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The Immigration Detention Risk Assessment

Mark Noferi
Robert Koulish, *University of Maryland - College Park*

THE IMMIGRATION DETENTION RISK ASSESSMENT

MARK NOFERI AND ROBERT KOULISH*

ABSTRACT

In early 2013, U.S. Immigration and Customs Enforcement ("ICE") deployed nationwide a new automated risk assessment tool to help determine whether to detain or release noncitizens pending their deportation proceedings. Adapted from similar evidence-based criminal justice reforms that have reduced pretrial detention, ICE's initiative now represents the largest pre-hearing risk assessment experiment in U.S. history—potentially impacting over 400,000 individuals per year. However, to date little information has been released regarding the risk assessment algorithm, processes, and outcomes.

This article provides the first comprehensive examination of ICE's risk assessment initiative, based on public access to ICE methodology and outcomes as a result of Freedom of Information Act requests. This article argues that immigration risk assessment in its current form will not reduce current over-detention trends. The unique aspects of immigration enforcement, laws, and the impacted population will likely frustrate accurate calibration of the risk tool, and effective implementation of even a calibrated tool—in turn frustrating constructive impact of ICE's risk assessment initiative on over-detention. Consequently, the immigration risk assessment may only add a scientific veneer to enforcement that remains institutionally predisposed towards detention and control.

Additionally, this article argues that even if more accurate, evidence-based immigration detention were achieved under a future risk assessment regime, it would nonetheless likely be accompanied by several disadvantages. Particularly, risk assessment could facilitate a transition from mass detention to mass supervision of an even wider net of supervisees, by justifying lesser deprivations of liberty such as electronic supervision.

* Mark Noferi, Enforcement Fellow, American Immigration Council (mnoferi@immcouncil.org), J.D., Stanford Law School, B.A., Boston College; Robert Koulish, Research Associate Professor, University of Maryland's Department of Government and Politics, Director of MLAW Programs (UMD's Law and Society Program); Lecturer of Law at Carey School of Law (rkoulish@umd.edu), Ph.D., University of Wisconsin-Madison. Mr. Noferi acknowledges research assistants Setenay Akdag, Leslie Bailey, Mary Bruch, Sara Fraser, Beile Lindner, Rebecca McBride, Jonathan Myers, Alexandra Olsen, Elana Rodman, Alex O'Sullivan-Pierce, and Tobias Schad. Professor Koulish acknowledges research assistants Jose M. Cabezas, Michael Rosenberg, Paul Stern, Enzo Ferrogiaro, and Felipe Westhelle.
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INTRODUCTION

In fiscal year 2013, U.S. Immigration and Customs Enforcement ("ICE") detained nearly 441,000 noncitizens pending deportation proceedings[1]—the largest number of individuals passing through any U.S. incarcerative system, federal or state.[2] Yet while bipartisan support grows for reductions in criminal incarceration,[3] including pretrial detention,[4] ICE's detention rates remain stubbornly high. Criminal law scholars criticize jurisdictions in the U.S. pretrial detention system that unnecessarily detain 38 to 42 percent of defendants.[5] Meanwhile, in fiscal year 2013, ICE detained nearly 80 percent of its arrestees.[6] The immigration system's starting point appears to be widespread over-detention,[7] even more pronounced than current criminal pretrial over-detention.[8]

ICE has begun to make efforts. On March 19, 2013, ICE Director John Morton informed Congress that ICE had deployed its new automated "Risk Classification Assessment" ("RCA") tool nationwide.[9] Modeled upon similar evidence-based criminal justice reforms,[10] ICE uses the RCA tool to help make its detention decisions. Through RCA, ICE inputs database records and interview information into a "scoring system" that produces public safety and

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[1] JOHN F. SIMANSKI, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 5 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.
[2] DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4, 6 (2009) [hereinafter SCHRIRO REPORT], *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. This is greater than the number of persons handled by the Federal Bureau of Prisons or any state's prison system in a year. *See* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1446 (2010); César Cuauhtémoc García Hernández, *The Perverse Logic Of Immigration Detention: Unraveling The Rationality Of Imprisoning Immigrants Based On Markers Of Race And Class Otherness*, 1 COLUM. J. RACE & L. 353, 357 & n. 16 (2012).
[3] *See, e.g.*, David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS OF AM. ACAD. POL. & SOC. SCI. 266, 266-76 (2014); Newt Gingrich & Pat Nolan, *An Opening for Bipartisanship on Prison Reform*, WALL ST. J., July 14, 2014, *available at* http://online.wsj.com/articles/newt-gingrich-and-pat-nolan-an-opening-for-bipartisanship-on-prison-reform-1405380090.
[4] *See infra* Part I.A.
[5] Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 725 (2011); *see infra* Part III.A.
[6] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 6-7 (2014) [hereinafter, U.S. GAO, ALTERNATIVES TO DETENTION], *available at* http://www.gao.gov/products/GAO-15-26.
[7] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (2010), http://columbialawreview.org/wp-content/uploads/2010/07/42_Anil_Kalhan.pdf (describing immigration over-detention of individuals who "pose no actual flight risk or danger to public safety").
[8] Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1344 (2014); Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 560 (2012).
[9] *The release of criminal detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the House Committee on the Judiciary*, 113th Cong. 11 (2013) (statement of John Morton, Immigration and Customs Enforcement Director) [hereinafter, Morton, *2013 Testimony*], *available at* http://www.dhs.gov/news/2013/03/19/written-testimony-us-immigration-and-customs-enforcement-director-john-morton-house.
[10] *See infra* Part I.A.

flight risk assessments—low/medium/high for each—and then recommends detention or release, with the capability to make attendant custody or supervision classifications.[11]

ICE's adoption of risk assessment has received little attention, with nearly all of it positive. Immigrant and human rights advocates have uniformly embraced risk assessment with only qualified concerns.[12] Indeed, the American Civil Liberties Union recommended that Congress explicitly condition immigration detention funding on Department of Homeland Security's ("DHS") use of risk assessment.[13] Congressional support has been bipartisan. For example, Representative Spencer Bachus (R-AL) asked Morton in 2013 whether ICE was "overusing detention," and continued: "[W]hy do you not do a risk assessment on . . . those being detained? . . . . If these people are not public safety risks, if they are not violent, if they do not have a criminal history, if they are not repeat offenders, if they are going to show up for proceedings, why are they detained at all?"[14]

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[11] U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) RISK CLASSIFICATION ASSESSMENT (RCA 1.0), ENFORCE ALIEN REMOVAL MODULE (EARM 5.0), AND CRIME ENTRY SCREEN (CES 2.0) 4 (2012) [hereinafter DHS 2012 PIA], *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_piaupdate_EID_april2012.pdf.

[12] HUMAN RIGHTS FIRST, *How to Repair the U.S. Immigration Detention System: Blueprint for the Next Administration*, 8, 11 (2012) [hereinafter HRF 2012], *available at* http://www.humanrightsfirst.org/wpcontent/uploads/pdf/immigration_detention_blueprint.pdf ("Prevent unnecessary detention by implementing validated dynamic risk classification tool nationwide."). *See also, e.g.*, *Our Work on Detention Reform*, WOMEN'S REFUGEE COMMISSION (Feb. 3, 2014, 4:53 PM), http://womensrefugeecommission.org/programs/migrant-rights/immigration-detention/reform-and-alternatives-to-detention; CENTER FOR VICTIMS OF TORTURE, THE TORTURE ABOLITION AND SURVIVOR SUPPORT & THE UNITARIAN UNIVERSALIST SERVICE COMMITTEE, TORTURED & DETAINED; SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 17 (2013), http://www.uusc.org/files/Report_TorturedAndDetained_Nov2013.pdf; THE ADVOCATES FOR HUMAN RIGHTS, UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS VIOLATIONS OF THE RIGHTS OF REFUGEES, ASYLUM SEEKERS AND OTHER NON-CITIZENS, 109TH SESSION OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE, OCT. 13-31, 2013, (2013), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15240_E.pdf; NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 8 (2013), http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf; *The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of the Am. Immigration Lawyers Ass'n), *available at* http://www.aila.org/content/default.aspx?docid=43708; HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. DETENTION SYSTEM—A TWO-YEAR REVIEW 23 (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; LUTHERAN IMMIGRATION AND REFUGEE SERVICE, UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY 20-21 (2013) [hereinafter LIRS], *available at* http://www.lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf; INTERNATIONAL DETENTION COALITION, THERE ARE ALTERNATIVES 8 (2011), http://idcoalition.org/there-are-alternatives/.

[13] *The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of the ACLU) *available at* https://www.aclu.org/files/assets/aclu_statement_for_3_19_house_judiciary_committee_hearing_on_immigration_enforcement_final_3_18_13.pdf.

[14] *The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (50) (2013) (statement of Rep. Spencer Bachus, Member, H. Comm. on the Judiciary), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80066/pdf/CHRG-113hhrg80066.pdf; *see also Department of Homeland Security Appropriations for 2014: Hearings Before a Subcomm. of the H.*

This article represents the first comprehensive examination of risk assessment in immigration detention decision-making, and whether it reduces over-detention. It utilizes the first public view of ICE's methodology: 485 risk assessment results from ICE databases from Baltimore in spring 2013 that the authors received through the Freedom of Information Act, and are empirically analyzing in a separate report.[15] These "RCA Detailed Summary" samples contain detailed criminal and family history, RCA's categorization of public safety and flight risk, and RCA recommendations and ICE supervisory decisions regarding detention or not. ICE guidance and training manuals, also received by the American Immigration Council through FOIA, complement this analysis.[16] These materials help explain the limited public information regarding RCA outcomes and processes recently released by the DHS Inspector General.[17]

This article argues that incorporating risk assessment into immigration custody determinations will not significantly reduce over-detention, at least in RCA's current form. Although scholars have articulated the significant parallels between immigration and criminal law enforcement,[18] the differences will frustrate successful RCA implementation. The authors thus differ from scholars that have preliminarily noted the potential for reductions to immigration over-detention practices,[19] as criminal pretrial risk assessment tools have achieved.[20] For example, Professor Mary Fan argued that federal

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Comm. on Appropriations, 113th Cong. 7 (2013) (statement of Rep. David E. Price, Member, H. Comm. on Appropriations)("We need to get to the point where ICE decision making about the use of detention is based only on consistent, reviewable, risk-based criteria.").

[15] Robert Koulish & Mark Noferi, *Immigration Detention in the Risk Assessment Era*, Migration Policy Institute (forthcoming 2015) [hereinafter Koulish & Noferi, MPI] (on file with authors). The Exhibits to this article are several examples of RCAs received by the authors. *See* RCA Exhibits 1-8, *available at* http://mlaw.umd.edu/facultyprofile/Koulish/Robert ("Research" tab).

[16] These FOIA documents are on file with the American Immigration Council.

[17] U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-15-22, U.S. Immigration and Customs Enforcement's Alternatives to Detention (revised), 11-15, 22, 25-30 (February 2015) [hereinafter "DHS OIG Report"], *available at* http://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

[18] *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 28 IMMIGR. & NAT'LITY L. REV. 679 (2006); Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

[19] Professor César Cuauhtémoc García Hernández notes that risk assessment may help reduce detention, and uses preliminary risk custody classification data to argue that immigration over-detention exists. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1406, 1412 (2014). Professor Alina Das briefly describes ICE'S proposed risk tool in the abstract, calls it an important step to determine the "optimal scope of detention," and makes helpful preliminary observations, discussed *infra*. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 162 (2013). A student Note also argues to use risk assessment for U.S. asylum seekers. Alexandra Olsen, Note, *Over-Detention: Asylum-Seekers, International Law, and Path Dependency*, 38 BROOK. J. INT'L L. 451, 472 (2012).

[20] "Reasonable evidence" exists that effective quantitative pretrial risk assessments "could reduce jail populations," in the growing number of jurisdictions using such tools. BUREAU OF JUSTICE ASSISTANCE, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 3 (2010) [hereinafter BJA], *available at* https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

immigration authorities should "learn from the states" and adopt criminal justice reforms like risk assessment.[21]

That said, preliminary statistics indicate continued immigration over-detention even with risk assessment. The authors' Baltimore data showed that RCA recommended 76 percent for detention—and startlingly, less than 1 percent for release—of those ICE conducted risk assessment upon, with ICE ultimately detaining 82 percent.[22] Similarly, the recent DHS Inspector General report stated that RCA recommended 70 percent for detention and less than 1 percent for release of those ICE conducted risk assessment upon between July 30, 2012 and December 31, 2013, with ICE ultimately detaining 91 percent.[23] Conversely, in the pretrial criminal justice field, judges recommend *release* for 70 to 80 percent of defendants in jurisdictions employing risk assessment.[24] Outcomes are nearly reversed.

Mandatory immigration detention laws are one significant obstacle.[25] The authors' empirical research preliminarily found that a majority of those entering immigration proceedings in Baltimore were subject to mandatory detention without bail.[26] But even were mandatory detention laws revised based on emerging risk assessment data,[27] as Rep. Bachus suggested,[28] ICE's current RCA tool is still unlikely to significantly reduce detention. ICE's criminal justice-derived tool is an imperfect fit to its impacted immigrant population. Noncitizen immigrants are likely less dangerous than criminal defendants, and more likely to have families but less likely to report them to ICE, for example.[29]

And in any case, robust immigration risk assessment requires the same accuracy mechanisms that evidence-based criminal pretrial risk tools require: transparent calibration towards specific populations, validation, and updating.[30] Such concerns are under-studied even in criminal legal

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[21] Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 133, 142-47 (2013).
[22] Koulish & Noferi, MPI, *supra* note 15.
[23] DHS OIG Report, *supra* note 17, at 25. A separate U.S. government report showed that ICE ultimately detained 91 percent in FY 2013. U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 28 (of 168,087 aliens processed by the RCA in fiscal year 2013, some whom were eligible for bond). Although the U.S. GAO reported that "the RCA tool *recommended* that 91 percent of the 168,087 aliens processed by the RCA in fiscal year 2013 be detained in ICE custody—some of whom were subsequently eligible for bond" (emphasis added), from comparing the GAO report to the DHS Inspector General's report and the authors' Baltimore data, it appears more plausible that ICE *detained* 91 percent in FY 2013. *See* U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 28.
[24] *See infra* Part III.A.
[25] Das, *supra* note 19, at 162; Fan, *supra* note 21, at 146.
[26] *See infra* Part III.B; Koulish & Noferi, MPI, *supra* note 15.
[27] Robert Koulish & Mark Noferi, Op-Ed., *Unlocking immigrant detention reform*, BALTIMORE SUN, February 20, 2013, http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs.
[28] "Are some of those mandatory detentions that you could recommend to Congress they not be?" Rep. Bachus, *supra* note 14 at 50.
[29] *See infra* Part III.B.2.b.
[30] *See infra* Part III.B.2.a. Validation is the process through which risk assessments can be "normed or proven reliable for different types of populations." CYNTHIA A. MAMALIAN, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 19 (2011), *available at* https://www.bja.gov/publications/pji_pretrialriskassessment.pdf. Calibration is a method of determining

scholarship.[31] This article summarizes the relevant criminal legal scholarship, and then provides the first assessment of these concerns in the immigration context regarding ICE's RCA. Even though RCA is likely now the largest U.S. detention risk assessment experiment in history,[32] unlike some comparable criminal tools,[33] ICE's algorithm, processes by which it is implemented and reviewed, and results have received little transparency—likely exacerbating over-detention.

Moreover, even if ICE's risk assessment tool was properly calibrated to an immigration enforcement population, structural and institutional differences in immigration enforcement and law may negate the tool's impact. DHS both determines and executes initial detention, allowing DHS to "let the court sort it out"[34]—but if the court does, with higher burdens on immigrants and less assistance in the way of counsel,[35] making release more unlikely. Immigration detention is more commonly prolonged, making periodic risk review more essential—yet ICE does not typically re-run the risk assessment, even when unique immigration processes would logically dictate it (such as for an asylum seeker in expedited removal that passed a credible fear

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whether an "instrument can successfully predict the outcomes of interest for the population being served." *Id.* at 35; *see also* Christopher T. Lowenkamp, Richard Lemke & Edward Latessa, *The Development and Validation of a Pretrial Screening Tool*, 72 FED. PROBATION, Dec. 2008, at 2-9.

[31] *See infra* Part I.

[32] At current rates, ICE will likely use risk assessment on more individuals per year than any one U.S. criminal justice authority. Seven states (Colorado, Connecticut, Florida, Kentucky, Ohio, Maine, and Virginia), the federal system, and several localities (including New York City) employ pretrial detention risk assessments. *See* MARIE VANNOSTRAND & CHRISTOPHER LOWENKAMP, ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 5 (2013), *available at* http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_no-interview_FNL.pdf. Quite likely, none of these jurisdictions will assess the risk of close to 441,000 criminal defendants per year. *See id.* at 9 (in Kentucky, pretrial risk assessments were done on less than all of the 153,770 defendants arrested and booked into a jail in FY 2009-10); NEW YORK CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2012 8, 17 (2014) (345,017 arraignments in New York City in 2012, with nearly 277,000 defendants interviewed pretrial); THE SUPREME COURT OF OHIO, 2012 OHIO COURTS STATISTICAL REPORT, 58-182 (2012), *available at* https://www.supremecourt.ohio.gov/publications/annrep/12OCS/2012OCS.pdf (in Ohio, 104,762 criminal cases in court of common pleas in 2012, with another 125,773 domestic violence cases); FLORIDA OFFICE OF THE STATE COURTS ADMINISTRATOR, OVERALL STATISTICS, 2-4 (2013), *available at* http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-overall-statistics.pdf (in Florida, 186,845 circuit criminal filings for FY 2012-13); U.S. DISTRICT COURTS, UNITED STATES COURTS, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx (in federal system, 91,266 federal criminal defendants in 2013, although it is unclear).

[33] *See*, *e.g.*, EDWARD LATESSA ET. AL., CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM, FINAL REPORT, 18-22 (2009) (describing results of validation study of Ohio's criminal pretrial risk assessment tool).

[34] LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION, 39 (2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf (describing tendency of ICE to over-charge, based on interviews with immigration judges and DHS attorneys); *see also* Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 84-85 (2012) (arguing similar dynamic exists regarding detention decisions).

[35] César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives In Immigration Detention*, 57 HOW. L.J. 869, 880-81 (2014).

interview).[36] More fundamentally, incorporating risk assessment into the traditionally rights-free realm of immigration, with less transparency and Constitutional checks than criminal justice, may result in less accuracy (such as that furthered by access to information), as well as perhaps systemic biases (such as national origin-based determination) that may be better checked in criminal justice, if imperfectly.[37]

All the while, the actuarial, scientific nature of risk assessment may politically legitimize outcomes, whether accurate or not.[38] If so, the risk assessment will be little more than a "false veneer of scientific analysis" hiding continued over-detention,[39] and perhaps exacerbating it, as critics of criminal sentencing risk assessments have begun to argue.[40]

Notably, nothing about President Obama's recent executive action to clarify immigration enforcement priorities should change this dynamic.[41] Most entering ICE's enforcement system have already been candidates for mandatory detention or had a minor criminal history.[42] The former will still be detained. The latter are those whom theoretically risk assessment should benefit, but whom largely have not benefitted as of yet.

Lastly, the authors assess for the first time in immigration scholarship a future evidence-based immigration detention system, were one more accurately implemented. The result would likely be reduced detention—more commensurate to actual public safety or flight risk, with more consistent and uniform decisions, and likely increased use of alternatives to detention such as supervision and electronic tracking. A future system could help mitigate flight and public safety risk at greatly reduced financial and human cost,[43] as many advocates hope.[44] But even if evidence-based detention were achieved, several disadvantages would exist as well. Counterproductive over-supervision through unnecessary restrictions, such as electronic tracking, is

[36] *See infra* Part III.B.3.b.
[37] *Id.*
[38] *See infra* Part III.B.3.c.
[39] Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 51 (2013) (quoting JACK M. BEERMAN, INSIDE ADMINISTRATIVE LAW: WHAT MATTERS AND WHY 165 (2011)).
[40] Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 865-67 (2014) (psychological literature suggests that framing risk predictions as scientific and data-driven may increase the weight judges give the predictions).
[41] Memorandum from Jeh Charles Johnson, Secretary, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerkilowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Services & Alan D. Bersin, Acting Assistant Secretary for Policy, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) [hereinafter DHS, Johnson Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.
[42] In FY 2013, 87 percent of ICE interior U.S. removals were of those with a criminal history. That said, from fiscal year 2003 to 2013, only 18 percent of individuals ICE removed were convicted of a "Level 1" most serious crime. MARC R. ROSENBLUM & KRISTEN MCCABE, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 12-13, 18-20 (2014), *available at* http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.
[43] Das, *supra* note 19, at 163.
[44] *See* LIRS, *supra* note 12, at 20-22.

one such concern—under-emphasized in criminal law scholarship,[45] and immigration law provides even less moderating procedural checks than criminal justice does. More broadly, risk assessment could facilitate a transition from mass detention to mass supervision of an even wider net of low risk supervisees,[46] as some criminal justice precursors indicate is possible.[47]

Part I of this Essay surveys the development and recent expansion of criminal pretrial risk assessment tools. Part II surveys ICE's development of the immigration risk assessment tool and provides the first description of the tool in scholarship, along with illustrative samples. Part III evaluates whether ICE's new RCA tool will reduce over-detention in the immigration system and raises concerns about future RCA regimes in relation to deprivations of liberty. Part IV analyzes a future evidence-based immigration detention system, and raises salient concerns about misuse and potential control scenarios.

I. U.S. CRIMINAL JUSTICE PRETRIAL RISK ASSESSMENTS

First, this section surveys the state of criminal pretrial detention risk tools upon which DHS modelled its efforts, to fill a gap in criminal law scholarship.[48] Second, it surveys methods identified by criminal researchers that help ensure pretrial risk instrument accuracy and reliability.

A. The Development of U.S. Criminal Pretrial Risk Assessments, and Their Effectiveness

The use of pretrial detention risk assessment tools began in the 1960s, as part of New York City's Manhattan Bail Project.[49] Since the 1984 federal Bail Reform Act, which directed federal courts to consider eleven factors when detaining pretrial to prevent crime, the use of pretrial detention risk tools has

[45] *See* Wiseman, *supra* note 8, at 1344 (addressing privacy concerns regarding monitoring and calling them "overstated," but not addressing that over-supervision may be practically counterproductive).
[46] Robert Koulish & Mark Noferi, *ICE Risk Assessments: From Mass Detention to Mass Supervision?*, CRIMMIGRATION.COM, (May 16, 2013), http://crimmigration.com/2013/05/16/ice-risk-assessments-from-mass-detention-to-mass-supervision.aspx; Hernández, *supra* note 19, at 1414 n.378.
[47] *See* Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, 139 DÆDALUS 131, 4-5 (2010).
[48] Criminal law scholars have not recently surveyed the state of criminal pretrial detention risk tools, despite recent empirical research that has facilitated their growing acceptance. A helpful student note addresses the implementation of pretrial risk assessment in Kentucky. *See* Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L. J. 777 (2014) (arguing that impact of risk assessment on reducing detention is lessened because judges can opt out of following tool). *Cf.* Michael S. Woodruff, Note, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241 (2013) (arguing for Eighth Amendment right to have bail determination by pretrial risk assessment).
[49] Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 NYU L. REV. 67, 67-95 (1963); Anne Rankin, *The Effect of Pretrial Detention*, 39 NYU L. REV. 641, 655 (1964).

increased.[50] In 2002 the American Bar Association recommended pretrial risk assessment.[51] Seven states, multiple localities, and the federal criminal system now use risk assessment tools, constituting about ten percent of U.S. jurisdictions.[52]

Notably, as pretrial over-detention has received increasing scrutiny,[53] pretrial risk assessments have attracted positive reviews from scholars, policymakers and experts with little criticism.[54] Indeed, some criminal justice scholars have argued that "practitioners' frequent resistance to actuarial tools is unconscionable."[55] Empirical studies have tended to confirm the positive impact of pretrial risk assessments in reducing detention.[56] In 2010, for example, after Mecklenburg County, North Carolina implemented a pretrial

[50] Bail Reform Act of 1984, Pub. L. No. 94-473, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. § 3142(g)). The factors, still in place today, are in essence (1) the nature and circumstances of the offense charged, (2) the weight of the evidence, (3) the financial resources of the defendant, (4) the character and physical and mental condition of the defendant, (5) family ties, (6) employment status, (7) community ties and length of residency in the community, (8) record of appearances at court proceedings, (9) prior convictions, (10) whether, at the time of the current offense, the defendant was under criminal justice supervision, and (11) the nature and seriousness of the danger to the community or any person that the defendant's release would pose. *See also* LAURA AND JOHN ARNOLD FOUNDATION, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (2013), http://ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf [hereinafter LJAF]; Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION, Sept. 2009, *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2009-09/FederalCourt.html; Baradaran & McIntyre, *supra* note 8, at 506.

[51] ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE Standard 10-1.10 (2007).

[52] PRETRIAL JUSTICE INST., USING TECHNOLOGY TO ENHANCE PRETRIAL SERVICES: CURRENT APPLICATIONS AND FUTURE POSSIBILITIES 14 (2012), *available at* http://www.pretrial.org/download/pji-reports/PJI%20USING%20TECHNOLOGY%20TO%20ENHANCE%20PRETRIAL%20SERVICES.pdf; Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 FED. PROBATION, Sept. 2011, at 30, *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2011-09/implementing.html.

[53] Shima Baradaran, Op-Ed., *The Right Way to Shrink Prisons*, N.Y. TIMES, May 30, 2011, at A23, *available at* http://www.nytimes.com/2011/05/31/opinion/31baradaran.html; Baradaran & McIntyre, *supra* note 8, at 560; Wiseman, *supra* note 8, at 1346-47.

[54] Jerome E. McElroy, *Sentences Before Sentencing: Introduction to the Manhattan Bail Project*, 24 FED. SENT'G REP. 8 (2011) ("The idea that pretrial services need to use and validate a risk-assessment system… now has widespread recognition"). Several scholars have supported pretrial risk assessments, as part of larger arguments. *See* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities In Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 956-59 (2013) (supporting evidence-based bail determinations); Allen Hopper et al., *Shifting The Paradigm Or Shifting The Problem? The Politics Of California's Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527, 578-81 (2014) (similar); Juliene James et al., *A View From the States: Evidence-Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821, 837-39 (2012) (similar); Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 73-75 (2011) (supporting data collection to inform pretrial risk assessment tools).

[55] Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 FED. PROBATION, Sept. 2009, at 33, *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2009-09/ActuarialRisk.html.

[56] PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT 101: SCIENCE PROVIDES GUIDANCE ON MANAGING DEFENDANTS 3 (2012) [hereinafter PJI], www.pretrial.org/Featured%20Resources%20Documents/PJI%20Risk%20Assessment%20101%20(2012).pdf; LJAF, *supra* note 50. Some criminal empiricists have expressed concern about risk assessment leading to over-supervision. *See, e.g.*, MAMALIAN, *supra* note 30, at 32; VANNOSTRAND & LOWENKAMP, *supra* note 32.

risk assessment tool, its jail's average daily population dropped 33 percent.[57] Reductions in pretrial detention can in turn lead to reductions in fiscal costs, since alternatives like electronic monitoring cost fractions of detention. For example, when Miami-Dade County implemented electronic monitoring, it cut costs from $20,000 per pretrial defendant per year to $432.[58]

In contrast, post-conviction risk assessments used in sentencing, probation, and parole have attracted serious criticism from scholars[59] and ex-Attorney General Eric Holder,[60] as their use has risen under the rubric of "smarter" criminal justice.[61] Most criticism has been on the grounds that punishment should depend on what a defendant did, not who he or she is.[62] That said, while punishment is backwards-looking, pretrial detention is entirely forward-looking and predictive—rendering moot a primary argument

[57] PJI, *supra* note 56, at 5.

[58] Wiseman, *Pretrial Detention*, *supra* note 8, at 1372; ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 4 (final paper 2013) [hereinafter COSCA], *available at* http://www.colorado.gov/ccjjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf.

[59] *See e.g.* Starr, *supra* note 40; Cecelia Klingele, *Beyond Control: Reframing Sentencing & Correctional Reform* (forthcoming 2015) (on file with author); Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 398 (2005).

[60] Eric Holder, U.S. Attorney General, Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html; *see also* Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, Criminal Division, to Patti B. Saris, Chair, U.S. Sentencing Commission 5 (July 29, 2014), *available at* http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf ("There is much to be celebrated" about "bringing data and the scientific method to corrections," but "there is… also great dangers."); *id.* at 7 (raising "constitutional questions because of the use of group-based characteristics and suspect classifications," and the "disparate and adverse impact on offenders from poor communities").

[61] For scholars supporting risk assessment in criminal sentencing, *see* John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT'G. REP. 158 (2014); J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1395-98 (2011); Margareth Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43, 47 (2009); Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAP. J. OF CRIM. JUST. 1, 4 (2009); Kirk Heilbrun et al., *Risk-Assessment in Evidence-Based Sentencing: Context and Promising Uses*, 1 CHAP. J. CRIM. JUST. 127, 127 (2009); Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1404-07 (2008); Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1311 (2007). *See also* NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP (2011), http://www.ncsc.org/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx.

[62] Sonja Starr, Op-Ed., *Sentencing, by the Numbers*, N.Y. TIMES, Aug. 10, 2014, at A17, *available at* http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html; *see also* Wroblewski, *supra* note 60, at 7 ("Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior"); John Monahan**,** *A Jurisprudence Of Risk Assessment: Forecasting Harm Among Prisoners, Predators, And Patients*, 92 VA. L. REV. 391, 395 (2006) (arguing for risk factors in sentencing to be constrained to those that "index the extent or seriousness of the defendant's prior criminal conduct.").

against risk assessments in sentencing.[63] Critics have also alleged that employing science in sentencing masks the exacerbation of racial disparities while adding little to accuracy, an argument addressed in Section III.B.3.[64]

To date, pretrial risk assessments have been justified as more accurate than individual officers' subjective assessments. Historically, criminal pretrial services officers' subjective judgments have been shown to be inconsistent, disparate, and potentially arbitrary.[65] Correspondingly, a national empirical study of large urban counties from 1990 to 2006 showed that "about half of those detained [had] a lower chance of being arrested pretrial than many of the people released," and that states could release 25 percent more pretrial defendants and still decrease the crime rate.[66] Likewise, historically criminal judges have tended to over-emphasize the dangerousness of flight risk.[67]

While qualitative risk assessments developed first, they still proved more inconsistent and less predictive than quantitative assessments.[68] For example, "federal pretrial officers who relied solely on qualitative risk assessments significantly over-recommended detention for offenders in all risk categories and recommended unnecessarily high levels of supervision for low-risk offenders who were released."[69] Particularly, unnecessary pretrial detention on low-risk individuals leads to worse outcomes. For example, incidences of pretrial arrest, failure to appear, and future crime after disposition all increase with increased detention length for a low-risk defendant.[70]

In contrast, emerging research shows that quantitative pretrial risk assessments can differentiate flight or public safety risk with high accuracy rates.[71] For example, Kentucky's risk assessment protocol, as of 2012,

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[63] David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Monahan, *supra* note 62, at 434 ("Civil commitment is entirely forward-looking").
[64] Starr, *supra* note 40, at 806; Bernard E. Harcourt, *Risk as a Proxy for Race*, CRIM. & PUBLIC POL'Y (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654; Jessica M. Eaglin, *Against Neorehabilitationism*, 66 SMU L. REV. 189, 190 (2013) (evidence-based sentencing "stands to institutionalize a focus on the wrong offenders, exacerbate racial disparities, and distort our perception of justice").
[65] Keith Cooprider, *Pretrial Risk Assessment and Case Classification: A Case Study*, 73 FED. PROBATION, June 2009, at 12.
[66] Baradaran & McIntyre, supra note 8, at 558. Notably, the three categories of criminal defendants Baradaran & McIntyre identified as over-detained relative to public safety risk—the older, those with only one criminal charge, and those charged with fraud and public order criminal offenses—are often mandatorily detained in U.S. immigration removal proceedings. Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, in IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS (Robert Koulish ed., forthcoming 2015).
[67] Baradaran & McIntyre, supra note 8, at 558.
[68] BJA, *supra* note 20, at 2.
[69] BJA, *supra* note 20, at 3; VanNostrand & Keebler, *supra* note 50.
[70] LJAF, *supra* note 50 at 2. *See generally* MAMALIAN., *supra* note 30; Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMMUNITY CORRECTIONS, 2004, at 3.
[71] PJI, *supra* note 56, at 4; BJA, *supra* note 20, at 3; David Levin, *Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries*, PRETRIAL JUSTICE INSTITUTE (2007), http://www.pretrial.org/download/supervision-monitoring/Examining%20the%20Efficacy%20of%20Pretrial%20Release%20Conditions%20-%20Levin%202007.pdf.

resulted in a 90 percent appearance rate and only 8 percent re-arrest rate.[72] Similarly, in 2008 the District of Columbia's risk assessment tool resulted in an 88 percent appearance rate and a 12 percent re-arrest rate, while releasing 80 percent of defendants without bond.[73]

Research continues regarding the relative predictive validity of factors. Recent tools tend to separate out predictions for flight risk and public safety.[74] Prominently, researchers debate the predictive validity of static factors (i.e., past behavior, such as criminal and flight risk history), versus dynamic factors (i.e., ongoing behavior, commonly "community ties"). For example, a study validating Virginia's risk assessment identified eight factors, including both static and dynamic factors.[75] That said, some researchers recently argued that dynamic "community ties," such as residence or employment, have little or no predictive value.[76] Thus, Dr. Marie VanNostrand and Professor Christopher Lowenkamp argued that pretrial risk assessment can be successfully achieved quantitatively based on criminal and flight risk history without any intake interview.[77]

B. Methodological Techniques for Ensuring Accuracy of Risk Assessment Tools

Criminal researchers have identified several methods to ensure the reliability and accuracy of risk assessment tools. First, such tools should be transparently validated, "normed or proven reliable for different types of populations."[78] Without outside scrutiny, their reliability is questionable.[79] For example, University of Cincinnati researchers made publicly available their validation of Ohio's risk assessment tools.[80] Outside researchers have also validated Kentucky's and Virginia's risk tools, among others.[81]

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[72] COSCA, *supra* note 58, at 8.
[73] *Id.* at 7.
[74] BJA, *supra* note 20, at 3.
[75] The eight factors were primary charge, pending charge, criminal history, two or more failures to appear, two or more violent convictions, length at current residence, employed/primary caregiver, and history of drug abuse. BJA, *supra* note 20, at 3; Marie VanNostrand & Kenneth J. Rose, PRETRIAL RISK ASSESSMENT IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT 9 (2009). Employment, particularly, has been more consistently associated with lower failures to appear. Richard R. Peterson, PREDICTING PRETRIAL MISCONDUCT AMONG DOMESTIC VIOLENCE DEFENDANTS IN NEW YORK CITY, 2 (2008), *available at* http://www.cjareports.org/reports/releaseN4R.pdf; COSCA, *supra* note 58, at 6. Similarly, in the federal system, VanNostrand & Keebler identified nine factors—pending charges, prior misdemeanor arrests, prior felony arrests, prior failures to appear, primary charge category, primary charge type, employment status, residence status, and substance abuse type. VanNostrand & Keebler, *supra* note 50, at 13.
[76] VanNostrand & Lowenkamp, *supra* note 32, at 3; Kristen Bechtel et al., *Identifying the Predictors of Pretrial Failure: A Meta-Analysis*, 75 FED. PROBATION, Sept. 2011, at 78; Cadigan & Lowenkamp, *supra* note 52; Baradaran & McIntyre, *supra* note 8, at 557.
[77] VanNostrand & Lowenkamp, *supra* note 32; LJAF, *supra* note 50, at 4. Similarly, California's risk assessment tool for parolees uses solely static factors. *See* Weisberg & Petersilia, *supra* note 47, at 7.
[78] MAMALIAN, *supra* note 30, at 19, 37.
[79] Etienne, *supra* note 61, at 53.
[80] Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)* 74 FED. PROBATION, June 2010, at 16, *available at*

Second, risk tools should be calibrated towards specific populations of offenders that commit certain offenses.[82] For example, domestic violence offenders may have unique motivations to re-offend pretrial against a particular victim,[83] while sex-offenders commonly re-offend at higher rates than risk tools show.[84] Also, certain variables for certain offenders may be predictive of flight but not re-offending, and vice versa.[85]

Third, risk instruments should be periodically updated. The predictive value of any factor changes over time.[86] For example, a landline phone's predictive value regarding community ties has drastically decreased as cellphone use has risen.[87] Accordingly, New York City's criminal pretrial services office re-evaluates its model every five years.[88]

Lastly, risk tools should strive to avoid over-supervision, as well as over-detention. Studies have shown severe restrictions on low-risk individuals, such as reporting requirements, monitoring, and curfews, to be counterproductive.[89] For example, the imposition of substance abuse treatment, third-party monitoring, or location monitoring on low-risk criminal defendants all resulted in worse pretrial failure rates.[90]

II. ICE'S NEW IMMIGRATION CUSTODY RISK CLASSIFICATION ASSESSMENT (RCA)

This section summarizes DHS' development of ICE's risk assessment tool, as well as DHS' enforcement priorities that have informed it. It then provides the first detailed description of RCA's processes, based on FOIA responses that have augmented public information.

A. DHS' Development of the Risk Classification Assessment Tool

The Obama Administration conceptualized risk assessment as part of its effort to incorporate criminal justice reforms into immigration detention

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http://www.uscourts.gov/uscourts/federalcourts/pps/fedprob/2010-06/02_creation_validation_of_oras.html.

[81] *Id.* at 1, 3; Austin et al., KENTUCKY PRETRIAL RISK ASSESSMENT INSTRUMENT VALIDATION (2010), *available at* http://www.pretrial.org/download/risk-assessment/2010%20KY%20Risk%20Assessment%20Study%20JFA.pdf; VanNostrand & Rose, *supra* note 75.

[82] Kevin M. Williams et al., EVALUATING THE PREDICTIVE VALIDITY OF RISK/NEED ASSESSMENTS: RECOMMENDATIONS FOR CORRECTIONAL AGENCIES AND CRIMINAL JUSTICE RESEARCHERS 5-6, http://nicic.gov/library/027196. *See also* Lowenkamp et al., *supra* note 30, at 2-9.

[83] Peterson, *supra* note 75, at 1.

[84] BJA, *supra* note 20.

[85] For example, misdemeanor jail sentences were predictive of flight risk, but not future re-arrest, for domestic violence offenders. Peterson, *supra* note 75, at 35.

[86] Cadigan & Lowenkamp, *supra* note 51.

[87] *Id.*

[88] *Id.*

[89] Lowenkamp & Latessa, *supra* note 70, at 3-8.

[90] VanNostrand & Keebler, *supra* note 50, at 19; PJI, *supra* note 56, at 5.

decision-making.[91] In early 2009 then-DHS Secretary Janet Napolitano commissioned a report by Dr. Dora Schriro, previously Arizona's criminal corrections director, to examine immigration detention.[92] Schriro's report in October 2009 recommended ICE implement risk assessment.[93]

Schriro envisioned that risk assessment would better tailor detention to individuals warranting it, and increase ICE's use of alternatives to detention, by ascertaining the "optimal pool of participants."[94] Schriro also recommended that ICE's risk tool be "validated," and "specifically calibrated for the US alien population."[95] As she noted, the "demeanor" of immigration detainees is different from criminal detainees, with most immigration detainees seeking "repatriation or relief," exercising "exceptional restraint," and having a "low propensity for violence."[96] Schriro also recommended both "initial and ongoing" use of the tool, such as updated individual assessments over time.[97] She also recommended "publication of a technical manual" and ongoing staff training.[98] For those released, Schriro additionally recommended supervision that "fits the alien's profile."[99]

Napolitano adopted Schriro's recommendation, and announced that ICE would immediately "develop a risk assessment and custody classification."[100] ICE first pilot-tested the risk assessment in paper form.[101] ICE then developed the automated risk tool's business rules under its "Automated Threat Prioritization ("ATP") effort," part of ICE's "Criminal Alien Identification Initiatives ("CAII")" program."[102] ICE conducted IT work between January 2011 and July 2012.[103] Meanwhile, throughout 2011 ICE was developing new detention standards that incorporated custody classifications inside facilities based on risk.[104] Based on that custody classification system, in August 2011

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[91] Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, at A1, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html. *See also* Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. CIV. RTS. & ECON. DEV. 101 (2014).
[92] SCHRIRO REPORT, *supra* note 2.
[93] *Id.* at 17.
[94] *Id.* at 20 (ICE "needs a risk assessment instrument to implement a nationwide Alternatives to Detention program.").
[95] *Id.* at 20.
[96] *Id.* at 2, 21.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Fact Sheet: ICE Detention Reform: Principles and Next Steps*, DEP'T OF HOMELAND SEC. 2 (Oct. 6, 2009), http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.
[101] *Holiday on Ice: The U.S. Department of Homeland Security's New Immigration Detention Standards Before the Subcomm. on Immigration Policy and Enforcement* 112th Cong. 20-30 (2012) (statement of Kevin Landy, Assistant Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement); DHS 2012 PIA, *supra* note 11, at 4.
[102] *IT Program Assessment: ICE—Criminal Alien Identification Initiatives (CAII)*, DEP'T. OF HOMELAND SEC. (2012), http://www.dhs.gov/xlibrary/assets/mgmt/itpa-ice-caii2012.pdf.
[103] *ICE – Detention and Removal Operations Modernization (DROM)*, ITDASHBOARD, https://itdashboard.gov/investment/project-summary/137 (last updated Aug. 31, 2014).
[104] The 2011 Performance-Based National Detention Standards (PBNDS) included a new "risk assessment tool" informing the level of security over detainees. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 70-89 (rev. 2013),

ICE directed its contractor to develop a risk "score" to determine whether to impose initial detention or allow release.[105] In April 2012 DHS released a Privacy Impact Assessment ("PIA") of an early version of the risk tool ("Risk Classification Assessment 1.0"), which described ICE's implementation of RCA into its databases.[106]

ICE then scheduled deployment of the automated RCA in six phases across its Field Offices from July 30, 2012 to January 28, 2013.[107] In January 2013, ICE completed national deployment of the risk tool.[108]

While ICE developed the RCA tool, immigrant and human rights advocates echoed Schriro's call for risk assessment, as well as her assumption that risk assessment would foster alternatives to detention.[109] However, some criticized the actual implementation of ICE's risk tool. UNHCR Expert Consultant Alice Edwards called the risk tool "heavily weighted in favour of detention," based on her review of a preliminary ICE May 28, 2010 risk intake worksheet.[110] Edwards also worried that risk assessment might become a "bureaucratic, tick-box exercise" resulting in "artificial individual assessments rather than real ones."[111]

Since then there has been little public information about the risk tool's algorithm, processes, or impact on detention outcomes, until the authors' work.[112] (Had 2013 Senate immigration reform legislation passed, which contained transparency provisions, that might be different.)[113] DHS' Inspector General released a report in February 2015 that provided information about ICE's internal RCA processes,[114] as well as national statistics regarding RCA

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available at http://www.ice.gov/detention-standards/2011. The tool employs a scoring system based on categories, most regarding dangerousness (criminal convictions, history of violence, etc.) and one regarding flight risk (whether the detainee had absconded in the past). *Id.*

[105] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 29 (2012); Landy, *supra* note 101.

[106] DHS 2012 PIA, *supra* note 11.

[107] *Update on Detention Reform with Assistant Director Kevin Landy*, THE PUBLIC ADVOCATE VOICE, Dec. 2012, at 2, http://www.ice.gov/doclib/about/offices/ero/pdf/voice-3_12-2012.pdf.

[108] DHS OIG Report, *supra* note 17, at 4; *see also* Morton, *2013 Testimony*, *supra* note 9, at 4.

[109] LIRS, *supra* note 12, at 20-21.

[110] Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, DIVISION OF INTERNATIONAL PROTECTION 81 n.485 (2011), http://www.refworld.org/docid/4dc935fd2.html.

[111] *Id.*

[112] *See also* Koulish & Noferi, MPI, *supra* note 15.

[113] In May 2013, after Morton's testimony, the Senate amended its immigration reform legislation to require ICE to publicly report risk assessment results. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3720(b)(10), (e) (2013). The provision would have required ICE to report to Congress and make publicly available "risk assessment results for [each] alien, including if the alien is subject to mandatory custody or detention," by county, state and nationally. *Id.*

[114] DHS OIG Report, *supra* note 17, at 11-15, 22, 26-30 (analyzing the procedures and effectiveness of ICE's RCA methods, reporting on ICE's Risk Classification Assessment Checklist, and reporting on special vulnerabilities processes, among other items). Additionally, the U.S. GAO in November 2014 provided the first public statistics on ICE's use of RCA in FY 2013. U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 28.

recommendations and ultimate ICE detention decisions.[115] However, ICE has not publicly explained RCA's scoring system—i.e. how RCA reaches the public safety and flight risk assessments that underlie RCA recommendations and ultimate detention decisions.[116] Additionally, although DHS' Inspector General reported that ICE updated its RCA tool in August 2013 and January 2014, ICE has not reported the impact of its changes on detention outcomes, nor publicly reported validation of the tool.[117]

B. DHS Enforcement Priorities and RCA

Morton and other ICE officials envisioned risk assessment as helping to tailor detention to ICE's civil enforcement priorities,[118] which Morton had updated in 2011.[119] Those priorities emphasize public safety more so than flight risk. For example, Morton stated that ICE would "focus detention and removal resources on those individuals who have criminal convictions or fall under other priority categories,"[120] such as mandatory detention.[121] RCA guidance follows this, explicitly stating that the "intended goal" is "optimizing

[115] *Id.* at 25.
[116] DHS OIG Report, *supra* note 17; *see* RCA Exhibit 1, *supra* note 15 (showing immigration and criminal history that led to RCA classifying the individual as medium public safety risk and medium flight risk).
[117] The OIG report stated that ICE "made significant RCA process changes in August 2013 and January 2014, such as for scoring and decision logic," based on "rigorous analyses of RCA recommendations and field office decisions, cross referencing every crime category and flight risk factor." DHS OIG Report, *supra* note 17, at 14. However, the OIG report only reported the impact of the changes upon the rate of ICE overrides of RCA recommendations. *Id.* It did not report the impact of the changes on detention outcomes—i.e. whether higher or lower detention rates resulted. The OIG report also stated that ICE is completing another review of the RCA by July 31, 2015. *Id.* at 13.
The authors' RCA samples also indicate that ICE updated its scoring logic at times. *Compare* RCA Exhibit 1, *supra* note 15 (indicating that ICE used RCA Scoring Version "2.31") *with* RCA Exhibit 2, *supra* note 15 (indicating that ICE used RCA Scoring Version "2.32") *with* DHS 2012 PIA, *supra* note 11 (analyzing RCA "1.0").
[118] Landy, *supra* note 101.
[119] Morton, *2013 Testimony*, *supra* note 9; DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 132-34 (2013), *available at* www.migrationpolicy.org/pubs/enforcementpillars.pdf.
[120] *Department of Homeland Security Appropriations for 2013 Before the Subcomm. of Homeland Sec.*, 112th Cong. 16-30 (2012) (statement of John Morton, Director, U.S. Customs and Immigration Enforcement) [hereinafter Morton, *2012 Testimony*]. ICE Director Morton's March 2011 memo specifically identified "aliens who pose a danger to national security or to public safety" as ICE's "highest immigration enforcement priority." Memorandum from John Morton, Director, Immigration and Customs Enforcement, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011), [hereinafter Morton, March 2011 Memo] *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf. This included aliens convicted of crimes, "with a particular emphasis on violent criminals, felons, and repeat offenders." *Id.* at 2. Morton's 2011 memos also applied ICE's enforcement priorities to ICE's detention decisions. *See id.* at 2-3 (to prioritize "detention space," detention resources should support ICE's "enforcement priorities"). Morton's June 2011 memo specifically noted that prosecutorial discretion encompasses decisions "to detain or to release," as well as decisions to issue or cancel a detainer. Memorandum from John Morton, Director, Immigration and Customs Enforcement, (June 17, 2011), [hereinafter Morton, June 2011 Memo] *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. It also encouraged prosecutorial discretion for low-priority noncitizens "as early… as possible," to "preserve government resources." *Id*. at 5.
[121] Morton, March 2011 Memo, *supra* note 119, at 3-4.

public safety."[122] The Obama Administration's new November 2014 enforcement priorities continue this prioritization of detention resources upon "criminal aliens," with some clarifications.[123]

Also, ICE and the Obama Administration have emphasized RCA's ability to identify special vulnerabilities and tailor detention decisions accordingly.[124] ICE also cited fiscal concerns—i.e. that "low-risk aliens" could be monitored "at a lower per-day cost than detention."[125]

Morton also stated risk assessment would improve "transparency and uniformity" in its custody decisions.[126] Currently, anecdotal reports are that ICE makes differing custody decisions for similar individuals and in extremely disparate ways in different geographical areas.[127]

[122] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, RCA QUICK REFERENCE GUIDE 1.0 (2012), at 1 (citing Morton, June 2011 Memo, at 5) (on file with American Immigration Council) (50-page reference manual for ICE officers in how to input data; obtained through FOIA); *see also* Morton, March 2011 Memo, *supra* note 119, at 1.

[123] DHS, Johnson Memo, *supra* note 41. The new priorities continue to provide that detention resources should "support the [new] enforcement priorities," or noncitizens subject to mandatory detention. *Id.* at 5. The new priorities now define national security dangers, state felonies, an immigration "aggravated felony," and offenses including the element of "active participation in a criminal street gang" as Priority 1. *Id*.at 3. Priority 2 is now defined as those convicted of three or more misdemeanors, those convicted of certain "significant misdemeanors," defined to include, *inter alia*, DUI, domestic violence, drug distribution, or any offense involving time served of 90 days. *Id*. at 4. Priority 3 is now defined as anyone with a recent removal order. *Id.*

[124] *Fact Sheet*: *Advancing The Human Rights Of LGBT Persons Globally*, WHITE HOUSE OFFICE OF THE PRESS SEC'Y (June 2014), http://www.whitehouse.gov/the-press-office/2014/06/24/fact-sheet-advancing-human-rights-lgbt-persons-globally (including RCA as an accomplishment in protecting LGBT asylum seekers, and noting that special vulnerabilities include "whether a person may be at risk due to sexual orientation or gender identity"); *Detention Reform Accomplishments*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 19, 2014), http://www.ice.gov/detention-reform/detention-reform.htm (RCA "requires ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations").

[125] *Id.*; *see also* DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 82 (2014) (explaining request to reduce detention levels by "ICE prioritizes its resources by focusing on those aliens who pose the greatest risk to public safety and national security.").

[126] Morton, *2012 Testimony*, *supra* note 120.

[127] REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, U.S. COMM'N ON INT'L AND RELIGIOUS FREEDOM 62 (2005), *available at* http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal.UnitedStatesDepartmentofHomelandSecurity.2013; *End Arbitrary Detention of Immigrants*, NATIONAL IMMIGRANT JUSTICE CENTER, https://www.immigrantjustice.org/end-arbitrary-detention-immigrants (last visited April 7, 2014).

C. How RCA Helps Make Custody Determinations[128]

ICE employs the RCA during its intake (a.k.a. "book-in") process for nearly all noncitizens that enter ICE custody, including those apprehended by other DHS agencies or components (such as Border Patrol).[129] The only significant exception appears to be that ICE officers are not required to complete an RCA for any noncitizen "for whom detention is mandatory and whose departure or removal will likely occur within five days."[130] This appears to potentially include individuals in expedited removal or reinstatement of removal, without a chance of relief. The risk assessment, as part of the custody determination, appears separate from ICE's charging determination (i.e. issuance of a Notice to Appear).[131]

ICE officers conducting intake interviews are guided to collect certain dynamic information from the noncitizen (e.g., local ties, family ties, residency history, or substance abuse).[132] ICE inputs that data into structured database fields, rather than entering free-text fields at their own discretion.[133] It is unclear whether ICE officers collect different, new information, or simply record differently the information ICE officers were already collecting.[134]

After RCA makes a recommendation to detain or release, ICE officers make the final custody determination,[135] after at least one level of supervisory

[128] This information is derived from 485 RCA Detailed Summaries the authors obtained through FOIA (lightly redacted, as noted herein), representing risk assessments that ICE's Baltimore Field Office primarily conducted from March to June 2013; 2012 and 2013 ICE RCA guidance and training documents that the American Immigration Council obtained through FOIA; and public information, such as the February 2015 DHS Inspector General report, DHS' April 2012 privacy assessment of RCA, and DHS officials' public statements.
Additionally, in 2014, author Robert Koulish and the University of Minnesota Law School Center for New Americans filed additional FOIA requests for national and Minnesota risk assessment data, as well as for documents reflecting ICE's development and updating of RCA, RCA screening for special vulnerabilities, and the role of RCA in determining who is mandatorily detained under 8 U.S.C. § 1226(c). Those requests are pending.

[129] Email from ICE RCA POC (Point of Contact), Atlanta Field Office to author (January 23, 2013) (on file with American Immigration Council) ("all cases, except those few who will fall into the exceptions (outlined in the Mead memo), will have to have an RCA completed as part of standard processing procedure."). *See also* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, RCA QUICK REFERENCE GUIDE 1.0, *supra* note 122.

[130] Memorandum from Gary Mead, Executive Associate Director, Immigration and Customs Enforcement, Enforcement and Removal Operations to all employees, Risk Classification Assessment (c. August 15, 2012) (on file with American Immigration Council) (providing guidance for RCA); *see also* DHS OIG Report, *supra* note 17, at 11 n. 4. Officers are also not required to complete an RCA for "Room and Board cases"—i.e. a noncitizen ICE detains on behalf of another federal agency or DHS component. *Id.*

[131] *See* U.S. Immigration and Customs Enforcement, RCA Training and Deployment Update for Baltimore and Washington, POCs and Training SMEs 10 (March 2012) (PowerPoint presentation) (on file with American Immigration Council); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122 (does not mention Notice to Appear).

[132] DHS OIG Report, *supra* note 17, at 11, 22; DHS 2012 PIA, *supra* note 11, at 4.

[133] DHS 2012 PIA, *supra* note 11, at 6.

[134] "ICE will continue to collect the same information about aliens as it does currently." *Id.* at 4 ("[b]ecause ICE is already performing risk classifications manually, this update will not change the information that ICE collects about aliens.").

[135] *Id.* at 5.

review.[136] A supervisor who overrules the RCA recommendation must affirmatively enter an explanation into the system.[137] Additionally, only an ICE supervisor may initiate a second RCA re-determination after an initial determination, and the supervisor must provide a justification.[138] It is unclear whether non-ICE officials—e.g. private contractors, or state and local detention facility officials—participate in risk assessments.[139]

The RCA Detailed Summary, which appears to be sent to detention facilities, reflects ICE's assessment for a given individual and the relevant underlying information.[140] It has five sections, reflecting the RCA process: (1) an overview and decision history regarding detention or release, (2) a special vulnerabilities assessment, (3) a mandatory detention assessment, (4) a public safety risk assessment, and (5) a flight risk assessment.[141]

1. Overview and Decision History

ICE, through the RCA, collects basic personal information about the noncitizen, such as age, gender, country of origin and country of citizenship.[142] The RCA Detailed Summary also reports the removal authority and case status for the noncitizen as part of the assessment—whether he or she is in formal removal proceedings;[143] summary out of court procedures, like expedited removal,[144] reinstatement of a prior removal order,[145] or administrative removal[146]; or whether the noncitizen has a final removal order.[147]

[136] "All RCA recorded recommendation and decisions must be approved by an ICE supervisor." U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122, at 1. In August 2013, ICE created an exception for expedited removal cases. In those, RCA now generates an "automatic detain decision… allowing field offices to skip the submission/approval steps otherwise required." DHS OIG Report, *supra* note 17, at 13.
Future research will examine the impact of ICE supervisory review of RCA recommendations.
[137] *Id.* at 23 (requiring additional field "only when a supervisor disagrees with the system-generated recommendation").
[138] *Id.* at 23-24.
[139] *See* U.S. Immigration and Customs Enforcement, Risk Classification Assessment (RCA) Module Phase 1-4 Deployment Lessons Learned (January 3, 2013) (on file with American Immigration Council) (noting that some contractors at El Paso Service Processing Center "initially completed RCA recommendations," but listing "issues with this process"); DHS 2012 PIA, *supra* note 11, at 12 (stating that RCA automates a process that is currently manually performed by ERO officers and contractors).
[140] DHS 2012 PIA, *supra* note 11, at 5; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122, at 15.
[141] *See* RCA Exhibits 1-8, *supra* note 15.
[142] *See* RCA Exhibits 1-8, *supra* note 15; DHS 2012 PIA, *supra* note 11, at 4.
[143] *See generally* 8 U.S.C. § 1229a (2012); *see also* RCA Exhibit 1, *supra* note 15.
[144] *See generally* 8 U.S.C. § 1225(b)(1)(A)(i) (2012); *see also* RCA Exhibit 6, *supra* note 15.
[145] *See generally* 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 1241.8(a); *see also* RCA Exhibit 7, *supra* note 15.
[146] *See generally* 8 U.S.C. § 1228(b) (2012), *citing* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (deportability for "aggravated felony"); *see also* 8 U.S.C. § 1101(a)(43) (2012) (definition of "aggravated felony"); *see also* RCA Exhibit 8, *supra* note 15.
[147] *See, e.g.*, RCA Exhibits 3, 4, *supra* note 15. *See generally* 8 U.S.C. § 1231 (2012). Not all immigration detention is pretrial; much is post-removal order. *See infra* Part III.A.

Based on separate assessments of public safety and flight risk, the RCA can generate the following recommendations: (1) detention or release (including eligibility for release), (2) bond amount, (3) for those released, their custody classification, and/or (4) for those released, their level of supervision.[148] The RCA Detailed Summaries provided to the authors show these recommendations, with the exception of the bond dollar amount.[149]

2. Special Vulnerabilities

ICE officials have long stated that RCA would "promote identification of vulnerable populations,"[150] and incorporate special vulnerabilities into "custody and classification determinations."[151] ICE assesses vulnerabilities based on the intake interview.[152] Special vulnerabilities include "serious physical illness," "serious mental illness," "disabled," "elderly," "victim of persecution/torture," "victim of sexual abuse or violent crime," "victim of human trafficking,"[153] "primary caretaking responsibility," pregnant, nursing, and "risk based on sexual orientation /gender identity." Although the samples obtained for this article reflect the incidence of vulnerabilities, ICE redacted most descriptions of particular vulnerabilities.[154]

A special vulnerability does not trump mandatory detention, if mandatory detention applies.[155] Rather, if mandatory detention does not apply, the RCA

[148] DHS 2012 PIA, *supra* note 11, at 4-6, 10. It is unclear whether in practice ICE officers employ the RCA recommendation for supervision level, or whether ICE's alternatives to detention (ATD) officers follow it. ICE's ATD program has two levels of supervision—"Full-Service," involving robust supervision, case management, and technological check-in, and "Technology-Only," involving only technological check-in. U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 9-12; *see also* notes 344-49, *infra*. Additionally, technological check-in can take two forms—GPS monitoring and technological check-in. *Id.* RCA Detailed Summaries for those released reflect a recommendation for "technology," or "no technology," but not the specific type of technology (e.g., telephonic or GPS check-in). *See* RCA Exhibit 5, *supra* note 15. ICE's PIA stated that "the ERO officer determines the specific type of technology to be used." DHS 2012 PIA, *supra* note 11, at 4-5. In any event, in the Baltimore RCA samples, 83 percent of the technology recommendations for those released were blank. Koulish & Noferi, MPI, *supra* note 15.

[149] *See* RCA Exhibit 1, *supra* note 15.

[150] *Department of Homeland Security Appropriations for Fiscal Year 2013 Before the Subcomm. on Homeland Sec.*, 112th Cong. 11-22 (2012) (statement of Janet Napolitano, Secretary, Department of Homeland Security).

[151] Morton, *2013 Testimony*, *supra* note 9.

[152] For a description of the intake procedures related to a special vulnerability assessment, *see* DHS OIG Report, *supra* note 17, at 11-15, 29-30; United States Dep't of Homeland Sec., Scratch RCA Sheet (May 29, 2012) (on file with American Immigration Council). *See also* U.S. Immigration and Customs Enforcement, Office of Enforcement Removal Operations, Risk Classification Assessment, Special Vulnerabilities Quick Reference Guide, *available at* http://www.meldpuntvreemdelingendetentie.nl/images/risk%20classification%20assessment%20-%20rca%20-%20usa.pdf.

[153] Vera Institute has created, tested, and validated a screening tool for human trafficking. *See Out of the Shadows: A Tool for the Identification of Victims of Human Trafficking*, VERA INSTITUTE (June 10, 2014), http://www.vera.org/pubs/special/human-trafficking-identification-tool.

[154] RCA Exhibit 4, *supra* note 15.

[155] Koulish & Noferi, MPI, *supra* note 15.

tool leaves it to supervisors to determine detention or not, rather than making an explicit recommendation.[156]

3. Mandatory Detention

Mandatory detention, if it applies, results in a RCA recommendation to detain without eligibility for bond.[157] Even when mandatory detention applies, RCA still performs the risk assessment, so as to recommend security levels within detention.[158]

The RCA also plays a role in determining whether mandatory detention for prior crimes under 8 U.S.C. § 1226(c) applies. The RCA tool performs an "automatic assessment of whether an individual is subject to mandatory detention," after populating criminal history from a records check.[159] Baltimore samples show that RCA flags INA charges that trigger mandatory detention, and refer to an automated tool called "Subject to Mandatory Detention Version 2.0."[160] Those whom are found mandatorily detainable for a prior crime are listed on the RCA Detailed Summary as "mandatory detention… based on statutes and allegations."[161] The ICE officer makes the final determination.[162]

Concerns exist regarding the involvement of computers in legal determinations. An automated process cannot easily resolve complicated matters of law.[163] Mandatory detention analysis of aggravated felonies or crimes involving moral turpitude is "quite complex," as Justice Alito referenced.[164]

RCA also records whether a removal order has been entered, whether the removal order occurred within the last 90 days (and if not, whether removal is

[156] *See* RCA Exhibit 4 (on file with authors) ("Rec: Supervisor to Determine—Detain or Release on Community Supervision").
[157] RCA Exhibit 1, *supra* note 15.
[158] *Cf.* DHS 2012 PIA, *supra* note 11, at 4 ("When continued detention is recommended, RCA also assigns to the alien a detention custody classification level of Low, Low/Medium, High/Medium, or High.")
[159] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122, at 6.
[160] RCA Exhibit 1, *supra* note 15.
[161] RCA Exhibit 1, *supra* note 15; Koulish & Noferi, MPI, *supra* note 15. Pursuant to 8 U.S.C. § 1226(c), DHS mandatorily detains a non-citizen if he has previously committed an aggravated felony, two crimes involving moral turpitude at any time after admission into the US, one crime involving moral turpitude with a term of imprisonment of more than one year, a controlled substance offense, or a firearm offense. An ICE officer makes that threshold inquiry into any prior convictions at the time of issuing the Notice of Custody. *See* 8 U.S.C. § 1226(c) (2012); *see also* Noferi, *supra* note 34, at 84-85.
[162] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122, at 1. ICE officers are directed to review the items underlying the RCA mandatory detention recommendation "for accuracy." *Id.* at 6. Additionally, in the Baltimore samples, ICE officers chose to release three individuals whom RCA identified as mandatorily detainable for a prior crime. Koulish & Noferi, MPI, *supra* note 15.
[163] *See* Noferi, *supra* note 34, at 88-94.
[164] Padilla v. Kentucky, 599 U.S. 356, 377-378 (2010) (Alito, J. concurring) (statutory analysis of immigration impact of aggravated felonies or crimes involving moral turpitude is "quite complex").

reasonably foreseeable), and whether the noncitizen has re-entered after a prior removal order.[165]

4. Public Safety Risk Assessment

The RCA produces a public safety assessment of "low," "medium" or "high" risk. This is based mainly on "static" (i.e. unchanging) information, primarily detailed criminal records checks.[166] It includes a list of all criminal charges, dispositions and sentences produced by record checks, as well as open wants or warrants, and criminal supervision history such as bond breaches or supervision violations.[167] RCA's public safety assessment also includes as specific factors severity of charges and convictions, and special public safety factors (prior DUI's or domestic violence crimes).[168] The one "dynamic" (i.e. potentially changing) factor ICE uses to evaluate public safety risk appears to be gang affiliation (a.k.a. "Security Threat Group" status), which derives from ICE's interview.[169] There is no specific factor that measures the length of time since the last criminal infraction, although RCA records the dates of criminal charges and convictions.[170]

The RCA also contains disciplinary infraction information, and appears to include criminal and immigration detention stays.[171] Immigration detention facilities can update the RCA by entering recent disciplinary infractions.[172] It appears the RCA only records new demerits, not new merits. No evidence indicates that the RCA records good behavior in immigration detention, which

[165] RCA Exhibit 4, *supra* note 15. The 90-day window is significant because in that time period, the Attorney General must "remove the alien from the United States." 8 U.S.C. § 1231 (2012). If the noncitizen is not removed within this 90-day period, "the alien shall be subject to supervision under regulations prescribed by the Attorney General." § 1231(a)(3). These regulations include checking in with an immigration officer periodically, required "medical and psychiatric examination[s]", as well as giving "information under oath" and other "reasonable written restrictions on the alien's conduct." § 1231(a)(3)(A)-(D).

[166] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 122, at 1 ("RCA will utilize data that has been entered into the Crime Entry Screen (CES) to evaluate an individual's criminal history, including all charges and convictions"). *See also* U.S. Immigration and Customs Enforcement, Helpful Hints when Starting an RCA for Detain/Release Decision 2 (December 3, 2012) (on file with American Immigration Council), p. 2 ("The Criminal History section is automatically populated from Crime Entry Screen.") For a comparison of static to dynamic factors, *see* Kristin Bechtel, et al., *Identifying the Predictors of Pretrial Failure: A Meta-Analysis*, 75 FED. PROBATION, Sept. 2011, at 78.

[167] *See, e.g.*, RCA Exhibit 3, *supra* note 15. It is not clear which criminal databases the risk assessment checks. ICE's description states only that it checks "criminal history." DHS 2012 PIA, *supra* note 11, at 4.

[168] *See, e.g.*, RCA Exhibit 3, *supra* note 15.

[169] U.S. Immigration & Customs Enforcement, *supra* note 122, at 7-8.

[170] *See, e.g.*, RCA Exhibit 3, *supra* note 15. Those dates of charges and convictions are redacted in the authors' samples. *Cf.* Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1738-43 (2011) (noting that immigration law poorly takes into account the passage of time).

[171] *See, e.g.*, RCA Exhibit 1, *supra* note 15 (referring to a "current detention stay" as well as "historic sustained disciplinary infractions"); DHS 2012 PIA, *supra* note 11, at 9.

[172] *See* DHS 2012 PIA, *supra* note 11, at 9.

suggests that ICE is not pursuing rehabilitation goals for detainees' re-entry into the community.[173]

5. Flight Risk Assessment

The RCA separately produces a flight risk assessment of "low," "medium" or "high." Conversely though, the flight risk assessment is derived mainly from "dynamic" information, collected through ICE's intake interview.[174] This includes family history (e.g. a U.S. citizen spouse or child, or other noncitizen family), residency history, work authorization, legal representation, substance abuse history, and other factors.[175] Other information includes the possession of a valid government ID from country of citizenship or conversely the possession of invalid documents or aliases.[176] Flight risk assessment does evaluate some "static" information, i.e. immigration violation history, history of absconding, and the existence of a pending USCIS benefit application.[177]

Criminal researchers have generally found dynamic information less predictive, as mentioned above.[178] Plausibly too, noncitizen individuals might under-report some of these factors—particularly the existence of noncitizen family members—due to fear of their deportation.

* * *

Additionally, it is now known which factors are *not* included in the automated RCA recommendation, although ICE officers may factor them into their supervisory review. Among these factors not included are eligibility for relief based on a family relationship, asylum claim, U-visa, or T-visa;[179] lawful status in the United States; entry as a minor; lack of ties to, or conditions in, the home country; ties to the U.S. military; whether someone entered lawfully or unlawfully; threat to national security or known gang members; whether removal is unlikely; and time-based factors (length of lawful status, recent unlawful entry, or length of time since last criminal

[173] *Cf.* Hernández, *supra* note 19, at 1401, 1405-06 (rehabilitation is inapposite to immigration detention).
[174] *See* DHS OIG Report, supra note 17, at 11, 12 (describing intake interview); U.S. Immigration and Customs Enforcement, Risk Classification Assessment (RCA) Module Phase 1-4 Deployment Lessons Learned 3-4 (January 3, 2013) (on file with American Immigration Council) (local community ties such as a US citizen spouse or child are gleaned from interview); U.S. Immigration and Customs Enforcement, Helpful Hints when Starting an RCA for Detain/Release Decision 2 (December 3, 2012) (on file with American Immigration Council), p. 2 (flight risk information requires "manual data entry for all questions," as opposed to criminal history which is automatically populated).
[175] *See, e.g.*, RCA Exhibit 6, *supra* note 15; DHS 2012 PIA, *supra* note 11, at 4. Other factors considered include school enrollment, and "property ownership" or other "considerable assets." Koulish & Noferi, MPI, *supra* note 15.
[176] RCA Exhibit 1, *supra* note 15.
[177] *See, e.g.*, RCA Exhibit 1, *supra* note 15.
[178] *See* VanNostrand & Lowenkamp, *supra* note 32, at 3; Bechtel et al., *supra* note 166, at 78; Baradaran & McIntyre, *supra* note 8, at 557.
[179] *See also* DHS OIG Report, *supra* note 17, at 14 ("RCA was not intended to predict factors such as the likely future rulings of immigration judges").

infraction).[180] Nor is ability to pay bond considered.[181] Some information relating to these factors is included elsewhere in the RCA, though, making their utilization unclear.[182]

Much information about the Risk Classification Assessment is still unclear, however, even though more is now known. For example, ICE has never released its methodology nor business rules (a.k.a. its "scoring system") that govern how RCA reaches its final custody recommendation.[183] Through the authors' research, it is now known how "low," "medium," and "high" scores on flight risk and public safety interact to produce an overall custody recommendation.[184] But, it is not known how RCA reaches the public safety and flight risk assessments that underlie RCA recommendations and ultimate detention decisions, as noted.[185]

III. ASSESSING THE RISK CLASSIFICATION ASSESSMENT'S IMPACT ON IMMIGRATION OVER-DETENTION

ICE has thus incorporated into its detention decision-making a risk assessment tool modeled after criminal justice tools. But the question is: Will the risk assessment work in similarly reducing over-detention levels, and tailoring detention better to actual risk?

First, this section argues that over-detention exists in immigration enforcement, relative to risk—at least, compared to criminal justice levels. Second, ICE's RCA—at least in its current form—will likely not significantly reduce immigration over-detention because immigration enforcement operates under different laws (such as mandatory detention), upon a different, less risk-inclined population, and in the context of different processes and institutions, all of which may negate even a properly calibrated tool's impact.

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[180] U.S. Immigration and Customs Enforcement, Risk Classification Assessment POC & Training SME (November 2012) (PowerPoint presentation) (on file with American Immigration Council) ("Factors that are not scored or considered in the RCA recommendation but should be taken into account" include above factors).

[181] DHS OIG Report, *supra* note 17, at 14.

[182] For example, factors influencing the risk of flight include a *pending* USCIS benefit application (although not *eligibility* to apply for a benefit), work authorization (which often denotes lawful permanent resident status, but also can be obtained after 150 days by an asylum seeker), and veteran or current military member status. *See* U.S. Dep't of Homeland Sec., *supra* note 152. Also, although the sufficiency of an asylum claim does not appear to be considered, the special vulnerabilities assessment of persecution of torture includes review of "documentation of claim." U.S. Immigration and Customs Enforcement, *supra* note 152.

[183] DHS has stated that ICE's methodology incorporates "current ICE policies and guidance on detention decisions into a set of business rules," that process the information ICE collects. DHS 2012 PIA, *supra* note 11, at 4.

[184] Koulish & Noferi, MPI, *supra* note 15.

[185] *See* note 116, *supra*.

A. Current Immigration Over-Detention, Relative to Criminal Justice Levels

As several recent studies suggest, over-detention in immigration enforcement currently exists[186]—at least compared to criminal justice detention levels, the best available analog if an imperfect one.

In criminal justice, nationally, the U.S. is estimated to detain pretrial about 480,000 at any one time, as of 2012.[187] Still, in individual cases, most studies show that criminal judges release a majority of defendants pretrial (if a shrinking majority), even including defendants with more serious charges.[188] Nationally, state criminal judges released 58 percent of defendants in 2006.[189] In 2009, criminal judges in the 75 largest U.S. urban counties released 62 percent of more serious felony defendants, with only 1 in 10 denied bail.[190] In New York in 2010, criminal judges in 2010 released 68 percent on recognizance; set bond for another 31 percent, with 80 percent of bonds under $1,000; and denied bail to only 1 percent.[191]

Release rates have been even higher in jurisdictions employing risk assessments, as noted—80 percent in the District of Columbia in 2008[192] and 70 percent in Kentucky in 2011.[193] Along those lines, Professors Shima Baradaran and Frank McIntyre argued that the U.S. could safely release pretrial over 70 percent of defendants.[194]

In immigration enforcement, nationally, the U.S. detained nearly 441,000 in fiscal year 2013,[195] with the capability to detain 34,000 or more at any one time.[196] In individual cases, U.S. immigration authorities detain in opposite proportions to criminal justice ratios. For example, a study of ICE's New York arrestees from 2005 to 2010 showed ICE held without a bond setting nearly 80 percent of arrestees; set bond for another 20 percent, with

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[186] *See* Kalhan, *supra* note 7, at 48; *see also* Hernandez, *supra* note 19, at 1412.
[187] ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST (2nd ed. 2014)
[188] *See* Baradaran, *supra* note 5, at 725.
[189] This compares to 64 percent of defendants in 1990. Baradaran & McIntyre, *supra* note 8, at 560.
[190] BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES, at 15 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fdluc09.pdf. Federal judges in 2009 released pretrial 47 percent of defendants in non-immigration cases, and 34 percent of defendants in all federal cases including immigration cases. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS 324-29 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf.
[191] N.Y.U. SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 10 (July 23, 2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.
[192] COSCA, *supra* note 58, at 7.
[193] Veldman, *supra* note 48, at 789-91.
[194] *See* Baradaran & McIntyre, *supra* note 8, at 558-60 (arguing to release 25 percent more defendants over 2006 levels of 58 percent releases).
[195] SIMANSKI, *supra* note 1, at 5.
[196] U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-14-116, ICE'S RELEASE OF IMMIGRATION DETAINEES 1 (August 2014), *available at* http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

over half those individuals unable to pay bond, as nearly 75 percent of bonds were over $5,000;[197] and released less than 1 percent on recognizance.[198]

Even after ICE introduced risk assessment, preliminarily results are similar. The DHS Inspector General report found that ICE detained 91 percent of those upon whom ICE conducted risk assessment between July 30, 2012 and December 31, 2013.[199] The authors' recent study showed similar results. In Baltimore in spring 2013, ICE detained 82 percent of individuals upon whom it performed the RCA.[200]

Unless noncitizen immigration arrestees pose significantly more risk than criminal pretrial detainees, more accurate immigration detention would almost certainly be less detention. There is no comprehensive national study of the accuracy of evidence-based immigration detention—the authors' Baltimore study is the first. But if ICE simply tailored its detention decisions to criminal justice ratios, ICE would detain 30 to 40 percent less of its arrestees—perhaps 50 to 60 percent less, if tailored to criminal jurisdictions employing risk assessment.[201]

Empirical evidence to date indicates that noncitizen immigration arrestees do not, in fact, pose more risk than criminal pretrial detainees. Regarding public safety risk, for example, criminal recidivism by ICE arrestees has been found to be significantly lower than recidivism by the general prison population.[202] A U.S. criminal justice study found that released noncitizens were re-arrested pretrial at lower rates than U.S. citizens: 0.0 to 3.2 percent compared to 1.9 to 4.5 percent.[203] Schriro also anecdotally noted immigration

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[197] Immigration bonds are a minimum $1,500 by law, a contributing factor. 8 U.S.C. § 1226(a) (2012).

[198] N.Y.U. SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC ET AL., *supra* note 191, at 2, 10. That said, in expedited removal processes, DHS releases comparatively greater percentages of detainees that are seeking asylum, albeit only after they pass a credible fear interview. In FY 2012, DHS reported that it paroled 80 percent of asylum seekers with "credible fear." U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ASSESSING THE U.S. GOVERNMENT'S DETENTION OF ASYLUM SEEKERS: FURTHER ATTENTION NEEDED TO FULLY IMPLEMENT REFORMS 9 (2013), http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf. It is unclear, though, how many were paroled with bond or conditions.

[199] DHS OIG Report, *supra* note 17, at 25.

[200] Koulish & Noferi, MPI, *supra* note 15.

[201] Put another way, if ICE's classifications for *severity* of detention were used instead to determine *initial* detention, ICE's detention population might shrink by 80 percent. Hernandez, *Immigration Detention as Punishment*, *supra* note 19, at 1411-13 (in 2011, ICE classified 41 percent and 40 percent of detainees as "low-risk" or "medium-risk," respectively, with even medium-risk detainees lacking a history of violence or serious offenses).

[202] Congressional Research Serv., ANALYSIS OF DATA REGARDING CERTAIN INDIVIDUALS IDENTIFIED THROUGH SECURE COMMUNITIES: UPDATING THE PREVIOUS ANALYSIS WITH CITIZENSHIP DATA (2012), *available at* https://www.hsdl.org/?view&did=745580.

[203] Allyson Theophile, *Pretrial Risk Assessment and Immigration Status: A Precarious Intersection*, 73 FED. PROBATION, Sept. 2009, at 49, *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2009-09/Intersection.html. In Allyson Theophile's words, "while the public at large may share concerns over the number of crimes committed by illegal aliens," criminal risk tools "should not currently or in any future version incorporate illegal immigration." *Id*. This dovetails with research showing that immigrants are more law-abiding than natural-born citizens. *See* Jorge M. Chavez & Doris M. Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 83 (2009); *see also* RUBEN RUMBAUT & WALTER EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT

detainees' less dangerous demeanor, which she ascribed to their "appreciably well-developed" life skills—being more likely than those in the criminal justice system to have come from "intact families," with jobs, families, children and a "stake in the community."[204]

There may be indicators of under-detention for public safety risk among a certain subset of immigration arrestees—ICE arrestees whom had committed serious crimes and received a removal order, but whom ICE released after their countries refused to receive them.[205] Yet under post-removal custody review procedures, ICE can continue to hold those whom are "specially dangerous" based on their prior criminal history, even for longer than six months.[206] Nothing prevents risk assessment from properly informing that process. Even if it did not, on a systemic level it is unlikely that unnecessary releases among this small subset would countermand other over-detention.[207]

Regarding flight risk, criminal empirical researchers similarly found no evidence that lack of U.S. citizenship increases flight risk.[208] The Ninth Circuit, sitting en banc, recently found similarly.[209] More to the point, if flight risk is the sole concern, alternatives to detention techniques like supervision

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CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN (2007) (migration contributes to a decrease in violent crime rate).

[204] Human Rights First, *Dialogues on Detention: What is "Civil" Detention?* at 0:49-4:57 (content from UT Austin Panel 2- Dialogues on Detention) (comments by Dora Schriro) (Dec. 12, 2012), https://www.youtube.com/watch?v=QM7zZe7I1OM.

[205] Constitutional Due Process requires review of post-removal order detention. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (concluding that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute"). ICE released some noncitizens with criminal convictions after their deportation orders because their home countries would not take them back, and some convicted of murder killed again. Maria Sacchetti, *Many freed criminals avoid deportation, strike again*, BOSTON GLOBE (Dec. 9, 2012), http://www.bostonglobe.com/metro/2012/12/09/secret-criminals-quietly-released-criminals-who-were-supposed-deported-with-deadly-consequences/864u1YQbUaVcRiSnz6VaxJ/story.html. The Boston Globe reported "only 13 cases [over four years of ICE] seeking to hold immigrants longer because they are dangerous." *Id*. Exhibit 3 may exemplify this trend: a 59-year old man with a long and recent criminal record, but for whom removal was not reasonably foreseeable after his removal order, whom ICE released when the supervisor overrode RCA's automated determination. RCA Exhibit 3, *supra* note 15.

[206] 8 C.F.R. § 241.14 (procedures for continued detention of removable aliens on account of special circumstances, "even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future," including those "specially dangerous" or for "security or terrorism concerns"); 8 C.F.R. § 241.4 (general provisions for detention beyond the 90-day removal period).

[207] *See* ROSENBLUM & MCCABE, *supra* note 42, at 12-13.

[208] A criminal defendant's "likelihood of committing a new offense or failing to appear is statistically unaffected by . . . immigration status." Theophile, *supra* note 203; *see also* VanNostrand & Keebler, *supra* note 50 (finding that "risk classification scheme mimics judicial practice: as risk increased, the likelihood of pretrial detention increased from 13 percent of defendants classified as level 1 (the lowest risk) to 72 percent of those classified as level 5 (the highest risk) . . . [and] when defendants were released, the likelihood of pretrial failure increased as the level of pretrial risk increased"). That said, some local criminal jurisdictions impose minimum bail based on undocumented status, while others do not. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1160-61, 1174-75 (2013) (comparing Harris County, TX, which imposes a minimum bond of $35,000 on undocumented immigrants, with Los Angeles County, CA, which considers immigration status irrelevant to bail hearings).

[209] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 783 (9th Cir. 2014) (en banc) ("the record contains no findings, studies, statistics or other evidence (whether or not part of the legislative record) showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents.").

and electronic tracking have since emerged that successfully prevent flight,[210] even though some scholars have theorized that immigration arrestees pose comparatively greater flight risk.[211] ICE's current supervision program has showed high success in preventing flight. Ninety-five percent of supervisees in ICE's full-service Alternatives to Detention program appeared for hearings between 2011 and 2013.[212]

In short, an immigration risk tool should have much "low-hanging fruit" to recommend for release, even more so than criminal pretrial risk tools. Yet no evidence to date shows reductions in immigration detention after ICE implemented RCA. The next section explores why.

B. Continued Immigration Over-Detention, Despite Risk Assessment

Several factors make it likely that risk assessment will not significantly reduce immigration detention levels. First and foremost, mandatory detention laws are present in immigration while absent in criminal justice. Second, ICE's RCA tool may be improperly calibrated—perhaps due to inherent risk assessment concerns, but likely exacerbated by the different immigration enforcement context and population. Third, even a tool designed well may be frustrated in impact, by structural and institutional differences in immigration enforcement and law.

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[210] Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, *in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS (Springer, forthcoming 2015), *available at* http://ssrn.com/abstract=2370062; *see* Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. MIGRATION & HUMAN SEC. 97, 103, 107 (2013). Moreover, in 1996, DHS made release decisions arbitrarily by bed space, without identifying those more likely to flee, and did not identify lawful permanent residents with families and jobs, with more incentive to stay in the U.S. Demore v. Kim, 538 U.S. 510, 563-64 (2003). Even qualitative risk assessments remedied those failures. Also, greater coordination between federal immigration and local criminal authorities (*e.g.*, Secure Communities) has remedied prior failures to identify deportable noncitizens after convictions. Frances M. Kreimer, Note, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. Rev. 1485, 1518 (2012).

Flight concerns were likely even overstated when made. For example, a 1995 U.S. Senate report found that over 20 percent of deportable "criminal aliens" failed to appear for hearings, and a 1994 Department of Justice report, similarly found that 21% of noncitizens failed to show for proceedings in 1992. U.S. SENATE COMM. ON GOVERNMENTAL AFFAIRS, CRIMINAL ALIENS IN THE UNITED STATES, S. REP. NO. 104-48, at 4 (1995); U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REP. NO., I-93-03, CASE HEARING PROCESS IN THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 5 (1994). Yet these rates were never much different than comparable criminal abscondment rates. Noferi, *supra* note 91, at 146 & n.301(citing evidence that in 2009, in the 75 largest U.S. counties, 83 percent of adult felony criminal defendants who were released pretrial attended all court hearings).

[211] As scholars once described it, noncitizens seek additional time in the U.S., and gain time by absconding while losing little beyond removal if apprehended. Stephen Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 537 (1999); Peter Schuck, *INS Detention and Removal: A "White Paper*," 11 GEO. IMMIGR. L.J. 667, 671-72 (1996).

[212] U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 30.

1. Immigration Mandatory Detention Laws

The risk assessment recommendation cannot affect release of an individual mandatorily detained.[213] In three primary instances, immigration laws widely mandate detention without a bond hearing in individual cases.[214] First, in formal in-court removal proceedings, mandatory "custody" applies to individuals with certain prior crimes,[215] many quite minor.[216] DHS has interpreted "custody" to require incarcerative detention.[217] Second, in summary non-judicial removal proceedings, such as expedited removal and reinstatement of removal, mandatory detention applies with limited exceptions.[218] Non-judicial removal proceedings constituted 83 percent of DHS removals in FY 2013 (over 363,000),[219] a likely contributor to the large increases in numbers of individuals detained.[220] Third, mandatory detention applies for 90 days after entry of a removal order.[221] Moreover, although of unclear impact to any individual case, a system-wide "bed quota" requires DHS to maintain "not less than" 34,000 detention beds daily.[222]

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[213] Das, *supra* note 19, at 162; LIRS, *supra* note 12, at 41; *see* Fan, *supra* note 21, at 146.

[214] *See generally* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 609-13 (2010) (reviewing detention authorities).

[215] 8 U.S.C. § 1226(c) (2012). Mandatory detention for prior crimes also applies in "administrative removal," a streamlined, non-judicial proceeding for noncitizens without lawful permanent resident (LPR) status that have committed a crime that qualifies as an "aggravated felony" under immigration laws. 8 C.F.R. § 238.1; 8 U.S.C. § 1228(b) (2012); 8 U.S.C. § 1101(a)(43) (2012); Madrane v. Hogan, 520 F. Supp. 2d 654, 656 (M.D. Pa. 2007) (petitioner served with "Notice of Intent to Issue a Final Administrative Order of Removal under section 238(b) of the Immigration and Nationality Act . . . advising him that he would be placed into expedited removal proceedings as an alien convicted of an aggravated felony").

[216] An "aggravated felony" or certain "crimes involving moral turpitude" qualify one for mandatory detention. An "aggravated felony" could encompass marijuana possession, a bar fight, or shoplifting, while a "crime involving moral turpitude" could encompass subway turnstile jumping or a disorderly persons offense. *See* Noferi, *supra* note 34, at 89-93.

[217] Memorandum from the Am. Immigration Lawyers Ass'n on The Use of Electronic Monitoring and Other Alternatives to Institutional Detention on Individuals Classified under INA § 236(c) to David Martin, Office of Gen. Counsel, and Brandon Prelogar, Office of Policy, U.S. Dep't of Homeland Sec. (Aug. 6, 2010), *available at* www.nilc.org/document.html?id=94. Senate legislation would have explicitly allowed those mandatorily detained for prior crimes to be placed in "secure alternatives," such as electronic ankle devices. S. 744, *supra* note 113, § 3715(d).

[218] Expedited removal applies to certain "arriving aliens" DHS encounters at or within 100 miles of a border with insufficient or improper documents. 8 U.S.C. §§ 1225(b)(1)(A)(i), 1182(a)(6)(C), (7)(A)(i)(I) (2012). Reinstatement of removal applies to a person apprehended with a prior removal order. 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 1241.8(a).

[219] SIMANSKI, *supra* note 1, at 5; *see also* MARC ROSENBLUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 3 (2014), http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

[220] MARK NOFERI, CTR. FOR MIGRATION STUDIES, IMMIGRATION DETENTION: BEHIND THE RECORD NUMBERS (Feb. 13, 2014), at http://cmsny.org/immigration-detention-behind-the-record-numbers/.

[221] 8 U.S.C. § 1231(a)(1)-(2) (2012). If DHS does not remove the noncitizen by then, DHS may release the noncitizen under supervision, after conducting a custody review. 8 U.S.C. § 1231(a)(3) (2012). But DHS may also continue to detain noncitizens whom pose a flight risk or danger, or certain inadmissible or criminal aliens. 8 C.F.R. §§ 241.4(f)-.5 (2014). Detention, however, may not constitutionally extend beyond a period "reasonably necessary to secure removal," with the U.S. Supreme Court holding six months to be presumptively reasonable. Zadvydas v. Davis, 533 U.S. 678, 699-701 (2001).

[222] Consolidated Appropriations Act, 2014, H.R. 3547, "U.S. Immigration and Customs Enforcement, Salaries and Expenses," 113th Cong. (2014) ("funding made available under this heading shall maintain

Similar mandatory detention provisions are largely absent in criminal pretrial justice, save for capital or other extremely serious offenses.[223] For example, if probable cause exists that a defendant committed certain serious crimes, federal criminal law goes so far as to provide a rebuttable presumption towards detention without bail—but does not flatly mandate detention without a hearing.[224] System-wide criminal detention quotas are also absent.[225]

In a majority of cases, these mandatory detention provisions will prevent risk assessment from affecting ICE's detention decision. For example, in the authors' Baltimore study, 63 percent of individuals entering in-court removal proceedings or non-judicial processes at the time ICE ran RCA were mandatorily detainable by law.[226] Absent the mandatory detention laws, ICE could have considered many for release based on RCA's assessment of public safety risk. For example, of those mandatorily detainable for a prior crime in in-court removal proceedings, 76 percent were "low" or "medium" risk to public safety[227]—statistically indistinguishable from those discretionarily detained or released.[228] Those mandatorily detainable for prior crimes in in-court removal proceedings also had strong stability factors—79 percent with a stable address, 75 percent with family in the United States (and 46 percent with a US citizen spouse or child), and 29 percent with work authorization.[229]

Until mandatory detention laws change, risk assessment's impact on immigration detention levels will undoubtedly be more modest than on

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a level of not less than 34,000 detention beds"); Meissner et al., *supra* note 119, at 127; SCHRIRO REPORT, *supra* note 2, at 2 (noting the "rapid expansion of ICE's detention capacity from fewer than 7,500 beds in 1995 to over 30,000 today"). A recent DHS Inspector General report found that to some degree, field office detention decisions respond to perceived pressure from Congress to fill the bed quota on a daily basis. U.S. DEP'T OF HOMELAND SEC., *supra* note 196, at 13, 18. Additionally, ACLU reported that ICE was now setting bonds at the border instead of releasing asylum seekers, with local ICE officials crediting RCA. Conference Call on Issues related to CFI/RFI Working Group, 4 (Oct. 22, 2013) (notes on file with authors). For more information on the bed quota, *see The Immigration Detention Bed Quota: Background*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/dwn_bed_quota_backgrounder_and_talking_points.pdf.

[223] Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 787-88 & nn.10-11 (9th Cir. 2014) (collecting state criminal statutes that categorically prohibit bail). As noted, the Ninth Circuit recently struck down a criminal mandatory detention provision for undocumented immigrants. *Id*.

[224] 18 U.S.C. § 3142(e)-(f) (2012); s*ee also Lopez-Valenzuela*, 770 F.3d at 785 ("irrebuttable presumptions are disfavored").

[225] Robert M. Morgenthau, Op-Ed., *Immigrants jailed just to hit a number*, Daily News (Jan. 19, 2014), http://www.nydailynews.com/opinion/immigrants-jailed-hit-number-article-1.1583488 (detention quota is "unique to the immigration context").

[226] Koulish & Noferi, MPI, *supra* note 15. A recent GAO report cited ICE as stating that "77 percent to 80 percent of aliens in detention facilities" were mandatorily detained. The specific detention authorities were unclear, but included some detained post-removal order. U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 8, at 28 & n. 58. Similarly, Schriro's 2009 report stated that two-thirds of detainees on one day in 2009 were mandatorily detained (although the specific detention authorities were similarly unclear). SCHRIRO REPORT, *supra* note 2, at 6; *see also* Kalhan, *supra* note 7, at 46.

[227] Koulish & Noferi, MPI, *supra* note 15.

[228] Brief of 46 Social Science Researchers and Professors as Amici Curiae Supporting Petitioners-Appellees/Cross-Appellants and Urging Affirmance, Rodriguez v. Robbins, Nos. 13-56706 and 13-56755, 3 & nn. 3, 29-30 & 97-98 (9th Cir. Sept. 29, 2014), *available at* https://www.aclu.org/sites/default/files/assets/rodriguez_social_science_amicus_filed.pdf.

[229] Koulish & Noferi, MPI, *supra* note 15.

criminal pretrial detention levels. However, public data showing the risk that mandatory detainees pose may inform Congressional reevaluation of the utility of mandatory detention laws.[230]

2. Potential Prediction Failures

For those not mandatorily detained, the risk tool has the capability to impact their detention decision. But if the risk tool is not accurate, nor calibrated to the different population impacted by immigration enforcement, over-detention may continue.[231]

To illustrate, preliminary empirics show that ICE is detaining at higher rates, even where it has discretion. In the Baltimore study, solely examining in-court removal proceedings—the closest procedural analog to criminal processes with pretrial detention—the authors found that ICE discretionarily detained 58 percent of its arrestees, *not* including those ICE mandatorily detained for prior crimes, likely to be more serious.[232] This compares to U.S. criminal jurisdictions that detained 38 percent of only *felony* defendants, as noted.[233]

Additionally for example, in the authors' study, RCA assessed only 2 percent of noncitizens as both "low" public safety and flight risk.[234] If DHS' tool continues to result in recommendation rates like these,[235] over-detention is even more likely.[236]

a) Accuracy Concerns Inherent to Actuarial Assessment

Actuarial risk assessment inherently entails over-detention concerns in either the criminal or immigration context. Actuarial risk assessment involves applying the laws of large numbers to statistical and archival knowledge, and producing specific predictions.[237] Actuarial tools have shown greater predictive power than clinical judgment in many fields, including the criminal

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[230] Koulish & Noferi, *supra* note 27; *see also* Das, *supra* note 19, at 163.
[231] James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, 70 FED. PROBATION, Sept. 2006, at 58, 59 (2006).
[232] Koulish & Noferi, MPI, *supra* note 15. Including those mandatorily detained, ICE detained 74 percent of arrestees pre-hearing in in-court removal proceedings. *Id.* Moreover, not all arrestees have criminal records, and although over half of immigrant detainees do, many crimes are minor, nonviolent, or exclusively immigration-related. "About 21 percent of the criminal aliens deported in FY 2009-12 had been convicted exclusively of immigration-related crimes, and about 23 percent of *non*immigration crimes have consisted of minor, nonviolent offenses." ROSENBLUM & MEISSNER, *supra* note 219, at 7.
[233] *See* REAVES, *supra* note 190.
[234] Koulish & Noferi, MPI, *supra* note 15.
[235] *Id.*
[236] Danielle Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 4-5 (2014).
[237] Stephen Collier, *Enacting Catastrophe: Preparedness, Insurance, Budgetary Realization*, 37 ECON. & SOC'Y. 224, 227 (2008); s*ee also* Kirk Heilbrun, Allison Hart & Heather Green, *Risk-Assessment in Evidence-Based Sentencing: Context and Promising Uses*, 1 CHAPMAN J. CRIM. JUST. 127, 127, 134 (2009) ("The *sine qua non* of actuarial assessment involves using an objective, mechanistic, reproducible combination of predictive factors, selected and validated through empirical research, against known outcomes that have also been quantified.").

justice system.[238] However, risk assessments are far from perfectly predictive. Professor Sonja Starr argues that actuarial criminal sentencing models attempting to predict recidivism offer only "fairly modest improvements over chance."[239]

More importantly, regarding preventive, future-oriented detention generally, such as criminal pretrial and immigration detention, decision makers are "likely to err on the side of detention,"[240] thereby contributing to continued over-detention. When future false positives are inherently unknowable, detention is a safer choice.

Thus, even regarding criminal pretrial models, Dr. Cynthia Mamalian argues that risk assessments "will always generate large margins of error," because of mis-classification and over-classification, invariably "in the direction of over-detaining."[241] Actuarial assessment amplifies those tendencies since risk management initiatives echo "the classic Hobbesian response of security interventions translated into a world of only imaginable futures."[242] Moreover, any human biases programmed into the algorithms potentially may cause a "disparate impact on historically subordinated groups,"[243] as addressed below. Efficiencies in detention decision making created by RCA may compound the incidences of shortcuts and errors that come at the immigrant's expense.[244]

At the outset, to fix any inaccuracies or biases, risk tools should be publicly validated, as criminal researchers and Schriro both recommend.[245] Currently, no public validation exists regarding ICE's tool. Moreover, ICE should continue to update its tool over time as it gathers additional data.[246] Criminal researchers have pointed out that "some risk factors change over periods as short as six months."[247] ICE is currently updating its tool, but DHS has released little information about the nature and impact of the updates.[248]

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[238] *See* Lowenkamp & Whetzel, *supra* note 55, at *2; Oleson, *supra* note 61, at 1336; Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 10, 51 (2003); BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (U. Chi. Press reprt. ed. 2006).

[239] Starr, *supra* note 40, at 806.

[240] Cole, *supra* note 63, at 696.

[241] MAMALIAN, *supra* note 30, at 32. Moreover, studies of detention risk tools always examine samples at least partially contaminated by suppressed risk—i.e. risk suppressed by current government actions, such as incarceration. *Id.*

[242] Pat O'Malley, *Security After Risk: Security Strategies for Governing Extreme Uncertainty*, 23 CURRENT ISSUES CRIM. JUST. 5, 8 (2011).

[243] Citron & Pasquale, *supra* note 236, at 4-5.

[244] Incorporating efficiency principles into legal process passes more risk of error onto the individual immigrant. Legomsky, *supra* note 18, at 679.

[245] *See* Monahan & Skeem, *supra* note 61, at 162 ("Unless a tool is validated in a *local sanctioning system*—and then periodically *revalidated*—there is little assurance that it works."); MAMALIAN, *supra* note 30, at 37; SCHRIRO REPORT, *supra* note 2, at 20.

[246] *See* Cadigan & Lowenkamp, *supra* note 52.

[247] Monahan & Skeem, *supra* note 61, at 161 n.20 ("a risk factor's variability requires repeated, reliable assessment of the risk factor over time.").

[248] *See* note 117, *supra.*

b) Calibration to Immigration Arrestee Population

Even assuming some inherent over-detention in criminal pretrial detention, even with the use of risk assessment, immigration discretionary detention levels are quite higher. One reason may be that ICE's tool is not specifically calibrated for immigration offenders, as Dr. Schriro recommended.[249]

Criminal pretrial research highlights the importance of calibrating risk to specific offenders—whether for domestic violence, sex offenses, or other violent crimes.[250] ICE's tool appears to follow a criminal pretrial template.[251] Yet while noncitizen immigrant arrestees have markedly different flight and public safety risk profiles,[252] research indicates that ICE's tool may not yet capture them. Factors which work well in criminal justice to predict public safety and flight risk may not operate similarly in immigration proceedings, and vice versa.

For example, the immigration risk assessment may be ***missing key factors***. Most notably, ICE's current RCA does not evaluate chances of relief at a removal hearing, historically considered the key predictor of immigration flight risk.[253] While criminal judges commonly consider the strength of a case at a bail hearing on public safety grounds,[254] chances of relief in deportation proceedings may more greatly impact flight risk because an immigration respondent's stakes—permanent banishment—are arguably even higher.[255] An ICE officer can consider chance of relief in his or her review of the RCA recommendation[256]—although it is unclear whether this occurs in practice, or logistically could occur after only an initial intake interview during book-in.

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[249] *See* SCHRIRO REPORT, *supra* note 2, at 20 ("ICE needs to develop a validated risk assessment instrument specifically calibrated for the U.S. alien population.").

[250] *See* Lowenkamp et al., *supra* note 30, at 2-9; *cf.* Starr, *supra* note 40, at 806 (the "specifics of the actuarial instrument matter").

[251] Koulish & Noferi, MPI, *supra* note 15.

[252] Schriro noted the greater "diversity" of populations in the civil detention system. Human Rights First, *supra* note 204.

[253] *See* EILEEN SULLIVAN ET AL., VERA INSTITUTE OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 4 (2000), *available at* http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf ("effect of intensive supervision is more dramatic… for those with fewer incentives to comply on their own-the undocumented workers who have little chance of winning their cases"). Mark Krikorian called those with little chance of relief the "embodiment of a flight risk." Kate Linthicum, *Push for cheaper alternatives to immigrant detention grows*, L.A. TIMES, May 14, 2014, http://www.latimes.com/nation/la-na-immigration-detention-20140601-story.html. Particularly, after a removal order, flight risk is presumed to rise sharply. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 703 (2000) (an "alien's incentives to keep appearing diminish significantly… when an immigration judge rules against the alien"); Legomsky, *supra* note 211, at 539.

[254] This practice has been criticized as an impermissible pretrial guilt determination. Baradaran, *supra* note 5, at 771-72.

[255] *See* Padilla v. Kentucky, 559 U.S. 356, 265, 370 n.11 (2010) (deportation is akin to "banishment or exile"). Essentially, while most convicted criminals are presumed to re-enter the community one day, a deported immigrant is not.

[256] U.S. Immigration and Customs Enforcement, Risk Classification Assessment POC & Training SME (November 2012) (PowerPoint presentation) (on file with American Immigration Council).

Additionally, ICE's RCA does not consider lawful immigration status (i.e. a green card), nor length of residence in the United States (whether lawful or unlawful). Those possessing both these factors are usually presumed to have stronger community ties, and thus lower flight risk.[257]

Further, certain factors may be ***unreliably reported*** in the immigration context. Primarily, noncitizens may under-report family ties in an ICE interview for fear of relatives' deportation, a concern less present in criminal justice. Or, ICE reports that its officers are typically unable to verify whether noncitizens possess valid ID from another country.[258] The RCA flight risk assessment based on these factors may thus be potentially unreliable.

Some factors may ***operate differently*** in the immigration context. For example, immigration proceedings are not necessarily triggered by recent criminal activity as criminal proceedings commonly are, since no statutes of limitations exist regarding immigration detention or deportation.[259] In the authors' Baltimore study, for example, 60 percent of those mandatorily detainable for a prior crime did not have that crime associated with their recent ICE encounter.[260] Plausibly, many immigration arrestees have lived non-criminal lives for a number of years, and would be considered low public safety risks in the criminal justice system.[261] Although ICE's RCA evaluates criminal history in detail, and collects data on the length of time since criminal infractions, it is unclear whether or how that information impacts RCA's public safety assessment.

Additionally, although criminal researchers cite employment as a predictor of lower flight risk,[262] for noncitizens, the relationship between employment and flight risk is more complicated because not all noncitizens are authorized to work. ICE's RCA does consider work authorization, which is typically available to lawful permanent residents, those with deferred action, and certain others.[263] That said, asylum seekers *will* be eligible to apply for work authorization 150 days after submitting an application.[264] ICE's RCA does not consider this at the outset, nor is RCA commonly re-run to update for such factors. More fundamentally, many noncitizens without work authorization nevertheless have stable work, which ICE's RCA does not consider.

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[257] *See* Legomsky, *supra* note 211, at 537-38, 549 n.35 ("In criminal proceedings, strong community ties increase the chance that a released defendant will appear in court. Whether the same pattern carries over to removal proceedings is not yet known." . . . "the higher stakes typically possessed by deportable noncitizens if anything give them greater, not lesser, incentive to abscond").

[258] U.S. Immigration and Customs Enforcement, Risk Classification Assessment (RCA) Module Phase 1-4 Deployment Lessons Learned 3 (January 3, 2013) (on file with American Immigration Council) ("Few individuals actually have valid ID on their person when they are in custody, and the officers are wary to believe the individual if the information cannot be verified.").

[259] Ben Winograd et al., *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice,* AMERICAN IMMIGRATION COUNCIL 4 (March 2013), http://www.immigrationpolicy.org/special-reports/two-systems-justice-how-immigration-system-falls-short-american-ideals-justice.

[260] Koulish & Noferi, MPI, *supra* note 15.

[261] *Cf.* SCHRIRO REPORT, *supra* note 2, at 21.

[262] Peterson, *supra* note 75, at 2; COSCA, *supra* note 58, at 6.

[263] 8 U.S.C. § 1324a(h)(3) (2012); 8 C.F.R. § 274a.12.

[264] 8 C.F.R. §§ 274a.12(c)(8), 208.7(a)(1).

Along these lines, some factors helpful to the criminal context may have ***little predictive value*** in the immigration context. Factors that have little variance—where nearly all respondents are similar—have little predictive value, since they fail to distinguish among respondents.[265] Regarding public safety, the authors' Baltimore study found that 97 percent of individuals did not have open criminal warrants, 94 percent did not have supervision failures, 96 percent did not have gang affiliations, and 99 percent did not have disciplinary infractions in custody.[266] Regarding flight, the authors' Baltimore study found that 87 percent have no absconding history, 91 percent have no substance abuse history, and 94 percent have no invalid ID.[267] Although these factors might predict safety or flight risk in criminal processes, they may do little to predict it among immigration arrestees.

Some factors with great variance that might strongly predict risk in the criminal context, may not predict risk in the immigration context for certain classes of noncitizens. One example is an asylum seeker's community and family ties. The authors' Baltimore study showed that noncitizens in expedited removal reported few community ties, and thus ICE's RCA rated them as high flight risks.[268] Yet those claiming asylum with little but the shirt on their back might have even greater incentive not to abscond, to avoid returning to persecution.[269] The immigrant population is not one-size-fits-all.

In short, the reasons for higher discretionary detention even with ICE's new RCA are unclear. But, preliminarily, it is possible that ICE's RCA is not truly yet an "immigration" risk tool—unsurprising, since RCA is the first of its kind, with no state analogs to borrow from. Mis-calibration appears particularly likely regarding flight risk. The RCA is strongly weighted towards detaining based on flight, which differs from ICE's stated emphasis on public safety.[270]

3. Structural, Institutional and Political Concerns

Even if the risk assessment tool was properly calibrated to recommend reductions in detention, structural and institutional differences in immigration enforcement and law may negate the tool's impact, while concurrently its actuarial nature may politically legitimize its outcomes.

a) Structural Differences

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[265] *See* MAMALIAN, *supra* note 30, at 14 n.33 (summarizing literature on "statistically rare events," where low occurrence rates can result in higher false positives).
[266] Koulish & Noferi, MPI, *supra* note 15.
[267] *Id.*
[268] *Id.*
[269] CATHRYN COSTELLO & ESRA KAYTAZ, BUILDING EMPIRICAL EVIDENCE INTO ALTERNATIVES TO DETENTION: PERCEPTIONS OF ASYLUM-SEEKERS AND REFUGEES IN TORONTO AND GENEVA 11 (2013), *available at* http://www.refworld.org/pdfid/51a6fec84.pdf; CENTER FOR VICTIMS OF TORTURE ET AL., *supra* note 12, at 7.
[270] Koulish & Noferi, MPI, *supra* note 15.

Immigration enforcement and adjudication operate differently than the criminal justice system, which may frustrate the efficacy even of a robust risk tool (leaving aside mandatory detention provisions).

For one, unlike the criminal field, DHS both determines and executes initial detention, compared to a magistrate initially serving as a neutral decision maker.[271] This structure may exacerbate ICE officers' incentive to choose the safer path of detention, since DHS can "let the court sort it out."[272] ICE officers retain review capability over RCA recommendations, even if the risk tool recommends release (and in some instances, such as individuals with special vulnerabilities, RCA explicitly defers decisions to officers).[273] When RCA recommends detention, it is possible that ICE's initial detention responsibility may amplify the institutional incentive for a risk-averse ICE officer to follow the automated recommendation.[274]

[271] *See* Hernández, *supra* note 35, at 869 ("Combined, the Court's decisions in *Demore* and *Zadvydas* subject hundreds of thousands of migrants annually to detention for potentially long periods of time without affording them the judicial review that is characteristic of liberalism"). In criminal law, Rachel Barkow has criticized the functional incorporation into the prosecutor's office of powers other than pretrial detention—charging decisions, cooperation agreements, plea bargains, and sentence recommendations—which she argues lead to gross abuses of power. Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

[272] *See* Benson & Wheeler, supra note 34, at 39 (describing tendency of ICE to over-charge, based on interviews with immigration judges and DHS attorneys); *see also* Noferi, *supra* note 34, at 84-85 (arguing similar dynamic exists regarding detention decisions).

[273] *See* RCA Exhibit 4, *supra* note 15 ("Rec: Supervisor to Determine: Detain or Release on Community Supervision").

[274] Starr, *supra* note 40, at 808 ("providing judges with risk predictions that are framed as scientific and data driven will likely increase the weight placed on them").

Nationally, between July 30, 2012 and December 31, 2013, ICE officers collectively increased detention rates as they reviewed RCA recommendations—but in large part because RCA also recommended to defer some decisions to the supervisor, some of which resulted in detention. RCA recommended 81 percent to be detained (52.5 percent without bond, 28.4 percent eligible for bond), deferred 18.4 percent to the supervisor, and recommended 0.6 percent for release. After the ICE supervisor decision, ICE detained 91.4 percent (78.1 percent without bond, and 13.3 percent but eligible for bond), and released 8.6 percent. DHS OIG Report, supra note 17, at 25.

Much of the overall increase in detention rates was attributable to RCA deferral recommendations that resulted in detention. Of the 41,971 deferrals, officers chose to detain 70.6 percent (42 percent without bond, 28.6 eligible for bond), and chose to release 29.5 percent. Additionally, officers converted 66 percent of RCA recommendations to detain with eligibility for bond into a decision detain without bond. *Id*.

That said, RCA recommendations to detain without bond likely included significant numbers of mandatorily detainable individuals (which OIG's data did not report). It is less clear how ICE officers made decisions when mandatory detention was not at issue, across all RCA recommendation categories. Also, the DHS OIG report stated that ICE supervisors overrode 21.9 percent of RCA recommendations between July 30, 2012, and December 31, 2013. DHS OIG Report, supra note 17, at 12. After changing the RCA scoring system in January 2014, ICE supervisors then overrode 7.6 percent of RCA recommendations between January 2014 and August 2014. However, because the OIG report only reported new override rates, not new *detention* rates, it is unclear whether ICE officers reviewing RCA recommendation under the new scoring system are collectively increasing or reducing detention rates. *Id*. at 14.

The authors' future research will explore these trends.

Secondly, periodic review is more essential in immigration processes than in pretrial criminal processes.[275] Lengthy custody is more common in immigration detention, because of the lack of a Speedy Trial Act and long court delays.[276] For example, a 2009 snapshot of the U.S. detention system on a particular day found that 3 percent of pre-removal order immigration detainees, and 11 percent of post-removal order, had been detained for one year or more.[277] Moreover, dynamic factors might change an individual's flight risk, if a detainee acquires legal representation, ability to post bond, NGO sponsorship for shelter, or work authorization.[278]

Particularly, procedural changes in certain immigration processes impacting eligibility for relief may dramatically change a detainee's position and thus flight risk. In non-judicial expedited removal processes, when DHS finds a mandatory detainee to possess a "credible fear" of persecution, DHS then refers that noncitizen into formal, in-court removal proceedings to bring an asylum claim, and can re-determine his or her detention status.[279] Yet even though the noncitizen now has eligibility for relief, ICE does not re-run the RCA unless a supervisor specially decides to do so with a written justification.[280] Rather, the RCA apparently only considers violations while in detention—bad behavior, but not good behavior. Indeed, a federal court recently found that DHS was denying bond to some recent Central American arrivals in expedited removal processes as DHS referred them to immigration court, based upon a policy of taking deterrence of mass migration and national security concerns into account for detention decisions.[281]

Third, review of DHS' initial detention decision is comparatively less likely to reduce detention outcomes than criminal judges' decisions regarding prosecutors' bail recommendations. While in criminal bail hearings courts substantively review the executive's detention rationale with some right to appeal,[282] the immigration process is less robust. In immigration court, the individual must affirmatively request the court to challenge detention, whether

[275] Schriro and immigration advocates recommended that ICE periodically re-run the risk assessment to account for new circumstances. SCHRIRO REPORT, *supra* note 2, at 20; LIRS, *supra* note 12, at 54; HRF 2012, *supra* note 12, at 8-9.
[276] Winograd et al., *supra* note 259, at 9.
[277] Donald Kerwin & Serena Yi-Ying Li, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?,* MIGRATION POLICY INSTITUTE 16-17 (Sept. 2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.
[278] LIRS, *supra* note 12, at 54 (recommending that RCA reconsider eligibility for release "at any point during custody when there is a change of flight risk circumstances" based on dynamic information).
[279] 8 C.F.R. § 235.6.
[280] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 122, at 23-24 ("Only supervisors perform this action. . . . Providing a justification for proceeding with a redetermination of a detain/release decision is required."). *See also* DHS 2012 PIA, *supra* note 11, at 4 n.6 ("Subsequent evaluations may be triggered by changes in ICE policies, disciplinary infractions committed by the alien, the discovery of new case information about the alien, or violations by the alien of the conditions of release."); HRF 2012, *supra* note 12, at 8-9 (requesting formal triggers for re-running assessment).
[281] R. I. L-R vs. Johnson, 2015 WL 737117, *4-5 (D.D.C. Feb. 20, 2015) (entering injunction against consideration of deterrence, and provisionally certifying class).
[282] MAMALIAN, *supra* note 30, at 37.

in a bond hearing or *Joseph* hearing,[283] rather than receiving an automatic bail hearing.[284] If and when the immigration court reviews bond, it does so with a higher burden on the immigrant,[285] and statutorily cannot impose bond less than $1,500.[286] Federal courts are then statutorily prohibited from reviewing the immigration court's decision.[287]

Notably, the immigrant must navigate this entire process without appointed counsel.[288] A forthcoming study finds that the odds of being granted bond are more than 3.5 times higher for detainees with attorneys than those who appeared pro se.[289] Another study found that when bond is granted, it is lower for those with attorneys.[290]

b) Institutional Differences

More broadly, incorporating risk assessment into the traditionally rights-free realm of immigration, with less transparency and Constitutional checks than the criminal justice realm, may result in fewer checks on accuracy that might mitigate over-detention.

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[283] Hernández, *Invisible Spaces*, *supra* note 35, at 881 (citing Joseph, 22 I. & N. Dec. 799, 806 (BIA 1999)).

[284] *Joseph*, 22 I. & N. Dec. 799, 886 (BIA 1999).

[285] Those discretionarily detained pre-hearing in formal removal proceedings bear the burden to show that they are *not* a flight risk nor danger. 8 C.F.R. § 1236.1(c)(8) (2012) (respondent must demonstrate that his "release would not pose a danger to property or persons"). Those mandatorily detained pre-hearing in formal removal proceedings bear the even higher burden to first show that the Government is "substantially unlikely" to ultimately establish the mandatory detention charge(s) at the removal hearing—i.e., that the Government has no colorable argument for mandatory detention. *Joseph*, 22 I. & N. Dec. at 800. Those detained post-removal order are mandatorily detained for 90 days, and receive administrative custody review, at which they must show "good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed," as well as lack of flight risk and danger. 8 C.F.R. § 241.13 (2012); *see also id.* § 241.4(d)(1). Those detained in expedited removal are mandatorily detained and receive no detention review. 8 U.S.C. § 1182(d)(5) (2006 & Supp. 2011). However, those whom are found to have a credible fear of persecution may be paroled at ICE's discretion, if they arrived at a port of entry. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE (2010), *available at* http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

[286] 8 U.S.C. § 1226(a) (2012).

[287] 8 U.S.C. § 1226(e) (2012).

[288] *See* Noferi, *Cascading Constitutional Deprivation*, *supra* note 34.

[289] Emily Ryo & Caitlin Patler, *Bonding Out: Judicial Decision-Making in Immigration Bond Hearings* (forthcoming) (on file with authors).

[290] A recent study of the San Francisco immigration courts found that where respondents asked a judge to review bond, the average bond issued by a judge was over $2,000 less for represented respondents than respondents overall ($5,742 versus $3,411). NORTHERN CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA, 24 (October 2014), *available at* https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf. These bond amounts are still higher than comparable criminal amounts, though. *See* Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1753-54 (2002) (average bail amounts were $2,441 for represented defendants, and $3,012 for unrepresented defendants, with higher amounts of represented simply released on recognizance).

Immigration law has long lacked checks on executive power.[291] Substantively, due to longstanding plenary power assumptions, no Constitutional prohibitions exist on practices such as profiling.[292] Procedurally, courts have begun to carve out due process exceptions, albeit still developing.[293] Thus, due process protections largely present in the criminal system, such as appointed counsel, strict burdens of proof, and court review of detentions, have been largely absent in the immigration system.[294]

Procedural review and correction checks on the risk assessment thus appear severely limited. For example, in the limited immigration court review described above, courts likely do not currently review risk assessments.[295] An EOIR FOIA representative stated to the authors that DHS trial attorneys who litigate bond hearings "have never heard of this [RCA] form," and thus it is "unlikely to be admitted into evidence."[296] Needless to say, if DHS attorneys are not proffering the RCA form, immigration judges are not asking for it, and respondents are not receiving it, RCA is not being independently reviewed. Or, DHS may simply not follow the RCA in some cases, such as by detaining for reasons other than individual circumstances.[297] Absent transparency and review, it is difficult to tell.

Moreover, no evidence indicates immigrants have the ability to access the information underlying the RCA determination. DHS could provide the RCA Detailed Summary to respondents, and stated in 2012 it would, in noncitizens' "A-Files" (Alien Files).[298] However, in 2013 USCIS denied requests by the authors for RCAs in A-Files, and informed the authors that ICE retained control over risk assessments.[299]

Nor do immigrants have the ability to review or correct the information, even if they could access it. DHS stated there are "no changes to the individual access, redress, and correction procedures" for RCA data.[300] This contrasts with criminal justice rules, which provide one with a "right to

[291] Hernandez, *supra* note 35, at 873-80; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).
[292] There is no "equal protection right to be free of selective enforcement of the immigration laws based on national origin, race or religion." Turkmen v. Ashcroft, 589 F.3d 542, 550 (2d Cir. 2009).
[293] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE. L.J. 545 (1990); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002).
[294] Legomsky, *supra* note 18, at 679; Stumpf, *supra* note 18.
[295] Das, *supra* note 19, at 162.
[296] Letter from Cecelia Espenoza, Senior Assoc. Gen. Counsel, U.S. Dep't of Justice, Executive Office for Immigration Review, to author (Aug. 6, 2013) (on file with author).
[297] R. I. L-R vs. Johnson, supra note 281, at *17.
[298] DHS 2012 PIA, *supra* note 11, at 5. DHS stated that the risk assessment summary would be "printed and placed in the [immigrant's] A-File," which would theoretically make the risk assessment obtainable from USCIS through FOIA. DHS also stated the summary would be placed in a noncitizen's detention facility file upon arrival. *Id*.
[299] Letter from Jill A. Eggleston, Director, FOIA Operations, U.S. Citizenship and Immigration Services, to author (Apr. 26, 2013) (on file with authors) (stating that copies of RCA Summaries in A-Files are "not under the purview of USCIS," and rather are "maintained under the jurisdiction of ICE"). 2013 Senate legislation would have required A-File disclosure without resort to FOIA. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3502(b) (2013).
[300] DHS 2012 PIA, *supra* note 11, at 10.

access, review, and seek correction of their criminal history information" by writing the FBI under NCIC System of Records Notice procedures.[301] Deprivations of liberty due to inaccurate NCIC records are common, but at least procedures exist.[302] Moreover, immigration agencies' "poor track record with data quality and management," given the lack of transparency regarding DHS information, gives even more concern regarding risk assessment.[303]

Substantively, DHS has the capability to ensconce systemic bias in the RCA tool in a way that criminal justice actors could not. As Professors Malcolm Feeley and Jonathan Simon have pointed out, predictive actuarial assessment necessarily entails group profiling that may encompass race.[304] Through the risk tool, individual identity is fragmented and reconstructed according to the factor associated with levels of risk.[305] Risk assessments inherently measure behavior against a norm, and those outside the norm are more likely to be designated as risky.[306]

Professors Danielle Citron and Frank Pasquale similarly argue that human biases programmed into risk algorithms potentially cause a "disparate impact on historically subordinated groups."[307] This is particularly likely in a risk assessment, since preventive detention decision makers "all too often fall back on stereotypes and prejudices as proxies for dangerousness," as Professor David Cole noted.[308] Criminal theorists, specifically, have alleged that sentencing risk assessments functionally discriminate against minorities.[309] Thus, actuarial tools are on firmer legal ground when used as shields, to reduce detention, rather than as swords to increase detention based on group characteristics.[310]

But while race or national origin would be an impermissible factor in a criminal justice risk assessment,[311] fewer Constitutional prohibitions exist on such profiling in immigration law.[312] Thus, any systemic or pro-state bias against noncitizens due to nativism and racism in an immigration risk assessment, whether explicit or implicit, could remain unchecked.[313] For

[301] *Id.*
[302] Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1136 (2013).
[303] *Id.*; *see also* Margaret Hu, *Big Data Blacklisting*, FLORIDA L. REV. (forthcoming 2015).
[304] Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 466 (1992).
[305] *Id.*
[306] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 144 (1976). *See also* Feeley & Simon, *supra* note 304, at 452 (actuarial assessments regulate levels of deviance, rather than responding to individual deviants); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2012).
[307] Citron & Pasquale, *supra* note 236, at 4-5.
[308] Cole, *supra* note 63, at 696 ("no one can predict the future").
[309] Harcourt, *Risk as a Proxy for Race*, *supra* note 64; Starr, *supra* note 40, at 865-67.
[310] Etienne, *supra* note 61, at 48, 51 ("Due process concerns arise when freedom is restricted based on groups characteristics").
[311] Monahan & Skeem, *supra* note 61, at 161 & n.28.
[312] There is no "equal protection right to be free of selective enforcement of the immigration laws based on national origin, race or religion." Turkmen v. Ashcroft, 589 F.3d 542, 550 (2d Cir. 2009).
[313] David Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIMINOLOGY L. REV. 157 (2012).

example, a risk assessment could impose detention based on national origin, based on a larger profile based on aggregated data plots, rather than on truly individualized custody determinations.[314]

As an example, consider Exhibit 2 from our FOIA responses: a Salvadoran male, age 26, with no reported spouse or dependents.[315] The man has no criminal history, no immigration violation history aside from being present without inspection, and no flight history. Yet, ICE's RCA identifies him as "strongly suspected" of gang membership, based on an ICE officer interview.[316] The tool classifies him as medium safety risk and high flight risk, and recommends detention in medium/high custody.[317] His detention may not be because of anything he did, but because he matches the profile of MS-13 gang members of similar age. With less checks and transparency in the immigration system, such profiling may be harder to discover.

c) Political Concerns

Even if detention decisions remain inaccurate, disproportional or unfair, though, actuarial assessment can give decision makers unwarranted faith in those decisions' accuracy.[318] Professor Anil Kalhan noted the "inherent fallibilit[y]" of "automation complacency" and "bias," whereby decision makers "place too much trust in the proper functioning of automated systems even when they suspect error or malfunction."[319] DHS guidance to have risk-averse personnel presumptively follow the automated RCA recommendation may amplify this tendency, potentially raising concerns of a "tick-box, bureaucratic exercise."[320]

Likewise, the facial neutrality of actuarial decisions (whether correct or not) may further the political legitimacy of over-detention, and increase the likelihood over-detention will continue. The government can cite risk assessment as public proof that releases do not cause danger. For example, the White House and ICE Director Morton responded to Congressional criticism

[314] *See* Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. J. 147, 219-20 (2014) (describing post-9/11 NSEERS program, in which DHS required noncitizen males from certain Muslim-majority countries to register, and many were detained on material witness grounds).
[315] RCA Exhibit 2, *supra* note 15.
[316] *See also* Din v. Kerry, 718 F.3d 856 (9th Cir. 2013), *overruled*, 135 S. Ct. 2128 (U.S. June 15, 2015) (No. 13-1402) (reviewing doctrine of consular nonreviewability, in situation where visa applicant was denied entry based in part on tattoos).
[317] *Id.*
[318] Complementarily, post-9/11 risk technology may be as a palliative for the moral panic that traditionally arises from the neurotic subject and is commonly directed at immigrants. Michael Welch, *Panic, Risk, Control*, *in* PUNISHING IMMIGRANTS: POLICY, POLITICS, AND INJUSTICE 17 (Charis E. Kubrin et al. eds., 2012); Pat O'Malley, *Neoliberalism and Risk in Criminology*, *in* THE CRITICAL CRIMINOLOGY COMPANION 55-67 (Thalia Anthony & Chris Cunneen eds., 2008).
[319] Kalhan, *Immigration Policing*, *supra* note 302, at 1135-36.
[320] Edwards, *supra* note 110, at 81; Christopher Hood, *The Risk Game and the Blame Game*, 37 GOV'T OPPOSITION 15 (2002); Jonathan Bendor et al., *Politicians, Bureaucrats, and Asymmetric Information*, AM. J. POL. SCI. 796, 796-828 (1987).

of recent budgetary detainee releases by calling them "low-risk."[321] Yet if risk assessment scientifically indicates releasees are "low-risk," by circular implication detainees are scientifically "high-risk." And if detention levels stay the same, risk assessment may help legitimize those levels in the public's eye—in effect, providing a "false veneer of scientific analysis" to continued over-detention,[322] and perhaps exacerbating it.[323]

Immigration enforcement authorities could plausibly implement a transparent risk assessment system that respects individual rights. Solutions like public disclosure of the algorithm and criteria, government oversight, audit trails, and individual access to underlying data would facilitate some due process over the automated decision[324] and ensure risk assessment is used as a shield, not as a sword. However, the implementation of the current tool does not help protect against mis-calibration or biases, which may contribute to current over-detention. Future review should be calibrated carefully to immigration processes, and at heart based on discrete individual acts—not group-based characteristics such as racial or ethnic profiling. Otherwise, process could merely add a symbolic layer of legitimacy to a substantively unfair system.[325]

IV. EVIDENCE-BASED DETENTION WITH RISK ASSESSMENT—AND FURTHER CONCERNS

Evidence-based detention, if more accurate, would likely be reduced detention—more commensurate to actual public safety or flight risk, with more consistent and uniform decisions, and likely increased use of alternatives.[326] Alternatives to detention supported by risk assessment would be an improvement from individual liberty, human rights, and fiscal standpoints. However, even more accurate detention would have disadvantages. As in the criminal justice context, the potential exists for supervision of a wider net of individuals through high-tech, efficiency-based, and decentralized measures. In essence, the new risk assessment tool may facilitate a transition from mass detention to wider supervision, with

[321] Muzaffar Chishti & Faye Hipsman, *Sequester Affects Immigration Enforcement—and Invites Attention to Detention Policy*, Mar. 15, 2013, MIGRATION POLICY INSTITUTE, http://www.migrationpolicy.org/article/sequester-affects-immigration-enforcement-%E2%80%94-and-invites-attention-detention-policy; Suzy Khimm, *Why did the government release all those immigrants from detention?*, WASHINGTON POST, Mar. 8, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/08/why-did-the-government-release-all-those-immigrants-from-detention/.

[322] Baradaran, *supra* note 39, at 51. *See also* PAUL FEYERBEND, AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE (1975).

[323] Starr, *supra* note 40, at 865-67 (psychological literature suggests that framing risk predictions as scientific and data-driven may increase the weight judges give the predictions).

[324] Citron & Pasquale, *supra* note 236, at 27-30.

[325] Noferi, *supra* note 34, at 128-29; Judith Resnik, *Due Process: A Public Dimension*, 39 FLA. L. REV. 405 (1987).

[326] SCHRIRO REPORT, *supra* note 2; Morton, *2013 Testimony*, *supra* note 9.

"alternatives to detention" for the medium- or high-risk becoming "alternatives to release" for the slim- and no-risk.

A. Increased Use of Alternatives to Detention

A more accurately calibrated risk assessment tool would likely lead to less individuals in bricks-and-mortar detention, and more individuals in alternatives to detention ("ATD").[327] As noted above, similar immigration detention levels as to criminal justice ratios would be easily 30 to 40 percent lower, perhaps more.[328] Mandatory detention laws currently frustrate this scenario,[329] but better calibration would still have some effect. Many whom would today be detained would instead be placed into alternatives, assuming ICE expanded its ATD program.

There is much room for ICE to expand ATD. While ICE's use of detention has exploded fivefold, from 85,730 individuals in 1995 to nearly 441,000 individuals in FY 2013,[330] ICE's use of alternatives to detention pales in comparison.[331] ICE's Intensive Supervision Appearance Program ("ISAP"), involving electronic monitoring and varying degrees of supervision, supervised nearly 41,000 unique noncitizens over the course of fiscal year 2013, and nearly 24,000 that began in that year.[332] The ISAP program has two levels of supervision. The "Full-service" program involves supervision, either electronic GPS tracking or phone reporting, periodic visits, case management and assistance.[333] The "Technology-only" program involves only electronic GPS tracking or phone reporting.[334]

ISAP has showed remarkably high success. From fiscal years 2011 to 2013, 99 percent of participants in the full service program appeared at scheduled court hearings, and 95 percent appeared at removal hearings.[335] Those in the full-service program spent about 10 months in supervision, and those in technology-only spent about a year and a half.[336]

Alternatives to detention are also much cheaper. A GAO report found the average daily cost of the ISAP program to be $10.55 per day, compared to the

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[327] *See generally* Robert Koulish, *Entering the Risk Society: A Contested Terrain for Immigration Enforcement*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 61-86 (Maria João Guia et al. eds., 2012).
[328] *See supra* Part III.A.
[329] For those mandatorily detained for prior crimes, DHS could interpret the statutory language "custody" to encompass alternatives to detention, rather than physical incarceration. *See* Am. Immigration Lawyers Ass'n, *supra* note 217.
[330] SIMANSKI, *supra* note 1, at 5; Kalhan, *supra* note 7, at 42.
[331] Sampson & Mitchell, *supra* note 210, at 103, 107.
[332] U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 8, 13; MEISSNER ET AL., *supra* note 119, at 130.
[333] *Id.* at 9-10.
[334] *Id.*
[335] U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 30-31. ICE does not track the technology-only program. *Id.* See also MEISSNER ET AL., *supra* note 119, at 130 (94 percent of supervisees appeared for hearings in FY 2011).
[336] U.S. GAO, ALTERNATIVES TO DETENTION, *supra* note 6, at 17.

$158/day estimated cost of detention.[337] An independent study found that DHS could save over $1.44 billion of its $2 billion detention budget at the time by detaining only noncitizens with serious crimes, and otherwise using alternatives.[338] Still, ICE requested $122 million for alternatives in fiscal year 2016—an increase, but much less than its $2.4 billion request for detention.[339]

B. Mass Detention to Mass Supervision?

But evidence-based immigration control with reduced detention may produce an even larger pool of noncitizen supervisees, still restricted—"freed but not free," as a report found.[340]

Going forward, noncitizens no longer detained would nonetheless remain under "soft line methods of control," such as those discussed by Professors Feeley and Simon,[341] including supervision, electronic tracking or other controls.[342] Such post-panoptic controls have the capability to impose micro-aggressions against liberty.[343] While an improvement over bricks and mortar detention from a liberty standpoint, such controls are neo-liberal alternatives to incarceration that can "widen the net"—exposing more noncitizens to control techniques,[344] due to less political opposition and procedural checks.

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[337] *Id.* at 19.

[338] NAT'L IMMIGRATION FORUM, *supra* note 12, at 1.

[339] DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 45, 64-67 (February 2015) (requesting an increase of $28 million over the President's budget for FY 2015, to increase the daily population in ATD from 27,219 participants at the end of FY 2014 to 53,000 participants), *available at* http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification_15_0325.pdf.

[340] RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC & AMERICAN FRIENDS SERVICE COMMITTEE, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION (2012), *available at* http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf.

[341] Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 452 (1992); STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION 127, 143 (1985).

[342] Cohen, *supra* note 341, at 26; Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3 (1992); Michael Hardt, *The Global Society of Control*, 20 DISCOURSE 139 (1998).

[343] DERALD WING SUE, MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACT 3 (2010).

[344] Hernandez, *supra* note 19, at 1410; Michelle Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y. 51, 52 (2013). François Ewald describes risk assessment as a governmental technique of neoliberalism (governmentality) in which new systems of power are informed by a law and economics style of decision making. François Ewald, *The Return of Descartes' Malicious Demon: An Outline of a Philosophy of Precaution*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 273-301 (Tom Baker & Jonathan Simon eds., 2002). In future research we plan to examine the governmentality of risk technologies to govern immigrant populations, building upon the governmentality studies of Mitchell Dean, *Risk, Calculable and Incalculable*, 49 SOZIALE WELT 25 (1998); Nikolas Rose, *Governing Risky Individuals: The Role of Psychiatry in New Regimes of Control*, 5 PSYCHIATRY, PSYCHOLOGY AND LAW 177 (1998); and O'Malley, *supra* note 318, at 55 that revealed new forms of rationalities of state (and non-state) control and security. Mitchell Dean, *Power at the Heart of the Present: Exception, Risk and Sovereignty*, 13 EUR. J. OF CULTURAL STUD. 459 (2010); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans. 1977).

Criminal reforms have evidenced this result. For example, in the U.S. criminal system, intensive supervision programs ("ISPs") introduced in the 1980s resulted in an increase in the "supervision of those already on probation," rather than prison diversion.[345] Thus, probation and incarceration levels rose together since the 1980s, rather than probation increasing while incarceration decreased.[346] Even while bipartisan opposition to over-incarceration grows today, Professors Dagan and Teles called an "equal reduction in community supervision" "almost impossible."[347]

Similar dynamics are plausible in the immigration context. Notably, ICE's risk assessment now appears to assume that all possess baseline risk—containing a "low" risk category but lacking a "no risk" category. As a result, electronic monitoring and other forms of supervision may invariably always be justified.

Correspondingly, even if a bipartisan political consensus forms against immigration detention,[348] it may entrench supervision. Liberals' and conservatives' common ground includes human rights advocacy against incarceration and detention in addition to neo-liberal deficit reduction.[349] Thus, though future risk assessment tools may effectively reduce detention, save money, and reduce overall intrusions on individual liberty, they may also widen and normalize government control on the cheap. Alternatives to detention for the high- and medium- risk may become alternatives to release for the slim- and formerly no-risk,[350] when supervision should ideally turn a "high risk" into a "low risk" individual and avoid the need for detention.[351]

Criminal researchers also criticize over-supervision for those who don't need it as counterproductive to reducing flight or public safety risks.[352] "[A]ssigning intense supervision or preventative detention to low-risk

[345] Weisberg & Petersilia, *supra* note 47, at 5.
[346] Hernandez, *supra* note 19, at 1410.
[347] Dagan & Teles, *supra* note 3, at 266-76.
[348] Fan, *supra* note 21, at 87.
[349] On the one hand, the ACLU and HRF recently advocated risk assessment to reduce incarceration and its severe harm to individuals, *see* HRF 2012, *supra* note 12, at 7-8. On the other hand, some conservative elected politicians and U.S. policymakers, including Representative Bachus, the Heritage Foundation, former ICE director Julie Myers Wood, and Grover Norquist have advocated risk assessment to reduce over-detention costs. Bachus, *supra* note 14; Matt Mayer, *Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies*, HERITAGE FOUND. (Jan. 10, 2012), http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies; Julie Myers Wood & Steve J. Martin, Op-Ed. *Smart Alternatives to Immigration Detention*, WASHINGTON TIMES, Mar. 28, 2013, http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/; Human Rights First, *A Conversation with Grover Norquist: Applying Lessons from Criminal Justice Reform to Immigration Detention*, YOUTUBE (May 2, 2013), at https://www.youtube.com/watch?v=rOGc7PWdhWg.
[350] Koulish & Noferi, *supra* note 46; RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC & AMERICAN FRIENDS SERVICE COMMITTEE et al., *supra* note 340.
[351] Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Hilario Antonio Garcia Garcia, Matter of Garcia Hilario Antonio Garcia Garcia, 25 I. & N. Dec. 93 (BIA 2009), *available at* http://www.aila.org/content/default.aspx?docid=29251.
[352] Lowenkamp & Latessa, *supra* note 70, at 3-8; *see also* Brian Lovins, Christopher Lowenkamp & Edward Latessa, *Applying the Risk Principle to Sex Offenders: Can Treatment Make Some Sex Offenders Worse*? 89 THE PRISON JOURNAL 344 (2009).

defendants either removes the individual from pro-social aspects of their life or exposes them to risk factors" they were previously not exposed to, thus putting the defendant at "greater risk of recidivism or negative supervision outcomes."[353]

Similarly, over-supervision may remain and expand in the immigration field,[354] which immigration scholars have not explored.[355] Schriro noted in 2009 that DHS observers already had criticized "overly restrictive conditions of supervision imposed by ICE."[356] Moreover, supervision tends to be subject to even less procedural checks than detention—and even less so in immigration law than criminal law.[357] In U.S. criminal justice, courts have only intermittently applied due process to electronic supervision and other alternatives. Liberty interests "tend to begin only at the jailhouse door," as Professor Erin Murphy stated."[358] In immigration enforcement, due process is even less likely to apply. For example, U.S. federal courts have less frequently found electronic supervision conditions reviewable.[359] So long as procedural checks are largely absent, over-supervision is likely.

The transfer of risk management to nongovernmental entities, both for-profit and non-profit, may incentivize this new alternative to release ("ATR") regime. Because private prison companies, such as GEO Group, also own electronic supervision companies like BI Incorporated,[360] companies may financially benefit from a wider net of supervisees.[361] As to nongovernmental entities that undertake community supervision, NGOs may be co-opted into

[353] Lowenkamp et al., *supra* note 30, at 8; *see also* Lowenkamp & Latessa, *supra* note 70.
[354] VanNostrand & Keebler, *supra* note 50, at 19; PJI, *supra* note 56, at 5.
[355] Fan, *supra* note 21, at 87 (summarizing possibility for bipartisan support to reduce costs); *see also* Wiseman, *supra* note 8, at 1371.
[356] SCHRIRO REPORT, *supra* note 2, at 20.
[357] Robert Koulish, *Spiderman's Web and the Governmentality of Electronic Immigrant Detention*, 11 LAW, CULTURE AND THE HUMANITIES 83 (2015). Risk rationalities are generally linked to political programs that "represent a major retraction of … rights …." Pat O'Malley, *Risk and Responsibility*, *in* FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALES OF GOVERNMENT 189-208 (Andrew Barry et al. eds., 1996); MITCHELL M. DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY (2009); Bendor et al., *supra* note 320, at 796-828.
[358] Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1352 (2008).
[359] Diawara v. Sec'y of DHS, No. AW-09-2512, 2010 WL 4225562 (D. Md. Oct. 25, 2010); Zadvydas v. Davis, 533 U.S. 678 (2001). *Diawara*, following *Zadvydas*, held that an electronic tracking bracelet under an order of release did not constitute custody, and dismissed a habeas petition. *See also* Ortega v. U.S. Immigration and Customs Enforcement, 737 F.3d 435 (6th Cir. 2013) (considering whether individual, subject to home confinement with electronic monitoring, had liberty interest against being transferred to jail pursuant to an ICE detainer. "A prison cot is not the same as a bed, a cell not the same as a home, from every vantage point: privacy, companionship, comfort…. What process is due will vary from setting to setting…"). *See generally* Koulish, *supra* note 327. Comparably, in the criminal realm, the Supreme Court defined custody in terms of whether a government authority ordered an individual's release, rather than the terms of conditions of confinement or restrictions on liberty. Reno v. Koray, 515 U.S. 50 (1995).
[360] *Immigration Services*, BI INCORPORATED, http://bi.com/immigration (last visited Apr. 9, 2014).
[361] As noted, these companies' employees at detention facilities may be participating in the risk decision. *See infra* note 139.

expanded supervision, as criminal justice critics allege occurred with the 1960s U.S. community corrections movement.[362]

Lastly, the "migration management" rationale implied by risk assessment, involving aggregate decisions rather than individual ones, may not only contribute to net-widening, but raises other concerns attendant to control. Robyn Sampson and Grant Mitchell argue to shift the language of "border control" to that of "migration management," "whereby governments regulate (irregular) migrant populations through processing, management and targeted enforcement rather than controlling migrants through segregation and confinement."[363] This new narrative may "moderate[] popular anxiety about border transgressions" while promoting "confidence in systems of governance."[364] Whether such confidence is warranted deserves additional research. Moreover, as Foucault described it, risk management's result is to "arrange things that the surveillance is permanent in its effects."[365] Surveillance then reinforces the risk tool's disaggregation of identity and its reconstitution through risk factors.[366] A concern is that control and the threat of expulsion remain omnipresent.

CONCLUSION

This article has provided the first comprehensive examination of ICE's risk assessment, with an overview of its development, the first detailed public description of the tool, and the first comprehensive evaluation of potential outcomes, both positive and negative. If properly calibrated, the risk tool may ultimately greatly improve ICE's custody decision-making. Transparency regarding risk results may also provide evidence for the normative position that discretionary detention should serve as a last resort, tailored towards moderate or high risk immigrants. However, the RCA may also plausibly become a scientific veil for the harsh status quo, with policies that deny immigrants rights and justice.

Data from the risk tool may also clarify whether mandatory detention is overbroad and unnecessarily harsh for civil immigrant detainees. Indeed, this may be the largest impact of ICE's risk assessment initiative. Looking forward, President Obama has committed to immigration enforcement that

[362] The 1960s criminal community corrections movement was similarly oriented towards rehabilitation, but "surveillance and monitoring of offenders in the name of community safety became the primary objective." Wayne Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 175 (2000). The community-based shift in penology served to "diffuse the surveillance of the prison to the community at large." GARY MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 220 (1988).

[363] Sampson & Mitchell, *supra* note 210, at 103, 107.

[364] *Id* at 107. In our view, federal immigration policy has traditionally sought to achieve risk management, particularly managing the uncertainty inherent to the flow of noncitizen populations across territorial borders. Rather than examining and detaining noncitizens at the border (such as at Ellis Island), risk technologies offer the capacity to monitor noncitizens inside the border, at far lower costs. In future research, we plan to further explore these arguments.

[365] FOUCAULT, *supra* note 344, at 201.

[366] Deleuze, *supra* note 342, at 4 ("which abstracts human bodies from concrete settings into abstract data points, for constant comparison against the norm.")

focuses on "felons, not families."[367] But it may be impossible in practice to draw the bright line President Obama seeks.[368] The authors' preliminary data shows that many that ICE currently mandatorily detains are likely misdemeanants, not felons—and with families, not without them.

Much depends on ICE's institutional commitment to reform and Congress' willingness to revisit mandatory detention provisions, depending in turn on both entities' openness to the scientific results. Questions of transparency and accountability remain, particularly regarding the undisclosed algorithm and its structure, function and purpose. Corresponding empirical research by these authors will begin to reveal the early realities of ICE risk assessment.

[367] "We're going to keep focusing enforcement resources on actual threats to our security. Felons, not families." President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration. *See also*, DHS, Johnson Memo, *supra* note 41.

[368] Morton, *supra* note 9, at 51-52 ("you have to look at people's individual circumstances… It is very easy to make simple statements about non-criminals, simple statements about criminals. But then you realize sometimes a criminal can mean somebody who is 28 years old and they have committed a terrible sexual assault, and sometimes it can mean somebody who is 68 years old, has been here for 44 years, is a lawful permanent resident, people who have children.").