

Immigration Detention: Information Gaps and Institutional Barriers to Reform

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INTRODUCTION

This Article examines and critiques the institutional design choices underlying the civil immigration detention system in the United States. The stated objective of this system is to effectuate removal orders and ensure public safety during the removal process by detaining noncitizens who pose a flight risk or danger to the public. The design choices utilized to achieve this objective, however, hinder the effective acquisition and use of information regarding flight risk and danger. Reliance on mandatory detention, evidentiary limitations, and shifting burdens of proof create a presumption of detention. As a result, decision makers lack the means or the incentive to collect and use information to release individuals who do not pose a flight risk or danger—including individuals who may not ultimately be removed from the United States—at significant cost to the administration of the immigration system as a whole.

Over the last twenty-five years, immigration detention in the United States has dramatically expanded in both incidence and duration. The federal government has increased the daily number of individuals in immigration detention from 6,785 in 1994¹ to over 34,069 in 2012.² The federal government now holds

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¹ Donald Kerwin and Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 6 (Migration Policy Institute Sept 2009), online at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf> (visited Mar 3, 2013).

² Immigration and Customs Enforcement (ICE), *ICE Total Removals* (Department of Homeland Security (DHS) Aug 25, 2012), online at <https://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf> (visited Mar 3, 2013) (listing the average daily population in detention).

nearly 400 thousand individuals annually, in a patchwork of county jails, privately run prisons, and other facilities across the country.³ Detention has increasingly become prolonged, with some individuals held for years pending removal proceedings or the execution of a removal order.⁴ The government holds many of these individuals under “mandatory detention,” that is, without the right to an individualized bond hearing as to their risk of flight or danger to the community.⁵

The expansion of immigration detention has sparked considerable discussion in academic literature. Scholars have critiqued the erosion of constitutional limitations on detention and Congress’s efforts to limit judicial review.⁶ Some have called for legal and policy reforms, with the goals of scaling back or altering the nature of detention to conform to its status as a civil, rather than penal, institution.⁷

This Article examines the immigration detention system through a different lens: institutional design. According to gov-

³ See *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* 1 (Human Rights First 2011), online at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> (visited Mar 3, 2013).

⁴ See Kerwin and Lin, *Immigration Detention* at 16–23 (cited in note 1); *Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 1–2 (ACLU July 2009), online at http://www.aclu.org/files/assets/prolonged_detention_issue_brief.pdf (visited Mar 3, 2013).

⁵ Dora Schiro, *Immigration Detention: Overview and Recommendations* 2 (DHS Oct 6, 2009), online at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (visited Mar 3, 2013) (stating that 66 percent of immigrant detainees are held pursuant to mandatory detention provisions). Recent studies question whether the majority of detainees are subject to mandatory detention. See, for example, Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 *Cardozo L Rev* 357, 374 (2011) (finding that the majority of detainees in a study were not subject to mandatory detention).

⁶ See, for example, David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 *Emory L J* 1003, 1006–07 (2002) (exploring due process limitations on detention); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 *Tex L Rev* 1615, 1616 (2000) (critiquing the “ferocious assault on judicial review of immigration decisions”); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 *Harv L Rev* 1890, 1928–31 (2000) (discussing constitutional challenges to mandatory detention); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L J* 545, 546–50 (1990) (discussing constitutional norms that underlie courts’ protection of detained noncitizens).

⁷ See, for example, Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 *Harv CR–CL L Rev* 601, 626–33 (2010) (describing recent efforts to reform immigration detention and proposing additional changes); Anil Kalhan, *Rethinking Immigration Detention*, 110 *Colum L Rev Sidebar* 42, 43–44, 50–56 (July 21, 2010), online at http://www.columbialawreview.org/wp-content/uploads/2010/07/42_Anil_Kalhan.pdf (visited Mar 3, 2013).

ernment policy, detention serves as a tool of immigration enforcement—to effectuate the deportation of those who are removable under the law and to prevent danger to the community during this process.⁸ Rather than question these first-order objectives, this Article examines how the legal institutions and administrative rules governing immigration detention affect the government’s ability and incentives to access the information necessary to achieve its purported goals.

A growing body of legal scholarship has examined the administration of immigration law and policy through the lens of institutional design. Professors Adam Cox and Eric Posner have carefully examined the central design choices governing the screening and selection of immigrants⁹ and the conflicting incentives among institutional actors within the immigration system.¹⁰ Professor Ingrid Eagly has explored the institutional design of criminal immigration prosecutions.¹¹ In the context of immigration detention policy, Professor Stephen Legomsky has critiqued the federal government’s preference for fixed rules over administrative discretion.¹² In this Article, I assess the institutional design choices that govern the acquisition and use of information in the current detention system, and the barriers that these choices create for meaningful reform. By doing so, I hope to add a critical perspective to the debate over the US immigration detention scheme.

Part I of this Article provides a brief overview of the first-order policy goals behind immigration detention and the applicable constitutional constraints. Part II examines the design choices utilized to achieve these goals. I argue that the current

⁸ See Part I. These are the purposes that the federal government has articulated and that the Supreme Court has deemed as legitimate rationales for detention policy. See *Demore v Kim*, 538 US 510, 517–20 (2003) (discussing the government’s rationales for detention of noncitizens pending removal proceedings). Other possible goals—for example, to discourage unauthorized immigration or to encourage noncitizens to agree to deportation or withdraw their appeals by making the deportation system more onerous—may also be motivating factors for detention policy. See Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U Miami Int-Am L Rev 531, 540 (1999) (suggesting a deterrence rationale). For the purpose of this Article, unless otherwise stated, I measure the federal government’s policy by the objectives that it has officially proffered.

⁹ See generally Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan L Rev 809 (2007).

¹⁰ See generally Adam B. Cox and Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 NYU L Rev 1403 (2009).

¹¹ See generally Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw U L Rev 1281 (2010).

¹² See Legomsky, 30 U Miami Int-Am L Rev at 535 (cited in note 8).

legal institutions and rules fail to ensure the adequate acquisition of information and, in many cases, prevent decision makers from utilizing relevant information to make effective detention decisions. Part III considers possible design reforms. Current reform proposals, while laudable, fall far short of addressing the central design flaws in the immigration detention system. I argue that major design constraints, including an overreliance on mandatory detention and counterproductive burden-shifting schemes, must be eliminated to achieve meaningful reform.

I. FIRST-ORDER POLICY GOALS AND CONSTITUTIONAL CONSTRAINTS IN THE DETENTION SYSTEM

Throughout the history of immigration policy, the United States has used detention as a tool for immigration enforcement. Stated simply, the first-order policy goals of immigration detention are to ensure that the federal government may effectuate its decisions to exclude or deport noncitizens from the United States and to protect the public from any danger that may be posed by noncitizens pending this process.¹³

These goals have been central to immigration detention policy for over a century.¹⁴ From the beginning, the power to detain was tied to the power to inspect noncitizens seeking entry to the United States. Detention initially served as an administrative tool to ensure immigrants were “properly housed, fed, and cared for” pending a screening,¹⁵ which more often than not led to entry.¹⁶ Subsequent legislation required the detention of certain “arriving alien immigrants” for inspection as a means of preventing flight, but the duration of detention was relatively short and immigration officials exercised discretion to release immigrants on bond.¹⁷ During these time periods, early Supreme Court cases

¹³ The goal of protecting the public from danger is arguably subsumed within the goal of effectuating removal orders. For an excellent discussion of the development of the dangerousness rationale underlying immigration detention, see Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 NYU L Rev 1485, 1494–98 (2012).

¹⁴ See Daniel Wilsher, *Immigration Detention: Law, History, Politics* 7–13 (Cambridge 2012) (discussing the legal origins of immigration detention).

¹⁵ Immigration Act of 1891 § 8, ch 551, 26 Stat 1084, 1085–86 (permitting detention “until a thorough inspection is made”).

¹⁶ See Wilsher, *Immigration Detention* at 13–14 (cited in note 14), citing *Immigration Investigation*, HR Rep No 52-2090, 52d Cong, 1st Sess 100 (1892) (describing the procedurally lax process governing the detention and release of noncitizens pending inspection).

¹⁷ Immigration Act of 1893 § 5, ch 206, 27 Stat 569, 570 (“[I]t shall be the duty of every inspector of arriving alien immigrants to detain for a special inquiry . . . every person who may not appear to him to be clearly and beyond doubt entitled to admission.”).

distinguished detention from imprisonment and recognized the federal government's power to detain as ancillary to its power to exclude or expel noncitizens from the United States.¹⁸

For the next several decades, detention policy continued to reflect the priorities of immigration enforcement, increasingly becoming a tool for deporting immigrants whom the government deemed undesirable. In *Carlson v Landon*,¹⁹ the Supreme Court upheld the government's decision to detain noncitizens without bail upon placing them in deportation proceedings due to their alleged Communist ties.²⁰ The Court explained that "[d]etention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings."²¹

In the late 1980s and 1990s, Congress vastly expanded the deportation and detention system, enacting a mandatory detention scheme and providing new grounds of removal to trigger such detention.²² Immigrant detainees challenged various aspects of the detention system, ultimately resulting in two Supreme Court decisions that reinforced the government's ability to pursue its first-order policy goals within constitutional constraints. In *Zadvydas v Davis*,²³ the Supreme Court addressed the question of whether the federal government may continue to hold a noncitizen with a final order of removal even when effectuation of the removal order was no longer reasonably foreseeable.²⁴ The Court interpreted the statute to require individualized release determinations if the agency is unable to remove an individual within a reasonable time after completion of removal proceedings, holding that "where detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'"²⁵ In *Demore v Kim*,²⁶ the Court upheld mandatory

See also Wilsher, *Immigration Detention* at 15, 17–18 (cited in note 14) (noting that officials widely used bail to release immigrants and that Congress codified the practice into law).

¹⁸ See, for example, *Wong Wing v United States*, 163 US 228, 235 (1896).

¹⁹ 342 US 524 (1952).

²⁰ *Id.* at 540–44 (holding that the attorney general may detain noncitizens without bail on the basis of their Communist ties and that Congress's delegation of such authority was permissible).

²¹ *Id.* at 538.

²² See Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in David A. Martin and Peter H. Schuck, eds, *Immigration Stories* 343, 345–54 (Foundation 2005) (detailing the history behind mandatory detention legislation).

²³ 533 US 678 (2001).

²⁴ *Id.* at 690.

²⁵ *Id.* (alterations in original).

²⁶ 538 US 510 (2003).

detention for noncitizens with certain types of criminal records, during the “limited period” necessary for the agency to decide whether to order their removal.²⁷ Emphasizing that such detention would have an end point upon completion of the removal proceedings, the Court found that “[s]uch detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”²⁸ While recognizing important due process constraints on the use of detention authority, the Court ultimately legitimated the federal government’s rationales for detention policy in these decisions.

The combined effect of these first-order policy goals and constitutional constraints has been to give the federal government considerable leeway to detain individuals who are—or may be legitimately presumed to be—flight risks or dangers to the community, in order to effectuate their removal and protect the public pending that removal. Given the range of choices, the federal government’s preference may very well be to detain as many people as possible within this rubric. Such a policy would benefit the federal government by ensuring the effectuation of its removal orders and the enforcement of its immigration priorities.²⁹ Some have argued that this in turn benefits current or future immigrants, to the extent that removable noncitizens who are not removed may displace noncitizens who otherwise would be able to immigrate to and remain in the United States through existing legal mechanisms.³⁰ Detention also prevents costs associated with certain negative externalities pending a lengthy re-

²⁷ Id at 531.

²⁸ Id at 528 (noting that Congress was relying on evidence that indicated that permitting the release of immigrants pending removal proceedings would lead to many deportable noncitizens missing their court hearings).

²⁹ See Office of the Inspector General, *Immigration and Naturalization Service: Deportation of Aliens after Final Orders Have Been Issued*, Inspection Rep No I-96-03 (Department of Justice (DOJ) Mar 1996), online at <http://www.justice.gov/oig/reports/INS/e9603/index.htm> (visited Mar 3, 2013) (describing how detention ensures deportation of individuals who have a final order of removal).

³⁰ *Demore*, 538 US at 518 (noting Congressional testimony that “[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others”), quoting *Immigration Control and Financial Responsibility Act of 1996*, S Rep No 104-249, 104th Cong, 2d Sess 7 (1996). It is unclear what displacement effect removable noncitizens still present in the United States may have on new immigration, as there is no direct correlation between the number of available visas, for example, and the number of people the federal government has successfully deported.

moval process, such as any criminal activity by a noncitizen prior to her removal.³¹

Detention also comes with its own costs, however.³² The federal government currently spends \$122 per day to detain a noncitizen facing removal.³³ US taxpayers spend \$1.9 billion on immigration detention annually.³⁴ Detention also imposes costs on individuals detained—costs that may have significant ripple effects in cases involving individuals with strong ties to the United States. It deprives an individual of her liberty and prevents her from working, paying taxes, or otherwise contributing to the community.³⁵ Where detainees have family ties, detention obstructs the family's access to caregiving and financial support.³⁶ At its extreme, immigration detention may lead to US cit-

³¹ Immigrants in the United States are generally less likely to commit crime than US-born individuals. See Ramiro Martinez Jr and Matthew T. Lee, *On Immigration and Crime*, in Gary LaFree, ed, 1 *Criminal Justice 2000: The Nature of Crime; Continuity and Change* 485, 498–501 (National Institute of Justice 2000) (discussing several statistical studies on the relationship between immigrants and crime levels). As with citizens generally, however, noncitizens who have previously committed crimes may recidivate. Office of the Inspector General, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States* 29–30 (DOJ Jan 2007), online at <http://www.justice.gov/oig/reports/OJP/a0707/final.pdf> (visited Mar 3, 2013) (discussing FBI statistical analyses of noncitizens with criminal records).

³² In addition to the costs discussed in text, some may argue that immigration detention also carries moral costs that outweigh any benefits to government or society as a whole. See, for example, Laura Magnani and Harmon L. Wray, *Beyond Prisons: A New Interfaith Paradigm for Our Failed Prison System* 1–3, 30–33 (Fortress 2006). I share this view, but for the purposes of this Article analyze the immigration detention system under the prevailing legal and policy perspective in the United States that immigration detention is permissible where properly tailored toward its stated objectives.

³³ DHS, *Congressional Budget Justification: FY 2012* 938–39 (2012), online at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf> (visited Mar 3, 2013). The \$122 figure does not include all costs associated with operating immigration detention facilities. See *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* 11 (Lutheran Immigration and Refugee Service 2011), online at <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf> (visited Mar 3, 2013) (noting that the average cost of immigration detention increases to \$166 per day when salary and other personnel costs are taken into account).

³⁴ DHS, *Congressional Budget Justification* at 938–39 (cited in note 33) (showing that the cost for FY 2011 was \$1,903,764,000).

³⁵ See Raul Hinojosa-Ojeda and Marshall Fitz, *A Rising Tide or a Shrinking Pie: The Economic Impact of Legalization versus Deportation in Arizona 2* (Center for American Progress and Immigration Policy Center Mar 2011), online at http://www.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/rising_tide.pdf (visited Mar 3, 2013); Legomsky, 30 U Miami Int-Am L Rev at 541 (cited in note 8).

³⁶ See Amy Bess, *Human Rights Update: The Impact of Immigration Detention on Children and Families* *1–2 (National Association of Social Workers 2011), online at <http://www.socialworkers.org/practice/intl/2011/hria-fs-84811.immigration.pdf> (visited Mar 3, 2013) (“When parents are held in detention, the subsequent family separation poses great risks for their children. . . . Children experience emotional trauma, safety concerns, economic instability, and diminished overall well-being.”); Ajay Chaudry, et al,

izens' reliance on public assistance or the placement of US-citizen children in foster care.³⁷ Detention also has an adverse effect on the administration of removal proceedings. Noncitizens who are detained are less likely to find counsel than noncitizens who are not detained.³⁸ Noncitizens who are detained are often transferred far from home and face other obstacles to accessing the witnesses, evidence, and support necessary to defend their cases.³⁹ Moreover, detention creates an incentive for noncitizens to drop their cases—even when they may have valid claims to relief from removal (that is, relief establishing that it is in the best interest of the United States that they remain in the country).⁴⁰ For these reasons, many commentators have advocated for

Facing Our Future: Children in the Aftermath of Immigration Enforcement 27–39 (Urban Institute Feb 2010), online at http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf (visited Mar 3, 2013) (recounting the effects of detention and deportation on family economic well-being, specifically in relation to food and housing security).

³⁷ See Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 5 (Applied Research Center Nov 2011), online at <http://act.colorlines.com/acton/attachment/1069/f-0079/0/-/1-sf-cl-7014000000T6DHAA0-000f/1-sf-cl-7014000000T6DHAA0-000f:a81e/file.pdf> (visited Mar 3, 2013) (discussing the extent to which the detention of primary caregivers has led to the placement of US-citizen children in foster care); Emily Butera, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention* 10–13 (Women's Refugee Commission Dec 2010), online at http://womensrefugeecommission.org/resources/doc_download/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention (visited Mar 3, 2013) (discussing the impact of detention on parental rights).

³⁸ See *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 7–8 (National Immigrant Justice Center Sept 2010), online at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf> (visited Mar 3, 2013) (noting that the majority of detained noncitizens lack legal representation and the majority of detention facilities do not offer access to know-your-rights programs). A recent study of representation for noncitizens apprehended in New York City indicates that 60 percent of detained noncitizens lack legal representation, compared to only 27 percent of nondetained noncitizens. Steering Committee of the New York Immigrant Representation Study Report, 33 *Cardozo L Rev* at 363 (cited in note 5). The study also found that 74 percent of noncitizens who are represented and released (or never detained) had a favorable outcome in their removal case, whereas only 18 percent of noncitizens who are represented but detained had a favorable outcome, and only 3 percent of noncitizens who are both unrepresented and detained had a favorable outcome. See *id.* at 363–64.

³⁹ See Alison Parker, *United States: A Costly Move; Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 1–5 (Human Rights Watch June 2011). See also Legomsky, 30 *U Miami Int-Am L Rev* at 541 (cited in note 8).

⁴⁰ See Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation without Due Process* 6–9 (Western State University College of Law, Mills Legal Clinic of Stanford Law School, and National Immigration Law Center Sept 2011), online at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf (visited Mar 3, 2013) (“[M]any [detained] noncitizens may . . . have had little choice but to accept whatever the government offered.”); *Isolated in Detention* at 7 (cited in note 38).

increased use of alternatives to detention—such as governmental or community monitoring and supervision programs—that may achieve the objectives of detention at lower financial and societal cost.⁴¹

An optimal immigration detention policy would therefore be one that limits detention to cases where the costs of release (due to flight risk and danger) exceed the costs of detention (due to the deprivation of liberty and its monetary and societal effects).⁴² At the time a person is placed in removal proceedings, however, the federal government faces an information gap on these matters.⁴³ Detention decisions are thus prone to what commentators describe as Type I errors (or “false positives”), where the system results in the detention of someone who should instead be released, and Type II errors (or “false negatives”), where the system results in the release of someone who should instead be detained.⁴⁴ To minimize these errors, one would design a system that facilitates the acquisition and use of the information necessary to close the information gap, and to encourage experimentation and research to determine whether alternative policies may effectively serve the purpose of detention while lowering its costs. However, as discussed in greater detail below, the design choices governing the immigration detention system today tend to hinder the government’s ability to collect and use the information necessary to achieve its policy goals or experiment with alternatives. As a whole, these choices lead primarily to Type I errors—that is, overdetection.

II. THE DESIGN CHOICES GOVERNING IMMIGRATION DETENTION

The effective acquisition and use of information presents a considerable challenge in the detention context. At the moment the federal government is contemplating whether to exclude or

⁴¹ See, for example, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* 1, 7–9 (National Immigration Forum Aug 2012), online at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> (visited Mar 3, 2013) (noting that use of Alternative To Detention programs (ATDs) would result in an 80 percent reduction in detention costs for the federal government); Alison Siskin, *Immigration-Related Detention: Current Legislative Issues* 15–17 (Congressional Research Service Jan 12, 2012), online at <http://www.fas.org/irp/crs/RL32369.pdf> (visited Mar 3, 2013) (reporting on the cost-effectiveness of detention and ATDs and legislation in the pipeline).

⁴² As discussed above, some may argue that the moral costs of detention outweigh any costs associated with release under this framework. See note 32.

⁴³ See notes 45–47.

⁴⁴ See, for example, Legomsky, 30 U Miami Int-Am L Rev at 545–47 (cited in note 8) (discussing “false negatives” and “false positives” in the detention context).

deport a noncitizen, it generally lacks sufficient information to assess the noncitizen's flight risk and danger to the community pending that decision. The information gap is arguably widest in situations involving "arriving alien[s]" at the border, when the federal government may have little or no information about the prospective immigrant.⁴⁵ In such cases, the government has historically exercised its detention authority broadly, collecting information and using that information to exclude individuals or release them based on ex post screening.⁴⁶ The information gap is different for individuals already in the United States whom the government seeks to deport. In such cases, the prospects for acquiring sufficient information are more favorable, and the government may have a greater incentive to collect and use the information it has to meet its policy goals.⁴⁷

This Part focuses on the key institutional design choices governing the detention of individuals facing removal, particularly with respect to the level of discretion that the federal government has chosen to provide the agencies⁴⁸ making these detention decisions and the evidentiary rules governing such discretion. First, I address mandatory detention—Congress's choice to narrow the window of discretion historically afforded to the agencies empowered to detain and release noncitizens pending their removal. Second, I address recent changes and constraints

⁴⁵ 8 CFR § 1.2 (defining an "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry"). Under limited circumstances, the term may also be interpreted to apply to some individuals who have been previously screened and admitted. Immigration and Naturalization Act (INA) § 101(a)(13)(C), 8 USC § 1101(a)(13)(C) (listing several circumstances in which a noncitizen previously admitted to the United States as a permanent resident may still be considered to be "seeking an admission" to the United States).

⁴⁶ See notes 12–16. Current federal law mandates the detention of "arriving alien[s]" but permits the federal government to exercise parole authority in its discretion. See INA § 235, 8 USC § 1225 (authorizing immigration officers to detain "arriving aliens"); 8 CFR § 235.3 (setting out procedures for the detention, removal, and parole of "arriving aliens" in the United States).

⁴⁷ See Cox and Posner, 84 NYU L Rev at 1438–54 (cited in note 10) (exploring the state interest in considering the effect of immigration policies on noncitizens who invest in the United States through family, employment, and other socioeconomic ties).

⁴⁸ Immigration detention decisions are made by a diverse set of actors within DHS and DOJ. DHS officers make initial decisions to arrest, detain, and release noncitizens within their statutory and regulatory authority. See INA § 235, 8 USC § 1225 (authority to detain noncitizens seeking admission pending screening); INA § 236, 8 USC § 1226 (authority to detain pending removal proceedings); INA § 241, 8 USC § 1231 (authority to detain pending execution of a final order of removal). Federal law authorizes limited review of bond and classification decisions by immigration judges, employees of the Executive Office for Immigration Review within the DOJ. See INA § 236, 8 USC § 1226; DOJ, *Executive Office for Immigration Review: Organization Chart* (July 2012), online at <http://www.justice.gov/eoir/sibpages/Organization.html> (visited Mar 3, 2013).

on what remaining discretion agencies still retain to order release on bond. As explained herein, these second-order design choices have a profound effect on the government's ability to acquire and apply information on flight risk and danger, despite the value of this information to first-order goals.

A. Mandatory Detention

For most of the history of immigration policy, Congress has provided federal immigration authorities with the discretion to detain or release individuals pending screenings for admission to the United States or removal proceedings. In 1988, Congress passed the first mandatory immigration detention law, requiring the detention of a specified class of noncitizens and depriving federal immigration officials of the authority to release those individuals on bond pending their removal proceedings.⁴⁹ Congress was apparently concerned that noncitizens were being released from criminal custody for serious crimes before federal immigration officials had the opportunity to deport them.⁵⁰ In the view of some lawmakers, this inhibited the government's ability to effectuate the deportation of noncitizens who would ultimately be ordered removed but would abscond prior to their deportation, that is, Type II errors. To address this problem, Congress created a category of noncitizens—people convicted of “aggravated felonies”—and eventually barred these individuals from most forms of relief from removal and from release from detention.⁵¹ In 1996, Congress vastly expanded the types of removable of-

⁴⁹ See Anti-Drug Abuse Act of 1988 § 7343(a)(4), Pub L No 100-690, 102 Stat 4181, 4470, amending INA § 242(a)(2), codified at 8 USC § 1252(a)(2) (1992). For an in-depth discussion of the enactment of mandatory detention legislation, further amendments, and subsequent litigation, see Taylor, *Judicial Deference to Congressional Folly* at 350 (cited in note 22).

⁵⁰ See *Matter of Eden*, 20 I&N Dec 209, 214 (BIA 1990) (discussing legislative history and its stated purpose “to ensure that illegal aliens convicted of drug or violent crimes are incarcerated until they are returned to their homeland”) (emphasis omitted), quoting Omnibus Anti-Substance Abuse Act of 1988, S 2852, 100th Cong, 2d Sess, in 134 Cong Rec 27462 (Oct 3, 1988) (statement of Sen Lawton Chiles).

⁵¹ See Anti-Drug Abuse Act of 1988 § 7343(a)(4), 102 Stat at 4470, amending INA § 242(a)(2), codified at 8 USC § 1252(a)(2) (1992) (authorizing the attorney general to detain and not release noncitizens who have been convicted of aggravated felonies). An “aggravated felony” is currently defined by reference to twenty-one subcategories of offenses. INA § 101(a)(43)(A)–(U), 8 USC § 1101(a)(43)(A)–(U). Federal law bars any noncitizen who has been convicted of an aggravated felony from eligibility for many forms of relief from removal. See, for example, INA § 240A(a), 8 USC § 1229b(a) (cancellation of removal); INA § 208(b)(2)(B)(i), 8 USC § 1158(b)(2)(B)(i) (asylum); INA § 101(f)(8), 8 USC § 1101(f)(8) (naturalization); INA § 316(a)(3), 8 USC § 1427(a)(3) (naturalization); 8 CFR § 316.10(b)(1)(ii) (naturalization).

fenses that trigger mandatory detention to include offenses that were not per se bars to relief from removal, like drug crimes and multiple “crimes involving moral turpitude.”⁵² Various other “mandatory detention” provisions were also enacted to require the detention of “arriving aliens”⁵³ or individuals held pending a removal period following a final removal order.⁵⁴

Congress’s choice to curb the agency’s discretion to release noncitizens represents a classic “control strategy” given a perceived principal-agent problem.⁵⁵ Lawmakers often delegate their authority to an agency while simultaneously creating a series of rules to control the agency’s exercise of its discretion. Where the principal no longer believes that the preferences of the agent align with its own, the principal may enact more restrictive ex ante rules to narrow the agent’s “discretionary window.”⁵⁶

This is essentially what some lawmakers chose to do by enacting mandatory detention. Proponents of mandatory detention perceived then—Immigration and Naturalization Service (INS)

⁵² Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 440(c), Pub L No 104-132, 110 Stat 1214, 1277, amending INA § 242(a)(2), codified as amended at 8 USC § 1252 (expanding grounds of mandatory detention to include other specified categories of removal); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 303(a), Pub L No 104-208, 110 Stat 3009, 3009-585, amending INA § 236(c), codified as amended at 8 USC § 1226(c) (same); INA § 237(a)(2)(A)(ii), 8 USC § 1227(a)(2)(A)(ii) (“Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude . . . is deportable.”).

⁵³ “Arriving aliens” may be released on parole, but denials of parole are not reviewable by immigration judges. INA § 254, 8 USC § 1155; 8 CFR § 1003.19(h)(2)(i)(B). See also note 45.

⁵⁴ For a ninety-day removal period following a final removal order, the government must detain a noncitizen. INA § 241(a)(2), 8 USC § 1231(a)(2) (ordering the attorney general not to release noncitizens “during the removal period”). If a noncitizen has not yet been deported within six months of a final removal order, the agency is required to conduct post-order custody reviews to determine if continued detention is justified. See *Zadvydas*, 533 US at 690 (finding that the indefinite detention of noncitizens raises many constitutional issues). The custody review process has been criticized as ineffective. See General Accounting Office (GAO), *Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434, 11 (May 2004), online at <http://www.gao.gov/assets/250/242498.pdf> (visited Mar 3, 2013) (noting several logistical problems with the custody removal procedures of DHS).

⁵⁵ Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 Harv L Rev 1422, 1438–46 (2011) (describing principal-agent control strategies). See also Sean Gailmard, *Discretion Rather Than Rules: Choice of Instruments to Control Bureaucratic Policy Making*, 17 Polit Analysis 25, 30–38 (2009); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 Admin L Rev 429, 479–87 (1999).

⁵⁶ Stephenson, 124 Harv L Rev at 1440 (cited in note 55); Gailmard, 17 Polit Analysis at 26–28 (cited in note 55).

as an ineffectual agent, unable to identify removable noncitizens, let alone deport them.⁵⁷ Nor did they trust the judgment of the agency to make decisions about bond.⁵⁸ Empirical studies indicated that over 20 percent of nondetained “criminal aliens”—including individuals whom INS released on bond or declined to detain at all—failed to appear for deportation hearings.⁵⁹ The costs to the system were described as threefold: financial costs, displacement costs due to these noncitizens “effectively taking immigration opportunities that might otherwise be extended to others,” and costs associated with any recidivism by noncitizens who are not removed.⁶⁰ As a result, some lawmakers concluded “that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country.”⁶¹ Presented with statistics that INS was failing to assess flight risk and danger with sufficient accuracy, members of Congress opted to err on the side of overdetection, significantly narrowing the discretionary window for agency action.⁶²

As scholars have noted, however, such control strategies are imperfect and costly.⁶³ To be sure, the mandatory detention of noncitizens pending their removal proceedings will all but ensure the deportation of noncitizens whom the government orders removed, thus limiting Type II error.⁶⁴ However, detention also imposes significant costs, with little or none of its intended benefits, to the extent that it covers individuals whom the government ultimately decides not to remove (individuals who are granted relief from removal, for example) or who do not pose a

⁵⁷ See, for example, *Demore*, 538 US at 518. DHS is now responsible for the detention authority that INS previously possessed.

⁵⁸ See, for example, *id* at 519.

⁵⁹ *Id* at 519 & n 4, citing *Criminal Aliens in the United States*, S Rep No 104-48, 104th Cong, 1st Sess 2 (1995) (discussing appearance rates for “criminal aliens” released pending their removal proceedings).

⁶⁰ *Demore*, 538 US at 518–19, quoting S Rep No 104-249 at 7 (cited in note 30) (noting the various costs of an agency’s inability to remove deportable noncitizens).

⁶¹ See *Demore*, 538 US at 521, citing *Hearing on HR 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 101st Cong, 1st Sess 52–54 (1989) and S Rep No 104-48 at 32 (cited in note 59) (describing lawmakers’ rationale for the legislative expansion of mandatory detention).

⁶² See Stephenson, 124 Harv L Rev at 1440–42 (cited in note 55); Gailmard, 17 Polit Analysis at 26–28 (cited in note 55).

⁶³ See, for example, Stephenson, 124 Harv L Rev at 1441 (cited in note 55) (“The specification of a discretionary window is a relatively crude control strategy, as it entails delegating unconstrained discretion within a range and totally prohibiting anything outside that range.”).

⁶⁴ Legomsky, 30 U Miami Int-Am L Rev at 545–46 (cited in note 8) (noting that mandatory detention eliminates false negatives).

flight risk or danger to the community. Mandatory detention policies tend to increase Type I errors by detaining those individuals even though the costs of detention outweigh the costs of release in their cases.⁶⁵ Removing all discretion from the agency to make detention decisions is thus an extreme measure and a poor fit for imposing Congress's stated policy goals within constitutional constraints.

An alternative approach would be for Congress to permit discretion but impose "enactment costs" to make certain types of policy choices more favorable than others for the agent.⁶⁶ For example, rather than prohibit the agency from collecting any information with respect to flight risk and danger for a large class of noncitizens, Congress could have instead reined in the agency's discretion through procedural requirements, more exacting review, or other mechanisms to ensure that the agency's use of discretion aligned more closely with Congress's goals.⁶⁷ By forgoing these more nuanced options, Congress designed a system that incentivizes the agency to ignore information about flight risk and danger for a broad class of noncitizens, who in fact may or may not merit detention.

Undoubtedly, Congress may have felt that any alternatives short of mandatory detention would be insufficient to align the agency's preferences with its own. Given the statistics indicating significant nonappearance rates where discretion was exercised, Congress had reason to believe that the agency was incapable of exercising discretion appropriately. However, a closer examination of the information before Congress reveals a wider range of institutional choices.

⁶⁵ See *id.* at 546–47 (noting that individualized adjudications avoid false positives). Lawmakers may prefer Type I errors over Type II errors in this context, however, given political considerations. Lawmakers may fear the notoriety of releasing noncitizens who later abscond or commit additional crimes prior to their removal more than any pushback they may receive for Type II errors where a noncitizen is unnecessarily detained. Professors Peggy Cooper Davis and Gautam Barua have discussed this phenomenon in the context of child welfare policy. See Peggy Cooper Davis and Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U Chi L Sch Roundtable 139, 141–42 (1995) (noting the tendency of child welfare protective services to remove children from their homes, sometimes unnecessarily, due to political considerations).

⁶⁶ See Stephenson, 124 Harv L Rev at 1442 (cited in note 55) (describing the use of enactment costs to influence agency preferences).

⁶⁷ See *id.* at 1441–42 (discussing how legislatures may employ a system of variable rewards and penalties to influence an administrative agency's choices and how enactment cost mechanisms are "at least as good for the principal as is fixing a discretionary window, and usually better").

First, the nonappearance rates that Congress found so problematic do not necessarily point to a misalignment in policy preferences between Congress and the agency. Rather, the reason that the agency exercised discretion to release many individuals appears to be driven by resource allocation.⁶⁸ Studies indicated that INS's initial custody decisions—including whether to detain at all or how much bond to set—were based in large part on inadequate funding and lack of bed space, rather than an individualized assessment of risk of flight or danger to the community.⁶⁹ Rather than depriving the agency of its authority to release individuals, Congress could have imposed evidentiary constraints that proscribe the agency's ability to consider funding or bed space in its custody determinations and provided sufficient funding and bed space to respond to any resource deficiencies.⁷⁰

Second, to the extent that the agency was mishandling its discretionary authority to release detainees, the nonappearance statistics may have masked the source of the problem. Although often conflated, discretionary detention authority operates at two distinct stages during the commencement of removal pro-

⁶⁸ See Taylor, *Judicial Deference to Congressional Folly* at 348 (cited in note 22):

It was not a lack of legal authority to keep noncitizens in custody, nor a history of making poor judgments about flight risk or dangerousness, that caused the INS to have such a weak record of deporting criminal offenders. Rather, the agency lacked the bed space to hold almost anyone being deported from the interior, and had no system in place to keep track of those who remained at liberty pending deportation or after a final order was entered against them.

⁶⁹ In *Demore*, Justice David Souter noted that nonappearance rates prior to mandatory detention

tell[] us nothing about flight risk at all because . . . the INS was making its custody determinations not on the ground of likelihood of flight or dangerousness, but “in large part, according to the number of beds available in a particular region.” . . . The desperate lack of detention space likewise had led the INS to set bonds too low, because “if the alien is not able to pay, the alien cannot be released, and a needed bed space is lost.”

Demore, 538 US at 563 (Souter concurring in part and dissenting in part), quoting S Rep No 104-48 at 23 (cited in note 59) (“[R]elease determinations are made by the INS in large part, according to the number of beds available in a particular region.”) and *Immigration in the National Interest Act of 1995*, HR Rep No 104-469, Part 1, 104th Cong, 2d Sess 124 (1996).

⁷⁰ Congress has rapidly increased funding for detention beds over the last several years. See *Math of Immigration Detention* at 2 (cited in note 41). The increases have at times exceeded the amount that DHS itself has requested to cover its detention needs. *Id.* at 1. This may be due in part to lobbying efforts by entities that profit from detention. See *id.* at 4 (explaining the correctional industry's interest in maintaining and increasing the number of immigration detainees); Stephen Raher, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 U Richmond J L & Pub Interest 209, 224–28 (2010) (describing how private prison companies influence legislative and contracting processes for private gain).

ceedings. First, immigration officials must make an initial decision whether to detain an individual and, if so, what amount of bond—if any—to set for that individual to secure her release.⁷¹ Second, an individual may seek a bond hearing from an administrative immigration judge to review the agency's decision.⁷² Much of the criticism of the agency's use of its discretionary authority involves the first stage of decision making: decisions by INS not to detain individuals or to release them on low bonds due to their lack of resources for detention.⁷³ Thus, even if Congress chose to constrain the agency's initial authority, Congress could have retained immigration judges' authority to conduct bond hearings where flight risk and danger could be considered and decisions based on impermissible factors would be subject to review. The nonappearance statistics—which did not clearly distinguish between noncitizens never detained by INS, noncitizens released by INS on a low bond, or noncitizens released by an immigration judge after a bond hearing—reveal little if anything about the effectiveness of bond hearings.⁷⁴

Third, to the extent that Congress was attempting to improve INS's ultimate success in deporting individuals in light of high nonappearance rates, Congress had a choice in addressing other inefficiencies in the system. Congressional reports leading to the implementation of mandatory detention repeatedly referred to the agency's ineffectual identification and record-keeping systems.⁷⁵ Studies have indicated that, in a significant percentage of cases, INS failed to notify noncitizens of the pend-

⁷¹ 8 CFR § 1236.1(c)(8) (authorizing officials to exercise discretion to release certain noncitizens).

⁷² 8 CFR § 1236.1(d) (authorizing noncitizens to appeal custody determinations to an immigration judge).

⁷³ See notes 57–62 and accompanying text.

⁷⁴ See *Demore*, 538 US at 564 (Souter concurring in part and dissenting in part). One study of bond rates in Chicago, Illinois, attempted to examine the role of INS vis-à-vis immigration judges in setting bond, finding that immigration judges lowered bond rates in about 95 percent of all cases where a detained noncitizen sought a bond redetermination hearing. Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 San Diego L Rev 347, 369 (1987). The study found about 95 percent of noncitizens released on bond by an immigration judge appeared at their next hearing. *Id.* at 379. However, only 63–80 percent of individuals in the study who were released following a bond redetermination hearing complied with orders to voluntarily depart or to surrender for deportation. *Id.* at 390. The author of the study recommended further analysis to determine the relationship of bond amounts with compliance rates. *Id.* at 407–08.

⁷⁵ See *Demore*, 538 US at 518 (“Congress’ investigations showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country.”), citing S Rep No 104-48 at 1 (cited in note 59).

ing removal proceedings against them.⁷⁶ Congress could have taken steps to enhance the agency's ability to identify and notify removable noncitizens of their hearings, rather than resorting to mandatory detention as its primary solution to a more nuanced problem.

Similarly, Congress did not consider alternative methods of securing the appearance of noncitizens for removal hearings, including evidence-based community supervision programs. At the time that Congress was depriving INS of its discretionary authority to release a large subset of noncitizens, INS was examining how it might improve its monitoring capacity.⁷⁷ The agency contracted with the Vera Institute of Justice to develop the "Appearance Assistance Program," an alternative to traditional detention that ensured community supervision and appearance of noncitizens for the removal process at significantly lower costs.⁷⁸ Congress implemented mandatory detention before giving the agency an opportunity to implement these alternative methods on a larger scale.

Finally, to the extent Congress felt it necessary to rely on mandatory detention despite the alternatives, Congress had a choice in how it defined the class of individuals subject to mandatory detention. When it first enacted mandatory detention in 1988, it created a new class of noncitizens—individuals convicted of "aggravated felonies"—who faced the most severe immigration penalties.⁷⁹ Congress gradually eliminated this class of im-

⁷⁶ See GAO, *Immigration Control: The Central Address File Needs to Be More Accurate*, GAO/GGD-92-20, 3, 7 (Jan 1992), online at <http://www.gao.gov/assets/220/215432.pdf> (visited Mar 3, 2013) (estimating that INS fails to notify approximately 12 percent of noncitizens of their hearings because of inaccuracies in recording the names and addresses of the noncitizens and/or their representatives); GAO, *Immigration Control: Deporting and Excluding Aliens from the United States*, GAO/GGD-90-18, 3, 22–38 (Oct 1989), online at <http://www.gao.gov/assets/150/148384.pdf> (visited Mar 3, 2013) ("[N]on-appearance can be attributed, in part, to aliens not being notified by the INS of the time and place of their hearings.").

⁷⁷ See Taylor, *Judicial Deference to Congressional Folly* at 351–54 (cited in note 22) (discussing INS's exploration of monitoring improvements as Congress debated detention policies).

⁷⁸ See *id.* According to an evaluation of the Appearance Assistance Program, 91 percent of all participants (and 94 percent of "criminal alien" participants) in the intensive supervision program appeared for their hearings. See Eileen Sullivan, et al, 1 *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* ii, 3 (Vera Institute of Justice Aug 1, 2000), online at http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf (visited Mar 3, 2013).

⁷⁹ See Anti-Drug Abuse Act of 1988 § 7343(a)(4), 102 Stat at 4470, amending INA § 242(a)(2), codified at 8 USC § 1252(a)(2) (1992) (granting the attorney general the power to hold noncitizens who have been convicted of aggravated felonies in custody without bond).

migrants from eligibility for most forms of relief from removal.⁸⁰ Thus, to the extent that the primary purpose of mandatory detention was to ensure the deportation of individuals who must be swiftly removed, narrowly defining the scope of deportation to fit this class would serve Congress's purpose. However, in 1996, Congress vastly expanded the class of individuals who are subject to mandatory detention, including individuals who by law remain eligible for relief from removal.⁸¹ People who are eligible for relief from removal have a stronger incentive to appear in immigration court to resolve their cases.⁸² Narrowing the class of individuals to only those noncitizens who are most likely to be ineligible for relief would avoid overdeterrence.

By failing to recognize the spectrum of institutional design choices it had at its disposal, Congress opted for a relatively extreme change to detention policy to the detriment of more nuanced reforms. Moreover, by opting for mandatory detention, Congress has diminished the administrative agency's incentive to gather information by which to make optimal detention deci-

⁸⁰ See notes 49–51 and accompanying text.

⁸¹ See AEDPA § 440(c), 110 Stat at 1277, amending INA § 242(a)(2), codified as amended at 8 USC § 1252(a)(2) (expanding the grounds of removal triggering mandatory detention); IIRIRA § 303(a), 110 Stat at 3009-585, amending INA § 236(c), codified as amended at 8 USC § 1226(c) (same). Congress's expanded list of offenses triggering mandatory detention corresponded to the list of offenses for which Congress initially eliminated most discretionary relief from removal in AEDPA. Compare AEDPA § 440(c), 110 Stat at 1277 (referencing several criminal grounds of removal in addition to the "aggravated felony" ground), with IIRIRA § 306, 110 Stat at 3009-607 (providing a complete rewrite of INA § 242) and IIRIRA § 303(a), 110 Stat at 2009-585 (reenacting the provisions from AEDPA § 440(c) that IIRIRA § 306 repealed as INA § 236(c)). Congress subsequently restored relief to lawful permanent residents, except for those convicted of aggravated felonies. See INA § 240A(a), 8 USC § 1229b(a) (restricting permanent residents who have been convicted of an "aggravated felony" from cancellation of removal). It failed to make a corresponding change to the mandatory detention statute. See INA § 236(c)(1), 8 USC § 1226(c)(1). As a result, many individuals who are eligible for relief from removal are nonetheless ineligible for release from detention pending their removal proceedings.

⁸² See Bradley B. Baniyas, *A "Substantial Argument" against Prolonged, Pre-removal Mandatory Detention*, 11 Rutgers Race & L Rev 31, 61–64 (2009) (arguing that noncitizens should not be subject to mandatory detention if they have a substantial argument against their deportability). The agency's own process for reviewing whether a noncitizen is properly subject to mandatory detention does not take eligibility for relief from removal into account and is limited to determining whether the government is "substantially unlikely to prevail" on the charges subjecting the noncitizen to mandatory detention, a standard which is highly skewed against the detainee. *In re Joseph*, 22 I&N Dec 799, 807 (BIA 1999); Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, Georgetown Immig L J *3, 42–43 (forthcoming 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856758 (visited Mar 3, 2013). Such a narrow inquiry and skewed burden of proof do little to ensure that the agency is making optimal decisions regarding the proper application of the mandatory detention statute.

sions.⁸³ As will be discussed in further detail below, this hampers the government's ability to explore reforms and experiment to develop better models, including alternatives to detention.

B. Bond Determinations

For most individuals in removal proceedings who are not subject to "mandatory detention," Congress preserved the authority of the federal immigration agency to decide whether to detain or release them on bond or conditional parole.⁸⁴ For most of the history of immigration law, such discretionary authority involved a presumption against detention, with the burden placed on the government. In *Matter of Patel*,⁸⁵ the Board of Immigration Appeals explained the general rule that "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk."⁸⁶ Noncitizens who were detained at high bond or denied bond in the agency's discretion were able to seek a bond redetermination hearing by an immigration judge. At such a hearing, the government would be required to demonstrate sufficient flight risk or danger to justify its bond decision.⁸⁷

Following the 1996 immigration law reforms, the INS proposed a rule change to shift the burden in bond cases from the government to the noncitizen.⁸⁸ The resulting regulation provides that

[a]ny officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not [subject to mandatory detention] *provided* that the alien must demonstrate to the satisfaction of the officer that such release would not

⁸³ See Stephenson, 124 Harv L Rev at 1444 (cited in note 55) (describing how ex ante substantive and procedural constraints on an agent's discretion reduces the agent's incentive to acquire better information about its choices).

⁸⁴ See INA § 236(a), 8 USC § 1226(a) (granting the attorney general the authority to arrest and detain noncitizens as well as to release them on bond or conditional parole).

⁸⁵ 15 I&N Dec 666 (BIA 1976).

⁸⁶ *Id.* at 666 (citations omitted) (explaining the limited circumstances in which noncitizens should be detained).

⁸⁷ *Id.* at 666–67 (noting the lack of evidence establishing that a noncitizen is a flight risk or danger to the community).

⁸⁸ Proposed Rule: Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed Reg 443, 483 (1997) (proposing changes to the burden of proof for contesting immigration detention).

pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.⁸⁹

In responding to comments that the rule would represent “a reversal of long established procedure that provides that a non-criminal alien is presumptively eligible for release,” INS explained that it “has been strongly criticized for its failure to remove aliens who are not detained” and that the “mandate of Congress, as evidenced by budget enhancements and other legislation, is increased detention to ensure removal.”⁹⁰

The shifting of evidentiary burdens marks another institutional design choice that may have profound effects on the government’s incentive to acquire information in reaching optimal detention decisions. As is true in other contexts, the placement of the burden and the amount of evidence required affects the incentives of the parties to gather necessary evidence. For example, in the criminal context, the placement of a high burden of proof upon the government strengthens the government’s incentive to acquire and use information to meet its burden—particularly because the default option (that the defendant is acquitted) in the absence of this effort is, at least *ex ante*, undesirable to the government.⁹¹

The shift in burden for discretionary detention cases is therefore problematic. It affects detention decisions at both stages of the process. It makes it easier for the agency to detain individuals in the first place because the agency has little incentive to gather information prior to the arrest of an individual for removal proceedings and the noncitizen has no ability to present favorable evidence prior to the agency’s decision. At a subsequent bond hearing, the agency has little incentive to produce evidence that may be relevant to a more optimal bond determination. Presumably, its preference is to maintain the status quo based on its initial (albeit potentially flawed) detention deci-

⁸⁹ 8 CFR § 1236.1(c)(8) (placing the burden on noncitizens to prove that they are not dangers to the community or flight risks).

⁹⁰ Final Rule: Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed Reg 10312, 10323 (1997).

⁹¹ See Stephenson, 124 Harv L Rev at 1448 (cited in note 55) (“A prosecutor who believes a defendant to be guilty is more likely to invest heavily in evidence gathering if she knows she must prove her case beyond a reasonable doubt than if she knows she must prove her case only by a preponderance of the evidence.”).

sion.⁹² If anything, it may choose to produce additional adverse evidence—such as criminal records or immigration history documents—as part of its pursuit of the removal charge itself. This leaves the noncitizen with the burden of establishing positive equities in light of a baseline record that may already be skewed against her.

If a noncitizen and the agency had equal access to favorable equities, the placement of the evidentiary burden arguably would have little effect on the outcome of a bond hearing. In fact, one might assume that a noncitizen would have better access to evidence of positive equities on flight risk or danger to the community, such as evidence of length of residency, family ties, and employment history.⁹³ However, detention itself makes such information acquisition relatively difficult for the noncitizen. Detained noncitizens have no right to government-appointed counsel.⁹⁴ Detained noncitizens may be held in any facility across the United States, and many are transferred far from their families and communities.⁹⁵ An unrepresented detainee's ability to gather sufficient evidence to meet her burden of proof may be quite limited. Given these realities, one may expect that a burden-shifting scheme that favors the agency over the noncitizen will lead to suboptimal, *ex post* detention outcomes that maintain the status quo of detention.

Other institutional rules also hinder the agency's ability to acquire and use information to make optimal detention decisions.⁹⁶ For example, current rules constrain the ability of the agency to release detainees under nonfinancial conditions or to consider a detainee's financial ability in setting bond. By statute, Congress authorizes the attorney general to release a detained individual on bond "of at least \$1,500" *or* "conditional parole."⁹⁷ The Department of Homeland Security (DHS) is

⁹² See Davis and Barua, 2 U Chi L Sch Roundtable at 148–50 (cited in note 65) (discussing "status quo bias" and empirical studies that indicate that decision makers may prefer not to disrupt the status quo).

⁹³ See *In re Guerra*, 24 I&N Dec 37, 40 (BIA 2006) (listing the factors an immigration judge may consider in assessing bond).

⁹⁴ See INA § 240(b)(4)(A), 8 USC § 1229a(b)(4)(A) (providing a noncitizen with "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"). See also INA § 292, 8 USC § 1362.

⁹⁵ See note 39.

⁹⁶ See Stephenson, 124 Harv L Rev at 1449 (cited in note 55) (noting that the exclusion of otherwise probative evidence is another institutional rule that principals use to constrain agents).

⁹⁷ INA § 236(a), 8 USC § 1226(a) (setting out procedures for the arrest, detention, and release of noncitizens).

therefore statutorily prohibited from setting a bond of less than \$1,500, even though it has the discretion not to detain the individual in the first instance or to release a detained individual through conditional parole.⁹⁸ In reviewing bond decisions by DHS, immigration judges also have interpreted this rule as prohibiting them from setting a bond lower than \$1,500.⁹⁹ However, many immigration judges constrain themselves even further by interpreting the law as prohibiting them from releasing noncitizens on any conditions other than bond.¹⁰⁰ Some immigration judges, for example, view themselves as unable to release individuals on their own recognizance—even when presented with evidence that the noncitizen, while lacking flight risk or dangerousness, is simply unable to afford a bond.¹⁰¹

There is little evidence to suggest that such restrictions are necessary to secure appearance in court or protect public safety. In the criminal context, for example, financial ability is well established as a factor in the determination of bail and officials retain broad authority to release people on recognizance.¹⁰² While excessive bail rates have come under fire in both the criminal and immigration systems, a recent New York-based study found that defendants in criminal court were seventy-five times more likely to be released on their own recognizance than noncitizens

⁹⁸ See *Matter of Garcia-Garcia*, 25 I&N Dec 93, 97 (BIA 2009) (“The plain language of section 236(a) gives the Attorney General the authority, which is shared with the Secretary of Homeland Security, to place conditions on an alien’s release from custody when setting a monetary bond of at least \$1,500.”).

⁹⁹ See Executive Office for Immigration Review, *Immigration Judge Benchbook: Bond Guide* ¶ I.E.2 (DOJ 2009), online at <http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm> (visited Mar 3, 2013) (“For non-mandatory custody aliens, Immigration Judges can: (1) continue to detain; or (2) release on bond of not less than \$1,500.00.”), citing INA § 236(a), 8 USC § 1226(a).

¹⁰⁰ See Executive Office for Immigration Review, *Immigration Judge Benchbook* at ¶ I.E.2id (cited in note 99) (stating that immigration judges may release noncitizens who are not subject to mandatory detention on bond but “[s]ection 236(a) of the Act does not provide for the release of an alien on the alien’s own recognizance”).

¹⁰¹ Unpublished agency decisions have held that the statute “does not provide any authority for releasing an alien on his or her own recognizance.” *In re Muhammed Ghabboun*, 2004 WL 1739018, *1 (BIA) (dismissing a noncitizen’s appeal of the denial of his request to be released from immigration detention on his own recognizance). Some decisions indicate that release on recognizance may be possible if the immigration judge requires sufficient supervisory conditions. See, for example, *In re Martin Mireles-Nevarez*, 2004 WL 848429, *1–2 (BIA) (“In releasing the respondent on his own recognizance *without placing any conditions* on the respondent to insure his appearance at future proceedings, the Immigration Judge did not comply with section 236(a)(2) of the Immigration and Nationality Act.”) (emphasis added).

¹⁰² See 18 USC § 3142(b), (g)(3) (allowing federal criminal defendants to be released on bond pending trial and requiring a consideration of financial resources as a factor in determining bond).

in immigration detention and that bail rates in the criminal justice system tended to be much lower than the bond rates in the immigration system.¹⁰³ As a result of high bond rates, 55 percent of noncitizens apprehended in New York for removal proceedings who received a bond determination nonetheless remain detained because of an inability to pay.¹⁰⁴ The more restrictive rules governing bond in immigration proceedings thus appear to be leading to high rates of detention among those eligible for release, with little evidence that such detention is necessary to secure appearance in court in the face of less restrictive—and less costly—alternatives.

III. IMMIGRATION DETENTION REFORM

As described above, immigration detention policy has undergone significant changes in the last several years to address a perceived principal-agent problem regarding INS's release of noncitizens who pose a flight risk or danger to the community. Unfortunately, these changes have resulted in legal and institutional rules that prevent the agency from collecting and utilizing the information necessary to reach optimal detention decisions. As a result, the system is now characterized by overdetection, with a significant percentage of detainees never receiving an individualized assessment of their flight risk or danger to the community.

Current agency-led proposals for reform do not adequately address this imbalance.¹⁰⁵ In 2009, DHS announced an overhaul of the immigration detention system.¹⁰⁶ Its proposed reforms focus primarily on improving detention conditions, in recognition of the overly penal nature of the facilities in which the majority of noncitizen detainees are currently held.¹⁰⁷ As scholars have

¹⁰³ See *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City* 2, 8–10 (NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, and Families for Freedom July 23, 2012), online at <http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf> (visited Mar 3, 2013).

¹⁰⁴ See *id.* at 11.

¹⁰⁵ See Kalhan, 110 Colum L Rev Sidebar at 53–54 (cited in note 7) (noting that the government has declined to undertake new reforms, such as exercising parole authority more often and interpreting custody mandates not to apply to particular classes of noncitizens, that would alleviate the problem of overdetection).

¹⁰⁶ See DHS Press Office, *Fact Sheet: ICE Detention Reform; Principles and Next Steps* *1–3 (DHS Oct 6, 2009), online at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf (visited Mar 3, 2013).

¹⁰⁷ See Schriro, *Immigration Detention* at 3 (cited in note 5) (outlining recommendations for improving the conditions of immigration detention facilities).

observed, however, the reforms do little to address the problem of overdetention.¹⁰⁸ The reforms leave mandatory detention, and the burden and evidentiary schemes for bond decisions, essentially untouched.¹⁰⁹ Congress itself has not acted in this area, except to provide additional funding each year for more detention beds.

The failure to change these legal and institutional rules has a profound effect on the agency's incentive to engage in meaningful research, experimentation, and reform.¹¹⁰ The agency itself has little incentive to assess whether mandatory detention, as it is currently applied, covers individuals who are not flight risks or dangers to the community. Conducting such research provides no direct payoff to the agency, as the additional information would have no effect on the range of policy choices that the agency is authorized to use. Similarly, the agency has little incentive to experiment with varying burdens in the context of discretionary bond decisions. If anything, the increasing funding stream for detention helps to ensure that the agency will prefer rules that favor detention over release.

However, recent agency-led reforms include two important proposals that, if expanded and prioritized, could change incentives or produce the information necessary to change incentives. First, DHS has recognized the importance of funding and studying alternatives to (or noncustodial forms of) detention, such as electronic monitoring and government or community supervision programs, in light of the success of the Appearance Assistance Program.¹¹¹ While DHS's current proposals and funding streams are limited, they are a marked improvement over the resources allocated to such alternatives in the past. However, current re-

¹⁰⁸ See, for example, Kalhan, 110 Colum L Rev Sidebar at 51–54 (cited in note 7) (“Though ambitious and important, the Obama Administration’s proposals leave intact a range of practices that contribute to detention’s excessiveness for many noncitizens.”).

¹⁰⁹ A repeal of mandatory detention would require an act of Congress. However, DHS has the power to scale back the scope of mandatory detention by changing the way it interprets the law. See *id.* at 53–54 (proposing that the government could interpret mandatory custody provisions so as to not apply to certain classes of noncitizens); Heeren, 45 Harv CR–CL L Rev at 626–33 (cited in note 7) (suggesting that the government could interpret mandatory detention to apply only for the first six months of detention and to define “custody” to include electronic monitoring); *Issue Brief* at 1–2 (cited in note 4) (describing how the government’s current interpretation of mandatory custody statutes is excessive in light of the Supreme Court case law and the statutory language itself).

¹¹⁰ See Stephenson, 124 Harv L Rev at 1444 (cited in note 55) (describing how ex ante substantive and procedural constraints on an agent’s discretion reduces the agent’s incentive to acquire better information about its choices).

¹¹¹ See notes 41, 77–78 and accompanying text (discussing the government’s attempts to implement alternatives to traditional immigration detention).

search may have limited application to the overall detainee population because people subject to mandatory detention are not able to participate in these pilot projects as currently designed,¹¹² and many people who might be otherwise eligible to participate remain detained due to high bond requirements. Nonetheless, the funneling of additional resources into these efforts will hopefully incentivize greater use and experimentation with alternatives to detention for those who are eligible for release under current law and practice.

Second, the government's proposed reforms include the development of a risk assessment tool that, if broadly applied, would narrow the information gap regarding flight risk and danger for those in removal proceedings.¹¹³ Borrowing from the criminal context, the risk assessment tool aims to use objective criteria to guide the agency's detention decisions.¹¹⁴ It also systematizes the information collected on each individual upon their arrest, rather than relying on individual immigration officials to decide what information is relevant and which details to record.¹¹⁵ It assigns numerical weight to a specified list of factors that the agency can use to quantify flight risk and danger for purposes of bond, supervision, and other release determinations.¹¹⁶

The implementation of a risk assessment tool presents an important step forward in ensuring the acquisition of information necessary to determine the optimal scope of detention. Presumably, the agency will be able to use the risk assessment tool to make better decisions about the flight risk and danger posed by a noncitizen pending removal proceedings, and thus it will be able to exercise its discretion to release individuals from detention on an appropriate level of bond or not to detain the in-

¹¹² Advocates have urged DHS to interpret the "custody" requirement underlying mandatory detention to include intensive forms of supervision short of detention, such as electronic monitoring and home confinement. See, for example, Nicole D. Finnie, Roman Guzik, and Jennifer J. Pinales, *Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention* 24–25 (Rutgers School of Law–Newark Immigrant Rights Clinic and American Friends Service Committee July 2012), online at <http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf> (visited Mar 3, 2013) (arguing that electronic monitoring is a form of "custody" in the immigration detention context); Heeren, 45 Harv CR–CL L Rev at 632 (cited in note 7) (same). If DHS were to adopt this position, its opportunities for research and experimentation with alternatives to detention would increase significantly. See Heeren, 45 CR–CL L Rev at 634.

¹¹³ See *Unlocking Liberty* at 20–22 (cited in note 33).

¹¹⁴ See id. at 20 (explaining that objective criteria will be used to guide a variety of decisions, such as whether a detained noncitizen will be released and what type of supervision may be required).

¹¹⁵ See id.

¹¹⁶ See id.

dividual in the first instance. Without changes to mandatory detention rules, however, the agency will nonetheless be prevented from effectively utilizing this information to effectuate releases in a large subset of cases. Moreover, it is unclear what impact the risk assessment tool will have on the bond hearing process that follows the agency's initial bond determination. Similarly, it does not appear to affect the initial decision to arrest a noncitizen, as it is designed to apply to noncitizens who are already in Immigration and Customs Enforcement (ICE) custody.¹¹⁷ Thus, its impact is limited. Where it does apply, its effectiveness will undoubtedly turn on which criteria are used and how these criteria are weighted. In reviewing an early version of the tool, the United Nations High Commissioner for Refugees expressed concern that the tool "risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones" and that its methodology "appears heavily weighted in favour of detention."¹¹⁸

Nonetheless, the risk assessment tool represents the first comprehensive attempt to use an evidence-based model to assess flight risk and danger. The data could be used for testing different theories on flight risk and danger, and how much bond and/or conditions of supervision are necessary to offset such risk. In this way, reliance on risk assessment tools may encourage experimentation and expansion of alternatives to detention.¹¹⁹ Moreover, if DHS applies the risk assessment tool to collect flight risk and danger information in all cases—including mandatory detention cases—DHS will begin to have an empirical gauge to measure overdetention. Even if DHS cannot use the risk assessment information to release individuals subject to mandatory detention, DHS—and Congress—may use the information to reconsider the breadth of the mandatory detention statute.

¹¹⁷ See *Unlocking Liberty* at 21 (cited in note 33) (explaining the risk assessment tool as applying after noncitizens have been arrested and when decisions regarding whether and how to continue to detain them must be made).

¹¹⁸ Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* 81 (United Nations High Commissioner for Refugees Apr 2011), online at <http://www.unhcr.org/refworld/pdfid/4dc935fd2.pdf> (visited Mar 3, 2013) (noting that while the risk assessment tool is an improvement over past US practices it nonetheless may be problematic for refugees and other migrants).

¹¹⁹ See *id.*

CONCLUSION

In the end, meaningful reform does not appear possible if institutional rules prevent or hinder the agency from both collecting and utilizing accurate, evidence-based data regarding flight risk and danger to make detention decisions. Where the rules create a presumption of detention, or bar decision making altogether, the agency will have little incentive to research whether the rules lead to optimal detention decisions. Given the high costs of overdetention due to Type I error, the federal government should consider more radical reforms aimed at deossifying the detention decision-making process. In order to free the agency from the current constraints on information acquisition and use, and to encourage experimentation with more expansive reforms, Congress should eliminate or narrow the scope of mandatory detention in favor of a more structured, individualized inquiry. Such an inquiry must be governed by balanced rules of evidence and a heightened burden on the government to incentivize the collection of information necessary to make appropriate detention decisions.