quickly. One judge famously remarked the immigration court system amounts to deciding “death penalty cases . . . in traffic court.”<sup>363</sup> The risks of bias are particularly high here because high caseloads,<sup>364</sup> which often involve describing traumatic details,<sup>365</sup> lead to burnout of judges.

---

<sup>356</sup> Faigman et al., *supra* note 25, at 1177.

<sup>357</sup> Studies have not documented conditions for USCIS adjudicators, so this section focuses solely on immigration court conditions.

<sup>358</sup> Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> [<https://perma.cc/E3H9-W93L>].

<sup>359</sup> Hennessy-Fiske, *supra* note 353. Many immigration judges handle more than 1,400 cases at a time, and some have more than 3,000 cases. *Id.*

<sup>360</sup> See *supra* Part IV. For example, the traditional evidentiary rules do not apply. *Id.*

<sup>361</sup> See generally *Despite Hiring, Immigration Court Backlog and Wait Times Climb*, TRAC IMMIGR. (May 15, 2017), <http://trac.syr.edu/immigration/reports/468/> [<https://perma.cc/JE9L-25UR>] [hereinafter TRAC, *Despite Hiring*].

<sup>362</sup> Hennessy-Fiske, *supra* note 353 (quoting former immigration judge Eliza Klein as saying that “[a] lot of judges have sort of post-traumatic stress”).

<sup>363</sup> Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/WU84-G9CV>]; see also Denise Noonan Slavin & Dana Leigh Marks, *You Be the Judge: Who Should Preside Over Immigration Cases, Where, and How?*, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES* 89, 90 (D. Kanstroom & M. Brinton Lykes, eds. 2015).

<sup>364</sup> Dickerson, *supra* note 351. Immigration judges handle more than twice as many cases as Federal District Court judges. *Id.*

<sup>365</sup> Stuart L. Lustig, et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER’S IMMIGR. BULL. 22, 23 (2008), <http://pdfserver.amlaw.com/nlj/ImmigrJudgeStressBurnout.pdf> [<https://perma.cc/S9XQ-ZCMJ>].

According to a study, immigration judges report burnout at a higher rate than any among all other professionals, including those who work in hospitals and prison systems.<sup>366</sup>

The risk of relying on attitudes and stereotypes may be exacerbated in cases involving gang allegations, which allow broad discretion in identifying potential gang members and associates. Furthermore, allegations are informed by law enforcement and gang database protocols which rely on culturally influenced criteria, such as wearing gang clothing, having tattoos, living in so-called gang areas, and interacting with alleged gang members or associates.<sup>367</sup> Because gangs are not defined explicitly in the INA and judges themselves need not rely on any gang identification criteria, little structure exists for decision-making.

The broad discretion of deciding the veracity of a gang allegation may also be compounded with further discretion when an adjudicator decides whether a child deserves to be granted relief, such as lawful permanent residence or asylum. When an adjudicator determines a negative factor is present, which may include gang association, then the adjudicator must weigh positive and negative factors to determine whether the discretionary grant is merited.<sup>368</sup> These layers of discretion with weak structural bounds are particularly compounded in the immigration court context due to the rushed decision-making conditions within courts that are bursting with skyrocketing dockets.

To improve conditions, adjudicators must have fewer cases and more time to make their decisions. Although the Trump administration has increased hiring of immigration judges, backlogs continue to worsen.<sup>369</sup> According to a recent report from April 2017, the number of immigration cases waiting for a decision achieved an all-time high of 585,930.<sup>370</sup>

### 3. Data Collection on Immigration Decisions

To assess bias in immigration proceedings—individually and as a whole—immigration judges and USCIS officers should try to track their decisions.<sup>371</sup> Just as it is hard to gauge weight loss without a scale, it is difficult to determine implicit bias within immigration courts without more quantifiable data.<sup>372</sup> By compiling basic information about decisions, adjudicators may be able to assess patterns that cannot be recognized in single decisions.

#### C. Accounting for Youthfulness

As adjudicators address bias against youth of color in immigration proceedings, they can improve fundamental fairness by bolstering youth-centered safeguards. Although decisions

---

<sup>366</sup> *Id.* at 26.

<sup>367</sup> *See supra* Part III.A.

<sup>368</sup> *Matter of Marin*, 16 I. & N. Dec. 581, 581, 584 (B.I.A. Aug. 4, 1978); *Matter of C-V-T*, 22 I. & N. Dec. 7, 12 (B.I.A. Feb. 12, 1998).

<sup>369</sup> TRAC, *Despite Hiring*, *supra* note 361.

<sup>370</sup> *Id.*

<sup>371</sup> David L. Faigman, et al., *supra* note 25, at 1178.

<sup>372</sup> *Id.*

regarding immigration benefits and defenses often rely on a broad exercise of discretion, youthfulness is not listed as a positive discretionary factor<sup>373</sup> in decision-making,<sup>374</sup> nor is it a positive factor in bond hearings.<sup>375</sup>

In making decisions regarding many forms of immigration relief, adjudicators must decide if the immigrant merits a positive exercise of discretion.<sup>376</sup> If no negative factors are present, relief is usually granted.<sup>377</sup> Positive factors include (1) family ties within the United States; (2) residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age); (3) evidence of hardship to the respondent and family if deportation occurs; (4) service in this country's armed forces; (5) a history of employment; (6) the existence of property or business ties; (7) evidence of value and service to the community; (8) proof of a genuine rehabilitation if a criminal record exists; and (9) other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives).<sup>378</sup> A major negative discretionary factor is criminal justice involvement.<sup>379</sup> These factors were not developed with youth in mind who, due to their age, often have not lived in the U.S. for long, often do not have family ties with U.S. status, and often do not have extensive work history or business ties.<sup>380</sup>

Similarly, in a bond context the immigration judge has "wide discretion" to determine what factors should be considered and may consider evidence regarding accusations of criminal activity

---

<sup>373</sup> See *Marin*, 16 I. & N. Dec. at 585; *C-V-T*, 22 I. & N. Dec. 7 at 11. In contrast, an older ICE Memorandum regarding prosecutorial discretion explicitly includes "the person's age, with particular consideration given to minors and the elderly." Memorandum from John Morton, Dir. U.S. Immigration & Customs Enf't, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to All Field Dir., All Special Agents in Charge, All Chief Counsel 4 (June 17, 2011). This memorandum has since been rescinded. Minors are also included in a list of individuals who warrant special care. *Id.* ("Factors to Consider When Exercising Prosecutorial Discretion"). A later ICE memorandum also found age and whether the individual is a young child to be compelling humanitarian factors that should be considered. Memorandum from Jeh Charles Johnson, *supra* note 59, at 6.

<sup>374</sup> See *Marin*, 16 I. & N. Dec. at 585–86; *C-V-T*, 22 I. & N. Dec. 7 at 11–12.

<sup>375</sup> See generally U.S. DEP'T OF JUSTICE, *supra* note 279.

<sup>376</sup> WIEGAND, III, *supra* note 258. Some examples of relief that require positive discretion include voluntary departure; cancellation of removal; asylum (not withholding of removal or protection under the Convention Against Torture); adjustment of status; and waivers of inadmissibility or deportability. *Id.*

<sup>377</sup> *Matter of Arai*, 13 I. & N. Dec. 494, 496 (B.I.A. Mar. 4, 1970).

<sup>378</sup> *Marin*, 16 I. & N. Dec. at 581; *C-V-T*, 22 I. & N. Dec. at 11.

<sup>379</sup> See IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1261–62 (15th ed. 2016).

<sup>380</sup> See *Marin*, 16 I. & N. Dec. at 585. A more common scenario is that adult immigrants have had children who are U.S. citizens to show family ties. See *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1114 (B.I.A. Nov. 3, 1999).

even in the absence of a conviction.<sup>381</sup> If negative factors exist, the immigrant must demonstrate positive factors to outweigh the negative; if negative factors are serious, the immigrant may be required to show “unusual or outstanding equities.”<sup>382</sup> Significant positive factors for setting bond include having a fixed address, the length of residence, family ties, and employment history, all of which may be more difficult for children to show because they often lack control over their living situation, often are less likely to have U.S. citizen family members, and due to age, have not necessarily lived in the U.S. for very long, nor do they necessarily have an employment history.<sup>383</sup>

This Article suggests the Executive Office of Immigration Review and USCIS, the agencies with oversight of immigration judges and immigration adjudicators, should issue agency guidance instructing adjudicators that children’s youthfulness should be considered a positive discretionary factor to undercut negative factors. Because youth, due to their age, are not able to demonstrate a number of listed factors, allowing their age to be a positive factor could help close this justice gap. Furthermore, as the Supreme Court has opined in the juvenile justice context, a fundamental principle is the State “cannot proceed as though they were not children.”<sup>384</sup> In the criminal context, children by their nature and lack of fully developed capacity are not as culpable as adults and, therefore, should not be held up to the same standards.<sup>385</sup>

#### D. Accessing Counsel

Perhaps the most critical safeguard for children is access to representation in immigration proceedings.<sup>386</sup> There is no statutory right to appointed counsel in immigration proceedings.<sup>387</sup> Most children in deportation proceedings do not have attorneys,<sup>388</sup> and most unrepresented

---

<sup>381</sup> Matter of Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. Sept. 28, 2006).

<sup>382</sup> *Marin*, 16 I. & N. Dec. at 583.

<sup>383</sup> Significant factors include a fixed address, length of residence, family ties, employment history, immigration record, attempts to flee, prior failures to appear, and criminal records. U.S. DEP’T OF JUSTICE, *supra* note 279, at 6–7.

<sup>384</sup> *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

<sup>385</sup> See generally *Miller*, 567 U.S. 460, 465; *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 553 (2005).

<sup>386</sup> *New Data on Unaccompanied Children in Immigration Court*, *supra* note 290; Eagly & Shafer, *supra* note 245, at 76.

<sup>387</sup> 8 U.S.C. § 1229a(b)(4) (2012). However, the federal government, through Health and Human Services, is tasked with finding counsel to the greatest extent practicable for unaccompanied youth. 8 U.S.C. § 1232(c)(5) (Supp. 2013).

<sup>388</sup> For example, in fiscal year 2014, only about one third of the 63,721 unaccompanied children with cases pending in Immigration Court were able to obtain representation. *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> [<https://perma.cc/L25G-KTHU>]. In fact, of the 21, 588 children’s cases that were filed and completed from 2012 to 2014, only 41% had representation. *Id.*

children—about 80%—are deported.<sup>389</sup> However, a vast majority of represented children are allowed to stay in the United States.<sup>390</sup> This disparity in outcomes for represented and pro se children is in keeping with findings regarding national trends for immigration representation.<sup>391</sup> According to Ingrid Eagly and Steven Shafer’s leading study on access to counsel in immigration court, immigrants in removal proceedings with attorneys were 15 times more likely to pursue a defense to deportation as compared to those without and 5.5 times more likely to obtain relief from removal.<sup>392</sup> Likewise, findings specific to asylum adjudications have found represented asylum seekers 3 times more likely to win their cases than their unrepresented counterparts.<sup>393</sup> As I have written before, unrepresented children are simply unable to navigate the labyrinth of courts and agencies required to succeed in immigration adjudications.<sup>394</sup>

Representation may be particularly significant in gang allegation cases for a few reasons. First, the youth may need to file public records requests to obtain copies of the purported evidence against him or her.<sup>395</sup> Secondly, due to the novelty of these claims, immigration judges may not be aware of the significant documentation regarding the unreliability and racially disproportionate results of gang identification protocols and database procedures. Therefore, filing extensive reports with this background information, as well as using an expert witness regarding gang identification, may be necessary. Lastly, once a judge substantiates a gang allegation, the youth will likely need to provide substantial evidence of positive discretionary factors and rehabilitation.

### Conclusion

Gang allegations in immigration proceedings are part of the immigration regime’s long and ignoble history of explicit and implicit racism. Immigrant children, particularly youth of color, increasingly find themselves in the crosshairs of a punitive immigration system and subject to over-policing within schools and by law enforcement. These factors converge with existing racial biases and a lack of special protections for youth in the immigration regime, creating a perfect storm. To address this problem, gang allegations and related evidence should be excluded from

---

<sup>389</sup> *Id.*

<sup>390</sup> *New Data on Unaccompanied Children in Immigration Court*, *supra* note 290.

<sup>391</sup> One complicating factor is the possibility that those with stronger claims are more likely to be represented. However, reports have found that due to the magnitude of the representation variable, it is unlikely that the strength of the claim is the sole causal factor. Ramji-Nogales et al., *supra* note 289, at 340; *see also* Peter L. Markowitz et al., *Accessing Justice: The Available and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 384–86 (2011).

<sup>392</sup> Eagly & Shafer, *supra* note 245, at 76; Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. MIGRATION & HUM. SEC. 287, 287 (2014) (“14.3 percent of those found to be eligible for DACA were also found to be eligible for some other form of immigration relief . . . the most common legal remedies available to these individuals [includes] . . . Special Immigrant Juvenile Status (12.6 percent).”).

<sup>393</sup> Ramji-Nogales et al., *supra* note 289, at 340.

<sup>394</sup> Hlass, *supra* note 286.

<sup>395</sup> Heeren, *supra* note 244, at 1571.

immigration adjudications due to their unreliability and prejudicial nature. Furthermore, safeguards must be implemented to address this phenomenon, particularly as gang allegations appear to be on the rise. The immigration agency should attempt to interrupt adjudicator bias through education, improved decision-making conditions, and data collection. Secondly, youth should explicitly be a positive factor in discretion and bond decisions. Finally, to stall the school to deportation pipeline, children should have access to representation in immigration adjudications.