PAY UP OR ELSE: IMMIGRATION BOND AND HOW A SMALL PROCEDURAL CHANGE COULD LIBERATE IMMIGRANT DETAINEES

Abstract: On any given day, thousands of immigrants are detained while they await their day in court. While there are procedures in place that would allow them to be released on bond, many immigrants who are granted bond remain detained due to their inability to pay. This is partially because immigration judges are not required to consider an immigrant's financial situation when setting bond. A recent decision from the Ninth Circuit requires immigration judges to consider an immigrant's financial situation when setting bond. This decision has both policy and legal merit and could result in the liberation of thousands of immigrants.

INTRODUCTION

Xochitl Hernandez, a non-legal Mexican immigrant and mother of five, was detained in Los Angeles while visiting a friend in February of 2016.[1] Never charged with a crime, she was transferred from the custody of the Los Angeles Police Department to the Department of Homeland Security ("DHS").[2] Appearing before the immigration court *pro se*, Ms. Hernandez successfully convinced an Immigration Judge ("IJ") that she should be released on bond.[3] Without considering Ms. Hernandez's financial situation, the IJ set her bond at sixty-thousand dollars, which she was unable to afford.[4] As a result, Ms. Hernandez remained detained in an immigration detention center for a substantial portion of her immigration proceedings.[5]

---

[1] *See* Hernandez v. Sessions (*Hernandez II)*, 872 F.3d 976, 983–84 (9th Cir. 2017) (challenging the government's detention policies). Ms. Hernandez was the named plaintiff of this suit, which was a class action. *See id.* at 983–85.

[2] *Id.* at 984.

[3] *See id.* Immigration Judges ("IJs") are administrative judges appointed by the Attorney General and are responsible for presiding over immigration proceedings. *Immigration Judge*, U.S. CUSTOMS & IMMIGRATION SERVS., https://www.uscis.gov/tools/glossary/immigration-judge [https://perma.cc/VSC5-93JB]; *see Pro Se*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *pro se* as representing oneself without a lawyer).

[4] *Hernandez II*, 872 F.3d at 984.

[5] *See id.* Immigration detention centers vary, though some reports have outlined inhumane conditions with immigrants reporting being denied access to healthcare, or safe food. *See* Elaine Murphy, *What Really Happens Inside American Immigration Facilities and Detention Centers*, TEEN VOGUE (Jan. 14, 2019), https://www.teenvogue.com/story/inside-american-immigration-facilities-and-detention-centers [https://perma.cc/59RV-WB53] (detailing immigrant reports of subpar detention conditions); *see also* OFFICE OF THE INSPECTOR GEN., DEP'T HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (2017) (detailing health and safety issues at various immigration detention centers).

The federal government has long struggled with the question of what to do about immigrants who illegally enter the United States.[6] This debate has often focused, at least for the general public and the media, on when an immigrant should be deported, and under what circumstances they should be allowed to stay.[7] Immigration activists and lawyers confront a lesser known, but equally important, struggle: reforming the procedures of an immigration court system that they view as draconian.[8]

---

[6] *See generally* Kari Hong, Opinion, *My Great-Grandparents Weren't 'Illegal' When They Came to the U.S. They Would Be Now*, HUFFINGTON POST (Feb. 2, 2018), https://www.huffingtonpost.com/entry/opinion-hong-immigrants-iirira_us_5a734e0ae4b01ce33eb0b97b [https://perma.cc/GW2M-LE4H] (discussing the various influences that have impacted the development of immigration law). Throughout the statutes, regulations, and relevant case law, immigrants are often referred to as "aliens." *See, e.g.*, 8 U.S.C. § 1226(a) (2018) (providing that "an *alien* may be arrested" (emphasis added); Matter of Fatahi, 26 I. & N. Dec. 791, 791 (B.I.A. 2016) (stating "an *alien* who seeks a change in custody status . . .") (emphasis added); 8 C.F.R. § 1003.19 (2018) (providing "an *alien's* request for a subsequent bond proceeding . . .") (emphasis added). This term has been deemed by many as offensive. *See* Derek Hawkins, *The Long Struggle Over What to Call 'Undocumented Immigrants' or, as Trump Said in His Order, 'Illegal Aliens,'*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm_term=.bf460ea6daf0 [https://perma.cc/E43Q-XFBY] (discussing the debate over the term "alien"); Jose Antonio Vargas, Opinion, *I'm Not an 'Alien'*, L.A. TIMES (Aug. 13, 2015), http://www.latimes.com/opinion/op-ed/la-oe-0814-vargas-illegal-alien-20150813-story.html [https://perma.cc/5JGD-VF96] (discussing offensive connotations connected with the term "alien"). As such, throughout this Note, when possible, individuals in immigration proceedings are referred to as "immigrants" instead of "aliens." *See infra* notes 7–224 and accompanying text.

[7] *See generally* Ross Douthat, Opinion, *The Necessary Immigration Debate*, N.Y. TIMES (Feb. 3, 2018), https://www.nytimes.com/2018/02/03/opinion/sunday/necessary-immigration-debate.html [https://perma.cc/2XZE-CR9V] (discussing the various issues at play in the debate on immigration policy).

[8] *See generally* Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. TIMES (Sept. 28, 2017), http://www.latimes.com/projects/la-na-access-to-counsel-deportation/ [https://perma.cc/M5U4-NY9S] (discussing difficulties for detained immigrants located far away from big cities and public interest lawyers and the draconian nature of immigration detention facilities); Oliver Laughland, *Inside Trump's Secretive Immigration Court: Far from Scrutiny and Legal Aid*, THE GUARDIAN (June 7, 2017), https://www.theguardian.com/us-news/2017/jun/07/donald-trump-immigration-court-deportation-lasalle [https://perma.cc/V8LJ-JQKQ] (discussing procedural, structural, and technical flaws involved with an immigrant detention center located in La Salle, Louisiana); Maria Sacchetti, *In This Boston Court, Chains Are a Familiar Sound*, BOS. GLOBE (Aug. 29, 2016), https://www.bostonglobe.com/metro/2016/08/28/boston-immigration-court-chains-are-familiar-sound/Gzczn3WdHMgPiDFnqKF01L/story.html [https://perma.cc/CW8K-ZEUB] (discussing the practice of having immigrant detainees appear in court in chains). The practice of locating detention centers far away from big cities results in a shocking lack of representation in immigration proceedings. *See* Kim, *supra* (noting that in one survey, only 14% of detainees had secured counsel). Even when detained immigrants are housed in detention centers in big cities, some procedures implemented can be far outside of the norm for civil or even criminal proceedings. *Compare* Sacchetti, *supra* (discussing the practice of chaining the hands and feet of *all* detainees appearing before the Boston Immigration Court), *with* Illinois v. Allen, 397 U.S. 337 (1970) (finding that a judge *may* order a defendant bound on a case by case basis if necessary to maintain order in the courtroom).

In 2017, U.S. Immigration and Customs Enforcement (ICE) reported an average of thirty-eight thousand detainees under its control on any given day.[9] This number is expected to increase based on a change in policy under the Trump Administration.[10] These detainees, like their counterparts in the criminal system, are afforded the right to a hearing and can be freed by a judge.[11] Immigrants can achieve release from detention through an award of bond, which functions in a substantially similar manner to criminal bail.[12] The procedures in immigration bond hearings, however, differ from criminal bail hearings in several important ways.[13] One crucial difference is the approach taken under the two systems to determine the amount at which bail will be set, or if bail will be granted at all.[14] In criminal proceedings, judges are required to consider the defendant's financial resources and ability to pay when setting a

[9] *See* Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers,* NPR (Oct. 26, 2017), https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers [https://perma.cc/KVH4-7JRD] (discussing increased federal funding for ICE). U.S. Immigration and Customs Enforcement (ICE) is a government entity within the Department of Homeland Security (DHS) that is responsible for the detention of immigrants, among other things. *See Enforcement and Removal Operations*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/ero [https://perma.cc/Z92W-DPQD] (stating the functions of the DHS).

[10] *See* Wamsley, *supra* note 9 (detailing the increased federal budget for ICE); *see* SARAH PIERCE & ANDREW SELEE, MIGRATION POLICY INST., IMMIGRATION SHIFTS UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION 2 (2016) (outlining the changes in immigration policy in the first year of the Trump Administration). Under the Trump administration, immigration arrests and deportations have drastically increased. *See* Michael Burke, *ICE Arrests and Removals Continue to Surge Under Trump*, THE HILL (Sept. 6, 2018), https://thehill.com/homenews/administration/405405-ice-arrests-of-noncriminal-immigrants-continue-to-surge [https://perma.cc/HPK4-X76Y] (detailing the increased number of immigrants detained by ICE).

[11] *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 169–71 (2016) (detailing immigration bond hearing procedures); *see also* N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2012) (providing procedures for criminal bail hearings in New York).

[12] *See* Gilman, *supra* note 11, at 169–71 (providing an explanation of immigration bond procedure). Throughout this Note, I will refer to bail and bond; generally, bond refers to immigration proceedings and bail refers to criminal proceedings, though the meanings of the two terms are largely interchangeable. *See Bail*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bail as "a *bond*") (emphasis added).

[13] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (discussing the lack of procedural protections for detainees in immigration court that are present for defendants in criminal court).

[14] *Compare* Stack v. Boyle, 342 U.S. 1, 5 (1951) (discussing how courts should set bail amounts), *and* N.Y. CRIM. PROC. LAW § 510.30 (listing factors to consider when setting criminal bail in New York), *and* WYO. RULES. CRIM. PROC. 46.1(d) (2018) (listing factors to consider when setting criminal bail in Wyoming), *with Fatahi*, 26 I. & N. Dec. at 793 (establishing factors to consider when setting immigration bond), *and* 8 C.F.R. § 1236.1 (providing procedure for setting initial immigration bond).

bail amount.[15] This is not the case in immigration proceedings.[16] IJs set bond amounts with no consideration of an immigrant's finances.[17] Thus, immigrants often remain in detention because they lack the necessary financial resources to make bond, even though they pose no threat to the community.[18]

This Note examines the relationship between the bail system employed in criminal law and bond proceedings employed in immigration law, and argues in favor of the decision by the U.S. Court of Appeals for the Ninth Circuit that IJs should consider an immigrant's financial situation when setting a bond amount.[19] Part I examines the procedures and constitutional limits for both criminal bail and immigration bond.[20] Part II discusses constitutional protections provided to non-legal immigrants and the ways in which criminal constitutional protections could be extended to the immigration context.[21] Finally, Part III argues that the decision reached by the Ninth Circuit was proper on

---

[15] 18 U.S.C. § 3142(g)(3)(A) (2018); MASS. GEN. LAWS c. 276, § 58 (2016); N.Y. CRIM. PROC. LAW § 510.30(2)(a)(ii); WYO. R. CRIM. PROC. 46.1(d)(3)(A); *see* Gilman, *supra* note 11, at 205 (comparing standards for bail in the criminal and immigration systems).

[16] *See* 8 U.S.C. § 1226(a) (2018) (providing the statutory authority for immigration bond by the Attorney General); *Fatahi*, 26 I. & N. Dec. at 793 (establishing factors to consider when setting immigration bond); *In re* Castillo-Cajura, No. A089 853 733, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009) (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *In re* Sandoval-Gomez, No. AXXX XX3 965, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008) (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); *In re* Patel, 15 I. & N. Dec. 666, 666–67 (B.I.A. 1976) (finding that in determining immigration bond, an IJ should consider the flight risk posed by a particular immigrant and any danger they might pose to the national security); 8 C.F.R. § 1003.19(h) (noting that the factors to be considered when setting bond but not including financial resources). The statute provides that initial bond determinations are made by the Attorney General. *See* 8 U.S.C. § 1226(a) (providing that initial bond determinations are made by the Attorney General). In reality, it is usually ICE officers who make this initial determination. *See* Gilman, *supra* note 11, at 165 (discussing the initial bond determination made by DHS agents).

[17] *See Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that the financial situation of an immigrant is not a relevant factor in determining bond amount); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); 8 C.F.R. § 1003.19(h) (providing procedure for setting immigration bond that does not include consideration of an individual's financial situation).

[18] *See Hernandez II*, 872 F.3d at 984 (noting that the IJ in lower proceeding found that plaintiff was not a threat, but that the plaintiff remained detained due to plaintiff's lack of funds with which to pay bond); *see also* OLGA BYRNE ET AL., HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 25–30 (2016) (describing experiences of immigrants who were granted monetary bond but remained detained due to their inability to pay); N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 11 (2012) [hereinafter INSECURE COMMUNITIES] (noting that in New York, 55% of immigrants who are granted monetary bond are unable to pay it and thus remain detained). If an immigrant is found to be a threat, they cannot be granted bond. *Fatahi*, 26 I. & N. Dec. at 793.

[19] *See infra* notes 1–224 and accompanying text.

[20] *See infra* notes 23–84 and accompanying text.

[21] *See infra* notes 85–183 and accompanying text.

both legal and policy grounds, and ought to be upheld and adopted as policy by the federal government.[22]

I. BOND AND BAIL PROCEDURES: HOW THEY STAND

It is an established legal premise in the United States that one who has not yet been convicted of a crime generally should not have his liberty restricted.[23] The purpose of bail in criminal cases is largely to ensure that the accused can maintain his liberty until such time that he is convicted, while also providing a monetary incentive for him to attend all required court appearances.[24] Bail is not intended as a punishment, but rather as a method of keeping the criminally accused present in a particular jurisdiction.[25] Although each state has its own specific criminal statutes and procedural rules, courts have generally held that bail should be granted unless a defendant poses a particularly high risk of flight or a significant danger to the safety of the community.[26]

The Eighth Amendment to the U.S. Constitution prohibits instituting excessive bail.[27] The U. S. Supreme Court has held that a bail amount set higher than necessary to ensure a defendant's presence at required court appearances

---

[22] *See infra* notes 184–224 and accompanying text.

[23] *See* Bandy v. United States, 81 S. Ct. 197, 197 (1960) (stating "[t]he fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt").

[24] *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) (discussing the historical purpose of bail); *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (discussing the purpose of bail not as a punishment but rather a means of ensuring a defendant's appearance).

[25] *See Stack*, 342 U.S. at 5 (discussing the purpose of bail as being a protection against the flight of the defendant); *Milburn*, 34 U.S. at 710 (discussing the purpose of bail as a means for ensuring a defendant's appearance).

[26] *See* Carbo v. United States, 82 S. Ct. 662, 669 (1962) (holding that rejection of bail was merited as the defendant posed a significant threat to his community); Vigil v. State, 563 P.2d 1344, 1347 (Wyo. 1977) (establishing when bail should be granted). The Wyoming Rules of Criminal Procedure list various factors to take into consideration when determining a particular defendant's flight risk. WYO. R. CRIM. PROC. 46.1(d); *Vigil*, 563 P.2d at 1347. Similar factors are widely considered in other jurisdictions as well and include:

> (1) [t]he nature and circumstances of the offense charged (2) [t]he weight of the evidence against the person; (3)(A) [t]he person's character, physical and mental condition, family ties, employment, financial resources, the length of his residence in the community, community ties, past conduct, history related to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.

WYO. R. CRIM. PROC. 46.1(d); *see* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (listing factors similar to those in the Wyoming Rules of Criminal Procedure that a judge must consider when deciding whether to grant bail); *see also* Jones v. Grimes, 134 S.E.2d 790, 792 (Ga. 1964) (finding that a judge should consider several factors when deciding whether to grant bail, many of which are similar to those found in the Wyoming Rules of Criminal Procedure).

[27] U.S. CONST. amend. VIII.

violates the Constitution.[28] As such, when determining an appropriate bail amount in criminal cases, judges are expected to consider a defendant's ability to raise the required funds.[29]

Similarly, immigration proceedings allow the accused to pay for release using the bond system.[30] Pursuant to the Immigration and Nationality Act ("INA"), after an initial warrant is issued, an immigrant can be arrested and held by DHS.[31] Agents make an immediate determination as to whether they think the arrested immigrant should be released on bond.[32] If they decide to hold the immigrant in detention without bond, the immigrant can request a bond redetermination hearing in immigration court.[33] If redetermination is requested, an IJ determines whether the immigrant should be released.[34]

---

[28] *See* United States v. Salerno, 481 U.S. 739, 759 (1987) (finding that if the government's goal in pretrial detention of a defendant is ensuring his appearance, then bail should be set to an amount no greater than what is required for that purpose); *Stack*, 342 U.S. at 5 (noting that bail set higher than reasonably necessary to ensure a defendant's appearance was unconstitutional).

[29] *See Salerno*, 481 U.S. at 759 (finding that if the government's purpose in pre-trial detention is ensuring a defendant's appearance, bail should be set no greater than required to accomplish that purpose); *Stack*, 342 U.S. at 5 (noting that bail set higher than reasonably necessary to ensure a defendant's appearance was unconstitutional); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (finding that the due process and equal protection requirements of the Fifth Amendment requires individualized bail hearings that consider a defendant's financial situation).

[30] *See* 8 U.S.C. § 1226(a) (providing statutory authority for immigration detention); 8 C.F.R. § 1236.1 (providing procedures for immigration bond and immigration detention).

[31] *See* 8 U.S.C. § 1226(a) (providing the statutory authority for prehearing detention of immigrants); *Enforcement and Removal Operations*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/ero [https://perma.cc/Z92W-DPQD] (providing that the function of ICE is in part to arrest and detain immigrants).

[32] *See* 8 U.S.C. § 1226(a) (providing the statutory authority for prehearing detention of immigrants); Gilman, *supra* note 11, at 165, 167 (describing procedure by which ICE determines whether an immigrant should be initially detained upon arrest); *Enforcement and Removal Operations*, *supra* note 31 (providing that the function of ICE is in part to arrest and detain immigrants).

[33] 8 C.F.R. § 1003.19(b). Unlike in criminal cases, where a bail hearing is automatic, a detained immigrant must request a bond hearing from a judge and have that request granted, in order for one to be held. *Compare* 18 U.S.C. § 3142 (providing that a judge should consider bail upon a defendant's first appearance in court, but not requiring that the defendant affirmatively request that he do so), *with* 8 C.F.R. § 1003.19(b) (providing that an immigrant must request that a judge reconsider their initial bond). This is significant because there is no right to government provided counsel in immigration proceedings. *See* 8 U.S.C. § 1362 (providing that respondents in immigration proceedings are guaranteed the right to counsel at no cost to the government). In other words, immigrants have the right to an attorney if they can afford one themselves. *See id.* This is unlike criminal law where defendants who are facing jail time have a right to an attorney whether or not they can afford one. *See* U.S. CONST. amend. VI (providing for the right to an attorney); Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (holding that the Sixth Amendment right to counsel paid for by the government for indigent defendants extends to the states via the Fourteenth Amendment).

[34] *See* 8 C.F.R. § 1003.19 (providing immigration detention procedures including bond redetermination).

There are a few major differences between the procedures for determining bail in criminal cases and determining bond in immigration cases.[35] First, criminal case law directs judges to allow for bail unless there is strong evidence of a defendant's threat of flight.[36] In immigration cases, the burden is on accused immigrants to prove to an IJ that they do not pose a threat to their community and are not a flight risk.[37] It is worth noting that statistics show that it is far more difficult for an immigrant to be granted bond than for a criminal defendant to be granted bail.[38] Second, whereas case law and state rules of criminal procedure generally require a judge to take into account a defendant's ability to pay when setting a bond amount, there is no such requirement in the regulations governing bond determinations in immigration proceedings.[39]

---

[35] *Compare* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (listing financial situation as a factor to consider when setting bail in New York), *and* WYO. R. CRIM. PROC. 46.1(d) (listing financial situation as a factor to consider when setting bail in Wyoming), *with Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount), *and Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount), *and* 8 C.F.R. § 1003.19 (providing immigration detention procedures for bond redetermination without requiring consideration of an immigrant's financial situation).

[36] *See Stack*, 342 U.S. at 4–5 (providing that defendants should be granted bail as long as they are not an undue flight risk); *Milburn*, 34 U.S. at 710 (noting that bail should only be refused if a defendant represents an undue flight risk); Querubin v. Commonwealth, 795 N.E.2d 534, 540 (Mass. 2003) (noting that there is a strong judicial interest in detaining a defendant pre-trial unless that defendant can show that he does not pose a flight risk).

[37] *See Fatahi*, 26 I. & N. Dec. at 793 (providing that danger to community and danger to national security should be considered when deciding whether to grant immigration bond); *Patel*, 15 I. & N. Dec. at 666 (providing that an immigrant should not be detained without bond unless he represents a high danger to national security or undue flight risk); *see also* 8 C.F.R. § 1236.1(c) (providing that the immigrant must establish by *clear and convincing* evidence that they are not a danger or a flight risk).

[38] *See* THOMAS COHEN & BRIAN REAVES, DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007) (providing data about bail for criminal defendants); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 17 (2016) (providing data about immigrants' access to attorneys). A study conducted by the American Immigration Council indicates the difficulty in receiving bond in immigration proceedings: only 44% of represented immigrants and 18% of unrepresented immigrants requested, and were granted, a bond hearing. EAGLY & SHAFER, *supra*. Of those who requested hearings, 44% of represented immigrants and 11% of unrepresented immigrants were released on bond. *Id.* This can be compared with a study conducted by the Department of Justice, which found that in the 75 largest counties in the country, 62% of felony defendants in state court were released on bail. COHEN & REAVES, *supra* (providing statistics about criminal defendants released on bail).

[39] *See* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (listing financial situation as a factor to consider when setting bail in New York); WYO. R. CRIM. PROC. 46.1(d) (listing financial situation as a factor to consider when setting bail in Wyoming); *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (noting that bail set higher than needed to ensure a defendant's appearance in court violates the Eighth Amendment); *Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); 8 C.F.R. § 1236.1 (providing immigration bond procedures, which do not include consideration for an immigrant's financial situation).

Section A of this Part summarizes the procedures for setting bail in criminal cases.[40] Section B briefly discusses the constitutional limitations placed on bail in criminal proceedings.[41] Section C explains the procedures for determining bond in immigration cases.[42]

A. Bail Procedures in Criminal Law

Bail and pre-trial release have deep roots in American jurisprudence.[43] Although each American jurisdiction has its own rules of criminal procedure, the general principles of bail are essentially the same across the country.[44] To briefly summarize, soon after a criminal defendant is charged with a crime, a judge (or magistrate) holds a bail determination hearing.[45] During this hearing, the judge determines whether a defendant should be granted bail and how much that bail should be.[46] In determining whether bail should be granted, the judge generally considers whether the defendant poses an unreasonably high risk to community safety and whether there is a strong reason to believe that the defendant will flee the jurisdiction regardless of bail.[47]

---

[40] *See infra* notes 43–58 and accompanying text.

[41] *See infra* notes 59–70 and accompanying text.

[42] *See infra* notes 71–85 and accompanying text.

[43] *See* Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) (providing for the right to bail in non-capital offenses in the newly established Northwest Territory); MASSACHUSETTS BODY OF LIBERTIES § 18, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 37 (W. Whitmore ed. 1890) (expressing a right to bail in the Massachusetts Bay Colony in 1641); PENNSYLVANIA FRAME OF GOVERNMENT, art. XI, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3061 (Francis Newton Thorpe ed., 1909) (providing for the right to bail in the Province of Pennsylvania in 1682).

[44] *See generally* 18 U.S.C. § 3142 (providing federal bail procedures); N.Y. CRIM. PROC. LAW § 510.30 (providing bail procedures in New York); PA. R. CRIM. PROC. 523 (2016) (providing bail procedures in Pennsylvania); WYO. R. CRIM. PROC. 46.1 (providing bail procedures in Wyoming).

[45] *See* 18 U.S.C. § 3142(f) (providing federal bail procedures); FLA. R. CRIM. PROC. 3.131 (2018) (providing bail procedures in Florida); MASS. GEN. LAWS ch. 276, § 58 (2016) (providing bail procedures in Massachusetts). In federal court, a bond hearing is generally held at a defendant's initial court appearance. *See* 18 U.S.C. § 3142(f). The statute provides that for defendants charged with certain crimes considered to be of higher danger, a prosecutor may request a continuance of up to five days with which to prepare their argument as to why bail should not be granted. *See id.*

[46] *See* 18 U.S.C. § 3142 (providing that during a defendant's first court appearance, a judge should determine whether to grant the defendant bail, and how much the bail should be); FLA. R. CRIM. P. 3.131 (providing bail hearing procedures in Florida and factors a judge should consider when determining bail); MASS. GEN. LAWS ch. 276, § 57 (providing bail hearing procedures in Massachusetts and provides how a judge should determine whether to grant bail and how much that bail should be).

[47] *See* 18 U.S.C. § 3142 (providing reasons why bail may be denied by a federal judge); FLA. R. CRIM. P. 3.131 (providing that a judge should grant bail if doing so would allow a defendant liberty without posing a threat to community or an undue flight risk); MASS. GEN. LAWS ch. 276, § 58 (providing that bail should not be granted if a defendant poses a high flight risk or threat to community); N.Y. CRIM. PROC. LAW § 510.20 (directing judges in New York to consider the likelihood that the defendant will flee the jurisdiction in determining bail). Although there is variation among jurisdic-

A judge is directed to consider several factors when determining if a defendant might try to flee.[48] These factors vary among jurisdictions, but primarily serve two main purposes.[49] First, some factors are intended to help determine a defendant's likelihood of success at trial and the severity of the punishment if convicted.[50] This is based upon the theory that a defendant with strong evidence against him, or one who is facing a harsh punishment if convicted, is more likely to flee from a jurisdiction.[51] Therefore, that defendant may require a higher bail amount to ensure his appearance.[52] Second, some factors are intended to help a judge determine how strongly a particular defendant is tied to a jurisdiction.[53] A defendant with weak ties to a jurisdiction, and strong ties elsewhere, presents a high risk of flight, which therefore may

---

tions, many states list certain conditions under which bail may not be granted at the discretion of the judge. *See* FLA. R. CRIM. P. 3.131 (providing that bail may *not* be granted in cases where a defendant is charged with a capital offense or an offense with a possible sentence of life imprisonment) (emphasis added); MASS. GEN. LAWS ch. 276, § 57 (providing restrictions for when bail may be granted based on conviction of certain crimes).

[48] *See* 18 U.S.C. § 3142(g) (listing several factors for a federal judge to consider when setting bail); N.Y. CRIM. PROC. LAW § 510.30 (listing several factors for a judge to consider when setting bail in New York); WYO. R. CRIM. PROC. 46.1(d) (listing several factors to consider when setting bail in Wyoming). These factors include:

> (1) [t]he nature and circumstances of the offense charged (2) [t]he weight of the evidence against the person; (3)(A) [t]he person's character, physical and mental condition, family ties, employment, financial resources, the length of his residence in the community, community ties, past conduct, history related to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings

WYO. R. CRIM. PROC. 46.1(d).

[49] *See* 18 U.S.C. § 3142(g) (listing factors that help determine whether a defendant has motivation to flee due to risk of high sentence or close ties elsewhere); N.Y. CRIM. PROC. LAW § 510.30 (listing factors that help determine whether a defendant has motivation to flee due to risk of high sentence or close ties elsewhere in New York); WYO. R. CRIM. PROC. 46.1(d) (listing factors that help determine whether a defendant has motivation to flee due to risk of high sentence or close ties elsewhere in Wyoming).

[50] *See* 18 U.S.C. § 3142(g)(2) (listing weight of evidence against defendant as a factor to consider when setting bail at the federal level); N.Y. CRIM. PROC. LAW § 510.30(2)(a)(viii), (ix) (listing weight of evidence against defendant and severity of sentence for the crime charged as factors to consider when setting bail in New York); WYO. R. CRIM. PROC. 46.1(d) (listing the type of crime charged and the weight of evidence against the accused as factors to consider when setting bail in Wyoming).

[51] *See Salerno*, 481 U.S. at 759 (finding that if the government's purpose in pre-trial detention is ensuring a defendant's appearance, bail should be set no greater than required to accomplish that purpose); *Stack*, 342 U.S. at 5 (discussing how bail should be set at an amount commensurate with the need to keep a defendant from fleeing from a jurisdiction).

[52] *See Stack*, 342 U.S. at 5 (providing bail procedures).

[53] *See* 18 U.S.C. § 3142(g)(3)(A) (listing family ties, community ties, length of time in the community, and employment status as factors to consider when determining bond amount at the federal level); N.Y. CRIM. PROC. LAW § 510.30(2)(A)(ii), (iii) (listing employment, family ties, and length of time in the community as factors to consider when determining bond amount in New York); WYO. R. CRIM. PROC. 46.1(d)(3)(A) (listing family ties, community ties, length of time in the community, and employment status as factors to consider when determining bond amount in Wyoming).

necessitate a higher bail amount.[54] Additionally, many jurisdictions direct judges to consider a defendant's financial resources and ability to raise funds when setting bail amount.[55]

In the criminal context, there is a propensity toward granting bail.[56] This is based on two premises: (1) that a defendant is innocent until proven guilty; and (2) bail is not meant as a punishment.[57] In the case that bail is not granted, or is granted but a party is dissatisfied with the amount, a party may challenge the outcome as unreasonable or unconstitutional.[58]

B. Constitutional Limitations on Bail

Throughout history, a general right to bail has been present in American jurisprudence both on the state and federal level.[59] The Eighth Amendment to the Constitution bans excessively high bail amounts.[60] With some qualifications, this has generally been interpreted by federal courts to guarantee a right to bail for criminal defendants.[61] Judges may still refuse to grant bail to a de-

---

[54] *See Stack*, 342 U.S. at 4–5 (analyzing the requirements judges should follow when determining bail).

[55] *See* 18 U.S.C. § 3142(g)(3)(A) (directing judges to consider financial situation when setting bail amount at the federal level); MASS. GEN. LAWS ch. 276, § 58 (directing judges to consider financial resources when setting bail amount in Massachusetts); N.Y. CRIM. PROC. LAW § 510.30(2)(a)(ii) (directing judges to consider financial resources when setting bail amount in New York); WYO. R. CRIM. PROC. 46.1(d)(3)(A) (directing judges to consider financial resources when setting bail amount in Wyoming); *see also Querubin*, 795 N.E.2d at 540–42 (summarizing common law considerations for setting bond).

[56] *See Stack*, 342 U.S. at 4–5 (discussing the historic right to freedom before conviction and its connection to the presumption of innocence).

[57] *See id.* (discussing the importance of bail in preserving the presumption of innocence for criminal defendants); *Milburn*, 34 U.S. at 710 (discussing the purpose of bail not as a punishment but as a means to keep a defendant within a jurisdiction).

[58] *See* 18 U.S.C. § 3145 (providing procedures for challenging bail determinations in federal criminal court); United States v. Golding, 742 F.2d 840, 841 (5th Cir. 1984) (challenging bail assignment as excessive and in violation of the Eighth Amendment); *Pugh*, 572 F.2d at 1055–56 (challenging bail as being in violation of the constitutional right of equal protection).

[59] *See* Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 328–29, 337, 351, 353–54 (1982) (discussing the right to bail throughout the history of the United States). Of the states that achieved admittance to the Union after 1789, all but two included a right to bail in their constitutions. *See id.* at 351. Since then, the right has largely remained intact, although some states have amended them to permit preventative detention which is automatic detention of defendants accused of certain crimes. *See* MICH. CONST. art. 1, § 15 (providing for preventative detention for defendants charged with murder, treason, or certain violent felonies in Michigan); NEB. CONST. art. 1, § 9 (providing for preventative detention for treason and sexual offenses in Nebraska); TEX. CONST. art. 1, § 11 (providing for preventative detention for capital offenses in Texas); WISC. CONST. art 1, § 8(3) (providing legislative authority to enact preventative detention in Wisconsin); Verrilli, *supra*, at 353–54 (discussing the right to bail provided in state constitutions).

[60] U.S. CONST. amend. VIII.

[61] *See Stack*, 342 U.S. at 3–4 (stating that bail set higher than what is reasonably necessary to ensure a defendant's appearance is unconstitutional); *Milburn*, 34 U.S. at 710 (noting the constitution-

fendant if that defendant is deemed to be too high-risk to be released, but this is determined on a case-by-case basis.[62]

Under the Eighth Amendment, the most frequent challenges to bail are claims that the amount is excessive and above what is necessary to ensure a particular defendant's appearance in court.[63] The Supreme Court has held that a bail amount set above what is necessary to ensure appearance in court serves no purpose and thus violates the Eighth Amendment.[64]

There are additional restrictions placed on bail by the Fifth and Fourteenth Amendments.[65] One such restriction is the prohibition of master bail schedules that predetermine bail amounts for specific crimes.[66] Courts have reasoned that restricting a defendant's liberty without holding an individualized hearing violates the due process and equal protection requirements of the Fifth and Fourteenth Amendments.[67]

---

al importance of providing liberty to pretrial defendants); Hunt v. Roth, 648 F.2d 1148, 1157–58 (8th Cir. 1981), *vacated as moot*, Murphy v. Hunt, 455 U.S. 478 (1982) (holding that under the Eighth Amendment, it is unconstitutional to determine bail without holding an individualized hearing). *But see* Carlson v. Landon, 342 U.S. 524, 545–46 (1952) (stating that Congress should have the power within the Eighth Amendment to create laws banning defendants charged with certain crimes from receiving bail); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) (finding that bail is not constitutionally impermissible simply because it is set to an amount higher than the defendant can afford).

[62] *See Hunt*, 648 F.2d at 1157–58 (finding that in some circumstances it is constitutional to deny bail outright); *Preliminary Proceedings, Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1984–1985*, 74 GEO. L.J. 499, 663–64 (1986) (noting that the government has the burden of showing a defendant's dangerousness by clear and convincing evidence).

[63] *See Stack*, 342 U.S. at 5 (noting that bail set at an amount more than is necessary to ensure a defendant's appearance at court violates the Eighth Amendment); *Golding*, 742 F.2d at 841 (challenging bail assignment as excessive and in violation of the Eighth Amendment).

[64] *See Stack*, 342 U.S. at 5 (noting that bail set higher than what is reasonably necessary to ensure a defendant's appearance is unconstitutional); *see also* Beddow v. State, 68 So. 2d 503, 503 (Ala. 1953) (finding a bail set higher than what was necessary to ensure the defendant's appearance was impermissible under the Alabama constitution); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 950–54 (2013) (discussing the constitutional right to be free from excessive bail).

[65] *See* U.S. CONST. amend. V (providing for the right to due process); *id.* amend. XIV (requiring states to provide the right to due process); Williams v. Illinois, 399 U.S. 235, 240–41 (1970) (finding that under the Fourteenth Amendment it is unconstitutional to hold someone simply because they are unable to pay required court fees); *Pugh*, 572 F.2d at 1057 (finding that the due process and equal protection requirements of the Fifth Amendment require individualized bail hearings); Brangan v. Commonwealth, 80 N.E.3d 949, 961–64 (Mass. 2017) (finding that the Fourteenth Amendment's Due Process Clause requires individualized bail hearings); *see also* Hegreness, *supra* note 64, at 931–36 (discussing the limitations placed on bail by the Fourteenth Amendment).

[66] *See Pugh*, 572 F.2d at 1057 (finding a master bail schedule to be unconstitutional); *Brangan*, 80 N.E.3d at 959 (discussing the unconstitutionality of master bail schedules).

[67] *See Pugh*, 572 F.2d at 1057 (holding that the Fifth Amendment requires individualized bail hearings); *Brangan*, 80 N.E.3d at 961–64 (finding that the Fourteenth Amendment requires individualized bail hearings).

Through these protections, as well as those found in state and federal statutes, courts have held that a judge must take a defendant's ability to pay into consideration when setting bail.[68] It is not unconstitutional per se for a judge to set bail that a defendant cannot afford, as long as the bail amount is reasonable considering all the factors a judge must consider.[69] It has been found unconstitutional, however, for a judge to neglect to consider a defendant's financial situation when determining the amount of bail needed to ensure the defendant's appearance in court.[70]

C. Immigration Detention Procedures

The procedure for detaining an immigrant in a deportation proceeding is generally governed by the INA and accompanying regulations.[71] Upon the arrest of an immigrant by an ICE agent, that agent makes a determination as to whether bond should be granted.[72] The INA provides three options upon the arrest of an immigrant: (1) ICE can place the arrested immigrant in detention; (2) ICE can release the immigrant on a bond of $1,500 or more; or (3) ICE can release the immigrant on conditional parole.[73] Under the INA, ICE must detain immigrants who have committed certain crimes.[74] Beyond this mandatory de-

---

[68] *See Pugh*, 572 F.2d at 1057 (finding that judges should consider financial situation of defendant when determining bail amount); *Beddow*, 68 So. 2d at 503 (finding that in setting bail "consideration should be given to the station in life of the defendant and the surrounding circumstances"); Camera v. State, 916 So. 2d 946, 947 (Fla. Dist. Ct. App. 2005) (remanding a case for examination of a defendant's financial situation for the purpose of determining a reasonable bail); *Brangan*, 80 N.E.3d at 959 (finding that financial situation of a defendant must be taken into consideration when setting bail for the bail determination to be sufficiently individualized as the Constitution requires).

[69] *See McConnell*, 842 F.2d at 107 (finding that bail is not constitutionally impermissible simply because it is set to an amount higher than the defendant can afford); *Brangan*, 80 N.E.3d at 959 (noting that bail is not constitutionally impermissible simply because it is set to a higher amount than the defendant can afford).

[70] *See Pugh*, 572 F.2d at 1057 (finding that it is unconstitutional for a judge to set criminal bail without consideration of a defendant's financial situation); *Brangan*, 80 N.E.3d at 959 (holding that it is unconstitutional to set criminal bail without consideration of a defendant's financial situation).

[71] *See* 8 U.S.C. § 1226 (providing statutory authority for immigration detention); 8 C.F.R. §§ 1003.19, 1236.1 (regulating immigration bond procedures).

[72] *See* 8 U.S.C. § 1226(c); 8 C.F.R. § 1236.1; Gilman, *supra* note 11, at 165–68 (discussing the initial bond determination made by DHS upon apprehension of an immigrant).

[73] *See* 8 U.S.C. § 1226(a) (providing three courses of action an agent may take upon arrest of an immigrant by DHS). "Conditional parole" is essentially the same as personal recognizance. *See* NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW & DEFENSE § 7:12 (2017) (defining "conditional parole"). Personal recognizance is defined as the release of a criminal defendant before trial without the requirement of bail. *Personal Recognizance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[74] *See* 8 U.S.C. § 1226(c) (requiring mandatory detention under certain circumstances). The crimes included under this restriction are subject to a further legal analysis, but include, among others, certain drug and firearm offenses. *See id.* § 1227(a)(2) (defining deportable offenses, which result in automatic detention). "Committed" is a key term here, as conviction is not actually required for mandatory detention. *See id.* §§ 1182(a)(2) (listing crimes, which if "committed" would result in automat-

tention, ICE agents have the authority to determine whether or not to grant an immigrant bond.[75] The relevant regulation states that an on-scene ICE agent may release an immigrant on bond or conditional parole if the agent determines that the immigrant in question does not pose a significant threat to the safety of others and that the immigrant is likely to appear at immigration proceedings.[76]

An immigrant generally has the ability to request a rehearing on the question of bond if they are unsatisfied with the initial determination made by ICE.[77] A bond redetermination hearing before an IJ is not automatic; it must be requested by the immigrant or his representative.[78] This hearing is considered separate from any other proceedings in which an immigrant may be participating.[79]

During a bond hearing in immigration court, an IJ must first determine whether the immigrant has committed a specified crime that would represent a statutory bar to bond.[80] This decision can be subject to a substantial amount of

---

ic detention), 1226(c) (providing that immigrants who have "committed" certain offenses should be automatically detained), 1227(a)(2) (providing that immigrants who have "committed" certain offenses should be deported). If an immigrant admits to an act, or admits to the elements of an act, mandatory detention may be required as if the immigrant had been convicted of the crime. *See id.* §§ 1182, 1226(c), 1227(a)(2).

[75] *See id.* § 1226(a) (establishing the procedures for ICE agents determining initial bond); Gilman, *supra* note 11, at 165 (describing the authority of DHS to determine the initial bond of immigrant detainees).

[76] *See* 8 U.S.C. § 1226(a) (providing the procedures for ICE agents); Gilman, *supra* note 11, at 165 (describing the authority of DHS to determine the initial bond of immigrant detainees).

[77] *See* 8 U.S.C. § 1226(c) (allowing access to a bond redetermination hearing upon request of an immigrant detainee); 8 C.F.R. § 1003.19 (establishing procedures for bond redetermination hearings); EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 141–42 (2017) (describing procedures for immigration bond redetermination hearings); Gilman, *supra* note 11, at 169–71 (describing the bond redetermination hearing process). A recent decision by the Supreme Court has prohibited certain immigrants from seeking bond redetermination hearings. Nielsen v. Preap, No. 16-1363, 2019 WL 1245517, at *10–11 (S. Ct. Mar. 19, 2019). In *Nielsen v. Preap*, the Court found that it is permissible to deny hearings to immigrants who have been previously convicted of crimes that result in mandatory detention under § 1226(c), even if the immigrant has already been released from prison for the previous crime. *Id.*

[78] *See* 8 C.F.R. § 1003.19(b) (establishing procedures for bond redetermination). The requirement of a request in order for a hearing to be held is significant, as many respondents in immigration proceedings are *pro se*, and statistics show that they request and are granted release at a much lower rate than immigrants with counsel. *See* EAGLY & SHAFER, *supra* note 38, at 9, 17 (noting the low percentages of immigrants who obtain counsel, as well as the low number of *pro se* immigrants who request bond redetermination hearings).

[79] *See* 8 C.F.R. § 1003.19(d) (providing procedures for bond redetermination). In practice this means that during a bond hearing, an immigration judge is supposed to consider the evidence being presented solely for the purpose of determining bond. *See id.* The judge should not be influenced by the evidence when determining an immigrant's other requests for relief. *See id.*

[80] *See* 8 U.S.C. §§ 1182 (listing crimes which make an immigrant inadmissible), 1226(c) (requiring that immigrants who have committed certain crimes be automatically detained), 1227(a)(2) (listing crimes that make an immigrant deportable).

discretion for two reasons: (1) a judge must determine whether the immigrant has "committed" the crime, which involves an examination of the immigrant's actions and his legal criminal history; and (2) a judge must also consider whether a particular crime is considered one of "moral turpitude."[81] The Board of Immigration Appeals ("BIA") has defined crimes involving moral turpitude as crimes involving conduct "which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons."[82]

If an immigrant remains eligible for bond after the IJ reviews his past criminal conduct, the IJ is then directed to consider three factors in determining whether to release the immigrant on bond: (1) whether the immigrant presents a threat to the community; (2) whether the immigrant presents a threat to national security; and (3) whether the immigrant is a flight risk.[83] The IJ can consider evidence submitted by both sides in determining whether to grant bond.[84]

---

[81] *See* 8 U.S.C. §§ 1182(a)(2) (listing "crimes including moral turpitude" as a crime that would make an immigrant inadmissible), 1226(c) (identifying crimes that would make an immigrant inadmissible or deportable as crimes that would result in automatic detention), 1227(a)(2) (listing "crimes involving moral turpitude" as a crime that would make an immigrant deportable). This term, moral turpitude, has been used in immigration law since the Immigration Act of 1891. *See* Immigration Act of 1891, 26 Stat. 1084 (1891) (providing that if an immigrant has committed crimes involving moral turpitude they should not be admitted into the United States). It has been generally defined by the Board of Immigration Appeals (BIA), and upheld by the Supreme Court, as sufficiently specific to satisfy due process requirements. *See* Jordan v. De George, 341 U.S. 223, 231–32 (1951) (finding that the term moral turpitude is not unconstitutionally vague); Matter of D–, 1 I. & N. Dec. 190, 194 (B.I.A. 1942) (defining moral turpitude). *But see* Isius-Veloz v. Whitaker, 914 F.3d 1249, 1261 (9th Cir. 2019) (Fletcher, C.J., concurring) (stating that "moral turpitude" should be found to be unconstitutionally vague). In practice, although case law has established whether many crimes are considered to involve moral turpitude, a judge may have to look to the elements of a particular crime to determine whether it fits the definition established by the BIA. *See* 8 U.S.C. §§ 1182, 1226(c), 1227(a)(2); *Matter of D–*, 1 I. & N. Dec. at 194; 8 C.F.R. § 1236.1. *See generally* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 6:2 (2017) (summarizing case law defining certain crimes as crimes involving moral turpitude and stating that in determining whether a crime involves moral turpitude an IJ should look at the elements of the crime charged rather than the actions committed by the immigrant).

[82] *Matter of D–*, 1 I. & N. Dec. at 194.

[83] *See Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's threat to national security, threat to community safety and flight risk when determining bond); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19(h) (providing that an immigrant needs to show "that release would not pose a danger to other persons or to property [and] that the alien is likely to appear for any scheduled proceeding or interview").

[84] *See* 8 C.F.R. §§ 1003.19, 1236.1 (providing immigration bond redetermination hearing procedures); EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 77 (identifying procedures for immigration bond redetermination hearings). The law does not direct an IJ to consider any factors beyond these three when determining bond, and the BIA has specifically held that evidence of an immigrant's financial situation is irrelevant to bond determinations. *See Fatahi*, 26 I. & N. Dec. at 793 (finding

II. THE CONSTITUTIONAL RIGHTS OF IMMIGRANTS AND THE POLICY DANGER OF AN IMMIGRATION DETENTION SYSTEM THAT DOES NOT VALUE LIBERTY

Despite the fact the criminal bail and immigration bond serve effectively the same goals, they are notably different in a number of critical ways.[85] To understand why, and whether this divergence is justified, it is instructive to explore two questions have been central to shaping the modern immigration system in the United States.[86] The first is if and when constitutional protections should apply to immigrants who have no legal status.[87] This has been an ongoing discussion and has been decided differently depending on courts' interpretation of the phrase "the people" or "persons" as those terms are used in the Constitution.[88] The second question is if immigrants do have certain rights, when should immigration procedures follow those of criminal law and when

---

that IJs should consider an immigrant's threat to national security as well as threat to community safety when determining bond); *Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19(h) (providing immigration bond procedures and what must be shown to be granted bond).

[85] *Compare* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2012) (listing financial situation as a factor to consider when setting bail in New York), *and* WYO. R. CRIM. PROC. 46.1(d) (2018) (listing financial situation as a factor to consider when setting bail in Wyoming), *with In re* Castillo-Cajura, No. A089 853 733, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009) (finding that financial situation of an immigrant is not a relevant factor in determining bond amount), *and In re* Sandoval-Gomez, No. AXXX XX3 965, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008) (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount), *and* 8 C.F.R. § 1003.19 (2018) (providing immigration detention procedures for bond redetermination without requiring consideration of an immigrant's financial situation).

[86] *See* Plyler v. Doe (*Plyler II)*, 457 U.S. 202, 205 (1982) (discussing whether the Fourteenth Amendment should apply to non-legal immigrants); Legomsky, *supra* note 13, at 472 (discussing the development of immigration law out of criminal law).

[87] *See Plyler II*, 457 U.S. at 205 (deciding whether Fourteenth Amendment equal protection rights applied to non-legal immigrants).

[88] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 265 (1990) (analyzing whether non-resident aliens are included in "the People" for Fourth Amendment protection); *Plyler II*, 457 U.S. at 210 (deciding whether non-legal immigrants are included in "persons" for Fourteenth Amendment protections); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–97 (1953) (discussing whether immigrants are "persons" for Fifth Amendment protection); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (considering whether non-legal immigrants are included in "the People" for Second Amendment protection); Mathilda McGee-Tubb, Comment, *Sometimes You're In, Sometimes You're Out: Undocumented Immigrants and the Fifth Circuit's Definition of "the People" in* United States v. Portillo-Munoz, 53 B.C. L. REV. E-SUPP. 75, 75 (2012), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3235&context=bclr [http://perma.cc/J958-K8ND] (exploring the inconsistent nature in which courts have defined "the people" in terms of constitutional rights).

should the two diverge.[89] This question is important because although immigration proceedings are officially classified as civil, the restriction of the immigrant's liberty often makes the proceedings seem more like criminal proceedings.[90] In this Part, Section A discusses how courts have interpreted various constitutional amendments in deciding if and when those constitutional rights should apply to non-legal immigrants.[91] Section B lays out the ways in which criminal bail and immigration bond have diverged.[92] Section C explores recent cases supplying authority for following criminal bail procedures in the immigration bond context.[93]

A. When Does "The People" Mean All of the People?

Before addressing what procedures an adjudicator should follow in an immigration hearing, it is first important to understand what constitutional protections, if any, non-legal immigrants have in the United States, a topic of significant debate.[94] The term "The People" or "persons" is used throughout the U. S. Constitution.[95] The document's preamble begins with the well-known phrase "We The People of the United States."[96] A question for lawyers dealing with non-legal immigrants, therefore, became who should be included as "The People."[97] This question is important not just because it involves the identity of the United States as a nation, but because its answer determines who is afforded the vital rights that make up the core of the democracy in this country.[98]

---

[89] *See* Gilman, *supra* note 11, at 203–07 (discussing the uneven borrowing of criminal law considerations in the immigration system); Legomsky, *supra* note 13, at 482–84, 487–90, 494–501 (discussing the similarities and differences between criminal and immigration procedures).

[90] *See* Gilman *supra* note 11, at 195 (discussing the uneven borrowing of criminal law considerations in the immigration system); Legomsky, *supra*, note 13, at 500–02 (discussing the similarities and differences between criminal and immigration procedures); Sacchetti, *supra* note 8 (discussing the practice of having immigrant respondents appear in chains). In a recent episode of *Last Week Tonight with John Oliver*, John Oliver displayed a clip of an interview with an IJ who stated, "in essence we're doing death penalty cases in a traffic court setting." *Last Week Tonight with John Oliver: The Immigration Courts* (HBO television broadcast Apr. 1, 2018).

[91] *See infra* notes 94–117 and accompanying text.

[92] *See infra* notes 118–153 and accompanying text.

[93] *See infra* notes 154–183 and accompanying text.

[94] *See* McGee-Tubb, *supra* note 88, at 75–76 (discussing the debate over whether constitutional rights should apply to non-legal immigrants).

[95] *See* U.S. CONST. amend. II (providing the right to bear arms for "the people"); *id.* amend. IV (providing the right to be secure in one's home for "the people"); *id.* amend. V (providing criminal procedure protections for "persons"); *id.* amend. XIV (providing due process and equal protection for "persons").

[96] *Id.* pmbl.

[97] *See* McGee-Tubb, *supra* note 88, at 75–76 (discussing the significance of the term "The People" in the analysis of whether constitutional rights apply to non-legal immigrants).

[98] *See id.* (considering the importance of constitutional language in determining whether constitutional rights apply to non-legal immigrants); *see also* Raoul Lowery Contreras, *Yes Illegal Aliens Have Constitutional Rights*, THE HILL (Sept. 29, 2015), http://thehill.com/blogs/pundits-blog/immigration/

1. "The People" Inclusive: Rights That Have Been Found to Apply to Non-Legal Immigrants

Among the most famous cases involving the constitutional rights of non-legal immigrants is *Plyler v. Doe* (*Plyler II)*, in which the Supreme Court considered whether the Fourteenth Amendment's Equal Protection Clause applied to non-legal immigrants.[99] This case arose out of an attempt by the State of Texas to pass a law withholding funding from public schools that admitted non-legal immigrant children.[100] The policy was challenged on the grounds that doing so violated the Equal Protection Clause of the Fourteenth Amendment.[101] The Supreme Court found the Equal Protection Clause applies to all people residing in a jurisdiction regardless of immigration status.[102] The Court concluded that the Clause was meant as a check on state governments and was an effort by the federal government to ensure that anyone who was subjected to the laws of a jurisdiction would be guaranteed the same constitutional protections within that jurisdiction, regardless of immigration status.[103]

255281-yes-illegal-aliens-have-constitutional-rights [https://perma.cc/4ZC3-77Y7] (discussing the constitutional rights of non-legal immigrants). An example of this can be found in the Second Amendment, which reads, "[a] well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear arms, shall not be infringed." U.S. CONST. amend. II (emphasis added).

[99] *See Plyler II*, 457 U.S. at 205 (considering the constitutional rights of non-legal immigrants). The Due Process Clause of the Fourteenth Amendment reads, in relevant part:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

[100] *See Plyler II*, 457 U.S. at 205. The state's proffered justification for this law was that public schools' limited funding should be reserved for students who have legal status. *See id.* at 207. The Supreme Court noted, however, that because schools received funding at both the state and federal level based on *enrollment,* preventing children without legal status from enrolling would do little to improve schools. *See id.*

[101] *See* Doe v. Plyler (*Plyler I*), 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd* 628 F.2d 448 (5th Cir. 1980), *aff'd* Plyler v. Doe, 457 U.S. 202 (1982) (the District Court case that eventually was appealed to the Supreme Court as *Plyler II*).

[102] *See Plyler II*, 457 U.S. at 212 (finding that the Due Process Clause applies to non-legal immigrants).

[103] *See id.* at 214 (considering the purpose of the Fourteenth Amendment); CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (providing the legislative history for the passage of the Fourteenth Amendment). In support of the Amendment, Representative John Bingham of Ohio said the following, "[i]s it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" CONG. GLOBE, 39th Cong., 1st Sess. 1090.

In *Plyler II*, the Court focused on territorial boundaries as an indicator of constitutional rights.[104] It reasoned that the purpose of constitutional protections was to ensure that all people present within a jurisdiction's territorial boundaries, and thus subject to its laws, should have basic constitutional protections.[105] This focus on territorial boundaries as an indicator of constitutional rights echoes that of previous decisions regarding the constitutional rights of non-legal immigrants.[106] When individuals interact with the government, there is a risk that the individuals will be treated unfairly due to the inherent power imbalance between them and the government.[107] The purpose of the Fifth, Sixth, and Fourteenth Amendments is thus to protect people from the risk of governmental overreach.[108] Therefore, the legal status of a person should not matter; if a person is subjected to the laws of a jurisdiction, then that person should have the benefit of constitutional protections.[109] This territorial jurisdiction analysis has generally been applied to determine when non-legal immigrants should have rights.[110] If a person is subjected to domestic laws of a ju-

---

[104] *See Plyler II*, 457 U.S. at 214 (discussing the purpose of the Fourteenth Amendment as being a jurisdictional protection).

[105] *See id.* (discussing the jurisdictional purpose of the Fourteenth Amendment).

[106] *See id.* at 212–14 (deciding that the Fourteenth Amendment protects all those within a particular jurisdiction and citing previous cases that had similar holdings); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments apply to any person within a territorial jurisdiction regardless of immigration status); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Due Process Clause of the Fourteenth Amendment applies to any person within a territorial jurisdiction regardless of immigration status).

[107] *See Plyler II*, 457 U.S. at 211–12 (discussing the purpose of constitutional amendments).

[108] *See id.*

[109] *See id.* (discussing the jurisdictional nature of certain constitutional amendments); *Wong Wing*, 163 U.S. at 238 (holding that the Fifth and Sixth Amendments apply to any person within a territorial jurisdiction regardless of immigration status); *Yick Wo*, 118 U.S. at 369 (holding that the Due Process Clause of the Fourteenth Amendment applies to any person within a territorial jurisdiction regardless of immigration status). The Eighth Amendment may also apply to non-legal immigrants. *See* Caballero v. Caplinger, 914 F. Supp. 1374, 1380 (E.D. La. 1996) (holding that a statute denying bail hearings to non-legal immigrants violated the Eighth Amendment). When faced with the question of whether the Eighth Amendment should guarantee bond to non-legal immigrants, however, the Supreme Court decided that as there was no absolute "right to bail," a statute allowing the Attorney General to deny bond to non-legal immigrants was constitutional. Carlson v. Landon, 342 U.S. 524, 544 (1952). It would follow then that although the federal government has the constitutional right to deny bond outright, if it is to grant bond, the bond may not be excessive. *See id.*; *Caballero*, 914 F. Supp. at 1380. Although one district court, the Eastern District of Louisiana, has held this, when the argument was made in *Hernandez v. Sessions*, the Ninth Circuit declined to discuss the argument and instead decided the case on other grounds. Hernandez v. Sessions (*Hernandez II*), 872 F.3d 976, 990 n.16 (9th Cir. 2017); *Caballero*, 914 F. Supp at 1380.

[110] *See Plyler II*, 457 U.S. at 211–12 (discussing when constitutional amendments should apply to non-legal immigrants); *Wong Wing*, 163 U.S. at 238 (holding that the Fifth and Sixth Amendments apply to any person within a territorial jurisdiction regardless of immigration status); *Yick Wo*, 118 U.S. at 369 (holding that the Due Process Clause of the Fourteenth Amendment applies to any person within a territorial jurisdiction regardless of immigration status).

risdiction, they should have constitutional rights protecting them from the overreach of that jurisdiction.[111]

2. "The People" Exclusive: Rights That Have Been Found to Not Apply to Non-Legal Immigrants

A decision from the Fifth Circuit discussing constitutional rights of non-legal immigrants followed a different path than cases previously discussed.[112] In *United States v. Portillo-Munoz*, the court considered a challenge to a federal statute banning non-legal immigrants from possessing firearms.[113] In its decision, the Fifth Circuit relied heavily on the statutory interpretation of the Second Amendment carried out by the Supreme Court in *District of Columbia v. Heller*.[114] The Fifth Circuit found that Second Amendment rights only applied to law-abiding *citizens*, not all *people* within a geographic area.[115] By adopting the *Heller* Court's definition of "The People," the Fifth Circuit strayed by refusing to apply the term to all people in the jurisdiction and rather reserved it for citizens.[116] The question of whether Second Amendment rights

---

[111] *See Plyler II*, 457 U.S. at 211–12; *Wong Wing*, 163 U.S. at 238 (holding that the Fifth and Sixth Amendments apply to any person within a territorial jurisdiction regardless of immigration status); *Yick Wo*, 118 U.S. at 369 (holding that the Due Process Clause of the Fourteenth Amendment applies to any person within a territorial jurisdiction regardless of immigration status).

[112] *See Portillo-Munoz*, 643 F.3d at 442 (finding that the Second Amendment should not apply to non-legal immigrants); McGee-Tubb, *supra* note 88, at 82–84 (discussing the Fifth Circuit's decision in *Portillo-Munoz)*. *But see Plyler II*, 457 U.S. at 211–12 (providing Fifth Amendment protections to immigrants); *Wong Wing*, 163 U.S. at 238 (providing constitutional protections to immigrants); *Yick Wo*, 118 U.S. at 369 (providing Due Process protections to immigrants).

[113] *Portillo-Munoz*, 643 F.3d at 439. The defendant in this case had been arrested for possession of a firearm which he used to protect chickens from coyotes at his ranch in rural Texas. *See id.*

[114] *See id.* at 439–40 (citing District of Columbia v. Heller, 554 U.S. 570, 580–82 (2008)). In *Heller*, a police officer challenged, on Second Amendment grounds, a city ordinance that prevented him from bringing his service weapon home. *See Heller*, 554 U.S. at 575–76. The *Heller* Court carrying out a historical analysis of the term "the people" found that rather than applying to all people within a territorial jurisdiction, "the people" should be read as being a specific subset of the population made up of Americans. *See id.* at 580–82. Although *Heller* did not involve any discussion of rights of immigrants, the *Portillo-Munoz* court found the Court's analysis of the Second Amendment instructive in its decision. *See id.*; *Portillo-Munoz*, 643 F.3d at 439–40, 442. Using the *Heller* Court's interpretation of "the people," the Fifth Circuit found that "the People" in the Second Amendment was intended to apply only to law-abiding citizens. *See Heller*, 554 U.S. at 580–82; *Portillo-Munoz*, 643 F.3d at 439–40, 442.

[115] *See Portillo-Munoz*, 643 F.3d at 442 (considering whether the Second Amendment applies to non-legal immigrants). As discussed earlier, the text of the Second and Fourth Amendments include the phrase "*The People,"* whereas the Fifth and Fourteenth Amendments include "*Persons." See* U.S. CONST. amend. II (providing the right to bear arms for "the people"); *id.* amend. IV (providing the right to be secure in one's home for "the people"); *id.* amend. V (providing criminal procedure protections for "persons"); *id.* amend. XIV (providing due process and equal protection for "persons").

[116] *See Portillo-Munoz*, 643 F.3d at 442 (using reasoning from *Heller* to find that the Second Amendment should not apply to non-legal immigrants). *But see Plyler II*, 457 U.S. at 210 (recognizing that non-legal immigrants have historically been considered "persons" for constitutional analysis).

apply to non-legal immigrants has not yet been discussed by the Supreme Court, so it remains to be seen how this new statutory interpretation will affect future debates on the constitutional rights of non-legal immigrants.[117]

B. The Divergence of Immigration Bond from Criminal Bail

In theory, criminal bail and immigration bond serve the same purpose.[118] They both represent a tool used by the government to ensure that individuals appear at court hearings when they are suspected of having violated either a criminal law or an immigration law.[119] The Supreme Court has used criminal bail procedures as a guide in their interpretation of immigration detention procedures, and to an extent, the procedures developed for immigration detention have indeed matched those of its criminal counterparts.[120] Immigration deten-

---

[117] *See Portillo-Munoz*, 643 F.3d at 442; McGee-Tubb, *supra* note 88, at 87 (discussing the effect of the *Portillo-Munoz* decision). The Fifth Circuit's holding with respect to the Second Amendment rights of non-legal immigrants has been adopted by the Fourth and Eighth Circuits. *See* United States v. Carpio-Leon, 701 F.3d 974, 978–79 (4th Cir. 2012) (holding that the Second Amendment right to bear arms should not apply to non-legal immigrants); United States v. Flores, 663 F.3d 1022, 1022–23 (8th Cir. 2011) (finding that the right to bear arms should not apply to non-legal immigrants). The Seventh Circuit has concluded otherwise and held that Second Amendment rights do apply to non-legal immigrants. *See* United States v. Meza-Rodriguez, 798 F.3d 664, 672 (7th Cir. 2015) (finding that non-legal immigrants should be protected by the Second Amendment). The Seventh Circuit held that despite this, a statute restricting a non-legal immigrant's access to guns was constitutional within the Second Amendment. *See id.* at 673 (finding a statute restricting the gun rights of non-legal immigrants to be constitutional).

[118] *Compare* 18 U.S.C. § 3142(g) (2018) (providing judges should release defendants on bail if they find that it is unlikely that they will pose a threat to their community, or flee the jurisdiction), *and* Stack v. Boyle, 342 U.S. 1, 4–5 (1951) (finding that bail should be tailored to ensuring a defendant's appearance at court events), *and* Querubin v. Commonwealth, 795 N.E.2d 534, 540 (Mass. 2003) (noting a primary purpose of bail as being to a means to ensure a defendant's appearance at trial), *with* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (noting that the primary justification for immigration detention is ensuring a immigrants' appearance in court, and protecting against any threat that an immigrant might pose), *and In re* Patel, 15 I. & N. Dec. 666, 666–67 (B.I.A. 1976) (finding that in determining immigration bond, an IJ should consider the flight risk posed by a particular immigrant and any danger they might pose to their community or national security).

[119] *Compare Zadvydas*, 533 U.S. at 690 (noting the primary purpose of immigration detention), *and* 8 C.F.R. § 1003.19 (providing that immigrants may be released on bond so long as they prove they are not a danger to the community or a flight risk), *with* 18 U.S.C. § 3142(g) (providing statutory authority for pretrial detention in criminal law), *and Stack*, 342 U.S. at 4–5 (discussing the purpose of pre-trial detention).

[120] *See Zadvydas,* 533 U.S. at 690–91 (using criminal procedure as a guide for interpreting immigration detention procedures); Gilman, *supra* note 11, at 197, 203–05 (discussing selective integration of criminal detention procedures into the immigration detention system); Legomsky, *supra* note 13, at 489–90, 494–500 (discussing similarities between criminal bail procedures and immigration bond procedures); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996) (holding that criminal bail procedures should act as a guide in situations that involve depravation of liberty).

tion, however, has diverged from pre-trial detention in several significant ways.[121]

1. The Immigration Detention System and Its Attachment to Monetary Bond

Monetary bail has traditionally held a place in the criminal context to ensure defendants appear at their required court appearances.[122] Recently, however, many jurisdictions have moved away from requiring monetary bond when possible.[123] This shift in policy was influenced by growing agreement as to monetary bail's ineffectiveness.[124] Robust pretrial service systems are now preferred to monetary bail, and policy-makers as well as academics argue that they are more effective both in terms of ensuring a defendant's appearance and in ensuring that liberty is not unnecessarily infringed.[125]

Despite this shift in criminal procedure, no such movement has occurred in immigration detention.[126] Due to the immigration system's reliance on monetary bond, immigrant respondents are often not able to obtain liberty due to a

---

[121] *See Zadvydas*, 533 U.S. at 690 (discussing the importance of only using immigration detention when it is necessary to fulfill the purpose of ensuring court appearances and preventing undue community danger); Gilman, *supra* note 11, at 196–97, 200–02 (discussing how criminal jurisdictions are beginning to use alternative methods to detention which often times are more effective and the immigration system has failed to follow suit).

[122] *See* Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) (providing a right to monetary bail in the Northwest Territory); *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (noting the purpose of bail as being a means of keeping a defendant present in a jurisdiction); *Querubin*, 795 N.E.2d at 540–42 (noting the historic importance of bail to ensuring a defendant's appearance at trial).

[123] *See* Gilman, *supra* note 11, at 199–201 (discussing the movement away from monetary bail for many jurisdictions).

[124] *See id.* at 198–201; Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html [https://perma.cc/K69H-PJGQ] (summarizing problems with monetary bail).

[125] *See* Gilman, *supra* note 11, at 198–201 (noting a shift away from pretrial detention among some jurisdictions). An example can be found in the District of Columbia. *See id.* at 200 (discussing pre-trial services in the District of Columbia); *Pretrial Services Agency for the District of Columbia*, https://www.psa.gov [https://perma.cc/7J2E-YDYD] (outlining the services provided by the Pretrial Services Agency). The District, through its pretrial services agency, has expanded non-monetary bail options for criminal defendants. *See* D.C. CODE § 23-1303(h) (1999) (authorizing the pretrial services agency to implement these non-monetary bail options); *Pretrial Services Agency for the District of Columbia*, *supra* (providing that the PSA provides several services to released pretrial defendants including drug treatment). This program has resulted in a higher portion of defendants appearing at court events, as well as lower rates of crimes committed by those released. *See* Gilman, *supra* note 11, at 200 (noting the reduced rate of released defendants fleeing the jurisdiction as well as the lower rate of released defendant's committing violent crimes).

[126] *See* Gilman, *supra* note 11, at 201–02 (discussing the failure to shift away from monetary bond in the immigration detention system); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2143 (2017) (noting the reliance of the immigration system on monetary bond despite other alternatives). Based on ICE budget proposals, the number of detained immigrants was expected to increase in 2018. *See* Wamsley, *supra* note 9 (noting that President Trump requested a $1.2 billion increase in ICE's budget to pay for increased detention).

lack of funds.[127] One explanation for the immigration system's continued reliance on monetary bond is the way in which the bond is determined.[128] Unlike in criminal law, the initial decision on whether an immigrant respondent should be required to pay bond is decided by an ICE agent rather than a judge.[129] This agent is subject to outside influences which may encourage a determination of detention.[130] For example, the agency is mandated by Congress to keep their number of detained immigrants at a certain level.[131] This could create pressure for DHS to detain up to the point of capacity without a detailed individual analysis of whether detention is appropriate in each case.[132]

Only after this initial determination is made does an immigrant have the opportunity to seek a decision from an IJ on the issue of pre-hearing release.[133] There are potential issues at the adjudicative stage as well, however, as judges in immigration courts are not Article III judges, but rather administrative judges employed through the Department of Justice.[134] Although they operate in the DOJ rather than the DHS, IJs are still executive branch employees operating within the same immigration control structure as ICE agents and thus may be subject to pressures from the Attorney General or the President.[135]

The two-step bond determination process inherently results in an emphasis on monetary bond due to a number of additional factors.[136] For example, during their preliminary assessment, DHS agents overwhelmingly assign monetary bond in the rare cases in which they determine that an immigrant should

---

[127] *See* BYRNE ET AL., *supra* note 18, at 25, 30 (describing experiences of immigrants who were granted monetary bond but remained detained due to their inability to pay); INSECURE COMMUNITIES, *supra* note 18, at 11 (noting that in New York, 55% of immigrants who are granted monetary bond are unable to pay it and thus remain detained).

[128] *See* Gilman, *supra* note 11, at 174–77; *see also* Marouf, *supra* note 126, at 2147–48 (noting that DHS, the first decision maker in the immigration detention process interprets "custody" to mean detention and thus automatically detains large groups of people).

[129] *See* 8 U.S.C. § 1226(a) (2018) (providing that the Attorney General makes the initial detention determination for an arrested immigrant); Gilman, *supra* note 11, at 165 (discussing procedure for initial bond determination by DHS).

[130] *See* Gilman, *supra* note 11, at 183–85 (discussing influences on the initial bond determination by DHS).

[131] *Id.* at 183.

[132] *See id.* at 183–184 (discussing the pressures on ICE to detain up to capacity); Sarah Childress, *Why ICE Released Those 2,000 Immigrant Detainees*, FRONTLINE (Mar. 19, 2013), https://www.pbs.org/wgbh/frontline/article/why-ice-released-those-2000-immigrant-detainees/ [https://perma.cc/ME5B-8AD8] (describing the release of non-violent low risk immigrants who had been detained by DHS once DHS reached its budgetary maximum).

[133] *See* 8 U.S.C. § 1226(c) (providing statutory authority for bond redetermination); 8 C.F.R. § 1003.19 (providing procedures for bond redetermination hearings).

[134] *See* Gilman, *supra* note 11, at 169 (noting that IJs are not Article III judges).

[135] *See id.*

[136] *See id.* at 195–97 (discussing the bond determination process and its emphasis on monetary bond).

be released from initial arrest without detention.[137] The lack of access to counsel for immigrant respondents is another factor that contributes to the disparity in use of monetary bond.[138] As immigrant respondents must affirmatively request bond redetermination hearings, and then make legal arguments as to why they deserve release on no bond, it can be expected that the rate of success for *pro se* respondents would be low.[139]

2. Immigration Courts' Lack of Individualized Bond Determinations

Even if an immigrant acquires legal counsel and requests an individualized bond hearing, monetary bond remains the likely result.[140] This is partially the result of the lack of factors considered in immigration hearings as compared to criminal bail proceedings.[141] As discussed above, the sole factors considered by immigration courts when determining bond are (1) whether the immigrant has committed any of the "mandatory detention" crimes; (2) danger to national security; (3) danger to community; and (4) flight risk.[142] The evidence

---

[137] *See* Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 50 (2014) (noting the high rates of immigrants detained in Baltimore after the original DHS agent detention determination); *see also Decisions on ICE Detainees: State by State Details*, TRAC IMMIGRATION (May 22, 2013) http://trac.syr.edu/immigration/reports/320/ [https://perma.cc/CH5H-LF7K] (finding that in 2013, 4% of detainees were released without monetary bond after their initial ICE custody determination).

[138] *See* Gilman, *supra* note 11, at 201 (discussing the lack of counsel for many immigrants and how this leads to reliance on monetary bond).

[139] *See* 8 C.F.R. § 1003.19 (providing that immigrants must affirmatively request bond redetermination hearings); EAGLY & SHAFER, *supra* note 38, at 17 (noting the negative effect which lack of counsel has on the likelihood of success for immigrant respondents).

[140] *See* Gilman, *supra* note 11, at 195–96 (noting that release for immigrants without monetary bail is rare).

[141] *Compare* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (listing financial situation as a factor to consider when setting bail in New York), *and* WYO. RULES. CRIM. PROC. 46.1(d) (listing financial situation as a factor to consider when setting bail in Wyoming), *with In re* Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016) (finding that IJs should consider an immigrant's threat to national security as well as threat to community safety when determining bond but not directing them to consider financial situation of the defendant), *and Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount), *and* Sandoval-Gomez, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount), *and* 8 C.F.R. § 1003.19 (providing immigration detention procedures for bond redetermination without requiring consideration of an immigrant's financial situation).

[142] *See* 8 U.S.C. §§ 1182 (listing crimes which would make an immigrant inadmissible), 1226(c) (providing that immigrants who have committed certain crimes should be automatically detained), 1227(a)(2) (providing crimes which make an immigrant deportable); *Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's threat to national security, threat to community safety and flight risk when determining bond); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19(h) (providing that in order to be released an immigrant needs to show that he is not a danger to people or property, and that he is likely to return for hearings).

presented by the respondent can only be tailored to proving those requirements.[143]

This differs from criminal law, where courts consider a broad array of factors relevant both in terms of a defendant's likelihood to appear at court events and a defendant's likelihood to commit another crime while on pre-trial release.[144] There is no room in the limited immigration bond redetermination hearing for consideration of these factors found to be relevant in criminal law.[145]

This difference in procedure remains despite the fact that the immigration system often treats immigrants as if they were criminal defendants.[146] Pre-hearing detention in the two systems is used for essentially the same purpose.[147] Additionally, the same criminal enforcement apparatus is often used to

---

[143] *See Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 77, at 141–42 (2017) (providing procedures for immigration bond redetermination hearings including the presentation of evidence).

[144] *See* Gilman, *supra* note 11, at 204–07 (discussing various factors used to determine bail in the criminal context including: family ties, *financial resources*, and presence of a support system for the defendant should he be released). Empirical research has identified certain factors that can help to predict when a criminal defendant will pose a high risk to their community or an undue risk of fight. *See id.* at 205. Using these studies, guides have been developed for judges to use in pretrial bail hearings to more accurately match bail amounts to the risk posed by a defendant. *See id.* at 205–06. The nature of the immigration bond redetermination does not allow for the introduction of factors such as financial situation. *See Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's threat to national security as well as threat to community safety when determining bond but not directing them to consider financial situation of the defendant); 8 C.F.R. § 1003.19 (providing immigration detention procedures for bond redetermination without requiring consideration of an immigrant's financial situation or other).

[145] *See Fatahi*, 26 I. & N. Dec. at 793 (providing factors for IJs to consider when determining bond); *Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial status should not be a taken into consideration when determining bond); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that financial situation is irrelevant in the consideration of a bond amount); 8 C.F.R. § 1003.19 (providing factors to consider when determining bond); Gilman, *supra* note 11, at 204–07 (discussing various factors used to determine bail in the criminal context including financial resources).

[146] *See* Legomsky, *supra* note 13, at 475–98 (discussing inclusion of certain criminal procedures into immigration law including use of local police and plea bargaining).

[147] *Compare Zadvydas*, 533 U.S. at 690 (summarizing the goals of immigration detention as to ensure a defendant does not pose a danger to the community or an undue flight risk), *with* Carbo v. United States, 82 S. Ct. 662, 669 (1962) (holding that rejection of bail was merited as the defendant posed a significant threat to his community), *and Milburn*, 34 U.S. at 710 (noting that the purpose of bail is to keep a defendant present in a jurisdiction to face trial). It is also worth noting that immigration officials often engage in a practice similar to plea bargaining in the criminal context. *See* Legomsky, *supra* note 13, at 494–95 (discussing "plea" deals in the immigration context). In exchange for information on criminal targets, immigration officials will sometimes grant immigrants with temporary legal status. *See id.* Additionally, there are cases where immigrants have been granted less permanent (and thus less desirable) forms of immigration relief in exchange for forgoing their asylum applications. *See id.*

arrest and detain immigrants as is used in the criminal context.[148] Finally, the public often considers non-legal immigrants as being similar to criminals.[149] Many within the public view non-legal immigrants as lawbreakers and this may influence the development of immigration policy.[150] Despite the similarities between the purpose and perception of detention in the criminal and immigration systems, bail determination hearings for criminal detainees are far more detailed than they are for immigrants.[151] The consideration of financial resources, and other individual factors, is a procedural protection that can often be the difference between liberty and detention.[152] The immigration system's practice of deciding bond amounts without a detailed individualized analysis leads to bond determinations that are often unobtainable for immigrant detainees, thus causing detention of immigrants whom an IJ found could be safely released.[153]

---

[148] *See* Legomsky, *supra* note 13, at 496–98 (discussing the authorization by the federal government to have state authorities assist in immigration enforcement).

[149] *See id.* at 500–01 (discussing public perception of non-legal immigrants as being similar to criminals).

[150] *See id.* This is despite the fact that immigrants as a group commit less crimes per-capita than non-immigrants. *Id.* at 501.

[151] *Compare* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (listing financial situation as a factor to consider when setting bail in New York), *and* WYO. RULES. CRIM. PROC. 46.1(d) (listing financial situation as a factor to consider when setting bail in Wyoming), *with Fatahi*, 26 I. & N. Dec. at 791 (finding that IJs should consider an immigrant's threat to national security as well as threat to community safety when determining bond but not directing them to consider financial situation of the defendant), *and Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of a immigrant is not a relevant factor in determining bond amount), *and Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount), *and* 8 C.F.R. § 1003.19 (providing immigration detention procedures for bond redetermination without requiring consideration of an immigrant's financial situation).

[152] *See Hernandez II*, 872 F.3d at 984 (discussing how the plaintiff was found to not be a flight risk or danger to her community, but remained detained because the IJ, without considering her financial situation, set a bond that was beyond her ability to pay); BYRNE ET AL., *supra* note 13, at 25–30 (describing experiences of immigrants who were granted monetary bond but remained detained due to their inability to pay); INSECURE COMMUNITIES, *supra* note 18 (noting that in New York, 55% of immigrants who are granted monetary bond are unable to pay it and thus remain detained); Michael K. T. Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. REV. 69, 74–76 (2017) (discussing the result of not requiring IJs to consider financial situation when determining bond).

[153] *See Fatahi*, 26 I. & N. Dec. at 793 (establishing factors that should be considered when determining bond); *Castillo-Cajura*, 2009 WL 3063742, at *1 (finding an immigrant's financial status is irrelevant to a bond determination); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding financial status should not be considered when determining bond); BYRNE ET AL., *supra* note 18, at 25–30 (discussing immigrants who were granted bond they could not afford); INSECURE COMMUNITIES, *supra* note 18 (noting that in New York, many immigrants remain detained despite being granted bond); Tan & Kaufman, *supra* note 152, at 88–89 (discussing how not considering immigrant's financial situation often results in immigrants spending time in detention); Gilman, *supra* note 11, at 211–13 (discussing the often arbitrary nature of immigration bond determination). Stories of immigrants being detained due to their inability to pay bond are abundant. *See* BYRNE ET AL., *supra* note 18, at 25 (describing experiences of various immigrants from all over the world who were granted monetary bond but re-

C. Authority for Applying Criminal Bail Procedures to Immigration Bond

The Supreme Court has addressed the constitutional rights of immigrants several times.[154] The Court has held that once in the United States, immigrants, regardless of their legal status, are afforded certain constitutional protections.[155] These protections include the Fourteenth Amendment's Due Process Clause.[156] Additionally, the Supreme Court has found that the Fourth and Fifth Amendments apply to all people residing within the borders of the United States and therefore apply to non-legal immigrants.[157] Furthermore, a recent decision from the Court of Appeals for the Ninth Circuit could require IJs to consider an immigrant's financial situation when determining a bond amount in order to comply with the requirements of the Constitution.[158]

1. Immigration Bond Precedent: The Effect of the *Zadvydas* Decision

The Supreme Court addressed the rights of detained immigrants extensively in *Zadvydas v. Davis*.[159] The Court held that indefinite detention was unconstitutional and if there was no reasonable possibility of deportation

---

mained detained due to their inability to pay). For example, Pilar, a transgender woman from Honduras was subjected to severe persecution and sexual abuse in her home country. *Id.* After receiving no help from Honduran authorities, Pilar fled to the United States. *Id.* She was detained at the border and placed in removal proceedings. *Id.* She was given the assistance of a lawyer for her bond hearing from a non-profit legal aid agency, but despite this the IJ set her bond at $12,000. *Id.* As Pilar was unable to afford this, she spent the next six months in detention until she was granted asylum. *Id.*

[154] *See Zadvydas*, 533 U.S. at 702 (finding indefinite detention of non-legal immigrants to be unconstitutional if there is no reasonable likelihood of removal); *Plyler II*, 457 U.S. at 210 (finding that the Fifth and Fourteenth Amendments apply to non-legal immigrants); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (allowing Fifth and Fourteenth Amendment protection to non-legal immigrants).

[155] *See Zadvydas*, 533 U.S. at 693–94 (finding that the Due Process Clause applies to non-legal immigrants); *Plyler II*, 457 U.S. at 210 (finding that some constitutional protections apply to non-legal immigrants); *Mathews*, 426 U.S. at 77 (providing constitutional protections to non-legal immigrants).

[156] *See Zadvydas*, 533 U.S. at 693–94 (providing Due Process Clause protection to non-legal immigrants); *Mathews*, 426 U.S. at 77 (finding that the Due Process Clause applies to non-legal immigrants).

[157] *See Verdugo Urquidez*, 494 U.S. at 271 (finding that the Fourth Amendment applies to all those living within the borders of the United States); *Mathews*, 426 U.S. at 77 (finding that the Fifth Amendment applies to non-legal immigrants).

[158] *See Hernandez II*, 872 F.3d at 990–91 (finding that under the Fifth Amendment, IJs are likely required to consider an immigrant's financial situation when determining a bond amount).

[159] *See Zadvydas*, 533 U.S. at 693–94 (addressing the constitutional rights of non-legal immigrants). It is important to note that this case was decided three months before the September 11, 2001, terrorist attacks in New York City and Washington D.C. *See* Margaret Taylor, *Judicial Deference to Congressional Folly: The Story of* Demore v. Kim, *in* IMMIGRATION STORIES 343, 344–45 (David Martin & Peter Schuck eds., 2005) (discussing the historical context of the *Demore* decision). There is speculation that the events of September 11, 2001, changed the Court's views on the constitutional rights of non-citizens. *See id.* There is some evidence of this in the Court's decision in *Demore v. Kim*, where the Court held that indefinite detention of immigrants convicted of certain types of crimes was constitutional. *See* 538 U.S. 510, 531 (2003); Taylor, *supra* (discussing the potential effect of the terrorist attacks of September 11 on the Supreme Court's decision in *Demore*).

through the legal process known as removal, DHS was required to release a detained immigrant, regardless of his lack of legal status.[160] The Court held that a non-legal immigrant's liberty interest is not reduced in any way due to his lack of legal status.[161] In reaching this conclusion, the Court acknowledged that the procedures used in criminal detention cases can act as helpful guides when analyzing the procedures used in immigration detention.[162] Following this, the Court determined that detention should be limited to meeting two purposes: ensuring an immigrant's appearance in court and protecting people from any danger the immigrant might pose.[163] The Court stated that in order to justify infringement on liberty, detention must be sufficiently tailored to reducing the danger posed by the detainee and preventing undue flight risk.[164]

The holding in *Zadyydas* stands for the position that once in the United States, immigrants, regardless of their legal status, are afforded certain constitutional protections.[165] These protections include the Fourteenth Amendment's Due Process Clause.[166] Additionally, the Supreme Court has found that the Fourth and Fifth Amendments apply to all people residing within the borders of the United States and therefore apply to non-legal immigrants.[167] As a result

---

[160] *See Zadvydas*, 533 U.S. at 699 (concluding that detention is not permissible if removal is not reasonably possible). Removal is sometimes made impossible due to an immigrant's home country refusing to allow the immigrant entry. *See id.* at 684. In order for removal to occur, the United States must find a country that is willing to accept the immigrant. *See* Carol Morello, *Deporting Convicted Criminals from the U.S. Is Not as Easy as It Sounds*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/world/national-security/deporting-convicted-criminals-from-the-us-is-not-as-easy-as-it-sounds/2016/11/27/b2d8759a-b1ac-11e6-be1c-8cec35b1ad25_story.html?utm_term=.2f88382d1e31 [https://perma.cc/KL83-V5P6] (discussing the requirement of travel papers from an immigrant's home country in order to deport that immigrant, and a group of countries who refuse to issue them).

[161] *See Zadvydas*, 533 U.S. at 704 (finding indefinite detention of non-legal immigrants to be unconstitutional if there is no reasonable likelihood of removal); *Plyler II*, 457 U.S. at 210 (finding that the Fifth and Fourteenth Amendments apply to non-legal immigrants); *Mathews*, 426 U.S. at 77 (finding that the Fifth and Fourteenth Amendments apply to non-legal immigrants).

[162] *See Zadvydas*, 533 U.S. at 690–91 (using criminal bail procedures as a guide to determining a civil bond issue). This premise was later enforced by the Court in *M.L.B. v. S.L.J.*, 519 U.S. 102, 127–28 (1996). The Court held in *M.L.B.* that precedent and procedure for detaining individuals in criminal proceedings should not be limited to criminal defendants, but rather should include individuals in all proceedings that involve deprivation of liberty. *See id.*

[163] *See Zadvydas*, 533 U.S. at 690–91 (discussing the purpose of immigration bond).

[164] *See id.* at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (discussing the constitutionality of immigration detention).

[165] *Id.* at 693–94 (finding that the Due Process Clause applies to non-legal immigrants); *see Plyler II*, 457 U.S. at 210 (finding that some constitutional protections apply to non-legal immigrants); *Mathews*, 426 U.S. at 77 (providing constitutional protections to non-legal immigrants).

[166] *Zadvydas*, 533 U.S. at 693–94 (providing Due Process Clause protection to non-legal immigrants); *see Mathews*, 426 U.S. at 77 (finding that the Due Process Clause applies to non-legal immigrants).

[167] *See Verdugo-Urquidez*, 494 U.S. at 271 (granting Fourth Amendment protections to all those living within the borders of the United States); *Mathews*, 426 U.S. at 77 (finding that the Fifth Amendment applies to non-legal immigrants).

of *Zadvydas*, indefinite detention of immigrants is no longer permitted where there is no reasonable likelihood that the immigrant will be removed.[168] The reasoning in *Zadvydas* has not extended to the determination of bond amount, however, as IJs are not required to consider an immigrant's ability to pay when determining bond.[169]

2. The Ninth Circuit's Decision in *Hernandez II*

Recently, a case in the Ninth Circuit has introduced the premise that an immigrant's ability to pay should be taken into consideration when determining bond in immigration cases.[170] In *Hernandez v. Lynch* (*Hernandez I*), a class of immigrants sued the federal government, arguing that bond determination procedures violated their constitutional rights.[171] The plaintiffs claimed that the existing government procedures violated the Fifth and Eighth Amendments.[172] Finding that the plaintiffs had established a substantial likelihood of success, the District Court for the Central District of California granted a preliminary

[168] *See Zadvydas*, 533 U.S. at 699 (finding that indefinite immigration detention is prohibited under the constitution).

[169] *See* 8 U.S.C. § 1226(c) (providing statutory authority for immigration detention and immigration bond); *Castillo-Cajura*, 2009 WL 3063742, at *1 (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *Sandoval-Gomez*, 2008 WL 5477710, at *1 (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); *Fatahi*, 26 I. & N. Dec. at 791 (finding that IJs should consider an immigrant's threat to national security, community safety and flight risk when determining bond but not that they should consider financial ability); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk but not that they should consider financial ability of respondent); 8 C.F.R. § 1003.19(h) (providing immigration bond procedures but not providing an opportunity for the IJ to consider the financial ability of the respondent); *see also Zadvydas*, 533 U.S. at 690 (stating that immigration detention should be sufficiently related to serving its stated purpose).

[170] *See Hernandez II*, 872 F.3d at 1000 (finding that it is likely unconstitutional to set immigration bond without considering an immigrant's financial situation).

[171] Hernandez v. Lynch (*Hernandez I*), Case No. 16-00620-JGB, 2016 WL 7116611, at *2 (C.D. Cal. Nov. 10, 2016), *aff'd*, 872 F.3d 976 (9th Cir. 2017). This case was the district court decision that was appealed to the Ninth Circuit in *Hernandez II*. *See Hernandez II*, 872 F.3d at 981; *Hernandez I*, 2016 WL 7116611, at *1. The difference in the named defendant is due to the change in administration, and thus change in Attorney General, that occurred between 2016 and 2017. *See Hernandez II*, 872 F.3d at 981; Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 9, 2017), https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html [https://perma.cc/3GSL-FCV5] (noting the confirmation of Jeff Sessions as the new Attorney General). On November 7, 2018, Jeff Sessions resigned as Attorney General and was replaced by Matthew Whitaker, as such the case name of this litigation changed, and will change again as soon as an official nominee is confirmed. *See* Peter Baker et al., *Jeff Sessions Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/V6DH-N2VU].

[172] *See Hernandez I*, 2016 WL 7116611, at *21.

injunction requiring IJs in the district to consider financial situation when setting bond.[173] The government appealed the injunction to the Ninth Circuit.[174]

The Ninth Circuit upheld the preliminary injunction, finding that the plaintiffs demonstrated a likelihood of success on their Fifth Amendment due process challenge.[175] The court began its analysis by stating that any objectives accomplished by the government through detention must be of greater importance then the constitutional interest of protecting an individual's liberty.[176] The court added that there must be a reasonable connection between the effect of detention of immigrants and the purpose of that detention.[177] The court noted that in order for an immigrant to be granted bond, an IJ must first find that the particular immigrant is not dangerous and is likely to appear at required court hearings.[178] The court then went a step further by concluding that consideration of an immigrant's financial situation is necessary to ensure that detention and bond are closely related enough to satisfy Fifth Amendment due process requirements.[179]

In reaching this conclusion, the Ninth Circuit cited precedent from both the Supreme Court and other federal appellate courts.[180] A recurring principle

---

[173] *See id.* at *20. In granting this preliminary injunction the District Court for the Central District of California used a standard established by the Supreme Court. *See id.* (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)) (summarizing the standard for granting a preliminary injunction). In order to be granted a preliminary injunction a plaintiff must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *See Winter*, 555 U.S. at 20.

[174] *Hernandez II*, 872 F.3d at 981.

[175] *Id.* at 1000. Although the Ninth Circuit noted that the district court additionally found that the plaintiffs had a substantial likelihood of success under their Eighth Amendment excessive bail challenge, the Ninth Circuit affirmed solely on the basis of the due process challenge and neglected to reach an opinion on the plaintiffs' Eighth Amendment challenge. *See id.* at 990 n.16; *Hernandez I*, 2016 WL 7116611, at *28 (finding that plaintiffs were likely to succeed on their Eighth Amendment challenge).

[176] *Hernandez II*, 872 F.3d at 990. The interest furthered by detaining immigrants is ensuring that they appear at required court hearings and preventing any unreasonable danger they might cause if released. *See id.*

[177] *Id.* (quoting *Zadvydas*, 533 U.S. at 690) (stating "any detention incidental to removal must bear[] [a] reasonable relation to [its] purpose").

[178] *Id.*

[179] *See id.* at 990–91, 1000. In support of its finding, the Ninth Circuit cited a statistic that showed that between 95% and 99% of immigrants released from detention through an alternative release program (one without monetary bond such as conditional parole or ankle bracelet monitoring) attended all of their required hearings. *See id.* at 991.

[180] *See* Turner v. Rogers, 564 U.S. 431, 447–48 (2011) (finding that the prosecution must show that a defendant has the ability to pay child support before imprisoning him for failure to pay); Bearden v. Georgia, 461 U.S. 660, 672 (1983) (finding it unconstitutional to revoke probation due to the failure of an individual to pay a court ordered fee without first considering the defendant's financial situation); *Hernandez II*, 872 F.3d at 991–92; Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (finding that financial situation should be considered to ensure that bail is sufficiently tailored to its purpose).

from those cases declares that the government cannot be said to have adequately balanced the cause for detention (i.e. protection from dangerous respondents and negation of flight risk) with its effect (i.e. restriction of a respondent's liberty) if the government has not considered a respondent's financial situation.[181] The Ninth Circuit concluded that the government was unable to show a need to continue the detention of immigrants who have been granted bond but are unable to afford it.[182] Therefore, the court held that it is likely a violation of the Fifth Amendment's Due Process Clause to fail to consider an immigrant's ability to pay when setting bond.[183]

III. The Benefits of Requiring Immigration Judges to Consider an Immigrant's Financial Situation When Determining Bond

The decision of the Ninth Circuit in *Hernandez II* resulted in a substantial change to the bond redetermination procedures of immigration courts located within the Ninth Circuit.[184] The court found that the plaintiffs in this case had a likelihood of success on their Fifth Amendment due process challenge, and upheld the preliminary injunction granted by the U. S. District Court for the Central District of California.[185] The preliminary injunction requires ICE agents and IJs operating within the Central District of California to take into consideration an immigrant's financial situation when setting bond.[186] Additionally, the injunction restricts them from setting bond higher than what is

---

[181] *See Turner*, 564 U.S. at 447–48 (considering detention for a respondent who was unable to pay child support due to lack of funds); *Bearden*, 461 U.S. at 672 (considering detention for a respondent who was unable to pay court imposed fine due to a lack of funds); *Hernandez II*, 872 F.3d at 991–92 (considering detention for immigrants who are unable to pay bond due to a lack of funds); *Pugh*, 572 F.2d at 1057 (considering detention for indigent criminal defendants). The court dismissed the argument that cases dealing with criminal detention should not be applied in the civil detention setting, noting that the Supreme Court in *Zadvydas* used criminal bail procedure as guidance. *See Zadvydas*, 533 U.S. at 690–91 (noting that criminal law can be used as guidance for immigration law); *Hernandez II*, 872 F.3d at 993; *see also M.L.B.*, 519 U.S. at 127–28 (finding that criminal bail procedures are an appropriate guide in situations involving depravation of liberty).

[182] *See Hernandez II*, 872 F.3d at 994 (considering the government's purpose for immigration detention).

[183] *See id.* at 1000. The result of *Hernandez II* was a continuation of the preliminary injunction issued in *Hernandez I*, and a trial on the merits is still forthcoming. *See id.* A decision was released as recently as January 3, 2018, and involved attorney's fees for a motion to compel drafted by the plaintiffs (the motion to compel, as well as the motion for attorney's fees, were granted). *See* Hernandez v. Sessions, Case No. EDCV 16–620–JGB, 2018 WL 276687, at *3 (C.D. Cal. Jan. 3, 2018). This is the most current update available at the time of this Note's publication.

[184] *See* Hernandez v. Sessions (*Hernandez II)*, 872 F.3d 976, 987, 1000 (9th Cir. 2017) (holding that determining immigration bond without considering an immigrant's financial situation likely violates that immigrant's constitutional rights).

[185] *Id.* at 1000; Hernandez v. Lynch (*Hernandez I*), Case No. 16-00620-JGB, 2016 WL 7116611, at *20 (C.D. Cal. Nov. 10, 2016), *aff'd*, 872 F.3d 976 (9th Cir. 2017).

[186] *Hernandez II*, 872 F.3d at 987; *Hernandez I*, 2016 WL 7116611, at *20.

reasonably required to compel the immigrant's appearance at hearings.[187] Finally, it requires them to consider alternative conditions to release, such as ankle bracelet monitoring, and if possible, grant those conditions instead of monetary bond.[188] Because the case is still ongoing in the district court, the fate of this injunction is unclear, both in terms of whether it will become a permanent injunction and whether its policy will be expanded beyond the Ninth Circuit.[189]

The decision of the Ninth Circuit to affirm the preliminary injunction is sound both in terms of law and policy.[190] Section A of this part discusses why the legal reasoning in *Hernandez II* is likely to be upheld by the district court and on future appeals (to either other circuits or the BIA) and why it is consistent with the historical understanding of the purpose of bond.[191] Section B explores the policy implications of this injunction and argue that it is in the best interest of the DHS and Department of Justice (DOJ) to change their regulations to match the requirements of the preliminary injunction.[192]

A. Yes, Immigrants Have Fifth Amendment Rights: The Merit of Hernandez II

It is worth examining if the Ninth Circuit's holding in *Hernandez II* is consistent with precedent regarding constitutional protections for non-legal immigrants.[193] In affirming the preliminary injunction issued by the District

---

[187] *Hernandez II*, 872 F.3d at 987; *Hernandez I*, 2016 WL 7116611, at *20.

[188] *Hernandez II*, 872 F.3d at 987; *Hernandez I*, 2016 WL 7116611, at *20. The preliminary injunction also requires all members of the certified class to be given a new bond redetermination hearing within forty-five days of the decision. *See Hernandez II*, 872 F.3d at 987; *Hernandez I*, 2016 WL 7116611, at *20.

[189] *See Hernandez II*, 872 F.3d at 1000. The decision of the Ninth Circuit upheld a preliminary injunction granted by the district court. *See id.* The case is still being litigated at the district court level, and a decision in favor of the government would result in the removal of the preliminary injunction. *See id.* (upholding the district court's preliminary injunction); *Preliminary Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "preliminary injunction" as "[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case").

[190] *See Hernandez II*, 872 F.3d at 1000 (holding that the plaintiffs had a substantial possibility of success on their Fifth Amendment claims); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (finding that bond amount must be tailored to meet its purpose of ensuring an immigrant's appearance at hearings); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding that Fifth Amendment rights apply to non-legal immigrants); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (finding that the due process and equal protection requirements of the Fifth Amendment requires individualized bail hearings that consider a defendant's financial situation); Tan & Kaufman, *supra* note 152, at 88–89 (noting the positive impact which *Hernandez II* will have on immigration detention policy).

[191] *See infra* notes 193–206 and accompanying text.

[192] *See infra* notes 207–224 and accompanying text.

[193] *Hernandez II*, 872 F.3d at 1000; *see Zadvydas*, 533 U.S. at 690 (finding that bond must be reasonably tailored to meet the stated goals of the government); *Wong Wing*, 163 U.S. at 238 (holding that Fifth Amendment rights apply to non-legal immigrants); Tan & Kaufman, *supra* note 152, at 79–82 (discussing constitutional protections of immigrants and how they pertain to immigration detention).

Court, the Ninth Circuit found that the plaintiffs were likely to succeed on their Fifth Amendment challenge.[194] By setting bond without considering an immigrant's financial situation, the government likely violated the Due Process Clause of the Fifth Amendment.[195] Fifth Amendment rights, and specifically protection under the Due Process Clause, have long been found to apply to non-legal immigrants.[196] As this decision only applies to the Ninth Circuit, other courts will still have to deal with the question of whether the Due Process Clause protects non-legal immigrants from bond determinations that do not consider financial situation.[197]

This decision is consistent with the understanding of the Due Process Clause of the Fifth Amendment within the immigration context.[198] It has been established that the Fifth Amendment requires that the act of detention be sufficiently tailored to meet the stated purpose of the government.[199] In order to receive release on bond, it must be determined that a particular immigrant does not pose a danger to national security or to their community.[200] Therefore, the purpose of bond itself must be to reduce an immigrant's risk of flight and to

---

[194] *See Hernandez II*, 872 F.3d at 1000.

[195] *See id.* at 990, 1000; *Hernandez I*, 2016 WL 7116611, at *20, *27 (summarizing the preliminary injunction sought by plaintiffs and determining that plaintiffs have a substantial likelihood of success on their Fifth Amendment challenge).

[196] *See* Plyler v. Doe (*Plyler II*), 457 U.S. 202, 210 (1982) (allowing Fifth Amendment protections to apply to non-legal immigrants); *Wong Wing*, 163 U.S. at 238 (providing that Fifth Amendment rights to non-legal immigrants); *Hernandez II*, 872 F.3d at 990, 1000 (finding that plaintiffs had a substantial likelihood of success on their Fifth Amendment due process claim).

[197] *See Hernandez II*, 872 F.3d at 990, 1000 (granting a preliminary injunction); ACLU, PRACTICE ADVISORY, BOND HEARINGS AND ABILITY-TO-PAY DETERMINATIONS IN THE NINTH CIRCUIT UNDER *HERNANDEZ V. SESSIONS* 1 (2017) (noting that *Hernandez II* is the first decision of its kind and that although it will only apply in the Ninth Circuit, other courts will likely use it as persuasive authority); *Preliminary Injunction*, *supra* note 189.

[198] *Hernandez II*, 872 F.3d at 990; *see Zadvydas* 533 U.S. at 690 (finding that bond must be reasonably tailored to meet the stated goals of the government); *Wong Wing*, 163 U.S. at 238 (finding that Fifth Amendment rights apply to non-legal immigrants). If the Fifth Amendment applies to non-legal immigrants, and in order to comply with the Fifth Amendment detention must be tailored to meet government goals, it follows that if the government is going to grant bond it must be tailored to an immigrant's ability to pay. *See Hernandez II*, 872 F.3d at 990.

[199] *See Zadvydas*, 533 U.S. at 690 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (holding that immigration detention with the end purpose of removal must reasonably relate to its purpose); *Hernandez II*, 872 F.3d at 990; Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008) (citing *Zadvydas*, 533 U.S. at 690) ("[D]ue process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'").

[200] *See In re* Fatahi, 26 I. & N. Dec. 791, 793 (B.I.A. 2016) (holding that IJs should consider an immigrant's threat to national security, threat to community safety, as well as risk of flight when determining bond); *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (holding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19 (2018) (providing that in determining immigration bond, an IJ should consider an immigrant's flight risk and threat of danger).

incentivize appearances at hearings.[201] Many criminal law cases support the premise that in order for a bond to properly incentivize court appearances, it must be geared toward an individual's unique financial situation.[202]

As immigration procedure stood before *Hernandez II*, DHS agents and IJs set bond without consideration of a respondent's financial situation.[203] This ensured that bond did not represent a reasonable incentive for court appearance for many individuals who were unable to afford the amount set.[204] Immigration detention represents a situation where restriction of liberty is being used not to achieve some legitimate government purpose, but rather as an unnecessary

---

[201] *See Hernandez II*, 872 F.3d at 990–91; *Fatahi*, 26 I. & N. Dec. at 793 (holding that IJs should consider an immigrant's threat to national security, threat to community safety as well as danger of flight risk when determining bond); *Patel*, 15 I. & N. Dec. at 666 (holding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19 (providing that IJs should consider an immigrant's risk of flight and risk of danger when determining bond amount).

[202] *See Pugh*, 572 F.2d at 1057 (holding that a defendant's financial situation must be considered when determining bail); Beddow v. State, 68 So. 2d 503, 504 (Ala. 1953) (holding that a defendant's "station in life" must be considered when determining bail); Camera v. State, 916 So. 2d 946, 947 (Fla. Dist. Ct. App. 2005) (remanding the case to consider a defendant's financial situation for the purposes of bail); Brangan v. Commonwealth, 80 N.E.3d 949, 959 (Mass. 2017) (finding that the Fourteenth Amendment requires that a judge consider a defendant's financial situation when determining bail). Justice Geraldine Hines of the Supreme Judicial Court of Massachusetts summarized this problem well in her decision in *Brangan*. *See* 80 N.E.3d at 959. Justice Hines stated, "[a] bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair." *Id.* The decision went on, "[a] $250 cash bail will have little impact on the well-to-do, for whom it is less than the cost of a night's stay in a downtown Boston hotel, but it will probably result in detention for a homeless person whose entire earthly belongings can be carried in a cart." *Id.*

[203] *See Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's threat to national security, community safety, as well as flight risk when determining bond, but not directing any inquiry into the financial situation of the immigrant); *In re* Castillo-Cajura, No. A089 853 733, 2009 WL 3063742, at *1 (B.I.A. Sept. 10, 2009) (finding that financial situation of an immigrant is not a relevant factor in determining bond amount); *In re* Sandoval-Gomez, No. AXXX XX3 965, 2008 WL 5477710, at *1 (B.I.A. Dec. 15, 2008) (finding that an immigrant's financial situation is not a relevant factor in the consideration of bond amount); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk, but not directing any inquiry into the financial situation of the immigrant); 8 C.F.R. § 1003.19 (providing immigration bond procedures for redetermination hearings without allowing for consideration of an immigrant's financial situation).

[204] *See Zadvydas*, 533 U.S. at 690 (finding that detention should be tailored to the government's purpose which is ensuring an immigrant's appearance at hearings); BYRNE & ACER, *supra* note 127, at 204 (describing experiences of immigrants who were granted monetary bond but remained detained due to their inability to pay); INSECURE COMMUNITIES, *supra* note 18, at 11 (noting that in New York, 55% of immigrants who are granted monetary bond are unable to pay it and thus remain detained). Chinua, from Nigeria, can provide another example of an immigrant who was granted bond, but remained detained due to his inability to pay. BYRNE ET AL., *supra* note 18, at 26. After Boko Haram killed his wife and one of his children, Chinua fled to the United States. *See id.* ICE set an initial bond of $7,500 which Chinua was unable to afford and as a result he remained detained for six months while awaiting his day in court. *See id.*

infringement on constitutionally protected liberty.[205] The Ninth Circuit's opinion followed this reasoning in finding that detaining immigrants simply because they could not pay bond did not meet any government purpose and thus is likely unconstitutional.[206]

B. Why the Holding of Hernandez II *Is Good for the Federal Government (Looking at You DHS)*

The policy change enacted by the preliminary injunction issued in *Hernandez II* should be adopted as a regulation by DHS and the DOJ, as the resulting effects for the government (and taxpayers) would be largely positive.[207] Rather than continuing to challenge this procedural change, the government should accept it and use the money it would save for more effective forms of immigration enforcement.[208]

The amount of money the federal government spends on the detention of immigrants (legal and non-legal) is approximately $2 billion per year, and that number is expected to grow as the new administration aggressively expands

---

[205] *See Zadvydas*, 533 U.S. at 690 (finding that bond must be reasonably tailored to meet the stated goals of the government which is ensuring an immigrant appears at hearings, and is not dangerous); *Hernandez II*, 872 F.3d at 990 (finding that under the Fifth Amendment, immigration detention must be tailored so that it meets the government's purpose without unnecessarily infringing upon the liberty of immigrants); *Casas-Castrillon*, 535 F.3d at 950 (finding that detention must balance the government's interest in ensuring an immigrants appearance, with the immigrant's interest in liberty); Tan & Kaufman, *supra* note 152, at 75–76 (noting how immigrants are routinely detained not because they are dangerous or pose a flight risk, but because they cannot afford the bond which is set for them).

[206] *See Hernandez II*, 872 F.3d at 992, 1000. Although the Ninth Circuit did not address the plaintiff's Eighth Amendment claims, the district court did, and in granting the plaintiffs' preliminary injunction, found that they were likely to prevail. *See id.* at 990 n.16; *Hernandez I*, 2016 WL 7116611, at *20. As there is very little judicial discussion on this issue, it will be interesting to see if it will be discussed in further cases, or if courts will continue to base the decisions solely on the Fifth Amendment argument as the Ninth Circuit did. *See Hernandez II*, 872 F.3d at 990 n.16.

[207] *See Hernandez II*, 872 F.3d at 987 (discussing the scope of the preliminary injunction); Marouf, *supra* note 126, at 2160–70 (noting alternative forms of release for immigrants and noting their cost compared to detention as well as their rate of success); NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 2 (2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf [https://perma.cc/2XP6-V2KE] (noting the amount of money which the government spends on immigration detention); ACLU, *supra* note 197 (noting alternatives to detention some of which cost only 17 cents a day per immigrant compared to up to $298 a day for detention).

[208] *See Hernandez II*, 872 F.3d at 987 (discussing the scope of the preliminary injunction as requiring IJs to consider an immigrant's ability to pay bond as well as alternatives monetary bond when deciding release conditions); Marouf, *supra* note 126, at 2160–70 (noting alternative forms of release for immigrants and noting their cost compared to detention); Gilman, *supra* note 11, at 198–202 (noting the success of alternatives to detention in the criminal system); ACLU, *supra* note 197 (noting alternatives to detention some of which cost only 17 cents a day per immigrant compared to up to $298 a day for detention and calling on DHS to change their detention policies).

the scope of its immigration enforcement activities.[209] This means that $150–$300 is spent per immigrant per day.[210] If immigration control is to remain a priority for the current administration (and presumably Congress), funding may be devoted not just to increase ICE operations, but to increase border patrol and potentially construct a physical barrier on the border.[211] Assuming taxes are not raised, the funding for this increased immigration and border control will have to come from cuts or repurposing of funds elsewhere in the government.[212] If fewer immigrants were detained, the federal government, and specifically DHS, stands to save a significant amount of money.[213]

---

[209] *See* NAT'L IMMIGRATION FORUM, *supra* note 207, at 2 (detailing the funds spent by the federal government on immigration detention); *see also* John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017), https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom [https://perma.cc/DD5K-5MB7] (discussing the large amount of money spent on immigration detention); Wamsley, *supra* note 9 (discussing the increased budget request for ICE as the new administration looks to make more immigration arrests).

[210] *See* NAT'L IMMIGRATION FORUM, *supra* note 209, at 2 (noting that DHS spent around $159 a day per immigrant in 2014 and $164 a day per immigrant in 2012); *see also* ACLU, ALTERNATIVES TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCKUP, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf [https://perma.cc/DG8Q-M8FN] (noting amounts spent by various different detention facilities which were as much as $298 per immigrant per day).

[211] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS 18 (2018) (requesting increases in funding for several immigration related initiatives); Pete Grieve, *Trump Tweets 'We Will BUILD THE WALL!,'* CNN POLITICS (June 22, 2017), https://www.cnn.com/2017/06/22/politics/donald-trump-build-wall-mexico-second-deadliest/index.html [https://perma.cc/XT5R-XWNC] (discussing a plan to build a physical barrier on the border with Mexico); Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html [https://perma.cc/4FZX-MQZA] (discussing changes in the plan to build a wall on the border with Mexico). The issue of funding for a border wall came to a head in December 2018, with President Trump refusing to allow any budget which did not provide $5.7 billion for a barrier. *See* Julie Hirschfeld Davis & Emily Cochrane, *Demanding Wall Funding, Trump Balks at Bill to Avert Shutdown*, N.Y. TIMES (Dec. 20, 2018), https://www.nytimes.com/2018/12/20/us/politics/trump-government-shutdown.html [https://perma.cc/N9YD-AWQY] (summarizing events culminating in a partial shutdown of the federal government). This argument resulted in the longest federal government shutdown in history, with Democrats refusing to cede to the President's funding demands. *See* Abigail Abrams, *This Is Now the Longest Government Shutdown in U.S. History*, TIME (Jan. 12, 2019), http://time.com/5499397/shutdown-longest-history/ [https://perma.cc/CHK9-DQB5] (discussing the 2018–2019 partial shutdown of the federal government).

[212] *See* Hamad Aleaziz, *'Collateral' Immigration Arrests Threaten Key Crime Alliances*, S.F. CHRON. (Apr. 28, 2017), https://www.sfchronicle.com/bayarea/article/Collateral-immigration-arrests-threaten-key-11106426.php [https://perma.cc/N3CX-F5JX] (noting that to meet the demands of its increased deportation priorities, DHS has directed its investigations division, which normally focuses on cross border crime, to devote more time to immigration control); Alan Gomez, *Trump Budget Wants Billions More for Border Wall, Immigration Agents and Judges*, USA TODAY (Feb. 12, 2018), https://www.usatoday.com/story/news/politics/2018/02/12/trump-budget-wants-billions-more-border-wall-immigration-agents-and-judges/329766002/ [https://perma.cc/D4PT-KNME] (noting the commitment by the Trump administration to increase border security); *see also* Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html [https://

This is not to say that detention serves no role in immigration control.[214] If an immigrant bears a significant threat to their community, to national security, or poses an unreasonably high flight risk, it is likely in the best interest of the public that they remain detained while awaiting their immigration hearing and final deportation.[215] This is not the case, however, for immigrants who are granted bond.[216] As discussed above, the only way in which a DHS agent, or an IJ may legally grant an immigrant bond is if the immigrant is able to prove first that they are not statutorily barred due to committing certain crimes and then that they: (1) are not a threat to the national security; (2) do not pose a threat to their community; and (3) are not an unreasonable flight risk.[217] Many immigrants, however, who are granted bond remain detained (at a cost of $150–$300 a day) simply because they are unable to pay the bond set.[218] The

---

perma.cc/2A87-LJXK] (discussing the Tax Cuts and Jobs Act, which was signed into law by President Trump and lowered taxes). On February 15, 2019, President Trump declared a national emergency and sought to divert funds from the Department of Defense to begin construction of a wall on the southern border. Presidential Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

[213] *See* NAT'L IMMIGRATION FORUM, *supra* note 209, at 2 (noting that DHS spent around $159 a day per immigrant in 2014 and $164 a day per immigrant in 2012); ACLU, *supra* note 197 (noting amounts spent by various different detention facilities which were as much as $298 per immigrant per day).

[214] *See Zadvydas*, 533 U.S. at 690 (noting the purpose of immigration bond as being a means to ensure immigrants appear at hearings); *Fatahi*, 26 I. & N. Dec. at 792, 795 (finding that an immigrant who held a fake passport which was found to be created by the Islamic State in Iraq and Syria, a terrorist organization, posed a danger to national security and thus should not be granted bond); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk).

[215] *See Fatahi*, 26 I. & N. Dec. at 795 (finding that an IJ was correct in denying bond to an immigrant who was found to pose a threat to national security); *In re* Guerra, 24 I. & N. Dec. 37, 41 (B.I.A. 2006) (finding that an IJ was correct in determining that an immigrant involved in a drug trafficking business posed a threat to the community and thus should not be released on bond); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk).

[216] *See Patel*, 15 I. & N. Dec. at 667 (finding that an immigrant who had never been arrested and presented little risk of flight should be released from detention); 8 C.F.R. § 1003.19 (providing that immigrants should be granted bond so long as they do not pose a threat to the community or an unreasonable flight risk).

[217] *See* 8 U.S.C. §§ 1182 (2018) (providing crimes that make an immigrant inadmissible), 1226(c) (providing that immigrants who have committed certain crimes should be automatically detained), 1227(a)(2) (providing crimes that make an immigrant deportable); *Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's threat to national security, threat to community safety and flight risk when determining bond); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose a high safety risk or an undue flight risk); 8 C.F.R. § 1003.19(h) (providing that an immigrant needs to show "that release would not pose a danger to other persons or to property [and] that the alien is likely to appear for any scheduled proceeding or interview).

[218] *See* Gilman, *supra* note 11, at 201–02 (discussing the negative effects of prolonged detention on an immigrant's chances of a positive legal result); *see also* ACLU, *supra* note 197 (noting amounts spent by various different detention facilities which were as much as $298 per immigrant per day); BYRNE ET AL., *supra* note 18, at 25–30 (describing experiences of immigrants who were granted mon-

preliminary injunction issued by the District Court for the District of Central California, and affirmed by the Ninth Circuit, should be implemented nationwide, as it would save the DHS significant amounts of money.[219]

It is true that a main purpose of bond in the immigration context is to encourage the appearance of immigrants at hearings.[220] It has, however, been shown in both the immigration and criminal context that there are other methods of ensuring appearances that are just as, if not more, effective.[221] These methods also cost significantly less money than detention.[222] If the true purpose of immigration arrest is indeed removal, then it should not matter to the government whether the immigrant spends his time in detention or at home with family.[223] Additionally, if the immigrant manages to win his case and remain in the country, then removing detention from the scenario eliminates an unnecessary burden on liberty for an individual with a legal claim to stay in the country.[224]

---

etary bond but remained detained due to their inability to pay); NAT'L IMMIGRATION FORUM, *supra* note 209, at 2 (noting that DHS spent around $159 a day per immigrant in 2014 and $164 a day per immigrant in 2012); INSECURE COMMUNITIES, *supra* note 18 (noting that in New York, 55% of immigrants who are granted monetary bond are unable to pay it and thus remain detained).

[219] *See Hernandez II*, 872 F.3d at 1000; *Hernandez* I, 2016 WL 7116611, at *20; NAT'L IMMIGRATION FORUM, *supra* note 209, at 2 (detailing the large amount of taxpayer money spent on immigration detention); ACLU, *supra* note 197 (noting alternatives to detention some of which cost only 17 cents a day per immigrant).

[220] *See Zadvydas*, 533 U.S. at 690 (noting that a main purpose of immigration detention is ensuring that an immigrant appears in court); *Fatahi*, 26 I. & N. Dec. at 793 (finding that IJs should consider an immigrant's risk of flight); *Patel*, 15 I. & N. Dec. at 666 (finding that bond should be granted so long as an immigrant does not pose an undue flight risk).

[221] *See* Gilman, *supra* note 11, at 199–202 (describing alternative methods to monetary bond, specifically mentioning the pretrial agency of D.C.); Marouf, *supra* note 126, at 2155–70 (discussing alternatives to bond which include supervised release, electronic monitoring, and personal recognizance); *Pretrial Services Agency for the District of Columbia*, *supra* note 125 (detailing pretrial services available for criminal defendants in Washington D.C. which include drug treatment and have reduced crime and flight rates among pre-trial defendants who are released from custody).

[222] *See* Marouf, *supra* note 126, at 2160–70 (noting alternative forms of release for immigrants and noting their cost compared to detention); NAT'L IMMIGRATION FORUM, *supra* note 209, at 2 (noting the amount of money which the government spends on immigration detention); ACLU, *supra* note 197 (noting alternatives to detention some of which cost only 17 cents a day per immigrant compared to up to $298 a day for detention).

[223] *See Zadvydas*, 533 U.S. at 690 (noting that a main purpose of immigration detention is ensuring that an immigrant appears in court, and preventing any danger the immigrant might pose); *Hernandez II*, 872 F.3d at 990–92 (discussing lack of reasons why the government needed to detain immigrants who cannot afford bond); *Patel*, 15 I. & N. Dec. at 666 (finding that immigrants should be granted pre-hearing release so long as they can show they do not pose a danger to national security or a flight risk); 8 C.F.R. § 1003.19(h) (providing that as long as an immigrant is not statutorily barred from release, they should be granted pre-hearing release if they can show that they are not a danger or a flight risk).

[224] *See Zadvydas*, 533 U.S. at 690 (noting the strength of immigrants' interest in liberty); Stack v. Boyle, 342 U.S. 1, 5 (1951) (discussing the strong constitutional interest in liberty). *See generally* BYRNE ET AL., *supra* note 18 (describing experiences of immigrants who were granted monetary bond but remained detained due to their inability to pay). Nina, from Honduras provides one final example

CONCLUSION

In *Hernandez II*, the Ninth Circuit found that the Fifth Amendment's Due Process Clause ensured that immigrants should have their financial situation taken into account when bond is set. This represents a significant change in immigration procedure. If upheld, and expanded beyond the Ninth Circuit, it would result in a significant decrease of detained immigrants. It would also result in a large reduction in government expenditures on immigration detention. *Hernandez II* was a legally sound decision because the Fifth Amendment undisputedly applies to non-legal immigrants, and the purpose of detention is not aided by detaining immigrants who cannot afford bond. The resulting policy change is also sound as it would allow more funding for more effective immigration control, while reducing unnecessary restrictions on liberty.

JEREMY PEPPER

of an immigrant who remained detained due to a lack of funds despite proving to an IJ that she wasn't a flight risk or a danger to others. *See id.* at 28. At age 18, Nina was raped, and when the Honduran police refused to help her despite continued threats from her rapist, she fled to the United States. *See id.* Finding she was not a flight risk, or a danger to others, an IJ granted her bond set at $7,500. *See id.* As Nina could not afford this she was detained for eight months awaiting her hearing. *See id.*