

Immigration Detention in the Risk Classification Assessment Era

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I. INTRODUCTION AND SUMMARY OF FINDINGS

Since 2013,¹ Immigration and Customs Enforcement (ICE) has had the capacity to tailor immigration detention to those who are truly dangerous and to release others into community supervision for monitoring.² Between 1996 and 2013, Congress relied on mandatory detention provisions (such as mandatory detention³ and minimum bed mandates⁴) and agency discretion to contain “violent aliens” and ensure immigrant appearances in court. In this article, I argue that these far-reaching punitive measures have become anachronistic in the risk era,⁵ a sentiment echoed by multiple 2016 presidential candidates⁶ and congressional members, who see the measures as wasteful, overbroad, and a violation of civil liberties.

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¹ See U.S. DEP’T OF HOMELAND SEC., Office of Inspector Gen, *OIG-15-22, 4 U.S. Immigration and Customs Enforcement Alternatives to Detention (Revised)*, (2015). https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

² See U.S. DEP’T OF HOMELAND SEC., *U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2015 Congressional Justification*, 64–66 (Feb. 2015) (ICE stated goals to “focus costly detention space on criminal and priority aliens,” and “[c]ontinue to prioritize aliens for ATD who present the highest risk of flight.”).

³ 8 U.S.C. § 1226(c) (2012); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), Pub. L. No. 104-208 (1996).

⁴ *Consolidated Appropriations Act, 2016*, Pub. L. No. 114-113, § 2(f)(II), 129 STAT. 2244, 257-58 (2015) (“funding made available under this heading shall maintain a level of not less than 34,000 detention beds”), <https://www.congress.gov/bill/114th-congress/house-bill/2029/text>.

⁵ See ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Sage Publications ed., 1992) (1986), for general discussion of the risk era.

⁶ Tierney Sneed, *Clinton Criticizes Immigrant Detentions Under Obama*, U.S. NEWS & WORLD REPORT, (May 6, 2015) (former Secretary Clinton: “[T]here is actually a legal requirement that so many beds be filled. So people go out and round up people in order to get paid on a per-bed basis. I mean that just makes no sense at all to me.”), <http://usnews.com/news/articles/2015/05/06/hillary-clinton-criticizes-immigrant-detention-practices-under-obama>; Bernie Sanders, *A Fair and Humane Immigration Policy*, BERNIE SANDERS (last accessed January 18, 2016), <https://berniesanders.com/>

This article presents an empirical investigation of how, through risk assessment, ICE has detained a record-breaking 2.5 million immigrants during the Obama Administration, which early on announced its intention to oversee the decriminalization of immigration detention and its desire to see the use of detention limited to those who really need it.⁷

In 2009, an ICE study (the Schriro Report) recommended that ICE adopt risk assessment⁸—an actuarial tool designed to prioritize serious public safety risks using detailed, evidence-based assessments of individuals. ICE adapted the Risk Classification Assessment from the criminal justice system, where similar tools have reduced pretrial detention levels.⁹ In January 2013, ICE fully deployed RCA nationwide.¹⁰

As imagined in the Schriro Report, risk assessment would help serve as a technological palliative to the problem of draconian over-detention. It would improve the uniformity of detention decisions, effectively identify dangerous individuals, and increase ICE's successful use of alternatives to detention (ATD). With RCA, ICE could limit detention for those identified with a "propensity for violence," which the Report said was distinct from that of the criminally incarcerated.¹¹

Plans for RCA also signaled new ICE enforcement priorities around dangerousness. In 2010, ICE Director John Morton revised ICE's enforcement priorities to identify national security and public safety dangers as ICE's "highest immigration enforcement priority." Priority One thus included noncitizens convicted of crimes, especially "violent criminals, felons, and repeat offenders."¹² In November 2014, DHS Secretary Johnson clarified these priorities further. Today, Priority One includes those convicted of "aggravated felonies" or a state felony (other

issues/a-fair-and-humane-immigration-policy/ (advocating that "Congress defund the detention bed quota").

⁷ Dora Schriro, *Immigration Detention Overview and Recommendations* 3 (Washington, DC: U.S. Immigration and Customs Enforcement (ICE), 2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁸ *Id.*

⁹ See Pretrial Justice Institute, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (Gaithersburg, MD: Pretrial Justice Institute, 2012), [www.pretrial.org/Featured%20Resources%20Documents/PJI%20Risk%20Assessment%20101%20\(2012\).pdf](http://www.pretrial.org/Featured%20Resources%20Documents/PJI%20Risk%20Assessment%20101%20(2012).pdf).

¹⁰ OIG-15-22, *supra* note 1, at 4.

¹¹ *Id.* at 2, 17, 21.

¹² Memorandum from U.S. Immigr. and Customs Enf't Assistant Secretary John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, 2 (June 30, 2010) <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>. Within Priority One, the memo further defined sub-priorities as Level 1, those convicted of "aggravated felonies" or two felonies; Level 2, those convicted of any felony or three misdemeanors; and Level 3, those convicted of misdemeanors. Recent illegal entrants were Priority Two, and those with prior removal orders were Priority Three. *Id.* at 2–3.

than an offense containing immigration status as an element). Priority Two includes those convicted of three misdemeanors arising out of separate incidents, or a “significant misdemeanor,” generally including convictions for which the penalty exceeds 90 days or certain domestic violence, driving under the influence (DUI), burglary, firearms, sexual abuse, and drug crimes. Priority Three includes those with removal orders issued after January 1, 2014.¹³

According to the enforcement priorities set in 2010 and 2014, ICE should reserve detention for noncitizens meeting public safety based priorities, or for those whom Congress mandated be detained.¹⁴ There is substantial overlap between these two groups, as Congress has mandated detention for individuals convicted of most felonies and many types of misdemeanors. Although ICE’s enforcement priorities failed to substantively discuss the role that flight risk should play in ICE’s detention decision making, ICE’s budget requests for supervised release programs, also known as “alternatives to detention” (ATD),¹⁵ clearly refers to plans for flight risk assessment. Besides, flight risk is a central part of RCA assessment protocol even though ICE’s RCA guidance to its officers has emphasized that the “intended goal” of RCA methodology was “optimizing public safety,” rather than focusing on flight risk.¹⁶

With RCA and ATD, ICE would have capacity to achieve its enforcement priorities while also leaving detention as a last resort. Thus, ICE’s use of its RCA tool fits within a broader effort by U.S. Department of Homeland Security (DHS) in the Obama Administration—particularly since November 2014—to focus immigration enforcement resources on

¹³ Memorandum from U.S. Dep’t of Homeland Sec. Secretary Jeh Johnson, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, 3–4 (November 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. See also Memorandum from U.S. Dep’t of Homeland Sec. Secretary Jeh Johnson, Secure Communities, 2, (November 20, 2014), (changing policy to limit ICE detainer requests to requests for notification, for those in the first two priorities, only with criminal convictions) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

¹⁴ Memorandum from U.S. Immigr. and Customs Enf’t Director John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, 3 (March 2, 2011), (“As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law.”), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; Johnson, *supra* note 12, at 5 (similar).

¹⁵ U.S. DEP’T OF HOMELAND SEC, *supra* note 2. (ICE stated goals to “focus costly detention space on criminal and priority aliens,” and “[c]ontinue to prioritize aliens for ATD who present the highest risk of flight.”)

¹⁶ U.S. Dep’t of Immigrations and Customs Enf’t, *RCA Quick Reference Guide 1.0* May 2012, <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/RCA%20Materials%20ICE%20RCA%20Materials%20RCA%20Quick%20Reference%20Guide%201.0.%20May%202012.pdf>.

high priority cases and exercise discretion in other ones.¹⁷ But the degree to which RCA will reduce U.S. detention numbers remains unclear. 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 percent of those individuals upon whom ICE conducted RCA between July 30, 2012 and December 31, 2013.¹⁸

This article investigates the relationship between ICE enforcement priorities and mass detention at a time when computers increasingly make important legal decisions that affect individual liberty in the immigration context. Despite RCA's promise, this article explains the limited impact of RCA on ICE detention outcomes (herein referred to as the Study) by analyzing 592 risk assessments that ICE's Baltimore Field Office performed in spring 2013, based on data provided to the author through the Freedom of Information Act (FOIA). Similar to national rates, according to the Study ICE's Baltimore office detained about 82 percent of those individuals upon whom ICE conducted RCA. From analyzing ICE's Baltimore decisions, three primary factors explain the limited impact of ICE's use of RCA on detention outcomes.

First and foremost, statutory mandatory detention provisions prevent ICE from releasing a majority of its arrestees, including many that RCA identified as low public safety risks.¹⁹ The findings below show that nearly two-thirds (63 percent) of ICE's Baltimore arrestees, identifiable as entering a particular type of removal process at the time ICE ran RCA, were classified as mandatorily detainable.²⁰ In the future, the rates of those mandatorily detained are likely to increase, since DHS in November 2014 narrowed its enforcement priorities to those with serious criminal

¹⁷ See ROSENBLUM & MCCABE, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 1–7 (Washington, DC: Migration Policy Institute, 2014), <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>.

¹⁸ OIG-15-22, *supra* note 1, at 11–12, 25. In fiscal year 2013, ICE detained nearly 441,000 individuals nationally; JOHN SIMANSKI, IMMIGRATION ENFORCEMENT ACTIONS: 2013 (Washington, DC: DHS Office of Immigration Statistics, 2014), 5, https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

¹⁹ SHEBAYA & KOULISH, DETAINED WITHOUT PROCESS: THE EXCESSIVE USE OF MANDATORY DETENTION AGAINST MARYLAND'S IMMIGRANTS, (ACLU, 2016).

²⁰ This report is the first to report a rate of mandatory detention among ICE arrestees. Nationally, U.S. GAO reported that 77 to 80 percent of noncitizens in detention facilities were mandatorily detained, from FY 2011 through FY 2013. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, 28, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* (2014). <http://www.gao.gov/products/GAO-15-26>. However, the percentage of those in detention facilities that are mandatorily detained may differ from the percentage of those *arrested* that are mandatorily detained.

convictions, those apprehended at the border, and those with recent prior immigration violations.²¹

Second, ICE's RCA tool classified a surprisingly large share of ICE arrestees as medium and high flight risks. This in turn resulted in high rates of detention recommendations even for those whom ICE had discretion to release. RCA identified only 4.9 percent as low flight risk (and correspondingly, only 1.7 percent as low flight risk *and* low public safety risk), while identifying 59.1 percent as high flight risk. In turn, RCA recommended only 0.8 percent of arrestees for release in Baltimore, similar to the nationally reported rate.²² Meanwhile, despite the focus on public safety in DHS's formal enforcement priorities, public safety did not appear to be the primary determining factor in who was detained or not. The public safety risk of those detained in the Baltimore sample differed little from those released.

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. Overall, in the Baltimore sample, RCA recommended detention in 77.2 percent of cases, and ICE supervisors decided to detain 81.1 percent of cases.²³ Furthermore, when RCA tasked supervisors with making a detention determination in 20.9 percent of cases, they opted to detain subjects in a majority (57.1 percent) of those cases as well.²⁴ Given these three factors—mandatory detention provisions, RCA's tendency to identify individuals as higher flight risks and recommend them for discretionary detention, and supervisors' acceptance or independent choice of recommendations to detain—it appears unlikely that RCA as implemented in spring 2013 will facilitate reductions in detention.

Additionally, these findings—and the data underlying them—more broadly inform public debate on several intersections between risk, ICE's use of detention, DHS and ICE enforcement priorities, and Congressional detention mandates.²⁵ For example, while ICE's adherence to

²¹ U.S. DEP'T OF HOMELAND SEC., *Fixing Our Broken Immigration System Through Executive Action - Key Facts*, DHS (accessed January 18, 2016), <http://www.dhs.gov/immigration-action>.

²² Nationally, from July 30, 2012 to December 31, 2013, RCA recommended 0.6 percent for release on community supervision (1,558 out of 228,095). OIG-15-22, *supra* note 1, at 11, 25. The DHS Inspector General report did not report public safety and flight risk assessments.

²³ Based on data pursuant to FOIA, from March-July, 2013.

²⁴ *Id.*

²⁵ Comprehensive immigration reform which passed the Senate but not the House in 2013 would have required ICE to report annually to Congress on "risk assessment results... including if the alien is subject to mandatory custody or detention." Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st sess., § 3720(b)(10), (e).

Congressional mandatory detention provisions may impede ICE's efforts to tailor detention to public safety risks, advocates have asked DHS to reinterpret the statutory provision that mandates custody for individuals with certain prior crimes, and into change its RCA process to account for asylum seekers found to have a credible fear of persecution. And while ICE continues to prioritize detention of public safety threats and aims to place high flight risks into ATD supervised release programs, ICE nevertheless detained most of the individuals in Baltimore that RCA assessed as low public safety but high flight risk. If similar nationwide, such findings would validate arguments that ATD programs have successfully ensured appearance at proceedings at lower cost.²⁶

Further, mandatory detention provisions and ICE supervisor decisions led to the detention of many with special vulnerabilities, such as primary caretakers, the elderly, ill, persecuted, and LGBT individuals, even though ICE has de-prioritized their detention, and RCA specifically identifies those individuals.²⁷ Moreover, if the nationwide population has a similarly low share of low public safety risks, such RCA assessments would undercut the rationale for Congress' mandated national bed minimum of "not less than 34,000 detention beds daily."²⁸ Lastly, while President Obama has stated his intention that DHS focus enforcement on "felons, not families,"²⁹ the Baltimore data suggest it will be difficult in practice to detain and deport criminal offenders without deporting some parents and other family members.

II. U.S. IMMIGRATION DETENTION: THE STATUTORY FRAMEWORK

Decisions to detain are governed by the terms of section 236 of the Immigration and Naturalization Act (INA), 8 U.S.C. 1226. When taking a noncitizen into custody, ICE officers must decide whether to detain the individual or release him or her pending deportation. Two basic steps are involved in this decision. First, ICE determines whether the noncitizen individual is a member of certain classes that must be detained until their deportation proceedings end, per U.S. Congressional mandates (subject to

²⁶ GAO-15-26, *supra* note 19, at 18, 30 (95 percent of those in the U.S. ATD program appear at a final removal hearing, and ATD costs U.S. \$10.55 per day versus \$158 per day for detention).

²⁷ *See infra* § III.A.

²⁸ *See* DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI AND CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, 127 (2013). <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

²⁹ "We're going to keep focusing enforcement resources on actual threats to our security. Felons, not families." Barack Obama, President, Remarks by the President in Address to the Nation on Immigration (November 20, 2014). <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

some court-imposed limits). This is referred to as mandatory detention.³⁰ Second, ICE officers and supervisors may exercise discretion in those cases where Congress has not mandated detention,³¹ and generally do so based on two categories of risk factors: flight and public safety.

Additionally, Congress has mandated that ICE maintain a minimum number of detention beds nationwide on any given day—which may influence ICE to detain certain people who might otherwise be released, though it is unclear whether and how the bed-minimum affects discretion in individual cases. This is referred to as the "bed mandate."

A. Mandatory Detention

Congress has imposed mandatory detention at the outset of removal processes on two groups of unauthorized immigrants and other removable noncitizens: (1) those convicted of certain prior crimes, and (2) those placed into non-judicial removal proceedings (i.e., removed administratively by DHS, rather than after a full hearing before an immigration judge). Additionally, at the end of removal processes, Congress has required mandatory detention for 90 days after an immigration judge issues a formal removal order.³²

1. Mandatory Detention for Prior Crimes

In 1996, against the backdrop of rising anti-immigrant and anti-crime sentiment, Congress mandated in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that immigration enforcement authorities "shall take into custody" pending removal individuals who committed a remarkably broad category of fairly minor crimes, "when the alien is released" from criminal custody.³³

³⁰ 8 U.S.C. § 1226(c)

³¹ *See id.* §1226(a)

³² 8 U.S.C. § 1231(a)(2) (2012). ("During the [90-day] removal period, the Attorney General shall detain the alien.") After a removal order is issued, different statutes and standards apply to ICE's detention decisions (i.e., 8 U.S.C. § 1231 and accompanying regulations). If ICE is unable to remove the individual within 90 days, ICE may conduct a custody review based primarily on flight risk and public safety risk. 8 C.F.R. § 241.4(d) (2016). Following the review, ICE may choose to continue to detain the noncitizen, or choose to release him or her under supervision. 8 U.S.C. §§ 1231(a)(3), (6) (2012); 8 C.F.R. §§ 241.4-.5 (2016). Detention, however, may not constitutionally extend beyond a period "reasonably necessary to secure removal," and the U.S. Supreme Court has held six months to be presumptively reasonable. *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001). However, exceptions exist for individuals deemed to be especially dangerous or security risks. 8 C.F.R. § 241.14 (2016).

³³ 8 U.S.C. § 1226(c) (2012); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), *supra* note 3. Mandatorily detained noncitizen can request a conviction review hearing in immigration court. *Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). The noncitizen can appeal that bond redetermination to the Board of Immigration Appeals (BIA). 8 C.F.R. § 236.1(d)(3) (2016).

The crimes requiring detention without a bond hearing pending removal include “aggravated felonies” and “crimes involving moral turpitude” under federal immigration law,³⁴ which can include drug possession, disorderly conduct, and other relatively minor offenses.³⁵ ICE must ensure that the offense matches those federal definitions before subjecting a noncitizen to mandatory detention. For state crimes—which most noncitizens removed for crimes have committed—the definitions “aggravated felonies” and “crimes involving moral turpitude” differ from state to state.³⁶ As a recent ACLU report found, ICE nearly always resolves legal ambiguity from different states’ definitions of crimes in favor of the government, leaving noncitizens in detention.³⁷ Although there is no public data on individuals mandatorily detained for criminal convictions, this number is potentially significant given the large number that DHS removes following a criminal conviction.³⁸

Mandatory detention applies to lawful permanent residents (LPRs) as well as temporary residents and unauthorized immigrants. However, while ICE must take LPRs before immigration judges for a full removal hearing, ICE may use “administrative removal” on unauthorized immigrants and noncitizens without LPR status who have committed an aggravated felony. When ICE employs administrative removal, immigration judges review neither the removal nor detention.³⁹

2. *Mandatory Detention in Non-Judicial Removal Proceedings*

Congressional immigration laws also require detention for those removed through administrative processes—primarily through “expedited

³⁴ Pursuant to 8 U.S.C. § 1226(c) (2012), DHS mandatorily detains a non-citizen if (s)he has previously committed an aggravated felony, two crimes involving moral turpitude at any time after admission into the US, one crime involving moral turpitude with a term of imprisonment of more than one year, a controlled substance offense, or a firearm offense.

³⁵ See Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICHIGAN J. OF RACE & L. 63, 84–85 (2012).

³⁶ SHEBAYA & KOULISH, *supra* note 19.

³⁷ *Id.* at 12.

³⁸ Forty-five percent of DHS removals in FY 2013 (198,882 of 438,421 cases) were of individuals with a previous criminal conviction, though not all of those convictions were for aggravated felonies or removable offenses. ROSENBLUM & MCCABE, *supra* note 17, at 13, Table 2.

³⁹ The noncitizen can challenge the removal in writing to DHS within 10 days, but not at a hearing. 8 U.S.C. § 1228(b) (2012); 8 U.S.C. § 1101(a)(43) (2012); 8 C.F.R. § 238.1 (2016); *see also* Madrane v. Hogan, 520 F. Supp. 2d 654, 656 (M.D. Pa. 2007). From FY 2003 to FY 2013, 3 percent of DHS removals (and 7 percent of interior removals) were administrative removals. ROSENBLUM & MCCABE, *supra* note 17, at 23.

removal” and “reinstatement of removal.”⁴⁰ In these cases, DHS removes the noncitizen without a full hearing before an immigration judge. As discussed above, ICE can remove unauthorized immigrants and temporary visa holders through such administrative processes, but not LPRs.

Expedited Removal can be applied to certain “arriving aliens” DHS encounters at or within 100 miles of a border with insufficient or improper documents.⁴¹ Expedited removals constituted 44 percent of all removals in Fiscal Year 2013 (193,032 individuals).⁴² IIRIRA mandates detention of those subjected to expedited removal until their actual removal,⁴³ with only limited exceptions, primarily for asylum seekers.⁴⁴ Unlike the provision regarding prior crimes, this statutory provision specifically mandates “detention,” not just “custody,” for noncitizens in expedited removal proceedings.⁴⁵

Reinstatement of Removal can apply to a noncitizen apprehended with a prior removal order, which includes both those who returned to the United States after being deported and those who absconded from a removal order and never left.⁴⁶ Reinstatements constituted 39 percent of all removals in Fiscal Year 2013 (170,247 individuals).⁴⁷ As with expedited removals, DHS similarly detains all noncitizens with reinstatements of removal orders until their actual removal, with only limited exceptions, primarily for asylum seekers.⁴⁸ As above, this statutory detention provision mandates “detention,” not just “custody.”⁴⁹

⁴⁰ ROSENBLUM & MEISSNER, *THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT* 14 (Washington, DC: Migration Policy Institute, 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

⁴¹ 8 U.S.C. § 1225(b)(1)(A)(i) (2012); 8 U.S.C. § 1182(a)(6)(C) (2012); 8 U.S.C. § (7)(A)(i)(I) (2012); ROSENBLUM & MEISSNER, *supra* note 40, at 14 & n.31. The Immigration and Naturalization Service (INS) and DHS recently expanded this category—in 2002, to those encountered in between ports of entry, and in 2004, to those encountered within 100 miles of a US border, or who had not been continuously present in the U.S. for more than 14 days. *See* MEISSNER ET. AL., *supra* note 28, at 123.

⁴² SIMANSKI, *supra* note 17, at 5.

⁴³ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012).

⁴⁴ If a noncitizen expresses a fear of persecution or requests asylum to an immigration officer, USCIS interviews the noncitizen for credible fear of harm if removal occurred. 8 U.S.C. § 1225(b)(1) (2012). If the noncitizen passes the credible fear interview, (s)he is placed on a different track and referred into in-court removal proceedings. 8 C.F.R. § 235.6 (2016).

⁴⁵ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012) (“Any alien subject to the procedures under this clause shall be detained”); 8 U.S.C. § 1225 (b)(2)(A) (2012).

⁴⁶ 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 1241.8 (2016); *see also* MEISSNER ET. AL., *FORMIDABLE MACHINERY* 124.

⁴⁷ SIMANSKI, *supra* note 17, at 5.

⁴⁸ 8 U.S.C. § 1231(a)(2) (2012); 8 C.F.R. § 1241.8(f) (2016).

⁴⁹ 8 U.S.C. § 1231(a)(2) (2012).

B. *Discretionary Detention*

Beyond those it is required to detain, ICE has significant discretionary authority to detain individuals whom it places in removal proceedings according to 8 U.S.C. 1226(a). The District Director makes the initial decision to detain, release, or release on bond on a case-by-case basis, ordinarily within 24 hours of the arrest.⁵⁰ The District Director may initially detain an individual, release him/her, or set a bond of at least \$1,500.⁵¹ The noncitizen may request a formal bond redetermination hearing in immigration court, at which the noncitizen bears the burden of showing (s)he does not pose a flight risk or danger to the public.⁵² The noncitizen can appeal the bond decision to the administrative Board of Immigration Appeals, but no further.⁵³

With discretionary decisions to detain, RCA can operate unfettered by either mandatory detention provisions, or other mitigating requirements, like the bed mandate.⁵⁴ Discretionary decisions can apply the scalpel of risk to ensure ICE detains only those who are likely to harm the community or flee.

C. *Congress's National Bed Minimum Requirement*

Additionally, a Congressional appropriations provision requires ICE to maintain a minimum number of detention beds, currently a little below 34,000.⁵⁵ The statutory language is ambiguous as to whether the provision requires an average daily population of detainees (“heads in beds”), or merely the capacity to detain 34,000 daily. Some members of Congress have indicated that their interpretation is the former, though DHS Secretary Jeh Johnson has stated that his interpretation is the latter.⁵⁶ The average daily population fluctuates throughout the year and from year to year. For example, during Fiscal Year 2013, the year for which the author obtained data on ICE detainees, ICE housed an average of 32,805 detainees each

⁵⁰ 8 C.F.R. § 236.1(d)(1) (2016).

⁵¹ 8 U.S.C. § 1226(a) (2012).

⁵² 8 C.F.R. § 236.1(c)(1) (2016); 8 C.F.R. § 236.1(d) (2016).

⁵³ 8 C.F.R. § 1003.19 (2016).

⁵⁴ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2498, Division F, Department of Homeland Security Appropriations Act of 2016, Title II, “U.S. Immigration and Customs Enforcement” (2015) (“funding made available under this heading shall maintain a level of not less than 34,000 detention beds”), <https://www.congress.gov/bill/114th-congress/house-bill/2029/text>.

⁵⁵ *Id.*

⁵⁶ ROSENBLUM & MEISSNER, *supra* note 40, at 46 & n.124 (detailing DHS Secretary testimony to Congressional members).

day⁵⁷ and 34,451 at the end of January 2013.⁵⁸ This number recently dropped to approximately 26,000 in April 2015, according to reports.⁵⁹

Federal government auditors found that the national bed minimum has at times influenced ICE to detain more individuals, although the precise impact on any individual case was unclear. According to a recent DHS Office of Inspector General (OIG) report, the bed minimum required ICE “to make release decisions based on bed space availability, not only whether detention [was] necessary for public safety or to effect removals.”⁶⁰ For example, OIG found that ICE field offices might have discretionarily detained a higher proportion of noncitizens during periods of lower apprehensions (when bed space was abundant) while releasing more noncitizens during periods of higher apprehensions (when bed space was scarce).⁶¹

III. ICE’S RISK CLASSIFICATION ASSESSMENT (RCA)

ICE’s RCA is a computerized tool, adapted from analogous criminal justice settings.⁶² It is designed to mitigate uncertainty associated with the future conduct of noncitizens in immigration custody. Using statistics, it predicts whether an individual is likely to put public safety at risk.⁶³ The risk tool also administers ICE detention priorities and tailors ICE detention

⁵⁷ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 7 (2014), <http://www.gao.gov/assets/670/666467.pdf>.

⁵⁸ DEP’T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL (OIG), OIG-14-116 (Revised), ICE’S RELEASE OF IMMIGRATION DETAINEES 9 (2014), http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

⁵⁹ House Judiciary Committee, *Hearing: Oversight of U.S. Immigration and Customs Enforcement EventID=103305*, YOUTUBE (Apr. 14, 2015), <https://youtu.be/INz2b9INXP4>.

⁶⁰ DEP’T OF HOMELAND SECURITY, *supra* note 58, at 18. ICE officials also reported average daily population statistics weekly to Congress, in response to Congress’ bed minimum. *Id.* at 16.

⁶¹ *Id.* at 18.

⁶² While ICE’s RCA is adapted from analogous criminal justice settings, its implementation is unique in practice, because immigration enforcement operates on differing legal bases, through differently-structured institutional actors. For example, while prosecutorial arrest discretion has long existed in criminal justice, DHS’ publication of extremely detailed prosecutorial discretion guidance may affect the characteristics of the population arrested and subsequently detained. While pretrial detention in the criminal context serves to ensure appearance at trial, detention in the immigration context extends to ensuring removal, both after a hearing and where no hearing will be held. While criminal court judges determine initial detention based on a prosecutor’s recommendation, executive branch immigration officials (i.e. DHS) both determine and execute initial detention, subject at times to a different executive branch redetermination (i.e. by Department of Justice immigration judges). And the two systems have different tools in place to enforce subsequent court appearances. These and other disconnects are discussed at Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEORGETOWN IMMIGR. L.J. 45, 78–87 (2015), <https://articleworks.cadmus.com/geolaw/zs900115.html>.

⁶³ *Id.*

to dangerousness.⁶⁴ Per the Schriro Report,⁶⁵ "dangerousness"⁶⁶ is assessed in terms of prior crimes, disciplining in detention, and membership in gangs. Possible equities, such as the likelihood of relief from removal, are not considered, nor are subjective factors, such as the individual's credibility. Rather, RCA assesses public safety risk via static data from existing immigration databases. Although a supervisor makes the final detention decision, the supervisor decisions begin (and often end) with the computer generated RCA. The supervisor never lays eyes on the individual.⁶⁷

In addition to public safety and flight risk, RCA recommends detention or release, the amount of bond (if any), and detention or supervision levels.⁶⁸ ICE conducts RCA on nearly all noncitizens taken into ICE custody for more than a few days, even though a large share is subject to statutory detention mandates.⁶⁹

DHS and ICE have also emphasized the role of RCA in identifying noncitizens with special vulnerabilities, presumably so they would not be detained.⁷⁰ As enumerated in RCA, special vulnerabilities include "serious physical illness," "serious mental illness," "disabled," "elderly," "pregnant," "nursing," "primary caretaking responsibility," "risk based on

⁶⁴ *Id.*

⁶⁵ In Section III, unless otherwise noted, information derives from sources fully collected with citations in Section II of Koulisch, *id.* at 59–68. Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulisch/Robert%20> (Research tab), last accessed January 18, 2016. Certain guidance documents provided to the American Immigration Council through FOIA are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/RCA%20Materials%20RCA%20FOIA%20Docs.pdf>, last accessed January 18, 2016.

⁶⁶ Robert Castel, 1989

⁶⁷ Conversation with the author. Notes on file with author.

⁶⁸ Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulisch/Robert%20> (Research tab), last accessed January 18, 2016.

⁶⁹ As described below, ICE does not conduct RCA on individuals who are mandated for detention and removal and expected to be in custody for less than five days.

⁷⁰ ICE, *Detention Reform Accomplishments*, <https://www.ice.gov/detention-reform#tab1> (RCA "requires ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations."); Written testimony of DHS Secretary Janet Napolitano to the Senate Committee on Appropriations, Subcommittee on Homeland Security (Mar. 8, 2012), www.dhs.gov/news/2012/03/08/written-testimony-dhs-secretary-janet-napolitano-senate-appropriations-subcommittee. In June 2014, the White House highlighted the role of RCA in helping to protect LGBT refugees and asylum seekers. Press Release, Office of the Press Secretary, FACT SHEET: Advancing The Human Rights of LGBT Persons Globally (June 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/24/fact-sheet-advancing-human-rights-lgbt-persons-globally>, last accessed January 18, 2016.

sexual orientation/gender identity,” “victim of persecution/torture,” “victim of sexual abuse or violent crime,” and “victim of human trafficking.”⁷¹

A. ICE’s RCA in Practice

ICE employs RCA during its booking process for nearly all noncitizens entering ICE custody, including those referred by Border Patrol and other DHS components, with one significant exception: ICE does not run RCA on any noncitizen for whom detention is mandatory and whose departure or removal will likely occur within five days.⁷² This exception likely includes many individuals placed into expedited removal or reinstatement of removal without a chance of relief. Indeed, the vast majority of noncitizens coming into ICE custody are apprehended by the Border Patrol and only held for a few days before their deportation.⁷³

RCA assesses two factors—risk to public safety and risk of flight from immigration court proceedings—and it produces an assessment of high, medium, or low for each risk factor.⁷⁴ RCA collects extensive data to assess these risks, and also collects data on special vulnerabilities that might offset such risks.⁷⁵

RCA’s public safety risk assessment is based on abstract fragments of objective information that, by definition, avoids consideration of subjective factors related to the individual. For example, RCA does not assess an individual’s credibility. Rather it considers mainly “static” (i.e. previously-existing) data on criminal history: records of criminal charges, dispositions and sentences; open wants or warrants; supervision history (e.g., bond breaches, or supervision violations); and disciplinary infractions.⁷⁶ The one “dynamic” factor that could change over time is ICE’s evaluation of gang affiliation (also termed “Security Threat Group”) status, based on information gathered by an ICE officer during the intake interview.⁷⁷ From

⁷¹ DHS OIG, *supra* note 1, at 29-30.

⁷² Certain guidance documents provided to the American Immigration Council through FOIA are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/RCA%20Materials%20RCA%20FOIA%20Docs.pdf>, last accessed January 18, 2016.

⁷³ Partly for this reason, ICE used RCA for only 168,087 of the 554,247 noncitizens ICE processed in FY 2013. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS, 16, 28 (Nov. 2014), <http://www.gao.gov/products/GAO-15-26>. Also, ICE nationally deployed RCA tool only midway through the fiscal year, in February 2013. *Id.* at 8 n. 20.

⁷⁴ Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulish/Robert%20> (Research tab), last accessed January 18, 2016.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

static criminal history, RCA also assesses whether Congress has mandated that the noncitizen in custody be detained for a prior crime, in which case mandatory detention trumps RCA's detention recommendation.⁷⁸

RCA's flight risk assessment is based primarily on dynamic information collected by an officer through ICE's intake interview, including: local ties (e.g., a U.S. citizen spouse or child), family history, history of U.S. residence, substance abuse history, work authorization, and legal representation.⁷⁹ Certain static data also influences the flight risk assessment, including immigration violation history, history of absconding (apparently in criminal or immigration proceedings),⁸⁰ and the existence of a pending USCIS benefit application.⁸¹

Based on an overall weighting of these two factors by secret algorithm, RCA then produces one of four recommendations: (1) detain without bond, (2) detain with eligibility for bond, (3) defer the decision to the ICE supervisor, or (4) release (see Table 1). RCA always produces a recommendation to detain without bond if the individual in custody is subject to mandatory detention.⁸² As of spring 2013, RCA recommendations for the non-mandatory detained were made following this decision matrix, which was developed by the author based on analysis of the Baltimore sample described later in this report:

⁷⁸ Even when mandatory detention applies, RCA apparently performs the risk assessment so as to recommend security levels within detention (i.e. low/medium/high-security).

⁷⁹ Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulish/Robert%20> (Research tab), last accessed January 18, 2016.

⁸⁰ The history of absconding factor appears to encompass both criminal and immigration proceedings to some degree. RCA records "bond breach immigration and criminal," "fled or used other means to avoid removal after an immigration judge has issued a final order," "violation of conditions of supervision for immigration," "prior revocation of supervision for immigration," "walk-away from a non-secure facility or ATD," or any combination thereof.

⁸¹ Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulish/Robert%20> (Research tab), last accessed January 18, 2016.

⁸² In August 2013, ICE streamlined RCA process in expedited removal cases by generating an automatic detain decision, thus allowing field officers to skip those submission and approval steps. DHS OIG, *supra* note 1, at 13.

Table 1: *RCA Recommendation Matrix, ICE Baltimore Field Office Sample, Spring 2013*⁸³

		Public Safety Risk		
		Low	Medium	High
Flight Risk	Low	Release	Supervisor to Determine	Detain (with or without bond)
	Medium	Supervisor to Determine	Supervisor to Determine	Detain (with or without bond)
	High	Detain (with or without bond)	Detain (with or without bond)	Detain (with or without bond)

Additionally, for those with “special vulnerabilities” who are not mandatorily detained, RCA automatically defers the decision to the supervisor by producing a “Supervisor to Determine” recommendation.⁸⁴ For those individuals determined to be eligible for release with bond, RCA also recommends a bond amount.⁸⁵ For those detained, RCA also recommends a custody classification level (high, medium/high, medium/low, and low).⁸⁶

ICE officers then make the final custody determination, after at least one level of supervisory review.⁸⁷ A supervisor who overrules an RCA recommendation must enter an explanation for that decision into the system.⁸⁸ Additionally, only an ICE supervisor may initiate an RCA re-determination after an initial determination, and the supervisor must provide a justification for the re-determination.⁸⁹

⁸³ Source: Analysis of risk classification assessment (RCA) Detailed Summaries from ICE’s Baltimore Field Office, March through June 2013, provided by ICE through the Freedom of Information Act (FOIA). On file with author.

⁸⁴ *Id.*

⁸⁵ RCA Detailed Summary samples provided to the authors did not reflect the bond amount, however. Additionally, as a general rule, it appears that RCA does not recommend eligibility for bond if the individual has a final removal order.

⁸⁶ For those released, RCA also has the ability to recommend a community supervision level (i.e. “technology” or “no technology”). However, it is unclear whether in practice ICE officers employ RCA recommendation for supervision level, or whether ICE’s alternatives to detention (ATD) officers follow it; see DHS OIG, *supra* note 1, at 12.

⁸⁷ Certain guidance documents provided to the American Immigration Council through FOIA are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/RCA%20Materials%20/RCA%20FOIA%20Docs.pdf>, last accessed January 18, 2016.

⁸⁸ *Id.*

⁸⁹ Certain guidance documents provided to the American Immigration Council through FOIA are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/RCA%20Materials%20/RCA%20FOIA%20Docs.pdf>, last accessed January 18, 2016.

IV. FINDINGS: RCA IN PRACTICE IN THE BALTIMORE ICE OFFICE

To produce this report, the author analyzed 592⁹⁰ Risk Classification Assessment Detailed Summaries, provided by ICE through the Freedom of Information Act in 2013 and 2014. These 592 cases reportedly represent all the risk assessments that ICE's Baltimore Field Office conducted from March 1 to June 17, 2013.

The average age of the individuals was 32.64 years, with ages ranging from 18 to 81. 90.2 percent (534) of the individuals were male, and 9.8 percent (58) were female. 66.7 percent (395) of the individuals came from the Northern Triangle (Guatemala, Honduras, or El Salvador). Another 10.5 percent (62) were citizens of Mexico.⁹¹

ICE detained 81.1 percent (480 out of 592)—most without bond (69.5 percent, 408 of 592)—and released 18.1 percent (107 of 592) of the Baltimore sample. Although high, these rates of detention in the Baltimore sample were slightly below the national rate around that time. DHS reported that between July 30, 2012 and December 31, 2013, ICE detained 91.4 percent of the individuals upon whom ICE conducted RCA—most without bond (78.1 percent).⁹²

A. *Mandatory Detention*

Perhaps the most important factor contributing to high detention rates was the large share of those screened through RCA who were subject to mandatory detention without bond (see Table 2). About 42 percent of those in custody (248 out of 592 cases) were mandatorily detainable regardless of the RCA assessment of their particular public safety and flight risks.⁹³

⁹⁰ A previous unpublished version of this report is based on 485 cases that were in the author's possession at the time it was prepared. The author is now in receipt of two additional installments of RCA summaries from ICE pursuant to an RCA request, the addition of which explains the complete data set at 592 cases.

⁹¹ The nationalities of individuals in this RCA sample from ICE's Baltimore office differ considerably from the national population in ICE custody in FY 2013. During that fiscal year, of initial admissions to ICE detention facilities, 55.5 percent were Mexican and 34 percent were from Northern Triangle countries. SIMANSKI, IMMIGRATION ENFORCEMENT ACTIONS: 2013, 5.

⁹² DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL (OIG), OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ALTERNATIVES TO DETENTION (REVISED) 11–12, 25 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf. For those individuals for whom ICE set bond, some may have posted bond to ICE and secured release. Others whom ICE detained may have subsequently received a bond redetermination hearing before an immigration judge, and successfully argued to the judge to change detention without bond to detention with a bond or to lower ICE's bond amount, and then posted that amount and secured release.

⁹³ The "mandatorily detainable" row encompasses those listed by RCA Detailed Summary as 1) mandatorily detainable for criminal history, including non-LPRs placed into "administrative removal" processes because they had committed an "aggravated felony" under immigration laws; 2) placed into expedited removal or reinstatement of removal, in the "processing disposition" value, because they are

Table 2: *Detention Outcomes for Mandatorily Detainable and Discretionary Cases, ICE Baltimore Field Office, Spring 2013*⁹⁴

	Detained	Released	Total
Mandatorily detainable	241 (97.2%)	7 (2.8%)	248
Discretionary case	239 (70.5%)	100 (29.5%)	344
Total	480 (81.8%)	107 (18.2%)	592

For this 41.9 percent share of cases, the mandatorily detainable classification represents ICE’s assessment at the moment when ICE conducted RCA. Others in the sample, however, may have been mandatorily detainable at some prior point in time. Specifically, individuals whose 90-day removal window had elapsed represented a significant number of discretionary cases.⁹⁵ If one were to examine only

initially mandatorily detainable by law; or 3) subject to a final removal order within the previous 90 days at the time ICE conducted RCA. Some placed into expedited removal or reinstatement of removal may have subsequently passed a “credible fear” or “reasonable fear” interview, and were released by ICE in its discretion, posted bond, or successfully litigated a bond redetermination hearing in immigration court.

The “discretionary” row reflects all other cases, including those listed as placed into judicial immigration proceedings, all of whom do not have a final removal order (125 cases—73 detained and 52 released); those listed as “bag and baggage” cases (i.e. with a set date for removal, *see* ROSENBLUM & MCCABE, DEPORTATION AND DISCRETION 25 & n.52 (2014)) (107 cases—81 detained, 26 released), and those listed with “other” case statuses (26 cases—23 detained, 3 released).

The “Released” column reflects those whom ICE chose to release on community supervision. Notably, five individuals that were “mandatorily detainable” but whom ICE officers nevertheless released on community supervision are listed as both “mandatorily detainable” and “released.” *See* § IV.C of this article.

⁹⁴ Source: Analysis of risk classification assessment (RCA) Detailed Summaries from ICE’s Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with author.

⁹⁵ For example, of the 107 discretionary cases listed as “bag and baggage” at the time RCA was run, 104 were listed as having a final removal order, with all showing that RCA was not run within 90 days of that final removal order.

One explanation is that ICE conducted RCA after it had re-apprehended individuals sometime after their removal order. For example, after an immigration court issued a removal order, ICE may have released the individual, or the individual remained out of ICE custody pending an appeal. Either way, after the removal order was finalized, ICE may have then sent a “bag and baggage” letter setting a date for removal. But, the individual absconded, ICE apprehended him or her, and upon intake ICE conducted RCA, now regarding post-removal order custody.

Some of these individuals may have been mandatorily detainable when initially placed into removal processes, whether for criminal history or because they were placed into expedited removal or reinstatement of removal. That said, we are unable to determine this from the Baltimore RCA Detailed Summaries. Also, when ICE conducts RCA on individuals with a prior removal order, it does not screen for mandatory detention for criminal history. *See* ICE, “RCA Quick Reference Guide 1.0,” 6.

Another possible explanation is that in spring 2013, ICE’s Baltimore office was conducting RCA on individuals already in its custody, some of whom already had final removal orders more than 90

individuals identifiable as within removal processes at the time RCA was conducted, 63 percent were mandatorily detainable.⁹⁶

While detention of individuals whom ICE assessed as mandatorily detainable was near-universal, ICE supervisors did release five of these individuals, as discussed in Section IV.C below.

B. The Influence of Public Safety and Flight Risk Assessments on Detention Outcomes in Discretionary Cases

Mandatory detention did not apply to 58.1 percent of the Baltimore sample (344 out of 592 cases), over whose detention or release ICE had discretion. But a second factor that likely contributed to high detention rates in the Baltimore sample is that RCA assessed the vast majority of these discretionary cases as being medium or high for at least one risk factor. RCA did not recommend release if either risk factor was medium or high, as Table 1 showed. Ultimately, ICE detained over two thirds of these discretionary cases: 70.5 percent, or 239 of 339 cases (184 of those detentions without bond).⁹⁷ At the same time, a careful analysis shows that RCA's risk assessment classifications appear to have had a limited impact on actual discretionary detention outcomes.

As noted above, the RCA tool assesses two factors (risk to public safety and risk of flight), produces an assessment of high, medium or low for each risk factor, and then considers the two factors to make a detention recommendation. RCA assessed the vast majority of these discretionary cases as being medium or high flight risks, medium or high public safety risks, or both. Flight risk particularly skewed medium or high. A majority of these discretionary cases were classified as high flight risks (57.5 percent, 195 of 339 cases), and almost all of the remainder (38.9 percent, 132 of 339 cases) were classified as medium flight risks (Table 3b). By comparison, just 21.2 percent were classified as high public safety risks (72 of 339 cases) and 37.5 percent were classified as medium public safety

days old. However, because ICE's Baltimore office had already piloted RCA starting in summer 2012, several months before national rollout, it is less likely that by March 2013, ICE's Baltimore office would have needed to conduct RCA on everyone already in its custody.

⁹⁶ I.e. 209 of 334 individuals that RCA Detailed Summaries clearly identified in the "processing disposition" value as in a particular type of removal proceeding (i.e. judicial (197 cases), administrative removal (29 cases), expedited removal (34 cases), or reinstatement of removal (74 cases)). Samples of RCA Detailed Summaries conducted in Baltimore and provided to author through FOIA are available at <http://mlaw.umd.edu/facultyprofile/Koulish/Robert%20>, last accessed January 18, 2016.

⁹⁷ Most of the detentions without bond represented individuals listed as "bag and baggage," because as noted, RCA does not appear to recommend eligibility for bond for those with a removal order. 118 of the 119 individuals listed as "bag and baggage" and detained were detained without bond. Other detentions without bond included 29 listed as in judicial proceedings, and 35 listed as "other."

risks (127 of 339 cases) (Table 3a).⁹⁸ Flight and public safety risk were somewhat inversely related (presumably because many immigrants with limited histories in the United States were assessed as high flight risks but lacked derogatory information that would lead to an adverse public safety finding). Thus, the most common overall RCA assessment was high flight risk and low public safety risk (27 percent, 92 of 339 cases) (Table 4). Conversely, comparatively few were classified high-risk for *both* public safety and flight (12.3 percent, 42 of 339 cases). Almost none were classified *low*-risk for both public safety and flight (only 1.5% percent, 5 of 339 cases)—the only classification that would result in an RCA recommendation to release (Table 1).

When the two public-safety and flight risk factors are analyzed together, it is difficult to discern any strong patterns of correlation between either risk factor and detention outcomes (see Table 4). Overall, those assessed as high flight risk were detained at slightly higher rates than those assessed as medium flight risk, while those assessed as low flight risk were more likely to be detained, albeit in such small number (just a total of ten cases) that conclusions are hard to draw. Surprisingly, given ICE's priorities, RCA assessments of public safety risk did not appear to be strongly related to detention outcomes. 73.6 percent of those assessed as low public safety risk were detained, as were 64.6 percent of those assessed as medium risk, and 75 percent of those assessed as high risk. Thus, ICE detained a higher share of low public safety risk individuals than medium risk individuals (see Table 3b). This held true for those assessed either as medium or high flight risk (see Table 4).

⁹⁸ The individuals listed as “bag and baggage” tended to skew towards higher flight risk and lower public safety risk compared to the individuals listed as in judicial proceedings. Of the 157 “bag and baggage” individuals, RCA assessed 79 percent (124 of 157 cases) as high flight risk, 19.1 percent (30 of 157 cases) as medium flight risk, and 1.9 percent (3 of 157 cases) as low flight risk; while RCA assessed 17.2 percent (27 of 157 cases) as high public safety risk, 28.7 percent (45 of 157 cases) as medium public safety risk, and 54.1 percent (85 of 157 cases) as low public safety risk. The higher flight risk assessments may be because individuals with a “bag and baggage” letter have a final removal order, and thus are assumed to have less incentive to appear for removal. Additionally, ICE may have re-apprehended many of these individuals after absconding. 50 of 107 individuals are listed with a history of absconding, and of those 50, 47 are assessed as high flight risk.

Comparatively, of the 125 individuals in judicial proceedings, RCA assessed 31 percent (39 of 125 cases) as high flight risk, 62 percent (78 of 125 cases) as medium flight risk, and 6 percent (8 of 125 cases) as low flight risk; while RCA assessed 22 percent (27 of 125 cases) as high public safety risk, 54 percent (67 of 125 cases) as medium public safety risk, and 25 percent (31 of 125 cases) as low public safety risk. Only 2 of the 125 individuals are listed with a history of absconding.

Table 3a: *Detention Outcomes for Discretionary Cases, by Public Safety Risk, ICE Baltimore Field Office, Spring 2013*⁹⁹

	Detained	Released	Total
Low	103 (73.6%)	37 (26.4%)	140
Medium	82 (64.6%)	45 (35.4%)	127
High	54 (75%)	18 (25%)	72
Total	239 (70.5%)	100 (29.5%)	339

Table 3b: *Detention Outcomes for Discretionary Cases, by Flight Risk, ICE Baltimore Field Office, Spring 2013*¹⁰⁰

	Detained	Released	Total
Low	10 (83.3%)	2 (16.7%)	12
Medium	78 (59.1%)	54 (40.9%)	132
High	151 (77.4%)	44 (22.6%)	195
Total	239 (70.5%)	100 (29.5%)	339

⁹⁹ Source: Analysis of RCA Detailed Summaries from ICE's Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with authors.

¹⁰⁰ Source: Analysis of RCA Detailed Summaries from ICE's Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with authors.

Table 4: *Detention Outcomes for Discretionary Cases, by Flight Risk and Public Safety Risk, ICE Baltimore Field Office, Spring 2013*¹⁰¹

Flight Risk	Public Safety Risk	Detained	Released	Total
Low	Low	4 (80%)	1 (20%)	5
	Medium	4 (80%)	1 (20%)	5
	High	2 (100%)	0 (0%)	2
Medium	Low	27(62.8%)	16 (37.2%)	43
	Medium	32 (52.5%)	29 (47.5%)	53
	High	19 (67.9%)	9 (32.1%)	28
High	Low	72 (78.3%)	20 (21.7%)	92
	Medium	46 (75.4%)	15 (24.6%)	61
	High	33 (21.4%)	9 (33%)	42
Total		239 (70.5%)	100 (29.5%)	339

C. ICE Supervisor Overrides of RCA Recommendations

A third factor that likely contributed to high detention rates is that ICE supervisors typically favored detention in the 58.3 percent of cases in which RCA did not make a recommendation, but instead deferred the detention decision to supervisors. Also, although ICE supervisors can override RCA recommendations, they overrode RCA recommendations to detain relatively infrequently.

Overall, RCA recommended detention in 77.8 percent of cases (without bond in 59.1 percent of cases), and ICE supervisors decided to detain in 81.9 percent of cases (without bond in 69.6 percent of cases).¹⁰² Supervisors' discretion to override detention recommendations was limited

¹⁰¹ Source: Analysis of RCA Detailed Summaries from ICE's Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with authors.

¹⁰² Nationally, ICE supervisors appeared to shift even more individuals to be detained without bond. Between July 30, 2012 and December 31, 2013 nationally, RCA recommended 52 percent to be detained without bond, 28 percent to be detained but eligible for bond, deferred 18 percent to the supervisor, and recommended 0.6 percent for release. After the ICE supervisor decision, ICE detained 78 percent without bond, detained 13 percent but eligible for bond, and released 9 percent. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL (OIG), OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ALTERNATIVES TO DETENTION (REVISED) 25 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

because many cases were mandatorily detainable. That said, in seven cases out of 248 mandatorily detainable individuals, supervisors did override to release individuals.¹⁰³

Among the cases in which RCA recommended discretionary detention, supervisors ordered detention without bond in 80.1 percent (109 of 136) cases in which RCA recommended detention without bond, and they ordered detention in 74.3 percent (58 of 78) cases—without bond in 33.3 percent (26 of 78) cases—in which RCA recommended detention with bond. In a total of 47 out of 214 cases (22 percent), RCA recommended some form of discretionary detention but ICE supervisors ordered the subjects of the recommendations to be released on community supervision. Additionally, RCA recommended that individuals be released in just five cases (1.5 percent of the total), all of which were discretionary cases. Supervisors overrode this decision and ordered that subjects be detained in four of the five cases.

Lastly, RCA recommended that the ICE supervisor make determinations in 21.2 percent of the cases (124 of 592), with this group including individuals that were comparatively lower-risk or vulnerable. When RCA directed supervisors to make determinations, ICE supervisors chose detention in a majority of cases, but at comparatively moderate rates. Leaving aside individuals that appear to have been in fact mandatorily detainable,¹⁰⁴ ICE supervisors chose to detain 57.1 percent (68 of 119 cases), and detain without bond 37.8 percent (45 of 119 cases), while choosing to release a comparatively high percentage—42.8 percent (51 of 119 cases).¹⁰⁵

¹⁰³ Three individuals were older individuals in their 40s, in judicial proceedings, whom RCA identified as mandatorily detainable for criminal history and recommended detention without bond; however, all three reported having a U.S. citizen spouse or child, and were released. Another was a 33-year old man, placed into reinstatement of removal, whose only criminal history was a pending charge for illegal re-entry—but who also had “significant assets” in the United States. In Table 5, those four individuals are included in the rows reflecting RCA recommendations to detain without bond.

The fifth was a 29-year old woman, with multiple theft convictions, who had received a final removal order 36 days earlier, and had a date set for removal—but also was assessed with a special vulnerability, and reported having family members in the local community. In her case, RCA recommended “supervisor to determine” for unknown reasons, even though she was mandatorily detainable as within 90 days of her final removal order. In Table 5, she is included in the rows reflecting RCA recommendations for “supervisor to determine.”

¹⁰⁴ Of these eight anomalous individuals, four were mandatorily detainable for a prior crime and in administrative removal, all of whom ICE ultimately detained. Three had final removal orders within the last 90 days, one of whom ICE released, and the other two whom ICE detained. One was in expedited removal, was assessed with a special vulnerability, but also had a prior homicide conviction. ICE detained that person.

¹⁰⁵ Baltimore ICE supervisors released slightly more individuals than ICE supervisors nationally when RCA deferred the detention decisions. Nationally, of those decisions RCA deferred to the ICE supervisor, ICE supervisors detained without bond 41.9 percent, detained eligible for bond 28.6

Table 5: Detention Outcomes for Discretionary Cases, by Flight Risk and Public Safety Risk, ICE Baltimore Field Office, Spring 2013¹⁰⁶

		ICE Supervisor Decision			
		Total	Detain Without Bond	Detain, Eligible for Bond	Release on Community Supervision
	Total	585¹⁰⁷	407 (69.6%)	72 (12.3%)	106 (18.1%)
RCA Rec.	Detain Without Bond	346 (58.4%)	311	1	34
	<i>Mandatorily detainable</i>	210	202	1	7
	<i>Discretionary case</i>	136	109	-	27
	Detain, Eligible for Bond	110 (18.6%)	42	48	20
	<i>Mandatorily detainable</i>	32	16	16	0
	<i>Discretionary case</i>	78	26	32	20
	Release on Community Supervision	5 (0.8%)	4	0	1
	Supervisor to Determine	124 (20.9%)	50	23	51
	<i>Mandatorily detainable</i>	5	0	0	5
<i>Discretionary case</i>	119	45	23	51	

percent, and released 29.5 percent. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL (OIG), OIG-15-22, at 25. In that national report, it is impossible to know how many individuals fell into the categories we classify here as “mandatorily detainable.”

¹⁰⁶ Source: Analysis of RCA Detailed Summaries from ICE’s Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with authors.

¹⁰⁷ Seven of the 592 samples are excluded from this Table. RCA recommendation for one individual is illegible and for another is missing. Both were mandatorily detainable—one for prior criminal history in administrative removal, and one placed into reinstatement of removal.

Among the small sample of individuals that ICE assessed as having a special vulnerability—i.e. “serious physical illness,” “serious mental illness,” “disabled,” “elderly,” “pregnant,” “nursing,” “primary caretaking responsibility,” “risk based on sexual orientation/gender identity,” “victim of persecution/torture,” “victim of sexual abuse or violent crime,” and “victim of human trafficking”—detention occurred at a lower rate, albeit not markedly lower. Of the 42 individuals that ICE identified with at least one special vulnerability, ICE detained 59.5 percent without bond (25 individuals), detained 4.8 percent with bond eligibility (2 individuals), and released 35.7 percent (15 individuals).

RCA recommendations to detain individuals with a special vulnerability occurred at a much lower rate, since RCA recommended either that the ICE supervisor make the determination or to detain without bond if mandatory detention applied, and did not recommend discretionary detention. However, detention outcomes were not much lower. Like the overall population, mandatory detention impacted the ability of RCA to make a difference for those with a special vulnerability. 40.5 percent (17 of 37 cases) were mandatorily detainable.¹⁰⁸ And ICE supervisors did not release vulnerable individuals at markedly higher rates. Among the supervisor-determined cases in the Baltimore sample, leaving aside individuals that appear to have been in fact mandatorily detainable, the release rate was not markedly different for those with a special vulnerability (48 percent) than those without (43 percent):

¹⁰⁸ These 16 individuals included 13 individuals that received an RCA recommendation to detain without bond—12 individuals mandatorily detainable for criminal history (one whom an ICE supervisor nevertheless released), and one placed into reinstatement of removal. Three mandatorily detainable individuals nevertheless received an RCA recommendation of “supervisor to determine”—one mandatorily detainable for criminal history in administrative removal, one placed into expedited removal, and one within 90 days of a final removal order.

Table 6: *ICE Supervisor Detention Decisions, by RCA Recommendations, for Individuals Assessed with Special Vulnerabilities, Baltimore ICE Office Sample, Spring 2013*¹⁰⁹

		ICE Supervisor Decision			
		Total	Detain Without Bond	Detain, Eligible for Bond	Release on Comm. Supervision
	Total	42	23 (62%)	2 (5%)	12 (32%)
RCA Rec.	Detain Without Bond	15 (35.7%)	12	0	1
	<i>Mandatorily detainable</i>	15	13	0	2
	<i>Discretionary case</i>	0	-	-	-
	Supervisor to Determine	27 (64.3%)	11	2	11
	<i>Mandatorily detainable</i>	2	2	0	0
	<i>Discretionary case</i>	25	10	2	13

D. *Population Characteristics Informing Public Safety and Flight Risk Recommendations*

Finally, a key value of examining RCA data is that it provides both criminal and family history in great detail. Indeed, RCA uses these factors to determine public safety and flight risk assessments, which in turn influence detention outcomes.

Among the public safety risk factors, two-thirds of the Baltimore sample (386 out of 592 cases) had a criminal conviction. Individuals with criminal convictions comprised all but one of those (110 out of 111) who were mandatorily detained for criminal convictions, as would be expected. But individuals with criminal convictions also comprised about two thirds

¹⁰⁹ Source: Analysis of RCA Detailed Summaries from ICE's Baltimore Field Office, March through June 2013, provided by ICE through FOIA. On file with authors.

of those discretionarily detained and half of those released. Most likely, the type of criminal conviction contributed to detention outcomes.

39 percent of the sample had a criminal charge (not necessarily a conviction) associated with the encounter in which ICE took the individual into custody, and there was not much variation in this share between those mandatorily and discretionarily detained. A much higher share of those released had a criminal charge connected to the ICE encounter: 60.7 percent. It may be that these were relatively minor charges that did not warrant ICE detention or that the individual was never convicted of the crime for which they were charged. Other research has shown that a large share of arrests leading to ICE custody have been for relatively minor crimes, as ICE expanded its cooperation with state and local law enforcement agencies leading up to 2013.¹¹⁰ 3.4 percent of the sample (20 individuals) were confirmed or strongly suspected to be security threat or have a gang affiliation, and all but one of these individuals were detained.

Among the flight risk factors, 54.1 percent of the sample had a stable residence in the United States for at least six months. As might be expected, this residentially stable group comprised a higher share of those released and those discretionarily detained than of those mandatorily detained. Nonetheless, a significant number (64 out of 320) were mandatorily detained due to a criminal conviction. Only a small number of the residentially stable group (78 out of 265) were released. Another 14.4 percent of the sample had a stable U.S. residence for less than six months; this group comprised similar shares of those mandatorily detained, discretionarily detained, and released. Thus, having a stable residence is not a strong predictor of being assessed as a low flight risk, or being eligible for release or released from detention. It may be that those detained generally had criminal convictions triggering mandatory detention, or discretionary detention based on public safety risk. There was significant overlap between the residentially stable groups and those with criminal convictions: 37.2 percent of the entire sample (220 of 592) had both a criminal conviction and reported a stable residence for at least six months, while another 13.8 percent (53 of 592) had both a criminal conviction and reported a stable residence for less than six months.

Similarly, most of the individuals in the Baltimore sample who had family ties to the United States were detained. 29.7 percent of the sample reported having a U.S. citizen spouse or child, and another 20.6 percent reported having a non-U.S. citizen spouse or child, or other family, in the local community. There was little variation in the shares of either group

¹¹⁰ See ROSENBLUM & MCCABE, *supra* note 93, at 12-15.

among those mandatorily detained, discretionarily detained, and released, although a higher share existed among those mandatorily detained due to a criminal conviction than those mandatorily detained on other grounds. As with the residentially stable groups, there was significant overlap between the groups with family ties and those with criminal convictions: 21.6 percent of the entire sample (128 of 592) both had a criminal conviction and reported a U.S. citizen spouse or child, while another 14.5 percent (86 of 592) both had a criminal conviction and reported a local family tie.

V. DISCUSSION AND RECOMMENDATIONS

As much potential as risk assessment holds for ICE to limit detention, ICE continues to detain immigrants at record numbers—and unnecessarily so in many instances, as this study has shown. Studying ICE’s use of risk assessment, it is clear that immigrants are needlessly over-detained. The analysis reveals three key features of ICE’s detention system that promoted unnecessarily high detention rates.

First and foremost, a substantial share of cases involved mandatory detention, and ICE supervisors rarely overrode RCA’s detention recommendations in those cases. Second, where ICE had broad discretion to detain or to release subjects, RCA almost always (94.6 percent of the time) considered individuals to be high or medium flight risks and usually (62.1 percent of the time) considered them to be high or medium public safety risks. As a result, RCA only recommended 0.8 percent of total cases for release, compared to 77.2 percent of cases in which RCA recommended detention (58.4 percent without bond and 18.8 percent with bond). Third, while ICE supervisors have authority to override RCA recommendations, supervisors usually accepted most detention recommendations and overrode most release recommendations. And when RCA tasked supervisors with making a detention determination in 20.9 percent of cases, they opted to detain subjects in a majority of those cases (57.1 percent).

In considering these findings, it is clear that many immigrants who have been placed in detention are there unnecessarily. Many of those in mandatory detention without bond should not be deprived of their liberty without due process and many of those in mandatory or discretionary detention would likely be better served in an alternative to detention. In the meantime, the findings suggest a renewed public debate about ICE’s use of detention, DHS and ICE enforcement priorities, and Congressional

detention mandates (although caution should be used in drawing national conclusions from a small sample of cases in a single ICE field office).¹¹¹

A. Mandatory Detention for Prior Crimes and in Non-Judicial Removals Prevents Release of Low-Risk Individuals

Mandatory detention provisions prevent ICE from reducing the rates of detention for individuals ICE’s RCA tool assesses as low or medium public safety risk, in accordance with a primary goal of the DHS and ICE civil enforcement priorities to tailor detention to public safety risk.¹¹²

Some advocates and at least one Senator have argued that the relevant statute allows ICE to exercise discretion to release those individuals classified as mandatorily detainable based on criminal history, because 8 U.S.C. § 1226(c) requires “custody”—not more explicitly “detention.”¹¹³ DHS has stated in litigation that the statute does not afford the agency discretion to release in such cases.¹¹⁴ However, data show that ICE supervisors overrode this “mandatory detention” requirement for individuals with a U.S. citizen spouse or child on at least three occasions in 2013, indicating that ICE officials do indeed exercise discretion in such cases, if on a case-by-case basis and minimally.

It is also clear from the findings that Congress should revise or re-interpret 8 U.S.C. § 1226(c) not to require detention. ICE could likely release into supervision a significant number of the low and medium public safety risks with prior criminal convictions without significant increases in crime or flight from proceedings, and thus free up resources for ICE to detain more significant public safety threats while minimizing humanitarian concerns based on family separation; 75 percent of

¹¹¹ For example, it is likely that the population booked and detained by an ICE field office closer to the southern border would contain a higher percentage of individuals placed into non-judicial proceedings (i.e. expedited removal or reinstatement of removal), as Border Patrol would refer more apprehended individuals to ICE there than in the interior of the United States.

¹¹² Concurrently, ICE officials have identified mandatory detention laws as an impediment to expanding ICE’s alternatives to detention programs. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION 28 (2014). Regarding post-removal order mandatory detention, it is difficult to draw conclusions from the Baltimore data, because of the small sample size of those within 90 days of their removal order.

¹¹³ Memorandum to David Martin, Office of General Counsel, US Department of Homeland Security: The Use of Electronic Monitoring and Other Alternatives to Institutional Detention on Individuals Classified under INA § 236(c), American Immigration Lawyers Association (Aug. 6, 2010), www.nilc.org/document.html?id=94; Letter from Sen. Richard Blumenthal to Secretary Jeh Johnson, (Mar. 24, 2014), <http://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/sen-blumenthal-letter-to-dhs-on-detention>.

¹¹⁴ *Rodriguez v. Robbins*, 715 F.3d 1127, 1132 (9th Cir. 2013) (Government argued that INA § 236(c) “unambiguously requires mandatory detention with no limit on the duration of imprisonment”). See also *MEISSNER ET. AL., FORMIDABLE MACHINERY*, 128 (discussing issue).

individuals mandatorily detainable for criminal history were not assessed as high public safety risks.¹¹⁵ Additionally, many of those mandatorily detained for criminal history reported strong ties to the United States—family ties, a stable U.S. residence, and work authorization¹¹⁶—which suggests those individuals were longer-term residents and relatively low flight risks.¹¹⁷ Although ICE did not release data on the date of criminal convictions, many individuals may have completed their criminal activity that triggered mandatory detention some time before they were taken into ICE custody, and built U.S. community ties in the meantime.¹¹⁸

Risk data can also inform ongoing litigation seeking to narrow the applicability of the mandatory detention provision regarding individuals previously released from criminal proceedings,¹¹⁹ as well as litigation seeking to provide a bond hearing after six months to those mandatorily detained.¹²⁰

Regarding those mandatorily detainable in non-judicial proceedings for immigration violations, current statutes mandate “detention,” not “custody,” and thus provide ICE with less interpretive discretion. The large

¹¹⁵ Of individuals mandatorily detained for criminal history, 17 percent (18 of 104 cases) were assessed as low public safety risk, 58 percent (60 of 104 cases) were assessed as medium public safety risk, and 25 percent (26 of 104 cases) were assessed as high public safety risk.

¹¹⁶ SHEBAYA & KOULISH, *supra* note 19; KOULISH, USING RISK TO ASSESS THE LEGAL VIOLENCE OF MANDATORY DETENTION (2016).

¹¹⁷ Data from the Baltimore sample supports this. Of individuals mandatorily detained for criminal history, a greater share—particularly individuals in judicial proceedings—were assessed as comparatively lower flight risk than the overall population in the sample. Of individuals mandatorily detained for criminal history, 15 percent (16 of 104 cases) were assessed as low flight risk, 54 percent (56 of 104 cases) were assessed as medium flight risk, and 31 percent (32 of 104 cases) were assessed as high flight risk. Of individuals mandatorily detained for criminal history in *judicial* proceedings—excluding, notably, non-LPRs placed into administrative removal—21 percent (15 of 72 cases) were assessed as low flight risk, 61 percent (44 of 72 cases) were assessed as medium flight risk, and 18 percent (13 of 72 cases) were assessed as high flight risk. Comparatively, of the overall population in the Baltimore sample, 5 percent (26 of 485 cases) were assessed as low flight risk, 36 percent (177 of 485 cases) were assessed as medium flight risk, and 58 percent (282 of 485 cases) were assessed as high flight risk.

¹¹⁸ In the Baltimore sample, a majority (61 percent, 63 of 104 cases) of individuals mandatorily detained for criminal history were mandatorily detained for a crime unrelated to their recent ICE encounter. *See* Table 7.

¹¹⁹ DHS has interpreted the requirement of 8 U.S.C. § 1226(c) for custody “when the alien is released” to require detention at any time after release from criminal custody—including years later—rather than only at the time of actual release. *Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001). That interpretation is being heavily litigated in federal courts. *E.g.*, *Khoury v. Asher*, No. 13-CV-1367 (W.D. Wash. Mar. 11, 2014) (class action), <https://www.aclu.org/cases/khoury-v-asher>; Gerard Savarrese, *When Is When? 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285 (2013), <http://ir.lawnet.fordham.edu/flr/vol82/iss1/7/>.

¹²⁰ Multiple federal judicial circuits, to avoid constitutional concerns, have interpreted 8 U.S.C. § 1226(c) to require a bond hearing after six months of mandatory detention, at which ICE must establish by clear and convincing evidence that the detainee poses a flight risk or a danger to the community. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).

numbers detained under these statutes will likely contribute to a failure by ICE to achieve its stated goals to detain public safety risks and prioritize high flight risks for alternatives to detention.¹²¹ Most mandatorily detainable individuals in non-judicial proceedings were assessed as high flight risks but low public safety risks.¹²² Most had few family or other community ties, but few had criminal convictions.¹²³

At the moment, individuals cannot generally seek release from detention during expedited removal or reinstatement processes until: they assert asylum or a similar protection-based claim, U.S. Citizenship and Immigration Services (USCIS) finds that they have a credible or reasonable fear of returning to their home country, and ICE refers them into judicial removal proceedings.¹²⁴ The number of asylum seekers in non-judicial processes is growing, as Central American violence has risen.¹²⁵ If individuals asserting protection-based claims generally matched the risk profile of those in Baltimore, however, strong arguments exist for releasing them on supervision. ICE could also change its internal processes to presumptively re-run RCA to account for a finding of credible or reasonable fear rather than requiring a supervisor's justification to do so, as advocates have suggested.¹²⁶ A non-frivolous asylum claim may provide additional incentive to appear at proceedings.¹²⁷

¹²¹ See Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CENTER FOR MIGRATION STUDIES, Feb. 13, 2014, <http://cmsny.org/immigration-detention-behind-the-record-numbers/>.

¹²² For example, RCA in Baltimore assessed 100 percent of those in expedited removal as "high" flight risk (34 of 34 cases) and 88 percent as "low" public safety risk (30 of 34 cases). The disparity was not quite as pronounced for those in reinstatement, who previously spent some time in the U.S. RCA assessed 86 percent (64 of 74 cases) as high flight risk and 14 percent (10 of 74 cases) as medium flight risk; and 35 percent (26 of 74 cases) as low public safety risk, 45 percent (33 of 74 cases) as medium public safety risk, and 20 percent (15 of 74 cases) as high public safety risk. Additionally, many in reinstatement of removal may have returned to join family members in the United States and may have strong incentives against flight, despite RCA's assessment as "high" flight risk.

¹²³ SHEBAYA & KOULISH, *supra* note 19.

¹²⁴ Section 235.3 <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-22466/0-0-0-22583.html>.

¹²⁵ *Asylum Abuse: Is it Overwhelming our Borders? Before the H. Comm. on the Judiciary*, 113th Cong. 14–16 (2013) (statement of Ruth Ellen Wasem, Specialist in Immigration Policy, Congressional Research Service), http://judiciary.house.gov/?a=Files.Serve&File_id=5D634F9D-D515-4545-A3F7-F8E6C83DA86D.

¹²⁶ HUMAN RIGHTS FIRST, *HOW TO REPAIR THE U.S. IMMIGRATION DETENTION SYSTEM* 13 (2012).

¹²⁷ Research indicates that those seeking asylum may arrive uniquely inclined to appear for immigration proceedings, even absent U.S. ties. MARK NOFERI, *A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS* (Washington, DC and New York, NY: American Immigration Council and Center for Migration Studies, July 2015), <http://immigrationpolicy.org/special-reports/humane-approach-can-work-effectiveness-alternatives-detention-asylum-seekers>.

B. ICE's Restrained Use of Alternatives to Detention for High Flight Risk, Low Public Safety Risk Individuals, Notwithstanding DHS Priorities

In Baltimore, ICE's risk assessments showed that many ICE arrestees are higher flight risk and lower public safety risk, yet were nevertheless detained—even where ICE possessed discretion to release them into alternatives to detention. These outcomes likewise diverge from DHS's and ICE's prioritization of detention for higher public safety risks, and additionally from ICE's goal to employ ATD for higher flight risks. ICE detained over two thirds of individuals (69.5 percent) that it had discretion to release. And ICE detained 78.3 percent of high flight risk, low public safety risk individuals over which it had discretion, despite the potential to place them into ATD. To encourage ICE supervisors to employ ATD, ICE could change its RCA tool to increase the percentage of RCA recommendations to release, or for a supervisor to determine detention, for those assessed as flight risks but not serious public safety risks. Fewer RCA affirmative recommendations to detain would likely result in fewer ICE decisions to detain.

Additionally, the data supports increasing ICE's discretionary use of ATDs, such as electronic monitoring devices and mandatory check-ins, that ensure appearance at proceedings at a lower cost than detention. ICE's alternatives to detention program, called the Intensive Supervision Appearance Program ("ISAP"), has demonstrated remarkably high success in ensuring appearance at court hearings.¹²⁸ From Fiscal Years 2011 to 2013, 95 percent of participants in ISAP's "full-service" program, which involves supervision, technology monitoring (either electronic GPS tracking or phone reporting), periodic visits and case management, appeared at their scheduled removal hearings.¹²⁹ If alternatives to detention were implemented more broadly—and in conjunction with reductions in

¹²⁸DHS INSPECTOR GENERAL ASSESSES ICE ALTERNATIVES TO DETENTION, CRIMMIGRATION <http://crimmigration.com/2015/03/10/dhs-inspector-general-assesses-ice-alternatives-to-detention/>.

¹²⁹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, at 30–31. Concurrently, DHS' Inspector General reported that in FY 2012, only 4.9 percent of ISAP participants absconded, and 4 percent were arrested by another law enforcement agency. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL (OIG), OIG-15-22, at 6. These ATD success rates echo earlier findings. For example, an earlier U.S. study from 1997 to 2000 showed that 92% of criminal aliens released under supervision attended all of their hearings, and concluded that "mandatory detention of virtually all criminal aliens is not necessary." VERA INSTITUTE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 33–36, 42 (2000), http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf.

detention—significant cost savings would result.¹³⁰ A U.S. GAO report found the average daily cost of ICE’s ISAP program to be \$10.55 per day, compared to the estimated \$159 per day cost of detention.¹³¹ Immigrant advocates have also argued that ATDs impose far fewer social burdens on immigrants and their families.¹³²

C. A Special Vulnerability Did Not Dramatically Affect Detention Outcomes, Notwithstanding DHS Priorities

Notably, the existence of a special vulnerability did not dramatically affect the chances of detention, even though DHS and ICE have deprioritized detention of vulnerable individuals. Mandatory detention provisions prevented release of many with special vulnerabilities, as with the general population, even though DHS memoranda direct ICE officers to specially consult with ICE lawyers for those identified as mandatorily detainable with a special vulnerability.¹³³ For other individuals with special vulnerabilities, although RCA automatically defers the decision to detain or release them to the ICE supervisor, supervisors did not release vulnerable individuals at markedly higher rates. Suggestions that RCA would moderate the incidence, as well as conditions, of detention of vulnerable individuals do not appear to have been borne out.¹³⁴ To moderate detention, ICE could also use prosecutorial discretion for those with a vulnerability, rather than initiating proceedings at all.

¹³⁰ MEISSNER ET. AL., FORMIDABLE MACHINERY, 130–31. ICE requested \$122 million for ATD in FY 2016—an increase of \$28 million over the President’s FY 2015 budget, albeit still much less than ICE’s \$2.4 billion request for detention. DHS, *U.S. Immigration and Customs Enforcement Salaries and Expenses*, FISCAL YEAR 2015 CONG. JUSTIFICATION, Feb. 2015, at 45, 64–67 (seeking to increase the daily ATD population from 27,219 participants at the end of FY 2014 to 53,000 participants).

¹³¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-26, at 18.

¹³² ROSENBLUM & MEISSNER, DEPORTATION DILEMMA, at 46.

¹³³ See SHEBAYA & KOULISH, *supra* note 19.

¹³⁴ When DHS finalized a regulation under the Prison Rape Elimination Act (PREA), DHS noted that “commenters and advocacy groups encouraged DHS to consider options other than detention for vulnerable populations.” For example, “that vulnerable individuals—including LGBT and mentally ill detainees—should be detained in only extraordinary circumstances,” or that “LGBT individuals or sexual abuse victims who cannot be safely housed by the government be released or granted prosecutorial discretion rather than be detained.” DHS responded that “existing ICE screening methods and practices sufficiently address the concern expressed by these commenters,” and that RCA “evaluates the potential vulnerability of all individuals apprehended by ICE to determine whether detention is appropriate.” Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100, 13130 (Mar. 7, 2014) (to be codified at 6 C.F.R. pt. 155), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

D. *The Congressional Detention Bed Minimum and RCA Public Safety Risk Assessments*

Additionally, the low share in the Baltimore sample of individuals that ICE assessed as significant public safety risks, if similar nationwide, undercuts the rationale for a Congressional national detention bed minimum of “not less than 34,000 detention beds daily.” And notably, as Baltimore is a non-border field office, detainees nationwide (especially in border areas) may be even more likely to be higher flight risk and lower public safety risk, as were the Baltimore arrestees placed into non-judicial processes. Put another way, if ICE could accurately tailor detention to public safety risk, there may not exist enough high public safety risks to fill 34,000 beds daily—which raises the question of the utility of the detention bed mandate, particularly in light of the cost savings referenced above.

National indicators already exist that detention prioritized for public safety would result in fewer individuals detained on a daily basis. After ICE implemented its new November 2014 enforcement priorities, ICE’s number of average detainees daily dropped to approximately 26,000 by April 2015.¹³⁵ Repeal of mandatory detention provisions, revised interpretations thereof (by either ICE or courts), or changes in ICE’s discretionary practices regarding detention or ATD, as described above, might result in even further reductions to ICE’s average daily detention population. And though ICE has defended their reductions in detention,¹³⁶ the Administration has requested reductions in the bed minimum,¹³⁷ and multiple 2016 Presidential candidates¹³⁸ and Congressional members have

¹³⁵ ICE, *DHS releases end of fiscal year 2015 statistics* (2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>.

¹³⁶ *Department of Homeland Security Appropriations for 2016 Before the H. App. Comm., Subcomm. on Homeland Sec.*, 114th Cong., 52–53 (2015) (statement of Rep. John Culberson: “We want you to use 34,000 beds.... I feel very confident you could find an extra 9,000 criminal aliens that needed to be detained to fill those beds in a heartbeat.”) (statement of ICE Director Sarah Saldaña: “It’s not the sole purpose and goal to fill a bed; it’s to fill it in the right way.”), <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg96904/pdf/CHRG-114hhrg96904.pdf>.

¹³⁷ For FY 2015, the Administration had requested Congress to lower the required average daily population to 30,539 beds, which ICE estimated would save by itself \$155 million per year. DHS, *U.S. Immigration and Customs Enforcement Salaries and Expenses, FISCAL YEAR 2015 CONGRESSIONAL JUSTIFICATION*, Feb. 2015, at 81.

¹³⁸ Tierney Sneed, *Clinton Criticizes Immigrant Detentions Under Obama*, U.S. NEWS & WORLD REPORT, May 6, 2015 (former Secretary Clinton: “[T]here is actually a legal requirement that so many beds be filled. So people go out and round up people in order to get paid on a per-bed basis. I mean that just makes no sense at all to me.”), <http://www.usnews.com/news/articles/2015/05/06/hillary-clinton-criticizes-immigrant-detention-practices-under-obama>; BERNIE SANDERS.COM, *A Fair and Humane Immigration Policy*, <https://berniesanders.com/issues/a-fair-and-humane-immigration-policy/> (advocating that “Congress defund the detention bed quota”), last accessed January 18, 2016.

criticized the bed minimum,¹³⁹ ICE retains significant Congressional support, as shown by the failure of a 2013 House vote to repeal it.¹⁴⁰

E. *Immigration Enforcement Against Criminal Violators with U.S. Families*

Lastly, while President Obama has stated his intention for DHS to focus on “felons not families,” these data show that it will likely be difficult in practice to detain and deport criminal violators without deporting some parents and other family members. Nearly two-thirds (65.2 percent, 386 of 592 cases) of the ICE arrestees in the 2013 Baltimore sample had at least one criminal conviction. But 21.6 percent (128 of 592 cases) both had a criminal conviction and reported a US citizen spouse or child, while another 14.5 percent (80 of 592 cases) both had a criminal conviction and reported a local family tie. Of those mandatorily detained for a prior crime, for example, 36.9 percent reported a US citizen spouse or child (41 of 111 cases) and another 26.1 percent (29 of 111) reported a local family tie. Moreover, many criminal violators may have committed misdemeanors rather than felonies, or committed their crimes long ago, making them particularly sympathetic cases if they have families as well.

VI. CONCLUSION

Actuarial risk has the potential to enhance the effectiveness of immigration detention. The tool can predict the likelihood of future acts of violence and ensure that immigrants who really are high risk to public safety remain detained for the duration of their immigration proceedings.

At the same time, the risk tool itself generates risks associated with a secretive algorithm that lacks transparency. Additionally, in instances of mandatory detention, the lack of access to bond, and the lack of discretion given to the ICE District Director on the front end of the detention process and the immigration judge on the back end of the process combine to create serious legal obstacles for the individuals enduring the process.¹⁴¹

The findings to this study show how the risk tool can achieve what mandatory detention policy intended to achieve—weed out violent

¹³⁹ See e.g. Letter from Congress to President Barack Obama (Sept. 25, 2013), http://teddeutch.house.gov/uploadedfiles/deutch_foster_detention_letter.pdf (65 Members of Congress expressed opposition to detention bed minimum in appropriations legislation).

¹⁴⁰ An amendment to DHS’ Fiscal Year 2014 appropriations legislation that would have stricken the bed minimum language failed 232-190 in a floor vote on June 5, 2013. H. Amend. 107 to H.R. 2217, 113th Cong., <https://www.congress.gov/amendment/113th-congress/house-amendment/107>; <http://clerk.house.gov/evs/2013/roll198.xml>.

¹⁴¹ SHEBAYA & KOULISH, *supra* note 19.

criminal aliens from the general public—with more precision, at less cost, and with fewer due process violations. Since mandatory detention and the bed mandate impede the risk tool’s effective use, however, I conclude by saying in light of the findings to this study, it is becoming beholden upon Congress to reinterpret or eliminate mandatory detention and the bed mandate and permit RCA to function effectively for this would allow ICE to tailor detention decisions to those who really need it. Along the way, immigration detention might come to be seen as more humane and less excessive and punitive.