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Risk Assessment and Immigration Court

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Abstract

Risk assessment and algorithmic tools have become increasingly popular in recent years, particularly with respect to detention and incarceration decisions. The emergence of big data and the increased sophistication of algorithmic design hold the promise of more accurately predicting whether an individual is dangerous or a flight risk, overcoming human bias in decision-making, and reducing detention without compromising public safety. But these tools also carry the potential to exacerbate racial disparities in incarceration, create a false veneer of objective scientific accuracy, and spawn opaque decision-making by "black box" computer programs.

While scholars have focused much attention on how judges in criminal cases use risk assessment to inform pretrial detention decisions, they have paid little attention to whether immigration judges should use risk assessment when deciding whether to detain noncitizens. Yet, the federal immigration detention system is one of the largest in the world, incarcerating nearly 400,000 noncitizens a year. Immigration courts contribute to unnecessary detention and deprivation of liberty due to serious structural flaws. Immigration judges are prone to racial bias, they focus on factors unrelated to danger and flight risk, their bond decisions are nontransparent and opaque, and they are subject to undue

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political influence that encourages judges to err on the side of detention rather than release.

Given the rise of algorithmic decision-making, the time has come to investigate whether risk assessment has a role to play in immigration court bond decisions. This Article suggests that while there is no easy answer, a well-designed and transparent risk assessment tool could provide a check against the worst features of the current immigration court bond system. Alternatively, even if risk assessment tools prove to be flawed, the information obtained from using them could provide support for broader reform of immigration detention.

Table of Contents

INTRODUCTION

Risk assessment, machine learning, and algorithmic tools are appearing all over the place. Scholars have proclaimed that the "age of algorithms is upon us"[1] and that "[m]achine-driven decision-making is everywhere."[2] Data-driven risk assessment tools have been particularly popular in the area of pretrial detention and bail.[3] Many criminal courts employ risk assessment to determine whether to detain or release defendants pending trial, using data-based tools to predict whether the defendant presents a danger to public safety or a risk of flight.[4] Similarly, Immigration and Customs Enforcement (ICE) has used a risk assessment tool since 2013 to decide whether to incarcerate or release noncitizen detainees.[5]

The debate about risk assessment in general, and its use in the criminal justice system in particular, has been fierce. Risk assessment has grown because of the belief that machines and tools are better than individual judges at predicting danger and flight risk, resulting in more accurate and targeted decisions that can reduce detention without harming public safety.[6] Critics, however, have questioned the wisdom of using risk assessment to make custody decisions. Complaints about risk assessment tools include that the tools lack transparency, making it difficult to assess their validity; that they exacerbate

1. Sandra Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2221 (2018).

2. Andrew Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 113 (2017).

3. *See* Mayson, *supra* note 1, at 2222.

4. *See* Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 54 (2014).

5. *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), https://perma.cc/32MA-NFGL.

6. *See infra* notes 92–98 and accompanying text.

racial biases, leading to disproportionate incarceration of people of color; that they are manipulated by results-oriented decision-makers; and that they have questionable accuracy while giving a false veneer of scientific objectivity.[7]

One illustrative example is the case of James.[8] James, a Black man originally from Jamaica, had been detained by ICE in a county prison for nearly a year-and-a-half before his case finally came up for a custody review. Because James had been in immigration detention for so long, he was presumptively entitled to release unless "clear and convincing" evidence demonstrated that he was currently a danger to the community or a flight risk.[9] More than ten years earlier, James had been convicted of attempting to possess with the intent to distribute marijuana, a nonviolent offense. Since completing his criminal sentence—and prior to his immigration detention—he spent years living with his family in New Jersey, working a steady job to support his family, putting two U.S.-citizen daughters through college, abiding by the law, and becoming a valued member of his community. He always resided at the same address and never failed to show up for any required court proceeding.

Despite these facts, James was deemed a danger to the community based solely on his ten-year-old nonviolent marijuana conviction and was ordered to remain detained for the full duration of his immigration proceedings—proceedings that would ultimately continue for more than four years.

Given the critiques of algorithmic risk assessment, perhaps this result is unsurprising. What may be surprising, however, is that a machine did not make this custody decision. A human did; in this case, a politically appointed immigration judge.

James's example highlights the conundrum that policymakers and advocates face when considering risk assessment. Risk assessment tools may make imperfect decisions, but humans may make equally bad or even worse decisions. And when it comes to the sprawling web of

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7. *See infra* notes 105–124 and accompanying text. For specific criticism of ICE's risk assessment tool, see *infra* notes 132–143 and accompanying text.

8. James is a pseudonym used to protect personal privacy. Documents relating to James's case are on file with the author.

9. *See* Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 224 n.12 (3d Cir. 2018).

immigration detention, poor decision-making has significant consequences. On any particular day, more than 45,000 noncitizens are imprisoned in immigration detention centers, and nearly 400,000 noncitizens were detained at some point during the 2019 fiscal year.[10] Many have families who depend on them; families that suffer lasting emotional, economic, and physical hardship caused by forced separation from a loved one.[11] A flawed custody and bond process threatens to wrongly keep thousands of noncitizens behind bars, even when they present a minimal danger or flight risk.

Although criminal courts and judges are increasingly employing risk assessment, little attention has been given to whether immigration courts should use risk assessment tools to make custody decisions rather than relying on immigration judges. Yet, the current immigration detention system in which immigration judges render custody decisions contains numerous flaws, including many of the problems commonly ascribed to risk assessment tools. It exhibits racial bias.[12] It is opaque, nontransparent, and largely impervious to meaningful review.[13] The bond amounts are largely arbitrary, causing individuals to remain detained simply because they lack ability to pay. Immigration judges often give outsized weight to prior criminal convictions without considering how much time has passed since the crime occurred.[14] They either explicitly or implicitly rely on factors that they are not supposed to consider and they fail to address factors that they should consider.[15] They operate under staggering caseloads and often can devote only minimal time to any particular case.[16] As a result, they often apply many factors categorically, without considering the individual facts

10. *See* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2019).

11. *See* Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313, 325 (2008).

12. *See* Mayson, *supra* note 1, at 2223.

13. *See infra* Part I.

14. *See* Jayashiri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 522–27 (2018).

15. *Id.*

16. *See infra* note 37 and accompanying text.

and circumstances relating to the detainee seeking release.[17] The system also fails to collect data that would allow it to reform or adjust how it assesses danger and flight risk.[18]

Given these shortcomings and that risk assessment tools are already used by ICE as well as by numerous state and county jurisdictions for assessing pretrial bail, immigration court might seem to present a prime opportunity for applying algorithmic risk assessment tools to immigration detention. Unlike ICE detention decisions, which are made by the law enforcement agency that is responsible for arresting and incarcerating noncitizens, immigration courts provide the opportunity for a noncitizen to seek release from an ostensibly neutral decision-maker: an immigration judge.[19]

Some scholars and advocates offered cautious hope that risk assessment tools could prove useful in the immigration context.[20] That initial optimism has receded as preliminary evaluation of ICE's experience with risk assessment suggests that it has not reduced detention, that it lacks transparency, that decision-makers often override the tool's release recommendations, and that the agency has adjusted the factors that the tool considers—and the weight given to those factors—so that it will recommend detention more frequently.[21]

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17. *See infra* note 51 and accompanying text.

18. *See* Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227, 231 n.6 (2019) [hereinafter Ryo, *Predicting Danger*] ("Empirical studies of immigration judges' decisions beyond bond decisions are also relatively rare due to data scarcity.").

19. *See* 8 U.S.C. § 1226 (establishing detention and bond framework); 8 C.F.R. § 1236.1(d)(1) (2023) (allowing immigration judges to make custody decisions); *see also* Noferi & Koulish, *supra* note 4, at 81 ("DHS both determines and executes initial detention, compared to a magistrate initially serving as a neutral decision maker.").

20. *See, e.g.*, Alina Das, *Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 162 (2013) (arguing that risk assessment may lead to more accurate custody decisions and may reduce overall detention rates).

21. *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 794–96 (2020); Hannah Bloch-Wehba, *A Lawsuit Against ICE Reveals the Danger of Government-by-Algorithm*, WASH. POST (Mar. 5, 2020), https://perma.cc/H23J-G6CE (discussing how ICE has been accused of manipulating its risk assessment tool); Complaint at ¶7, Velesaca v. Decker, 458 F. Supp. 3d 224 (S.D.N.Y. 2020) (No. 1:20-cv-01803) [hereinafter *Velesaca* Complaint] (alleging

Perhaps because of the ineffectual results so far, it appears that few people are advocating for bringing algorithmic risk assessment into immigration court bond decisions.

The problems with such risk assessment tools are real and should not be discounted. However, the time is ripe for reconsidering whether these tools could have a role to play in immigration detention decisions. The era of risk assessment is here whether we want it to be or not. Currently, risk assessment tools are used in numerous contexts, "including consumer finance, employment, housing, healthcare, and sentencing, among others."[22] In the criminal context, the question is not *if* they should be used but *how* they should be designed so as to work most effectively.

Currently, immigration risk assessment tools have been used only by ICE. They have not been used—or even proposed—in the immigration court system, where immigration judges are presently tasked with making thousands of custody and detention decisions every year. The time is right to bring the risk assessment discussion to immigration courts. The Biden Administration is paying attention to immigration detention and is resetting detention priorities.[23] It has proposed both new legislation and new immigration-related regulations.[24] If the government may choose to consider risk assessment, then it is

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that ICE's detention tool was manipulated and recommends detention of nearly 100% of noncitizens).

22. Selbst, *supra* note 2, at 113 (citations omitted).

23. *See Contact ICE About an Immigration/Detention Case*, ICE, https://perma.cc/UNL3-XUX8 (June 24, 2022). Under the Biden Administration, ICE has instituted a detention case review process that allows detainees to request a new custody review from ICE if they do not qualify as an enforcement priority. *See id.* The administration, however, may now be backtracking on its earlier promises to reduce detention. When President Biden assumed office, ICE halted detention of undocumented immigrant families with children. *See* Steph W. Knight, *Biden to Stop Holding Undocumented Families in Detention Centers*, AXIOS (Dec. 16, 2021), https://perma.cc/2QJJ-NS72. The Biden Administration, however, is now "considering reviving the practice of detaining migrant families who cross the border illegally." Eileen Sullivan & Zolan Kanno-Youngs, *U.S. Is Said to Reinstating Detention of Migrant Families*, N.Y. TIMES, https://perma.cc/3JNN-SX9Y (Mar. 6, 2023).

24. *See* THE WHITE HOUSE, FACT SHEET: THE BIDEN ADMINISTRATION BLUEPRINT FOR A FAIR, ORDERLY AND HUMANE IMMIGRATION SYSTEM (July 27, 2021), https://perma.cc/MT44-3KCZ.

important to deconstruct the salient features of the immigration court detention regime to consider what role, if any, risk assessment can play, and whether tools can be designed to promote accuracy, fairness, transparency, and racial equity.

The current immigration court bond regime does not do an effective job of weighing risk and evaluating whether noncitizens truly need to be detained during their immigration proceedings. A risk assessment tool that is carefully designed, transparent, and open to public scrutiny offers the potential for reform and for mitigating the growth of a carceral culture that has massively expanded the number of detained noncitizens. To be sure, there is reason to believe that algorithmic tool-based immigration detention decisions may be little better (or possibly worse) than individual judges in making detention decisions. However, risk assessment tools, if nothing else, will allow for data-gathering, comparison of judge-made decisions versus algorithmic decisions, public awareness of political interference with the bond process, greater transparency over custody determinations, more opportunities for periodic review of detention status, and more careful consideration of what factors should actually be considered when deciding whether a noncitizen must remain detained. If the data gathered from risk assessment reveals structural flaws in the immigration court system, it could provide additional support for more substantial reforms of the immigration detention system.[25]

This Article proceeds in four Parts. Part I provides an overview of the statutory and regulatory structure of immigration detention, and the procedures employed for bond hearings conducted in immigration court. Part II discusses the current debate surrounding risk assessment in the context of pretrial detention, both with respect to criminal courts and with respect to ICE's risk assessment tool. Part III explores the flaws and shortcomings of the current immigration court bond system. Part IV then considers what risk assessment might offer for immigration court bond decisions and how it could potentially provide advantages over the current system, assuming that the

25. These proposed reforms include creating an entirely independent immigration court system that is not part of the executive branch, providing a right to counsel in removal and bond proceedings, and other changes. *See, e.g.*, AM. BAR ASS'N, ACHIEVING AMERICA'S IMMIGRATION PROMISE (2021).

risk assessment tool is appropriately transparent, supervised, and validated.

I. THE IMMIGRATION BOND STRUCTURE

A. *Immigration Detention and Custody Review*

This Subpart provides an overview of the statutory and regulatory scheme of immigration detention.[26] For as long as the federal government has regulated immigration, it also has operated an immigration detention system.[27] Starting in the 1980s, federal policy shifted from one where freedom was the norm and detention the exception to one that defaulted to "the use of immigration detention as the norm instead of the exception," resulting in the tens of thousands of noncitizens who are detained at any given time.[28]

The Department of Homeland Security (DHS) is authorized to arrest and detain any noncitizen who is in removal proceedings, or who the agency has grounds to believe is subject to removal.[29] This includes individuals who DHS alleges are present in the United States unlawfully, individuals who were present lawfully but stayed beyond the time they were permitted in the United States, individuals who did not arrive to the United States with permission but who have applied for relief from deportation such as asylum, and individuals who have lawful status, but who have engaged in behavior, such as being convicted of a crime, that may subject them to

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26. For additional discussions of the immigration detention and bond regime, see, for example, Srikantiah, *supra* note 14, at 522–27; Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157 (2016).

27. *See* Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 6 (2022) ("Since the earliest days of federal regulation of immigration in the late 1800's, the need arose for a holding facility where intending migrants would remain while their claims for entry were being processed.").

28. *See id.* at 7.

29. *See* 8 U.S.C. § 1226(a) (authorizing the Attorney General to detain noncitizens "pending a decision on whether the alien is to be removed from the United States"); Gilman, *supra* note 26, at 164–65 (describing the complexities of releasing noncitizens in deportation proceedings); Srikantiah, *supra* note 14, at 522–23; 8 U.S.C. §§ 1225–1226; 8 C.F.R. § 1236.1 (2023).

deportation.[30] Once an individual is arrested, ICE—an agency within DHS—is charged with the initial decision whether to detain the noncitizen.[31] The agency has several options. It may opt to (i) release the individual on their own recognizance; (ii) set a monetary bond; (iii) release the individual under conditions of supervision; or (iv) deny release entirely.[32] If ICE chooses to set a bond, that means that the individual can be released upon full upfront payment of the bond amount.[33] If ICE sets a bond, the minimum bond it can set is $1,500.[34]

Individuals who remain detained can seek a custody review before an immigration judge in immigration court.[35] The immigration court system is separate from DHS. Instead, it is part of the Executive Office of Immigration Review (EOIR), housed within the Department of Justice.[36] Immigration court bond hearings are often quite rushed—running as short as five to ten minutes.[37] At the conclusion, the immigration judge will either deny bond and order continued detention or will grant bond.[38] If bond is granted, the immigration judge can release the detainee on their own recognizance (zero bond) or set a bond amount.[39] If the immigration judge chooses the latter, the minimum bond amount is $1,500 and whatever bond amount is set must be paid in full before the individual can be released.[40]

When making custody decisions, both ICE and immigration judges evaluate two factors—whether the noncitizen is a public

30. *See* 8 U.S.C. § 1182(a) (defining grounds making a noncitizen inadmissible into the United States); *id.* § 1227(a) (defining grounds that a noncitizen admitted into the United States can be removed).

31. 8 C.F.R. § 236.1(c)(8) (2023).

32. *Id.*

33. *See* Gilman, *supra* note 26, at 167.

34. 8 U.S.C. § 1226(a)(2)(A).

35. *See* 8 C.F.R. § 1236.1(d)(1) (2023).

36. *About the Office*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., https://perma.cc/7R69-J9T3 (last updated May 18, 2022) (showing that immigration courts are part of the EOIR).

37. *See* Srikantiah, *supra* note 14, at 545–46.

38. *Id.* at 523.

39. *Id.*

40. 8 U.S.C. § 1226(a)(2)(A); *see supra* note 33 and accompanying text.

safety risk and whether the noncitizen is a flight risk.[41] The first factor concerns whether the detainee, if released while deportation proceedings are ongoing, is likely to commit a crime or otherwise harm public safety.[42] If ICE or the immigration judge determines that the detainee is a public safety risk then the immigration judge is required to deny bond.[43]

If the immigration judge determines that the individual is not a danger, then the inquiry turns to flight risk—the risk that the individual will fail to attend future immigration court hearings.[44] At that point, the amount of bond can come into play. The higher a flight risk the individual is in the eyes of the immigration judge, the higher bond the judge is likely to set.

The immigration judge has "broad discretion" to determine whether an individual is a danger or a flight risk.[45] Case law provides a wide range of factors to consider, including prior criminal history, evidence of rehabilitation, length of presence in the United States, work history, family ties, and any prior immigration violations.[46] When balancing these factors, case law gives immigration judges discretion to consider some factors over others, and the immigration judge's decision will be upheld "as long as the decision is reasonable."[47]

At both the ICE and immigration court levels, there is a presumption in favor of detention. The government does not bear the burden of justifying detention.[48] Rather, noncitizens

41. *See* Matter of Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (detailing factors to address in deciding whether to grant or deny bond).

42. *See id.* at 39–40.

43. *See, e.g.*, Matter of Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) ("Dangerous aliens are properly detained without bond. . . . An Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community.").

44. *See id.*; *Guerra*, 24 I. & N. Dec. at 40.

45. *See Guerra*, 24 I. & N. Dec. at 40.

46. *See id.*

47. *See id.*; *see also* Matter of D-J-, 23 I. & N. Dec. 572, 575–76 (A.G. 2003) (emphasizing the Attorney General's broad latitude to detain noncitizens and the range of factors it may consider in assessing whether to grant or deny bond).

48. *See Guerra*, 24 I. & N. Dec. at 39 ("The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond."). *But see* Hernandez-Lara v. Lyons, 10 F.4th 19, 23 (1st Cir. 2021) (holding that due process requires the government to bear the burden of justifying detention).

bear the burden of proving that they are not a danger or a flight risk.[49] That can be very hard to do at a rushed hearing.[50] Immigration judges may not have time to read through the noncitizen's evidentiary submission. In a time-pressured situation, the immigration judge may focus on a single factor, like a prior conviction, and hinge the decision on that factor alone.[51]

After the immigration judge issues their decision, either DHS or the noncitizen can appeal to the Board of Immigration Appeals (BIA), an administrative appeals board within the Department of Justice.[52] However, because immigration judges have broad discretion in assessing danger and flight risk, appellate review is relatively deferential.[53] There is virtually no opportunity for federal judicial review. Federal law generally deprives federal courts of jurisdiction to review detention decisions.[54]

If an immigration judge denies bond, there is no automatic provision for reconsidering that decision or for conducting a new bond hearing as time passes. In other words, if an individual is denied bond at one point in time, that individual is not automatically entitled to a new bond hearing six months or a year later. The only way for an individual to get a new bond hearing is to show a material "change in circumstances."[55] But it is difficult to imagine what material changes in circumstances will occur while an individual is in detention and has little opportunity to rehabilitate, find a job, or establish community

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49. *See Guerra*, 24 I. & N. Dec. at 39.

50. *See, e.g.*, Srikantiah, *supra* note 14, at 545–46.

51. *See, e.g.*, *id*. ("Studies document that in brief hearings—like the typical five- or ten-minute immigration bond hearing—judges are likely to make quick decisions based on a single factor, such as a defendant's past conviction or a stereotype about what constitutes deceptive behavior.").

52. *See* 8 C.F.R. § 1003.1 (2023); *id.* § 1003.38(a) (2023).

53. *See* Carlson v. Landon, 342 U.S. 524, 540–41 (1952) (stating that because the Attorney General has broad discretion regarding detention decisions, its decision to detain an individual will be upheld unless it "was [made] without a reasonable foundation").

54. *See* 8 U.S.C. § 1226(e).

55. *See* 8 C.F.R. § 1003.19(e) (2023); *see also* Fajardo v. Decker, No: 1:22-cv-3014, 2022 WL 17414471, at *12 (S.D.N.Y. Dec. 5, 2022) (considering rehabilitation, employment status, and family ties as factors potentially relevant to establishing a material change in circumstances).

ties. Thus, as a practical matter, if an immigration judge denies bond, that denial likely will result in the noncitizen's detention for the full duration of their immigration proceedings—proceedings that can take years.[56]

Noncitizens are permitted to have counsel at their bond proceedings but they have no right to counsel.[57] Studies regarding the percentage of detainees with counsel show varying results.[58] But all studies appear to agree that having counsel greatly increases one's chance of getting bond and also one's chance of succeeding in the underlying immigration case.[59]

The prior discussion of the bond and detention process relates to noncitizens who are eligible for bond. Federal law also subjects large groups of noncitizens to mandatory detention with no opportunity for a bond hearing before an immigration judge. Detention without bond is required for several categories of noncitizens. First, mandatory detention applies to individuals classified as "arriving aliens."[60] This includes individuals apprehended at ports of entry and referred to removal proceedings as well individuals who are placed in "expedited

56. *See, e.g.*, Anariba v. Dir. Hudson Cnty. Corr. Ctr., 17 F.4th 434, 436 (3d Cir. 2021) (discussing the case of a noncitizen who had been detained for eighty-two months and had been transferred at least fifteen different times during that period); Diop v. ICE/Homeland Sec., 656 F.3d 221, 222 (3d Cir. 2011) (describing a noncitizen who was detained for more than two years and eleven months), *abrogated on other grounds by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

57. 8 U.S.C. § 1229a(b)(4)(A).

58. According to one study, approximately 86% of detained immigrants lack legal representation while 34% of non-detained immigrants lack counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 32–34 (2015). Another study found that for detained immigrants, representation rates ranged from 10% to 30% over the date range studied and for non-detained immigrants, representation rates ranged from 60% to 80% over the date range studied. *Who Is Represented in Immigration Court*, TRAC IMMIGR. (Oct. 16, 2017), https://perma.cc/S7WL-ARX3.

59. *See* Eagly & Shafer, *supra* note 58, at 9 (finding that detainees with counsel have a better chance of being granted bond and more than ten times of a greater chance of obtaining immigration relief); *see also* JENNIFER STAVE ET AL., ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 28 (2017).

60. 8 C.F.R. § 1003.19(h)(2)(1)(B) (2023).

removal proceedings."[61] Second, the mandatory detention law sweeps in any noncitizen who has a conviction for any of a variety of criminal offenses, including any controlled substance conviction or any conviction that qualifies as a "crime involving moral turpitude."[62] While, at first, this may seem to connect to public safety, these categories sweep up a wide range of crimes, including some as innocuous as marijuana possession, possession of drug paraphernalia (but not drugs), loitering with the intent to obtain a controlled substance, or misdemeanor welfare fraud.[63] In some cases, the length of mandatory immigration detention will exceed the length of the criminal sentence giving rise to mandatory detention in the first place.[64] Moreover, there is no statute of limitations on these convictions, meaning that a prior conviction will trigger mandatory detention no matter how far in the past the crime occurred.[65] Third, individuals who have a final order of removal and are awaiting deportation, or individuals who have a reinstated order of removal, must be detained without bond.[66] An immigration judge, therefore, lacks any authority to hold a bond hearing or order a bond for an individual subject to mandatory detention.[67] For those individuals, the only way to get a custody

61. 8 U.S.C. § 1225(b)(1)(B)(3)(iv); *see also* Matter of M-S-, 27 I. & N. Dec. 509, 515 (A.G. 2019) (holding that individuals who start in expedited removal proceedings and are transferred to full removal proceedings are ineligible for bond).

62. 8 U.S.C. § 1226(c).

63. *See* Gul v. Att'y Gen., 385 F. App'x 241, 243–44 (3d Cir. 2010) (finding that a New Jersey offense for loitering with the purpose of obtaining a controlled substance is a drug offense under federal immigration law); Matter of Cortez, 25 I. & N. Dec. 301, 306 (B.I.A. 2010) (holding that misdemeanor welfare fraud is a crime involving moral turpitude).

64. *See, e.g.*, Luciano-Jimenez v. Doll, 543 F. Supp. 3d 69, 72 (M.D. Pa. 2021) (sentencing a noncitizen to a twenty-four-month criminal sentence but detaining them for more than thirty-two months) (additional case documents showing criminal sentence and length of detention on file with author).

65. *See, e.g.*, *Diop*, 656 F.3d at 223–24 (bringing removal charges in 2008 based in part on a criminal conviction from 1995).

66. *See* Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021) (finding that individuals with a final order of removal, including individuals with reinstated removal orders, are detained pursuant to 8 U.S.C. § 1231 and not entitled to a bond hearing before an immigration judge).

67. *See id.*

review, at least in certain circuits, is by filing a habeas corpus action.[68]

B. *Detention's Consequences*

The federal government detains tens of thousands of noncitizens every day. As of 2020, the government holds nearly 40,000 noncitizens behind bars on any given day.[69] That number reached as high as an average daily population of nearly 50,000 in 2019 before strict border closure measures imposed by the Trump Administration caused the number to fall.[70] In 2019, the average daily detained population exceeded 49,000 and the total number of noncitizens detained over the course of the year approached 500,000.[71]

Detention inflicts significant and adverse consequences on noncitizens and their families.[72] First, although immigration

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68. *See, e.g.*, German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 210–13 (3d Cir. 2020) (finding a constitutional right to a bond hearing when detention has become indefinitely prolonged in an action brought in habeas corpus). In *Jennings v. Rodriguez*, the Supreme Court held that the mandatory detention statute did not create any statutory right to a bond hearing after prolonged detention but reserved decision on whether the U.S. Constitution provides a right to a bond hearing after prolonged detention. 138 S. Ct. 830, 836–51 (2018). Since *Jennings*, some circuit and district courts have held that indefinite mandatory detention without a bond hearing violates the Due Process clause, one has rejected the right to a bond hearing, and the question remains open in other circuits. *See* Freya Jamison, Note, *When Liberty is the Exception: The Scattered Right to a Bond Hearings in Prolonged Immigration Detention*, 5 COLUM. HUM. RTS. L. REV. ONLINE 146, 156–62 (2021).

69. Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Data Yet. It's Alarming*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://perma.cc/ZY7B-YTTM ("In November 2017, ICE reported that its total average daily population for FY 2018 was 39,322 people. This marks the second year in a row the U.S. government hit an unprecedented high in how many immigrants it incarcerates.").

70. *See 5 Reasons to End Immigration Detention*, NAT'L IMMIGRANT JUST. CTR., https://perma.cc/XD68-Y7S8 (showing detention statistics); *DHS Immigration Detention*, THE MARSHALL PROJECT, https://perma.cc/57X7-HRD9 (last updated Sept. 23, 2019) (showing number of detainees by year and average daily populations).

71. *DHS Immigration Detention*, THE MARSHALL PROJECT, https://perma.cc/57X7-HRD9 (last updated Sept. 23, 2019).

72. *See, e.g.*, Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (stating that "detention now represents a deprivation as severe as removal itself," and asserting that the term

detention is considered civil detention, it is no different than criminal punishment. Detainees are housed in prisons, often in facilities that also hold state prisoners.[73] They experience the same adverse consequences as state prisoners do—restricted liberty, solitary confinement, poor conditions, lack of access to medical care, mistreatment by correctional officers, being housed far away from family and friends, and lack of access to counsel.[74]

Second, detention can cause people to lose their jobs and the ability to support their family, strain or destroy family relationships, separate parents from their children, and inflict long-term physiological and psychological damage.[75] Numerous studies have shown that immigration detention harms a detainee's mental health, with detainees experiencing high levels of anxiety, depression, and post-traumatic stress disorder (PTSD).[76] Many noncitizens come to the United States to flee trauma and persecution in their home countries.[77] Imprisonment upon arrival can trigger them to relive the

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"detention" improperly "mask[s] circumstances approximating criminal 'incarceration' or 'imprisonment'").

73. *See* THE CONST. PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS 15 (2009), https://perma.cc/5RE3-AW9Z (PDF); *see also* German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 212–13 (3d Cir. 2020) (noting that a detainee "has been detained alongside convicted criminals" at the Pike County Correctional Facility). Pursuant to federal contracts with state and local governments, many noncitizens are incarcerated in state and local prisons and jails alongside individuals charged with or convicted of crimes. *See* THE CONST. PROJECT, *supra*, at 15.

74. *See* Srikantiah, *supra* note 14, at 526–27 (describing conditions of immigration detention); EUNICE HYUNHYE CHO ET AL., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION IN THE TRUMP ADMINISTRATION 6–9 (2020), https://perma.cc/2U4T-R6E9 (PDF).

75. *See* Fatma Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2150–54 (2017); Kalhan, *supra* note 71, at 46 ("The resulting economic, emotional, and psychological harms are visited upon not just detainees, but also their family members [including] children or other dependents.").

76. M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382, 383 (2018), https://perma.cc/J8F4-K4BC.

77. *See* AM. IMMIGR. COUNS., ASYLUM IN THE UNITED STATES 1 (2022), https://perma.cc/NX6H-75RP (PDF) ("Each year, thousands of people arriving at our border or already in the United States apply for asylum."),

trauma that they are trying to escape.[78] The recent experience of disproportionately high rates of COVID-19 within immigration detention facilities, combined with ICE's disregard for proper sanitation and risk-mitigation procedures and its refusal to release detainees in order to protect them from COVID-19, serve as stark reminders of the life-threatening effects of detention.[79]

Third, detention makes it harder to pursue one's legal case, develop evidence, and communicate with lawyers. Individuals in detention have a significantly greater likelihood of being deported than individuals who are not detained.[80] For some noncitizens, detention is so severe that they will choose to give up their claims and accept deportation rather than remain in prison while seeking permission to live in the United States.[81]

II. OVERVIEW OF RISK ASSESSMENT

Just as pretrial and noncitizen detention have a long history in this country, there is also a long history of using tools and data to try and predict whether it is safe to release individuals rather than detain them. This Part provides a broad overview of the rise of predictive risk assessment tools in evaluating an individual's future risk of danger or flight for the

78. Marouf, *supra* note 74, at 2151 (explaining how "the experience of detention" can be "re-traumatizing").

79. *See* Isabelle Niu & Emily Rhyne, *4 Takeaways from Our Investigation into ICE's Mishandling of Covid-19*, N.Y. TIMES (Apr. 25, 2021), https://perma.cc/TF9N-7BQ5 (documenting ICE's failure to follow Covid risk mitigation procedures and refusal to release inmates at risk of contracting COVID-19).

80. *See supra* note 58 and accompanying text.

81. *See* Marouf, *supra* note 74, at 2151 ("Given the number of obstacles that must be overcome, many detainees simply give up and never file or abandon applications for relief."); Kalhan, *supra* note 71, at 46–47; *see also EOIR Table 5-1: Asylum Withdrawals by Custody Status by Fiscal Year Completed*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM 670, https://perma.cc/QL8D-K5FY (PDF) (detailing that from 2000 to 2004, detained asylum seekers withdraw their claims more than twice as often as non-detained asylum seekers). In fact, it appears to occur with such frequency that immigration judges have a template order for individuals who give up their claims for bond and accept removal to their country of origin. *See* DEP'T OF JUST., EOIR–IJ BENCHBOOK–TOOLS–SAMPLE ORDERS–BOND WITHDRAWAL ORDER, https://perma.cc/8CKU-FW44 (PDF) (including sample bond withdrawal order from the former Immigration Judge's Benchbook).

purpose of deciding whether to detain or release that person on bond. This Part first discusses predictive risk assessment in the context of criminal pretrial bail decisions and examines both the potential benefits and the criticisms of using risk assessment tools to make detention decisions. It then examines ICE's experience with risk assessment in making detention decisions over the noncitizens in its custody.

A. *Criminal Pretrial Detention Risk Assessment*

Jurisdictions have experimented with risk assessment tools since the 1960s.[82] Numerous state jurisdictions currently use risk assessment tools in some form to decide whether to incarcerate or release pretrial criminal defendants.[83] As technology has advanced, risk assessment tools have become more prominent and widespread in addressing detention and release.[84]

The term "risk assessment" has been defined as "the process of using risk factors to estimate the likelihood (i.e., probability) of an outcome occurring in a population."[85] There are several types of risk assessment tools. Some may involve simple checklists of static factors like age and criminal history that are weighted to produce a score which represents one's risk level.[86] Other checklists may involve dynamic factors (ones that can change over time) such as community ties or employment opportunities.[87] Some refer to these checklists as a type of algorithm, especially if the checklist is subject to revision over

82. *See* Noferi & Koulish, *supra* note 4, at 54.

83. *See* DEP'T OF JUST.: BUREAU OF JUST. ASSISTANCE, RISK ASSESSMENT LANDSCAPE: PUBLIC SAFETY RISK ASSESSMENT CLEARINGHOUSE, https://perma.cc/V96R-K323 (PDF).

84. PRETRIAL JUST. INST., SCAN OF PRETRIAL PRACTICES 25 (2019), https://perma.cc/P49W-MSYW (PDF). One study of eighty-nine counties found that 73% used risk assessment tools in some form with respect to pretrial detention decisions and concluded that "in 2017, approximately one in four people in the United States lived in a jurisdiction that employed a validated evidence-based pretrial assessment tool, up from one in ten people in 2013." *Id.*

85. Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 448–49 (2020).

86. *See id.* at 451.

87. *See id.*

time.[88] Other tools use large data sets and machine-learning technologies to analyze that data and make predictive assessments of one's risk level.[89] This Article uses the term "risk assessment" or "algorithm" broadly to encompass the varied forms of predictive tools that are in use or development.

There is an extensive literature describing the use of risk assessment to predict safety and flight risk, particularly in the criminal pretrial context.[90] As with immigration detention, the question of whether pretrial criminal defendants should be released or detained largely rests on whether the defendant is judged to be a danger or a flight risk.[91]

Advocates of risk assessment tools maintain that properly validated tools may lead to more accurate decision-making and greater consistency.[92] Individual judges have their own biases and predilections.[93] Judge-made decisions are prone to arbitrariness.[94] The same defendant could receive a different outcome based on whether that person had a sympathetic judge or a difficult judge. Advocates of risk assessment also suggest that politically accountable judges may feel greater pressure to err on the side of detention rather than release to avoid the political risk that would arise if someone they released were to commit another crime or harm someone while out on bail awaiting trial.[95] Risk assessment tools present a potential

88. *See, e.g.*, Evans & Koulish, *supra* note 21, at 800 (describing ICE's checklist risk assessment tool as a "malleable algorithm").

89. *See* Garrett & Monahan, *supra* note 84, at 451.

90. This Article next cites just a few of the many articles discussing criminal risk assessment tools.

91. *See supra* note 41 and accompanying text.

92. *See* DEP'T OF JUST.: BUREAU OF JUST. ASSISTANCE, *supra* note 83 ("Ultimately, the importance of using actuarial risk assessment tools across criminal justice settings and stages is defined by improved consistency, efficiency, and effectiveness.").

93. *See* Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

94. Studies in the criminal pretrial context have concluded that bail decisions are often arbitrary, leading to widely disparate bail amounts for similarly situated individuals based on the judge assigned. *See, e.g.*, Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 497–99 (2016) (finding substantial variation in money bail amounts set by magistrate judges).

95. *See, e.g.*, Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012).

response to that bias. A consistently applied tool has the potential to treat similarly situated defendants the same without regard to the individual judge assigned to the case and to focus on each individual detainee's specific facts and circumstances.[96] Researchers suggest that well-designed and appropriately validated risk assessment tools are more accurate than judges in predicting an individual's risk of danger and flight risk.[97]

Even if imperfect, many contend that risk-based tools are superior to cash bail systems on the grounds that cash bail disproportionately harms the poor and racial minorities, that one's ability to pay has no bearing on their dangerousness or flight risk, and that such systems leave many low-risk individuals behind bars simply because they cannot afford the bail set by the judge.[98]

Additionally, some advocates assert that risk assessment tools will reduce pretrial incarceration without compromising

96. *See, e.g.*, Mayson, *supra* note 1, at 2277–79 (arguing that human-based risk assessment is inconsistent, arbitrary, inaccurate, and prone to bias in part because "individual judges may generalize to a greater extent, and with less grounding, than statistical models do").

97. *See* ADVANCING PRETRIAL POL'Y & RSCH., PRETRIAL RESEARCH SUMMARY: PRETRIAL ASSESSMENT TOOLS 2 (2021), https://perma.cc/2GUF-TLEZ [hereinafter APPR] ("A number of validation studies specific to the use of assessment tools in the pretrial context have also been conducted. These studies have generally confirmed the accuracy of actuarial models for estimating the likelihood of pretrial court appearance and remaining arrest-free pretrial . . . ."); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 306 (2018) ("There is ample research by social scientists suggesting that risk assessment tools *should* have beneficial effects. Risk assessment tools have been shown to be predictive of future arrest, and there is research suggesting (although not definitively) that they are better at predicting future arrest than judges are."); *id.* at 321; PICARD-FRITCHSE ET AL., DEMYSTIFYING RISK ASSESSMENT: KEY PRINCIPLES AND CONTROVERSY 9 (2017), https://perma.cc/V4LA-S6CN (PDF) (concluding that data-based risk assessment tools "have tended to outperform humans" in evaluating risk).

98. *See, e.g.*, AM. BAR ASS'N, RESOLUTION 112C, 1, 6 (2017), https://perma.cc/U9FE-Z6UU (recommending release on recognizance instead of cash bond for reasons of racial bias); Malia Brink, *ABA Bail Policy: Taking Steps to Achieve Reform*, AM. BAR ASS'N (Nov. 30, 2019), https://perma.cc/EY3G-L6TW ("Money bail systems historically result in the detention of indigent defendants simply because they cannot pay the bond or bail set, and not because they actually pose an increased risk of harm to the public."); HARV. L. SCH. CRIM. JUST. POL'Y PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 6–7 (2016), https://perma.cc/P752-8SSU (PDF).

public safety.[99] Several jurisdictions that have utilized risk assessment tools have seen detention rates fall without leading to increased flight or crime.[100] This not only provides benefits to pretrial defendants, who do not face the adverse impact of detention, but also to the relevant jurisdiction, which saves money from reduced incarceration.[101]

At the same time, advocates recognize the need for further study and for oversight of the risk assessment tools that jurisdictions utilize.[102] For example, it may be uncertain how much detention reduction is explained by a shift to risk assessment tools versus other contemporaneous criminal justice reforms, and researchers also acknowledge that most comparisons between humans and tools do not involve controlled settings.[103] Researchers also emphasize the importance of continually validating or updating the tool over time.[104] This includes checking the algorithm or tweaking it for greater accuracy and making sure it is not using flawed or faulty data.[105]

To be sure, risk assessment tools also have received significant criticism. Scholars and researchers express concern that some risk assessment tools are not transparent (this is particularly true for machine-learning tools), meaning that the public cannot always see what data is used or how the algorithm

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99. *See* APPR, *supra* note 97, at 3.

100. *See id.* (citing examples from New Jersey, where the state reduced its detention numbers by 6,000 without seeing a reduction in court appearances or an increase in crime and from Washington, where release rates rose to 73% from 53% without a reduction in court appearances or a rise in crime); Noferi & Koulish, *supra* note 4, at 55 (citing other examples where risk assessment significantly reduced pre-trial detention rates).

101. *See, e.g.*, APPR, *supra* note 97, at 3; Noferi & Koulish, *supra* note 4, at 55 (citing examples of fiscal benefit to municipalities from utilizing risk assessment).

102. *See* APPR, *supra* note 97, at 4, 6.

103. *See id.* at 4; Stevenson, *supra* note 97, at 321–25 (describing difficulties of comparing human decision-making to machine decision-making).

104. *See* Stevenson, *supra* note 97, at 375.

105. A validated tool is one where "the jurisdiction evaluated the risk assessment tool on the population in that jurisdiction, and it successfully predicts risk outcomes for pretrial defendants." SHAWN M. FLOWER ET AL., BEFORE THE DISPOSITION: A STUDY OF THE PRETRIAL LITERATURE 24 (2020), https://perma.cc/U4VS-4H6P (PDF) (citation omitted).

works.[106] If the algorithm is proprietary, or otherwise not visible to the public, its legitimacy and accuracy are subject to question.[107] Some also argue that an algorithm-based system is not transparent because it does not result in the types of written decisions or reasoned explanations that we commonly associate with judicial decisions.[108] If a computer program processes data and spits out an answer, there is no other information available to gauge the fairness of its decision.[109] A lack of explanation may turn into a lack of legitimacy.

The lack of transparency may be particularly concerning if there is a risk that the tools can be manipulated to reach a desired result, whether that result is greater detention or greater release. If the algorithm leads to results that people do not like, it can be altered to create a different outcome.[110] In other words, if the tool recommends release more often than policymakers want, they can simply tweak the tool to consider different factors, or to weigh certain factors more heavily, so that the same tool will now recommend detention more often. Critics claim that risk assessment will falsely "give a veneer of objectivity and science" to what is in reality a subjective and flawed system.[111] At bottom, risk assessment may just enable governments to more easily justify expanded detention rather than to improve outcomes or accuracy.[112] Some scholars also

106. *See* Stevenson, *supra* note 97, at 316 ("The black-box nature of the tool makes them non-transparent; which raises legal and ethical issues: it is difficult to challenge a high-risk classification if one does not know the reasons behind the classification." (citation omitted)); Kelly Hannah-Moffat, *Actuarial Sentencing: An Unsettled Proposition*, 30 JUST. Q. 270, 284–86 (2013) (describing ways in which risk assessment tools have limited transparency).

107. *See* Stevenson, *supra* note 97, at 316.

108. *See, e.g.*, Kiel Brennan-Marquez, *Plausible Cause: Explanatory Standards in an Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1280–98 (2017) (asserting that machine-based decisions may lack legitimacy when unaccompanied by explanatory reasoning).

109. *See supra* note 107 and accompanying text.

110. *See* John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUM. RTS. WATCH (July 17, 2017), https://perma.cc/RV8U-VSJ3 ("The scoring system can be scaled, the algorithm adjusted, exceptions added or taken away, that will increase or decrease the number of people detained or placed under supervision.").

111. *Id.*

112. Noferi & Koulish, *supra* note 4, at 52 (discussing the concern that "risk assessment will be little more than a 'false veneer of scientific analysis'

question whether rigidly following risk assessment tools creates legal or constitutional concerns.[113]

Additionally, using risk assessment may foster inaccuracy if the tools are not periodically reassessed. Some risk assessment tools, even if validated when they were first instituted, are not regularly reviewed or re-validated. For example, one study of county level pretrial risk assessment found that less than half of the studied counties continuously validate their tools.[114] Outside studies have suggested that some tools fail to accurately predict crime risk and are barely better than a coin flip.[115]

Others express concern that judges will override the tool when it recommends release—but not when it recommends detention—because of political pressures or because of the judge's own biases.[116] For example, Professor Megan Stevenson studied Kentucky's highly touted pretrial risk assessment law.[117] She concluded that the statute "led to only a trivial increase in pretrial release," in part because judges "took

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hiding continued over-detention" (quoting Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 51 (2013))).

113. *See, e.g.*, Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 263–71 (2015) (discussing the potential for risk-assessment tools to violate the fundamental rights of the accused); Sonja Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821–36 (2014) (arguing that using risk assessment or other data-based tools in sentencing violates the Equal Protection Clause); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1281–88 (2008) (asserting that using automation and other tools implicates significant due process concerns).

114. *See* FLOWER, *supra* note 105, at 24 ("The PJI 2019 *Scan* indicates that approximately two-thirds of counties sampled use a pretrial risk assessment to make decisions. Of these, less than half (45 percent) reported conducting continuous validation studies.").

115. *See* Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://perma.cc/ARH3-S5ZF (studying Broward County, Florida's risk assessment tool and finding that only 20% of individuals considered a risk to commit violent crime did so, and that only 61% of those identified as a future crime risk were arrested within two years); *see also* FLOWER, *supra* note 105, at 33 ("Skeptics of these algorithms suggest that they may be no more accurate at predicting defendant risk than humans.").

116. *See, e.g.*, Stevenson, *supra* note 97, at 306 ("The pressures of re-election or re-appointment may impact how and when the risk tool is used.").

117. *See id.* at 342–46.

advantage of the discretion allowed to them by law," though she did also find that there was a significant increase in non-monetary release for low-risk defendants and a smaller increase in release for moderate-risk defendants.[118] Furthermore, she found that even those changes disappeared over time as judges exercised their discretion in ways that limited release, and that after several years, "the pretrial release rate was lower than it was before the bill, and lower than the national average."[119] Humans may have a natural tendency to lean toward detention, even when a risk assessment tool would recommend release.[120]

Perhaps the strongest criticism of risk assessment tools is that they are susceptible to racial bias, and as a result will exacerbate existing racial disparities and disproportionately recommend detention for African Americans relative to similarly situated individuals of other races.[121] One common criticism is that the data sets that risk assessment tools rely on, such as prior convictions, arrests, or employment histories, are tainted by racial bias and so relying on them will produce racially disparate outcomes.[122] As a result, African Americans are more susceptible to "false positives," i.e. being wrongly labeled as a danger.[123] Additionally, tool designers have their

118. *Id.* at 308–09.

119. *Id.* at 309.

120. *See* Joel Miller & Carrie Maloney, *Practitioner Compliance with Risk/Needs Assessment Tool: A Theoretical and Empirical Assessment*, 40 CRIM. JUST. & BEHAV. 716, 719 (2003) (describing how law enforcement officers are much more likely than tools to recommend detention and that they or others will decline to follow the tool's recommendations).

121. *See, e.g.*, Mayson, *supra* note 1, at 2221–27 (describing how algorithmic tools will worsen racial disparities and surveying literature regarding racial bias and predictive tools); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015).

122. *See* Mayson, *supra* note 1, at 2222 ("Given that algorithmic crime prediction tends to rely on factors heavily correlated with race, it appears poised to entrench the inexcusable racial disparity so characteristic of our justice system, and to dignify the cultural trope of black criminality with the gloss of science."); Solon Baracas & Andrew Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 677–92 (2017); Harcourt, *supra* note 121, at 240; Stevenson, *supra* note 97, at 328.

123. *See* Mayson, *supra* note 1, at 2234.

own biases, and those biases may creep into the factors they program the tool to consider.[124]

A ProPublica study of Broward County, Florida's risk assessment experience found that its tool inaccurately labeled African Americans as dangerous twice as often as it did for white defendants.[125] Under the tool, African Americans were 45% more likely to be labeled as likely to commit a crime and 77% more likely to be labeled as likely to commit a violent crime.[126]

In short, the debate about criminal pretrial risk assessment reveals the idealized hope that tools could more accurately assess risk and could reduce pretrial detention without compromising public safety. This same debate also reveals the deep-seated worries that, in practice, they may not significantly reduce detention, that they have accuracy flaws, and that they accentuate bias.[127] As the next Subpart details, ICE's experience in using risk assessment tools for immigration detainees reveals the same tension.

B. *Risk Assessment in the Immigration Context*

Recent experience with ICE's use of risk assessment has traced a similar arc: from hope, to concern, to frustration. After a 2009 government report recommended the study and consideration of risk assessment with respect to immigration detention, ICE began investigating a risk assessment tool that it developed and unveiled starting in 2013.[128] When ICE announced that it would introduce risk assessment into its detention decisions, the immigration advocacy community initially greeted the decision with hope and optimism that risk assessment would ultimately reduce immigration detention

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124. *See* Stevenson, *supra* note 97, at 329.

125. *See* Angwin et al., *supra* note 115.

126. *Id.*

127. *See supra* notes 115, 120, 122 and accompanying text.

128. *See* U.S. DEP'T OF HOMELAND SEC.: OFF. OF INSPECTOR GEN., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 4 (2015), https://perma.cc/3GAU-WAL5 (PDF) ("ICE implemented the Risk Classification Assessment (RCA) in January 2013 . . . ."); *see also* DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20 (2009) (recommending that ICE implement risk assessment to make detention and release determinations).

without compromising public safety or increasing flight.[129] Advocates maintained that the current system detained far more people than necessary and hoped that a risk assessment tool focusing on evidence connected to safety and flight risk would find that many detainees could be released.[130] The prevailing sentiment was that "[e]vidence-based detention, if more accurate, would likely [result in] 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.[131]

That hope, however, turned to concern as people began studying ICE's experience with risk assessment. Among the scholars who have studied ICE's risk assessment tool most closely are Professors Mark Noferi, Robert Koulish, and Kate Evans.[132] Through several Freedom of Information Act (FOIA) requests, they attempted to study if and how ICE's risk assessment tool affected detention rates.[133] Ultimately, they found that ICE's tool suffered from a lack of transparency and was susceptible to political manipulation and human intervention to override release recommendations.[134] As a result, they concluded that the ICE tool did not reduce detention and may have increased it.[135]

For example, initial data obtained from ICE's Baltimore Enforcement and Removal Office (ERO) for 2013 found that the risk assessment tool recommended detention over 70% of the time and that ICE ordered detention more than 80% of the time (i.e., that ICE supervisors were ordering detention for some number of individuals whom the tool recommended for release).[136] Subsequent analysis of Baltimore data along with national statistics from 2012 to 2013 similarly showed that detention rates exceeded 80% after implementation of the risk

129. *See* Noferi & Koulish, *supra* note 4, at 48–49 (describing early support for ICE's adoption of risk assessment).

130. *See, e.g.*, *id.* at 88.

131. *Id.*

132. *Id.* at 45; Evans & Koulish, *supra* note 21, at 789.

133. *See* Evans & Koulish, *supra* note 21, at 796–800.

134. *See id.* at 794–95.

135. *See id.* at 794–96.

136. Noferi & Koulish, *supra* note 4, at 50.

assessment tool and in some cases exceeded 90%.[137] A subsequent study by Evans and Koulish following additional FOIA requests appears to confirm these high detention rates.[138]

The studies also found that ICE supervisors intervened to override the tool's recommendations for release but not its recommendations to detain.[139] It also appears that ICE altered the tool so that it would recommend detention more often. As the tool was periodically updated, it was adjusted so as to fit the government's enforcement priorities and not based on any new evidence or data related to safety or flight risks.[140] This includes one instance in 2017 where DHS allegedly adjusted the tool's measurements so that it would recommend detention nearly 100% of the time.[141] In another instance, the New Orleans field office denied 99.1% of applications by asylum seekers for release on parole from March 2019 to December 2019.[142] In other words, if the tool recommended release more than supervisors or political officials wanted, they simply overrode the tool's recommendation or changed the tool. Consequently, the tool did not reduce detention because it was ultimately crafted to reach a detention rate that government officials wanted.

These researchers also found that ICE was not transparent or open regarding how it programmed the tool or the method it used to determine an individual's risk level. ICE does not disclose or make publicly available its risk assessment tool and

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137. *See* Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 1, 6 (2017) ("To date, risk assessment appears to have had a minimal impact on ICE's high rates of detention. According to a recent DHS Inspector General report, nationally, ICE detained 91.4% of those individuals upon whom ICE conducted [risk assessment] between July 30, 2012, and December 31, 2013.").

138. *See* Evans & Koulish, *supra* note 21, at 848 (concluding that ICE's risk assessment "became a tool of immigration incarceration").

139. *See* Koulish, *supra* note 137, at 7 ("Third, while ICE supervisors have the authority to override RCA recommendations, supervisors usually accepted the detention recommendations and overrode most of the few release recommendations."); Evans & Koulish, *supra* note 21, at 838–40.

140. *See id.* at 805–06 ("With each change, RCA recommendations increasingly reflected the Obama Administration's political enforcement priorities, rather than indicia of flight risk or risks to public safety.").

141. *Velesaca* Complaint, *supra* note 21, at ¶1–3 (alleging that ICE used risk assessment to create a functional no-release policy for detainees in New York).

142. Cho, *supra* note 74, at 6.

scoring system. As Evans and Koulish explained, ICE vigorously fought requests to release this information, requiring more than four years of litigation over whether ICE was required to disclose information about how the tool worked, how it was validated, and what results it produced.[143]

The current experience with ICE risk assessment thus has muted initial hopes of fairer detention determinations while also raising concerns that in practice the tools will just reinforce existing detention practices. Nevertheless, risk assessment's footprint stands only to grow as technology advances. The era of big data risk assessment is here, and it is likely not going away any time soon.

It may be natural to think that the next arena for risk assessment is use by immigration judges to make bond decisions. The executive branch detains nearly 500,000 noncitizens a year and upwards of 40,000 noncitizens on any given day.[144] It is "the largest immigration detention system in the world."[145] Despite the vast reach of immigration detention and despite the rise of algorithmic decision-making in general, there has been virtually no discussion about incorporating risk assessment into immigration bond decisions made by judges in immigration court. The next two Parts undertake that discussion, first by examining the shortcomings of the current immigration court bond regime and then by examining whether a well-designed risk assessment tool could offer any advantages over the current system.

III. SHORTCOMINGS OF THE CURRENT IMMIGRATION COURT BOND SYSTEM

Bond denials in immigration court are common. Between 2018 and 2019, more than half of all immigrants who requested

143. For a detailed discussion of the arduous path for obtaining information from DHS about the tool, see Evans & Koulish, *supra* note 21, at 850–55.

144. *See* Cullen, *supra* note 69 ("In November 2017, ICE reported that its total average daily population for FY 2018 was 39,322 people, marking the second consecutive year in which the U.S. government hit an unprecedented high in how many immigrants it incarcerates.").

145. *See* Evans & Koulish, *supra* note 21, at 790.

a bond hearing were denied bond.[146] This is significantly lower than detention rates in the criminal pretrial context, where studies suggest that detainees are released over 60% of the time and that as few as one in ten defendants are denied bond outright.[147] Although this denial rate is lower than ICE's denial rate under its risk assessment tool, keep in mind that this subset encompasses only those noncitizens who are bond-eligible. Those who are not eligible for bond, such as individuals subject to mandatory detention, people with reinstated removal orders, or certain classes of arriving noncitizens, do not receive a bond hearing in immigration court.[148] DHS's release-denial rate, by contrast, includes noncitizens who fall into those categories. Thus, even for the narrower band of noncitizens who find themselves eligible to seek a custody review by an immigration judge, more than half end up being denied bond. Even among those granted bond, a significant number may remain detained because they cannot afford to pay the bond amount set by the immigration court.[149]

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146. In 2018, 48% of bond cases were successful; in 2019, 43% were successful. *See Importance of Nationality in Immigration Court Bond Decisions*, TRAC IMMIGR. (Feb. 12, 2019), https://perma.cc/6GM7-8CSD; *see also Velesaca* Complaint, *supra* note 21, at ¶3 (alleging that 40% of bond-eligible detainees under the jurisdiction of the New York Field Office were granted bond in immigration court); *Three-Fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGR. (July 16, 2018), https://perma.cc/3GMC-QG9T (describing rates of bond grants and denials in immigration court between 2014 and 2018).

147. *See, e.g.*, Baradaran & McIntyre, *supra* note 95, at 553 ("In our dataset, we know detention rates and predicted crime rates for 116,000 defendants from 1990 to 2006. Of those, approximately 45,000 were held and 72,000 were released."); THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), https://perma.cc/GR5X-EKZS (PDF); PATRICK LIU ET AL., HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018), https://perma.cc/SG4T-GQN9 (PDF) (finding that the share of felony defendants denied bond outright has consistently stayed at or below 10%); N.Y.U. SCH. OF L. IMMIGRANT RTS. CLINIC & IMMIGRANT DEF. PROJECT, FAMILIES FOR FREEDOM, INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 10 (2012), https://perma.cc/86Q5-BVT2 (PDF) (finding that fewer than 1% of criminal pretrial defendants in New York City were held without bail).

148. *See* 8 U.S.C. §§ 1225(b), 1226(c).

149. *See, e.g.*, Srikantiah, *supra* note 14, at 526 ("Many noncitizens languish in detention because they cannot afford to pay the bond amounts set by immigration judges."); *see also infra* notes 204–210 and accompanying text.

While these general numbers say little about the public safety risk or flight risk level of the individuals appearing in these bond hearings, it suggests at the outset that immigration judges as a whole may default toward detention rather than release.

As the previous Part discussed, data-based risk assessment tools create significant concerns about racial bias, lack of transparency, accuracy, and fairness. These concerns, at first blush, may appear to make a strong case against importing machine-learning tools and data-based risk assessment mechanisms into immigration court to make custody decisions currently made by immigration judges. However, the current system in which immigration judges make bond determinations is beset by the same—and often even worse—problems, resulting in continued detention of individuals who present neither a safety nor a flight risk. As this Part explains, immigration court bond proceedings appear to exhibit racial and ethnic bias, lack transparency, fail to consider relevant factors, set arbitrary bond amounts, and may reflect significant pro-detention bias.

A. *Ethnic and Racial Bias*

Immigration court bond decisions may exhibit some degree of either explicit or implicit racial and ethnic bias. Immigration judges—just like other decision-makers—bring their own cognitive biases to their decisions.[150] Consequently, bond decisions appear to correlate with the detainee's race and nationality. While it is hard to obtain data on immigration court bond decisions, one study of bond hearings in 2018 and 2019 concluded that "[t]he chances of being granted bond at hearings before immigration judges vary markedly by nationality, as do required bond amounts."[151] For example, detainees from India and Nepal had more than a 75% chance of receiving a bond.[152] By contrast, detainees from many countries in Central America

150. *See* Mayson, *supra* note 1, at 2278 ("Human beings are prone to cognitive biases that distort rational judgment. In the context of risk assessment, judges may overweight factors that have particular salience to them (including the current charged offense), fall victim to framing effects, and give undue significance to their own past experience.").

151. *Importance of Nationality in Immigration Court Bond Decisions*, *supra* note 146.

152. *Id.*

and certain Caribbean nations had a much lower chance of being granted bond.[153] Detainees from Cuba were granted bond in only 11% of cases; detainees from the Dominican Republic less than 30% of the time; and detainees from the "Northern Triangle" countries of El Salvador, Guatemala, and Honduras less than 50% of the time.[154] Without seeing individual case filings, it may be hard to interpret this data or to understand if other factors were at play. But does it suggest that an immigration judge may show more willingness to grant bond to a detainee from India or Nepal than one from Central America? Quite possibly.[155]

The report also found that even when bond is granted, the "required bond amount also varies widely by nationality."[156] For noncitizens with limited financial resources, or who have suffered financial hardship as a result of ongoing detention and a lack of work opportunities, a high bond amount functionally operates as a bond denial.[157] In part, this is because, unlike in the criminal bail setting, immigration bonds must be paid in full before ICE will release detainees.[158]

Other available data reinforce the possibility of racial or ethnic bias in bond decisions. Professor Emily Ryo has done significant empirical work on immigration court bond proceedings by conducting surveys and also collecting and

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153. *See id.*

154. *Id.*

155. Implicit racial and ethnic bias may also be operating in other areas of the immigration system. *See* Emily Ryo & Reed Humphrey, *The Importance of Race, Gender and Religion in Naturalization Adjudication in the United States*, 119 PNAS 9, 1 (2022), https://perma.cc/KKQ5-GW49 (conveying one recent study of naturalization applications which found that "all else being equal, non-White applicants and Hispanic applicants are less likely to be approved than non-Hispanic White applicants"); Eileen Sullivan, *Congressional Democrats Ask Biden to Review Treatment of Black Migrants*, N.Y. TIMES (Feb. 16, 2022), https://perma.cc/BGF8-LHCF.

156. *Importance of Nationality in Immigration Court Bond Decisions*, *supra* note 146 (finding that "the median bond for immigrants from the Philippines was just $4,000, while those from Bangladesh were required to post $10,000–$12,000").

157. One study reported that about 20% of individuals granted bond in immigration court remained detained, presumably because of their inability to pay the bond amount. *See Three-Fold Difference in Immigration Bond Amounts by Court Location*, *supra* note 146; *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings*, TRAC IMMIGR. (Sept. 24, 2016), https://perma.cc/3SQ5-U78H.

158. *See supra* note 40 and accompanying text.

analyzing audio recordings of bond hearings.[159] After analyzing over 400 immigration court bond hearings, she found that immigration judges were more inclined to label individuals from Central American countries as dangerous (which, in turn, requires the judge to deny bond) than individuals from non-Central American countries, even after controlling for other variables.[160] She describes various cognitive biases and stereotypes that could cause immigration judges to implicitly treat Central Americans as more dangerous than non-Central Americans.[161] Other scholars have found that immigration judges are especially susceptible to implicit bias because of (i) backlogged dockets which create pressure to move cases fast and reduce time for deliberation, (ii) relative insulation from judicial review because of jurisdictional limitations and deferential review standards, and (iii) lack of independence from political actors.[162]

Furthermore, because criminal convictions, or even arrests, often operate as the triggering event that results in ICE apprehending and detaining a noncitizen, racial and ethnic disparities in criminal law enforcement may lead to similar disparities with respect to who gets detained in the first place and in terms of how immigration judges will rule on bond.[163] Immigration judges often look to an individual's criminal history—both arrests and convictions—in assessing whether an individual should be denied bond as a public safety risk.[164] Because people of color face a disproportionate likelihood of

159. *See generally, e.g.*, Ryo, *Predicting Danger*, *supra* note 18; Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017) [hereinafter Ryo, *Fostering Legal Cynicism*].

160. *See* Ryo, *Predicting Danger*, *supra* note 18, at 245.

161. *See id.* at 245–46.

162. *See, e.g.*, Fatma Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 417 (2011); *see also* Mayson, *supra* note 1, at 2281 (stating that "there is every reason to expect that subjective risk assessment produces greater racial disparity than algorithmic risk assessment").

163. *See, e.g.*, Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1741–46 (2021) (discussing racial inequities in immigration enforcement and criminal arrest practices).

164. *See, e.g.*, Matter of Siniauskas, 27 I. & N. Dec. 207, 209 (B.I.A. 2018) (holding that immigration judges should "consider both arrests and convictions" when assessing dangerousness); *see also* Ryo, *Predicting Danger*, *supra* note 18, at 247–48 (discussing the role criminal convictions play with respect to immigration judge dangerousness determinations).

being arrested, they also face a disproportionate likelihood of being denied bond and deemed dangerous based on those arrests as well as any subsequent convictions.[165] Similarly, a focus on monetary bond—as opposed to other alternatives to detention—is likely to disproportionately harm racial and ethnic minorities if they are less likely to have the income necessary to pay the bond.[166] If risk assessment tools are prone to bias for considering an individual's criminal history that itself is a product of a racially biased policing system, then immigration judges who consider that same data in their decisions are prone to the same biasing effect. In other words, immigration judges not only incorporate the biases of risk assessment tools but also layer their own biases on top.

B. *Lack of Transparency*

Just as certain risk assessment tools are criticized for lacking transparency, immigration court bond proceedings suffer from a significant lack of transparency and oversight. First, immigration court bond hearings are not easily accessible to the public. The immigration courts that hear bond cases are often housed inside a detention center.[167] Thus, anyone who wants to attend a bond hearing in person must comply with the rules for entering a secure detention facility and often find themselves denied access.[168] Even if members of the public can access the hearing, they may be required to get advance

165. *See* BLACK ALL. FOR JUST IMMIGR., THE STATE OF BLACK IMMIGRANTS, 24–26, 40, https://perma.cc/GMG4-FRTT (PDF) (finding that Black immigrants experience a disproportionate likelihood of facing deportation proceedings and being placed in detention based on an underlying criminal conviction, and that 20% of noncitizens placed in deportation proceedings based on underlying criminal grounds are Black despite Black immigrants comprising 7.2% of the country's noncitizen population).

166. *See, e.g.*, Gilman, *supra* note 26, at 201 ("The racial impacts of the reliance on money bonds have not been studied in the immigration context but may well be significant.").

167. *See, e.g.*, *EOIR Immigration Court Listing*, U.S. DEP'T OF JUST., https://perma.cc/MK74-YF88.

168. In some cases, a detainee's children are prohibited from entering the detention facility to attend a bond hearing where the detention facility does not permit access for minors. In one case, a detainee's children who traveled hundreds of miles were prohibited from seeing their mother at all, let alone attend her hearing. *Matter of N-S-* (materials on file with author).

permission to enter the facility, learn the rules of the detention center, and overcome other obstacles.[169] That added effort reduces the chance that members of the public, or even interested family members, will attend bond hearings. Additionally, many detention centers are located in remote areas or far away from the detainee's family.[170] This separation and the lack of effective transportation options often makes it difficult for interested parties to attend. As a result, few people other than the detainees and their counsel—if they have counsel—witness immigration court bond hearings.

Second, recordings of proceedings are not publicly available and are hard to obtain. Unlike most judicial hearings or even immigration deportation hearings, bond hearings are not automatically recorded.[171] Even when they are recorded, they are recorded only on audio and the only way to find out what happened is for one of the parties to request a copy of the recording.[172] Furthermore, at least in the Author's experience, the immigration court sometimes will fail to record the bond hearing unless counsel or the detainee affirmatively requests recording.

Third, immigration bond proceedings offer little opportunity for the public to gain insight into judges' decision-making processes. Unlike judicial proceedings, the case files and documentary records are not available for public inspection and review.[173] Additionally, immigration judges

169. As one example, a detainee's children were not permitted to attend their parent's bond hearing, let alone testify (even though family ties are a relevant factor or bond), because the state prison housing the immigration court prohibited minors from entering except on designated visiting days. *See Visitation*, YORK CNTY. PRISON, https://perma.cc/L889-299S ("Children 13 years old and under are not allowed inside the prison except during children's visiting hours."); *see also* 8 C.F.R. § 1003.27(a) (2023) (permitting immigration judges to "place reasonable limitations on the number in attendance" at hearings in order to accommodate the physical limitations of the court).

170. *See EOIR Immigration Court Listing*, *supra* note 167.

171. *See* U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 9.3(e)(3), https://perma.cc/A2LX-XV76 ("Bond hearings are generally not recorded.") [hereinafter PRACTICE MANUAL].

172. *See id.*

173. Immigration courts make only general case information publicly available, such as hearing date and location, and what the overall outcome in the case was. *See Automated Case Information*, EOIR, https://perma.cc/WU44-GFAT. Case records and filings are only available to the attorney of record or

ordinarily do not issue written bond decisions, except in cases that are appealed to the Board of Immigration Appeals (BIA).[174] Even then, the decisions are short and not particularly revealing. The hearings are conducted quickly, often in fifteen minutes or less, as immigration judges endeavor to push through their heavy and backlogged dockets.[175] But for a handful of empirical studies, most information about bond proceedings comes from decisions by federal courts in habeas corpus actions challenging immigration court bond decisions.

Furthermore, immigration judges have little incentive to modify their behavior or provide additional reasoning because they are subject to limited oversight. Although a noncitizen or the government can appeal a bond decision to the BIA, immigration judges have wide discretion in assessing dangerousness and flight risk, and appellate review is deferential.[176] In many cases, appeal is not a realistic option. Even though appeals involving detained noncitizens are given priority, it can take months for the BIA to resolve a bond appeal.[177] In the meantime, the noncitizen's removal proceedings may already have gone forward to completion, rendering the appeal moot. Finally, almost all BIA decisions are unpublished and the BIA traditionally has not made them publicly available.[178] Like immigration judge bond decisions,

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an accredited representative, rather than the general public. *See Electronic Case Access System (ECAS)*, EOIR, https://perma.cc/QR6X-KPK9 ("For cases that have electronic Records of Proceedings (eROPs), attorneys and accredited representatives can file court and appeal documents, pay BIA filing fees, and download eROPs.").

174. *See* PRACTICE MANUAL, *supra* note 171, § 9.3(e)(7) ("Usually, the immigration judge's decision is rendered orally. Because bond hearings are generally not recorded, the decision is not transcribed. If either party appeals, the immigration judge prepares a written decision based on notes from the hearing.").

175. Srikantiah, *supra* note 14, at 545–46.

176. *See supra* notes 43–47 and accompanying text.

177. FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, ALL ABOUT BONDS 16 (2011), https://perma.cc/H42T-TZKU ("The appeal can take from six to nine months or more.").

178. *See* N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 209 (2d Cir. 2021) (ruling that, under FOIA, courts may require the BIA to make unpublished decisions accessible on its website); *Historic Settlement Levels the Playing Field for Immigration Advocates*, N.Y. LEGAL ASSISTANCE GRP. (Feb. 10, 2022), https://perma.cc/3B9C-PQC4 (stating that, following a federal New York district court's decision, the government agreed to make

BIA bond decisions are typically very short, contain little reasoning, and often defer to the immigration judge's discretion.[179] Thus, these decisions generally reveal little about how flight risk or dangerousness should be determined, or whether an immigration judge is properly assessing the relevant factors.

Federal judicial oversight is also largely absent. Federal courts lack jurisdiction to review discretionary bond denials.[180] In some cases, a noncitizen can file a habeas corpus petition in federal court, but the avenues for habeas corpus relief are limited to constitutional and federal statutory violations.[181] Habeas corpus is more frequently used by noncitizens subject to mandatory detention who are simply seeking the right to have a bond hearing, rather than to challenge a denial issued at a bond hearing.[182]

In short, the current immigration court bond system is just as opaque and mysterious, if not more so, than a risk assessment tool. Immigration judges say little on the record that provides insight into the decision calculus going on inside their heads.[183] They provide little explanation of how they weigh or balance various factors and the public has a difficult time gaining access to even that limited amount of information. Because appellate review at the agency level is largely deferential—and at the judicial level virtually non-existent—immigration judges have

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unpublished BIA decisions publicly accessible). The Department of Justice recently created a "reading room" to allow the public to search for unpublished BIA decisions. *See Reading Room*, EXEC. OFF. OF IMMIGR. REV., https://perma.cc/S2D3-SALQ.

179. *See, e.g.*, Matter of E-A-P- (B.I.A. Apr. 17, 2018) (affirming bond denial in a two-page decision that heavily deferred to the immigration judge's assessment of dangerousness) (document on file with author).

180. *See* 8 U.S.C. §§ 1252(a)(2)(B), (e) (eliminating judicial review of discretionary decisions and certain custody orders).

181. 28 U.S.C. § 2241(c)(3).

182. *See* Zadvydas v. Davis, 533 U.S. 678, 700–01 (2001) (holding that noncitizens with a final order of removal are entitled to release under conditions of supervision if they can demonstrate that their removal is not significantly likely to occur in the reasonably foreseeable future).

183. *See, e.g.*, Mayson, *supra* note 1, at 2279 (asserting that "subjective risk assessment is far more opaque, and far less accountable, than algorithmic assessment," because an algorithm can be examined and evaluated, while an individual's unexplained and implicit biases cannot); *see also* FLOWER, *supra* note 105, at 16.

little reason to provide more explanation. While machine-learning algorithm tools have been called a "black box,"[184] immigration judge decision-making is just the same black box in different form.

Immigration scholars have recognized this "data scarcity" regarding bond information.[185] In many ways, the information provided through analysis of ICE's risk assessment tool provides more information than the immigration court process. Although ICE has not willingly released information about its risk assessment tool, some information has become available via FOIA requests and some persistent litigation challenging the agency's refusal to disclose certain information under FOIA.[186] That information, while general, reveals whether detainees were labeled low, medium, or high risk for public safety and for flight, how each category was evaluated, and what percentage of detainees in each category were released or denied release.[187] The results also provide insight into ICE's scoring system for assessing whether someone is a low, medium, or high risk.[188] It shows when ICE supervisors are overriding the tool's recommendation to release detainees and also how rarely they disagree with the tools' decision to detain.[189] Additionally, the data provide some information about how mandatorily detained individuals, a class of individuals who would rarely receive a custody review in immigration court, were classified.[190] While it is regrettable that ICE did not voluntarily disclose that information, it does appear to paint a fuller picture of internal decision-making than the opaque and inaccessible decision-making of immigration judges.

184. *See* Stevenson, *supra* note 97.

185. *See, e.g.*, Ryo, *Predicting Danger*, *supra* note 18, at 231 n.6 ("Empirical studies of immigration judges' decisions beyond bond decisions are also relatively rare due to data scarcity.").

186. *See* Evans & Koulish, *supra* note 21, at 850–55.

187. *Id.* at 804–33.

188. *See id.*

189. *See id.*

190. *See id.* at 832.

C. *Lack of Individualized Decision-Making*

While algorithms are criticized for leading to categorical decisions, inaccurately analyzing data, or relying on flawed data, the immigration court bond system fosters similar problems. First, immigration judges tend to resort to categorical decision-making rather than individualized analysis. In particular, they focus extensively on prior criminal behavior and frequently use criminal convictions as a proxy for dangerousness without looking at the individual circumstances of a person's case.

Immigration judges often presume that an individual with prior arrests or convictions is automatically dangerous, regardless of the detainee's individual circumstances or the amount of time that has passed since the conviction.[191] This is not wholly surprising. Immigration judges operate against a backdrop in which Congress, executive branch officers, and appellate judges have created legal presumptions that individuals with criminal records are a danger to society. The mandatory detention provision that Congress enacted in 1996 is predicated on the presumption that individuals with any of a wide swath of criminal convictions, including virtually any drug conviction, are dangerous and therefore must be detained without an opportunity for bond during the duration of their proceedings.[192] Similarly, the Board of Immigration Appeals has held that any noncitizen with a DUI conviction—even one from ten years ago—is presumptively dangerous and should ordinarily be denied bond.[193]

The Attorney General has issued decisions finding that Haitian asylum seekers were categorically a national security risk and should automatically remain detained without regard to individual circumstances.[194] DHS at one time adopted a policy

191. *See* Ryo, *Predicting Danger*, *supra* note 18, at 247.

192. 8 U.S.C. § 1226(c).

193. Matter of Siniauskas, 27 I. & N. Dec. 207, 209 (B.I.A. 2018) (holding that "[d]riving under the influence is a significant adverse consideration in bond proceedings" and concluding that a noncitizen was dangerous even though his most recent DUI conviction was ten years old).

194. *See* Matter of D-J-, 23 I. & N. Dec. 572, 577–80 (A.G. 2003) (describing the danger that a group of 216 migrants, 207 of whom were Haitian, might pose to national security); *see also* Margaret Taylor, *Dangerous by Decree:*

"to detain without bond all noncitizens who have been convicted of a sex offense, regardless of the seriousness of the underlying offense, the detainee's risk of flight, or danger to the community."[195] In another case, DHS reportedly categorically deemed all Brazilians in Arizona to be flight risks because of heightened smuggling activity in the area.[196]

These categorical judgments have occurred even though immigration judges are supposed to make individualized assessments of dangerousness and flight risk. The legal standard for bond proceedings directs that immigration judges should not automatically deem a person dangerous with a criminal conviction but should consider the "extensiveness," "recency," and "seriousness" of any criminal activity, along with any rehabilitation, remorse, or post-conviction behavior.[197] The critical question for bond is whether an individual currently presents a danger or a flight risk, not whether that person was a danger in the past or at the time the prior crime occurred.[198] Naturally, the age of a conviction, the amount of time that has passed, and an individual's law-abiding behavior since the conviction should all be probative as to whether the noncitizen currently presents a danger or flight risk.

But that is not what is happening. Immigration judges often deem a detainee dangerous based on outdated, non-violent convictions. The case of James, described above, involving a ten-year-old marijuana conviction is just one example.[199] In *Matter of Siniauskas*,[200] the BIA overturned an immigration judge's decision setting a $25,000 bond, finding that a ten-year-old DUI conviction, along with one recent arrest (but no conviction), established dangerousness.[201] In another case, an immigration judge relied on a prior drug conviction to deny

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Detention Without Bond in Immigration Proceedings, 50 LOY. L. REV. 149, 164–67 (2004).

195. Taylor, *supra* note 194, at 168.

196. *Id.*

197. *See* Matter of Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

198. *See, e.g.*, Chi Thon Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1999) ("Measures must be taken to assess the risk of flight and danger to the community *on a current basis*." (emphasis added)).

199. *See supra* note 8 and accompanying text.

200. 27 I. & N. Dec. 207 (B.I.A. 2018).

201. *See id.* at 209–10.

bond, even though the U.S. Probation Office had determined in the underlying criminal case that the noncitizen had "a low risk of recidivism," i.e., a that the individual is unlikely to present an ongoing danger.[202] Other court cases reveal similar examples of bond denials based on temporally distant offenses or without adequate consideration of rehabilitative efforts. Based on her study of several hundred bond hearings, Emily Ryo found that immigration judges often relied on prior convictions to find dangerousness, "regardless of the recency of the last conviction and the total number of convictions."[203] Additionally, the heavy caseload and backlog immigration judges face pushes them to place outsized emphasis on criminal convictions rather than probing the full record to determine whether the detainee is currently a danger.[204]

In short, immigration judges may have a tendency to conclude, "once a criminal, always a danger." Indeed, some judges have explicitly expressed this attitude of permanent dangerousness based on a prior conviction. One federal judge, when rejecting a challenge to an immigration judge's bond denial for a detainee with a prior conviction, stated:

> [The petitioner's] continued detention is not a result of some constitutionally infirm procedure, as [the petitioner] suggests. Instead, [this] detention is the predictable consequence of his own criminal choices. Thus, the chains that now bind [the petitioner] are the chains he forged through the decisions he made and the crimes he committed.[205]

These attitudes and practices predictably result in over-detention of individuals who have minor or old convictions and who may not present a current danger to the community.

Relatedly, decision-makers in general—not just immigration judges—may be inclined to err on the side of

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202. *See* Matter of L-J- (Immigr. Ct. Mar. 2021) (case documents on file with author).

203. *See* Ryo, *Predicting Danger*, *supra* note 18, at 247 (describing that either a felony or violent conviction significantly increases the odds of being deemed dangerous, regardless of total number or recency).

204. *See supra* note 193 and accompanying text.

205. *See* Chajchic v. Rowley, No. 1:17-CV-457, 2017 WL 4401895, at *6 (M.D. Pa. July 25, 2017), *report and recommendation adopted*, No. 1:17-CV-457, 2017 WL 4387062 (M.D. Pa. Oct. 3, 2017).

detention rather than release. In some formats, risk assessment tools provide recommendations to a decision-maker who must then adopt or override that recommendation. Some examples show that decision-makers override the tool when it recommends a more lenient outcome but not when it recommends detention or more onerous release conditions. One study of probation and parole officers concluded that "practitioners routinely exercise substantial discretion to choose interventions that are more restrictive or intensive than the tool recommends."[206] With respect to ICE's risk assessment tool for immigration detention, when decisions went to supervisors, they "usually accepted the detention recommendations and overrode most of the few release recommendations."[207] This may reflect what some call the "Willie Horton" effect—based on the powerful attack ad that sunk Michael Dukakis's 1988 presidential campaign—which makes judges worry more about the risk of being held accountable if someone they release later commits a crime than about the risk of unfairly keeping someone behind bars.[208]

ICE also appears to categorically deny release to individuals with certain criminal records, even in the face of judicial orders to conduct individualized assessments. In a 2020 class action on behalf of medically vulnerable detainees at heightened risk for contracting COVID-19, a federal district court ordered ICE to conduct individualized assessments of all detainees with specified medical risk factors to determine whether they could be released.[209] Furthermore, the court ordered that ICE must make individualized determinations of each detainee's public safety and flight risk to be considered alongside the detainee's specific susceptibility to COVID-19, and

206. *See* Joel Miller & Carrie Maloney, *Practitioner Compliance with Risk/Needs Assessment Tools*, 40 CRIM. JUST. & BEHAV. 716, 728 (2003); *see also* Stevenson, *supra* note 97, at 334, 373 (discussing and later concluding from a study of Kentucky pretrial risk assessment judges "deviated" from the tool's recommendation "more often than not").

207. *See* Koulish, *supra* note 137, at 7.

208. *See, e.g.*, Roni Caryn Rabin, *Vulnerable Inmates Left in Prison as Covid Rages*, N.Y. TIMES (Feb. 27, 2021), https://perma.cc/63BA-GVZD (last updated July 19, 2021); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 696 (2009).

209. Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 724 (C.D. Cal. 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021).

stated that "blanket or cursory denials" will not satisfy the court's requirement for an individualized determination.[210] Despite these instructions, ICE continued to issue numerous blanket denials to individuals with criminal convictions or who were likely to be imminently deported.[211]

By contrast, ICE's current risk assessment tool, notwithstanding its flaws, does consider the age of a prior conviction when scoring one's safety risk.[212] This suggests that a risk assessment tool could be designed to consider appropriate factors, such as the amount of time since the detainee's most recent conviction, that immigration judges often fail to consider.

D. *Failure to Consider Relevant Factors, Such as Inability to Pay a Bond*

In addition to failing to engage in an individualized consideration of dangerousness, many immigration judges often fail to give an individualized consideration of the detainee's financial circumstances. Even when immigration judges grant a bond, they frequently set the bond at a level that the noncitizen cannot afford, resulting in continued detention for no reason other than the inability to pay.[213] If the theory of money bond is that the risk of forfeiting the bond will incentivize an individual to attend future hearings, then the amount of money necessary to cause one to appear should depend on the resources one has.[214] The wealthier one is, the more money might be necessary to compel an appearance. Conversely, for someone of limited means, a smaller amount will suffice. Setting a bond at a level that exceeds one's ability to pay serves no purpose whatsoever,

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210. Fraihat v. U.S. Immigr. & Customs Enf't, No. EDCV 19-1546 JGB (SHKx), 2020 WL 6541994 at *12 (C.D. Cal. Oct. 7, 2020).

211. *See* Order Appointing Special Master at 5–6 (Doc. 281), Fraihat v. U.S. Immigration & Customs Enforcement, No. EDCV 19-1546 JGB (SHKx) (C.D. Cal. Mar. 10, 2021).

212. Evans and Koulish, *supra* note 21, at 810–12.

213. *See* Sarah Betancourt, *Immigrants Pay Cripplingly High Bail Bonds to Be Released from Detention Across US*, THE GUARDIAN (Aug. 25, 2021), https://perma.cc/TMA6-2969.

214. *C.f. generally* JUST. POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL (2012), https://perma.cc/8EQW-L9Y5 (PDF) (discussing the long-standing theory that using money bond increases appearance rates).

unless you believe that no affordable amount of money would be sufficient to compel a future court appearance.

Money bond has been extensively criticized and is widely thought not to serve its intended purpose.[215] In fact, one justification for using risk assessment tools is that it moves away from a cash bond structure because risk assessment focuses on public safety and flight risk rather than one's ability to pay.[216] But if immigration judges are going to use a money bond system, then the amount set should at least be tied to one's ability to pay. At a minimum, ability to pay should be a factor that immigration judges consider when determining how high or low of a bond to set, or whether to release detainees on their own recognizance—i.e., without requiring a monetary payment.

Nonetheless, immigration judges often refuse to consider the detainee's financial constraints or limited ability to pay when setting a bond. In some cases, immigration judges appear to believe that they are not permitted to assess ability to pay, and in others, they just appear to disregard it.[217] Immigration

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215. *See, e.g.*, LIU ET AL., *supra* note 147, at 13; Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, AM. BAR ASS'N J. (Apr. 1, 2016), https://perma.cc/6KH5-3QY4 ("By conditioning freedom on the ability to pay, they say, bail systems needlessly imprison poor defendants who pose no threat. Meanwhile, wealthy people go free regardless of what danger they might pose."); Christopher Ingraham, *Why We Spend Billions to Keep Half a Million Unconvicted People Behind Bars*, WASH. POST (June 11, 2015), https://perma.cc/984E-SCX6 ("[P]eople sit behind bars not because they're dangerous, or because they're a flight risk, but simply because they can't come up with the cash."); AM. BAR ASS'N CRIM. JUST. STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE 31 (3d ed. 2007) (rejecting the idea that "risk of financial loss is necessary to prevent defendants from fleeing prosecution").

216. *See, e.g.*, Stevenson, *supra* note 97, at 317–20 (describing how the movement in favor of bail reform and use of risk assessment has proposed it as a superior alternative to money bail because risk assessment "encourages decision-making based on the risk of flight or future crime, not the ability to pay bail").

217. Several federal courts have found that immigration judges improperly failed to consider a detainee's financial circumstances or ability to pay a bond, holding that immigration judges are required to consider ability to pay when setting bond amounts. *See, e.g.*, Abdi v. Nielsen, 287 F. Supp. 3d 327 (W.D.N.Y. 2018); Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017) (finding that the policy of refusing to consider ability to pay when setting bond likely violated detainees' due process rights); Brito v. Barr, 415 F. Supp. 3d 258 (D. Mass. 2019) (finding that immigration judges must consider ability to pay and alternatives to detention when setting bond); Dubon Miranda v. Barr, 463 F.

judges regularly set bonds at levels that exceed the noncitizen's ability to pay, resulting in the ongoing detention of individuals who are neither a safety nor a flight risk.[218] The median bond amount currently stands at $8,500,[219] and it is an amount that, unlike criminal bail, must be paid in full to effectuate release.[220] It is therefore likely that a substantial percentage of detainees cannot afford such high bond amounts. As a comparison point, 80% of criminal pretrial detainees in Kentucky who have bail set at $500 or less are able to secure their release within three days of booking, while only 30% of detainees with a $5,000 bond and only 20% of detainees with a $10,000 bond were able to post bond within three days of booking.[221] Ultimately, the immigration court system's continued reliance on cash bond results in the unnecessary detention of individuals who present neither a significant danger nor a risk of flight.

E. *Failure to Consider Alternatives to Detention*

Furthermore, immigration judges often refuse to consider alternatives to detention such as community programs, orders

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Supp. 3d 362 (D. Md. 2020) (holding that due process likely required immigration judges to consider ability to pay and alternatives to detention in bond hearings); Lett v. Decker, 346 F. Supp. 3d 379, 389 (S.D.N.Y. 2018) ("Furthermore, the Court agrees with Petitioner that an immigration bond hearing that fails to consider ability to pay or alternative conditions of release is constitutionally inadequate."). Additionally, in response to a federal lawsuit, immigration judges in Southern California must agree to consider a detainee's ability to pay when setting a bond amount. *See* Settlement Agreement at Ex. A, 5, Hernandez v. Garland, No. 5:16-00620-JGB-KK (C.D. Cal. Mar. 29, 2022), ECF Doc. 357.

218. *See Three-Fold Difference in Immigration Bond Amounts by Court Location*, *supra* note 146 (reporting that about 20% of individuals granted bond in immigration court remained detained, presumably because of their inability to pay the bond amount); INSECURE COMMUNITIES, DEVASTATED FAMILIES, *supra* note 147, at 9–11 (finding that 55% of noncitizens in New York who were granted bond could not afford to pay it.); *see also* Gilman, *supra* note 26, at 201 (discussing how many immigrants will remain detained simply because they cannot afford to pay their bond).

219. *See Representation at Bond Hearings Rising but Outcomes Have Not Improved*, TRAC IMMIGR. (June 18, 2020), https://perma.cc/E7SS-BMVG.

220. *See id.*

221. *See* Stevenson, *supra* note 97, at 348–49; *see also* INSECURE COMMUNITIES, DEVASTATED FAMILIES, *supra* note 147, at 11 (finding that immigration bonds in New York City were set vastly higher than in criminal court).

of supervision, or regular check-ins, many of which have been shown to prevent flight and result in very high attendance rates at future hearings.[222] One federal pilot program, for example, found that electronic monitors, rather than detention, were highly effective at reducing flight risk while also being less costly than detention.[223] Individuals who used electronic monitoring appeared in court more than 99% of the time.[224] Other studies suggest that the perceived risk of flight may be overstated and can be mitigated by other measures. For example, securing legal representation for noncitizens has been shown to help ensure that those who are released from detention will show up at future hearings.[225] Other forms of supervised

222. *See* Gilman, *supra* note 26, at 197 (asserting that immigration regulations "do not give immigration courts clear authority to order release from detention upon conditions other than bond, such as electronic monitoring or registration for services"); Das, *supra* note 20, at 158 (noting that "many immigration judges" see the law "as prohibiting them from releasing noncitizens on any conditions other than bond").

223. *See* U.S. GOV'T ACCOUNTABILITY OFF., ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 15–26, 30 (2014), https://perma.cc/NT7S-WDPG. Electronic monitoring, however, has its own costs, including exposing noncitizens to constant surveillance, lack of privacy, and physical and mental stress. *See, e.g.*, Holper, *supra* note 27; BENJAMIN N. CARDOZO SCH. OF L. KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC, FREEDOM FOR IMMIGRANTS, & IMMIGRANT DEF. PROJECT, IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 12–13 (2021), https://perma.cc/4XGB-G8H5 (PDF) [hereinafter IMMIGRATION CYBER PRISONS]; *ICE Digital Prisons: The Expansion of Mass Surveillance as ICE's Alternative to Detention*, MIJENTE (June 23, 2021).

224. *See* IMMIGRATION CYBER PRISONS, *supra* note 223, at 9 (revealing that electronic monitoring achieved a 99% appearance rate in a study that involved over 2100 participants).

225. *See Most Released Families Attend Immigration Court Hearings*, TRAC IMMIGR. (June 18, 2019), https://perma.cc/2U8G-PXRS (finding that those with legal representation show up to hearings over 99% of the time, that those without representation are only marginally less likely to attend, and that many of those who miss their hearings do not get adequate notice of their hearings); Das, *supra* note 20, at 153 ("Studies have indicated that, in a significant percentage of cases, INS failed to notify noncitizens of the pending removal proceedings against them."); *see also* NINA SIULC & NOELLE SMART, VERA INST. OF JUST., EVIDENCE SHOWS THAT MOST IMMIGRANTS APPEAR FOR COURT HEARINGS (2020), https://perma.cc/7C7C-FVU5 (PDF) (finding that 98% of noncitizens with legal representation showed up at future hearings); *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR., https://perma.cc/7A4Z-9CC3 (finding that 98.7% of non-detained asylum seekers showed up for their court hearings); Ingrid Eagly & Steven Shafer, *Measuring* In Absentia

release, such as regular check-ins with an ICE officer or community support programs, also present a viable alternative to detention.[226] Moreover, studies in the federal criminal system show that supervised release is only about one-tenth as costly as detention.[227] Nonetheless, immigration judges routinely refuse to consider alternatives to detention, such as monitoring and supervised release, when deciding whether to grant or deny bond and when considering at what amount to set bond once granted.[228]

F. *Arbitrary and Inconsistent Reasoning*

Given that many immigration judges are not assessing a detainee's ability to pay, the bond amounts that immigration judges set often seem arbitrary and unrelated to a detainee's risk of flight. Some analyses show a wide range of average bond amounts across different immigration court jurisdictions, suggesting that the jurisdiction, or the predispositions of the particular judges in those jurisdictions, may be more relevant for predicting the bond amount than the individualized circumstances of the detainee.[229] Just as national origin affects

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Removal in Immigration Court, 168 U. PA. L. REV. 817, 873 (2020) (noting that, over an eleven-year period, 88% of noncitizens attended all their court hearings).

226. *See* IMMIGRATION CYBER PRISONS, *supra* note 223, at 25–28 (elaborating that community-based support programs can ensure high rates of appearance at future proceedings while minimizing privacy, health, and other harms associated with more intrusive electronic monitoring programs).

227. *Supervision Costs Significantly Less than Incarceration in the Federal System*, ADMIN. OFF. OF THE U.S. CTS. (July 18, 2013), https://perma.cc/4HPG-5R72.

228. *See* Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024, 1036 (W.D. Wash. 2019) (overturning an immigration judge's bond denial when the immigration judge failed to consider whether other conditions of supervision mitigated the detainee's danger and risk of flight); Ramos v. Sessions, 293 F. Supp. 3d 1021, 1037 (N.D. Cal. 2018) (finding that the immigration judge "failed to adequately consider whether alternatives to detention could protect the community from any continued dangerousness [petitioner] might pose").

229. *See Three-Fold Difference in Immigration Bond Amounts by Court Location*, *supra* note 146 (suggesting that individualized circumstances play a smaller role than legally intended); Gilman, *supra* note 26, at 212 ("The average bond amounts set by different immigration judges vary greatly without any apparent explanation for the disparities." (citations omitted)).

the likelihood of being denied or granted bond,[230] national origin also seems to correlate to bond amount.[231] In other cases, the bond amount seems to be based on the nature of the detainee's underlying conviction, without any explanation as to how that bears on flight risk.[232]

In other cases, immigration judges and government attorneys may manipulate a particular factor so that it always supports detention. One example concerns family or community ties. Current case law directs immigration judges to consider a noncitizen's "family ties" and "community ties" in assessing flight risk.[233] To be sure, there is some question as to whether family and community ties are probative of flight risk in immigration matters and others have documented various reasons that newly-arrived noncitizens fleeing persecution are highly motivated to attend future hearings even if they do not have family in the United States or have not yet developed strong community ties.[234] That being said, immigration judges can apply the factor inconsistently. If an individual has weak family ties, the immigration judge may find a higher flight risk because there is nothing that ties the noncitizen to the community.[235] On the other hand, if a noncitizen has strong family ties, ICE attorneys and immigration judges have argued that this also shows a high flight risk because there are many people who would help the noncitizen hide and avoid showing up for future hearings.[236]

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230. *See supra* notes 151–155 and accompanying text.

231. *See Importance of Nationality in Immigration Court Bond Decisions*, *supra* note 146 (finding that "the required bond amount also varies widely by nationality").

232. *See, e.g.*, Matter of Siniauskas, 27 I. & N. Dec. 207, 210 (B.I.A. 2018) (describing how the immigration judge set bond at $25,000 to reflect "the seriousness with which this court views the respondent's repeated conduct").

233. *See* Matter of Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *Siniauskas*, 27 I. & N. Dec. at 209.

234. *See* Gilman, *supra* note 26, at 207 ("Recently arriving asylum seekers may have few or no existing ties in this country but may have every incentive to appear for hearings in order to seek refugee status and avoid deportation to a country where they face physical harm or death."); Noferi & Koulish, *supra* note 4, at 80–81.

235. *See, e.g.*, Noferi & Koulish, *supra* note 4, at 80.

236. *See, e.g.*, United States v. Paulino, 335 F. Supp. 3d 600, 611 (S.D.N.Y. 2018); Audio Recording of Bond Hearing, *Matter of* [redacted] (Nov. 18, 2018) (on file with author).

G. *Improper Political Influence and Lack of Independence*

Immigration judges are subject to undue political influence which undermines their independence and increases the incentive to order detention rather than release on bond. Immigration Judges are not Article III judges; they are employees of the Department of Justice.[237] Immigration judges serve under the direction of a law enforcement officer: the Attorney General; they can be hired and fired by the Attorney General at will; and they do not receive civil service protections.[238] Unlike Administrative Law Judges (ALJs), who are hired through the civil service process and can be fired only for good cause,[239] immigration judges do not have these same employment protections.[240] Moreover, the Attorney General not only oversees the immigration court system but also acts as a prosecutor, defending removal orders and opposing habeas corpus actions that challenge detention decisions.[241] In other words, the person in charge of hiring and firing immigration judges is the same person who is actively seeking to deport and

237. *See* 8 U.S.C. § 1101(b)(4) (stating that immigration judges are officers appointed by the Attorney General, that they shall be subject to Attorney General supervision, and that they "shall perform such duties as the Attorney General may prescribe"); 8 C.F.R. § 1003.10(a) (2023) ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges. . . . Immigration judges shall act as the Attorney General's delegates in the cases that come before them.").

238. *See* 8 U.S.C. § 1101(b)(4).

239. *See* 5 U.S.C. § 7521 (establishing how ALJs can be disciplined). Further, ALJs have procedural protections against removal, as their disciplinary matters are heard by a separate body, the Merit Systems Protection Board (MSPB), whose judges also have civil service protections. *See id.*; *id.* § 1202(d) (providing good cause protections for members of the MSPB).

240. *See* 8 U.S.C. § 1101(b)(4) ("Immigration judges shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878, 54893 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3)

> Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission.

241. *Office of Immigration Litigation*, U.S. DEP'T OF JUST., https://perma.cc/2Z2R-VT9Z.

detain noncitizens. This creates a conflict of interest that incentivizes immigration judges to detain more and release less out of a fear that they may otherwise face adverse employment consequences.

This conflict is not simply theoretical. Recent Attorneys General have used their authority to appoint immigration judges who favor deportation and detention over the individual rights of detainees.[242] The Trump Administration, for example, prioritized political leanings over substantive expertise in appointing immigration judges and appointed individuals with no prior immigration law experience.[243]

This political pressure may be even more prevalent for immigration judges handling detained cases. Practitioners in one focus group commented that "judges on detained dockets were more 'vicious' and had more 'antagonism' than judges on non-detained dockets."[244] Immigration judges may also feel pressure to fill available bed space in detention centers due to federal contracts that guarantee tens of thousands of available slots in these centers.[245] Furthermore, some studies suggest that this political pressure may impact bond decisions and that immigration judges were more likely to deny bond during the Trump Administration's era of anti-immigrant rhetoric than

242. *See* INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 12 (2019), https://perma.cc/96JE-MRHR (PDF) [hereinafter THE ATTORNEY GENERAL'S JUDES] (citing focus group members discussing how immigration judges display a bias in favor of law enforcement and support government attorneys over noncitizens and their representatives). Recent litigation alleges that the administration's hiring practices "seem to skew in favor of essentially promoting candidates whose track records indicate the potential to stray from impartial adjudication in furtherance of the administration's goals." Complaint at ¶ 11, Am. Immigr. Laws. Ass'n v. U.S. Dep't of Just., No. 1:20-cv-00752 (D.D.C. Mar. 17, 2020).

243. *See* Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, THE HILL (Feb. 3, 2020), https://perma.cc/7AWE-XJQH ("EOIR recently swore in 28 immigration judges, and 11 of them had no immigration law experience.").

244. THE ATTORNEY GENERAL'S JUDGES, *supra* note 242, at 16.

245. *See* Anita Sinha, *Arbitrary Detention: The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 93–94 (2017); Koulish, *supra* note 137, at 13 ("Federal government auditors found that the national bed minimum has at times influenced ICE to detain more individuals, although the precise impact on any particular case was unclear."); Gilman, *supra* note 26, at 183.

during previous administrations.[246] In short, immigration judges may be explicitly or implicitly influenced by extra-legal factors and political calculations, rather than by the particular facts of an individual detainee's case.

Comparing bail decisions in the immigration context to those in the criminal pretrial context also suggests that the current immigration system is built to detain and that it does not effectively assess detainees' public safety or flight risk. The percentage of individuals in immigration detention who are denied release by ICE is significantly greater than the percentage of individuals denied bail in the criminal arena.[247] Mark Noferi and Robert Koulish showed that ICE denied release of 91% of detainees in the Baltimore Field Office jurisdiction, while judges in criminal pretrial matters recommend denial in only 20% to 30% of cases.[248] While the percentage of cases granted bond at the immigration court level is a bit higher, at slightly under 50%,[249] that is still dramatically lower than the 70% to 80% release rate in criminal cases.[250] And the difference is actually even more stark, as immigration judges do not make any bond determination for individuals who are mandatory detainees and thus barred by statute from seeking bond.[251] Yet criminal pretrial detention turns on the same factors as immigration detention—public safety and flight risk.[252] Given that studies show that both undocumented immigrants and lawfully-present immigrants are significantly less likely to commit crimes than native-born U.S. citizens and thus likely present less of danger than the general population,[253]

246. *See, e.g.*, Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1865 (2020) ("We find that on every metric of bond hearings, noncitizens fared worse during the Trump Era than they did during either the Bush II or Obama Eras.").

247. *See* Noferi & Koulish, *supra* note 4, at 47 ("Criminal law scholars criticize jurisdictions in the U.S. pretrial detention system that unnecessarily detain 38 to 42 percent of defendants. Meanwhile, in fiscal year 2013, ICE detained nearly 80 percent of its arrestees.").

248. *Id.* at 50.

249. *See supra* note 146 and accompanying text.

250. *See* Noferi & Koulish, *supra* note 4, at 50.

251. *See* 8 U.S.C. § 1226(c).

252. *See supra* Part II.A.

253. *See* Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native Born US Citizens*

the higher detention rate for noncitizens likely reflects some other bias or predisposition than it does an accurate assessment of one's flight or safety risk.

The highly politicized nature of immigration adjudication is so well known that numerous organizations have called on Congress to make immigration courts independent Article I courts rather than continue with the current structure.[254] Taken together, the above factors suggest that immigration judges can be influenced by political considerations, can face implicit pressure to detain in order to please their law enforcement supervisors, and may be likely to come into their position with a pro-detention mindset.

H. *Inadequate Opportunities for Periodic Review*

Finally, the immigration court bond structure is a blunt and imprecise tool for assessing ongoing safety and flight risk over time. Safety and flight risk are fluid concepts. A criminal conviction from six months ago may be more probative of future danger than a conviction from six years ago.[255] A person who is denied bond as a safety risk at one point in time may present less of a safety risk six months later. Yet, once the immigration judge makes an initial decision to deny bond, there is no entitlement to periodic review over time to determine whether an individual initially determined to be a safety risk is still a

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in Texas, 117 PNAS 32340, 32340 (2020), https://perma.cc/3YPY-632R (PDF) (finding that "[r]elative to undocumented immigrants, US-born citizens are over 2 times more likely to be arrested for violent crimes, 2.5 times more likely to be arrested for drug crimes, and over 4 times more likely to be arrested for property crimes" from Texas's data from 2012 to 2018); Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), https://perma.cc/RNF2-7VXU ("But the social-science research on immigration and crime is clear: Undocumented immigrants are considerably less likely to commit crime than native-born citizens, with immigrants legally in the United States even less likely to do so.").

254. *See, e.g.*, A.B.A. COMM'N ON IMMIGR., 2019 UPDATE REPORT, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5 (2019) [hereinafter 2019 UPDATE REPORT] (advocating for "the conversion of the administrative immigration court system housed in the Department of Justice to one that is independent of DOJ or any other department or agency").

255. *See supra* notes 197–198 and accompanying text.

safety risk.[256] Once bond is denied, noncitizens can get a new bond hearing only if they show that their "circumstances have changed materially since the prior bond redetermination."[257] Passage of time, however, will not constitute a change in circumstances.[258] Even factors that are relevant at the initial bond hearing, such as a stable home or place to live, or family ties, will not always qualify as changed circumstances that permit a new custody review by an immigration judge.[259]

Moreover, because of this limitation on seeking a new bond hearing, there is no easy way for detainees who receive a bond but cannot afford it to ask the immigration judge to reduce it.[260] By contrast, some criminal pretrial detention systems allow for review of bail amounts where an individual fails to pay.[261] In Kentucky, for example, if "the defendant does not post bail within twenty-four hours, the pretrial officer notifies the court,

256. 8 C.F.R. § 1003.19(e) (2023).

257. *Id.*

258. *See In re* Fordjour, No. AXXX XX9 516-SAN, 2010 WL 3355119, at *2 (B.I.A. July 30, 2010) (finding that the detainee was not entitled to custody redetermination nine months after initial bond denial and concluding that detainees have no "right to serialized custody hearings" in the absence of changed circumstances); *cf.* Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 276–80 (3d Cir. 2018) (finding that, as a matter of due process, an individual who was denied bond was not constitutionally entitled to a second bond hearing after his detention continued for another year).

259. *See In re* Abarca-Zepeda, No. AXXX XX4 273-MIA, 2011 WL 1373415, at *1 (B.I.A. Mar. 25, 2011) ("In addition, we agree with the Immigration Judge that evidence of the respondent's intention to live with his fianc[é] if released from custody does not constitute a material change in circumstances since the prior bond hearing."); *In re* Monzon, No. AXX XX2 801–ELOY, 2008 WL 2401128, at *1 (B.I.A. May 14, 2008) (finding that detainee's receipt of cancellation of removal was not a material change in circumstances warranting a new custody review where the grant of relief was not yet final); *see also* Matthew Boles, *Motion for Subsequent Custody Redetermination Hearing: What to Know About Asking an Immigration Judge for Bond Again*, 3 AILA L.J. 217, 220–22 (2021) (collecting cases finding that a grant of immigration relief or dismissal of underlying criminal charges could constitute a changed circumstance and cases finding that new information about family ties did not constitute changed circumstances).

260. *See supra* notes 256–258 and accompanying text.

261. *Cf.* MICHAEL R. JONES, PRETRIAL JUST. INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 23 (2013) (detailing how Dallas County, Texas reevaluates whether a defendant can be released on recognizance after the defendant cannot afford to post bail).

at which point the judge can choose to change the bond."[262] If the defendant remains detained after that, the defendant can again seek to have the bond reduced at the first hearing before the judge.[263] The immigration detention system, by contrast, provides for no such review of bond amounts.

Taken together, these factors reveal that the current immigration detention and bond regime are highly flawed. The structural weaknesses of both the immigration court bond system and ICE's detention policies are widely known.[264] That may be why advocacy groups and scholars cautiously applauded ICE's decision to utilize a risk assessment tool for immigration detention.[265] To be sure, that tool has not worked out as advocates hoped and appears not to have reduced detention rates.[266] In fact, some organizations are now suing ICE and arguing that its risk assessment tool is unconstitutional because it leads to categorical denials of release rather than individualized assessments, and that political actors have manipulated the tool for the purpose of increasing detention rates.[267] But the fact that organizations initially expressed hope about risk assessment and encouraged its adoption demonstrates the level of dissatisfaction with the existing structure for making bond decisions and the recognition that it leads to widespread over-detention.

In light of these shortcomings, it is worth asking whether risk assessment tools have anything to offer for reforming immigration detention. So far, only ICE has experimented with

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262. Stevenson, *supra* note 97, at 346.

263. *Id.*

264. *See* 2019 UPDATE REPORT, *supra* note 254, at 5.

265. *See* Noferi & Koulish, *supra* note 4, at 48 ("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."); Das, *supra* note 20, at 162 (suggesting that a risk assessment tool will allow the government "to make better decisions about the flight risk and danger posed by a noncitizen pending removal proceedings" and ultimately to reduce detention rates).

266. *See supra* notes 135–143 and accompanying text.

267. *See, e.g.*, *Velesaca* Complaint, *supra* note 21, at ¶2 (alleging that "[b]y mid-2017, ICE had changed its tool's algorithm to prevent it from recommending that people be released on bond or on their own recognizance").

risk assessment for immigration detention decisions.[268] Risk assessment has not yet been used at the immigration court level. As described above, risk assessment tools raise serious concerns about fairness, transparency, accuracy, and racial bias. Nonetheless, one should be careful before writing off risk assessment entirely. Instead, given the weaknesses of the current immigration detention structure, it is worth considering how risk assessment could be used more effectively, or alternatively how using risk assessment could promote reform by better exposing the systemic flaws and political manipulation of the current system of opaque, inaccessible, and non-transparent bond hearings. The next Part explores whether adopting risk assessment at the immigration court level could offer benefits and provides some options for how a risk assessment system could be structured.

IV. WHAT CAN RISK ASSESSMENT OFFER?

The previous Parts have explored strengths and weaknesses of risk assessment models as well as the strengths and weaknesses of immigration judge decision-making. This Part examines—in light of the recognized weaknesses of both structures—what risk assessment might offer if it were employed in the immigration court system to make bond determinations. Importantly, this discussion does not conclude that risk assessment is superior to immigration judge determinations or that it should be employed in every immigration court. Rather, it proposes that a risk assessment tool has the potential to offer some benefits if it were employed carefully and deliberately.[269] It also can provide opportunities for study and data collection that could generate better information both about the functioning of risk assessment tools and about immigration judge decision-making.[270]

If this data show that neither humans nor tools are fair or effective when predicting risk, that could show that the foundation of the nation's immigration detention system is

268. *Cf.* Evans & Koulish, *supra* note 21, at 793 (explaining that the Department of Homeland Security created the RCA for use by ICE to make pretrial detention decisions).

269. *See infra* Part IV.F.

270. *See infra* Part IV.C.

fundamentally flawed and provide a basis for more significant detention reform or even for abolishing detention altogether. Given that we are in a risk assessment age, and that governments may use these technological tools regardless of their warts,[271] the purpose here is to think about ways that risk assessment could be used to study the current system, ways that it could be designed to encourage transparency and independent review, and ways that it can create some level of independence in an otherwise politically beholden administrative adjudication system.

The time is ripe for considering the role of risk assessment in immigration court bond decisions. The current administration has shown an interest in addressing immigration detention and in making detention decisions more targeted.[272] Although a deadlocked Congress makes substantial legislative reform on immigration unlikely,[273] it may be possible to implement a risk assessment program administratively through notice-and-comment regulation.[274] The Immigration and Nationality Act[275] does not require bond decisions to be made by immigration judges.[276] The Act delegates authority to detain or release noncitizens to the Attorney General, but does not specify the manner by which the Attorney General must make that decision.[277] Rather, the immigration judge's role in making bond decisions is established by regulation.[278] Thus, if

271. *See* Sonja B. Starr, *The Risk Assessment Era: An Overdue Debate*, 27 FED. SENT'G REP. 205, 205 (2015) ("It is an understatement to refer to risk assessment as a criminal justice trend. Rather, we are already in the risk assessment era.").

272. *See supra* note 24 and accompanying text.

273. *See, e.g.*, Emily Cochrane & Luke Broadwater, *Biden Concedes Social Policy Bill Is Stalled as Immigration Plan Falters*, N.Y. TIMES (Dec. 16, 2021), https://perma.cc/VEE2-PQLN.

274. *See* 5 U.S.C. § 553 (authorizing government agencies to create regulation via notice-and-comment rule making and detailing the requirements of such rule making).

275. 8 U.S.C. §§ 1101–1504.

276. *See id.* § 1226(a)(1)–(2).

277. *See id.* By comparison, the Act requires an immigration judge to adjudicate and render decisions with respect to removal. *See id.* § 1229a(a)–(c) (stating that immigration judges shall conduct removal hearings and decide whether a noncitizen should be ordered removed from the United States).

278. *See* 8 C.F.R. § 1003.19 (2023); *id.* § 1236.1(d)(1) (2023).

the Department of Justice decides that it wants to experiment with using risk assessment to make bond decisions, it would appear to have the statutory authority to adopt new regulations that incorporate or authorize risk assessment tools.

A. *Tool Design and Oversight*

As previously discussed, transparency in design and an effective system of review, oversight, and revision are critically important for any risk assessment tool.[279] Any of the potential benefits discussed below are dependent on establishing a tool that is (i) transparent; (ii) subject to independent review, validation, and public input; and (iii) revisable based on the results of that independent review.[280]

In imagining how to design a transparent tool, the First Step Act[281]—a law related to criminal sentencing—may serve as an informative model. The First Step Act, enacted in 2018, instituted a variety of reforms to federal criminal sentencing.[282] Of relevance here, the Act "tasks the Department of Justice and the [Bureau of Prisons] with design and implementation of a new risk assessment instrument" for certain sentencing and post-sentencing determinations.[283] The purpose of this risk assessment tool is to categorize federal prisoners as minimal, low, medium, or high risk.[284] But what is notable about the legislation is the way that it builds both transparency and independent review into its assessment structure. While the Act empowers the Attorney General to choose which risk assessment tool to adopt, the Act also creates an "Independent Review Committee."[285] That committee must include people who are experienced with or have studied risk assessment.[286] It is

279. *See supra* Parts III.B, III.F.

280. *See, e.g.*, Noferi & Koulish, *supra* note 4, at 58 (summarizing literature concluding that risk assessment tools "should be transparently validated" and that "[w]ithout outside scrutiny, their reliability is questionable").

281. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

282. *Id.*

283. Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 121, 135 (2019).

284. 18 U.S.C. §§ 3621(h)(1), 3632(a); Garrett, *supra* note 283, at 114.

285. 18 U.S.C. §§ 3631–3632.

286. *Id.*

tasked with reviewing different tools and then making recommendations to the Attorney General about which tool to use.[287] The Act further requires that whichever tool is chosen must be reviewed, validated, and publicly reported every year.[288]

The Department of Justice must submit an annual report to Congress regarding the tool.[289] The Act also expressly requires the Department of Justice to consider if the tool is having a disparate impact on any demographic group, such as race.[290] Finally, the Act calls for ongoing review and reassessment of the tool.[291] The Attorney General must submit reports to Congress every five years regarding its risk assessment program.[292]

A similar model could be applied in immigration court. Whether or not it is identically followed, the First Step Act provides a blueprint for a risk assessment tool that is (i) open and visible to the public; (ii) reviewed, validated, and scrutinized by independent experts rather than political appointees (although final decisions may be made by political appointees); (iii) periodically reviewed and updated; and (iv) designed to specifically investigate whether the tool is having a disparate impact on specific groups.[293] If the Department of Justice decides to issue rules regarding risk assessment in immigration court, those rules could incorporate First-Step-Act-type procedures of transparency, independence, validation, and review.[294] Of course, even if the agency incorporates a tool with the types of procedural safeguards described above, that does not automatically mean it will lead to better outcomes than the

287. *Id.*

288. *Id.* § 3631(b)(4); Garrett, *supra* note 283, at 118.

289. 18 U.S.C. § 3631(b)(4).

290. *Id.*

291. *Id.* §§ 3632–3633.

292. *See* Garrett, *supra* note 283, at 120 n.109.

293. *See supra* notes 285–292 and accompanying text.

294. Alternatively, if the agency decided to utilize risk assessment through agency guidance documents rather than notice-and-comment rules, then the risk assessment tool likely could only be advisory rather than mandatory. That is because the rules would still authorize immigration judges to make bond decisions. So, absent new notice-and-comment rules, an immigration judge could consider any recommendation made by a risk assessment tool as one more data point or piece of evidence, but the judge would retain ultimate authority to grant or deny bond.

current bond and detention system. But it may offer a variety of possibilities worth considering, which are discussed below.

B. *Increased Transparency*

Although risk assessment tools have been described as a black box, they could allow for more transparency than the current bond system. An open and public tool would allow stakeholders to see just how much weight is afforded to specific risk factors, such as prior criminal history, the age of that criminal history, family ties, rehabilitative efforts, and so on. Right now, very little information exists on how immigration judges weigh these factors.[295]

By contrast, even just the limited data that diligent, committed lawyers have wrested from ICE about its risk assessment tools through FOIA litigation reveals more information than what we know from immigration judge decisions. That data show the factors that are weighed in determining danger and risk of flight, including prior convictions, type and age of conviction, community ties, employment history, previous failures to appear, special vulnerabilities, the scores given to each factor, and which overall scores will lead to detention, release, or referral of the ultimate decision to a supervisor.[296] It also shows which potentially relevant factors the tool does not consider, including eligibility for immigration relief and conditions in or ties to the individual's country of origin.[297] While one might disagree with the way that ICE designed its tool and whether it is accurate, at least we have some information about how it makes its decisions.

Similarly, a well-designed risk assessment framework will provide transparency with respect to when changes are made to the tool. If the tool is publicly available and independently reviewed, everyone will be able to see when the tool is changed,

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295. *See supra* notes 168–190 and accompanying text.

296. *See* Evans & Koulish, *supra* note 21, at 804–33.

297. *See id.* at 805

> [T]he [tool] does not take into account certain factors that should be considered when deciding whether to detain someone. Specifically, the RCA does not account for threats to national security, eligibility for relief, eligibility for a U or T visa, length of lawful status in the U.S., entry as a minor, lack of ties to the home country, conditions in the home country, or nationality that renders removal unlikely.

altered, or amended. If changes are imposed for political purposes, as ICE has been accused of doing with its tool, then that is something the public will see. By contrast, the public does not see how political pressure impacts immigration judges. Immigration judges may feel implicit or subtle pressures to decide cases in certain ways based on statements from the Attorney General or based on internal agency communications that are not openly available for public scrutiny.[298] In other words, if there is increasing pressure for immigration judges to increase (or decrease) detention, that pressure often is applied out of the public eye. Or it operates implicitly, in the sense that immigration judges might respond to that pressure, but certainly will not mention it when issuing a bond decision. By contrast, if the public can bear witness every time the government adjusts the tool, it will know when the government is adjusting to make bond easier or harder to obtain.

Moreover, at present it is very difficult to aggregate bond data when decisions are made by individual judges across the country in cases involving non-public and often paper records.[299] With a risk assessment tool, it becomes easier to aggregate data and to see, for example, what percentage of individuals with a DUI conviction were granted bond, or how many people who have lived in the United States for more than ten years before being detained were denied bond. If nothing else, a risk assessment tool may help to paint a clearer picture of how bond decisions are made than the opaque picture we currently have.

C. *Opportunities for Study*

Immigration scholars lament that it is very difficult to examine bond outcomes and that more empirical study is needed.[300] Risk assessment scholars similarly lament that while criminal risk assessment is widely used, better studies are needed to assess its efficacy and impact.[301] The immigration detention system is nationwide and renders thousands of

298. *See supra* notes 240–245 and accompanying text.

299. *See supra* notes 183–185 and accompanying text.

300. *See supra* note 18 and accompanying text.

301. *See, e.g.*, Stevenson, *supra* note 97, at 341 (describing shortcomings of prior risk assessment studies and concluding that "there is a sore lack of research on the impacts of risk assessment in practice").

custody decisions each year.[302] This offers numerous opportunities for designing different studies to compare results between immigration judges and the risk assessment tool. The government could pilot the tool in specific jurisdictions and compare the results to immigration judges in other jurisdictions, or compare the results to the results from prior years in the same jurisdiction. It could design intra-jurisdictional studies, where some judges make their own decisions and others follow the tool. Similarly, one could design a study for a single judge, where on alternating weeks, say, the immigration judge makes decisions like they are currently made, and then the next week follows the risk assessment tool, and compare the results. One could have immigration judges make decisions as they do now, without the benefit of the tool, and then use the tool afterward to see what result it would reach.[303] There should be a variety of opportunities to use the tool to learn more about how immigration judges make bond decisions.

D. *Independence from Political Pressure*

As explained above, the immigration court system has been extensively criticized as unduly subject to political influence, in no small part because immigration judges lack independence or civil service protection and instead can be hired and fired at will.[304] This means that decisions may be driven by an implicit desire to meet the policy goals of political bosses rather than more neutral concerns.[305] Creating a truly independent immigration court system, such as by turning them into Article I courts, would require congressional action that seems unlikely to occur anytime soon. In the absence of broader legislation, however, risk assessment offers an opportunity to insert a small layer of insulation from political interference and add a measure of independence into the current system. If the tool is designed,

302. Niu & Rhyne, *supra* note 79; *see supra* notes 69–71 and accompanying text.

303. This assumes that such experiments would be lawful and that it would not be "arbitrary and capricious" or unconstitutional to divide up immigration courts so that sometimes judges make decisions and sometimes risk assessment tools make decisions. *See* 5 U.S.C. § 706(2)(a). This Article offers no opinion on that question.

304. *See supra* notes 239–246 and accompanying text.

305. *See supra* notes 244–246 and accompanying text.

selected, and validated by a committee of independent experts, that takes one level of decision-making out of the hands of political actors and allows for a more independent evaluation of flight risk and danger.

Even if the ultimate decision of which tool to use rests with the Attorney General (or some other political appointee), that person most likely will be choosing among a list of possibilities vetted by the independent committee. And if the Attorney General acts against the committee's recommendation, that would become public knowledge and could negatively impact both the tool's and the Attorney General's legitimacy.[306] Such actions would suggest that choices about risk assessment tools reflect a political calculation rather than a scientific one.[307] Right now, by contrast, the public has no window for seeing how decisions are made and there is no evidence of any independent review mechanism for immigration judge bond decisions.[308]

Similarly, using a tool that is public and transparent will enable the public to see if changes to the tool are made for political purposes. If the agency has to explain each change it wants to make to the algorithm to the independent review committee or as part of the notice-and-comment process, the public can more readily see where political influence comes into play. For example, in 2017, ICE allegedly adjusted its risk

306. Having an independent advisory committee involved can be an important factor for ensuring fairness, even when the committee's recommendations are not followed. One example is the recent controversy over the approval of the medication Aducanumab for treating Alzheimer's disease. When the FDA voted to conditionally approve the drug, over the near-unanimous recommendation against approval by the FDA's advisory committee, that decision caused significant controversy and several scientists resigned from the committee in protest. Pam Belluck & Rebecca Robbins, *Three F.D.A. Advisers Resign Over Agency's Approval of Alzheimer's Drug*, N.Y. TIMES (June 10, 2021), https://perma.cc/2ZGX-KND2. The blowback from these actions caused the FDA Acting Commissioner to request that the Inspector General for the Department of Health and Human Services investigate the decision to approve the drug. Jamie Gumbrecht, *Acting FDA Commissioner Calls for Independent Investigation into Approval of Alzheimer's Drug*, CNN (July 9, 2021), https://perma.cc/TKP9-D5AD. It also prompted two Congressional committees to open an investigation into the FDA's process for approving Aducanumab. *See* Letter from Rep. Frank Pallone, Jr. and Rep. Carolyn B. Maloney to Dr. Janet Woodcock, Acting FDA Comm'r (Sept. 1, 2021), https://perma.cc/8HS4-N623 (PDF).

307. *See supra* notes 111–112 and accompanying text.

308. *See supra* notes 183–185 and accompanying text.

assessment tool simply for the purpose of increasing detention and reducing release, causing the rate of recommended releases to fall from 47% to 3%.[309] In the current system, immigration judges facing political pressure can make those adjustments implicitly and out of the public eye.[310] But with a public risk assessment tool that requires changes to be identified and justified, such political influence can become more identifiable. In short, while we continue to wait for a fully independent immigration court system, risk assessment tools, if carefully designed, can introduce one level of independence and political buffer into the bond decision-making process.

E. *Opportunities for Reforming the Bond Process*

Introducing a risk assessment tool also allows opportunities for reforming the bond process by ensuring consideration of factors relevant to flight risk and safety that immigration judges do not currently consider. For example, the tool could allow for greater consideration of changed circumstances and particularly the passage of time. An individual's safety or flight risk is not static; it can change over time. Risk assessment tools, to the extent they consider criminal history, recognize that the significance of a prior arrest or conviction may wane over time as that event recedes farther into the past.[311] If the risk assessment tool used in immigration court recognized the age of an event as a relevant factor, then this would necessarily mean that an individual's risk level may go down over time. Currently, immigration judges do not ordinarily conduct periodic re-evaluation of bond decisions and do not consider passage of time to be a changed circumstances that would justify a new bond hearing.[312] Yet, a noncitizen's circumstances are prone to change, say if the detainee "acquires legal representation, ability to post bond, NGO sponsorship for shelter, or work

309. *See* Hannah Bloch-Wehba, *A Lawsuit Against ICE Reveals the Danger of Government-by-Algorithm*, WASH. POST (Mar. 5, 2020), https://perma.cc/Q446-UR2P. *See generally Velesaca* Complaint, *supra* note 21.

310. *See supra* notes 183–184 and accompanying text.

311. *See, e.g.*, Evans & Koulish, *supra* note 21, at 810–12 (noting that ICE's risk assessment tool considers the age of a prior conviction when assigning weight to it).

312. *See* cases cited *supra* note 258 and accompanying text.

authorization."[313] A risk assessment tool, by contrast, might enable periodic review and recalculation of a detainee's score over time and could consider new data and information as part of those periodic reviews. An individual who is initially considered a flight or safety risk might be re-evaluated as a low risk six months later. It should not be a complicated task to set up a tool to conduct regularized periodic review for immigration detainees. This would offer an additional safeguard against unduly prolonged detention that does not exist in the current immigration court bond system.

Similarly, an independently designed and validated tool could weigh factors that many immigration judges do not currently consider. In particular, the tool could account for an individual's ability to pay bond in deciding whether to recommend release without a monetary bond, or to recommend release with certain conditions of supervision in lieu of a monetary bond. If the tool recommends a bond, and an individual remains detained because of inability to pay, there could be an avenue for a reassessment and adjustment or elimination of the bond amount, just as certain state criminal programs do.[314]

Additionally, using a risk assessment tool could ultimately reveal the disutility of a cash bond system and provide a basis for moving away from cash bond and toward alternative measures—such as community support programs, supervised release, or electronic monitoring—for ensuring both public safety and the likelihood that the noncitizen will appear at future hearings.[315] If a risk assessment tool can offer somewhat valid predictions of flight and safety risk without having to recommend a specific bond amount, that would simply underscore that money bond is not necessary for protecting against the risk of flight. This would provide greater justification for moving away from cash bond, and, in particular, the onerous 100% pre-payment requirement for immigration bonds. In turn, this would help mitigate the number of

313. Noferi & Koulish, *supra* note 4, at 82.

314. *See* Stevenson, *supra* note 97, at 346 (noting that if a defendant fails to post bond within twenty-four hours, the court can adjust the bond amount).

315. *See supra* notes 222–228 and accompanying text.

noncitizens who are granted bond but who remain detained because they cannot afford to pay it.

Finally, a risk assessment tool could also help to incrementally reduce the overburdened dockets that immigration judges face. Immigration judges in detention facilities handle both bond and removal matters.[316] Taking some custody decisions off their docket and diverting them to a risk assessment tool would give immigration judges comparatively greater time to spend on their removal docket.

F. *Some Validation Is Better than No Validation*

A risk assessment tool also offers the opportunity to validate results and to better incorporate relevant factors into custody decisions. To be sure, there is a widespread debate about the accuracy and fairness of risk assessment tools and the reliability of the information that such tools use to make recommendations.[317] Those risks should not be underestimated or downplayed. There is certainly no guarantee that risk assessment tools will lead to fairer outcomes.

At the same time, risk assessment offers a chance for careful design and validation that does not appear to exist in the current immigration court system. Moreover, the tool could be periodically reviewed, assessed, and validated by independent experts. Does any of that guarantee a fair result? No. But some validation may be preferable to no validation. And right now, as explained above, there is virtually no validation mechanism for immigration court bond decisions.[318] While any risk assessment tool may come with plenty of warts, the opportunity for requiring validation from ongoing assessments may allow for greater scrutiny than exists in the current system.

Similarly, a risk assessment tool allows for more rigorous scrutiny and attention to the risk of racial and ethnic bias. Adoption of a risk assessment tool would come with the knowledge and public awareness that such tools create a risk of perpetuating or exacerbating racial disparities.[319] That is why the First Step Act, for example, specifically mandates that, as

316. *See* PRACTICE MANUAL, *supra* note 171, at § 1.4.

317. *See supra* notes 106–124 and accompanying text.

318. *See supra* note 185 and accompanying text.

319. *See supra* notes 121–126 and accompanying text.

part of the ongoing evaluation of its risk assessment tool, the evaluators specifically investigate whether the tool is imposing a disparate impact on specific demographic groups.[320] By comparison, while immigration judge bond decisions may reflect implicit (or explicit) bias, that bias is difficult to uncover and document, let alone remedy. Trying to assess bias in current bond decision-making is an imperfect exercise, relying on information about bond grant rates by nationality and other general information. Thus, while risk assessment tools create a risk of biased decision-making, they may also bring greater awareness of that risk and a corresponding opportunity for attention to it and revision of the assessment tool as appropriate.

G. *Impetus for Legislative Reform of Mandatory Detention Statutes*

Implementing a risk assessment tool for bond decision-making also may provide a basis for promoting legislative reform of mandatory detention provisions.[321] Current law requires detention without a bond hearing for certain arriving aliens and for many noncitizens with prior criminal convictions.[322] Moreover, the statute requires detention for the entire duration of the noncitizen's removal proceeding, no matter how long that proceeding may take.[323] A significant percentage of immigration detainees are subject to these statutory mandatory detention provisions.[324] Indeed, because of mandatory detention, immigration court bond decisions, whether made by an immigration judge or a risk assessment

320. 18 U.S.C. § 3631(b)(4).

321. *See* Koulish, *supra* note 137, at 31.

322. 8 U.S.C. § 1226(c).

323. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 837–38 (2018).

324. Estimates of the number of detainees subject to mandatory detention vary. *See Mandatory Detention*, DETENTION WATCH NETWORK, https://perma.cc/8MNZ-TUGN ("According to ICE, over 70 percent of immigrants in detention are mandatorily detained."). One organization asserts that mandatory detention affects as many as 200,000 noncitizens every year. DETENTION WATCH NETWORK, FACT SHEET ABOUT MANDATORY DETENTION 4, https://perma.cc/548N-XX4Y (PDF). A study of detainees under the supervision of the Baltimore Field Office, by contrast, found that around 42% of detainees were mandatorily detained. *See* Koulish, *supra* note 137, at 18.

tool, will leave out this large subset of detainees who are not entitled to any bond hearing in the first place.

The mandatory detention regime has been widely criticized as over-inclusive and harmful.[325] The rationale for mandatory detention is that Congress established a presumption that certain categories of noncitizens presented a public safety or flight risk.[326] Thus, Congress concluded that they should automatically be detained without the need for an individualized hearing. In other words, the lynchpin of the mandatory detention regime is the asserted need to impose a presumption on certain categories of individuals. However, if the government were to adopt a risk assessment tool that is validated and open to public scrutiny, and if that tool is regarded as being able to make effective judgments about an individual's flight or safety risk, the purported need for a presumption disappears.

If we come to believe that a risk assessment tool can make relatively accurate assessments, then we can use that tool to evaluate all detainees without the need for a blunt and sweeping statutory presumption. Ultimately, if a risk assessment tool is tried and if it comes to be trusted over time, then Congress may feel that it can repeal the statutory presumption because of its faith in the ability of the risk assessment tool to effectively evaluate danger and flight risk. Of course, there are multiple assumptions embedded in this idea: that the risk assessment tool will have a significant degree of accuracy, that it will be validated, that it will gain public trust, and that Congress will respond by eliminating the statutory presumption of danger and flight risk. Some (or all) of these assumptions may never come to pass. But experimentation with risk assessment may allow us to determine if a risk assessment tool can push the needle toward reforming the mandatory detention statute.

At the same time, it is possible that utilizing risk assessment could undermine the impetus for more systematic reform of the detention system. As others have argued, true

325. *See* Das, *supra* note 20, at 147–55; Koulish, *supra* note 137, at 30–31 (finding that many mandatory detainees had other equities that made them low flight risks).

326. *See* S. REP. NO. 104-48, at 6–7 (1995) (describing aliens with criminal convictions as dangerous as justification for enacting statutory provisions imposing mandatory detention).

detention reform would entail broader use of supervised release, release on one's own recognizance, community-based supervision, and providing a right to legal representation.[327] But if the government introduces a risk assessment tool, it may feel that it has engaged in reform, which could reduce the momentum for considering larger-scale changes to the detention regime.[328]

While that is a significant concern, it does not mean that risk assessment should be rejected out of hand. First, at least at the current moment, the political appetite for detention reform is weak.[329] Second, as explained above, risk assessment tools offer the opportunity to gather data and evidence from an otherwise opaque system.[330] That collection of data, depending on what it shows, may highlight the need for broader reform and strengthen the argument for undertaking a broader overhaul of immigration detention and immigration courts. Thus, it is far from clear that introducing risk assessment will necessarily impede more substantial change.

H. *Exposing Arbitrariness*

What if introducing a risk assessment tool shows merely that risk assessment tools rely on faulty data and make poor decisions? Even if all we learn is that both humans and tools are bad at predicting one's future danger and flight risk, that is valuable information. Such information would show that we are (at least for the moment) hopelessly flawed at trying to guess whether we should infringe on noncitizens' liberty by detaining

327. *See, e.g.*, Srikantiah, *supra* note 14, at 546–48; Marouf, *supra* note 74, at 2155–70; Gilman, *supra* note 26, at 224.

328. *See, e.g.*, Aly Panjwani, *Rigged by Design,* INQUEST (Oct. 29, 2021), https://perma.cc/M8AX-XPGH (arguing that the ICE risk assessment tool reinforces existing pro-detention biases and distracts attention away from policy reform to eliminate immigration detention).

329. *See, e.g.*, Rebekah Wolf, *Immigration Detention and Enforcement Are a Mixed Bag in Biden's First Year*, AM. IMMIGR. COUNCIL (Dec. 17, 2021), https://perma.cc/PUV8-EEBL (noting that overall detention numbers have risen by 50% during President Biden's first year and criticizing the administration for exempting immigration detention centers from the government's decision to stop contracting with private prisons).

330. *See supra* Parts IV.B–C.

them on the ground that they present a danger of flight risk.[331] Our legal system is built on the idea that individuals are entitled to their liberty unless there is some justification for curtailing it.[332] The purported justification for immigration detention is that it is necessary to protect society from individuals who are a danger or who present a risk of flight.[333] If we cannot determine who is a danger or flight risk with any reliable degree of accuracy, then that justification evaporates and calls into question the validity of immigration detention as a whole. Thus, learning that both humans and risk assessment tools are poor predictors of danger and flight risk could provide a basis for reevaluating and possibly dismantling immigration detention writ large.

But even if society is not ready to eliminate immigration detention entirely, a risk assessment tool may at least merit consideration for no other reason than prior studies showing that such tools hold the promise of reducing detention and its attendant collateral consequences without compromising either safety or attendance at future hearings.[334] While there are exceptions, prior studies generally show that risk assessment tools tend to recommend detention less frequently than humans, and to recommend release more frequently than humans.[335] Thus, when humans get involved in the process, detention goes up. More often than not, when the tools' recommendations are not followed, it is because of human interference—interference that increases detention rates.[336] In the immigration context, when humans override a risk assessment recommendation, they almost exclusively override a release recommendation and almost never override a detention recommendation.[337] In other

331. *Cf.* Mayson, *supra* note 1, at 2225 ("In making the mechanics of prediction transparent, algorithmic methods have exposed the disparities endemic to all criminal justice risk assessment, subjective and actuarial alike.").

332. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

333. *See supra* note 326 and accompanying text.

334. *See supra* notes 222–226 and accompanying text.

335. *See supra* notes 100–101 and accompanying text.

336. *See* Stevenson, *supra* note 97, at 334.

337. *See supra* note 139 and accompanying text.

cases where a recommendation for release is not followed, it may be because of budget constraints or the lack of alternative supervision programs in which to place detainees.[338] Detention may result from a public failure to create and support feasible alternatives to detention. In short, risk assessment tools seem to show that detention can be reduced, and liberty can be increased, without compromising public safety.[339]

There is no doubt that tools have their flaws and that they are prone to misuse. But these results at least indicate that the tools warrant some consideration and that there is reason to experiment with them in certain contexts. One such context is immigration, where the current bond decision-making process is seriously flawed, geared toward promoting detention, not subject to oversight, and prone to abuse and political interference.[340] Again, this is not to say that risk assessment tools should be welcomed with open arms. It is important to experiment with eyes wide open, in recognition of the dangers that accompany such tools.[341] But we should also keep our eyes open to the flaws of the existing immigration detention regime and recognize the potential that risk assessment tools—ones that are carefully designed, validated, and subject to public scrutiny—might offer.

One criticism of risk assessment tools is that they are not necessarily better than humans, but that because they appear scientific, they offer a false image of scientific objectivity.[342] This criticism is understandable and worth heeding, but it should not automatically disqualify any attempt to experiment with risk assessment tools in immigration bond proceedings. First, the potential flaws and biases of risk assessment tools have been well-documented, and so there is widespread awareness that the tools are imperfect.[343] Second, if the risk assessment tool is transparent and available for public scrutiny, it has the potential to expose political or pseudo-scientific manipulation. If political actors change the tool without offering a strong

338. *See* Garrett, *supra* note 283, at 121–22.
339. *See* Evans & Koulish, *supra* note 21, at 794–96.
340. *See supra* notes 242–246 and accompanying text.
341. *See supra* notes 106–124 and accompanying text.
342. *See supra* notes 111–112 and accompanying text.
343. *See supra* notes 106–126 and accompanying text.

justification, then the veneer of independent scientific judgment will evaporate. If political actors disregard the recommendations of scientific experts, that also will expose problems with the tool. That said, there are always risks that an independent review board will be subject to agency capture or that they will be selected in a way that will compromise their independence. Accordingly, even if risk assessment is utilized to make bond determinations, it is important to maintain a skeptical eye and rigorously scrutinize the process. But it is not clear that the risk of placing false legitimacy on risk assessment tools is greater than the risk of placing false legitimacy on the current immigration court system. In other words, there is a high risk of ascribing false legitimacy to bond decisions whether or not risk assessment tools are used.

CONCLUSION

The federal government's immigration detention system impacts hundreds of thousands of noncitizens and their families and friends every year. The current system in which immigration judges make bond decisions by assessing dangerousness and risk of flight is beset with shortcomings and has caused widespread over-detention. While there was hope that the government's interest in using risk assessment tools to inform detention decisions would lead to a more rational outcome and would reduce detention without compromising safety, early studies of ICE's risk assessment tool suggests that it has not significantly impacted detention. Nevertheless, risk assessment tools have become ingrained in our society in numerous ways and this trend does not show any signs of going away. While it is important to pay close attention to the concerns that risk assessment raises, it also is important to pay attention to the concerns that the current immigration court bond system raises. With the use of risk assessment tools on the rise, it is important to consider whether these tools could play a useful role in immigration court bond decisions. As this Article has attempted to show, a well-designed, reviewed, and transparent risk assessment tool has the potential to counteract some of the more regrettable aspects of the current bond regime, or, at the very least, offer an opportunity for data gathering and study of immigration detention that may provide a foundation for more sweeping reforms of a deeply flawed system.