FUNDAMENTALLY UNFAIR: DATABASES, DEPORTATION, AND THE CRIMMIGRANT GANG MEMBER

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Provocative language painting immigrants as dangerous criminals and promises of increased immigration enforcement were cornerstones of Donald J. Trump’s presidential candidacy. As president, he has maintained this rhetoric and made good on many of his promises by broadening the definition of “criminal conduct” for immigration enforcement purposes, touting a renewed focus on immigrant gangs and cartels, and conducting several nation-wide anti-gang sweeps that placed an estimated 1095 “known” gang members in Immigration and Customs Enforcement (ICE) custody. But the Trump Administration did not create the specter of the criminal immigrant, or “crimmigrant,” gang member, nor did it create the detection and removal infrastructure, preloaded with thousands of “gang members.” Rather, the Trump Administration inherited the crimmigrant gang-member pipeline from the Obama Administration.

To target noncitizen gang members, the Obama Administration utilized data-sharing agreements between the Department of Homeland Security and state and local law enforcement to create immigration priority lists from state gang membership databases. Under these agreements, ICE is authorized to search nearly a thousand databases for removable noncitizens. The entries in these databases, however, present significant due process and data accuracy concerns,

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especially when this data flows unimpeded and uncorroborated from local law enforcement into civil immigration proceedings.

The Fifth Amendment protects noncitizens in civil removal proceedings and affords them the right to a full and fair hearing, along with a reasonable opportunity to present evidence on their own behalf and examine the evidence against them. The use of unsubstantiated gang data in removal proceedings violates these rights, making the hearing fundamentally unfair. Applying the Mathews v. Eldridge test to the use of unsubstantiated gang data in removal proceedings, the current procedures violate a noncitizen’s due process rights and increase the risk that otherwise eligible immigrants will be erroneously denied the chance to meaningfully apply for relief and then removed from the country. To comport with the fundamental fairness evidence standard and ensure noncitizens accused of gang membership receive a full and fair hearing, unsubstantiated gang data must either be excluded from removal proceedings, shared with the individual in advance, or corroborated before it is shared with the individual and admitted into evidence in immigration proceedings.

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INTRODUCTION

“That’s why, over the past six years, deportations of criminals are up [eighty] percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.”

—President Barack Obama, November 20, 2014

1. Remarks by the President in Address to the Nation on Immigration, 2014 DAILY COMP. PRES. DOC. 2 (Nov. 20, 2014).
“As I have said repeatedly to the country, we are going to get the bad ones out—the criminals and the drug dealers and . . . gang members and cartel leaders.”

—President Donald J. Trump, January 25, 2017

Only days into his presidency, President Trump issued Executive Order 13,768, increasing resources for immigration enforcement, broadening the definition of “criminal conduct” for immigration enforcement purposes, and expanding the discretion of immigration officers to target individual noncitizens. Combined, these provisions allow immigration authorities to target anyone they believe to have broken any law, regardless of whether the individual was ever charged with the crime. In the weeks following the Executive Order, the Trump Administration conducted several high-profile immigration raids and even detained DACA recipients, a group of young adults brought to the country as children, whom the Obama Administration had formerly shielded from deportation. These actions inflamed the
passion of immigration hardliners, raised the ire of immigration advocates, and struck fear throughout immigrant communities. Yet these enforcement priorities are not so different: despite the divergent rhetoric from President Obama’s tenure in office, President Trump’s enforcement priorities for certain noncitizens are simply the same policies with a new spokesperson. Specifically for “crimmigrant” gang members, the Trump Administration has inherited the Obama Administration’s detection and deportation infrastructure, preloaded with thousands of “gang members” ready for removal.

While the Obama Administration shielded groups of sympathetic noncitizens from deportation through high-profile uses of prosecutorial discretion, it simultaneously increased enforcement against other noncitizens. Beginning in 2011, the Department of


10. See Winston, supra note 8 (describing the bipartisan consensus that created the existing gang information sharing and deportation infrastructure).

Homeland Security (DHS) outlined positive factors for Immigration and Customs Enforcement (ICE) personnel to consider when determining whether a certain noncitizen merited a favorable use of prosecutorial discretion. Conversely, “known gang members or other individuals who pose a clear danger to public safety” were flagged for “particular care and consideration by ICE officers” as priorities for deportation. DHS did not define what conduct or convictions made a gang member “known,” but a pattern emerged in subsequent years.

The Obama Administration created immigration priority lists using state gang membership databases and criminal enforcement priority lists—information available because of DHS’s data-sharing agreements with state and local law enforcement agencies. Since 2011, ICE has been authorized to search nearly one thousand local and state law enforcement databases for removable noncitizens. The Immigration and Nationality Act of 1952 (INA) authorizes these cooperative agreements, which allow federal officers to enter into information sharing agreements with local and state law enforcement. These information-sharing agreements give DHS access to databases across the country that record and track individuals—citizens and noncitizens—whom local police consider to be gang members. Over time, access to these databases provides DHS with a continuous and vast pipeline of noncitizen “known gang members” to apprehend and remove. However, when gang database entries flow to ICE, important contextual information is lost, such as the conduct or criteria a specific

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12. See Prosecutorial Discretion Memo 2011, supra note 11 (explaining when DHS personnel should consider, inter alia, the individual’s military service; status as a victim, witness, or plaintiff in civil or criminal proceedings; and humanitarian factors, such as poor health, age, pregnancy, or a seriously ill relative).

13. See id. (emphasis added) (delineating exercise of prosecutorial discretion guidelines for ICE officials, and enumerating positive and negative factors for consideration on a case-by-case basis).


15. 8 U.S.C. §§ 1101–1537 (2012); see also id. § 1357(g) (2012) (stating that the Attorney General may enter written agreements with state or local governments to authorize local law enforcement to share some functions of federal immigration officers).


17. See infra Section I.B.2 (discussing federal data-sharing partnerships and how these partnerships inform immigration enforcement against alleged gang members).
jurisdiction uses to define a gang member, and ICE does not conduct additional investigations to corroborate the information. 18

By relying on unsubstantiated data to identify immigration targets, the Obama Administration placed noncitizens accused of gang membership, regardless of their underlying conduct, at a greater risk of removal from the country than other noncitizens. Designation as a gang member makes it more difficult for a noncitizen to access relief under immigration law, either because gang membership bars them from receiving certain visas or because individuals who qualify for relief from deportation bear the burden of convincing an immigration judge that they merit a discretionary grant of relief. 19 In the face of government-proffered evidence and a presidential administration’s enforcement priorities, 20 very few “gang members” will be able to convince an administrative agency or immigration judge to grant them relief. 21

The Obama Administration’s bifurcated use of prosecutorial discretion, which increased enforcement against some while shielding others, ignored the overlap between sympathetic or “good” noncitizens and the “bad.” This overlap became increasingly clear as large numbers of Central American refugees began arriving in the United States. Beginning in 2014, tens of thousands of Central American refugees fled the gang-dominated countries of Guatemala,

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18. See infra Sections I.B.1–2 and accompanying text (discussing the mechanics of tracking gang members, populating state gang databases, and sharing information across federal-state partnerships).

19. See infra Section I.C.1 (outlining the statutory requirements and the role of discretionary relief in removal proceedings).


Honduras, and El Salvador. Staggering levels of violence, rampant impunity for perpetrators, and pervasive corruption have made the “Northern Triangle” one of the most dangerous regions in the world. Because gangs target youths, the majority of the arriving refugees were mothers and their children seeking safety and reuniting with family. However, because the gangs who terrorize the Northern Triangle also operate in Central American communities in the United States, refugees fleeing gang violence often relocated to U.S. communities heavily policed by local law enforcement agents using databases to track gang membership. In 2016, the Obama Administration carried out several immigration enforcement actions against these recent arrivals, including more than 300 teenagers. Included within the immigrants taken into ICE custody were 120 former unaccompanied alien children—a humanitarian designation under immigration law. ICE reported that the teenagers were enforcement targets because they had criminal histories and/or suspected gang ties.

This Comment argues that unsubstantiated gang membership data violates the fundamental fairness evidence standard and admitting this evidence in removal proceedings violates a noncitizen’s Fifth


23. See Danielle Renwick, CENTRAL AMERICA’S VIOLENT NORTHERN TRIANGLE, COUNCIL ON FOREIGN REL. (Jan. 19, 2016), http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286 (indicating that the Northern Triangle includes El Salvador, Guatemala, and Honduras and noting that El Salvador was the “world’s most violent country not at war” in 2015).

24. See HISKEY ET AL., supra note 22, at 1; Kate Linthicum, WHY TENS OF THOUSANDS OF KIDS FROM EL SALVADOR CONTINUE TO FLEE TO THE UNITED STATES, L.A. TIMES (Feb. 16, 2017) http://www.latimes.com/world/mexico-americas/la-fg-el-salvador-refugees-20170216-htmlstory.html (reporting that teenagers and children, some as young as nine, are recruited by gangs).

25. Renwick, supra note 23.


27. See id. (noting that ICE targeted the teens for deportation and picked many of them up on their way to and from high school); ICE ANNOUNCES RESULTS OF OPERATION BORDER GUARDIAN/BORDER RESOLVE, IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/news/releases/ice-announces-results-operation-border-guardianborder-resolve (last visited Oct. 23, 2017) [hereinafter ICE ANNOUNCES RESULTS OF OPERATION].

28. ICE ANNOUNCES RESULTS OF OPERATION, supra note 27.

29. Id.
Amendment right to a full and fair hearing. Noncitizens in removal proceedings are entitled to due process of law, \(^{30}\) including the right to a full and fair hearing, the “reasonable opportunity” to examine the evidence against them and proffer evidence, and the exclusion of fundamentally unfair evidence. \(^{31}\) While service of a Notice to Appear (“NTA”) \(^{32}\) puts noncitizens on notice of the immigration violations charged against them, this service does not include any allegations of gang membership pulled from a gang database and admitted—uncontested and uncorroborated—into removal or bond proceedings through the Form I-213 Record of Deportable/Inadmissible Alien (I-213) \(^{33}\) or other sources. To apply for a grant of discretionary relief in a hearing that is full and fair, an individual must have a genuine opportunity to present evidence that he possesses good moral character and deserves to remain in the United States. Without notice of the discretionary argument against him, the individual cannot examine the evidence against him, which makes it nearly impossible for him to meet his burden of proof in his discretionary case before the immigration judge. The number of noncitizens accused of gang membership but statutorily eligible for discretionary relief is likely relatively small; \(^{34}\) however, for these individuals, the stakes could not be higher. Individuals deported as “gang members” may be permanently barred from returning to the United States and will likely

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\(^{30}\) See Reno v. Flores, 507 U.S. 292, 306 (1993) (reiterating that immigrants in removal proceedings are entitled to due process of law under the Fifth Amendment); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003) (allowing the use of hearsay evidence in removal proceedings as long as the hearsay is “probative and its admission is fundamentally fair”); Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972) (articulating that removal hearings are administrative proceedings that are civil in nature and “the sole criteria for documentary evidence lawfully obtained is whether it has probative value and whether its use is consistent with a fair hearing”).


\(^{32}\) The NTA is the charging document in immigration court that DHS is statutorily required to provide to a noncitizen before a removal hearing. See 8 U.S.C. § 1229(a)(1); \( infra\) Section I.C.4.

\(^{33}\) The I-213 is generally conceptualized as the police report of removal proceedings. See \( infra\) Section II.C.1 (exploring the differences between the I-213 and NTA).

\(^{34}\) To be statutorily eligible for discretionary relief, such as asylum, cancelation of removal, and adjustment of status, an individual must pass residency requirements, admission or visa procedures, and criminal bars. Even if an individual meets the statutory requirements for a specific form of relief, the judge may use his discretion to deny the individual or to determine that the individual lacks good moral character. See 8 U.S.C. §§ 1158(b), 1229b(b)(1), 1255(a); \( see\ also\ \( infra\) Section 1.C.2.
be deported to one of the three most violent countries in the world.\footnote{Sibylla Brodzinsky & Ed Pilkington, \textit{US Government Deporting Central American Migrants to Their Deaths}, GUARDIAN (Oct. 12, 2015, 8:57 PM), https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america.} Therefore, to comport with the evidentiary standard of fundamental fairness and the procedural due process requirement of a fair hearing, noncitizens who are statutorily eligible for discretionary relief must receive notice of the gang allegation in advance of their hearing. This would provide them a reasonable opportunity to examine the evidence against them and provide any countervailing evidence or testimony in their discretionary case.

Section I.A of this Comment explores the increasing convergence of criminal and immigration law in statutes, policy, and the public consciousness, begetting the trope of the crimmigrant gang member. Section I.B examines how local and state law enforcement gathers and stores gang membership data and how that information is shared with DHS. Section I.C outlines the statutory requirements of removal proceedings, the important role of discretion in immigration court, the “fundamental fairness” evidentiary standard, and the procedural due process protections that apply to noncitizens. Part II posits that the admission of unsubstantiated gang membership data violates the fundamental fairness evidence standard for immigration court and applies the \textit{Mathews v. Eldridge}\footnote{424 U.S. 319 (1976).} test—which determines the minimum due process procedures required in a civil case\footnote{Id. at 335.}—to DHS’s use of this data in removal proceedings. Finally, Part III proposes several solutions to address the due process and data reliability issues posed by the use of unsubstantiated gang database allegations in immigration court. Solutions include requiring DHS to share gang membership allegations with an individual in advance of his\footnote{Because the majority of individuals deported from the United States are male, this Comment uses the male pronoun to refer to noncitizens broadly and to those with alleged gang connections.} removal proceeding\footnote{See \textit{ICE Deportations: Gender, Age, and Country of Citizenship}, TRAC IMMIGR. (Apr. 9, 2014), http://trac.syr.edu/immigration/reports/350 (reporting that ninety-four percent of deportees in 2013 were male, according to ICE records).} and requiring further corroboration of the allegation by DHS before it is admitted as evidence. Additionally, state-level legislation could mandate that individuals listed in gang databases receive notice, which necessitates higher standards of data maintenance.
I. BACKGROUND

A. The Rise of the Crimmigrant Gang Member

Immigration is a complex and arcane area of the law where many competing government priorities overlap and often conflict. Rules for recruiting skilled foreign workers, guidelines governing national security threat detection and exclusion, family reunification, and international humanitarian programs are all governed by the nation’s immigration laws. At their core, immigration laws define the types of noncitizens American society sees as desirable and beneficial and those that it does not. Since the passage of the INA in 1952, criminal convictions and certain criminal activities have either barred noncitizens from admission to the United States or triggered their removal. In the late twentieth century, however, Congress implemented a series of reforms that moved the civil immigration code much closer to the criminal code in several significant ways. Over the course of a few decades, changes to the immigration code criminalized immigration violations that were formerly only civil offenses, increased

40. See 8 U.S.C. § 1153(a) (2012) (allotting immigrant visas for familial ties to four tiers of relatives of U.S. citizens and lawful permanent residents); § 1153(b)(1)(A) (providing immigrant visas for aliens with extraordinary ability); § 1101(a)(15)(H) (nonimmigrant visas for high-skilled workers); § 1101(a)(15)(P) (nonimmigrant visas for professional athletes and entertainers); § 1182 (defining the criteria and conduct that make a noncitizen inadmissible); § 1227 (defining the conduct that will make a noncitizen deportable).

41. See Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 136 (6th ed. 2015) (noting that “the law by which a nation selects its members speaks volumes about the nation’s values and about the society those values will produce”).


43. See 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Before 1996, noncitizens in the process of being removed from the United States faced “deportation” proceedings, whereas noncitizens who were stopped as they sought to enter the United States faced “exclusion” proceedings. After 1996, the process by which the government chooses to remove noncitizens from the country after entry is called “removal” proceedings, regardless of whether a noncitizen is seeking lawful admission or was already lawfully admitted. While the term “deportation” is still used by the public to describe removal, the distinction between individuals in removal but seeking lawful admission and those in removal after lawful admission remains legally significant. Individuals seeking admission to the United States must overcome inadmissibility grounds listed in 8 U.S.C. § 1182, but individuals already lawfully admitted to the U.S. must overcome the deportability grounds listed in 8 U.S.C. § 1227. See Richard A. Boswell, Essentials of Immigration Law 30–31 (Am. Immigr. Law Ass’n 4th ed. 2016).
penalties for noncitizens convicted of crimes, and gave statutory shape to the now familiar specter of the dangerous crimmigrant.  

In the 1980s, in response to increasing numbers of authorized and unauthorized immigrants, Congress created the expansive category of deportable offenses known as “aggravated felonies.” First defined in the Anti-Drug Abuse Act of 1988 as part of the nascent “War on Drugs,” aggravated felonies began as a list of drug-related convictions that would result in deportation for noncitizens, absent an immigration judge’s grant of discretionary relief. Since 1988, the list of aggravated felonies has expanded to cover many offenses, leading one immigration nonprofit to posit that it includes whatever offenses “Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.” Once a crime is defined as an aggravated felony, immigration consequences apply retroactively, meaning that any lawfully present noncitizen previously convicted of the enumerated crime immediately becomes deportable.

In 1996, Congress passed two immigration reform measures known collectively as the “1996 Amendments,” which further expanded the

44. See Jennifer M. Chacón, Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,” 2007 U. CHI. LEGAL F. 317, 321 (2007) (exploring the mechanics of the federal Community Shield program and how federal immigration officials share and use local gang data); García Hernández, supra note 9, at 1460–61 (charting the social, political, and legal changes that led to the melding of criminal and immigration law into crimmigration law).
46. See Chacón, supra note 44, at 321 (remarking that “Congress revised immigration laws to respond to the growing national preoccupation with drug crimes”).
49. AGGRAVATED FELONIES: AN OVERVIEW, AM. IMMIGR. COUNCIL 1 (Dec. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies.pdf (defining aggravated felony “as a term of art used to describe a category of offenses carrying particularly harsh immigration consequences for noncitizens convicted of such crimes”).
50. 8 U.S.C. § 1227(a) (2)(A)(iii) (mandating that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable”).
list of aggravated felonies while simultaneously restricting eligibility for all forms of removal relief. One amendment added many crimes traditionally associated with American gangs to the aggravated felony list, including, but not limited to, counterfeiting, bribing a witness, and conducting an illegal gambling business. The amendment also barred naturalization for anyone convicted of an aggravated felony after November 29, 1990. The 1996 Amendments criminalized a removed individual’s unlawful re-entry to the United States, replacing the civil penalty with criminal sentences ranging from ten to twenty years, depending on the original grounds of removal. Perhaps most notably, the 1996 Amendments eliminated the most common form of relief from removal, known as the § 212(c) waiver, which had allowed immigration judges to grant discretionary relief after weighing an individual’s positive or compelling qualities against his criminal and immigration record. Prior to 1996, individuals with aggravated felony convictions had often received relief under this provision, but after 1996, individuals convicted of aggravated felonies were statutorily prohibited from receiving most forms of discretionary relief.


53. Id.

54. 8 U.S.C. § 1326(b) (imposing sentences of between ten and twenty years for illegal re-entry and re-entry after the commission of a felony and subsequent deportation).

55. See 8 U.S.C. § 1182(c).

56. See Chacón, supra note 44, at 322 n.16 (noting that while it was available, relief from deportation under INA § 212(c) was granted in about half of all deportation proceedings).

57. Id. at 322 n.16, 323; see infra Section I.C.2 (discussing the role of discretion in removal proceedings).

58. See Chacón, supra note 44, at 325.
11, 2001, and the subsequent reorganization of the INS into DHS, collaborative enforcement efforts between local law enforcement and federal immigration officials increased. Efforts to improve national security in the wake of the attacks dovetailed with a national conversation conflating immigrant communities and crime, leading to the proliferation of programs using “immigration regulations as a means of bolstering domestic crime control efforts.”

Recent legislative and administrative reforms to the immigration system have likewise devoted significant resources to detecting and deporting “criminal aliens,” especially those involved in gangs. Federal deportation data does not specify which crimes deportees have committed, and the crimes triggering deportation can vary widely according to congressional and presidential priorities. For example, under the Obama Administration, individuals suspected of committing acts of terrorism and individuals who entered the country without documents after 2014 were both listed under the highest enforcement priority. As discussed above, the Obama Administration also initiated Operation Border Guardian, targeting recently arrived Central American immigrants and focusing on teenagers with criminal histories or suspected gang ties. The Trump Administration continued this enforcement trend in spring 2017, reporting 1095 arrests as a

59. Id. at 326–27.
60. Id. at 327; see infra Section I.B (discussing federal and local information sharing programs that facilitate the use of locally collected law enforcement data in immigration proceedings).
61. See generally Border Security, Economic Opportunity, and Immigration Modernization Act, S. Res. 744, 113th Cong. § 3701(c)(1)(B) (2013). In June 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act, a comprehensive immigration reform bill, passed the Senate. Id. While the bill never became law, the process demonstrated that the price of modestly pro-immigrant reforms would be harsher penalties for immigrants convicted of crimes, specifically crimmigrant gang members. Id. For example, while the bill proposed a path to citizenship, any individual DHS designated as a gang member would have been barred from applying. Id.
63. Enforcement Priority Memo 2014, supra note 6, at 3.
64. See supra note 27 and accompanying text.
result of a six-week, nation-wide gang sweep. A July ICE raid focused specifically on teen gang members, leading to 650 arrests even though only 130 of the teenagers arrested had criminal convictions.

B. Gang Lists and Databases: Defining and Tracking Gang Members

The INA does not include any mention of the word gang, nor does it impose specific immigration consequences for street gang membership or association. Despite legislative proposals to amend the INA to define and include gang membership as grounds for removal, none have been enacted to date, leading federal immigration authorities to rely on partnerships with local law enforcement where gang enforcement priorities align. Federal immigration authorities do not have the resources to remove every individual in violation of immigration law, which leads each president to issue enforcement priorities that distinguish targets among those eligible for removal. During the Obama Administration and now

65. See ICE-Led Gang Surge, supra note 20 (reporting the sweep as the latest successful Operation Community Shield operation between federal and local law enforcement and stating that 1095 of the individuals arrested were confirmed as gang members and affiliates).


68. On September 14, 2017, the Criminal Alien Gang Member Removal Act passed the House of Representatives. If enacted, the bill would amend the INA to make immigrants associated with a criminal gang inadmissible, deportable, and ineligible for various forms of relief. H.R. 3697, 115th Cong. § 2(a)-(g) (2017).

69. See, e.g., Prosecutorial Discretion Memo 2011, supra note 11 (prioritizing the detection and deportation of “known gang members”); Memorandum from Jeff Sessions, Att’y Gen. of the United States, to All Fed. Prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/press-release/file/956841/download (instructing all federal prosecutors to prioritize the detection and prosecution of noncitizens present in the United States with certain immigration and criminal violations, such as “one or more prior misdemeanor improper entry convictions with aggravating circumstances,” one of which is “gang membership or affiliation.”)

under the Trump Administration, gang members are high priority targets.  

State and local law enforcement maintain gang databases to assist their criminal cases but sign information sharing agreements that allow ICE to access this data for removal purposes. With access to these databases, ICE can search for noncitizens in violation of immigration law and then initiate removal proceedings against them. ICE has this authority even if local law enforcement never charged or arrested the individual and this unchecked flow of information from a local criminal to a federal civil database raises concerns about individual notice and data accuracy.

1. State gang databases

State statutes that define “gang member” and classify levels of gang participation generally follow a criterion-based format. From state to state, the criminalized conduct covers a broad spectrum of activity and behavior and the numbers required to constitute a gang range anywhere from one to five people. Statutory criteria indicate an individual’s level of involvement in the gang, and the greater the number of criteria an individual satisfies, the greater his involvement in the gang. In Arizona, for example, an individual must meet two of seven criteria.


72. See Thompson, supra note 66.

73. Id.

74. Id.

75. See, e.g., ARIZ. REV. STAT. ANN. § 13-105 (2016) (defining a criminal street gang as an association with “at least one individual who is a known criminal street gang member,” in which “members or associates individually or collectively engage in the commission, attempted commission, facilitation, or solicitation of any felony act”); DEL. CODE ANN. tit. 11, § 616 (2015) (defining a criminal street gang as a group of three or more persons having as one of its primary activities the commission of, conspiracy to commit, or solicitation of a violent crime, such as murder, kidnapping, assault, or sexual offenses); S.C. CODE ANN. § 16-8-230 (2013) (defining a criminal gang as a group of five or more persons “who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity”).

before state law enforcement considers him a gang member, with criteria ranging from “witness testimony or official statement” to “any other indicia of street gang membership.” In Florida, an individual who hits a single criterion enumerated in the statute—such as having a tattoo affiliated with a criminal gang—is a gang “associate.”

With statutory criteria as the guide, local law enforcement agencies generally employ two ways of engaging with suspected gang members: targeted investigations and field interviews. Targeted investigations use traditional law enforcement tools, such as undercover operations, search warrants, or confidential informant interviews, as part of an investigation against a specific person or gang. Anyone else law enforcement encounters incident to these targeted investigations can be logged into the database as a gang member or associate as long as the individual meets the required criteria. However, the more common gateway into the database is through conversations with law enforcement known as “field interviews.” The context of a field interview is different in each community, and while some jurisdictions favor a friendlier, less invasive approach, many field interviews involve a search of the individual and may result in the individual receiving a ticket or fine for a small violation. Field interviews are always reported as consensual or based on objective reasonable suspicion, although researchers working with defense attorneys and individual “gang members” have reported otherwise.

77. See Nat’l Gang Ctr., supra note 76, at 3.
78. Id.
80. See id. at 7 (exploring the different sources and collection practices of gang membership data).
81. Id.
82. Hufstader, supra note 16, at 677.
83. See id. (reporting that in Las Vegas officers issued tickets to individuals they perceived as uncooperative during a field interview, creating the opportunity to arrest the suspected gang members in the future for the failure to pay the ticket).
84. See Gang Immigration Consequences Report, supra note 79, at 7–8 (citing the testimony of defense attorneys and alleged gang members that stops were not consensual or based on reasonable suspicion because they “usually happen[ ] without any court oversight or nexus with a specific crime”); Hufstader, supra note 16, at 677 (recounting a jurisdiction with a more aggressive approach to consensual field interviews, including using multiple squad cars to approach individuals and searching them in the prone position).
After the field interviews are completed, individuals who hit the required number of criteria enumerated in the statute may be entered into a database as gang members. Officers record biographical and identifying information for each individual interviewed, such as name, date of birth, address, workplace, identifying tattoos, and social security numbers. Entries are also created for individuals the police observe but do not engage with in an interview. Field interview or field observation information should indicate which of the statutory gang membership criteria the individual exhibits, thereby justifying the database entry; in reality, the criteria are broad enough that little prevents police from entering individuals into databases. For example, in California, an individual’s entry into a state-wide database only requires that he meet at least two of nine criteria. However, some of California’s criteria—such as “seen wearing gang dress” or “seen affiliating with documented gang members”—bars very few people from entry into the database, especially in neighborhoods where gangs are enmeshed within the community and “gang dress” is an expression of culture. Individuals in these communities, especially young men of color, are likely to interact with police on a regular basis, potentially accumulating criteria and entries into the database without their knowledge. That means that individuals who

85. Hufstader, supra note 16, at 678 n.43 (noting that entry into the database is governed by different statutes and policies in different jurisdictions).
86. Id. at 678.
87. See id.
88. See GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 7; see also Hufstader, supra note 16, at 679–80 (listing differing criteria requirements per different state statutes, such as Texas’s requirement that an individual meet two of eight criteria before entry into a local or regional gang database versus Minnesota’s requirement that every individual have a criminal conviction before entry into its Gang Pointer File).
89. GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 7.
90. See id. at 3, 7–8 (asserting that, in California, gang criteria are easily met, disproportionately established in neighborhoods of color, and rarely rooted in objectively reasonable suspicion).
91. See id. at 3 (finding 99,000 of the 106,000, or roughly 1 in 140, of the boys and men between the ages of fifteen and thirty-four listed in the California gang database, CalGang, are men of color); cf. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 103, 123 (rev. ed. 2012) (arguing, in the context of the War on Drugs, that law enforcement discretion in applying enforcement criteria generally allows for the perpetuation of racial stereotypes and explains why the majority of people swept into the criminal justice system are young men of color).
92. See Hufstader, supra note 16, at 681 (noting that “an individual living in a heavily policed area could accumulate” gang interview cards or database entries that
have never been arrested, or arrested but never formally charged, likely have no notice that they are listed in a gang database; they also likely have no notice that the government will charge and treat them as gang members if they commit a crime or find themselves in removal proceedings.93 Even if individual noncitizens have been arrested or charged, police often designate this information as confidential, and only one state statute requires that the police notify an individual of his gang designation.94

2. Federal partnerships

While the federal criminal code defines a “criminal street gang,”95 ICE officials follow a separate, broader definition in its enforcement action guidelines.96 The federal statute requires five or more persons to form a gang; in contrast, ICE only requires the “association of three or more individuals . . . whose members collectively identify themselves by adopting a group identity . . . to engage in criminal activity which uses violence or intimidation to further its criminal objectives.”97 However, because the INA does not authorize ICE to remove gang members specifically, ICE must collaborate with state and local law enforcement to locate and target immigrant gang members eligible for removal.

Following the local and federal anti-gang collaborative efforts in the 1990s and the terrorist attack on September 11, 2001, ICE launched Operation Community Shield in March 2005.98 Originally created to disrupt activities of the Mara Salvatrucha (MS-13) gang,99 Operation

93. See id. at 680 (highlighting the general inability of individuals to become informed of their status as a gang database member because the data is often considered “confidential” and not available to the public).

94. Id.; see CAL. PENAL CODE § 186.34(d)(1) (West 2017). To date, California is the only state that requires law enforcement to notify an individual when he or she is designated as a gang member.


96. See What is a Gang?, supra note 76.

97. Id.

98. See Chacón, supra note 44, at 327–29 (recounting the creation and original mandate of Operation Community Shield).

99. MS-13 originated in immigrant neighborhoods in Los Angeles in the 1980s, but the gang has expanded prolifically since that time. MS-13, InSIGHT CRIME, http://www.insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile (last updated Mar. 9, 2017). Migrating with deportees, the gang’s reach now extends throughout North and Central America. Id. The gang’s ubiquity at all levels
Community Shield’s mandate has expanded to an “international effort to disrupt and dismantle violent and dangerous transnational street gangs” by targeting “all violent gang members nationwide.”

ICE originally targeted MS-13 because most members were foreign-born, were present in the United States illegally, had prior criminal convictions rendering them deportable, and/or were involved in crimes that subjected them to ICE’s authority. Operation Community Shield’s mandate added additional gangs over subsequent years, but locating and removing MS-13 and other transnational gangs remain the focus.

Through Operation Community Shield, ICE uses local and state law enforcement data to locate, investigate, prosecute, and remove crimmigrant gang members. This partnership is beneficial to ICE because it allows ICE to use local and state investigations and police work to create non-citizen target lists. The partnership is beneficial to local law enforcement because ICE can bring immigration charges against individuals suspected of gang membership but beyond the reach of criminal prosecution.

of society has destabilized the Northern Triangle, making it the most violent region in the world that is not at war. In 2012, the U.S. Department of the Treasury labeled the group a “transnational criminal organization,” the first time the designation has been awarded to a U.S. street gang. See generally Chacón, supra note 44, at 328–29 (describing MS-13’s origins as “more a U.S. phenomenon than a Central American import”).

100. Operation Community Shield: Efforts to Dismantle Violent Street Gangs Remain a Priority 10 Years On, IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 30, 2017), https://www.ice.gov/features/community-shield (recounting the growth and accomplishments of Operation Community Shield since its inception in 2005); see also Chacón, supra note 44, at 329.

101. See id. (reporting that as of 2007, “ICE’s public literature no longer provides any rationale for targeting these or any other ‘gangs,’ nor does it offer any explanation of the criteria that are applied to determine gang membership”).

102. Id. at 329–30; National Gang Unit: Overview, IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/national-gang-unit (last visited Oct. 23, 2017); see also GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 8 (reporting that confidentiality laws do not prevent local law enforcement from sharing gang database entries with other agencies, including ICE, on a need-to-know basis).

database, it can use immigration law violations\textsuperscript{105} to remove individuals suspected of street gang membership “even where state law provides no possible basis for criminally prosecuting those individuals.”\textsuperscript{106} Criminal convictions are not required for state and local officials to turn suspected gang members over to ICE, and ICE is not bound by each state’s gang database criteria, notification procedures, or data and privacy maintenance requirements.\textsuperscript{107}

The designation of “gang member” has no uniform definition or accompanying set of conduct by which an immigration judge can weigh the designation’s importance in an individual case. Importing local and state gang lists means that ICE also imports each jurisdiction’s methods, definitions, and criteria for identifying crimmigrant gang members.\textsuperscript{108} Research into the mechanics of gang databases shows that law enforcement officers are given significant discretion and a broad range of qualifying criteria when deciding whom to enter into a database.\textsuperscript{109} As stated above, criteria across jurisdictions range from an individual’s own admission of gang membership or convictions for gang-related offenses to evidence that an individual frequents an area associated with gang activity.\textsuperscript{110} However, because the INA does not define “gang member” or provide a standard of conduct, DHS can proffer gang allegations from disparate parts of the country into immigration proceedings with no standards against which an immigration judge can compare. For example, in many localities, an individual can be legally entered into a database using that jurisdiction’s statutory criteria even though he never committed a crime. Furthermore, without a federal benchmark or definition against which to measure one’s conduct, individuals lack notice that their conduct may place them on an ICE target list.\textsuperscript{111}


\textsuperscript{106} See Chacón, supra note 44, at 332.

\textsuperscript{107} See id. at 331–32.

\textsuperscript{108} Id. at 330.

\textsuperscript{109} See Hufstader, supra note 16, at 678–79; supra Section I.B.1 (examining the statutory criteria used by various states to collect gang member information).

\textsuperscript{110} See Hufstader, supra note 16, at 679.

\textsuperscript{111} See id. at 695–96 (proposing that the use of this data in immigration court does not provide adequate notice to noncitizens, in violation of the “void for vagueness” doctrine).
ICE’s use of state target lists and data is also important because any errors or issues at the state level will be transmitted directly to ICE. While there is ample anecdotal evidence of the high error rates within city and state gang databases, a recent audit of California’s state database, CalGang, casts doubt upon other similarly maintained databases. In the largest audit of a state gang database to date, auditors reported that thirteen of every one hundred entries in the CalGang database lacked the required evidence to support the entry. Additionally, the audit revealed forty-two individuals younger than one year of age at the time of entry into the database; the database reported that twenty-eight of those infants had “admit[ted]” to gang membership. The audit also found that gang entries were not reviewed every five years and deleted if the individual was inactive, as required by state law. Overall, the report concluded that CalGang’s “current oversight structure does not ensure that law enforcement agencies . . . collect and maintain criminal intelligence in a manner that preserves individuals’ privacy rights.” In response to the audit, California enacted legislation to reform the database entries, address errors, and provide notice to individuals listed as gang members. While this audit and legislation only bind California, many states share similar database entry practices and oversight mechanisms.

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112. See generally Dacia Anderson, Chapter 797: Un-Handcuffing Minors from the Gang Life, 45 McGeorge L. Rev. 561, 567 (2014) (detailing the low threshold standards for entry into a gang membership database and the inaccuracies this creates); Gang Immigration Consequences Report, supra note 79, at 10–11 (arguing that CalGang is overinclusive); Hufstader, supra note 16, at 689 (asserting that state gang databases are not sufficiently accurate or safeguarded to warrant their increased use in immigration enforcement).


115. See CalGang Audit, supra note 113, at 3.

116. Id. (letter from Elaine Howle, Cal. State Auditor, to the Governor of Cal., President pro Tempore of the Senate, and Speaker of the Senate).

117. Infra Section IIIA (proposing legislative solutions to the privacy and due process issues presented by using gang database information in immigration court).

C. The Use of Gang Data in Removal Proceedings

The notice and due process concerns raised by gang databases apply equally to noncitizens and citizens,\textsuperscript{119} but for immigrants living without legal immigration status, with criminal records, or both, the “gang member” designation has arguably graver consequences.\textsuperscript{120} While removal proceedings may parrot criminal proceedings in many ways, they differ significantly in the rules governing admissibility of evidence and the due process protections available to individuals. With fewer procedural protections, it is nearly impossible for a noncitizen to meaningfully contest a gang allegation proffered by the government, practically foreclosing the ability to receive a full and fair hearing on his application for discretionary relief.

1. Statutory requirements

The most important distinction between criminal proceedings and removal proceedings is that removal proceedings are civil and administrative.\textsuperscript{121} In immigration court, DHS bears the burden of showing that an individual is removable by “clear and convincing” evidence\textsuperscript{122} rather than by the “beyond a reasonable doubt” standard the government must overcome in criminal cases.\textsuperscript{123} If an individual does not contest DHS’s case for his removability but requests

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\textsuperscript{119} See Hufstader, \textit{supra} note 16, at 695–96 (arguing that the criteria used to populate gang databases should be “void for vagueness”).

\textsuperscript{120} See Winston, \textit{Marked for Life}, \textit{supra} note 118 ( remarking on the extreme difficulty of challenging an individual’s designation as a gang member); see also Ali Winston, \textit{You May Be in California’s Gang Database and Not Even Know It}, REVEAL NEWS (Mar. 23, 2016), https://www.revealnews.org/article/you-may-be-in-californias-gang-database-and-not-even-know-it (detailing the issue of notice for individuals entered into gang databases); Brodzinsky & Pilkington, \textit{supra} note 35 (confirming the deaths of three unrelated Honduran men in 2014 shortly after their deportation from the United States and estimating that the actual number of murdered deportees is much higher).

\textsuperscript{121} See Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972) (asserting that removal hearings are administrative proceedings that are “civil in nature”).

\textsuperscript{122} 8 U.S.C. § 1229a(c)(5)(A) (2012); Nijhawan v. Holder, 557 U.S. 29, 42 (2009) (modifying the government’s burden of proof for deportability from the “beyond a reasonable doubt” standard of proof to the “clear and convincing” standard).

\textsuperscript{123} In re Winship, 397 U.S. 358, 364 (1970) (announcing that the Due Process Clause requires that the government prove each element of the crime charged beyond a reasonable doubt in a criminal case).
discretionary relief, he bears the burden of proving his eligibility for that form of relief.  

An individual in removal proceedings “shall have a reasonable opportunity” to examine the evidence against him and present evidence on his own behalf, but there is no Sixth Amendment right to representation in immigration court. Noncitizens in removal proceedings may be represented by counsel, but counsel must be retained at their own expense. Removal proceedings may take place before an immigration judge in person, through video conference, through teleconference, or, in certain situations, without the immigrant present. In practice, the majority of individuals proceed before the immigration judge pro se due to the cost of retaining counsel and the barriers to obtaining counsel from detention.

Immigration proceedings commence with the service of a document called an NTA to the noncitizen and the immigration court. An NTA specifies the nature of the proceedings, the legal authority for the proceedings, the location and date of the proceedings, the alleged acts or conduct in violation of the law, the charges against the individual, and the statutory provisions violated. If service of an NTA is improper, if it does not contain the specific information required under the INA, or if it contains factual inaccuracies, an individual or

124. § 1229a(c)(4)(A) (requiring a noncitizen to prove that he or she “satisfies the applicable eligibility requirements” and “merits a favorable exercise of discretion” in applications for relief from removal).
125. § 1229a(b)(4).
126. See Gideon v. Wainwright, 372 U.S. 335, 335 (1963) (affirming that under the Sixth Amendment to the U.S. Constitution, states must provide counsel to represent defendants who are unable to afford their own counsel in criminal cases).
127. See § 1229a(b)(4)(A).
128. § 1229a(b)(2)–(3).
129. See generally Ingrid Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. PENN. L. REV. 1, 2 (2015) (finding that only thirty-seven percent of immigrants secured representation in 1.2 million deportation cases between 2007 and 2012).
130. § 1229(a)(1) (requiring written notice of the charges against the individual through service by mail or to the individual’s counsel of record); see also DHS Notice to Appear Form I-862, DEP’T OF JUSTICE (updated Jan. 13, 2015), https://www.justice.gov/eoir/dhs-notice-appear-form-i-862 (displaying a sample NTA).
132. § 1229(a)(1)(A)–(D).
an individual’s lawyer may contest an NTA. Contesting an NTA may preserve the right to appeal, lead to the termination of removal proceedings, preserve the individual’s eligibility for certain forms of relief, and allow an individual to contest his detention.

When preparing an NTA, DHS also prepares the I-213. The I-213 is often conceptualized as the police report of removal proceedings because the information contained in the I-213 usually forms the basis for DHS’s decision to issue an NTA. The ICE agent interviewing the individual in immigration custody typically fills out the I-213, and the form may include biographic, immigration, criminal, health, and humanitarian information that does not appear in an NTA. Unlike the NTA, DHS is not required to share the I-213 with the noncitizen at any point in the removal proceedings. I-213s often contain damaging information about the individual that DHS submits to the immigration court to support its claims regarding the individual’s alleged alienage and removability. The I-213 is a common way for gang database entries to enter the record.

While an individual may contest the information contained in the I-213 and request that the immigration judge exclude it from evidence, the Board of Immigration Appeals (BIA) has held that the I-213 is

133. See IMMIGR. PRACTICE POINTERS, supra note 131, at 519–20 (outlining proper NTA service).
134. See id. at 519 (listing possible benefits to contesting an NTA, such as holding DHS to its burden of proof, preserving the respondent’s rights on appeal, terminating removal proceedings, and assisting the respondent in contesting mandatory detention).
136. See id.; IMMIGR. PRACTICE POINTERS, supra note 131, at 523–24.
137. See id. at 518.
138. Id. at 524.
139. Id.; see GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 6 (recounting a client’s classification in the I-213 as a gang member, which made him ineligible for bond and placed him in “high security” detention); Winston, Marked for Life, supra note 118 (reporting that DHS attorneys often characterize gang members as threats to public safety, placing their I-213 forms in color-coded folders to denote the risk and asking judges to withhold bond). Conversations between the author, Ali Winston, and several immigration attorneys in the District of Columbia, Maryland, and Virginia region also confirm DHS’s use of gang allegations in the I-213, even if the individual has not been formally charged with any crime involving gang activity. Id.
140. The Board of Immigration Appeals (BIA) is the appellate body governed by the Department of Justice’s Executive Office for Immigration Review. The BIA has nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by DHS district directors. Unless modified or overruled by the Attorney General or a federal court, BIA decisions are binding on all immigration
inherently credible. If an individual rebuts the trustworthiness of the I-213, it violates due process for immigration judges to rely on it. In practice, it is extremely difficult to challenge the I-213 because DHS is not required to share the form with the individual in advance of his appearance before the immigration judge and an individual is not entitled to the right to cross-examine the author of the I-213. Therefore, absent evidence that an officer obtained the information under duress or coercion or that the information contains factual error, the form is usually admitted.

2. The role of discretion

Immigration judges presiding over removal or bond hearings are given broad discretion to look beyond the statutory requirements of an individual’s case and assess his character. A legal finding of “good moral character” is required for all forms of removal relief except one, and the most requested forms of relief—asylum, cancelation of removal, adjustment of status, and voluntary departure—include a discretionary component in addition to statutory requirements.


141. See Toro, 17 I. & N. Dec. 340, 345 (B.I.A. 1980) (holding that “to be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law”); Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (affirming that, in deportation cases, the “tests for the admissibility of documentary evidence in deportation proceedings are that evidence must be probative and that its use must be fundamentally fair”); infra Section I.C.4 (discussing the fundamental fairness standard for evidence in immigration proceedings).

142. See Pouhova v. Holder, 726 F.3d 1007, 1013–14 (7th Cir. 2013); Holper, supra note 135, at 695.

143. See IMMIGR. PRACTICE POINTERS, supra note 131, at 524 (noting that I-213 forms commonly contain source issues, lack of detail, and significant gaps in time between when the information was collected and when the I-213 was created); see Holper, supra note 135, at 726–27 (arguing for the right to cross-examine and confront one’s accuser in immigration court).


145. See 8 U.S.C. § 1101(f) (2012) (listing the grounds of disqualification from a finding of “good moral character” but noting that an immigration judge may still find persons outside the listed categories are not of “good moral character”); 8 C.F.R. § 316.10 (2017) (stating that an applicant for naturalization bears the burden of demonstrating that he or she has been and continues to be a person of good moral character, as determined on a case-by-case basis, which includes examining the statutory requirements and the standards of the average citizen in the community of residence).

146. FACT SHEET: FORMS OF RELIEF FROM REMOVAL, DEP’T OF JUSTICE 1–3 (2004),
Immigration judges are well suited to make discretionary determinations because they review a noncitizen’s history, the evidence against him, and any presented testimony.

Discretionary forms of relief are comprised of the threshold statutory requirements that an individual must meet and the discretion of the immigration judge. For example, lawful permanent residents must show the following requirements to be statutorily eligible for cancelation of removal: five years of permanent residency; at least seven years of continuous presence after lawful admission; and no aggravated felony convictions, which would preclude a finding of good moral character. If an individual demonstrates his eligibility by proving each statutory element listed above, he must then persuade the immigration judge that he deserves relief based on his personal history, positive characteristics, and good moral character.

The BIA has repeatedly stated that discretionary relief must be analyzed on a case-by-case basis because it would be difficult and undesirable to establish a bright-line rule. In In re C-V-T, the BIA articulated the following factors that courts consider when weighing an individual’s positive equities: family ties within the United States, length of residence, service in the U.S. armed forces, employment history, property or business ties, evidence of value and service to the community, proof of genuine rehabilitation (if a criminal record exists), and other evidence attesting to good character. Conversely, the following factors will weigh against an individual: the existence and nature of a criminal record, the recency and seriousness of the criminal record, additional significant violations of U.S. immigration laws, and “the presence of other evidence indicative of a respondent’s bad character or undesirability as a permanent resident.” For many of the immigrants facing removal based on alleged gang participation,
discretionary relief is the only form of relief available because they are undocumented, have been previously deported, entered unlawfully after 2014, or have a criminal record.153

In addition to the immigration judge’s ultimate discretion as to whether to grant relief, another important discretionary decision in which gang database allegations play an influential role is the bond determination hearing. Individuals with aggravated felonies or other serious criminal convictions are subject to mandatory detention under the INA, but other noncitizens are eligible for bond, dependent on the case they present to the immigration judge.154 The decision to issue bond or mandate detention “may be based upon any information that is available to the Immigration Judge or that is presented to him or her” by the noncitizen or by DHS.155 Other than removal hearings, bond hearings are the most common place for DHS to present an immigration judge with alleged gang data,156 often with determinative consequences for the noncitizen. First and foremost, receiving bond allows the noncitizen the chance to remain with his family outside of detention as he prepares for his case.157 Second, an individual’s chances of winning his case increase significantly if he is not detained because release from detention significantly increases his odds of

153. See Enforcement Priority Memo 2014, supra note 6, at 3–4 (listing recent arrivals and certain immigrants convicted or suspected of crimes as Priority 1 for removal and immigrants convicted of misdemeanors as Priority 2).
156. See Holper, supra note 135, at 689–90 (highlighting that gang databases lead to increased gang membership allegations, which cause immigration judges to deny bond even if the individual was never prosecuted for the alleged gang activity); Gang IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 6 (detailing the story of a noncitizen who was detained and experienced hardship after being incorrectly labeled a gang member); Winston, Marked for Life, supra note 118 (reporting that DHS uses color-coded folders for the I-213 to indicate to the immigration judge when to withhold bond due to gang membership or other risk).
157. See, e.g., Marwa Eltagouri et al., A Rare Look at Life Inside One of the Chicago Area’s 2 ICE Immigration Detention Centers, CHI. TRIB. (Mar. 24, 2017, 12:00 PM), http://www.chicagotribune.com/news/immigration/ct-immigrants-mchenry-detention-center-met-20170323-story.html (reporting on families torn apart as a result of the detention process); Patrick G. Lee, Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help, PRO PUBLICA (May 16, 2017), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help (reporting on the difficulties detained immigrants face in securing representation and quoting a Texas advocate’s opinion that “it’s been a strategic move by ICE to construct detention centers in rural areas” away from legal representation networks).
securing counsel. 158 Between 2007 and 2012, out of 1.2 million deportation cases, a mere fourteen percent of noncitizens in detention were represented. 159 With an attorney, a noncitizen’s likelihood of winning relief are five-and-a-half times greater than those who proceed without representation.160 Finally, individuals listed as gang members and denied bond may face additional dangers in the detention center itself, such as placement in high security units with restricted privileges and violent offenders. 161

3. Due process for noncitizens

The debate regarding what due process rights, if any, are available to noncitizens seeking entry to or fighting removal from the United States is as old as the country itself. While the Constitution does not expressly name a federal immigration power, a series of nineteenth-century Supreme Court rulings provide the legal foundation for Congress’s plenary power to determine which noncitizens to exclude or deport, with very deferential judiciary review.162 The establishment of the plenary power doctrine is the reason behind the Supreme Court’s deference to the legislative and executive branches regarding decisions to exclude or favor the admission of certain groups of noncitizens, even when such discrimination would violate constitutional norms in other areas of law.163 Today, the plenary power doctrine empowers Congress to determine what due process

158. See Esther Yu His Lee, Only 37 Percent of Immigrants Have Legal Representation, THINK PROGRESS (Sept. 29, 2016, 2:40 PM), https://thinkprogress.org/immigrants-legal-representation-39a5f7dbd434 (“[O]nly [two] percent of people without lawyers were able to successfully avoid deportation.”).

159. Eagly & Shafer, supra note 129, at 2.

160. Id.

161. G ANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 6 (reporting that a client DHS alleged was a gang member was placed in the “high security” detention after he was denied bond).

162. See LEGOMSKY & RODRIGUEZ, supra note 41, at 3 (citing the Chinese Exclusion Case, 130 U.S. 581 (1889), Ekiu v. United States, 142 U.S. 651 (1892), and Fong Yue Ting v. United States, 149 U.S. 698 (1893), as the three basic building blocks of the congressional plenary power over immigration).

163. See Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (observing that congressional and executive policy concerning aliens is “so exclusively entrusted to the political branches of the government as to be largely immune from judicial inquiry or interference”); Stephen H. Legomsky, Immigration Law and the Congressional Plenary Power, 1984 SUP. CT. REV. 255, 255 (1984) (noting that the Supreme Court has historically declined to review “even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy”).
protections apply to noncitizens seeking entry to the United States, but the Fifth Amendment guarantees due process rights for noncitizens present in the United States. Due process protections in removal proceedings also differ depending on what procedure the noncitizen is requesting. While courts have consistently held that a noncitizen has no protected liberty or property interest in receiving purely discretionary immigration relief, the Supreme Court has upheld a liberty interest in the right to apply for discretionary immigration relief and the right to a full and fair removal hearing, no matter the relief requested.

The Supreme Court’s jurisprudence on due process protections for noncitizens has slowly evolved over the past two hundred years. In the nineteenth century, the Supreme Court characterized Congress’s authority over immigration in absolutist terms. In *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*, the Supreme Court held that the right to exclude noncitizens from the United States was a congressional right inherent in the exercise of sovereign power. A few years later, *Fong Yue Ting v. United States* addressed whether Congress’s authority extended to the right to deport noncitizens already residing in the United States. Following the passage of the Chinese Exclusion Act in 1892, Fong Yue Ting, a

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165. *See U.S. Const. amend. V* ("No person shall be... deprived of life, liberty, or property, without due process of law."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (affirming that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). Compare *Mezei*, 345 U.S. at 212 (stating in dicta that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"), with *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (asserting that "courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien" and applying the due process balancing test announced in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).
166. *Patel v. Gonzales*, 470 F.3d 216, 220 (6th Cir. 2006) ("[W]e have previously held that "[t]he failure to be granted discretionary relief [such as voluntary departure] does not amount to a deprivation of a liberty interest." (alterations in original) (quoting *Ali v. Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004))).
169. 130 U.S. 581 (1899).
170. *Id. at 603–04*.
171. 149 U.S. 698 (1893).
172. *Id. at 698.*
Chinese immigrant residing in the United States before the Act, was
denied a certificate of residency and ordered deported. In response
to Ting’s habeas petition, the Supreme Court held that Congress has
an absolute right to deport non-naturalized foreigners, just as it has an
absolute right to deny noncitizens entrance into the country. The
Court declared that deportation was a civil penalty rather than a
criminal punishment, and therefore, it does not require the same level
of procedural due process protections as criminal proceedings.
Over time, the Court has acknowledged that deportation is a very harsh
penalty for immigrants and perhaps more devastating than criminal
punishment, but the holding in Fong Yue Ting remains good law.

With Congress’s power to both exclude and deport noncitizens
solidified, the subsequent one hundred years of procedural due process
jurisprudence maintained the plenary power. In Knauff v. Shaughnessy,
a German citizen, Knauff, fled Germany during the war and eventually
married a U.S. citizen. Upon Knauff’s attempt to naturalize and
enter the United States in 1948, she was excluded and detained
without a hearing solely based on the Attorney General’s finding that
her admission would harm the interests of the United States. When
she filed a writ of habeas corpus, the Court held that an immigrant
seeking entry into the United States requests a privilege and has no
constitutional rights to due process if the United States denies the
privilege. Reaffirming the plenary power, the Court declared that
“[w]hatever the procedure authorized by Congress is, it is due process
as far as an alien denied entry is concerned.” A few years later, in
Shaughnessy v. United States ex rel. Mezei, a resident of over twenty years
was barred from returning to the United States after he remained
abroad for nineteen months. When he returned to the United States,

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173. Id. at 702.
174. Id. at 713–14.
175. Id. at 730.
176. See Bridges v. Wixon, 326 U.S. 135, 164 (1945) (noting that the consequences
    of deportation range from the loss of family, friends, and a livelihood to poverty,
    persecution, and death).
177. See, e.g., United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1016 (9th Cir. 1993).
179. Id. at 539.
180. Id. at 539–40.
181. Id. at 542, 544.
182. Id. at 544.
183. 345 U.S. 206 (1953).
184. Id. at 208.
he was excluded on security grounds and subsequently stranded on Ellis Island when no other country would accept him. 185 When he challenged his exclusion, the Court held that his exclusion was a valid exercise of Congress’s plenary power, 186 and the Due Process Clause did not give him a right to review the secret evidence against him. 187

The Supreme Court’s more recent cases involving noncitizens seeking due process protections have indicated some willingness to deviate from the plenary power doctrine and apply the modern procedural due process analysis to noncitizens. Although it did not involve noncitizens, in Goldberg v. Kelly, 188 the Court provided for the first time the analysis for determining what procedural process is due to an individual or group when a constitutionally protected interest is at stake. 189 At issue in Goldberg was whether procedural due process required a pre-termination hearing before recipients of public welfare lost their benefits. 190 Holding that due process entitled the recipients to a pre-termination hearing, the Court balanced the interest of the welfare recipients in their benefit and requested procedures, the interest of the government in maintaining the current procedures and any potential burden the requested procedure might add, and the risk to the individual of erroneous deprivation. 191

In Mathews v. Eldridge, 192 the Supreme Court further clarified the Goldberg analysis when it addressed whether due process prohibited terminating an individual’s social security disability benefits without a pre-deprivation hearing. 193 Applying the balancing factors from Goldberg, 194 the Court held that because benefit termination was based on an assessment of evidence by doctors and that the recipients had other means of livelihood if the government erroneously terminated their benefits, due process did not require an in-person, pre-termination hearing. 195 The Court also stated the test for determining

185. Id.
186. Id. at 216.
187. Id. at 212. Note that due to the attention their cases received, the BIA eventually granted relief from exclusion to both Knauff and Mezei. See Legomsky & Rodriguez, supra note 41, at 144.
189. Id. at 266.
190. Id. at 260.
191. Id. at 264–66.
193. Id. at 323.
the minimum due process procedures required in a civil case before the government can take away a benefit or right, which remains the test today. On a case-by-case basis, courts must balance the following factors: (1) the private interest affected; (2) the risk of erroneous deprivation to the individual under the current procedures and the value of providing additional procedural safeguards; and (3) the government interest, including avoiding fiscal or administrative burdens, in using the current procedures rather than additional or proposed procedures.

Six years later, the Supreme Court applied the Mathews test for the first time to the deprivation of residence in the United States. In *Landon v. Plasencia*, Plasencia was a native of El Salvador before she entered the United States as a legal permanent resident in 1970. She later married a U.S. citizen and had children. In 1975, Plasencia and her husband traveled to Mexico, and on their return, she was stopped and placed in exclusion proceedings for attempting to smuggle other migrants over the border. In its holding, the Court affirmed that legal permanent residents have greater constitutional rights than immigrants seeking entry into the country for the first time. Then, the Court applied the Mathews test and held that Plasencia was entitled to deportation proceedings, rather than exclusion proceedings, because the immense personal interest at stake entitled her to stronger due process protections. The Court remanded the case to “evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the reentry of a permanent resident alien.”

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196. *Id.* at 335; see, e.g., *Panzella v. Sposato*, 863 F.3d 210, 218 (2d Cir. 2017) (applying the Mathews balancing test).
197. Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (stating that “the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation”).
198. Mathews, 424 U.S. at 335.
200. *Id.* at 23.
201. *Id.*
202. *Id.*
203. *Id.* at 32.
204. *Id.* at 34. Before the 1996 Amendments created “removal proceedings,” noncitizens who had entered the United States were entitled to a deportation hearing, which provided greater procedural safeguards. A noncitizen who had not entered the United States or was seeking re-entry, as the government argued Plasencia was, received fewer procedural due process protections and were placed in exclusion proceedings.
205. *Id.* at 35.
Finally, while the Sixth Amendment right to counsel does not apply to noncitizens in immigration court, a recent ruling may indicate a shift in the Court's immigration jurisprudence. In *Padilla v. Kentucky*, the Court acknowledged that deportations rooted in criminal convictions are unique in the spectrum of civil penalties because of their relationship and resemblance to criminal sanctions. In *Padilla*, an attorney incorrectly advised his client, a legal permanent resident who had lived in the United States for more than forty years, that a criminal conviction would not trigger his deportation. Upon his conviction and order of deportation, Padilla filed a Sixth Amendment claim for ineffective assistance of counsel. The Court declared that advising noncitizen clients of potential immigration consequences was not categorically removed from the ambit of the Sixth Amendment and held that the attorney's failure to correctly advise the defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient counsel. The Court remanded the case to the Kentucky courts for the determination of Padilla's ineffective assistance of counsel claim. Although it appears in dicta, the acknowledgement of the “enmeshed” nature of criminal convictions and civil immigration court proceedings and the severity of removal as a penalty marks an important deviation in the Court's immigration jurisprudence. Immigration scholars and advocates

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206. See Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1332, 1351 (2011) (positing that *Padilla v. Kentucky* marks a “critical pivot point” in the Court's immigration jurisprudence because it acknowledges the “quasi-criminal” nature of deportation).
208. Id. at 365–66.
209. Id. at 359.
210. Id. at 360; see Strickland v. Washington, 466 U.S. 668, 688, 692 (1984) (setting forth a two-pronged test for a successful ineffective assistance of counsel claim: (1) the counsel's representation must fall below an objective standard of reasonableness and (2) but for counsel’s errors there must be a reasonable probability that the proceeding results would have been different).
211. Padilla, 559 U.S. at 366, 374.
212. Id. at 375, remanded to 381 S.W.3d 322 (Ky. Ct. App. 2012) (vacating Padilla's conviction and holding that if Padilla had been properly advised of the deportation consequences of his plea, he would have made the rational decision to proceed to trial).
213. See Padilla, 559 U.S. at 365–66 (emphasizing that deportation is “intimately related” to the criminal process, especially as modern immigration law has “enmeshed criminal convictions and the penalty of deportation”); Markowitz, supra note 206, at 1332–33 (noting that although the Court’s discussion of deportation remains dicta, it
view the *Padilla* ruling as an important “pivot” in immigration jurisprudence and as an indication of “the Court’s crescendoing discomfort with the asymmetric incorporation of criminal justice norms into deportation proceedings” without accompanying criminal justice protections.214

4. The fundamental fairness evidentiary standard

While the civil nature of immigration proceedings offers noncitizens fewer constitutional protections than criminal court proceedings, individuals in removal proceedings are entitled to a full and fair hearing under the Fifth Amendment.215 Immigration proceedings must provide a noncitizen with notice and a reasonable opportunity to examine the evidence against him so as to “conform to the Fifth Amendment’s requirement of due process.”216 The evidence admitted in immigration proceedings, however, is not governed by the Federal Rules of Evidence but by a fundamental fairness standard.217 Under this standard, evidence will be admitted in immigration proceedings as fundamentally fair if it is reliable, probative, and lawfully obtained.218

The fundamental fairness evidentiary standard differs from the Federal Rules of Evidence in a few significant ways. First, hearsay evidence is admissible in immigration court if it passes the fundamental fairness threshold.219 The admission of hearsay is

marks a significant change in the Court’s concept of deportation when viewed within immigration jurisprudence as a whole).

214. Markowitz, supra note 206, at 1339, 1350 (predicting that the Court’s characterization of deportation as somewhere in-between the civil and criminal systems will “require the Court to grapple with the hard question of what other types of criminal protections should be afforded to respondents in deportation proceedings”).

215. See, e.g., Reno v. Flores, 507 U.S. 292, 306 (1993) (reiterating that immigrants in removal proceedings are entitled to due process of law under the Fifth Amendment); Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (“A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings.”).

216. Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005).

217. See Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (noting that relevance and fundamental fairness “so as not to deprive respondents of due process of law” are the only bars to admissibility of evidence in deportation cases); Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972) (defining the criterion in appraising documentary evidence lawfully obtained as whether it has probative value and whether its use is consistent with a fair hearing).

218. See, e.g., Pouhova v. Holder, 726 F.3d 1007, 1011, 1013 (7th Cir. 2013).

219. See, e.g., Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003) (deeming hearsay admissible in removal proceedings so long as its admission is probative and not fundamentally unfair).
important for immigrants accused of gang membership and seeking discretionary relief because the BIA encourages immigration judges to consult police reports and other hearsay evidence when weighing an individual’s equities. Unlike a court that is governed by the Federal Rules of Evidence, the BIA holds these forms of evidence as probative of an individual’s conduct, which is in turn probative of good moral character, a statutory requirement for all discretionary grants of relief. The judge’s ability to glean an individual’s character from his conduct is why immigration courts consider *nolle prosequi* charges and expunged convictions admissible and probative.

Not only does the fundamental fairness standard deviate from the Federal Rules of Evidence, it also deviates from the constitutional principles governing the admission of evidence. While evidence obtained in “violation of the law” can be fundamentally unfair, not all violations will result in the exclusion of evidence. For example, the Supreme Court specifically ruled that the Fourth Amendment exclusionary rule does not apply to evidence DHS officials obtained and proffered in immigration court. On the other hand, courts are more likely to exclude as fundamentally unfair evidence officials obtained in violation of the Fifth Amendment, and courts have ruled some Fourth Amendment seizures to be “so egregious” that to rely on the evidence would violate due process.

Once evidence is deemed fundamentally fair, the immigration judge will admit it either as an official exhibit or as part of DHS’s charging

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222. *See 8 U.S.C.* § 1101(f) (2012) (noting that an immigration judge may still find persons outside the listed categories are not of “good moral character”); *Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985) (holding that evidence of an immigrant’s conduct, without conviction, may be considered in denying the discretionary relief of voluntary departure).

223. *See 8 U.S.C.* § 1101(a)(48)(A) (defining “conviction” for immigration purposes as any formal adjudication of guilt entered by a court, any finding of guilt by the judge or jury, any admission of sufficient facts by the noncitizen that warrants a finding of guilt, or any judge-ordered restraint on the noncitizen’s liberty); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 810 (9th. Cir. 1994) (explaining that the nature of a discretionary grant permits the BIA to consider evidence of conduct that does not result in a conviction).


documents, such as an NTA or I-213. Information entered into the record through the I-213 or other charging document is considered trustworthy unless the noncitizen provides counterevidence that law enforcement obtained the information illegally or the information is inherently untrustworthy.226

II. USE OF ALLEGATIONS OF GANG MEMBERSHIP IN REMOVAL PROCEEDINGS VIOLATES THE FUNDAMENTAL FAIRNESS EVIDENCE STANDARD AND PROCEDURAL DUE PROCESS REQUIREMENTS

In the spring and summer of 2017, federal immigration officials conducted several high-profile raids focused solely on detecting, detaining, and removing crimmigrant gang members.227 While ICE touted the raids as successful, several alleged gang members targeted by these raids and prior raids during the Obama Administration filed federal lawsuits which enumerated concerns related to the underlying data, the role of racial profiling in populating gang databases, and alleged due process violations.228 A plaintiff in one of the recently filed suits, Chicago resident Luis Vicente Pedrote-Salinas, learned he was listed as a gang member by Chicago police when he was arrested in 2011 in an Operation Community Shield Sweep.229 Mr. Pedrote-Salinas has averred that he has never been a member of a gang and that his due process rights were violated when the Chicago police labeled him as a gang member and shared that erroneous designation with ICE.230 But for his gang designation, Mr. Pedrote-Salinas would have been eligible for DACA and a U visa, which is available to immigrants who have been victims of certain crimes.231 He now faces removal from the United States.232

Admitting unsubstantiated gang database entries in removal proceedings creates a fundamentally unfair hearing because the data

226. See Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (determining that absent proof that an I-213 contains information that is incorrect or was obtained by coercion or duress, the document is inherently trustworthy and admissible as evidence to prove alienage and deportability or inadmissibility).
227. See ICE-Led Gang Surge, supra note 20 (reporting that the Operation Community Shield sweep resulted in the arrest of 1095 individuals confirmed as gang members and affiliates).
228. See Thompson, supra note 66.
231. Id. at 2–3.
232. See Thompson, supra note 66.
is untrustworthy and highly prejudicial. Due to the discretionary nature of immigration relief, any piece of evidence admitted in a removal hearing or bond determination could tip the scales for or against an individual. Immigration judges have the difficult task of determining which individual immigrants pose a threat to the community and should be removed and which individuals contribute to their community and should remain. On its face, an individual’s presence in a gang database would appear to be strong evidence that he presents a danger to the community and therefore is unfit for a grant of discretionary relief. However, the criteria and practices used to populate gang databases make the probative value of an entry unclear.233

Evidence that is neither probative nor trustworthy fails to meet the fundamental fairness standard and must be excluded from immigration proceedings.234 Unsubstantiated gang database entries are fundamentally unfair because the data alone is unreliable and not probative of whether an individual merits discretionary relief. Absent additional corroboration or context, an immigration judge does not know if a noncitizen’s presence in a gang database is probative of recent acts, old acts, bad behavior, innocuous behavior, database mismanagement, error, or gang membership.235 Therefore, DHS must omit unsubstantiated gang information from its case against an individual to comport with due process requirements of the fundamental fairness standard.

Additionally, DHS’s use of unsubstantiated gang database entries as evidence in a discretionary case creates a disparity in notice and fails the Mathews test for minimum due process requirements in civil deprivation proceedings. Individuals facing removal are guaranteed a reasonable opportunity to examine the evidence against them,236 but gang membership allegations pulled from local and state databases are never shared. Without notice of their designation as a gang member, an individual cannot adequately prepare his application for relief. This disparity in notice could be narrowed if DHS shared the allegations of its discretionary case in addition to an NTA, allowing the noncitizen the opportunity to prepare for the entirety of his case.

233. See supra notes 75–118 and accompanying text (explaining how gang databases are populated in different states before that data is shared with federal immigration officials).
235. See supra notes 113–18 and accompanying text (exploring the legal and mechanical issues raised by gang database data collection and data sharing).
A. Unsubstantiated Gang Member Data Should Be Excluded from Removal Proceedings as Fundamentally Unfair Because It Fails to Meet the Fundamental Fairness Evidentiary Standard

When a noncitizen requests discretionary relief from removal, case law instructs immigration judges to consider any available evidence that is fundamentally fair and probative of the nature, recency, and severity of the individual’s convictions or conduct, as well as any evidence of bad character or genuine rehabilitation.\textsuperscript{237} Fundamentally fair evidence must be probative, trustworthy, and lawfully obtained.\textsuperscript{238} For example, hearsay evidence, such as a police report or law enforcement database entry, is admissible in removal proceedings as long as it is fundamentally fair.\textsuperscript{239}

Data pulled from state gang databases is not probative of whether an individual merits discretionary immigration relief because local and state law enforcement officers employ discrepant criteria to identify gang members and improperly exercise significant discretion when designating individuals as gang members. While the civil and administrative nature of removal proceedings affords significant discretion to the executive branch, this discretion is not intended for use at the state and local level.\textsuperscript{240} This is because local law enforcement officers primarily gather gang information for investigative purposes and the entries receive little oversight.\textsuperscript{241} Furthermore, prosecutors rarely use this data alone as direct evidence of gang membership in court.\textsuperscript{242} However, the current data-sharing agreements allow DHS to put forward the same data in immigration court to make its case that an individual is a gang member and therefore undeserving of bond or relief from removal.\textsuperscript{243}

\textsuperscript{238} Pouhova v. Holder, 726 F.3d 1007, 1011, 1013 (7th Cir. 2013).
\textsuperscript{239} See Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003) (allowing for the admission of hearsay evidence in removal proceedings if the admission is probative and not fundamentally unfair).
\textsuperscript{240} See Hufstader, supra note 16, at 689 (arguing that the immigration system withholds discretion from local law enforcement by design and that allowing the use of locally populated gang databases undermines this design and violates due process).
\textsuperscript{241} See GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 1.
\textsuperscript{242} Id.
\textsuperscript{243} See Holper, supra note 135, at 689–90 (stressing the danger of relying on police data to make life-altering immigration decisions because, even if the data was not used to prosecute a criminal charge, reports of gang membership influence discretionary decisions in immigration court, such as whether to grant bond or relief from
Divorced from the context of what conduct or criteria led to an individual’s designation as a gang member, it is far more difficult for an immigration judge to assess if the data is probative to the discretionary analysis. Discretionary relief is rooted in the idea that an individual who behaved badly or dangerously in the past can reform himself to a degree that he poses no threat to his community and deserves the opportunity to remain in the United States. Further, evidence is probative in the discretionary relief analysis only if it allows the immigration judge to assess the conduct that led to an individual’s designation as a gang member, the recency of that conduct, and whether the conduct is likely to continue. As noted in C-V-T-, a grant of discretionary relief must consider proof of genuine rehabilitation if a criminal record exists, plus other evidence that attests to the individual’s good character. The conduct that led to a “gang member” designation could be as simple as being seen in the presence of a known gang member in the individual’s community, which could have a myriad of innocent explanations, or conduct as serious as furthering the gang’s criminal businesses. Without further corroboration of the conduct underlying the government’s allegation of gang membership or providing the individual an opportunity to prepare counter-evidence by notifying them of this designation, the probative value of that data to the immigration judge is unclear.

Admitting this information without further corroboration has implications beyond the courtroom. Individuals removed to countries wracked by gang violence and painted as “gang members” are stigmatized by society and remain at risk for overzealous enforcement.

244. See Emma Whitford, Lawyers Grapple with New Hardline Attitude in Trump-Era Immigration Court, GOTHAMIST (Feb. 17, 2017, 11:55 AM), http://gothamist.com/2017/02/17/trump_ice_immigration.php (explaining the judge’s authority to make discretionary decisions immigration court as “the idea that a judge can differentiate between a jaywalker and a bank robber”).


246. See supra Section I.B.1 (reviewing the statutory criteria governing many state gang databases).

247. See Holper, supra note 135, at 675–76 (suggesting that all unsubstantiated police reports and other similar data should be excluded from immigration proceedings unless a noncitizen has the right to confront his accuser, the author of the report); Kopan & Jarett, supra note 21 (observing that immigration judges find it difficult to look beyond gang allegations “because discretion is paramount in immigration court”).
by local police or extrajudicial violence by gangs. ICE has acknowledged that it alerts Central American law enforcement agencies when “gang members” are deported back to their countries of origin, increasing the likelihood that an individual will face further penalties upon arrival in his home country.

Temporal issues also reduce the probative value of database entries. To determine if the noncitizen has presented “proof of genuine rehabilitation,” an immigration judge needs enough information to assess the temporal relationship between incidents in a noncitizen’s history. Several circuit courts have rejected admitted evidence in immigration proceedings when there is a significant gap between the time the data was gathered and the time it was entered into the I-213, holding that these gaps of time called the “inherent reliability” of the form into serious doubt. Data that DHS pulls from Operation Community Shield to use in removal proceedings could be ten days old or ten years old; without context, which is not usually provided in an immigration proceeding, the data does not provide immigration judges with the ability to interpret these gaps in time.

Temporal issues are exacerbated for individuals living in neighborhoods plagued by gangs and in neighborhoods of color. Noncitizen men of color are profiled and stopped by law enforcement more frequently than other members of these neighborhoods, subjecting them to numerous conversations with police. In states


249. See Winston, *Marked for Life*, supra note 118 (relaying that ICE shares information on gang-affiliated deportees with law enforcement authorities in Central America or Mexico, which increases the likelihood that deportees will face violence upon return, either at the hands of state authorities or gangs); see also Brodzinsky & Pilkington, supra note 35 (reporting the stories of deported noncitizens who were murdered upon their return to Central American countries).


251. See Pouhova v. Holder, 726 F.3d 1007, 1013–14 (7th Cir. 2013) (holding that a seven-year lapse between a conversation with immigration officials and the preparation of the I-213 called the “inherent reliability” of the form into serious doubt).

252. See IMMIGR. PRACTICE POINTERS, supra note 131, at 524 (recording immigration lawyers’ complaints that I-213s populated from gang databases suffer from source issues, lack of detail, and significant gaps in time between when the information was collected and when it is used in court).

253. See GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 1, 3 (finding 99,000 of the 106,000, or roughly 1 in 140, of the boys and men between the ages of fifteen and thirty-four listed in the CalGang database are men of color); see also
where database entries can result from contact with police that does not end in arrest, an individual could have no memory of the interaction that resulted in his designation as a gang member. 254 Furthermore, most state laws do not require an individual to receive notice of his designation as a gang member. 255 Lacking notice, it is possible that a noncitizen before an immigration judge for minor crimes or only immigration violations could have no idea that he is considered a gang member by local police, let alone federal immigration authorities. In this circumstance, a noncitizen seeking bond or discretionary relief will most likely be unable to provide the context needed for an immigration judge to contextualize the gang database entry. Without additional corroborating information, advance notice, and the chance to rebut the allegation, the temporal issue presented by this data cannot be cured.

Finally, the data pulled from these databases carries an indicia of unreliability because of the lack of standardization in the populating of gang databases and the substantial reporting on the mismanagement of these databases. The CalGang audit revealed that thirteen percent of entries in the database lacked the required evidence to support the entry and found other significant errors throughout the database. 256 The audit also found that old gang entries were not reviewed and deleted in accordance with the statutory guidelines, more or less ensuring that once an individual was designated as a gang member, the designation was for life. 257 While this is undoubtedly problematic for the thousands of noncitizens in California’s database, this audit is also problematic for the immigration courts that admit this data because other state databases use similar

\"Alexander, supra note 91, at 103, 123 (arguing that law enforcement discretion in applying enforcement criteria generally allows for the perpetuation of racial stereotypes, and explaining why the majority of people swept into the criminal justice system are young men of color).\"

\"See Gang Immigration Consequences Report, supra note 79, at 15 (recounting the difficulties noncitizens accused of gang membership face in immigration proceedings because they lack notice of the allegation).\"

\"See supra Section 1.B.1 (outlining statutory requirements for gang databases).\"

\"See CalGang Audit, supra note 113, at 1, 3; State Audit Affirms ACLU of California Concerns on Gang Database, supra note 114 (asserting that the audit confirms that CalGang database is rife with inaccurate entries and lacks critical oversight mechanisms).\"

\"See Winston, Marked for Life, supra note 118 (describing the near impossibility of removing an individual’s name from CalGang and other concerns for individuals listed in the database).\"
criteria and technology. This report raises significant concerns about the trustworthiness, accuracy, and probative value of the data in other gang databases regularly accessed by ICE. If management, oversight, and technological errors were present in CalGang, it is likely they are present in ICE’s data because other states feeding the ICE removal lists use the same commercially available software. The fundamentally unfair evidence standard requires the exclusion of gang member designations pulled from these databases because the designations are not probative of whether an individual merits discretionary relief and the data carries the indicia of unreliability.

B. Applying the Mathews v. Eldridge Procedural Due Process Test to the Admission of Gang Allegations in Immigration Court

The Fifth Amendment guarantees due process protections for all “persons,” bringing noncitizens present in the United States within the ambit of its protections. In the context of a removal hearing, courts have interpreted the Fifth Amendment to guarantee a noncitizen the right to a full and fair hearing before an immigration judge, the right to proffer evidence, and a reasonable opportunity to examine the evidence against him. Evidence admitted in immigration court must be fundamentally fair, which means it must be probative, reliable, and lawfully obtained. When determining what procedures satisfy due process for noncitizens in removal proceedings, courts have applied the Mathews test on a case-by-case basis. The Mathews test requires the court to weigh three competing interests: (1) the private interest affected; (2) the government interest, including avoiding fiscal or administrative burdens, in using the current procedures rather than additional or proposed procedures; and (3) the risk of erroneous deprivation to the individual under the current procedures and the
value of providing additional procedural safeguards.264 When comparing the procedures requested with the procedures in place, a reviewing court assesses whether the procedures in place minimize the risk of erroneous deprivation rather than what procedures would be best.265

Applying the *Mathews* test to the use of unsubstantiated gang data in removal proceedings, the current procedures violate an individual noncitizen’s due process right to a full and fair hearing. An individual has the highest private interest in meeting his burden of proof in removal proceedings, but without notice it is very difficult to rebut a gang allegation. The government interest in maintaining the current immigration enforcement data-sharing agreements and immigration court procedures is substantial, but providing a noncitizen with notice of the gang allegations would create *de minimis* additional work. Additionally, the risk of erroneous deprivation through removal is minimized if the noncitizen receives the gang allegation in advance of his immigration court hearings. Therefore, procedural due process requires that DHS share this information with the noncitizen in advance; otherwise, the data must be excluded.

1. **Noncitizens seeking discretionary relief have a significant personal interest in receiving notice of DHS’s gang membership allegations against them**

    A noncitizen facing removal has the highest personal interest in presenting strong evidence and examining the evidence against him because of the severity of removal as a penalty and the obstacles to re-entry after removal. The Supreme Court has acknowledged that an individual facing removal from the United States has a “weighty” personal interest in remaining in the United States.266 While individuals have no protected property or liberty interest in the outcome of a discretionary case,267 the Court has recognized their protected interest in the opportunity to meaningfully apply for relief.268

    Noncitizens removed from the United States face differing bars to re-entry dependent upon their grounds of removal, but the ability to

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264. *Id.*

265. *See* Turner v. Rogers, 564 U.S. 431, 447–48 (2011) (holding that it is not necessary to require that a defendant be provided counsel in every civil contempt proceeding because there is “available a set of ‘substitute procedural safeguards’” that, if employed, “can significantly reduce the risk of an erroneous deprivation of liberty” (quoting *Mathews*, 424 U.S. at 335)).


267. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 702 (1893).

return legally is extremely difficult and never guaranteed.\textsuperscript{269} The minimum bar to applying for admission after removal is five years, and a noncitizen convicted of an aggravated felony and deported will be barred from applying for admission for twenty years.\textsuperscript{270} However, even if a noncitizen can reapply, criminal bars to admission and the discretion of immigration authorities may prevent him from re-entering.\textsuperscript{271} If an individual seeks to re-enter without authorization, he will face ten years in prison for illegal re-entry after removal and twenty years for re-entry after the commission of a felony.\textsuperscript{272} Realistically, once an individual is removed, returning legally to the United States will not be an option.

An individual in removal proceedings has a great personal interest in receiving notice of the discretionary case against him so that he can make his application for discretionary relief as strong as possible. As discussed above, a removal hearing for an individual seeking discretionary relief has two components: (1) demonstrating eligibility under the statute and (2) demonstrating that he merits a grant of relief. Acknowledging the important role notice plays in an individual’s case, the INA requires DHS to share an NTA with a noncitizen in advance of removal hearings. However, a successful case requires meeting his burden of proof and then establishing that he merits a favorable exercise of discretion.\textsuperscript{273} Providing notice through the NTA and the I-213 would give the individual a reasonable opportunity to examine the evidence against him, as provided in the regulations,\textsuperscript{274} and make the hearing more fair because he would have a more meaningful opportunity to meet the burden of proof in both the statutory and discretionary portions of his case.\textsuperscript{275} Relatedly, individuals seeking bond also have a significant interest in reviewing this information before they enter immigration court because gang allegations affect whether they will be eligible for release or subject to

\begin{itemize}
\item \textsuperscript{269} See 8 U.S.C. § 1182(a)(9)(A) (2012) (listing conditions for re-admission for certain previously removed noncitizens).
\item \textsuperscript{270} § 1182(a)(2)(A), (9)(A).
\item \textsuperscript{271} Id.
\item \textsuperscript{272} See § 1326 (imposing criminal penalties for the "reentry of removed aliens" into the United States).
\item \textsuperscript{273} § 1229b; 8 C.F.R. §§ 240.11(d), 1240.8(d) (2017).
\item \textsuperscript{274} See 8 U.S.C. § 1229a(b)(4)(B).
\item \textsuperscript{275} See § 1229(a)(1)–(2)(A) (requiring written notice to be given to the individual specifying the nature of the proceeding, the legal authority under which the proceeding is conducted, the acts or conduct alleged to be in violation of the law, and the charge or charges against the individual).
\end{itemize}
immigration detention. The liberty interest in avoiding immigration detention aside, noncitizens have a far greater chance of prevailing in their application for relief if they are not detained. However, immigration judges presented with allegations of gang membership have proven unwilling to grant bond when faced with these allegations.

Finally, even if the individual loses his case, he retains a high personal interest in receiving notice that he may be deported as a “gang member.” DHS has reported that it shares deportation information about incoming “gang members” with law enforcement agencies in Central America. In 2015, The Guardian, a British news publication, confirmed that since January 2014, eighty-three U.S. deportees had been murdered upon their deportation to El Salvador, Guatemala, and Honduras. Ironically, many Central American migrants facing deportation as gang members arrived in the United States fleeing gang violence but relocated to neighborhoods where domestic chapters of the same gangs are active, increasing the likelihood of law enforcement entering them into a gang database. Therefore, the personal interest in receiving notification of DHS’s gang membership allegation in advance of immigration court proceedings is extremely high.

276. See § 1226(a)–(b) (providing the requirements for a discretionary bond determination); supra Section I.C.2 (discussing the important role of discretion in immigration court, both in the removal proceeding and in bond determination).

277. See BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND, NAT’L IMMIGR. L. CTR. 1, 4–5 (2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf (reporting the obstacles detained noncitizens face when trying to prepare their case, such as difficulty obtaining counsel, restrictive detention conditions, lack of access to legal materials or supporting documentation, ICE policies of frequently shifting detainees, and distance from family and friends).

278. See Holper, supra note 135, at 689–90 (cautioning that gang membership allegations will unfairly influence decisions to grant bond); GANG IMMIGRATION CONSEQUENCES REPORT, supra note 79, at 6 (recounting a client’s erroneous classification in the I-213 as a gang member, which made him ineligible for bond and placed him in an immigration detention facility with those who pose a greater threat to safety than other detainees); Winston, Marked for Life, supra note 118 (reporting that DHS attorneys often characterize gang members as threats to public safety, placing their I-213s in color-coded folders to connote the risk and asking judges to withhold bond).

279. See Winston, Marked for Life, supra note 118; see also Brodzinsky & Pilkington, supra note 35.

280. See Brodzinsky & Pilkington, supra note 35 (citing eighty-three confirmed deaths but noting the numbers are likely much higher).

281. See Winston, Marked for Life, supra note 118.
2. The government has a significant interest in combating transnational criminal gangs and maintaining the current immigration enforcement data-sharing agreements

In immigration cases, the government interests are clear and compelling: sovereignty and security. As noted in Plasencia, few governmental concerns supersede federal control over immigration “for the power to admit or exclude aliens is a sovereign prerogative.” The government also has a significant interest in protecting U.S. communities from gangs that endanger the neighborhoods in which they operate. Combating violent gangs is a priority for law enforcement across the United States, and many local and federal law enforcement leaders count gang databases and data-sharing agreements as vital tools in this fight. The government has an interest in maintaining families and preventing the break-up of communities in the United States. Congressional intent to balance these competing interests, which are often present in immigrant communities, is visible throughout the immigration code. For example, Congress created discretionary relief and waivers for some immigrants convicted of certain crimes who can show either significant equities or whose deportation would cause a U.S. citizen family member “extreme hardship.” When considering whether to grant a request for discretionary relief, the BIA has advised immigration judges to balance factors that indicate strong community and familial ties with negative factors that indicate “bad character or undesirability as a permanent resident of this country.”

In addition to the government interest in regulating which noncitizens remain in U.S. communities, the government has a humanitarian and national security interest in the geopolitical realities of the countries to its south. The extreme violence in the Northern

285. See LEGOMSKY & RODRIGUEZ, supra note 41, at 269-70 (expounding that family reunification is a cornerstone of U.S. immigration policy, with an estimated eighty percent of all immigrant admissions to the United States being family members of U.S. citizens and legal permanent residents).
Triangle implicates not only security concerns for the United States, but also humanitarian responsibilities. According to the international humanitarian principle of non-refoulement, the U.S. government may not remove an individual to a country where an individual’s life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group.\footnote{8 U.S.C. § 1231(b)(3). For an interesting discussion on the patchwork of U.S. refugee law and a suggestion for improvement, see Elizabeth Keyes, Unconventional Refugees, 67 Am. U. L. Rev. 89 (2017).} The United States has codified elements of the Convention against Torture and, under these laws, is prohibited from returning an individual to a country where it is more likely than not that he would be tortured.\footnote{8 C.F.R. § 1208.17 (2017).} If the individual meets his burden of proof, the grant of relief is mandatory.\footnote{Id.} While these are extremely difficult claims for noncitizens to win, their existence in the immigration framework demonstrates a governmental interest in ensuring that noncitizens are removed in a manner that not only complies with due process but that complies with humanitarian law.\footnote{See In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/CAM (last updated Aug. 16, 2017) (describing the small program launched by the USCIS in 2014 that allows certain qualified children from the Northern Triangle and an accompanying parent to apply for refugee status).}

3. Providing notice to noncitizens accused of gang membership would create de minimis administrative burdens for DHS and immigration courts

Providing a noncitizen requesting discretionary relief with notice of a gang membership allegation would create little to no extra work for the government. First, all of the information DHS plans to use against an individual is listed in the I-213, including information pulled through Operation Community Shield and other data-sharing agreements.\footnote{See supra notes 96–107 and accompanying text.} Because this document is prepared in every case, providing one additional copy for the individual would create \textit{de minimis} additional work for the government. Currently, DHS is not required to share the I-213 document, but a regulation or an immigration judge in an individual case could require it to do so.

Second, in many cases DHS does not need the gang membership designation to deny bond or win removal because either the individual’s criminal record is substantial or the individual committed...
an aggravated felony, which triggers mandatory detention, automatic removal, and bars discretionary relief. Therefore, providing the noncitizen with notice would not affect DHS’s case against him, and it would uphold a higher level of due process protection. However, if DHS had concerns that sharing this data would hamstring an important enforcement tool or if there was resistance to sharing this information for policy reasons, DHS could be required to share this information only if the noncitizen is not barred from and is requesting discretionary relief. In these limited cases, DHS could be required to share the I-213 or any other document populated from databases in advance of the hearing. In some of these cases, an individual faced with the evidence against him might choose not to contest the allegation, which would promote efficiency by removing the case from the immigration court docket completely. Equal notice for all noncitizens facing removal would be much easier to administrate than a case-by-case assessment, but the case-by-case assessment for a smaller, discrete set of cases would not put undue burden on DHS for the reasons discussed above. Additionally, where DHS has case-specific national security concerns, the INA allows DHS to withhold its evidence against the individual. Therefore, considering the severity of deportation’s consequences, the potential and slight burden on DHS does not outweigh the individual’s interest in having an opportunity to prepare his case and refute the allegation.

4. Admitting unsubstantiated gang data in removal proceedings increases the risk of erroneous deprivation of a noncitizen’s interest in living in the United States

In cases where both the personal interest and governmental interest are high, courts apply the *Mathews* test to determine which procedures

293. See 8 U.S.C. § 1158(b)(2)(A)–(B) (listing criminal bars to asylum); § 1226(c) (requiring mandatory detention for certain aliens that are inadmissible or deportable due to alleged criminal activity); § 1227(a)(2)(A) (listing criminal grounds for deportation, including any noncitizen convicted of an aggravated felony at any time); § 1229b(a) (listing criminal bars to cancellation of removal); see also Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (commenting that under current law, removal from the country is a nearly “automatic result for a broad class of noncitizen offenders”).


295. See Padilla, 559 U.S. at 365–66 (remarking upon the severity of deportation as a civil penalty).
are most likely to minimize the risk of erroneous deprivation.\textsuperscript{296} For individuals facing removal and accused of gang membership, the current due process procedures do not minimize this risk and can even compound it in some cases. The chronic and systemic errors within gang databases call into question whether this information meets the “trustworthiness” threshold required by the BIA.\textsuperscript{297} Not only does local law enforcement collect information for purposes unrelated to immigration law and removability, but the information itself is often unsubstantiated, wrong, or mismanaged.\textsuperscript{298} Once data is shared with DHS through Operation Community Shield, DHS is not required to corroborate entries before submitting them to the immigration court.\textsuperscript{299} Under the current system, therefore, an erroneous entry could flow unimpeded from a state database to the immigration judge, significantly decreasing the likelihood of reaching the correct result in a removal hearing.

Additionally, the current due process procedures do not minimize the risk of erroneous deprivation because immigrants facing deportation as gang members are easily misunderstood and misrepresented by government trial attorneys.\textsuperscript{300} In \textit{Goldberg}, the Court recognized that government social workers made poor representatives for groups with limited access to the government and negative societal stereotypes, and these groups should have the opportunity to examine the case against them.\textsuperscript{301} Similarly, database entries are created by

\textsuperscript{296} See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining the factors of the balancing test).

\textsuperscript{297} See supra Section I.C.4 (presenting the case law behind the fundamental fairness standard).

\textsuperscript{298} See \textit{CALGANG AUDIT}, supra note 113, at 1, 2 (recommending that the California legislature pass legislation to review and redraft the CalGang oversight and management infrastructure because an audit revealed significant error and mismanagement); \textit{State Audit Affirms ACLU of California Concerns on Gang Database}, supra note 114 (providing examples of numerous erroneous entries revealed in the audit).

\textsuperscript{299} See supra Section I.B.2 (discussing the close working relationship between state law enforcement agencies and federal immigration officials in their anti-gang collaborate efforts and how any errors or issues at the state level are transmitted directly to ICE without oversight or corroboration).

\textsuperscript{300} See Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (declaring that a welfare recipient must be allowed to state his position orally in order for the due process procedure to be satisfactory); Hufstader, \textit{supra} note 16, at 690–91 (analogizing the caseworkers tasked with representing citizen welfare recipients to students seeking DACA while being represented as gang members due to database entries).

\textsuperscript{301} \textit{Goldberg}, 397 U.S. at 266 (pronouncing that welfare recipients must be fully informed of the case against them in advance because “the possibility for honest error
police officers tasked specifically with identifying and observing gang members. This data is not gathered for immigration purposes; therefore, important countervailing information or additional context significant to the discretionary relief analysis is not recorded. This data is then shared with DHS, an agency tasked with prioritizing the deportation of “known gang members or other individuals who pose a clear danger to public safety.” Without further corroboration by DHS or the noncitizen, however, an immigration judge presented with this information will not know if the conduct that led to a “gang member” designation was dangerous or innocuous, increasing the risk of erroneous deprivation. Conversely, the likelihood of reaching the correct result is significantly increased if DHS shares the allegation in advance and the individual has the opportunity to provide mitigating evidence or context for gang allegations specifically.

Finally, a noncitizen facing removal should be fully informed of the discretionary case against him because removal effectively bars an individual’s ability to seek redress. Appeals following a denial of discretionary relief are limited, and appellate courts give immigration judges great deference in their decisions. Additionally, appealing a decision in immigration court does not stay an individual’s removal from the country. If a noncitizen exhausts his appeals or is removed before his appeal is granted, he faces almost insurmountable barriers to availing himself of administrative appeals from outside the country. For example, maintaining or obtaining counsel or gathering evidence or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him”).

302. See Hufstader, supra note 16, at 691 (noting that when an officer is tasked with recording information justifying why someone is a gang member, he has no reason to note any countervailing information he observes).


304. See supra note 75 and accompanying text (listing examples of state gang database statutes).

305. See supra notes 237–40 and accompanying text (noting that because immigration judges find it difficult to look beyond gang allegations, the risk of erroneous deprivation is heightened if unsubstantiated police reports and other similar data are not corroborated).

306. See Holper, supra note 135, at 677–79 (noting that reviewing courts apply stricter scrutiny when an immigration judge relies on a police report to establish removability but the immigration judge will receive wide latitude to use the same police report to reach a negative discretionary decision).

will be extremely difficult. Accordingly, the government’s interest in reaching the correct result and the individual’s interest in making his strongest application for discretionary relief are both better served if the noncitizen receives notice of DHS’s discretionary case against him. If DHS uses uncorroborated gang data against an individual in immigration court, the fundamental fairness evidentiary standard and the *Mathews* test require DHS to share the information with the individual in advance, thereby offering him a meaningful opportunity to meet his burden of proof and examine the evidence against him in a full and fair hearing.

III. SOLUTIONS TO THE FUNDAMENTAL FAIRNESS AND DUE PROCESS ISSUES RAISED BY ADMITTING UNGROBOATED GANG MEMBERSHIP ALLEGATIONS IN IMMIGRATION COURT PROCEEDINGS

A. Provide Noncitizens with Notice of Their Gang Member Designation in Advance of Their Hearing

Providing a noncitizen with notice of the statutory and discretionary case against him, by sharing the I-213 in conjunction with an NTA, would satisfy the *Mathews* test’s procedural due process requirements. While sharing the I-213 does not fix the fundamentally unfair nature of this data because the I-213 pulls directly from state and local databases with no additional corroboration, notice would allow a noncitizen to examine this evidence against him and prepare rebuttal evidence, making the hearing fairer. Providing reasonable notice to noncitizens accused of gang membership will also make it easier for immigration judges to fully exercise the discretion Congress has afforded them in bond determinations and grants of discretionary relief. Notice also increases due process protections for the noncitizen while creating *de minimis* additional work for DHS. First, an NTA is already prepared by DHS and shared with all individuals in advance of the hearing. Second, section 239 of the INA requires that an NTA include “acts or conduct alleged to be in violation of law.” This language should be read to require DHS to list in an NTA conduct that violates executive orders or enforcement priorities, such as suspected gang membership. Because the I-213 is generally prepared before an

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308. *See supra* Section I.C (discussing the use of I-213s in removal proceedings and the difficulty of contesting the I-213).
310. § 1229(a)(1)(C).
NTA and DHS is required to locate the individual and make proper service of an NTA, serving the I-213 in conjunction with the NTA would not impose an additional burden on DHS. However, an individual’s receipt of this information and an opportunity to prepare a rebuttal in advance of a removal hearing could be the difference between detention and bond, removal and relief.

Additionally, resolving the issue of notice through regulations or administration procedures acknowledges the immigration as a divisive, contentious issue. The current political climate is hostile towards increasing protections for immigrants in general, especially those with criminal records or accused of criminal activity. With these realities in mind, the practical solution is to address due process concerns at the level of individual immigration judges or immigration court practices and procedures. Providing notice in this manner protects an individual’s right to a fair hearing and fundamentally fair evidence without adding significant additional burden to DHS or depriving DHS of an important enforcement tool.

B. Require DHS to Corroborate Gang Database Information Before It is Admitted in Immigration Proceedings

Regulations, the BIA, or immigration court procedures could require DHS to corroborate gang database information as a condition of its inclusion in the I-213. Further corroboration by DHS would address the reliability issues currently presented by this data and allow an immigration judge to determine the underlying conduct and the recency of the conduct that led to the designation, relevant factors in the discretionary analysis. Following the Supreme Court’s characterization of removal proceedings as often “intimately related” to the criminal process, criminal law procedures and requirements for corroborating less reliable sources of evidence could be incorporated into immigration hearings using gang database information. What specific corroboration procedures to model from criminal law is beyond the scope of this Comment, but precedent for incorporating some criminal law protections or procedures into civil proceedings can be found in other “quasi-criminal” proceedings such

311. See supra note 71 and accompanying text.
312. See supra Section IIA (arguing that unsubstantiated gang database entries constitute fundamentally unfair evidence because entries alone do not describe the underlying conduct that led to the designation).
as juvenile delinquency proceedings, parental termination proceedings, civil commitment proceedings, and court martial proceedings. Immigration proceedings with discretionary components, such as a bond or removal hearing, and especially those stemming from criminal convictions, arguably belong on the list above.

Corroboration would take significant steps to address the factors that make unsubstantiated gang database entries fundamentally unfair: reliability and probative value. Accepting the results of the CalGang audit and other evidence that gang databases often contain errors or outdated information, the data is unreliable on its face. Requiring DHS to conduct additional investigation, such as contacting the locality in which the database operates, researching the gang membership criteria in a specific jurisdiction, or speaking with the police officer who created the entry are all examples of important contextual information that could either bolster the validity of an entry or identify an error.

Corroboration would also increase the probative value of any proffered gang allegation. As discussed previously, under many state statutes, the conduct underlying a “gang member” designation can be innocuous, such as seen wearing gang dress, or nefarious, such as furthering a gang’s criminal activities. Through discussions with local police or legal research into the criteria of a specific criminal statute, the recency and conduct underlying the designation could be uncovered. If DHS could not determine what conduct led to the designation, that would be probative context for the immigration judge as he or she weighed an individual’s discretionary application. If DHS could determine the underlying conduct and the recency of the conduct, that is equally probative context for the immigration judge to weigh when considering whether the noncitizen is a danger to his community or has demonstrated proof of genuine rehabilitation and good moral character. Furthermore, DHS is best situated to provide this context because the majority of states do not require law enforcement to notify individuals that they have been designated a gang member.

314. See Markowitz, supra note 206, at 1351.
315. See generally Holper, supra note 135; Markowitz, supra note 206.
316. Pouhova v. Holder, 726 F.3d 1007, 1011, 1013 (7th Cir. 2013).
317. See supra Section I.B.2 (identifying reliability issues within CalGang specifically and federal data-sharing agreements in general).
318. See supra Section II.A. (arguing that the broad range of conduct covered by most state gang statutes removes the probative value of a “gang member” designation).
gang member, and many individuals before immigration court may be unaware of their gang member designation.320

While further corroboration by local and state police would likely make the gang database entries more reliable, this approach does not address the due process concerns raised by the admissibility of police statements or reports in immigration courts. To address the confrontation and reliability issues presented by police reports in immigration court, one scholar has argued that immigration judges should not admit police reports into evidence unless the police officers are available for and subject to cross-examination.321

C. State Solutions: California Assembly Bill No. 2298

If DHS does not corroborate gang database information at the federal level, legislation at the state level could revise data entry procedures to reduce inaccuracies and require that law enforcement provide notice to individuals listed in gang databases. Recent events in California provide an interesting example and potential model for other jurisdictions concerned about the accuracy of the data in gang databases and the disproportionate effects of gang databases on minority and immigrant communities.

The 2016 audit of CalGang revealed significant and systemic flaws in the entries, prompting the California Assembly to introduce Assembly Bill No. 2298.322 The bill modified California Penal Code Sections 186.34 and 186.35 relating to criminal gangs, and requires that all individuals listed as suspected gang members, associates, or affiliates in CalGang or other “shared gang databases” are provided written notice and an opportunity to contest the designation.323 This modification followed the 2013 California statute requiring law enforcement to notify a parent or guardian before entering a minor into any “shared gang database.”324 In September 2017 the California legislature went

320. See supra notes 93–94 and accompanying text.
321. See Holper, supra note 135, at 677 (assessing the evidentiary issues presented by police reports in immigration court and arguing for the right for noncitizens to confront the police officers in removal proceedings).
323. CAL. PENAL CODE §§ 186.34, 186.35 (West 2017).
324. Id.
one step further, placing CalGang under the oversight of the California Department of Justice.\footnote{See Ulloa, supra note 322.} After the California Assembly passed the bill 41-29,\footnote{Assemb. B. 90, 2017–2018 Leg., Reg. Sess. (Cal. 2017).} Governor Jerry Brown signed the bill into law on October 12, 2017.\footnote{Governor Brown Issues Legislative Update, OFF. OF GOVERNOR EDMUND G. BROWN JR. (Oct. 12, 2017), https://www.gov.ca.gov/news.php?id=20015 (announcing that Governor Jerry Brown signed A.B. 90 into law on October 12, 2017).} With the bill now enacted into the law, beginning in January 2017 the Department will promulgate new entry criteria and data maintenance rules, as well as greater restrictions on sharing CalGang with different law enforcement officials, including federal immigration officials.\footnote{Cal. Assemb. A.B. 90 (noting specifically section 7(k)(8), which states that “[t]he department, with the advice of the committee, shall promulgate regulations governing the use, operation, and oversight of shared gang databases. The regulations issued by the department shall, at minimum, ensure the following . . . . Any records contained in a shared gang database are not disclosed for purposes of enforcing federal immigration law, unless required by state or federal statute or regulation.”).}

Similar legislation could be passed in other states participating in Operation Community Shield or where existing data-sharing agreements with DHS are in place.

**CONCLUSION**

It is a tenuous time for noncitizens—of all statuses—living in the United States. Encouraged by a zealous Executive and a supportive Congress, immigration enforcement officials are using their expanded authority to place greater numbers of noncitizens in detention and removal, and the enforcement ramp-up shows no signs of slowing in the months and years to come. While some more sympathetic groups of immigrants may receive reprieve from removal, the specter of the crimmigrant gang member remains a salient political talking point and policy justification. As DHS increases its reliance on state and local gang databases to define federal immigration targets, the likelihood that innocent—but mislabeled—noncitizens will be placed in removal proceedings also increases. Without notice of their designation as a crimmigrant gang member, noncitizens will not receive their Fifth Amendment right to a full and fair hearing because they will not be able to examine the evidence against them or gather the evidence they need to rebut these allegations and support their application for relief.
There are procedural steps, however, that could be implemented in removal proceedings to make the proceeding more fundamentally fair. At minimum, DHS could be required to share gang allegations with the noncitizen when the NTA is shared. This would provide the noncitizen with a reasonable opportunity to examine the evidence against him and prepare any rebuttal evidence or witness testimony he wishes to proffer. This solution, while administratively feasible, does not address the underlying reliability issues presented by gang database entries. Requiring DHS to corroborate gang database entries before they are admitted to immigration court would increase the reliability and probative value of the information, aiding immigration judges in the discretionary analysis. Finally, states can enact legislation that makes the gang databases themselves more reliable and fair, by ensuring data is maintained, revising gang designation criteria, and providing individuals with notice of their designation.