

# ARTICLES

## PUNISHING WITH IMPUNITY: THE LEGACY OF RISK CLASSIFICATION ASSESSMENT IN IMMIGRATION DETENTION

ROBERT KOULISH\* AND KATE EVANS\*\*

### ABSTRACT

*In 2012, the Department of Homeland Security adopted a risk classification assessment (“RCA”) tool to run on migrants in the custody of Immigration and Customs Enforcement (“ICE”). The risk tool helped determine who was detained and who was released from ICE custody. It was intended to curb detention rates by limiting detention based on risk of flight and danger and to ensure that the conditions of civil immigration detention were distinct from those in criminal detention. This Article presents data from several RCA datasets received pursuant to the Freedom of Information Act.*

*The story of the RCA is one of manipulation, subversion, and bias. In this study, we examine the RCA’s outcomes for migrants with special vulnerabilities, migrants subject to mandatory detention, and migrants eligible for bond*

---

\* Full Research Professor and Director of MLAW Programs at University of Maryland, and Lecturer at Law at Francis King Carey School of Law, Baltimore, MD. B.A. University of Pennsylvania; Ph.D. University of Wisconsin. I wish to thank the 2019 Law and Society Association Meetings in Washington DC, the Section 002 audience in particular, for helpful comments, my colleague Ernesto Calvo for informative discussions, Jose Cabezas for consultation and research assistance, and Kelsey Drotning, Elbereth Fernandez, Kee Hyun Park, and George Shalloway for research assistance. I also wish to thank colleagues attending annual Law & Society meetings and the CINETS International Crimmigration Network for their helpful comments at roundtables, panel presentations and during informal conversations, and reviewers. © 2021, Robert Koulish and Kate Evans.

\*\* Clinical Professor of Law and Director, Immigrant Rights Clinic, Duke University School of Law; B.A., Brown University; J.D. New York University School of Law. I thank Linus Chan, Ben Casper, Mark Noferi, and the remarkable *pro bono* counsel team from Dorsey & Whitney LLP led by Shannon Bjorklund and Colin Wicker who litigated our FOIA requests. I would also like to thank participants at the 2021 Border Criminologies conference and the UNC-Duke Law Clinical Scholarship Workshop for their support and helpful feedback. I am indebted to Natalie Pate and Andrew Lindsay for their invaluable research assistance throughout this project and to Christine Mullen for making this Article possible. Thanks to the incredible editors at the Georgetown Immigration Law Journal for their careful review and guidance in publishing this research.

*and release. We demonstrate that over time the risk tool recommended release or bond for fewer and fewer categories. Further, ICE officers' punitive use of detention defeated attempts at top-down reform and resulted in detention without bond for nearly every migrant.*

*As the Biden administration faces mounting criticism over its detention policy, our results amplify calls to shift the paradigm in immigration enforcement and to eliminate the use of detention as the predominant method of immigration control.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	3
I. THE FRAMEWORK FOR THE RCA . . . . .	9
A. <i>The Legal Parameters for Immigration Detention</i> . . . . .	9
B. <i>The Operation of the RCA within the Immigration Detention System</i> . . . . .	13
C. <i>The Role of the RCA in the Crimmigration Narrative</i> . . . . .	15
II. DATA AND METHODOLOGY: ICE DETENTION DECISIONS IN THREE DATASETS . . . . .	23
III. FINDINGS: WIDESPREAD DETENTION OF VULNERABLE AND LOWER RISK MIGRANTS . . . . .	26
A. <i>People with Special Vulnerabilities: Underreported and Largely Detained</i> . . . . .	27
B. <i>Mandatory Detention: Congressionally Imposed Custody of Lower Risk Migrants</i> . . . . .	32
C. <i>Subverting the RCA Into a Tool of Punishment</i> . . . . .	35
1. <i>Algorithmic Bias: Subversion from the Top</i> . . . . .	36
2. <i>Officer Bias: Subversion from the Bottom</i> . . . . .	56
3. <i>The Loss of Algorithmic Fairness Due to Algorithmic Bias</i> . . . . .	62
IV. THE IMPLICATIONS OF THE RCA'S RESULTS FOR DETENTION POLICY UNDER THE BIDEN ADMINISTRATION . . . . .	63
A. <i>People With Special Vulnerabilities</i> . . . . .	64
B. <i>The Scope of Mandatory Detention</i> . . . . .	66

2021]

PUNISHING WITH IMPUNITY

3

C.   *The Future of the RCA* . . . . .

67

D.   *The Nature of Immigration Enforcement and the Use of  
      Detention* . . . . .

69

CONCLUSION . . . . .

71

INTRODUCTION

The Biden administration took office amid promises to promote racial justice, decarceration, and a humane approach to immigration enforcement.<sup>1</sup> A flurry of executive orders and policy memoranda announced the administration’s efforts toward each goal.<sup>2</sup> However, immigrants as well as their families and advocates have watched a disturbing increase in the number of people detained.<sup>3</sup> Indeed, rather than reversing course from the Trump administration predecessor, these commitments appeared to be sidelined.<sup>4</sup> This increase portends a return to the detention policies of the Obama and Trump administrations: mass incarceration of Black, Latinx, and Asian migrants<sup>5</sup> under the guise of risk mitigation.

Since 2012, the decision to detain or release someone after an arrest for an immigration violation has been guided by the Risk Classification Assessment

1.   See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS DEMOCRATS, <https://perma.cc/NE66-QTAP>; *The Biden Plan to Build Back Better by Advancing Racial Equity across the American Economy*, BIDEN HARRIS DEMOCRATS, <https://perma.cc/5DK2-94LB>; *The Biden Plan for Strengthening America’s Commitment to Justice*, BIDEN HARRIS DEMOCRATS, <https://perma.cc/4T5F-XRU8>; Lisa Lerer, *Biden’s Sky-High Promises on Racial Justice*, N.Y. TIMES (Apr. 24, 2021), <https://perma.cc/9UE2-UNVU>.

2.   E.g., Advancing Racial Equity and Support for Underserved Communities through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Revision of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021); Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 26, 2021); Establishment of Interagency Task Force on the Reunification of Families, Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021).

3.   JORGE LOWEREE & AARON REICHLIN-MELNICK, AM. IMMIGR. COUNCIL, TRACKING THE BIDEN AGENDA ON IMMIGRATION ENFORCEMENT 22–23 (2021), <https://perma.cc/3LES-5L6Z>; Hamed Aleaziz, *The Number of Immigrants Jailed by ICE Has Ballooned under Biden This Year*, BUZZFEED NEWS (June 29, 2021, 6:17 PM), <https://perma.cc/K3VM-GXE8>; Philip Marcelo & Gerald Herbert, *Immigrant Detentions Soar Despite Biden’s Campaign Promises*, ASSOCIATED PRESS (Aug. 5, 2021), <https://perma.cc/2TVU-5MRQ>; NAT’L IMMIGRANT JUST. CTR., ROADMAP TO DISMANTLE THE U.S. IMMIGRATION DETENTION SYSTEM, (2021), <https://perma.cc/S28L-ZZBX>.

4.   LOWEREE & REICHLIN-MELNICK, *supra* note 3, at 18–24; Walter Ewing, *Biden’s Actions on Immigration Enforcement Have Been Inconsistent Since Taking Office*, IMMIGR. IMPACT (May 20, 2021), <https://perma.cc/MFS5-7PGU>.

5.   This Article uses the word “migrants” throughout to avoid both the legal significance of the word “immigrant” and the offensive nature of the term “alien,” which is still used in the Immigration and Nationality Act (“INA”). See generally MAI NGAI, *Introduction*, in IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2d ed. 2014). In April 2021, both ICE and CBP issued memorandums instructing agency officials to use “preferred terminology and inclusive language,” aligning communications practices with the Biden administration’s guidance. See Memorandum from Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, to ICE Leadership, Updated Terminology for Communications and Materials (Apr. 19, 2021); Memorandum from Troy A. Miller, Senior Off. Performing Duties of the Comm’r, U.S. Customs & Border Prot., Updated Terminology for CBP Communications and Materials (Apr. 19, 2021); see also Memorandum from Jean King, Acting Dir., Exec. Off. For Immigr. Review, Terminology (July 26, 2021).

(“RCA”) system.<sup>6</sup> The RCA is an automated risk tool designed to recommend whether to detain or release migrants pending resolution of removal charges.<sup>7</sup> Modeled on evidence-based criminal justice reforms,<sup>8</sup> the RCA combines database records and interview information into a weighted scoring system that produces public safety and flight risk assessments of “low,” “medium,” or “high” and issues a corresponding custody recommendation.<sup>9</sup> The RCA was programmed to generate one of four recommendations: (1) detain in the custody of the Department of Homeland Security (“DHS”) (no bond); (2) detain, but with an accompanying recommended bond amount; (3) supervisor to determine; and (4) release.<sup>10</sup> An Immigration and Customs Enforcement (“ICE”) supervisor then reviews the RCA recommendation and any accompanying comments and makes a final custody decision including any conditions for detention or release.<sup>11</sup>

In 2014, this research project, called Risk Assessment in Immigration Detention (“RAID”),<sup>12</sup> introduced the immigration RCA for detention to readers of the *Georgetown Immigration Law Journal*.<sup>13</sup> The article argued that the risk tool would not reduce current levels of over-detention.<sup>14</sup> It contended that competing immigration laws and policies undermined an effective and accurate risk assessment.<sup>15</sup> Author Robert Koulish later introduced data from the tool’s pilot in Baltimore, Maryland during 2012.<sup>16</sup> That study remarked on the high detention rates and the inability of risk to predict whether or not an individual would be detained.<sup>17</sup> More recently, in a joint study,<sup>18</sup> the

---

6. Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 802 (2020).

7. *Id.* at 793.

8. See Memorandum to Phyllis Coven, Acting Dir., Off. of Detention Pol’y and Plan., on Simulation of Custody Levels Under the Current Detention Standard and the Proposed Changes to Intake Processing (Nov. 18, 2010), in CONSOLIDATED RCA FOIA DOCUMENT RELEASE 2016-ICLI-00018, DUKE L. SCHOLARSHIP REPOSITORY 506–07, <https://perma.cc/7K8T-Y3VD> [hereinafter CONSOLIDATED FOIA RESPONSES]; see also Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION 3, 4 (2009) (describing pretrial detention decisions as based on an assessment of risk of flight and risk of danger to the community); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, *THE HIDDEN COSTS OF PRETRIAL DETENTION*, ARNOLD FOUND. 8 (2013) (describing Kentucky’s risk assessment tool used for pretrial detention).

9. Evans & Koulish, *supra* note 6, at 802–05; ATP RULES MATRIX v.3, DUKE L. SCHOLARSHIP REPOSITORY (n.d.) [hereinafter RCA RULES AND SCORING], <https://perma.cc/7K8T-Y3VD> (Logic-Based Scoring Rules, Points-Based Scoring Rules, Crime Codes).

10. Evans & Koulish, *supra* note 6, at 805.

11. *Id.*

12. RAID, which is organized by Professors Robert Koulish, Kate Evans, and Ernesto Calvo, is housed at the University of Maryland and Duke University School of Law.

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

14. *Id.* at 74.

15. *Id.* at 50–52.

16. See generally Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 3, 6 (2016) (explaining “the limited impact of RCA on ICE detention outcomes”).

17. *Id.* at 18.

18. See generally Evans & Koulish, *supra* note 6.

authors analyzed the “black box” algorithm<sup>19</sup> to demonstrate the manipulation of the risk tool over time and linked more restrictive detention outcomes to substantial changes in the risk algorithm.<sup>20</sup>

This Article is the culmination of several years of research on the RAID Project. It breaks down the broad analysis by Mark Noferi and Koulish<sup>21</sup> and goes inside the algorithmic black box previously analyzed by the authors. With the original empirical data presented here, we examine the carceral immigrant state and the mechanisms at play in detaining immigrants despite the best-made rhetoric on taming detention. Our analysis reveals the effects of ICE’s manipulation of the RCA algorithm on detention cases and demonstrates how the RCA’s recommendations and ICE’s detention decisions grew increasingly punitive over time. In sum, we see ICE detaining lower-risk individuals at almost the same rate as higher-risk ones. That is, ICE has used the risk tool as an instrument to legitimize detention, not limit it.

### Summary Findings

#### Detention

- About 18 percent of immigrants in ICE custody are mandatorily detained under § 236(c) of the Immigration and Nationality Act (“INA”).
- Almost 20 percent of immigrants in ICE custody are detained despite eligibility for bond under INA § 236(a).
- Almost 55 percent of immigrants in ICE custody are in some expedited process and are not scheduled to see an immigration judge.
- Few detained migrants have committed violent offenses.
- Most cases with “high” flight-risk assessments receive the designation automatically because the individuals are in expedited removal, even if they are asylum seekers with family ties in the United States and strong incentives to pursue their cases in immigration court.

#### Special Vulnerabilities

- ICE underutilizes the special vulnerabilities designation to protect migrants who face particularly severe harm in detention.
- Only 6 percent of people processed through the RCA were designated as having special vulnerabilities
- People with special vulnerabilities are more likely than those without special vulnerabilities to be released.
- An overwhelming majority of people with special vulnerabilities are nonetheless detained.

---

19. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015). Pasquale emphasizes the risks involved in secretive algorithms, particularly when liberty is at stake. *Id.* at 8, 52 (He says that demanding transparency is a first step towards creating a more democratic process.).

20. Evans & Koulish, *supra* note 6, at 846–48.

21. See generally Noferi & Koulish, *supra* note 13.

### Changes to the RCA Algorithm and their Impact:

- Between 2012 and 2019 ICE increasingly detained lower-risk immigrants.
- ICE removed bond eligibility from the RCA recommendations in 2015.
- ICE suspended the release recommendation for all immigrants in 2017.
- By 2019 nearly every migrant was detained without bond regardless of risk level.

The RCA was created and implemented alongside a broader array of reforms adopted by the Obama administration to focus immigration enforcement efforts on certain categories of migrants.<sup>22</sup> These efforts faced opposition from two sources: (1) court challenges that prevented the broader prosecutorial discretion programs from being implemented;<sup>23</sup> and (2) resistance from ICE officers to restrictions on arrests and detention.<sup>24</sup>

Our analysis dissects this quasi principal-agent dilemma<sup>25</sup>—ICE officers’ subversion of the directives issued by political appointees<sup>26</sup>—as a lesson to be learned by the Biden administration. Perhaps the most intractable problem Biden faces is overcoming a highly discretionary and punitive culture within ICE bent on detaining and removing as many migrants as possible. Scholars have documented that punishment, even cruelty, is the objective of ICE’s operations.<sup>27</sup> Scholars and advocates have similarly shown that ICE intransigence to reform is hard-wired from within.<sup>28</sup> Our work serves as an

22. Christie Thompson, *Deporting ‘Felons, Not Families,’* MARSHALL PROJECT (Nov. 21, 2014, 5:22 PM), <https://perma.cc/Z9KB-PS7A>. Though the *felons, not families* policy ostensibly focused enforcement actions on security threats and violent criminal offenders it also ensnared large numbers of families, including many fleeing persecutions, through its enforcement priorities. *Id.*

23. See generally *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (affirming a challenge brought by Texas and twenty-five other states seeking to block the implementation of DAPA and expansion of DACA), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

24. See, e.g., *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (challenge to DACA by ICE officials); Julia Preston, *Agents Sue over Deportation Suspensions*, N.Y. TIMES (Aug. 23, 2012), <https://perma.cc/4XP8-A3AC>.

25. Principle-agent scholarship, primarily in economics and political science, shows that policy-makers and bureaucracies have different incentive structures. See, e.g., Brian J. Cook & B. Dan Wood, *Principal-Agent Models of Political Control of Bureaucracy*, 83 AM. POL. SCI. REV. 965 (1989).

26. See *supra* notes 18–19 and accompanying text; Jennifer Lee Koh, *Downsizing the Deportation State*, 17 HARV. L. & POL’Y REV. (forthcoming 2021) (manuscript at 17–19) (describing the dynamic between frontline officers and political appointees in the immigration context); *id.* at 13 (“The legal framework developed by the courts and Congress facilitates the tremendous power exercised by the deportation state’s front line, which it exercises with very little accountability.”).

27. E.g., ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS* ch. 5 (2020); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (“By so intertwining immigration detention and penal incarceration, Congress created an immigration detention legal architecture that, in contrast with the prevailing legal characterization, is formally punitive.”); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (“Immigration detention has embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”).

28. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187–90 (2015) (discussing the history of ICE’s resistance to deferred action); Ahilan



intervention in the literature discussing the differences and trade-offs between regulating through rules versus standards.<sup>29</sup> Our research suggests the choice of regulatory method may not matter on the ground; instead, what may matter most is the choice of regulator.

Our study exposes ICE officers' efficacy in subverting attempts to mitigate the use of detention. Over time, the tool was manipulated and overridden to the point that its founding risk was jettisoned. Instead, ICE imposed detention without justification. With the veil of risk removed, all that remains is the high rate of detention the RCA was intended to prevent. More broadly, just as risk assessment systems have failed to prevent the widespread incarceration of Black and Brown people in the criminal justice system,<sup>30</sup> the RCA has similarly failed to wean out racial bias in the immigration enforcement system.<sup>31</sup> Two conclusions emerge: (1) immigration detention is used to punish; and (2) the punitive bias of ICE officers to detain and deter has prevailed over efforts for reform.

The Biden administration is poised to fail in its efforts to reform immigration detention for the same reasons the Obama administration did.<sup>32</sup> In Spring 2021, ICE publicly refuted President Biden's new enforcement priorities, just as it had Obama's and instead adhered to its own punitive habitus.<sup>33</sup> The agency again demonstrated how intransigent organizational culture can result from broad delegations of discretion.<sup>34</sup> Further, the administration has retreated from strict oversight of ICE officers' focus on enforcement

Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014), <https://perma.cc/UR6X-4ZA2> (describing "a historical context of defiance—some would say insurrection—by ICE enforcement agents and attorneys who essentially refused to implement prior directives on prosecutorial priorities"); DANIEL E. MARTÍNEZ, JEREMY SLACK & JOSIAH HEYMAN, BORDERING ON CRIMINAL: THE ROUTINE ABUSE OF MIGRANTS IN THE REMOVAL SYSTEM, PART 1: MIGRANT MISTREATMENT WHILE IN U.S. CUSTODY, IMMIGR. POL'Y CTR. (2013); JOSIAH HEYMAN, JEREMY SLACK & DANIEL E. MARTÍNEZ, WHY BORDER PATROL AGENTS AND CBP OFFICERS SHOULD NOT SERVE AS ASYLUM OFFICERS, CTR. FOR MIGRATION STUD. ESSAYS (2019).

29. See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULEBASED DECISION-MAKING IN LAW AND IN LIFE (1991); Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 576 (2014); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585 (1993); Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

30. See generally KELLY ROBERTS FREEMAN, CATHY HU & JESSE JANNETTA, RACIAL EQUITY AND CRIMINAL JUSTICE RISK ASSESSMENT (2021); Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://perma.cc/3N6Y-2CX4>.

31. Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOC. RACE & ETHNICITY 82, 94 (2016).

32. Koh, *supra* note 26 (manuscript at 3, 18); *Early Immigration Actions Taken by the Biden Administration*, AM. IMMIGR. LAWYERS ASS'N (Apr. 29, 2021), <https://perma.cc/Y4V6-37SP>.

33. By habitus we mean its own constitution or, "way of doing things." Nicole Narea, *Biden Is Trying to Rein in ICE with New Immigration Enforcement Priorities*, VOX (Feb. 19, 2021, 2:20 PM), <https://perma.cc/8GHY-TAVQ>; Koh, *supra* note 26 (manuscript at 13); John Washington, *ICE Subverting Biden's Priorities for Detention and Deportation*, INTERCEPT (May 7, 2021, 10:59 AM), <https://perma.cc/65UL-N4FV>.

34. See Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 TEX. L. REV. 1633, 1659–60 (2000); Washington, *supra* note 33; Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 103–04 (2020) (describing ICE as "a rogue agency unconstrained by the constitution and other legal limits").

priorities in its initial directive<sup>35</sup> and instead left the final decision as to who to arrest, detain, and prosecute to officer discretion.<sup>36</sup> The Biden administration's embrace of ICE's enforcement ethos and ultimate choice as to policy implementation is likely to undermine its success at limiting detention.<sup>37</sup>

Our evidence shows that the Biden administration cannot achieve its goals of decarceration, racial equity, and the creation of a fair and humane immigration system without dismantling the immigration detention machinery. It must abandon hidden algorithms that are subject to abuse from top to bottom. It should seek to eliminate immigration provisions from the Clinton era that are largely responsible for mass immigrant incarceration. It must commit to radically rethinking the use of immigration detention and enforcement methods. President Biden, like reform-minded predecessors, must overcome ICE resistance or fall victim to it.

The Article is presented as follows. Part I lays out the legal framework for immigration detention and how the RCA operates within this system. It also covers the RCA's genesis in the convergence of immigration and criminal enforcement systems and its role in reinforcing a narrative that equates migrants with criminals. Part II describes the data and methodology we use to analyze the impact of the RCA. Part III describes the empirical findings that demonstrate the manipulation of the risk tool toward an ever more punitive system of immigration detention in order to accommodate ICE officer bias. In Part IV, we explore the implications of our study for vulnerable migrants, the mandatory detention statutes, and the future of risk assessment in guiding immigration detention, and the nature of immigration enforcement moving forward. Our findings support existing calls to abolish ICE in its current form and to move toward an enforcement model centered on community support and pathways for legal integration.<sup>38</sup> We conclude by calling on the Biden administration to end the rampant and unjustified immigration detention that the RCA facilitated and that has characterized modern immigration enforcement.

---

35. See Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't to All ICE Employees 5 (Feb. 18, 2021), <https://perma.cc/6U6U-X7DL>.

36. See Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, 5 (Sept. 30, 2021), <https://perma.cc/U5Z2-NRU4>.

37. *Id.* at 1 (stating that "I am grateful to [the Acting Director of ICE], the other leaders of U.S. Immigration and Customs Enforcement, and our frontline personnel for the candor and openness of the engagements we have had to help shape this guidance. Thank you especially for dedicating yourselves—all your talent and energy—to the noble law enforcement profession. In executing our solemn responsibility to enforce immigration law with honor and integrity, we can help achieve justice and realize our ideals as a Nation.")

38. See, e.g., Markowitz, *supra* note 34, at 129–40; Koh, *supra* note 26 (manuscript at 18–28); Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. (forthcoming in 2022); RANDY CAPPS & DORIS MEISSNER, MIGRANT POL'Y INST. FROM JAILERS TO CASE MANAGERS: REDESIGNING THE U.S. IMMIGRATION SYSTEM TO BE EFFECTIVE AND FAIR 13–22 (2021); Nana Gyamifi, *Until We're Free: Open Letter to President Biden*, BLACK ALLIANCE FOR JUST IMMIGR., <https://perma.cc/WU6D-4H5Z>; Letter to Alejandro N. Mayorkas, Sec'y of Dep't of Homeland Sec. (June 28, 2021), <https://perma.cc/6V4P-CPLX>; Sarah Sherman-Stokes, Opinion, *There is Nothing 'Civil' or Human About the Detention of Noncitizens*, HILL (May 28, 2021, 8 :00 AM), <https://perma.cc/EVS7-WX4F>.



## I. THE FRAMEWORK FOR THE RCA

The RCA's stated functions were to ensure that the use of immigration detention aligns with its civil purpose and to promote consistency and transparency in ICE officers' custody determinations through the use of an algorithm.<sup>39</sup> In this Part, we explain the rationale for and restrictions on civil immigration detention, how the RCA fits into ICE's enforcement procedures, and the RCA's origins in the criminal justice system.

### A. *The Legal Parameters for Immigration Detention*

The Fifth Amendment's guarantee of liberty absent due process of law generally prohibits civil detention.<sup>40</sup> The Supreme Court has recognized that detention for non-punitive purposes may be permissible in "special" and "narrow" circumstances.<sup>41</sup> Civil detention in support of immigration enforcement has a long history as one of these special and narrow circumstances.<sup>42</sup> Accordingly, detention must be non-punitive in purpose and effect, in addition to having a special justification that outweighs the individual's interest in their liberty.<sup>43</sup> Those justifications are limited to (1) ensuring the appearance of migrants at future immigration proceedings or for their removal from the country; and (2) preventing danger to the community.<sup>44</sup> However, these justifications are not sufficiently strong to justify civil detention in every case.<sup>45</sup> Moreover, if removal is unlikely, the government's interest in preventing flight becomes "weak or nonexistent."<sup>46</sup> The Court has also explained that prior criminal history alone is insufficient to justify preventative civil detention.<sup>47</sup> Instead, detention must be limited in duration and restricted to especially "dangerous" people or those who are likely to flee enforcement.<sup>48</sup>

The Court has articulated these principles through a series of challenges to statutes governing detention preceding and succeeding an order of removal issued by an immigration judge or the Board of Immigration Appeals. Specifically, the Court has upheld Congress's detention provisions following a final order of removal but only so far as detention is supported by these two justifications.<sup>49</sup> Similarly, the Court has upheld civil immigration detention

---

39. Evans & Koulish, *supra* note 6, at 833.

40. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

41. *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80); *Hendricks*, 521 U.S. at 357.

42. See *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

43. *Zadvydas*, 533 U.S. at 690; *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

44. *Zadvydas*, 533 U.S. at 690; *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021).

45. *Zadvydas*, 533 U.S. at 690–91 (finding these justifications insufficient to warrant the indefinite detention in the case).

46. *Id.* at 690; see also *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

47. See *Zadvydas*, 533 U.S. at 690–91.

48. *Id.*

49. See *id.*

preceding a final removal order so long as it mitigates flight risk and danger to the community.<sup>50</sup>

Congress has authorized the use of immigration detention through three separate statutes. Section 235 of the Immigration and Nationality Act (“INA”) authorizes the detention of migrants subject to expedited removal.<sup>51</sup> The statute authorizes the expedited removal of migrants without a hearing or further review for anyone who (1) cannot demonstrate that they have been physically present in the United States for two years immediately preceding the encounter; and (2) is present without being formally admitted to the United States, or presents themselves at the border and lacks authorization to enter.<sup>52</sup> Section 241 of the INA governs the detention of people with an administratively final order of removal,<sup>53</sup> including those who have departed the United States after receiving a removal order and subsequently reentered so that the prior removal order is reinstated.<sup>54</sup> Our analysis focuses principally on the third detention statute: INA § 236. This law provides for discretionary detention under § 236(a) and mandatory detention under § 236(c) during removal proceedings and pending a final decision on whether the person will be ordered removed.<sup>55</sup>

In 1996, Congress enacted a series of changes to the immigration laws that made it more difficult for immigrants with *any* criminal history to remain in the United States.<sup>56</sup> At the same time, Congress expanded the grounds of mandatory immigration detention.<sup>57</sup> The changes to the mandatory detention provision in § 236(c) increased the category of no-bond detention for persons convicted of specific enumerated offenses to include minor misdemeanor offenses alongside serious violent crimes.<sup>58</sup> The justification for mandatory detention was to incapacitate “dangerous” immigrants—who posed the greatest flight risk—to ensure their removal from the country as well as to protect

---

50. *Demore v. Kim*, 538 U.S. 510, 527–28 (2003); *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 848 (2018); *Zadvydas*, 533 U.S. at 690; *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021).

51. Immigration and Nationality Act (INA) § 235, 8 U.S.C. § 1225.

52. INA § 235(b)(1)(A)(i), (iii)(II).

53. INA § 241. An order is administratively final typically upon dismissal of, waiver of, or expiration of time allowed for an appeal. 8 C.F.R. § 1241.1 (2008). However, an order issued *in absentia* is final immediately upon issuance and an order certified to the BIA or AG is final upon a “subsequent decision ordering removal.” *Id.*

54. INA § 241(a)(5); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021).

55. INA § 236(a) (providing that the Attorney General may detain migrants during removal proceedings); INA § 236(c) (providing that the Attorney General shall detain certain categories of migrant pending a final order of removal).

56. See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 298, 303 (2017) (discussing the goals and impacts of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), the Antiterrorism and Effective Death Penalty Act, and Personal Responsibility and Work Opportunity Reconciliation Act); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000).

57. See IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1226(c)).

58. INA § 236(c)(1) (citing to portions of INA §§ 212 and 237(a)(2), making certain crimes involving moral turpitude, aggravated felonies, controlled substances offenses, firearms offenses, and national security offenses inadmissible or deportable offenses).

public safety by preventing people with certain categories of criminal convictions from committing future crimes.<sup>59</sup>

Section 236(a) allows for discretionary detention and provides ICE with three options: (1) to continue to detain the arrested migrant pending the removal proceedings; (2) to release the noncitizen on “bond of at least \$1,500;” or (3) to release the noncitizen on “conditional parole.”<sup>60</sup> The regulations implementing § 236(a) require a case-by-case determination based on whether the individual poses a risk to public safety or risk of flight.<sup>61</sup> Categorical detention is thus not permitted by statute or regulation for this group of migrants.

People detained under § 236(a), with or without bond, can challenge their detention and any accompanying bond amount set before an immigration judge through a “custody redetermination” hearing.<sup>62</sup> However, this process is neither easy, quick, nor accurate in its current form.<sup>63</sup> In contrast to pretrial detention in the criminal setting wherein a bail hearing is held within forty-eight hours of detention,<sup>64</sup> a custody redetermination hearing can take weeks to schedule.<sup>65</sup> Custody redetermination hearings also place the burden on the migrant to prove that they are not a danger nor a risk of flight,<sup>66</sup> though this burden allocation has been successfully challenged in several courts.<sup>67</sup>

59. See *Demore v. Kim*, 538 U.S. 510, 518–21 (2003).

60. INA § 236(a)(1), (2).

61. 8 C.F.R. § 1236.1(c)(8) (“[T]he alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”).

62. 8 C.F.R. §§ 1003.19(a), 1236.1(d); see also *Matter of Guerra*, 24 I. & N. Dec. 37, 40–41 (B.I.A. 2006) (finding the immigration judge appropriately considered evidence regarding public safety).

63. Class Petition for Writ of Habeas Corpus and Class Complaint for Declaratory and Injunctive Relief at ¶ 5, *Vazquez Perez v. Decker*, 2019 WL 4784950 (S.D.N.Y. 2019) (No. 18-cv-10683) [hereinafter *Vazquez Perez Complaint*] (alleging that ICE’s practice of waiting months before giving individuals in an NYC detention facility an initial court appearance violates the U.S. Constitution and the Administrative Procedure Act); *COVID-19 Pandemic Drives Up Immigration Court Backlog and Delays*, TRAC IMMIGR.: WHAT’S NEW (Sept. 18, 2020), <https://perma.cc/HLK4-SE2D> (noting delays for bond hearings in light of the COVID-19 pandemic); Adolfo Flores, *ICE Detainees Were Held without Bond Hearings for Months. Attorneys Worry It Will Get Worse*, BUZZFEED NEWS (Feb. 13, 2020, 3:12 PM), <https://perma.cc/LQ46-K6Q7> (discussing a New Mexico detention center that held detainees for months without a bond hearing, in part because bond hearings were “being deprioritized for other hearings”).

64. See, e.g., *O’Donnell v. Harris County*, 892 F.3d 147, 160 (5th Cir. 2018).

65. See *Vazquez Perez Complaint*, *supra* note 63, at ¶¶ 21, 28 (noting a median wait time of eighty days for detainees in an NYC detention center to receive an initial hearing, when a detainee has the first opportunity to be released on bond); Paul Moses & Tim Healy, *Only 20% of ICE Detainees Get a Hearing within 10 Days*, DOCUMENTED (Dec. 20, 2020, 12:47 PM), <https://perma.cc/R23J-S22H> (noting “eight courts in which it took EOIR longer than a median of 17 days to provide either a master calendar hearing or bond determination”).

66. 8 C.F.R. § 236.1(c)(8) (“[T]he alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”); *Guerra*, 24 I. & N. Dec. at 40; Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 176–77 (2016).

67. See, e.g., *Hernandez-Lara v. Lyons*, 10 F.4th 19, 39 (1st Cir. 2021) (holding “that the government must bear the burden of proving dangerousness or flight risk in order to continue detaining a noncitizen under [INA § 236(a)]”); *Velasco Lopez v. Decker*, 978 F.3d 842, 846 (2d Cir. 2020) (affirming a district court decision that placed the burden on the government); see also Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 117–22 (2016) (arguing that the government should bear the burden).

Additionally, the detained migrant is not guaranteed representation to help marshal documents, witnesses, or arguments to prove that they should be released, even if they are indigent.<sup>68</sup> And because they are detained, the likelihood that they can secure legal counsel is extremely low.<sup>69</sup> Unsurprisingly, the rate of success at these hearings is also low.<sup>70</sup>

On the other hand, migrants who are subject to mandatory detention cannot rely on any individualized review of their risk levels that would allow them to be released.<sup>71</sup> The legality of the statutes that mandate detention on entire categories are tied to their nexus to risk. In upholding these statutes, the Supreme Court has concluded that the categories of migrants encompassed by those statutes are inherently riskier and, therefore, the statutes are sufficiently grounded in the acceptable justifications for immigration detention.<sup>72</sup>

Whether detained as a matter of discretion or by mandate, the harms incurred to the people detained, their families, and their communities are substantial. A person waiting weeks to seek a bond from an immigration judge faces the loss of their employment, their home, and long-lasting trauma stemming from family separation.<sup>73</sup> In addition, detention itself imposes physical and psychological harms on those incarcerated, including mental illness, exposure to debilitating diseases, and death.<sup>74</sup>

---

68. Immigration & Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (giving noncitizens in removal proceedings the right to representation, but only “at no expense to the Government”); see *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013). But see Nicole Narea, *New York Gave Every Detained Immigrant a Lawyer. It Could Serve as a National Model*, Vox (June 9, 2021, 8:00 AM), <https://www.vox.com/policy-and-politics/22463009/biden-new-york-immigrant-access-lawyer-court> [archived at <https://perma.cc/2VLY-36LE>] (describing New York’s recent initiative to provide publicly-funded lawyers to all detained immigrants).

69. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32–36 (2015).

70. See *Representation at Bond Hearings Rising but Outcomes Have Not Improved*, TRAC IMMIGR. (June 18, 2020), <https://perma.cc/HG9V-YAPR>; *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR. (last updated Sept. 2021), <https://perma.cc/4D7U-78EN> (showing that immigration judges granted bond in only 33 percent of cases in FY2021, down from 52 percent in FY2020).

71. 8 U.S.C. § 1226(c)(1) (mandating detention for certain categories of offenses).

72. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 847 (2018); *Demore v. Kim*, 538 U.S. 510, 513, 519–21 (2003).

73. See SAMANTHA ARTIGA & BARBARA LYONS, KAISER FAM. FOUND., *FAMILY CONSEQUENCES OF DETENTION/DEPORTATION: EFFECTS ON FINANCES, HEALTH, AND WELL-BEING* (2018), <https://perma.cc/E4DN-7DKG>; CAITLIN PATLER, UCLA INST. FOR RSCH. ON LAB. & EMP., *THE ECONOMIC IMPACTS OF LONG-TERM IMMIGRATION DETENTION IN SOUTHERN CALIFORNIA 2* (2015) (indicating “that long-term detention produces financial insecurity at the individual and household levels, and removes millions of dollars from local communities in the form of lost wages”).

74. See generally, e.g., OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., *OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3* (2019) (reporting findings of “unsafe and unhealthy conditions to varying degrees at all [four ICE] facilities” inspected); *US: Deaths in Immigration Detention: Newly Released Records Suggest Dangerous Lapses in Medical Care*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), <https://perma.cc/2DUB-78QT> (noting “evidence of the misuse of isolation for people with mental disabilities, inadequate mental health evaluation and treatment, and broader medical care failures” in detention facilities); Darius Tahir, *‘Black Hole’ of Medical Records Contributes to Deaths, Mistreatment at the Border*, POLITICO (Dec. 1, 2019, 6:52 AM), <https://perma.cc/GQ8Q-KUH2>; Leigh Hopper, *COVID-19, Suicide and Substandard Medical Care Driving High Rate of Death Among ICE Detainees*, USC NEWS (Jan. 21, 2021), <https://perma.cc/EGH5-J8U5>; Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2151–

In sum, the stakes for people in immigration custody and their families are high, and the protections are low. For people whose detention is congressionally mandated by § 236(c), the data from the RCA allow us to examine whether the justifications for that statute bear out—whether the people falling into this category are inherently more likely to abscond, more likely to endanger others, or both. For migrants who are detained as a matter of discretion under § 236(a), the data from the RCA allow us to evaluate the degree and accuracy of individualized risk assessment used to determine whether to detain or release each person. To fully understand the data from RCA, we must examine how ICE officers and supervisors deploy the RCA in the course of deciding whether to detain hundreds of thousands of people who pass through their custody each year.

### B. *The Operation of the RCA within the Immigration Detention System*

In January 2013, DHS completed its national rollout of the RCA—the largest risk assessment tool in the country<sup>75</sup>—as part of its expanding detention regime. The RCA would, in theory, measure a migrant’s flight risk and risk to public safety in order to determine whether he or she should be detained by ICE.<sup>76</sup> The RCA consists of over 100 factors distributed across four modules: special vulnerabilities, mandatory detention, public safety risk, and flight risk.<sup>77</sup> The mechanics of each of these modules are described in detail in Part III, along with their results. In brief, the tool combines database records and interview information in a scoring system to produce public safety and flight risk assessments. These assessments are divided into “low,” “medium,” and “high” categories based on the RCA’s scoring thresholds.<sup>78</sup> The RCA then combines the risk assessment level for public safety with the risk assessment level for flight, along with special vulnerabilities and mandatory detention information, to generate a custody recommendation. The algorithm initially

---

53 (2017); Alyssa Aquino, *ICE Must Test Migrants before Sending Them to Wash. Center*, LAW360 (Aug. 24, 2021, 7:02 PM), <https://www.law360.com/articles/1415863> [archived at <https://perma.cc/KSU8-6PLA>] (reporting that ICE had failed to test detainees before transferring them, exposing vulnerable detainees to COVID-19); Samantha Sherman, *Defining Forced Labor: The Legal Battle to Protect Detained Immigrants from Private Exploitation*, 88 U. CHI. L. REV. 1201, 1203 (2021) (mentioning reports of “abusive forced labor practices that not only violate fundamental principles of human dignity but also pose serious dangers to [detainees’] mental and physical health and well-being”); *Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), <https://perma.cc/2GVX-V6Z2> (documenting heightened and additional risks faced by detainees throughout the pandemic); HUM. RTS. WATCH, AMERICAN CIV. LIBERTIES UNION, NAT’L IMMIGRANT JUST. CTR. & DET. WATCH NETWORK, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1 (2018), <https://perma.cc/AD34-GGF6> (linking deaths in immigration detention to “dangerously inadequate medical care”); *Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 749–51 (C.D. Cal. 2020) (granting a preliminary injunction requiring ICE to make custody redeterminations for detainees in light of its failed COVID-19 response).

75. See Noferi & Koulisch, *supra* note 13, at 51 n.32.

76. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S ALTERNATIVES TO DETENTION (REVISED) 4–5 (Feb. 4, 2015), <https://perma.cc/U73S-PT7B>.

77. *Id.* at 5.

78. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).



produced one of four recommendations: (1) “detain in the custody of DHS” (meaning without bond); (2) “detain, eligible for bond,” with a recommended bond amount; (3) “supervisor to determine detain or release;” or (4) “release under community supervision.”<sup>79</sup> During the course of our study, the RCA’s recommendations to “detain, eligible for bond” or “release under community supervision” were eliminated.

The RCA’s labels are misleading in that the recommendation “detain, eligible for bond” does not correspond to the legal category of people statutorily eligible for bond under § 236(a). Migrants whose detention is not mandatory under § 236(a) could also receive the recommendation “detain in the custody of DHS” based on their RCA scores. Thus, people who are eligible for bond under § 236(a) fall into the both the “detain, eligible for bond” and “detain in the custody of DHS” outcomes.<sup>80</sup> For ease and to avoid the misleading label, we refer to the RCA’s recommendations and ICE’s final custody decisions as (1) detain, without bond; (2) detain, with bond; (3) supervisor to determine; and (4) release.

While migrants may be arrested by ICE, they may also enter ICE custody through an external office such as Customs and Border Patrol (“CBP”), Homeland Security Investigations, or Criminal Alien Program officers in state and federal prisons, or through state and local officers designated to enforce immigration law under the 287(g) Program.<sup>81</sup> The RCA is applied either by the external arresting agency or at the point of transfer to ICE custody.<sup>82</sup> If external officers ran the RCA, then ICE officers review the RCA summary along with other database entries upon booking the person into ICE detention.<sup>83</sup> During our study period, the only people exempt from the RCA were those subject to mandatory detention who would also likely depart or be removed from the United States within five days of the immigration arrest, or people benefitting from an ICE decision to exercise its prosecutorial discretion and not initiate removal proceedings.<sup>84</sup>

Once the RCA produces a custody recommendation through its algorithm, both the ICE officer and a supervisor must respond to the recommendation.<sup>85</sup> The officer must specify if they agree with the RCA recommendation and provide reasons for any disagreement.<sup>86</sup> Then, an ICE supervisor must review the RCA recommendation along with the ICE officer’s comments and make

---

79. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., *supra* note 76, at 11, 25 (providing data on the four recommendations).

80. See E-mail from ERO Taskings to Field Off. Dirs., Deputy Field Off. Dirs. and Assistant Field Off. Dirs. (Jan. 6, 2014, 5:17 PM), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 1734–35 [hereinafter 2014 RCA Scoring Methodology Change].

81. U.S. IMMGR. & CUSTOMS ENF’T, RISK CLASSIFICATION ASSESSMENT (RCA) SYSTEMS TRAINING 98–111, 134–35 (unpublished training slides) (on file with Duke University), <https://perma.cc/75TE-QHPJ> [hereinafter RCA SYSTEMS TRAINING].

82. *Id.*

83. *Id.*

84. Evans & Koulish, *supra* note 6, at 802 n.57.

85. *Id.* at 805; RCA SYSTEMS TRAINING, *supra* note 81 at 136–44.

86. RCA SYSTEMS TRAINING, *supra* note 81 at 136–44; Evans & Koulish, *supra* note 6, at 805.



a final decision with respect to the person's custody and any conditions for detention or release.<sup>87</sup>

The RCA classifications, custody recommendation, and final supervisor decisions, with any accompanying rationale, are placed in the detained person's file.<sup>88</sup> However, the RCA's results are not shared with the migrant, their attorney, or the immigration judge reviewing ICE's custody determination, if such a hearing is available.<sup>89</sup> Thus, a direct challenge to the accuracy of the RCA's factors and scoring as applied to the migrant is not possible.

Through the RCA, DHS tried to quantify risk and justify immigration detention. The tool emerged from efforts to control crime and limit detention through assessing risk within the criminal justice system. In the next section, we examine how the RCA emerged from the convergence of criminal and immigration law and procedures. We explain how the use of risk tools and the theory behind them become particularly distorted and damaging when imported into the civil immigration enforcement regime.

### C. *The Role of the RCA in the Crimmigration Narrative*

The detention risk tool contributes to and is a product of the crime control movement in criminal justice and crimmigration. Crimmigration is a term of art coined by Professor Juliet Stumpf in 2006.<sup>90</sup> The term describes an immigration law phenomenon that has criminalized immigration in a variety of ways. The concept covers immigration consequences of criminal law (deportation for criminal acts); criminal consequences for immigration violations (entering the country without documents); and applications of criminal law enforcement resources and strategies to immigration enforcement.<sup>91</sup> During the past decade and a half, critical immigration scholars have examined this interdisciplinary field of study through frames also referred to as new penologies and enemy penologies. Together, they subject facets of immigration law and migration control to empirical and critical inquiry. For example, scholars have used the concept as a frame for exploring both border control,

---

87. RCA SYSTEMS TRAINING, *supra* note 81 at 136–44; Evans & Koulish, *supra* note 6, at 805.

88. U.S. IMMIGR. & CUSTOMS ENF'T, OFF. OF ENF'T & REMOVAL OPERATIONS, RISK CLASSIFICATION ASSESSMENT (RCA) FREQUENTLY ASKED QUESTIONS (FAQ), VERSION 1 (revised July 2012), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 1328.

89. Evans & Koulish, *supra* note 6, at 841.

90. We note that “crimmigration” is a controversial term. It is descriptive, reflecting the blurring of criminal and civil law processes as applied to immigration law. It is prescriptive, embraced by critical immigration law scholars primed to hold the process to account to constitutional due process; it has also been the basis for critical penology scholarship that subjects social and crime control techniques to critical analysis. Additionally, and attracting controversy, the term has also been used to criminalize immigrants. For more information on crimmigration, see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379–95 (2006); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* 22–39 (1st ed. 2019); CRIMMIGRANT NATIONS: RESURGENT NATIONALISM AND THE CLOSING OF BORDERS 1–32 (Robert Koulish & Maartje van der Woude eds., 2020).

91. Stumpf, *supra* note 90, at 381–82.

enforcement regimes,<sup>92</sup> bordering processes,<sup>93</sup> and the detention industry.<sup>94</sup> Scholarship has pulled back the cover on immigration enforcement and detention to reveal a huge carceral complex, with racism, abusive conditions, and rogue enforcement as endemic features.<sup>95</sup> Scholars have also positioned the immigration carceral system within systems of privatization and a larger political economy.<sup>96</sup>

Theories behind crimmigration scholarship evolved from and expanded on crime control scholarship.<sup>97</sup> With a focus on crime control rather than criminality, these critical scholars have analyzed the war on crime in terms of an industrial complex,<sup>98</sup> racism,<sup>99</sup> “culture of crime,”<sup>100</sup> “governing through crime,”<sup>101</sup> and crime-based rationality.<sup>102</sup> Each of these approaches describes a new paradigm for governing through crime to exact violence on people of color and reinforce white power elites. Crime control burst onto the scene in the 1980s, with President Reagan’s twin wars on drugs and crime.<sup>103</sup> Urban areas adapted these federal initiatives for zero tolerance policing, including

92. Stumpf, *supra* note 90, at 386–90; Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142–43 (2009).

93. NIRA YUVAL-DAVIS, GEORGIE WEMYSS & KATHRYN CASSIDY, *BORDERING* 1–28 (2019).

94. Hernández, *supra* note 27, at 1360–82 (tracing the origins of mass detention as entangled with the War on Drugs and explaining Congress’s punitive intent in passing immigration legislation); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489–94 (2007).

95. See, e.g., *supra* notes 18–19 and accompanying text; Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 173–74 (2020); Peter K. Enns & Mark D. Ramirez, *Privatizing Punishment: Testing Theories of Public Support for Private Prison and Immigration Detention Facilities*, 56 CRIMINOLOGY 546, 550–51 (2018) (describing the “racial animus” theory of support for privatized detention).

96. HERNÁNDEZ, *supra* note 90, see ch. 3–4; ALINA DAS, *NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS* 11–27 (2020); TODD MILLER, *EMPIRE OF BORDERS: THE EXPANSION OF THE U.S. BORDER AROUND THE WORLD* (2019).

97. Jonathan Simon draws comparisons between immigrants and crime and detention in Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577 (1998). For an introduction to the framing of crime control, see generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, ch. 5 (2001). For an understanding of the governing through crime concept, see generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR*, ch. 9 (2007).

98. See, e.g., *Globalism and the Prison Industrial Complex: An Interview with Angela Davis*, 40 RACE & CLASS 145, 145–46 (1999).

99. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, 13 NEW LEFT REV. 41, 41 (2002) (arguing “that slavery and mass imprisonment are genealogically linked”).

100. David Garland’s culture of crime analyzes crime through the lens of victims, for example laws being named after crime victims, like Megan’s Law. See David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent ‘Law and Order’ Policies*, 40 BRIT. J. CRIMINOLOGY 347, 351 (2000).

101. Jonathan Simon shows that the War on Crime has shifted the paradigm in law and society to tie nearly every social problem into a problem of crime. See SIMON, *supra* note 97, at 3–5.

102. Jonathan Simon examines social policy through the lens of crime. To Simon, zero-tolerance policies such as broken windows are rationalities of governing through crime. See *id.*

103. Michael Tonry, *Racial Politics, Racial Disparities and the War on Crime*, 40 CRIME & DELINQUENCY (1994).

the now discredited “broken windows” thesis,<sup>104</sup> which nonetheless unleashed aggressive policing targeted at communities of color and nonviolent offenses in particular.<sup>105</sup> Early initiatives like “broken windows” inspired a generation of crime control techniques designed to preempt crime.<sup>106</sup> Techniques included stop and frisk, racial profiling, and mass incarceration of Black and Brown men across the country.<sup>107</sup> Crimmigration scholarship surfaced to examine how ostensibly discredited crime control techniques found their way to migration control.<sup>108</sup> As much as crimmigration scholarship explains *how* policing techniques apply to immigration control, the new penology subfield followed a more direct line from crime control scholarship to explain *why* these control strategies have prevailed.<sup>109</sup> The RCA is both a product of and contributor to these frameworks.

Risk classifications has been around criminal justice for much of the 20th century, but it was not until the 1990s that technological advances made it possible to enhance objectivity and efficiency. Risk theory in the 1990s introduced a new frame for understanding social phenomena and was perceived as a particularly effective method of assessment and reform in criminal justice.<sup>110</sup> Scholars applying risk theory to crime control made the bold claim that risk would encompass a new era of policing.<sup>111</sup>

Although claims to a paradigm shift in policing through risk have been weakened by reality over time,<sup>112</sup> the new frame was useful for identifying social problems through a science of surveillance and prediction, and then addressing them through preemptive strategies for identifying, mitigating, or managing risk. The “risk principle” is a particularly useful heuristic to

104. William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 448 (1995); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 578–79 (1997).

105. Andrea McArdle, *Introduction to ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* 2–12 (Andrea McArdle & Tanya Erzen eds., 2001) (critically analyzing “Policing the Quality of Life”); Bratton, *supra* note 104, at 448; Livingston, *supra* note 104, at 579.

106. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

107. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 286 (2006); Jeffrey Fagan, Amanda Geller, Garth Davies & Valerie West, *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City* 1–8 (Colum. L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 09-203, 2009); CRIME, RISK AND JUSTICE: THE POLITICS OF CRIME CONTROL IN LIBERAL DEMOCRACIES 22 (Kevin Stenson & Robert R. Sullivan eds., 2001).

108. See generally Stumpf, *supra* note 90; KATJA FRANKO, *THE CRIMMIGRANT OTHER: MIGRATION AND PENAL POWER* 24, 28, 31, 44 (2019).

109. Leanne Weber & Jude McCulloch, *Penal Power and Border Control: Which Thesis? Sovereignty, Governmentality, or the Pre-emptive State?*, 21 PUNISHMENT & SOC'Y 496, 498–99 (2019).

110. See STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-1.10 (AM. BAR ASS'N 2007); Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 FED. PROBATION 33, 33 (2009).

111. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992); Pat O'Malley, *Experiments in Risk and Criminal Justice*, 12 THEORETICAL CRIMINOLOGY 451, 452–57 (2008).

112. Tim Owen, *Culture of Crime Control Through a Post-Foucauldian Lens*, INTERNET J. CRIMINOLOGY, 1 (2007); KEVIN STENSON, *The New Politics of Crime Control*, in CRIME, RISK AND JUSTICE, 15-28 (2000).

describe the projected relationship between detention and recidivism.<sup>113</sup> The concept connects detention to risk or dangerousness, not punishment or deterrence. The first wave of studies about risk classification assessment reinforced claims to objective decision-making in pretrial detention,<sup>114</sup> sentencing,<sup>115</sup> and parole<sup>116</sup> decisions. Scholars showed that risk tools lowered detention rates and kept low-risk defendants out of jail or prison when appropriately applied.<sup>117</sup> The key finding for criminal justice was that using risk tools led to lower recidivism.<sup>118</sup>

Risk assessment tools are most prevalent in criminal pretrial detention.<sup>119</sup> Their purpose is to impose the appropriate amount of restraint on criminal defendants to lower recidivism.<sup>120</sup> Risk tools, described as “a journey to ever increasing accuracy and reliability,”<sup>121</sup> endeavor to achieve a Goldilocks-and-the-Three-Bears scenario where those with “low” risk avoid detention (to detain low risk is to invite higher recidivism rates, as detainees hardened by detention are more likely to recidivate) and those with “high” risk are detained (to release them similarly invites re-offending). This scenario places the most attention on mid-level risk and bond eligibility schemes designed to lower recidivism.

Measuring risk first took hold in pretrial detention in the 1960s as part of New York City’s Manhattan Bail Project, a Vera Project Initiative that showed people accused of committing a crime can be relied on to appear in court.<sup>122</sup> An increase in the prevalence of risk in pretrial detention followed the 1984 Bail Reform Act.<sup>123</sup> Now, forty-eight states and Washington, D.C.

113. See Christopher T. Lowenkamp, Edward J. Latessa & Alexander M. Holsinger, *The Risk Principle in Action: What Have We Learned From 13,673 Offenders and 97 Correctional Programs?*, 52 CRIME & DELINQUENCY 77, 89–90 (2006).

114. Anne Milgram, Alexander M. Holsinger, Marie VanNostrand & Matthew W. Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENT’G REP. 216, 217–19 (2015).

115. See generally Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583 (2018).

116. See generally ROGER HOOD & STEPHEN SHUTE, *THE PAROLE SYSTEM AT WORK: A STUDY OF RISK BASED DECISION-MAKING* (2000).

117. Milgram, Holsinger, VanNostrand & Alsdorf, *supra* note 114, at 220.

118. Shima Baradaran, Opinion, *The Right Way to Shrink Prisons*, N.Y. TIMES (May 30, 2011), <https://perma.cc/997B-FQYJ>.

119. Risk tools have also been popular decision-making guides for post-conviction incarceration and release from custody. See Jodi L. Viljoen, Melissa R. Jonnson, Dana M. Cochrane, Lee M. Vargen & Gina M. Vincent, *Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systemic Review and Meta-Analysis*, 43 L. & HUM. BEHAV. 397, 397–98 (2019).

120. See Baradaran, *supra* note 118; Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 771–72 (2011).

121. Hazel Kemshall, *Crime and Risk*, in RISK IN SOCIAL SCIENCE 76, 82 (Peter Taylor-Gooby & Jens O. Zinn eds., 2006) (referencing James Bonta, *Risk-Needs Assessment and Treatment*, in CHOOSING CORRECTIONAL OPTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY 18 (Alan T. Harland ed., 1996)).

122. Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67 (1963).

123. Jerome E McElroy, *Introduction to the Manhattan Bail Project*, 24 FED. SENTENCING REPORTER 8, 8–9 (2011).

have had laws permitting courts to consider risk to public safety in pretrial detention and bail hearings.<sup>124</sup> Although risk tools assess risk for both flight and public safety, research attaching risk to recidivism focuses on public safety.<sup>125</sup> Scholars examining risk assessment in pretrial detention have shown its effectiveness in decreasing recidivism.<sup>126</sup> An effective risk tool would see reductions in incarceration without increasing recidivism.<sup>127</sup> Further, the risk tool can actually bring about decreases in re-offending by keeping high-risk offenders in jail.<sup>128</sup> Conversely, keeping low risk offenders out of jail and on supervised release is beneficial to the offender and society.<sup>129</sup> Risk assessment arrived at ICE at the behest of Dr. Dora Schriro, the former head of Corrections for the State of Arizona. Schriro envisioned risk in immigration detention as providing a cleaner selection system devoted to the detention of high-risk immigrants while lowering the detention overall.<sup>130</sup> In Arizona, she had made broad use of the criminal risk tool with the intention of lowering recidivism and measuring success in terms of lowered recidivism rates.<sup>131</sup>

In 2009, Schriro launched a nationwide investigation of immigration facilities for DHS.<sup>132</sup> At the time, the Obama administration attempted to confront a growing crisis of immigration detention. Mass incarceration was the predictable outcome of legislatively mandating detention and increased funding for an enforcement agency that prioritized holding migrants in custody. It came as no real surprise to see detentions jump from 20,000 daily, and about 204,000 annually in 2001<sup>133</sup> to 32,100 daily and 383,000 annually in 2009.<sup>134</sup>

124. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507 (2012).

125. E.g., John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 494 (2016).

126. NANCY LAVIGNE, SAMUEL BIELER, LINDSEY CRAMER, HELEN HO, CYBELE KOTANIAS, DEBORAH MAYER, DAVID MCCLURE, LAURA PACIFICI, ERIKA PARKS, BRYCE PETERSON & JULIE SAMUELS, URB. INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 5 (2014); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. ST. THOMAS L.J. 521, 522 (2006).

127. PAMELA M. CASEY, ROGER K. WARREN & JENNIFER K. ELEK, NAT'L CTR. FOR STATE CTS., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 8–9 (2011).

128. Edward J. Latessa, Richard Lemke, Matthew Markarios, Paul Smith, Christopher T. Lowenkamp, *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROBATION, 1 (2010); Sarah L. Desmarais, Kiersten L. Johnson, Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCH. SERVS. 206, 206–22 (2016).

129. See, e.g., James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT'G REP. 194, 196 (2004); Viljoen, Jonnson, Cochrane, Vargen & Vincent, *supra* note 119, at 398.

130. See DORA SCHRIRO, U.S. IMMIGR. & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 3 (2009).

131. See Dora Schriro, *Getting Ready: How Arizona Has Created a 'Parallel Universe' for Inmates*, NAT'L INST. JUST. (June 14, 2009), <https://perma.cc/4MVE-RNJA>.

132. SCHRIRO, *supra* note 130, at 2.

133. Emily Kassie, *Detained*, MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), <https://www.themarshallproject.org/2019/09/24/detained> [archived at <https://perma.cc/W8LS-J8ZC>].

134. *Id.*



The private prison industry was driver in mass detention. It was a formidable backer of pro detention candidates to Congress, had even less accountability than government facilities, and as a result oversaw watered down safety measures. Conditions predictably worsened, becoming increasingly unsafe,<sup>135</sup> with frequent accounts of physical and sexual abuse,<sup>136</sup> and inadequate access to health services,<sup>137</sup> and medical care.<sup>138</sup> By 2009, congressional hearings highlighting these matters<sup>139</sup> piqued alarm bells inside the new Obama administration.<sup>140</sup>

The Schriro Report, issued in late 2009,<sup>141</sup> was a response to the growing crisis. It provided a devastating critique of the existing detention system, documenting the growth of detention without using basic tools for measuring performance.<sup>142</sup> In theory, ICE was supposed to detain individuals rated a high-risk and release lower-risk individuals.<sup>143</sup> But no protocol existed for measuring the risk to flight or public safety.<sup>144</sup> The Report recommended the adoption of electronic alternatives to detention (“ATDs”) and a risk tool as means to tamp down on the detention of non-criminals.<sup>145</sup> Detention could adversely affect low-risk migrants<sup>146</sup> and re-traumatize victims of persecution.<sup>147</sup> Scholars concurred an objective risk tool would not recommend

135. See generally Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019), <https://perma.cc/KC8E-6XE9>; Monsy Alvarado, Ashley Balcerzak, Stacey Barchenger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis, Dan Keemahill, Rebecca Plevin, Jeremy Schwartz, Sarah Taddeo, Lauren Villagran, Dennis Wagner, Elizabeth Weise, Alissa Zhu, *These People Are Profitable’: Under Trump, Private Prisons Are Cashing in on ICE Detainees*, USA TODAY (Apr. 23, 2020, 12:25 PM), <https://perma.cc/PU7K-6974>.

136. HUM. RTS. WATCH, *DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION* 1–2 (2010).

137. See, e.g., Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 614–18 (2010).

138. See ALISON SISKIN, CONG. RSCH. SERV., RL34556, *HEALTH CARE FOR NONCITIZENS IN IMMIGRATION DETENTION* 10–12 (2009). See also Nina Bernstein, *The Impact of Investigative Journalism on U.S. Immigration Detention Reform* 8 (Glob. Det. Project, Working Paper No. 13, 2016).

139. See, e.g., SISKIN, *supra* note 138, at 10.

140. Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES (Aug. 5, 2009), <https://perma.cc/V74L-74U2>.

141. See generally, SCHIRO, *supra* note 130.

142. Specifically, Dr. Schiro reported that the facilities and operational standards used to detain immigrants are stunningly similar to—and in fact originally designed for—criminal incarceration. *Id.* This in turn results in a system that is far more expensive and punitive than necessary to safely manage the vast majority of immigrant detainees. *Id.* at 2–3. One of her key recommendations was for ICE to create risk assessments that would allow it to tailor detention and supervision standards that aligned with individual risk levels. See *id.* at 3. The report is also notable for its strong recommendation that ATDs be expanded and further utilized in immigration enforcement. *Id.* at 18–21.

143. Nina Bernstein, *Report Critical of Scope of Immigration Detention*, N.Y. TIMES (Oct. 6, 2009), <https://perma.cc/46ZJ-72Q4>.

144. *Id.*

145. See SCHIRO, *supra* note 130, at 3 (recommending a system “with the requisite management tools and informational systems to detain and supervise aliens in a setting consistent with assessed risk”).

146. Milgram, Holsinger, VanNostran & Alsdorf, *supra* note 114, at 219; Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, 2004 TOPICS IN CMTY. CORRECTIONS 3, 5–8.

147. Br. in Supp. of Pet’rs-Appellees by *Amici Curiae*: Scholars and Researchers in Sociology, Criminology, Anthropology, Psychology, Geography, Public Health, Medicine, Latin American Studies,



detention for such individuals.<sup>148</sup> A risk tool could incorporate industry standards that are “objectively knowable and amenable to probabilistic calculation.”<sup>149</sup> By using a standardized algorithm, low-risk migrants would be released, while those with high risks would be detained.<sup>150</sup>

The RCA’s business rules, FAQs, and instructions articulated these desired outcomes. The risk tool borrowed actuarial risk techniques from “current industry standard risk assessment techniques”<sup>151</sup> and the automated scoring system (the algorithm) would guide decision-making based on flight risk, public safety, and an individual’s special vulnerabilities.<sup>152</sup> Overall detention rates would decrease, and ICE would showcase a cleaner detention process using risk methods from criminal justice to “provid[e] better transparency, standardization, and reporting on key custody, custody classification level, and community supervision level decisions made daily by ICE agents and officers.”<sup>153</sup> In theory, ICE would detain dangerous migrants or people at high risk of flight. ICE was not supposed to detain low-risk migrants or people with special vulnerabilities.<sup>154</sup>

As we describe in Part III, the reality was quite the opposite. Problems arose almost immediately because of the architecture of the RCA. A criminal justice risk tool is misaligned for immigration enforcement. Risk tools used in pretrial detention are designed to lower recidivism among criminal offenders. The RCA imported the criminal risk tool’s focus on past criminal offenses, their severity, and how long ago the crimes were committed. But, unlike with criminal pretrial detention risk tools, the performance of the RCA

and Law, Whose Work Relates to Incarceration and Detention, Migrant Populations, and the Effect of U.S. Immigration Detention and Removal Policies on Migrant Populations 16–17, *Robbins v. Rodriguez*, 804 F.3d 1060 (9th Cir. 2015) (Nos. 13-56706 & 13-56755) [hereinafter Rabin Amicus Brief]; Marouf, *supra* note 74, at 2151.

148. SCHRIRO, *supra* note 130, at 6.

149. Hazel Kemshall, Louise Marsland, Thilo Boeck & Leigh Dunkerton, *Young People, Pathways and Crime: Beyond Risk Factors*, 39 AUSTL. & N.Z. J. CRIMINOLOGY 354, 355 (2006).

150. It should be noted that alternatives to detention had been discussed and studied a decade earlier during the Clinton Administration’s collaboration with the Vera Institute. See generally VERA INST. OF JUST., COMMUNITY SUPERVISION PROVES DETENTION IS UNNECESSARY TO ENSURE APPEARANCE T IMMIGRATION HEARINGS (2020).

151. U.S. Immigr. & Customs Enf’t, Risk Classification Assessment (RCA) in EARM 5.3 Quick Reference Guide (2013), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 1739 [hereinafter RCA Quick Reference Guide].

152. RCA SYSTEMS TRAINING, *supra* note 81, at 794.

153. *Id.* at 4.

154. U.S. Immigr. & Customs Enf’t, United Nations High Commissioner for Refugees Bi-National Roundtable on Alternatives to Detention: Buffalo, N.Y. & Fort Erie, Ontario (Sept. 25, 2012), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 23 [hereinafter UNHCR Roundtable]; Memorandum from ERO Taskings on behalf of Gary Mead, Exec. Assoc. Dir., to All ERO Employees (Aug. 15, 2012, 4:43 PM), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 43 (explaining changes to the RCA Scoring Methodology); RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules); INTER-AM. COMM’N ON HUM. RTS., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 8–9 (2010), <https://perma.cc/3HMH-3QUB>; *Written Testimony of Immigration and Customs Enforcement (ICE) Director John Morton for a House Committee on Appropriations, Subcommittee on Homeland Security Hearing on the President’s Fiscal Year 2013 Budget Request for ICE*, U.S. DEP’T OF HOMELAND SEC. (Mar. 8, 2012), <https://perma.cc/MG4W-285W>.

was never measured against criminal recidivism rates.<sup>155</sup> Migrants were simply doubly punished for any criminal history. Additionally, the Obama administration deployed detention to combat unauthorized entry and reentry through its flight risk assessment.<sup>156</sup> Indeed, by 2015, the RCA was marking (almost) every person crossing the border as “high” risk and detaining them without bond.<sup>157</sup> Again, the RCA’s flight risk rubric was never externally validated. Performance indicators were instead circular: the tool performed well to the extent that the RCA’s custody recommendations aligned with the final decisions by detention officers.

By the end of the Obama administration, a total of 3,181,867 migrants had been branded as risky and detained based on the likelihood they presented flight or public safety risks, at a cost to the public of \$14.5 billion dollars between 2010 and 2016.<sup>158</sup>

The Trump administration’s approach to migration control was zero tolerance. It promoted the convergence of the criminal and the immigrant. For former President Trump, the “illegal alien”<sup>159</sup> was as much a threat to law and order as the rapist or murderer.<sup>160</sup> The Trump administration’s zero tolerance enforcement policies for example, failed to distinguish low grade immigration violations from rape and murder in enforcement priorities.<sup>161</sup> In fact, zero tolerance enforcement incentivized officers to pick the low hanging fruit: the low-level offenders.<sup>162</sup> The Trump administration deployed the RCA accordingly and eliminated the recommendation of release for any migrant, regardless of risk.<sup>163</sup>

Though conceived as an antidote to widespread civil detention of mostly Black and Brown migrants, the RCA quickly became a tool to expand immigration incarceration. It introduced new technologies to the growing immigration control regime and brought preemptive enforcement strategies to bear on migrant controls. The RCA thus provided an avenue to apply “broken

---

155. 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734–35 (explaining that scoring changes were intended to “strengthen alignment both with ICE priorities and with the actual Detain/Release decisions currently being generated by ERO RCA end users”).

156. U.S. Immigr. & Customs Enf’t, Off. of Enf’t & Removal Operations, RCA Executive Action Scoring Updates Guide (Feb. 2015), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 1798 [hereinafter Executive Action Scoring Guide].

157. *See infra* Part III (Period 3).

158. Kassie, *supra* note 133.

159. *See* Aaron Blake, *Trump Seeks to Resurrect a Long-Dormant Phrase: ‘Illegal Alien,’* WASH. POST (Jan. 14, 2019), <https://perma.cc/SL7S-ZNXF> (noting President Donald Trump’s efforts in repopularizing the antiquated and offensive term).

160. *See* Jacqueline Thomsen, *Trump on Criticizing Mexican Immigrants: ‘Peanuts’ Compared to the Truth*, HILL (Aug. 2, 2018, 8:26 PM), <https://perma.cc/LM35-B7K4> (describing Trump’s repeated characterizations of undocumented people as violent criminals).

161. WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 1 (2018) (“Under the zero tolerance policy, DOJ prosecuted all adult aliens apprehended crossing the border illegally, with no exception . . .”).

162. Emma Whitford, *NYC’s Broken Windows Reform Is Too Weak, Critics Say*, GOTHAMIST (Jan. 26, 2016, 4:55 PM), <https://perma.cc/8FWR-CNUG>.

163. Mica Rosenberg & Reade Levinson, *Trump’s Catch-and-Detain Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018, 3:18 PM), <https://perma.cc/LJ3P-FUJN>.

windows” policing to immigration enforcement through the use of a tool for the pursuit and detention of migrants with almost any criminal history and low-grade offenders, with people who entered without inspection as quintessential low hanging fruit. The RCA became a vehicle for incapacitating low-risk migrants on the theory that detention would reduce unauthorized migration as a whole.<sup>164</sup>

Risk assessment promised a new purpose and method of detention that ensures detention’s connection with its permissible use in the civil law framework. In practice, the RCA transplanted a pre-emptive crime control approach onto immigration enforcement and analogized the migrant to the criminal, turning human beings into crimmigrants.<sup>165</sup> The RCA is at once emblematic of the convergence of criminal and immigration law and procedures and the failures that result. Our study subjects risk assessment within the immigration enforcement system to critical inquiry, examining its problems in design and application. The next section describes the data on which we based our study, followed by a discussion of our results.

## II. DATA AND METHODOLOGY: ICE DETENTION DECISIONS IN THREE DATASETS

This Article introduces data derived from three datasets pursuant to a variety of Freedom of Information Act (“FOIA”) requests and subsequent litigation, described in detail in our previous work.<sup>166</sup> Extracting information about the RCA’s scale and methodology required extensive FOIA requests, several rounds of administrative appeals, federal district court litigation, and a protracted settlement agreement, all of which took more than six years. The process began in 2011, as the RCA was piloted in ICE’s Baltimore and Washington field offices.<sup>167</sup> Author Robert Koulisch and Mark Noferi filed FOIA requests for the results of the new RCA system in these two locations.<sup>168</sup> DHS initially released several batches of RCA detailed summaries

164. See, e.g., Muneeba Talukder, *ICE Uses the Failed ‘Broken Windows’ Mentality, with Deadly Consequences*, ACLU PA. (June 12, 2020, 9:30 AM), <https://perma.cc/MG6X-SFGQ>; Max Rivlin-Nadler, *How Broken Windows Policing Breaks NYC’s Immigrant Sanctuaries*, VILL. VOICE (Dec. 13, 2016), <https://perma.cc/8TQX-X6M6>.

165. See Katja Franko Aas, *‘Crimmigrant’ Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance*, 15 THEORETICAL CRIMINOLOGY 331, 335 (2011); FRANKO, *supra* note 108, at 21–52 (describing the othering of immigrants by perpetuating the falsehood that they are more likely to be criminals); ROBERT KOULISCH & ERNESTO CALVO, *DETAINING IMMIGRANTS, SCORING CRIMINALS: HOW SCORING ALGORITHMS TRANSFORMED ANTI-IMMIGRANT SENTIMENTS INTO POLICY* (forthcoming 2021) (manuscript at ch. 3).

166. Evans & Koulisch, *supra* note 6, at 796–800. Frank Pasquale introduced algorithmic fairness as a topic for scholarship, suggesting that accuracy, reliability, and fairness in algorithms are mitigated by the “black box society.” PASQUALE, *supra* note 19, at 4. The effort to eliminate discrimination may be impossible as long as algorithms remain opaque. The immigration algorithm is an example of a secret algorithm that failed as a result.

167. U.S. Gov’t Accountability Off., GAO (441213), *ICE Alternatives to Detention: Questions Regarding the Risk Classification Assessment*, in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 33.

168. These FOIA requests are on file with author Robert Koulisch. See also Robert Koulisch, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5 LAWS 1, 8 n.29 (2016) (“ICE provided 505 RCA Detailed Summaries to the authors through a non-adversarial FOIA process, in a series of four productions from September 2013 to June 2014. All were from ICE’s Baltimore Field Office (which spans

in the form of a one- or two-page printout of the RCA outcome for each migrant. These summaries showed that the RCA was comprised of separate modules that assess a migrant's flight risk and risk to public safety as well as whether the individual has a "special vulnerability" or is subject to mandatory detention. The summaries also revealed that the RCA combined the results of each module in some way to produce an overall recommendation regarding whether to detain the migrant, to set a bond, and if so, for what amount. To address the core question of how DHS decides who to detain, the authors submitted five separate FOIA requests in the fall of 2014, targeting the different components of the RCA system as well as data on its results nationwide.<sup>169</sup> *Pro bono* counsel for the authors<sup>170</sup> perfected all administrative appeals, sued in federal district court, and negotiated a stipulated settlement requiring DHS to produce a wide array of documents and data.<sup>171</sup> The results of the FOIA requests are available through an electronic repository.<sup>172</sup>

The first dataset is derived from a file containing 1.4 million cases nationwide analyzed by the RCA from 2012 to 2016, cleaned and limited to immigration detention and release decisions (N=454,891). This dataset includes a summary of the RCAs with a limited set of variables available. To produce this dataset, we began with 1,439,792 records. These cases were distributed across three different RCA processes: Custody Classification, with 667,531 cases that represented 46.36 percent of the total; Detain/Release, with 744,474 cases that represented 51.71 percent of the total; and Community Supervision, with 26,888 cases that represented 1.87 percent of the total. There were 899 cases with missing values for this variable, which represented less than 1 percent of the total. Once we started with the preliminary analyses of the data, we realized that some of the entries were empty or missing key fields. Accordingly, we removed all the cases that were missing the variables "RCA Decision Type," "Risk to Public Safety," and "Risk of Flight." Once those missing cases were removed, we ended up with approximately 86 percent of the original cases. We also identified duplicate entries in which all thirty-one variables were identical.<sup>173</sup> Once duplicate entries were eliminated, we ended up with a grand total of 902,139 cases, losing almost 20 percent of the original entries. We also discarded entries that contained an invalid or an "out of place" value on the RCA Recommendation for the Detain/Release process. Once we isolated Detain/Release cases from the other RCA

---

the state of Maryland), in four batches labeled 'March 2013', 'April 2013', 'May 2013', and 'June 2013' (ICE represented that the last batch was incomplete).").

169. The electronic repository includes copies of all of the initial FOIA requests. See CONSOLIDATED FOIA RESPONSES, *supra* note 8. The FOIA requests were submitted jointly by Kate Evans, Robert Koulisch, Mark Noferi, Ben Casper Sanchez, and Linus Chan. The requestors then became joint plaintiffs in the subsequent FOIA litigation in the U.S. District Court for the District of Minnesota.

170. Attorneys Shannon L. Bjorklund, Colin Wicker, Michelle Grant, and Emily Mawer from Dorsey & Whitney LLP assisted with the authors' administrative and judicial challenges.

171. Evans & Koulisch, *supra* note 6, at app.; CONSOLIDATED FOIA RESPONSES, *supra* note 8.

172. See CONSOLIDATED FOIA RESPONSES, *supra* note 8.

173. The variables list can be made available by the authors upon request.

processes, we arrived at about 454,891 cases. It is important to highlight that we refer to cases, records, or entries using a data analysis nomenclature because we are not able to identify individual people *per se*. The detain/release cases had the following characteristics:

**RCA Risk Levels:**

- Risk of Flight: High 48.8%; Medium 21.2%; Low 30%
- Risk to Public Safety: High 38.1%; Medium 34.5%; Low 27.4%

**Custody: 92% Detained (with or without bond); 8% Released**

- Detained, without bond: 80.9%
- Detain, with bond: 11%
- Released on Community Supervision: 8.2%

**Bond (75,051 cases assigned bonds)**

- \$1,500–\$300,000 (11 cases assigned a bond greater than \$500,000 were eliminated as outliers)
- Mean bond amount: \$8,852

**Special Vulnerabilities (27,567 cases)**

- Detained, without bond: 56.0%
- Detained, with bond: 6.5%
- Release on Community Supervision: 37.5%

The second dataset consists of a random sample: 2,500 of the 1.4 million cases from the first dataset minus the cases with incomplete information, to give us N=2,411. This subset also covers cases nationwide from 2012 to 2016. It includes the detailed summaries of the RCAs with all of the factors scored and analyzed by the algorithm. The randomly selected sample in this dataset has the following characteristics:

**Demographics:**

- An average age of 33.5 years, with ages ranging from 2 to 77 years old.
- On average, males were 34, and females were 31.
- 82% (1976 out of 2404) of individuals were male, and 17.4% (419) were female.
- One-half were from Central America, 37% were citizens of the Northern Triangle, and one-third were citizens of Mexico.

**RCA Risk Levels:**

- Risk of Flight: High 68.2%; Medium 15.6%; Low 16.1%
- Risk to Public Safety: High 21.7%; Medium 23.6%; Low 54.6%

**Custody: 95% Detained (with or without bond); 5% Released**

- Detained, without bond: 86.9%

- Detained, with bond: 7.5%
- Released: 5.4%

These rates of detention are slightly above the national rate. DHS reported that nationally between July 30, 2012 and December 31, 2013, for example, ICE detained 91.4 percent of those people upon whom ICE conducted RCA—most without bond (78.1 percent).<sup>174</sup>

The third dataset is for the New York City Area of Operations from 2013 to 2019, consisting of 19,891 cases. The New York City Area of Operation includes the five boroughs of New York City, plus Dutchess, Nassau, Putnam, Suffolk, Sullivan, Orange, Rockland, Ulster, and Westchester counties. Decisions regarding the custody of migrants in this geographic region are made by ICE's New York City Field Office. This dataset comes from a FOIA request to ICE by the New York Civil Liberties Union.

The empirical analyses in Part III draw from these datasets covering the period from 2012 to 2019. The datasets include more than twenty different versions of the RCA algorithm, though the principal changes can be consolidated into three separate periods under the Obama administration and a final period under the Trump administration. The data include detain and release recommendations, the underlying risk levels, and the end users' dissent to the risk assessment recommendation on each case, allowing us to observe the reaction of officers and supervisors within and across risk algorithms.

### III. FINDINGS: WIDESPREAD DETENTION OF VULNERABLE AND LOWER RISK MIGRANTS

Our analysis shows that the Schriro Report did not herald a reckoning with the scale of immigration detention. It instead resulted in a contest for power in which political appointees and proponents of immigration detention reform lost to ICE's prevailing practice and culture. The RCA functioned to hide anti-immigrant bias and attempted initially to confine it. However, our findings demonstrate that through algorithmic bias, the risk tool has allowed ICE to continue to detain migrants at increasingly greater rates. This occurred in two ways. First, front-line ICE officers and supervisors overrode the RCA's recommendation as a matter of discretion. Second, ICE policymakers modified the algorithm to minimize the override rate such that officers with a bias for detention were able to train the algorithm contrary to risk logic. Efforts to manipulate the RCA from the top down and to obstruct the RCA from the bottom up combined to reduce the number of cases in which the RCA recommended release or bond and to reduce the number of cases in which ICE officers chose to release or grant bond.

In this section, we describe the results of the RCA tool over time. We examine the results of each module in the RCA in turn and reveal a

---

174. Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 1, 18 (2017).



substantial drop in the rates of release and bond over the course of our study. We conclude that policymakers and end-users subverted the RCA into a tool of punishment in which ICE's detention decisions bore little relation to risk.

A. *People with Special Vulnerabilities: Underreported and Largely Detained*

The general rule behind the first module on the RCA is that people with special vulnerabilities should not be detained.<sup>175</sup> This rule has particular significance as ICE officials told the United Nations High Commission for Refugees it would “promote identification of vulnerable populations” in the immigration enforcement process and would not detain people with special vulnerabilities unless required by statute.<sup>176</sup> The Obama administration made similar assurances to Congress and the public.<sup>177</sup> ICE's concern for migrants with special vulnerabilities is also signified by the placement of this module first and the alterations to the RCA's standard recommendations for people with one or more “special vulnerabilities.”

In the “special vulnerabilities” module, officers are instructed to screen migrants for serious physical illness; severe mental illness; disability; elderly status; pregnancy; nursing; primary caretaker responsibilities; risk based on sexual orientation or gender identity; or status as a victim of persecution or torture, victim of sexual abuse, or victim of a violent crime or human trafficking.<sup>178</sup> Among the list of eleven special vulnerabilities, the following seven were identified as “priorities”: disability, elderly status, pregnant, nursing, primary caretaking responsibility, serious mental illness, and serious physical illness.<sup>179</sup> As shown on the chart below, within those cases with a special vulnerability, the most frequently identified special vulnerability was the primary caretaking responsibility—reserved overwhelmingly for women.

---

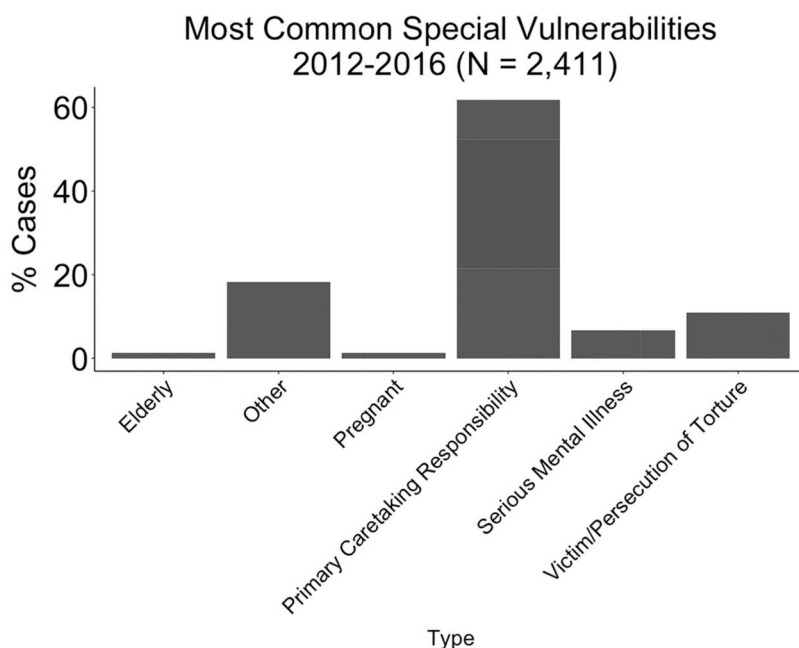
175. See Evans & Koulish, *supra* note 6, at 808; *Written Testimony of U.S. Immigration and Customs Enforcement Director John Morton for a House Committee on the Judiciary Hearing Titled: “The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?”*, U.S. DEP'T OF HOMELAND SEC. (Mar. 19, 2013), <https://perma.cc/4FWG-YLY3> [hereinafter *Morton 2013 Testimony*]; *Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives*, U.S. DEP'T OF HOMELAND SEC. (Oct. 6, 2009), <https://perma.cc/U4WL-ZMPX> (announcing, among other things, ICE's plans to “develop an assessment tool to identify aliens suitable for ATD [alternatives to detention],” and to “develop a risk assessment and custody classification” to “enable detainees to be placed in an appropriate facility”).

176. See Noferi & Koulish, *supra* note 13, at 65; Evans & Koulish, *supra* note 6, at 843; UNHCR Roundtable, *supra* note 154, at 22–32.

177. *Department of Homeland Security Appropriations for Fiscal Year 2013: Hearing on H.R. 5855 and S. 3216 before the Subcomm. on Homeland Sec. of the S. Comm. on Appropriations*, 112th Cong. 11–22 (2012) (statement of Janet Napolitano, Secretary, Department of Homeland Security); *Morton 2013 Testimony*, *supra* note 175.

178. Evans & Koulish, *supra* note 6, at 806; U.S. Immigr. & Customs Enf't, Off. of Enf't & Removal Operations, *Special Vulnerabilities Quick Reference Guide* (n.d.), in *CONSOLIDATED FOIA RESPONSES*, *supra* note 8, at 1491–92 [hereinafter *Special Vulnerabilities Quick Reference Guide*]; *RCA Quick Reference Guide*, *supra* note 151, at 1745.

179. U.S. Immigr. & Customs Enf't, *RCA Overview: Field Operations Briefing*, in *CONSOLIDATED FOIA RESPONSES*, *supra* note 8, at 234 [hereinafter *Field Operations Briefing*].



The risk tool algorithm functions on a points system, which assigns scores to risk factors for public safety and flight.<sup>180</sup> Early on, we presumed the risk tool would assign negative points to flight for people with special vulnerabilities. This would have lowered the risk level and, thus, lessened chances of a detention recommendation. However, the point-based system excludes the special vulnerabilities category.<sup>181</sup> During our study period, the RCA did not recommend detention for people with special vulnerabilities unless they were subject to mandatory detention based on removal charges or they were in reinstatement proceedings.<sup>182</sup> Migrants with special vulnerabilities were recommended for release if the RCA determined that they were a “low” flight risk and “low” public safety risk.<sup>183</sup> Otherwise, the RCA delegated these cases for the “supervisor to determine” whether to detain or release the person.<sup>184</sup> By January 2014, the RCA shrunk the scope of mandatory detention for migrants with special vulnerabilities. Migrants in reinstatement proceedings, who had a special vulnerability, no longer received an RCA recommendation

180. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules; Points-Based Scoring Rules).

181. *Id.* (Points-Based Scoring Rules).

182. Evans & Koulish, *supra* note 6, at 808 n.94.

183. *Id.* at 808 n.95.

184. *Id.* at 808 n.96.

to detain without bond unless they had a high public safety risk assessment.<sup>185</sup> The RCA instead assigned the detain/release decision for these migrants to the supervisor to determine.<sup>186</sup>

The results of our study of the RCA’s special vulnerabilities module are two-fold. First, only a small percentage of migrants are categorized as having special vulnerabilities. Second, ICE had little hesitation about detaining people with special vulnerabilities.

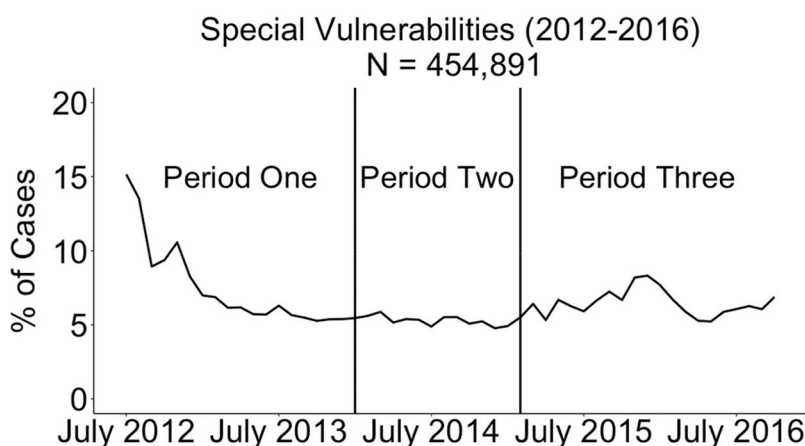
Though the RCA process required ICE officers to begin by evaluating the individual for vulnerabilities, they were rarely detected. Based on the ground rules for deciding special vulnerabilities, the empirical research shows very few migrants—6 percent across the four years of our dataset—were categorized as having special vulnerabilities. Conversely, 93.99 percent have no identified special vulnerability.

(National Dataset, N=454,891)

Special Vulnerabilities	N	%
None	427,546	93.99
1	25,441	5.59
2	1,689	0.37
3	184	0.04
4	23	0.01
5	8	0.001
Total	454,891	100.00

Though the rate of identification started much stronger, by the end of the Obama administration, barely 6 percent of migrants were listed as having a special vulnerability. The graph below illustrates the percentage of cases that were identified as having a special vulnerability across our largest national dataset.

185. *Id.* at 824 n.187.  
186. *Id.*



The low rate of people identified with one or more of the designated special vulnerabilities simply does not accord with the demographics of the migrants in the dataset. The fact that 37 percent of the group migrated from the Northern Triangle and 17 percent are women indicate that, at a minimum, the numbers of primary caretakers and victims of persecution or sexual assault should be much higher.<sup>187</sup>

Despite promises not to detain people with special vulnerabilities, ICE officers and supervisors often made detention decisions that ran counter to these assurances. Instructions for handling special vulnerabilities came from a variety of sources, including training materials and FAQ sheets.<sup>188</sup> But the RCA did not make recommendations for most migrants with special vulnerabilities. Instead, the custody decisions were entirely within the discretion of ICE supervisors, without an RCA recommendation to guide or override.<sup>189</sup> The formal training materials underscored supervisors' authority to detain someone despite the presence of a special vulnerability.<sup>190</sup> The RCA training

187. See PETER J. MEYER, CONG. RSCH. SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY (2021) (noting a spike of migrants from the Northern Triangle in FY2019, followed by a dip likely attributable to COVID-19); D'VERA COHN, JEFFREY S. PASSEL & ANA GONZALEZ-BARRERA, RISE IN U.S. IMMIGRANTS FROM EL SALVADOR, GUATEMALA AND HONDURAS OUTPACES GROWTH FROM ELSEWHERE, PEW RSCH. CTR. 16 (2017) ("Asylum applications from people born in El Salvador, Guatemala and Honduras have risen sharply in recent years . . ."); U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015) (illustrating the pervasiveness of sexual violence targeted toward women in the Northern Triangle countries); Jeffrey Hallock, Ariel G. Ruiz Soto & Michael Fix, *In Search of Safety, Growing Numbers of Women Flee Central America*, MIGRATION POL'Y INST. (May 30, 2018), <https://perma.cc/FCL7-7JSC> ("Family apprehensions are also up from previous years, with more families traveling together indicating that parents are no longer willing to leave children behind in the country of origin—a departure from past trends.").

188. Special Vulnerabilities Quick Reference Guide, *supra* note 178, at 1491–92; RCA Quick Reference Guide, *supra* note 151, at 1772–74; RCA SYSTEMS TRAINING, *supra* note 81, at 52–58.

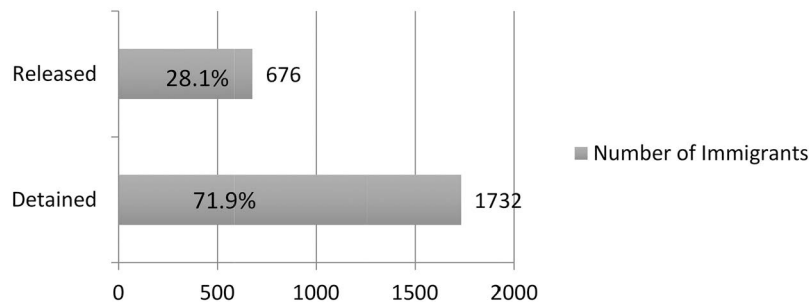
189. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).

190. U.S. Immigr. & Customs Enf't, Off. of Enf't & Removal Operations, RCA Scenario Playbook, Version 1.1 (Sept. 2012), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 285.

guidelines state that the presence of a special vulnerability based on the above factors “however, . . . do not represent the required decisions that must be reached when using the system.”<sup>191</sup> Instead, the circumstances of each case “and each field office will influence the decision-making process.”<sup>192</sup> Thus, the effect of having a special vulnerability on detention is up to the ICE supervisor.

Our data show that ICE officers exercised that discretion in favor of detention. As the chart below shows, more than 70 percent of migrants with special vulnerabilities were detained from 2012 to 2016.

**Custody Rates of Immigrants with Special Vulnerabilities, 2012-2016 (N=2411)**



Though most people with special vulnerabilities were detained, having one or more special vulnerabilities did increase the likelihood of being released from detention. The data show that the chances of being released are 22 percentage points higher if a migrant has a special vulnerability.

The bigger national dataset demonstrates the same trend as the detailed data on detention rates above. Almost two-thirds, or 62.9 percent (17,188) of migrants with special vulnerabilities (27,345) were detained. Of these, 20.7 percent (5,671) were mandatorily detained per statute and allegations in the Notices to Appear. Notwithstanding assurances by top level Obama administration officials that people with special vulnerabilities would not receive detention recommendations, 45.1 percent (12,321) of those not subject to mandatory detention were still detained.

191. *Id.*  
192. *Id.*

	With Special Vulnerabilities					
	Mandatory Detention				Total	
	No		Yes			
RCA Final Decision	N	%	N	%	N	%
Detain, with Bond	1,708	96.17	68	3.83	1,776	6.49
Detain, without bond	10,613	68.86	4,799	31.14	15,412	56.36
Release	9,353	92.08	804	7.92	10,157	37.14
Total	21,674	79.26	5,671	20.74	27,345	100

As a result of the high detention rates, pregnant women, the elderly, people with mental illness and victims of persecution and torture are frequently held in jail-like conditions, sometimes alongside defendants facing criminal charges for violent offenses or serving criminal sentences.<sup>193</sup> That reality is anathema to ICE’s promises.<sup>194</sup>

In the end, the RCA failed to deliver on its promise to release vulnerable migrants who face the risk of severe additional harm in detention. That failure stems from both the design of the algorithm, which provides ICE supervisors with unfettered discretion over custody decisions for most migrants with an identified vulnerability, and the persistent bias of those ICE officials to impose detention broadly.<sup>195</sup>

B. *Mandatory Detention: Congressionally Imposed Custody of Lower Risk Migrants*

The second module of the RCA assesses whether Congress mandated the person’s detention. This module identifies people who are in full immigration proceedings and subject to INA § 236(c), people with final removal orders

193. See, e.g., WOMEN’S REFUGEE COMM’N, PRISON FOR SURVIVORS: THE DETENTION OF WOMEN SEEKING ASYLUM IN THE UNITED STATES 26–40 (2017), <https://perma.cc/N947-DKL7> (detailing prison-like conditions faced by detained female asylum seekers); NORA ELLMANN, IMMIGRATION DETENTION IS DANGEROUS FOR WOMEN’S HEALTH AND RIGHTS, CTR. FOR AM. PROGRESS 9 (2019), <https://perma.cc/X97U-3MXG> (“Due to the fact that nondedicated facilities often exist within criminal jails and prisons, there may also be confusion and conflict between ICE [detainee health] standards and the standards of the local facilities.”); S. POVERTY L. CENTER, NAT’L IMMIGR. PROJECT OF NAT’L LAW. GUILD & ADELANTE ALA. WORKER CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 7 (2016), <https://perma.cc/8WHC-EETB> (finding a significant lack of “protection or accommodations to vulnerable detainees, including elderly, disabled and LGBT individuals”); Mark Brunswick & Alejandra Matos, *Detained Immigrant Teen Assaulted by Registered Sex Offender in Sherburne County Jail*, STAR TRIBUNE (Apr. 14, 2014, 10:51 AM), <https://perma.cc/R3ES-D7BT> (describing a particular incident of assault and the general dangers of housing non-criminal immigrants alongside violent criminals).

194. See *supra* note 176 and accompanying text.

195. See *infra* Part III.C (discussing widespread bias in favor of detention).



that are not yet executed, and people who have prior removal orders that were reinstated upon reentry to the United States under INA § 241.<sup>196</sup> Additionally, people in expedited removal proceedings under INA § 235 are also identified at this initial stage.<sup>197</sup> If the person was not authorized to enter the United States and ICE has designated them for expedited removal, the RCA will automatically recommend detention without bond and officers are not required to perform the rest of the RCA.<sup>198</sup>

The mandatory detention assessment is largely automatic. The inputs for mandatory detention are derived from various ICE databases, including immigration history, case processing type, and the Federal Bureau of Investigation (“FBI”)’s National Crime Information Center database, which aggregates criminal history across jurisdictions.<sup>199</sup> During our study period, the RCA recommended that ICE detain without bond nearly all categories of people with final orders.<sup>200</sup>

Migrants without a final order are screened for mandatory detention under INA § 236(c).<sup>201</sup> For this assessment, the mandatory detention module relies on the statutes and allegations from the document used to initiate removal proceedings (a Notice to Appear) to auto-populate the RCA.<sup>202</sup> ICE officers must review the migrant’s criminal history and ensure that the removal charges are correct.<sup>203</sup> The removal charges contained in the Notice to Appear, not the criminal offenses on which those charges are based, are then evaluated through the RCA to see if the removal charges trigger mandatory detention under INA § 236(c).<sup>204</sup> If they do, the RCA recommends detention without bond regardless of risk level.<sup>205</sup>

At any given time, detention under § 236(c) accounts for about 18 percent of all ICE encounters in our largest nationwide dataset. Of the 18 percent (83,101) of migrants subject to mandatory detention under § 236(c), 96.9 percent (80,486) were detained without bond. The migrants in about 2 percent (2,111) of the mandatory detention cases were actually released on community supervision.

---

196. Tim Gibney & Beth Mangum, Risk Classification Assessment Release 1.0 Business Requirements Version 1.8 (Aug. 19, 2011), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 888–91 [hereinafter RCA Release 1.0 Business Requirements]; RCA Quick Reference Guide, *supra* note 151, at 1743, 1745–46; RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).

197. RCA Quick Reference Guide, *supra* note 151, at 1743.

198. *Id.*

199. Evans & Koulish, *supra* note 6, at 817; *see also* U.S. Immigr. & Customs Enf’t, Off. of Enf’t & Removal Operations, Risk Classification Assessment (RCA) Quick Reference Guide, Version 3.0 (Mar. 2013), in CONSOLIDATED FOIA RESPONSES, *supra* note 8, at 1339 [hereinafter RCA Quick Reference Guide 3.0]; Special Vulnerabilities Quick Reference Guide, *supra* note 178, at 1491.

200. Evans & Koulish, *supra* note 6, at 832. People with “low” public safety and flight risk levels, however, could receive release recommendations despite final orders of removal. *Id.*

201. *Id.* at 817 n.143.

202. RCA Quick Reference Guide 3.0, *supra* note 199, at 1339; RCA Release 1.0 Business Requirements, *supra* note 196, at 888–89.

203. *See id.*

204. Evans & Koulish, *supra* note 6, at 819 n.156.

205. *Id.* at 818 n.144.

	Mandatory Detention				Total	
	No		Yes			
RCA Final Decision	N	%	N	%	N	%
Detain, with Bond	49,476	98.99%	504	1.01%	49,980	100%
Detain, without Bond	287,556	78.13%	80,486	21.87%	368,042	100%
Release	34,758	94.27%	2,111	5.73%	36,869	100%
Total	371,790	81.73%	83,101	18.27%	454,891	100%

The RCA training materials acknowledge that some removal grounds that trigger mandatory detention do not represent a high risk to public safety. For example, the RCA’s national training course includes the case study of a person designated for mandatory detention based on statutes and allegations for a drug possession conviction.<sup>206</sup> The RCA designated this offense as “low” severity and generated a “low” public safety risk classification.<sup>207</sup> However, because the offense is covered by § 236(c), the person received a detain, without bond RCA recommendation and a mandatory detention designation.

As a result of the policy to run the full RCA on those migrants whose detention is mandated by Congress, we were able to examine the RCA-determined riskiness of these groups and evaluate whether their risk levels support Congress’s decision to mandate detention. Migrants subject to mandatory detention are not substantially riskier than those subject to detention under 236(a).<sup>208</sup> Approximately 56 percent of mandatorily detained migrants are not “high” risks to public safety compared with 75 percent in the 236(a) category. Even more striking is the comparison of the flight risk levels. Nearly 50 percent of the people detained under § 236(c) are assessed as “low” flight risks versus 30 percent of the § 236(a) category. The percentage of migrants that are not “high” risk in either category is very similar for the mandatory detention and discretionary detention groups with 37 percent of migrants under § 236(c) and 31 percent under § 236(a) with “low” and “medium” risk combinations. Despite this similar risk profile to those eligible for bond by statute, the more than 23,000 lower risk migrants detained under § 236(c) during our study could not seek a bond based on their lack of dangerousness or risk of flight.

206. RCA SYSTEMS TRAINING, *supra* note 81, at 27–28.  
207. *Id.* at 27–30; RCA RULES AND SCORING, *supra* note 9 (Crime Codes).  
208. SIRINE SHEBAYA & ROBERT KOULISH, DETAINED WITHOUT PROCESS: THE EXCESSIVE USE OF MANDATORY DETENTION AGAINST MARYLAND’S IMMIGRANTS (ACLU Md. 2016), <https://perma.cc/L3TP-2H5K>.

Detained Migrants Under § 236(c)					
Risk of Public Safety					
		Low	Medium	High	Total
Risk of Flight	Low	1619 (2.59%)	11600 (18.59%)	16756 (26.85%)	29975 (48.04%)
	Medium	2701 (4.33%)	7249 (11.62%)	5699 (9.13%)	15649 (25.08%)
	High	3392 (5.44%)	8068 (12.93%)	5316 (8.52%)	16776 (26.88%)
	Total	7712 (12.36%)	26917 (43.14%)	27771 (44.50%)	62,400
Detained Migrants Under § 236(a)					
Risk of Public Safety					
		Low	Medium	High	Total
Risk of Flight	Low	1491 (3.01%)	6904 (13.92%)	6035 (12.17%)	14430 (29.10%)
	Medium	4591 (9.26%)	8462 (17.07%)	4163 (8.40%)	17216 (34.72%)
	High	9053 (18.26%)	6584 (13.28%)	2302 (4.64%)	17939 (36.18%)
	Total	15135 (30.52%)	21950 (44.27%)	12500 (25.21%)	49,585

In theory, mandatory detention should apply to the riskiest migrants. However, in practice, the statute sweeps in migrants in the “low” risk to public safety and flight risk categories. Were it not for mandatory detention, ICE could release or assign a bond to thousands of migrants who do not represent a “high” flight or safety risk. Mandatory detention, thus, stands as a fundamental obstacle to reducing detention by tailoring it to risk.

### C. *Subverting the RCA Into a Tool of Punishment*

Risk management does not occur in a political or administrative vacuum.<sup>209</sup> The risk assessment process is political and reveals bias. In *Manipulating Risk*, we demonstrated that enforcement priorities encouraged policymakers to sever the RCA’s algorithm from core risk factors.<sup>210</sup> Author Robert Koulish and Professor Ernesto Calvo separately examined the prevalence and strength of officer bias toward detention.<sup>211</sup> Our study of the RCA’s outcomes here reveals the alarming results of these two dynamics.

209. PASQUALE, *supra* note 19, at 4–6.

210. *Id.* at 794–95.

211. KOULISH & CALVO, *supra* note 164 (manuscript at ch. 3).

### 1. *Algorithmic Bias: Subversion from the Top*

In this section, we describe the incremental changes to the RCA's scoring algorithm and its recommendations, as well as the detention trends these changes produced. The RCA was designed to be highly malleable with a labyrinthine system of factors, scores, and business rules. The algorithm can be modified to change the factors assessed, the scores assigned to each factor; the severity levels for criminal offenses; the scoring thresholds associated with "high," "medium," or "low" risk levels; and the recommendation generated for each combination of flight and public safety risk levels. Manipulation of any one of these variables has the power to increase or decrease the likelihood of detention for thousands of migrants.

The RCA's algorithm changed nineteen times by our count between 2012 and 2016, with significant adjustments 2013, 2015, and 2017. We show that, over time, the RCA became a means of imposing detention in nearly all cases, instead of driving ICE to use alternatives to detention as originally intended. This subversion of the RCA's purpose was achieved in two ways. First, policymakers at ICE headquarters adjusted the algorithm to result in more detention recommendations and to eliminate bond recommendations. These endogenous and top-down manipulations resulted in an algorithm heavily tilted toward detention without bond, regardless of risk. Second, front line ICE officers increasingly dissented to RCA recommendations for release or bond, overriding the fundamental purpose of the RCA, and headquarter officials capitulated. Officials designing the RCA's algorithm used the rate of officer dissent as a core metric to evaluate the RCA and therefore conformed the RCA's algorithm to officers' detention preferences. This exogenous and bottom-up dynamic solidified the role of the RCA as a cloaking device: the RCA provided a veneer of risk logic to detention decisions that were unmoored from proven risk factors. By examining the effects of the algorithmic changes and officer overrides, our study shows that immigration detention is not used to mitigate risk. Detention is instead used to deter migration and punish migrants.

We review the progressive severance of the RCA algorithm from many risk factors during the Obama administration, which occurred in three main periods. The inaugural period, from July 2012 to December 2013, covers the RCA's phased deployment, the national launch in January 2013, and its first year of nationwide operation. ICE headquarter officials adjusted the algorithm significantly in January 2014 (beginning Period Two) and again in February 2015 (beginning Period Three). With the election of former-President Trump, the RCA saw the elimination of its recommendation for release in our final period.<sup>212</sup>

#### **Period One: July 2012–December 2013**

Detention priorities and enforcement priorities need not be the same. An administration can prioritize enforcement of the immigration laws against individuals who do not present a risk of flight or risk to public safety and

---

212. Rosenberg & Levinson, *supra* note 163.

therefore do not need to be detained. However, during Period One, the Obama administration’s enforcement priorities largely coincided with migrants presenting higher levels of risk.

When ICE launched the RCA, it incorporated ICE’s enforcement priorities as outlined by its director at the time, John Morton, in a series of memoranda known as the Morton Memos. The 2011 Morton Memo established a three-tiered system that prioritized migrants with criminal history, followed by recent entrants, followed by migrants with final orders of removal who absconded or re-entered the United States. The first priority category emphasized “violent criminals, felons, and repeat offenders.”<sup>213</sup> Though the second category included many asylum seekers who presented low risks of flight and low risks to public safety and the first priority included migrants with any misdemeanor conviction, the priority categories largely corresponded to groups with high flight risks or risks to public safety. Thus, for the Period One, the RCA came closest to aligning its scoring and custody recommendations with risk.

*Period One: Public Safety*

ICE translated the Morton Memo’s enforcement priorities into detention priorities largely through the public safety scoring rubric. Throughout our study, the RCA scored all criminal charges and convictions, including those pending or dropped; it did not score charges that are dismissed.<sup>214</sup> The score for charges or convictions were based on two criteria: (1) severity and (2) recency.<sup>215</sup>

The RCA identified an offense’s severity, and its corresponding score, based on the severity level assigned to offense descriptions from the FBI’s National Crime Information Center database.<sup>216</sup> The RCA architects assigned and adjusted these severity levels. During Period One, offenses ranged in severity from low to highest (Low=2; Moderate=4; High=6; Highest=7).<sup>217</sup>

Severity	Score
Low	2
Moderate	4
High	6
Highest	7

213. Memorandum from John Morton, Dir., U.S. Immgr. & Customs Enf’t, to All ICE Employees regarding Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://perma.cc/7GCT-NCAC>. Within Priority 1, 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. *Id.* at § A. Recent illegal entrants were Priority 2, and those with prior removal orders were Priority 3. *Id.*

214. Evans & Koulish, *supra* note 6, at 809 n.101.

215. *Id.* at 810–11 n.112–114 and accompanying text.

216. *Id.* at 809 n.102 and accompanying text.

217. *Id.*

Low severity crimes included offenses such as possessing a fraudulent immigration document, driving under the influence of drugs or alcohol (“DUI”), almost all traffic offenses, domestic violence (“DV”), prostitution, and drug possession. Moderate severity crimes included illegal entry, re-entry, drug trafficking, assault, embezzlement, stolen property, petty larceny, and sex crimes involving minors. High severity offenses included military desertion, negligent manslaughter, sexual assault, robbery, burglary, aggravated assault, drug smuggling, and arson. Finally, examples of the highest severity offenses were homicide, treason and espionage, kidnapping, rape, and state offenses for terroristic threats.<sup>218</sup>

The RCA first scored any charge or offense leading to the encounter with ICE.<sup>219</sup> In the instance of multiple charges, the charge that generates the highest score is used.<sup>220</sup> Once a charge or conviction has been scored in the public safety rubric, it is not used again.<sup>221</sup>

For offenses identified as “special public safety factors,” the RCA’s designers assigned an additional seven points. “Special public safety factors” included DUI and DV. These offenses were considered low severity and therefore should have garnered a score of two. However, because the RCA designated them as “special public safety factors,” they produced a score of seven points—a value akin to rape, kidnapping, or homicide.

The RCA then scored the most severe remaining criminal conviction (if any) based on its severity and recency:<sup>222</sup>

Severity	Age			
	< 5 years	5 – 10 years	10 – 15 years	> 15 years
Low	2	1	0	0
Moderate	4	3	2	1
High	6	6	5	5
Highest	7	6	5	5

Additional convictions and charges not yet scored by the RCA are assigned additional points along with points for violations of custody or release conditions and allegations of gang affiliation.<sup>223</sup> The total public safety score corresponded to one of three risk levels:<sup>224</sup>

218. RCA RULES AND SCORING, *supra* note 9 (Crime Codes).

219. RCA Release 1.0 Business Requirements, *supra* note 196, at 873, 968–69; RCA RULES AND SCORING, *supra* note 9 (Points-Based Scoring Rules).

220. Evans & Koulisch, *supra* note 6, at 809 n.104 and accompanying text.

221. *Id.* at 809 n.105.

222. RCA Release 1.0 Business Requirements, *supra* note 196, at 975; RCA RULES AND SCORING, *supra* note 9 (Points-Based Scoring Rules).

223. Evans & Koulisch, *supra* note 6, at 811–13 nn.117–29 and accompanying text.

224. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).



Public Safety		
	Minimum	Maximum
Low	0	4
Medium	5	11
High	12	53

Within the criminal justice system, detention aligns with dangerousness: the higher the risk to public safety, the more likely the person is to face jail while awaiting resolution of the criminal charge.<sup>225</sup> Researchers have shown that adherence to this risk principle can lower recidivism.<sup>226</sup>

The problem facing the RCA is the absence of evidence connecting migration to crime, or immigration detention to future crime.<sup>227</sup> In fact, scholars have shown that migrants are less likely than U.S.-born Americans to commit serious criminal offenses.<sup>228</sup> Nor does the deportation of migrants result in lower crime rates.<sup>229</sup> At the most basic level, there is no evidence that the theory underpinning risk tools in the criminal justice system translates to the immigration system.

Moreover, our data show that most people in detention have not committed serious crimes, and thus, should not have been detained according to the risk principle. Data from the detailed national dataset (N=2,411) show that the most common offense responsible for migrant encounters with ICE was DUI at 38.2 percent (221). The immigration offense of illegal entry was second at 32.2 percent (186). Traffic offenses were third at 16.9 percent (98), and felony assault was fourth at 8.3 percent (48). Finally, selling controlled substances was fifth at 4.32 percent (25). For almost every person detained with or without bond, the data show that the immigration enforcement arrest the lowest hanging fruit—DUI or traffic offenders—followed by immigration offenses. Only 12.6 percent of detained migrants had committed felony-level offenses. Even then, a third of these felony-level offenses were for non-violent drug crimes. Thus, according to risk logic, 87.5 percent of the detained

225. See Noferi & Koulish, *supra* note 13, at 54–55.

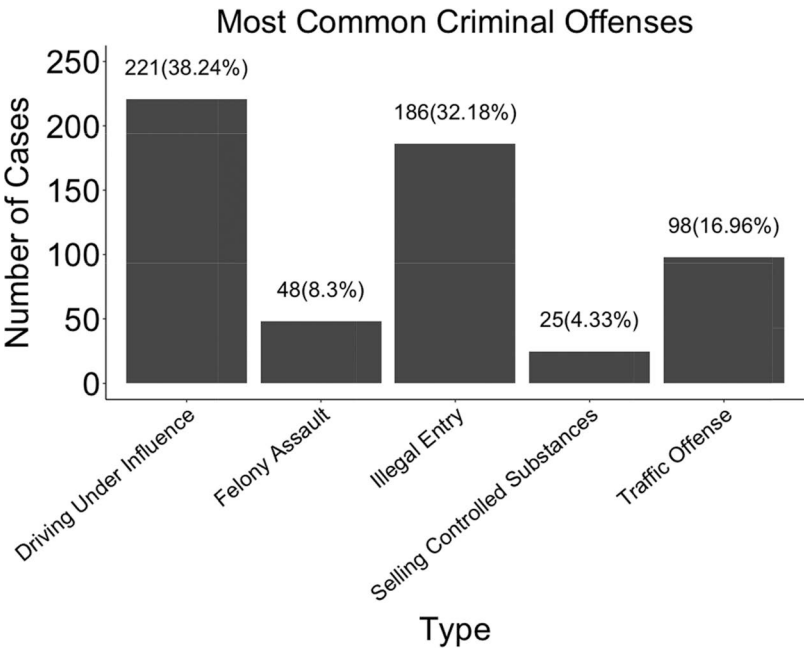
226. Lowenkamp & Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMMUNITY CORRECTIONS, at 3–6 (2004).

227. See Rubén G. Rumbaut, Roberto G. Gonzales, Golnaz Komaie & Charlie V. Morgan, *Debunking the Myth of Immigrant Criminality: Imprisonment Among First-and Second-Generation Young Men*, MIGRATION POL’Y INST. (June 1, 2006), <https://perma.cc/T95Z-CUB8>.

228. WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 4–6 (2015), <https://perma.cc/5ABK-ZNAG>; see also Alex Nowrasteh, *New Research on Illegal Immigration and Crime*, CATO INST. (Oct. 13, 2000, 4: 16 PM), <https://perma.cc/MVW5-C77F>.

229. A recent study about deportation showed that higher deportation rates are not associated with lower crime rates. See generally ANNIE LAURIE HINES & GIOVANNI PERI, IZA INST. OF LAB. ECON., IMMIGRANTS’ DEPORTATIONS, LOCAL CRIME AND POLICE EFFECTIVENESS 22 (2019), <https://perma.cc/2GYS-A4XA>.

population lacked any public safety justification for their immigration incarceration.



*Period One: Flight Risk*

The public safety component of the RCA assigned positive numbers for factors that indicated a migrant’s community ties and negative numbers for indicia of flight. Factors include prior expulsions at the border or interior; the status of any deportation proceeding; violations of release conditions; drug use; possession of valid identification; ties to family in the United States with permanent immigration status; stability of address; military or education enrollment; work authorization; legal representation; and assets.<sup>230</sup> In Period One, the scores assigned to each risk level were as follows:

Flight Risk		
	Minimum	Maximum
Low	none	-5
Medium	-4	1
High	2	none

230. Evans & Koulish, *supra* note 6, at 813–15.

During the first eighteen months of the RCA, it was difficult to achieve a low flight risk score; a low flight risk score required many community ties to arrive at a -5 score.

**Combining Risk to Public Safety and Risk of Flight**

During Period One, only the people who had mandatory detention removal charges or had a prior removal order and reentered the United States received the recommendation of “detain, without bond.” The algorithm produced a recommendation based on the combination of flight risk and public safety risk levels for everyone else as follows:<sup>231</sup>

		Public Safety			
			Low	Medium	High
Flight Risk			0 to 4	5 to 11	12 or higher
	Low	-5 or lower	Release	Supervisor to Determine	Detain, with bond
	Medium	-4 to 1	Supervisor to Determine	Supervisor to Determine	Detain, with bond
	High	2 or higher	Detain, with bond	Detain, with bond	Detain, with bond

The table below shows the RCA’s risk levels for migrants in custody during Period One:

**Period One RCA Risk Combinations (N = 170,437)**

Risk to Public Safety		Risk of Flight			
		Low	Medium	High	Total
Low	N	2,101	18,056	47,500	67,657
	%	1.23%	10.59%	27.87%	39.70%
Medium	N	3,189	25,444	36,136	64,769
	%	1.87%	14.93%	21.20%	38.00%
High	N	1,739	13,428	22,844	38,011
	%	1.02%	7.88%	13.40%	22.30%
Total	N	7,029	56,928	106,480	170,437
	%	4.12%	33.40%	62.47%	100.00%

231. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).

According to risk logic and the RCA’s rules for each risk combination, the RCA should have recommended release for 1.2 percent (2,101) of the migrants. A supervisor should have determined the status for 27.4 percent (45,793) of the migrants. And 71.6 percent should have been detained, with bond. However, the data show that the RCA recommended detention without bond for 577 out of 2,101 migrants in the low-low category, while it recommended 1,491 for release. This is because the mandatory detention statutes prevent ICE from releasing or offering bond to almost one-third of cases that are “low” risk to flight and public safety.

When it came to ICE’s final custody decisions, 89.6 percent of migrants were detained. Almost 75 percent were detained without bond, 16 percent were detained with bond, and 10.4 percent were released, in large part due to the supervisor decisions for some migrants within medium risk categories.

**Final Custody Decisions in Period One**

	N	%
Detain, with Bond	27,956	16.4
Detain, without Bond	124,747	73.19
Release	17,734	10.41
Total	170,437	100

**Period Two: January 2014 to February 2015**

Sociologist Ulrich Beck warned that the advent of risk science has been responsible for the creation of new risks.<sup>232</sup> Period Two reflects Beck’s warning; it shows a more restrictive algorithm with fewer migrants in the “low” risk categories, and as a result, even more migrants in detention.

Period Two also reflects new objectives for the RCA tool that create significant internal tension between its purported objectives and its evaluation metrics. In January 2014, ICE issued a memo to field offices that announced changes “to strengthen alignment both with ICE priorities and with the actual Detain/Release decisions currently being generated by” ICE risk officers, with the intended outcome of “a decrease in the number of times supervisors need to override RCA recommendations.”<sup>233</sup> These criteria for modification replaced traditional objectives like validation that the changes better mitigated flight or danger and transparency in the risk process or paring down detention rates. The changes in Period Two had the effect of the “tail wagging the dog,” with ICE officers’ decisions training the algorithm rather than

232. ULRICH BECK, THE RISK SOCIETY: TOWARDS A NEW MODERNITY ch. 1 (1992). The idea that risk is inherent in modern society contributes to formation of global risk society. Risk tools may themselves produce new risks. See, e.g., Anthony Giddens, *Risk Society: The Context of British Politics*, in THE POLITICS OF RISK SOCIETY 23, 27 (Jane Franklin ed., 1998) (stating that a risk society is “a society increasingly preoccupied with the future . . . which generates the notion of risk”).

233. 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734.

objective risk science training the ICE officers.<sup>234</sup> Patterns of punitive bias in officers thus pulled the algorithm in a more punitive direction.

*Period Two: Public Safety*

The changes in Period Two “place[d] greater emphasis on aliens’ criminal records” so that fewer people received a “low” public safety risk assessment.<sup>235</sup> This shift in the algorithm accommodated end-users’ preference to detain migrants with criminal history. To accommodate dissent, the risk tool was modified in a variety of ways. RCA architects changed the detain/release rubric to increase recommendations to detain migrants with criminal history and to release migrants with some community ties and no criminal history.<sup>236</sup> No migrant would receive a “detain” recommendation based on “high” flight risk and “low” public safety risk; this combination would instead result in a recommendation for the supervisor to determine detention or release.<sup>237</sup> Migrants with a “low” public safety score and a “medium” flight risk score would also be recommended for release.<sup>238</sup> The changes represented a ratcheting down in detention recommendations for people who present a “low” public safety risk, in addition to expanding the group referred to a supervisor for decision.<sup>239</sup> Additionally, migrants with “high” public safety scores and “medium” or “high” flight risk scores no longer received bond recommendations. Thus, the default recommendation for these categories became “detain without bond.”<sup>240</sup> This change coincided with increased scores assigned to certain criminal offenses.<sup>241</sup> Consequently, more people were likely to be assessed as a “high” risk to public safety and receive no bond unless they had overwhelming community ties.<sup>242</sup>

Offenses that shifted from low severity to moderate severity include domestic violence, drug possession, indecent exposure, bestiality, necrophilia, and prostitution offenses.<sup>243</sup> Offenses that changed from low to high severity included procuring minors for prostitution and enticement of a minor for indecent purposes.<sup>244</sup> At the same time, other classes of offenses were reduced from moderate to low severity, including, the immigration crimes of trafficking in fraudulent documents and illegal

---

234. *Id.* (“The RCA scoring methodology used to make Detain/Release recommendations is being revised to address feedback from ERO officers and to strengthen alignment both with ICE priorities and with the actual Detain/Release decisions currently being generated by ERO RCA end users. This should result in a decrease in the number of times supervisors need to override RCA recommendations.”).

235. *Id.*

236. *Id.* at 1734–35.

237. Evans & Koulisch, *supra* note 6, at 824 n.187.

238. *Id.* at 824 n.188.

239. RCA RULES AND SCORING, *supra* note 9 (Logic-Based Scoring Rules).

240. *Id.*

241. *Id.* (Crime Codes; Points-Based Scoring Rules).

242. 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734 (“[The Public Safety Scoring Updates] will result in fewer aliens receiving a Public Safety Score of Low, and more aliens receiving a Public Safety Score of High.”).

243. RCA RULES AND SCORING, *supra* note 9 (Crime Codes).

244. *Id.*

reentry; passing a fraudulent check; burglary; petty larceny; stolen property offenses; deceptive business practices; not performing duties as a government official; or a licensing violation.<sup>245</sup> With these changes, many property crimes, immigration crimes, and business crimes generated lower public safety scores.

While the RCA recommendations for people with “low” public safety risk levels were less restrictive, obtaining a “low” risk assessment became harder. As severity levels and the assigned points were adjusted for certain crimes, the thresholds for “low” and “medium” risk assessments narrowed, pushing more people into the “medium” and “high” risk categories. The changes made it increasingly difficult to receive an assessment of low public safety risk with any criminal history. The new levels were the following (the original threshold is struck through):<sup>246</sup>

Public Safety Risk		
	Minimum	Maximum
Low	0	4 (Period 1)
		3 (Period 2)
Medium	5 (Period 1)	11 (Period 1)
	4 (Period 2)	8 (Period 2)
High	12 (Period 1)	53
	9 (Period 2)	

During this period, two traffic offenses within the last five years would place someone in the “medium” public safety risk category, as did a single drug possession conviction within the last five years.<sup>247</sup> These offenses, therefore, precluded a release recommendation. Similarly, if within the last ten years, someone with a single drug possession charge had any other conviction (including a traffic offense), it would be impossible to receive a recommendation of release. As ICE officers reverse-engineered the risk system through dissent, the algorithm produced higher detention rates for migrants with criminal records.

245. *Id.*

246. *Id.* (Logic-Based Scoring Rules).

247. *See id.* (Point-Based Scoring Rules).



*Period Two: Flight Risk*

In terms of flight risk, the changes weighed certain community ties more heavily to reduce the flight risk scores while simultaneously adjusting the risk thresholds to increase the number of migrants assessed as a “low” risk of flight.<sup>248</sup> In January 2014, the new flight risk levels were as follows:<sup>249</sup>

Flight Risk		
	Minimum	Maximum
Low	none	<del>−5</del> −2
Medium	<del>−4</del> −1	<del>+</del> 2
High	<del>2</del> 3	none

The changes to the RCA recommendations—again, aimed at reducing the rate of supervisor overrides<sup>250</sup>—appeared as follows (RCA recommendations in Period One are struck through):

Public Safety					
			Low	Medium	High
Flight Risk			<del>0 to 4</del> 0 to 3	<del>5 to 11</del> 4 to 8	<del>12 or higher</del> 9 or higher
	Low	<del>−5 or lower</del> −2 or lower	Release	Supervisor to Determine	Detain, with bond
	Medium	<del>−4 to +1</del> −1 to 2	<del>Supervisor to Determine</del> Release	Supervisor to Determine	<del>Detain, with bond</del> Detain, without bond
	High	<del>2 or higher</del> 3 or higher	<del>Detain, Eligible for Bond</del> Supervisor to determine	Detain, with bond	<del>Detain, with bond</del> Detain, without bond

248. *Id.*  
249. *Id.* (Logic-Based Scoring Rules).  
250. 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734.

RCA Risk Combinations for Period Two (N=124,543)

Risk to Public Safety		Risk of Flight			Total
		Low	Medium	High	
Low	N	6,181	4,398	15,546	26,125
	%	4.96%	3.53%	12.48%	20.98%
Medium	N	15,081	8,400	22,556	46,037
	%	12.11%	6.74%	18.11%	36.96%
High	N	17,527	8,973	25,881	52,381
	%	14.07%	7.20%	20.78%	42.06%

Of the more than 21,000 migrants who the RCA should have recommended for release based on their risk levels, many of the “low/low” risk migrants and “low” public safety/”medium” flight migrants were detained, again, in part because of the mandatory detention statutes and in part due to officer overrides.

Final Custody Decisions in Period Two

	N	%
Detain, with Bond	17,636	14.16
Detain, without Bond	96,921	77.82
Release	9,986	8.02
Total	124,543	100

During Period Two, ICE detained 92.1 percent of migrants in ICE custody. A full 78 percent were detained without bond. However, based on the RCA recommendation rubric, only 38 percent should have received this outcome. Additionally, only 8 percent were released on community supervision even though the RCA should have recommended more than 17 percent of cases for release. Even with the restrictions to the algorithm for people with criminal history, officer overrides still thwarted the RCA’s rubric for release.

Period Three: February 2015 to October 2016

On November 20, 2014, former president Obama announced, “our immigration system is broken—and everybody knows it.”<sup>251</sup> He continued,

251. Address to the Nation on Immigration Reform, 2 PUB. PAPERS 1509 (Nov. 20, 2014).

Over the past six years deportations of criminals are up 80%, and that's why we're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids.<sup>252</sup>

Then-DHS Secretary Jeh Johnson clarified how the “felons, not families” policy would translate into three enforcement priorities in November 2014.<sup>253</sup> Priority One included people convicted of “aggravated felonies” as defined in immigration law, a state felony (other than an offense containing immigration status as an element), or an offense involving gang activity, as well as people apprehended at the border.<sup>254</sup> Priority Two included people convicted of three misdemeanors arising out of separate incidents; a “significant misdemeanor,” with a sentence of more than ninety days; and certain domestic violence, DUI, burglary, firearms, sexual abuse, and drug crimes.<sup>255</sup> Priority Two also included people who entered the United States without authorization and could not prove they had done so before January 1, 2014.<sup>256</sup> Priority Three included people with removal orders issued on or after January 1, 2014.<sup>257</sup> The RCA algorithm was changed so that it would recommend detention for people falling in any of these categories. A guide to the RCA

---

252. *Id.*

253. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs and Border Prot., Leon Rodriguez, Dir., U.S. Citizenship and Immigr. Servs. & Alan D. Bersin, Acting Assistant Sec'y for Pol'y, Dep't of Homeland Sec., regarding Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3–4 (Nov. 20, 2014), <https://perma.cc/S56P-EMME> [hereinafter Johnson Priorities Memo]; *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, Megan Mack, Officer, Off. of C.R. and C.L. & Philip A. McNamara, Assistant Sec'y for Intergovernmental Affs., Dep't of Homeland Sec., regarding Secure Communities 2 (Nov. 20, 2014), <https://perma.cc/HEJ6-NTAF> [hereinafter Johnson Secure Communities Memo] (limiting ICE detainer requests to requests for notification, for those in the first two priorities, only with criminal convictions). President Obama also issued a series of executive actions that attempted to expand the group of migrants who could receive a formal reprieve from immigration enforcement efforts accompanied by work authorization. 2014 *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Apr. 15, 2015), <https://perma.cc/SK4J-9VEH>. The Order included (1) the expansion of DACA and introduction of DAPA; (2) the termination of secure communities and its replacement by the Priority Enforcement Program; and (3) further clarification of enforcement priorities to focus on violent offenders. *Id.*; Johnson Priorities Memo, *supra*, at 253; Johnson Secure Communities Memo, *supra* note 253, at 2–3. DAPA consisted of expanding temporary protection to over four million undocumented parents of DACA recipients. *Texas v. United States*, 809 F.3d 134, 147–48 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271. However, a federal court subsequently blocked DAPA as an executive overreach. *Id.* at 146 (affirming a district court decision enjoining DAPA). Even then, the directive to focus enforcement resources away from people who would have been covered by this program remained. *See* Jeh Johnson, Sec'y, Dep't of Homeland Sec., Statement on Today's Supreme Court Decision (June 23, 2016), <https://perma.cc/3EHE-N88S>.

254. Johnson Priorities Memo, *supra* note 253, at 3.

255. *Id.* at 3–4.

256. *Id.* at 4.

257. *Id.*

scoring updates explained this realignment<sup>258</sup> and set out the new enforcement priorities alongside the detention recommendations the RCA would now typically produce.<sup>259</sup>

*Period Three: Public Safety*

To accommodate former-President Obama’s enforcement priorities, a “medium” risk for public safety usually resulted in the recommendation of detention without bond. Another important change to public safety risk algorithm was the addition of new “special public safety factors” called “serious misdemeanors.”<sup>260</sup> These offenses consisted of drug distribution and weapons offenses.<sup>261</sup> Like DUI and DV offenses, these charges (regardless of conviction) generated seven points, making detention without bond the most likely recommendation.<sup>262</sup>

Simultaneously, the RCA added a new offense severity level of “lowest.”<sup>263</sup> The “lowest” severity level offenses included traffic offenses (except for hit and run, DUI, and transporting dangerous materials).<sup>264</sup> These offenses had previously been categorized as low and would have generated two points for the public safety score if they were the basis for the ICE encounter or had occurred within the last five years.<sup>265</sup> Under the prior rubric, two traffic offenses within the last five years equated to a “medium” public safety risk level. The addition of a “lowest” severity level finally removed offenses like driving without a license—common in states that do not provide drivers’ licenses to residents without proof of immigration status—from the public safety risk assessment.<sup>266</sup>

Severity	Score
Lowest	0
Low	2
Moderate	4
High	6
Highest	7

The risk levels assigned to the public safety scores remained unchanged from Period Two and were as follows:

258. Evans & Koulisch, *supra* note 6, at 831 n.204; Executive Action Scoring Guide, *supra* note 156, at 1796–1800.

259. Executive Action Scoring Guide, *supra* note 156, at 1798.

260. RCA RULES AND SCORING, *supra* note 9 (Crime Codes).

261. Evans & Koulisch, *supra* note 6, at 827 n.198.

262. RCA RULES AND SCORING, *supra* note 9 (Points-Based Scoring Rules).

263. *Id.* (Crime Codes).

264. *Id.*

265. *Id.* (Crime Codes; Points-Based Scoring Rules).

266. *Id.* (Points-Based Scoring Rules).

Public Safety Risk		
	Minimum	Maximum
Low	0	4 (Period 1) 3 (Period 2 & 3)
Medium	5 (Period 1) 4 (Period 2 & 3)	4+ (Period 1) 8 (Period 2 & 3)
High	4+ (Period 1) 9 (Period 2 & 3)	53

### *Period Three: Flight Risk*

The flight risk algorithm experienced a radical shift during Period Three. In accordance with the prioritization of recent arrivals, the date of entry became the flashpoint for detention or release. The factor of “entry without authorization” after January 2014 was assigned fourteen points.<sup>267</sup> That factor alone would result in a “high” flight risk assessment and a recommendation for detention without bond.<sup>268</sup> This runs in sharp contrast to an unknown entry date, receiving one point, or entering the country without authorization before January 1, 2014, which was assigned zero points.<sup>269</sup>

Additionally, abuse of a visa or visa waiver program and a final order of removal on or after January 1, 2014 was assigned seven points.<sup>270</sup> This score corresponded to a “medium” flight risk level and the recommendation of detention without bond unless combined with a “low” public safety score.<sup>271</sup> In that case, the custody decision was given to the “supervisor to determine” without an RCA recommendation.

Having a final order before January 1, 2014 and being previously removed garnered one point, while a final order before January 1, 2014 without removal and no final order of removal scored zero points. People in these groups could achieve a “low” risk of flight assessment due simply to the age of their immigration history.

Most factors that were actually tied to risk of flight were either eliminated or reduced to 0 points. These included violation of supervision conditions; a bond breach; failure to comply with a prior removal order; an active case in removal proceedings; a pending appeal; pending application for immigration benefits; legal counsel; possessing valid or false identification; work authorization; and enrollment in an educational program.<sup>272</sup> The point values for the remaining factors that indicated community ties were reduced such that

267. *Id.* (Points-Based Scoring Rules).

268. *Id.* (Points-Based Scoring Rules; Logic-Based Scoring Rules).

269. *Id.* (Points-Based Scoring Rules).

270. *Id.*

271. *Id.* (Logic-Based Scoring Rules).

272. *Id.* (Points-Based Scoring Rules).

recent entry and visa violations could not be overcome with positive community ties.

The remaining factors and the points assigned are:<sup>273</sup>

- Living with immediate family members is assigned -1 points.
- Lived at their address for six months or more is assigned -1 points.
- Service in the armed services by migrant or spouse is assigned -1 points.
- Having a U.S. citizen spouse or child is assigned -1 points.
- (If no U.S. citizen spouse/child), spouse or child in the local community is assigned -1 points.
- (If no U.S. citizen spouse/child), family in United States but not in local community is assigned 0 points.
- Owning property or considerable assets is assigned -1 points.

The calibration of public safety scores to risk levels also saw major changes in February 2015.<sup>274</sup>

Flight Risk		
	Minimum	Maximum
Low	none	-5 (Period 1) -2 (Period 2) 1 (Period 3)
Medium	-4 (Period 1) -1 (Period 2) 2	4 (Period 1) 2 (Period 2) 8
High	2 (Period 1) 3 (Period 2) 9	none

Period Three was the most restrictive and punitive period for detention under the Obama administration. From this period onward, the algorithm stopped recommending bond eligibility for detained migrants. Notably, the public safety thresholds for each risk level did not change even though the recommendation to detain without bond was applied to all “medium” and “high” public safety groups.<sup>275</sup> Though the detention level was already hovering at 90 percent, the elimination of a bond recommendation by ICE had a significant practical effect because it forced those people

273. *Id.*  
274. *Id.*  
275. *Id.* (Logic Based Scoring Rules).



eligible for bond to wait for weeks to seek bond in immigration court.<sup>276</sup> The punitive shift queries the purpose of risk in immigration detention. If the RCA does not protect lower risk migrants from detention, what purpose does it serve?

		Public Safety			
			Low	Medium	High
Flight Risk			0 to 3 <del>0 to 4</del>	4 to 8 <del>5 to 11</del>	9 or higher <del>12 or higher</del>
	Low	<del>5 or lower</del> <del>2 or lower</del> 1 or lower	Release (All Periods)	Supervisor to Determine (All Periods)	<del>Detain, with Bond (Period 1 &amp; 2)</del> Detain, without Bond (Period 3)
	Medium	<del>4 to 1</del> <del>1 to 2</del> 2 to 8	<del>Supervisor to Determine (Period 1)</del> Release (Period 2) Supervisor to Determine	<del>Supervisor to Determine (Period 1 &amp; 2)</del> Detain, without Bond (Period 3)	<del>Detain, with Bond (Period 1)</del> Detain, without Bond (Period 2 & 3)
	High	<del>2 or higher</del> <del>3 or higher</del> 9 or higher	<del>Detain, with Bond (Period 1)</del> Supervisor to determine (Period 2 & 3)	<del>Detain, with Bond (Period 1 &amp; 2)</del> Detain, without Bond (Period 3)	<del>Detain, with Bond (Period 1)</del> Detain, without Bond (Period 2 & 3)

RCA Risk Combinations for Period Three

		Risk of Flight			
Risk to Public Safety		Low	Medium	High	Total
Low	N	6,907	2,459	20,575	29,941
	%	4.32%	1.54%	12.87%	18.72%
Medium	N	27,529	5,170	13,651	46,350
	%	17.22%	3.23%	8.54%	28.98%
High	N	56,538	10,219	16,863	83,620
	%	35.36%	6.39%	10.55%	52.29%
Total	N	90,974	17,848	51,089	159,911
	%	56.89%	11.16%	31.95%	100.00%

276. See *supra* Part I.A (describing process of seeking custody redetermination hearing in immigration court and widespread delays).

According to the RCA recommendation logic in Period Three, the RCA should have recommended detention without bond for 66,478 cases and designated the custody decision to a supervisor without providing a recommendation for 86,526 cases. The final custody decisions below show that ICE officers exercised their discretion almost always to impose detention without bond, such that more than 146,000 cases were designated for detention without bond. Additionally, because the RCA no longer recommended bond for any risk category, migrants who were eligible for bond under § 236(a) had to rely on the rare exercise of officer discretion or challenge their detention without bond in immigration court.

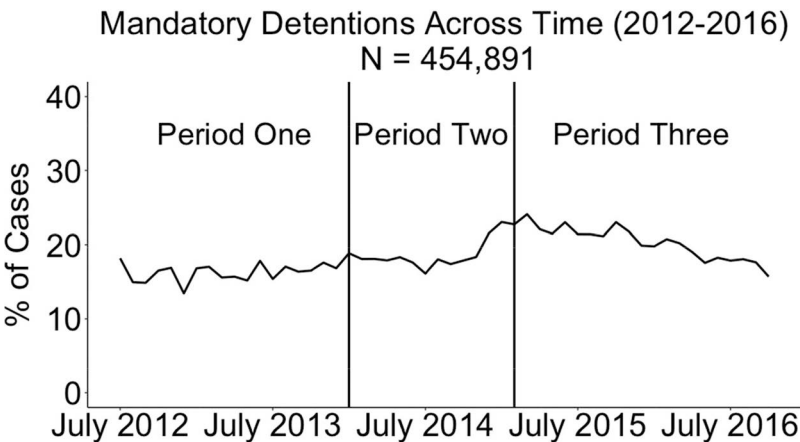
Final Custody Decisions for Period Three

	N	%
Detain, with Bond	4,388	2.74
Detain, without Bond	146,374	91.53
Release	9,149	5.72
Total	159,911	100

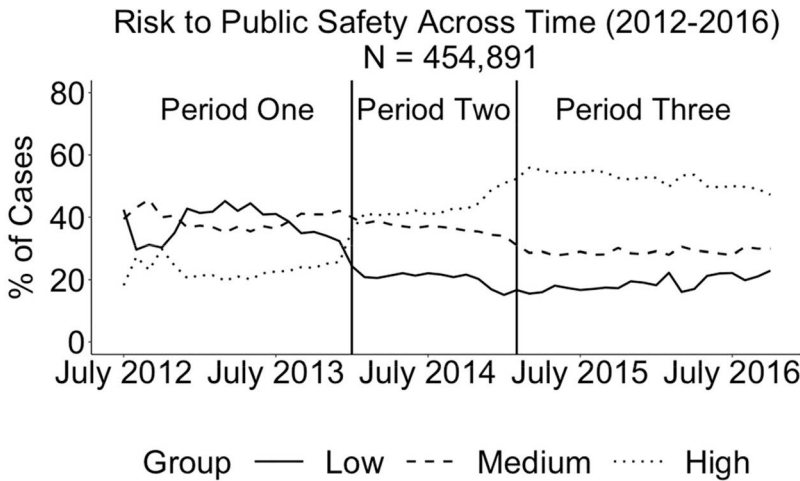
The Results of Algorithmic Changes

The trends in the risk profiles of the people detained tell an important story about the relationship between the RCA and immigration detention. These data show the impact of the algorithm’s shift to become increasingly punitive over time. Risk levels became tighter at the low end and broader at the high end; the same offense earned fewer points in Period One and more points by Period Three. The RCA also stopped accounting for many community ties. In Period One, the most punitive risk recommendation was detain, with bond. By Period Three, that recommendation was eliminated and the recommendation to detain, without bond had colonized the map—covering five out of nine possible combinations of public safety and flight risk levels. Here, we track the three periods of the RCA with these algorithmic changes in mind.

First, the share of people detained mandatorily under § 236(c) remained steady at about 18 percent over three significant algorithmic changes from 2012 to 2016. This means that regardless of risk levels—which our study shows were often “low” or “medium” in this group—approximately one fifth of all people in civil immigration detention will remain there, for months if not years, unless Congress reforms the mandatory detention statute or there is a successful challenge to its constitutionality, as discussed further in Part IV.

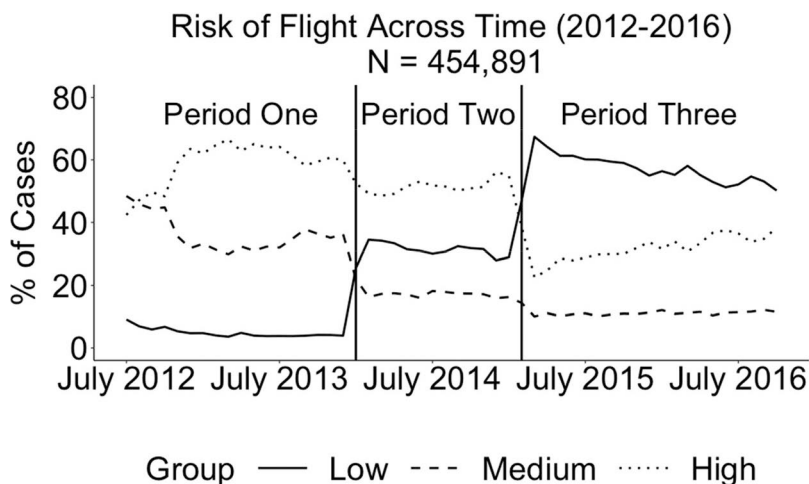


The risk to public safety trends demonstrate the RCA’s punitive trajectory most clearly. Early on in Period One, “low” public safety risk was the most common category of risk in detention, and “high” public safety risk was the least common category. By Period Three, these levels reversed themselves, with “high” risk comprising the most populous category and “low” public safety risk the least populous among detained migrants. The rate of migrants in the “low” risk to public safety category in Period One was nearly 40 percent, more than halving to 19 percent by Period Three. The manipulation of the algorithm squeezed the “low” risk to public safety category to produce and widen the parameters of the category for high risk to public safety.<sup>277,278</sup> Over time, the algorithmic changes pushed noncitizens into the “medium” and “high” risk categories for the same offense.

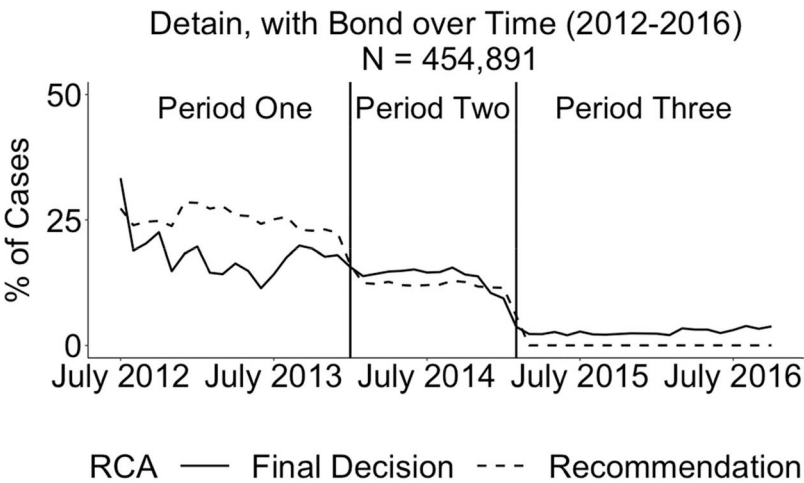


277. 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734.  
278. *Id.*

Next, the trend lines for the percentage of detained cases per flight risk levels traverses two significant adjustments to the algorithm with the opposite effect. The rate of cases with a “low” flight risk assessment from 2012 to 2016 flips from a relatively low rate in Period One to a dominating share of detained cases in Period Three. About 60 percent of detained cases were “high” flight risk during Period One, whereas about 60 percent of detained cases were “low” flight risk during Period Three. This dramatic shift in risk profile reflects a combination of algorithmic changes. First, the ratcheting up of the public safety rubric meant migrants with any criminal history were generally detained. Second, enforcement efforts followed the Obama administration’s focus on migrants with criminal history. Third, the flight risk rubric was tied nearly exclusively to date of entry or final removal order such that migrants who had lived in the United States for several years were generally categorized as “low” risk of flight. Together, these policies meant that migrants with any criminal history would be detained regardless of their “low” risk of flight.



Finally, and most severely, the data show the near elimination of bond during Period Three. This drop off coincides with the change to the RCA algorithm to eliminate a recommendation for bond. With this change, a bond from ICE, and therefore prompt release upon its payment, was only possible if an ICE officer granted bond in a case that the RCA designated for the “supervisor to determine” or overrode the RCA’s recommendation to release or detain without bond.



Though the percentage of people subject to § 236(c) remained steady, the portion of people detained under § 236(a) did not. This population dropped in Period Two and again in Period Three. Indeed, in Period Three, very few migrants who were subject to discretionary detention under § 236(a), rather than mandatory detention, were going through full immigration court proceedings. This seems to reflect the 2014 enforcement priorities directed at families crossing the southern border.<sup>279</sup> Indeed, our random sample from the national dataset shows that more than 54 percent of people detained during our study period were subject to expedited removal under § 235 or reinstatement or under § 241. As a result, these migrants received the RCA’s recommendation to detain without bond.

Expedited Removal, 893 Cases					
		Risk of Flight			
Risk to Public Safety	Low		Low	Medium	High
		Detain, without bond	13 (1.46%)	38 (4.26%)	768 (86%)
		Detain, with bond	0 (0%)	0 (0%)	6 (0.67%)
	Medium	Release	0 (0%)	0 (0%)	4 (0.45%)
		Detain, without bond	5 (0.56%)	8 (0.9%)	41 (4.59%)
		Detain, with bond	0 (0%)	0 (0%)	0 (0%)
	High	Release	0 (0%)	0 (0%)	1 (0.11%)
		Detain, without bond	1 (0.11%)	0 (0%)	8 (0.9%)
		Detain, with bond	0 (0%)	0 (0%)	0 (0%)
		Release	0 (0%)	0 (0%)	0 (0%)

279. Johnson Priorities Memo, *supra* note 253, at 3; Executive Action Scoring Guide, *supra* note 156, at 1798.

Except for those people in expedited removal proceedings, the RCA is performed in full notwithstanding their mandatory detention category.<sup>280</sup> Although ICE is not required to assess flight risk and public safety risk in expedited removal cases,<sup>281</sup> our data show where it did. Almost all migrants designated for expedited removal are detained without bond. And almost all the expedited removal cases are categorized as a “high” flight risk and “low” public safety risk.

The “high” flight risk designation is due largely to the manipulation of the RCA algorithm during Period Three, which scored recent entry to the United States as high risk regardless of community ties, eligibility for immigration benefits, or support from legal counsel. These migrants would be better served through an alternative to detention. This is especially so for migrants with a positive credible fear interview who were nonetheless detained. Absent the mandatory detention provision of § 235 for migrants in expedited removal and the manufactured “high” risk designation, they could have been released. Their detention instead illustrates the failures of the RCA to protect victims of trauma and to align detention with risk.

## 2. *Officer Bias: Subversion from the Bottom*

While enforcement priorities were one of several factors responsible for changing the algorithm, the rate at which ICE supervisors disagreed with the algorithm’s custody recommendations were equally important. Such disagreements came in the form of the override rate that measured the frequency at which supervisors’ final decisions diverged from the RCA’s recommendation. ICE has stated that it assesses the efficacy of its risk tool by evaluating the extent that ICE officers override the tool’s detain or release recommendation.<sup>282</sup> Since override rates became the stock and trade of the internal evaluations for the tool’s effectiveness, the corresponding incentive for the RCA’s designers was to create an algorithm that appeased the preferences of ICE supervisors. The idea that detention ought to accommodate risk levels thus evaporated, as the risk algorithm instead accommodated officer preference. The RCA became an example of the tail wagging the dog, resulting in the loss of liberty for thousands of people.

Like risk tools generally, the RCA is only as good as the people and objectives that support them. Just as people are prone to bias, the people who create, administer, and account for algorithms bring their own explicit and implicit biases into the creation and review processes. Scholars and advocates have documented how the culture within ICE is anti-immigrant and anti-Latinx.<sup>283</sup>

---

280. See RCA Quick Reference Guide, *supra* note 151, at 1743.

281. Evans & Koulish, *supra* note 6, at 817.

282. Field Operations Briefing, *supra* note 179, at 228; 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734.

283. See Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 351 (2009) (“The construction of the U.S. immigration policy and enforcement regime has resulted in a framework that victimizes Latin and Asian immigrants. These immigrants of color end up



Recent news and government investigations<sup>284</sup> and depositions gathered during lawsuits have revealed ICE and CBP are replete with racism, incompetence, and corruption.<sup>285</sup> The immigration algorithm has thus contended with racism and punitive anti-immigrant bias inside DHS, and ICE in particular.

We have published elsewhere that anti-immigrant punitive behavior by ICE officials hamstringing the RCA.<sup>286</sup> An original architect of the RCA told the authors that Director Morton, charged with implementing the RCA, met resistance from administrators implementing the risk tool in the field.<sup>287</sup> Additionally, the National ICE Council,<sup>288</sup> the union that represents ICE officers and agents, strongly opposed risk assessment because a risk tool threatened to diminish the power of its officers.<sup>289</sup> Ultimately, with the final decision to release or detain someone assigned to ICE supervisors, these officers were able to detain nearly everyone despite the RCA's purpose to limit detention.

Across our study period, the RCA's designers delegated different risk categories to ICE supervisors for custody decisions in the first instance. Notwithstanding these changes, the overall percent of cases delegated directly to a supervisor's discretion remained steady at about twenty-two percent.

### **Supervisor to Determine (N=454,891)**

Period One = 22.75%

Period Two = 22.14%

Period Three = 22.32%

The final custody decisions between 2012 and 2016 demonstrate that ICE supervisors deploy this discretion to impose detention without bond in most cases. These officers decided to detain nearly 81 percent of cases without bond and dramatically reduced the number of cases in which they granted release or bond over time.

being the subject of ICE raids. They are the ones who comprise the immigration visa backlogs. They are the ones that attempt to traverse the hostile southwest border. Their victimization has been institutionalized.”); Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, 8 NORTEAMÉRICA 31, 33–36 (2013) (explaining the racialized nature of federal immigration enforcement); Hamed Aleaziz, “Sickening” and “Proof” of Racism: DHS Officials Said Stephen Miller Must Go After His Emails Were Released, BUZZFEED NEWS (Nov. 15, 2019, 5:39 PM), <https://perma.cc/7NRJ-DDHR>.

284. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://perma.cc/B82E-2LCT>.

285. Zack Linly, *3 Black Border Patrol Officers File Lawsuit Against CBP Alleging Constant Racial Profiling and Harassment of Black Travelers*, ROOT (Apr. 4, 2021, 3:00 PM), <https://perma.cc/EQB9-6XAV>; *Customs and Border Protection Settles Federal Lawsuit with American Citizens Racially Profiled and Unlawfully Detained for Speaking Spanish*, ACLU (Nov. 24, 2020), <https://perma.cc/C7AP-Q9ZG>; Susan Ferriss, “Shocked and Humiliated”: Lawsuits Accuse Customs, Border Officers of Invasive Searches of Minors, Women, CTR. FOR PUB. INTEGRITY (Sept. 12, 2018, 10:57 PM), <https://perma.cc/HH8G-7FYZ>.

286. KOULISH & CALVO, *supra* note 164 (manuscript at 72–85).

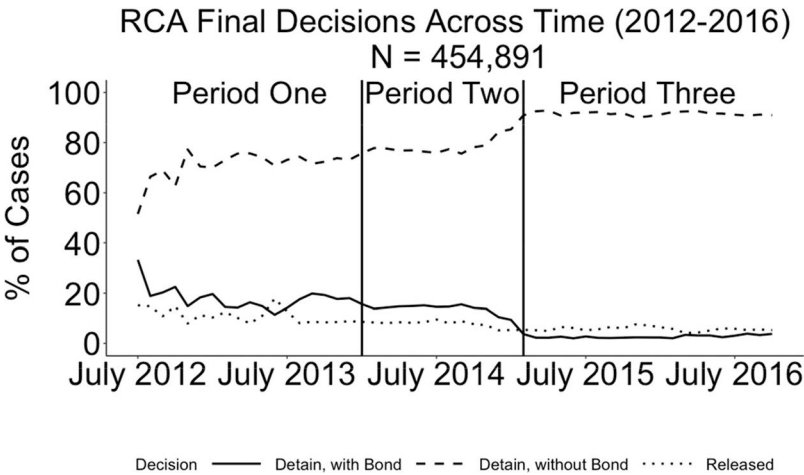
287. Interview with High-Ranking DHS Official (May 17, 2019) (on file with authors).

288. The American Federation of Government Employees National ICE Council represents approximately 7,600 officers, agents, and employees. *About AFGE National Council*, NAT’L ICE COUNCIL, <https://perma.cc/GQF9-QKCB>.

289. KOULISH & CALVO, *supra* note 164 (manuscript at 72).

		Final Custody Decisions			
		Period 1	Period 2	Period 3	Total
Detain, with Bond	N	27,956	17,636	4,388	49,980
	%	6.15%	3.88%	0.96%	10.99%
Detain, without Bond	N	124,747	96,921	146,374	368,042
	%	27.42%	21.31%	32.18%	80.91%
Release	N	17,734	9,986	9,149	36,869
	%	3.90%	2.20%	2.01%	8.11%
	N	170,437	124,543	159,911	454,891
Total	%	37.47%	27.38%	35.15%	100.00%

Data on the final custody decisions show an increase in the detention rate during the tenure of the RCA. There is a significant increase in Period Two and an even larger leap in the detention rate in Period Three. The data also show a significant decrease in cases with bond recommendations during Period Three. No migrants arriving after February 2015 were recommended for bond, and hence nearly all (92 percent) were detained without bond. Those released into the community on supervision also halved during the Obama administration.



The data from our study period show bias in ICE decisions to refrain from releasing low-risk migrants in ICE custody. As the presidential election approached in Fall 2012, detention officers increasingly subjected migrants

to detention through their discretionary authority.<sup>290</sup> Moreover, the rates of officer dissent during the Obama administration prompted changes to the algorithm to limit recommendations for release or bond.<sup>291</sup> The RAID Project has elsewhere documented the influence of electoral politics and punitive factors on detention decisions.<sup>292</sup> Specifically, detention officers make consistently punitive decisions to undermine even the illusion of fairness produced by the risk algorithm.

In 2016, for the first time in history, the ICE Council endorsed a candidate for president, backing Donald Trump.<sup>293</sup> Rank and file officers saw in Trump a president committed to removing all limits on immigration enforcement.<sup>294</sup> The Trump administration's zero-tolerance policy delivered on this promise. As a result, starting in February 2017, migrants were arrested and brought into custody regardless of risk level as an expression of that administration's universal enforcement policy. Although the Obama administration removed the bond recommendation from the RCA in February 2015, migrants with "low" flight and "low" public safety risk assessments were still recommended for release. ICE officers registered their discontent with the Obama-era algorithm and its release recommendation by overriding the RCA recommendation to release low-risk migrants. Accordingly, the officer overrides led to the detention of low-risk migrants starting that month. The no-release policy was then formalized in June 2017 through further manipulation of the RCA's recommendations. Following this shift, the rate of officer dissent plummeted.

The graph below demonstrates that ICE officers train the risk algorithm by using overrides. It shows an abrupt increase in supervisor overrides of risk recommendations for migrants who are a "low" risk to public safety. The override rate (share of officer disagreement) climbed from about 15 percent in February 2017 to almost 40 percent in May 2017. The supervisors' override rate quickly dropped in June 2017 with the advent of the new algorithm, which stopped recommending release for any risk category. The dramatic decline in officer dissent rates reflect their assent to the new algorithm their overrides generated.

---

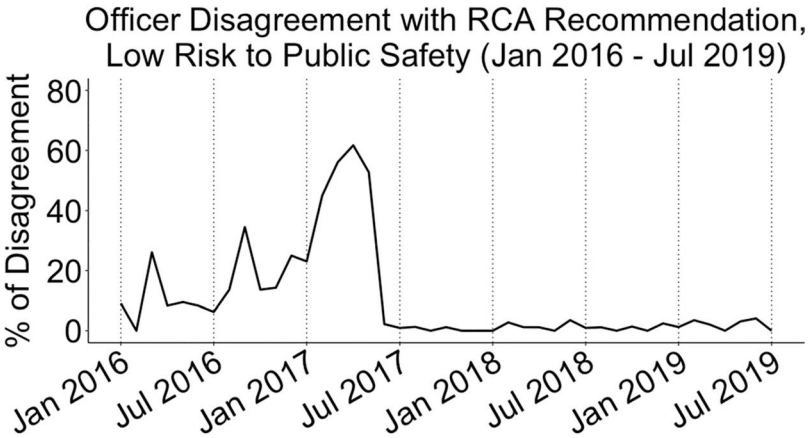
290. Robert Koulish & Ernesto Calvo, *The Human Factor: Algorithms, Dissenters, and Detention in Immigration Enforcement*, 102 Soc. Sci. Q. 1761, 1777–78 (2021).

291. Field Operations Briefing, *supra* note 179, at 228; 2014 RCA Scoring Methodology Change, *supra* note 8, at 1734.

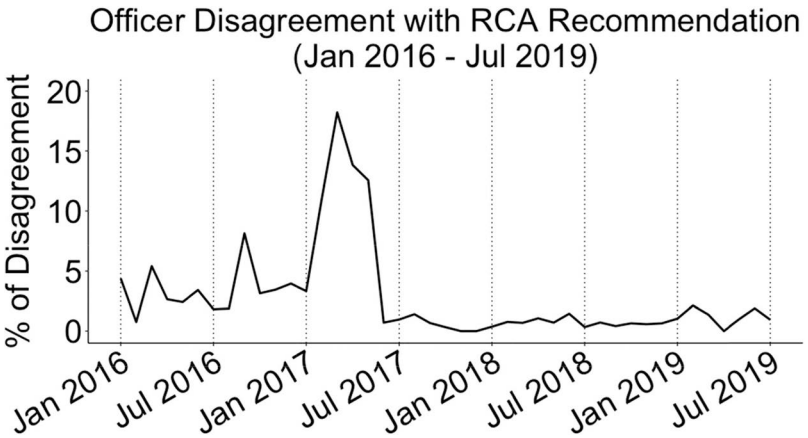
292. KOULISH & CALVO, *supra* note 164 (manuscript at 72–74).

293. *Id.* (manuscript at 72–74).

294. ICE ERO *Immigration Arrests Climb Nearly 40%*, U.S. IMMIGR. & CUSTOMS ENF'T (Oct. 7, 2021), <https://perma.cc/9BFFK-PH3N>; Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://perma.cc/T5SS-S7XS>.



The same trend in override rate followed by assent to changes in the algorithm is evident for the RCA recommendations in all risk categories, simply to a lesser degree. The officer override rate for all RCA recommendations then levels out to a relatively low rate under the Trump administration’s algorithm.



Our third dataset from the New York Area of Operations provides further evidence of officer bias toward detention under the Trump administration. After 2013, the rate of detention for migrants with “low” public safety risk levels dropped off dramatically until former-President Trump took office. The table below shows an almost doubling of detention for low-risk migrants between the end of the Obama administration in 2016 (15 percent) and the start of the Trump administration in 2017 (29 percent). The rate of low-risk migrants detained without bond then further increased in 2018 (32 percent) and again in 2019 (33 percent). This increase in detention of migrants with a “low” public safety risk results from the combination of the Trump administration’s universal enforcement policy, its elimination of a release

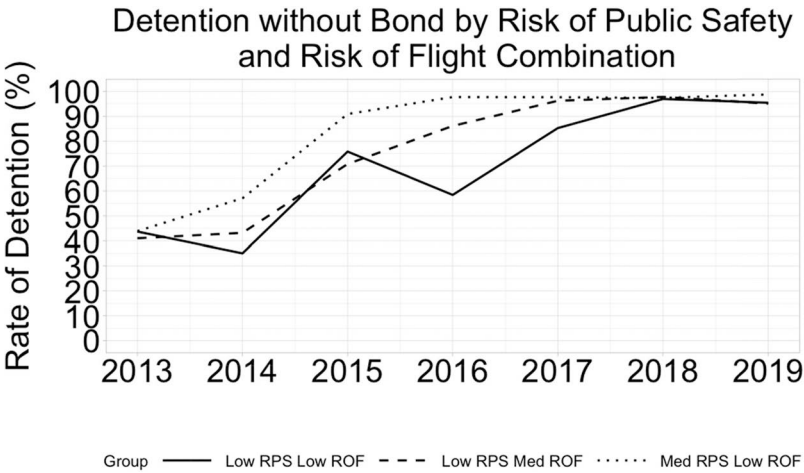
recommendation in the RCA, and the unfettered exercise of ICE officers’ discretion to detain.

**Migrants Detained by the New York City ICE Field Office by Public Safety Risk Level**

			2013	2014	2015	2016	2017	2018	2019	Total
Public Safety Risk Level	Low	N	1,996	896	187	228	844	1,035	431	5,617
		%	38.93	23.05	9.94	15.31	28.78	31.70	32.95	28.24
	Medium	N	2,268	1,773	605	463	901	1,085	415	7,510
		%	44.24	45.60	32.16	31.09	30.72	33.23	31.72	37.76
	High	N	863	1,219	1,089	798	1,188	1,145	462	6,764
		%	16.83	31.35	57.89	53.59	40.50	35.07	35.32	34.00
	Total	N	5,127	3,888	1,881	1,489	2,933	3,265	1,308	19,891
		%	100	100	100	100	100	100	100	100

*Note:* The 2019 data include information until mid-July and was projected to reach rates similar to those of 2017 and 2018.

Officer bias to detain is also apparent in the increased share of migrants detained without bond within this dataset. In the next graph, we see the decisions to detain, without bond, within the “low” and “medium” public safety and flight risk level combinations between 2013 and 2019.



The graph shows a remarkable spike in no bond detention for almost every low-risk migrant. The rate for the combination of low public safety risk and low flight risk went from a 40 percent detention rate in 2013, to about 35 percent in 2014, and then skyrocketed to 100 percent by 2018. This approach to near total detention without bond for low-risk migrants reflects ICE officers’

agreement with the Trump administration's no-release policy. At the same time, for those migrants eligible for bond by statute, these data show that their detention bore no relationship to risk.

### 3. *The Loss of Algorithmic Fairness Due to Algorithmic Bias*

The dramatic shift in risk scoring and custody recommendations from 2012 to 2016 raises questions about the overall fairness of the algorithm. For our purposes, algorithmic fairness means that similar cases are scored alike and similarly scored cases are treated similarly.<sup>295</sup> In the case of the RCA, migrants with the same history and characteristics might have been released in Period One but detained in Period Three due to the increasingly restrictive edits to the risk algorithm. This variance in RCA outcomes challenges the algorithm's fairness.

Too often, an algorithm can follow human behavior into the realm of biased determinations, which can have serious consequences.<sup>296</sup> Racial bias is a particularly salient driver of algorithmic bias.<sup>297</sup> ProPublica has shown pretrial detention risk scores are biased against Black defendants.<sup>298</sup> Generally, “[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so.”<sup>299</sup> The formula was particularly likely to falsely tag Black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.<sup>300</sup> On paper, a corrective measure would be to “blind” algorithms to race,<sup>301</sup> but in reality, algorithms mirror the racism that already infects the decision process. Another study found the reproduction of old biases in algorithmically generated bail decisions in New Jersey, even though the algorithm was more accurate than the professionals before it.<sup>302</sup>

Evaluating an algorithm's fairness identifies and mitigates bias that can imbue human decisions.<sup>303</sup> Algorithmic fairness shines a corrective gaze upon such bias.<sup>304</sup>

295. See Sam Corbett-Davies, Emma Pierson, Avi Feller, Sharad Goel & Aziz Huq, *Algorithmic Decision Making and the Cost of Fairness* 1 (Stan. Univ., Working Paper, 2017).

296. VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 6–7 (2019); Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Ashesh Rambachan, *Algorithmic Fairness*, 108 AEA PAPERS & PROC. 22, 22 (2018) (expressing concerns that biases are “baked in” algorithms “[b]ecause the data used to train these algorithms are themselves tinged with stereotypes and past discrimination”).

297. See generally JANE CHUNG, RACISM IN, RACISM OUT: A PRIMER ON ALGORITHMIC RACISM, PUB. CITIZEN (2021), <https://perma.cc/2VGR-YTSX> (discussing the various areas—including medical care, schooling, policing, and housing—that are impacted by “predictive algorithmic racism”); James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Detering Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 235–53 (2019) (discussing the racial implications of algorithms used in housing); RUHA BENJAMIN, RACE AFTER TECHNOLOGY (2019).

298. Angwin, Larson, Mattu & Kirchner, *supra* note 30.

299. *Id.*

300. *Id.*

301. Kleinberg, Ludwig, Mullainathan & Rambachan, *supra* note 296, at 22.

302. Motherboard, *One State Is Replacing Bail Hearings With . . . An Algorithm*, FUTURISM (Mar. 6, 2017), <https://perma.cc/34Q3-Z5K4>.

303. CATHY O’NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY, ch. 5 (2016).

304. Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Ziad Obermeyer, *Prediction Policy Problems*, 105 AM. ECON. REV. 491, 494–95 (2015).

The problem that befalls the RCA is that an external standard of measure is needed to adequately assess the tool for fairness. The RCA's designers, however, measured the tool's accuracy backwards through the rate of field officers' dissent.<sup>305</sup> Consequently, the RCA has no neutral arbiter and no objective, external standard by which to measure fairness. Instead, the RCA's quest for acceptance through expanding the categories of migrants recommended for detention without bond and eliminating the categories recommended for release resulted in divergent outcomes based on the same facts. Yet, our data indicate that this lack of fairness was of little concern. Moreover, as in the criminal justice system, the burden of algorithmic bias in the RCA was borne by Black and Brown people. Almost everyone in immigration detention in our study was a person of color. As the RCA's architects succumbed to the preferences of ICE officers and adjusted the algorithm accordingly, a Black or Brown migrant's prospect for release vanished alongside any claim of algorithmic fairness in the RCA.

#### IV. THE IMPLICATIONS OF THE RCA'S RESULTS FOR DETENTION POLICY UNDER THE BIDEN ADMINISTRATION

It has been a little more than a decade since ICE first launched the risk classification tool. During this time, immigration detention numbers reached 477,523 under the Obama administration, and then reached unprecedented levels under the Trump administration, approaching 500,000 detainees in 2019.<sup>306</sup> Our data show that the RCA has failed on its own terms and instead was manipulated and subverted over time to detain migrants representing all levels of risk, with few exceptions. Of particular concern is the detention of low-risk migrants.<sup>307</sup> More broadly, our study demonstrates ICE's practice of deliberately detaining migrants regardless of individual circumstances, thereby perpetuating a system of mass detention for migrants of color.<sup>308</sup> These results demand urgent attention and fundamental reforms in order to put an end to mass civil incarceration.

We do not purport to set forth a package of solutions to the many layered and interlocking problems raised by our results. However, to navigate a path forward, we review the implications of the RCA's outcomes and their intersection with other scholarship and proposals<sup>309</sup> for: (A) people with special

---

305. KOULISH & CALVO, *supra* note 164 (manuscript at ch. 1).

306. See Kassie, *supra* notes 133–34 and accompanying text.

307. See NOELLE SMART & ADAM GARCIA, VERA INST. OF JUST., TRACKING COVID-19 IN IMMIGRATION DETENTION: A DASHBOARD OF ICE DATA, (2020), <https://perma.cc/RU7X-43ZG>.

308. Rowaida Abdelaziz, *Black Immigrants Are Still Fighting Racism in the U.S. Immigration System*, HUFFPOST (July 2, 2021), <https://perma.cc/RVB8-SH5W>; JULIANA MORGAN-TROSTLE, KEXIN ZHENG & CARL LIPSCOMBE, BLACK ALLIANCE FOR JUST IMMIGR. & N.Y.U. SCH. OF L. IMMIGRANT RTS. CLINIC, *Part II: Black Immigrants in the Mass Criminalization System*, in THE STATE OF BLACK IMMIGRANTS 1, 24–26 (2016).

309. See, e.g., HERNÁNDEZ, *supra* note 90, at 77–95; Koh, *supra* note 26 (manuscript at Part II); Markowitz, *supra* note 34, at 129–43.



vulnerabilities; (B) the scope of mandatory detention; (C) the utility of the risk tool; and (D) the nature of immigration enforcement in the future.

### A. *People With Special Vulnerabilities*

Migrants with special vulnerabilities were not supposed to be subject to detention in significant numbers with the advent of the RCA. The risk tool gained support from the international community in large part because it was presented as a palliative for vulnerable migrants. Instead, our data show that special vulnerabilities screening was underutilized by ICE. Only 6 percent of the nearly half million migrants screened by the RCA during our study were identified with special vulnerabilities even though the list of vulnerabilities included being the primary caretaker and being a victim of trauma. The low rates of vulnerabilities identified simply cannot be accurate given the demographics of the study population, which included large numbers of women and even larger numbers of people in expedited removal proceedings, many of whom were likely fleeing harm and trauma in their home countries.

For the minority of cases in which the RCA identified a special vulnerability, detention was still the most likely outcome. Even though the RCA did not recommend detention for people with special vulnerabilities unless they were subject to mandatory detention, migrants with special vulnerabilities were almost as likely to be detained as those without them. Our study coincides with research by the Center for American Progress that found that the RCA did little to prevent the widespread detention of LGBTQI+ people, despite the fact that these individuals face high rates of sexual abuse in detention.<sup>310</sup>

Failure of the RCA's screening mechanism to identify elderly and pregnant migrants as well as people with serious physical illnesses has particularly grave consequences during the COVID-19 pandemic. Migrants have died in detention, suffered from severe illness, spread the virus to other people inside and outside detention centers, and contributed to its presence worldwide as a result of ICE's poor screening, mitigation, and treatment measures.<sup>311</sup> ICE remains subject to settlement agreements and further challenges for the COVID-related harms detention causes to vulnerable migrants.<sup>312</sup>

---

310. Sharita Gruberg, *ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants*, CTR. FOR AM. PROGRESS (Oct. 26, 2016, 11:20 AM), <https://perma.cc/WR4U-AAEG>.

311. See, e.g., Joel Rose, *Internal ICE Reviews of Two Immigrant Deaths Stoke Fears About COVID-19 Care*, NPR (Apr. 29, 2020, 2:31 PM), <https://perma.cc/U2KK-HPBN>; Jimmy Jenkins & Matt Katz, 'A Ticking Time Bomb': Advocates Warn COVID-19 Is Spreading Rapidly Behind Bars, NPR (Apr. 28, 2020, 5:00 AM), <https://perma.cc/4US6-G86X>; Lily Levin, *ICE Detention Centers: Dangerous, Ticking Time Bombs*, NC POL'Y WATCH (Apr. 21, 2020), <https://perma.cc/LL9H-P67Z>; *Immigration Detention and Covid-19*, *supra* note 74 (chronicling developments in ICE's mismanagement of the COVID-19 pandemic and related events).

312. See, e.g., *Fraihat v. U.S. Immigration & Customs Enf't*, 445 F. Supp. 3d 709 (C.D. Cal. 2020); *Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226 (W.D. Wash. 2020); *Basank v. Decker*, 449 F. Supp. 3d 205 (S.D.N.Y. 2020); *Roman v. Wolf*, No. 20-00768 TJH (PVCx), 2020 WL 1952656 (C.D. Cal. Apr. 23,

Additionally, many of the criteria characterized as special vulnerabilities are listed as factors that should militate against taking an enforcement action in the Biden administration's recent directive on enforcement priorities.<sup>313</sup> However, if ICE systematically under-identifies these factors, as our research indicates, it will not make enforcement choices properly and will fail to implement the administration's policy.

As with many of our other findings, the detention outcome for vulnerable migrants is largely attributable to the exercise of supervisor discretion. The RCA designates most cases in this group for the supervisor to determine detention or release in the first instance and does not provide a custody recommendation at all. As we see throughout the study, that discretion to decide whether to detain or release a person was usually exercised in favor of detention, even when other harms to the person detained and their family members are recognized<sup>314</sup> and despite the fact that the tool was intended to prevent these harms.

To avoid the widespread detention of vulnerable people in civil immigration detention and the harms that ensue, fundamental changes to detention policies are required. Robust screening procedures, training, and regular audits are needed so that people particularly susceptible to harms in detention are actually identified.<sup>315</sup> At the same time, the level of discretion that lies with ICE line officers should be reined in. More fundamentally, a recommendation of release should be the firm default for this group (as well as for all migrants within the immigration enforcement system). Any exception to release for someone with a special vulnerability should require strong evidence of danger to others, beyond criminal history alone,<sup>316</sup> and high-level approval should be necessary to detain someone with a special vulnerability.

2020); Kate Morrissey, *Lawsuit Filed for First COVID-19 Death in Immigration Custody*, SAN DIEGO UNION-TRIB. (Dec. 22, 2020, 10:49 AM), <https://perma.cc/E9RM-HXHC>; *Settlement Reached in Landmark COVID-19 Class Action Case Against Bristol County House of Correction* WILMERHALE (Apr. 7, 2021), <https://perma.cc/6T9S-3UR8>; Natalia E. Contreras, *No COVID Masks or Hand Soap at Indiana ICE Detention Facility, Complaint Says*, INDIANAPOLIS STAR (June 8, 2021, 12:05 PM), <https://perma.cc/Q2C8-7S3H>.

313. See Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, 3 (Sept. 30, 2021), <https://perma.cc/U5Z2-NRU4>.

314. See Rabin Amicus Brief, *supra* note 147, at 25–29; *The Expansion and Troubling Use of ICE Detention: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 158–166 (2019) (statement of the Ctr. for Victims of Torture); HAJAR HABBACH, KATHRYN HAMPTON & RANIT MISHORI, PHYSICIANS FOR HUM. RTS., “YOU WILL NEVER SEE YOUR CHILD AGAIN”: THE PERSISTENT PSYCHOLOGICAL EFFECTS OF FAMILY SEPARATION (2020), <https://perma.cc/J7Y5-YZM3>.

315. See NAT'L COMM. ON CORRECTIONAL HEALTH CARE, *Receiving Screening* (2011), <https://perma.cc/C3T3-WAXE>; NAT'L COMM. ON CORRECTIONAL HEALTH CARE, *Receiving Screening* (2019), <https://perma.cc/6Q8C-RWLN>; NAT'L COMM. ON CORRECTIONAL HEALTH CARE, *Initial Health Assessment* (2016), <https://perma.cc/QMN7-BYYV>; Michael S Martin, Ian Colman, Alexander Simpson & Kwame McKenzie, Mental Health Screening Tools in Correctional Institutions: A Systematic Review, 13 BMC PSYCHIATRY 275 (2013).

316. *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) (stating that preventative detention is only acceptable “when limited to specially dangerous individuals and subject to strong procedural protections” and that indefinite detention is only acceptable when “the dangerousness rationale [is] accompanied by some other special circumstances, such as mental illness”).

## B. *The Scope of Mandatory Detention*

The mandatory detention statutes prevent ICE from tailoring detention to risk. These statutes have been upheld based on presumptions that the categories of migrants covered by the laws represent greater flight risks, greater risk to public safety, or both.<sup>317</sup> These presumptions, however, are belied by the data. A greater portion of people subject to custody under § 236(c) have lower flight risk levels than those in § 236(a) proceedings. Additionally, the percentage of migrants with “low” and “medium” risk combinations is nearly identical in the § 236(c) and § 236(a) categories. Further, the scoring algorithm was altered to make nearly any criminal history generate a “medium” or “high” risk level. In doing so, the public safety module became a tool of preventative detention rather than a validated measure of risk. Nearly 12,000 migrants the RCA should have recommended for release based on their low risk levels were detained instead. Mandatory detention statutes likely stood as an obstacle in many of these cases. Similarly, more than 23,000 migrants who were not “high” risks to public safety or for flight were detained without bond under § 236(c). The same is true for migrants designated for expedited removal and detained under § 235. Nearly all migrants in this category in our study were assessed as low public safety threats and high risks of flight due to the RCA’s automatic designation of recent entry as a high flight risk. With a true assessment of community ties, most of this group would likely represent low risks of flight and danger to the community and should not be detained. Overall, even by the RCA’s inflated measures, risk levels do not justify the mandatory detention statutes.

Our data show detention does not bear a relationship to flight risk and danger for many migrants held under these statutes. Congress should therefore eliminate its dictates to detain and require individualized justification for the detention of any migrant. Alternatively, the administration or Congress could seek to interpret custody in a way that does not require incarceration but rather includes community monitoring and guardianship as pending legislation would provide.<sup>318</sup> Absent legislative and administrative reforms, the Supreme Court should revisit mandatory detention in light of the evidence that the statutes do not correlate to risk and should eliminate the preventative detention of thousands of people as anathema to our Constitution.<sup>319</sup>

---

317. See *id.* at 697 (differentiating a statute that applies “to ordinary visa violators” from mandatory detention that focus on “terrorists and criminals”); *Demore v. Kim*, 538 U.S. 510, 519–21 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 848 (2018); *Johnson v. Guzman*, 141 S. Ct. 2271, 2281 (2021).

318. See S. REP. NO. 117-000, at 30–40 (2021) (considering appropriations for DHS and outlining the use, review, and validation of risk classification assessment in mandatory detention).

319. NAT’L IMMIGRANT JUST. CTR., ENDING MANDATORY DET. 4 (2021), <https://perma.cc/97XH-> (proposing a congressional course of action).

### C. *The Future of the RCA*

Our study shows that the risk tool has failed on its own terms. It neither tamed mass detention nor aligned detention to risk for several reasons. The risk tool was largely borrowed from criminal justice pretrial detention without taking stock of significant differences between criminal law and civil law. There was no external validation and calibration of the tool to actual flight risk or danger in the civil context. Hence the RCA's performance measurement became subjective, ultimately rooted in detention officer dissents, and thereby allowing detention officers to rig the risk assessment system.

The RCA could not temper the blunt force of the Trump administration's anti-immigrant politics or the Obama administration's decision to detain all enforcement priorities regardless of risk. Instead, the RCA helped conceal the hazard of mass detention under the cloak of risk science. As the RCA designers manipulated the public safety algorithm to make nearly any crime worthy of detention, the RCA labeled more and more migrants as intolerable risks. In the end, millions of migrants were marked with a presumption of dangerousness,<sup>320</sup> reinforcing the criminal-immigrant (or crimmigrant<sup>321</sup>) narrative.

A standout feature of the RCA was its ability to replicate systemic racism at scale.<sup>322</sup> It automated detention and allowed ICE officers to execute their bias toward detention more efficiently through driving changes to the algorithm. Small-bore changes to the algorithm produced large-scale results: shifting points and severity levels for the same offense; changing the scoring thresholds to increase "medium" and "high" risk assessments; and tightening detention recommendations across the board. By the end of our study period, the RCA applied detention to nearly everyone with criminal history. This punitive bias in the risk tool ensured that victims of a racist criminal justice system were saddled with a second stint of imprisonment for the same offense. Ethnic profiling has also been a ritual of ICE enforcement.<sup>323</sup> The *usual suspects* for immigration enforcement are almost always poor and Black or Brown.<sup>324</sup> The RCA combination of punitive bias in the algorithm with racial

---

320. KOULISH & CALVO, *supra* note 164 (manuscript at ch. 4).

321. FRANKO, *supra* note 108, at 21–52.

322. See Ong Hing, *supra* note 283, at 309 ("Racism has become institutionalized in our immigration—a regime that focuses mostly on Latinos, especially Mexicans, and occasionally on Asians."); Ben & Sophie Westenra, *Racism, Immigration and Policing*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 61 (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018).

323. Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U.L.Q. 675, 676–97 (2000); Christian Briggs, Note, *The Reasonableness of Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement*, 88 S. CALIF. L. REV. 379, 380 (2015).

324. Jeanette Covington, *Round Up the Usual Suspects: Racial Profiling and the War on Drugs*, in PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 27, 27 (Dragan Milovanovic & Katheryn K. Russell-Brown eds., 2001); César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 179–89 (2009).

bias in policing imposed double punishment on migrants of color and the preventative detention the Schriro Report called to stop.<sup>325</sup> Moreover, the algorithm removed responsibility for mass detention from human beings to the machine.

Contrary to its purpose, the RCA facilitated the unjustifiable detention of migrants through the aggressive use of detention against low-risk immigrants. In this way, the RCA borrowed crime control penologies like “broken windows” policing, which plagued minority communities in urban centers a generation ago, and created their corollary in immigration control. By recommending detention for migrants with minor offenses, the RCA supported ICE officers as they followed the crime control pattern of the 1980s and rounded up and detained the *low hanging fruit* in migrant communities of color.<sup>326</sup>

If DHS continues to deploy the RCA, as it is presently considering,<sup>327</sup> it must function very differently. The scoring system and factors assessed should ensure that detention is a rare exception to liberty infringement in civil law enforcement and that detention is closely tied to non-punitive justifications. While there may be the rare case in which a threat to national security could support immigration detention, routine criminal history does not. Flight risk also fails to justify detention in the face of a growing body of evidence that community support programs are highly effective at ensuring appearances in court and for ICE supervision appointments.<sup>328</sup> In light of the efficacy of alternatives to detention and the absence of a risk-based justification for civil detention in the vast majority of cases, release must be the default. Furthermore, any tool used to circumscribe detention will fail if the ultimate decision is left to line officer discretion. Thus, any override of a release disposition should be limited and subject to close scrutiny by high-level officials.

---

325. See Schriro, *supra* notes 130, 141.

326. See David Spener, *Controlling the Border in El Paso del Norte: Operation Blockade or Operation Charade?*, in *ETHNOGRAPHY AT THE BORDER* 182, 186 (Pablo Vila ed., 2003); Margaret Edwards, *The Understandings and Human Cost of ‘Prevention through Deterrence,’ as Seen Amongst Advocates in the United States and Mexico*, SIT GRADUATE INST., <https://perma.cc/HYR7-2XWQ> (discussing the intentionally punitive American border strategy within the context of the United States’ more general “Prevention through Deterrence” approach to immigration enforcement).

327. See S. REP. NO. 117-000, at 30–40 (considering appropriations for DHS and outlining the use, review, and validation of risk classification assessment in mandatory detention).

328. See *Bell v. Wolfish*, 441 U.S. 520, 539–40 (1979); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (noting that ICE’s Intensive Supervision Appearance Program “resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings”); *id.* at 990 (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)) (“Detention of an indigent ‘for inability to post money bail’ is impermissible if the individuals’ ‘appearance at trial could reasonably be assured by one of the alternate forms of release.’”); VERA INST. OF JUST., *supra* note 153, at 2 (noting the success of the Vera Institute’s Appearance Assistance Program); AM. IMMIGR. LAWS. ASS’N, LUTHERAN IMMIGR. AND REFUGEE SERV., NAT’L IMMIGRANT JUST. CTR. & WOMEN’S REFUGEE COMM’N, *THE REAL ALTERNATIVES TO DETENTION* 1–3 (2021); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-26, *ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS* 35 (2014); CONG. RSCH. SERV., R45804, *IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS* 9 (2019).

The COVID-19 pandemic led to a massive reduction in the number of people detained, dropping from more than 50,000 daily to under 15,000. This creates an opportunity to test the actual risks that released migrants present. The release of, or decision not to detain, thousands of migrants who would have been detained absent the pandemic could serve as a natural experiment to allow for the RCA's recalibration in a way that measures true risk of flight and danger and maximizes release.<sup>329</sup>

#### D. *The Nature of Immigration Enforcement and the Use of Detention*

Our data show that ICE imposed detention in almost all cases, regardless of risk level, including for people considered low risk by even the RCA's elevated standards. Indeed, punitive bias within ICE was so powerful that it bent the RCA to ICE's will. With the veneer of risk is removed from ICE's detention decisions, the only remaining purposes for detaining low-risk migrants are to deter and punish.<sup>330</sup> The use of civil detention in this way raises a host of problems for the nature of immigration enforcement under the Biden administration.

First, using detention to deter does not work. Professor Emily Ryo recently conducted a study on the impact of detention on migrants arriving at the U.S. border.<sup>331</sup> She found that detention does not keep others from migrating.<sup>332</sup> It simply reinforces perceptions of the United States as a country that is unfair to migrants and operates outside the rule of law.<sup>333</sup> The perception that the United States treats migrants unfairly, in turn, reduces the effectiveness of immigration enforcement efforts. People are less likely to comply with legal requirements they perceive as unfair and far more likely to comply when they believe requirements are fairly applied.<sup>334</sup> Thus, President Biden's border policies that are driving detention rates back up<sup>335</sup> may be counterproductive to his goal of reducing unauthorized migration across the southern border.<sup>336</sup>

Second and relatedly, the use of civil detention to punish provides further evidence that ICE operates as a rogue agency when it is directed to limit enforcement actions. A growing body of literature and reporting documents

---

329. See Hilary J. Allen, *Regulatory Sandboxes*, 87 GEORGE WASH. L. REV. 579 (2019) (describing use of regulatory experiments that allow the regulator and the firm being regulated to operate in a more relaxed environment in order to refine required regulations).

330. See *Bearden v. Georgia*, 461 U.S. 660, 671–72 (1983).

331. See generally Emily Ryo, *The Unintended Consequences of U.S. Immigration Enforcement Policies*, 118 PROC. NAT'L ACAD. OF SCI., May 17, 2021, at 1. [hereinafter Ryo, *Unintended Consequences*]; see also Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237 (2019).

332. Ryo, *Unintended Consequences*, *supra* note 331, at 7–8; see also Ryo, *Detention as Deterrence*, *supra* note 331, at 248.

333. See Ryo, *Unintended Consequences*, *supra* note 331, at 8.

334. Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 667, n.182 (2015).

335. See Aleaziz, Marcelo & Herbert, *supra* note 3 and accompanying text.

336. See Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NPR (June 7, 2021, 10:55 PM), <https://perma.cc/UM2P-XSXQ>.



ICE officers' refusal to follow the dictates of courts or its leadership.<sup>337</sup> Evidence of agency recalcitrance and resistance is emerging again as ICE objected to the Biden administration's enforcement priority directives and has failed to follow them.<sup>338</sup> This phenomenon in ICE serves as a case study for scholarship that examines the role of line officers in defining administrative law.<sup>339</sup> In the realm of immigration enforcement, ICE officers modify and reconstitute administrative policy through distorting its implementation. New legal challenges that ICE officers, as a whole, have exceeded their authority by creating administrative law in conflict with those charged (and approved by the Senate) with setting the administration's policies may therefore emerge.

Third, as discussed in Part I.A, punitive civil detention is not legal,<sup>340</sup> and therefore one of two remedies must follow. One option is to require the full panoply of constitutional protections to attach to civil immigration detention just as they do in criminal proceedings. This remedy flows from the Supreme Court's decision from more than a century ago concerning the use of punishment in immigration enforcement.<sup>341</sup> The Court held that if the federal government imposed conditions of punishment as part of administrative detention, then migrants must be afforded the constitutional protections associated with punishment.<sup>342</sup> These protections would include the right to counsel at the government's expense, the right to a jury, and prohibitions on cruel and unusual punishment.<sup>343</sup> In light of data demonstrating that detention does not follow risk, the case for a right to counsel for detained migrants in particular is strong. By stacking a punitive immigration detention system on top of criminal detention, the stakes and the coercive force of the state are equivalent and replicated in both systems. Affording counsel allows detained migrants to challenge the data used to detain them and any punitive purpose.

Alternatively, the Biden administration and Congress must confront head on the culture and scale of ICE to eliminate its use of detention to punish and deter. Here, our study coincides with calls for reducing, redirecting, and reforming the role of immigration enforcement agents. Professor Peter Markowitz has laid out a positive model for immigration enforcement that would focus efforts on increasing the number of people who conform to the immigration laws rather than punishing violators through detention and deportation.<sup>344</sup> Professor Jennifer Lee Koh has proposed ways to downsize the deportation state in order to minimize the opportunity for front line officers to divert policy goals.<sup>345</sup> Doris Meissner, former Commissioner of the

---

337. See *supra* note 28 and accompanying text.

338. See *supra* notes 28, 33-34 and accompanying text.

339. See, e.g., Koh, *supra* note 26 (manuscript at 21-23).

340. See *supra* note 43 and accompanying text.

341. See generally *Wong Wing v. United States*, 163 U.S. 228 (1896).

342. See *id.* at 237.

343. U.S. CONST. amend. VI, amend. VIII.

344. See Markowitz, *supra* note 34, at 136-38.

345. See Koh, *supra* note 26.



Immigration and Naturalization Service (“INS”), proposes replacing reliance on detention with a system that makes supervised release “the prevailing method for exercising immigration custody” where necessary.<sup>346</sup> Dora Schriro suggests creating an alternative agency to ICE that would serve as the gatekeeper and refer only a small number of migrants to ICE for detention.<sup>347</sup> Both former administrators recognize that ICE’s enforcement culture represents a barrier to detention reform and propose locating responsibility for release and community supervision in separate dedicated offices.<sup>348</sup>

The Biden administration, however, is headed in the opposite direction. In its most recent announcement of enforcement priorities, the DHS Secretary eliminated the prior requirement for preapproval of enforcement actions outside of the priority categories<sup>349</sup> and instead stated that the Secretary leaves the exercise of prosecutorial discretion to the judgment of ICE officers.<sup>350</sup> The results of our study indicate that ICE officers will likely use this express delegation of discretion from the top to implement detention as their policy choice. Whether framed in terms of “abolishing ICE” or redirecting it, the Biden administration cannot succeed in making immigration enforcement fair or humane without dismantling the forces within ICE that have defeated reform efforts in the past—something it appears increasingly reluctant to do.

### CONCLUSION

Our research tells the story of how the RCA engaged in manipulation, subversion, and bias. It failed to enhance objectivity and transparency in detention decisions, failed to put a dent in mass detention, and instead seemed to rationalize ever more draconian detention outcomes for immigrants. We presented data that show ICE detains low hanging fruit using the risk tool to provide a scientific veneer, beneath which everyone is designated a risk, and almost everyone is detained without bond. Immigration detention policies were hijacked by frontline officers bent on maximizing the detention of immigrants. This occurred because frontline ICE officers were delegated a large amount of discretion in finalizing detention decisions. That discretion was used to manipulate the risk logic and confound efforts to create a rational custody determination process.

ICE’s subversion of the risk classification tool provides two teachable lessons for the Biden administration. First, frontline ICE officers have the power

---

346. RANDY CAPPS & DORIS MEISSNER, MIGRATION POL’Y INST., FROM JAILERS TO CASE MANAGERS: REDESIGNING THE U.S. IMMIGRATION DETENTION SYSTEM TO BE EFFECTIVE AND FAIR 2 (2021), <https://perma.cc/QJ5P-B7EE>.

347. See NEW SCHOOL, *Virtual Conference: Imagining a Post-ICE Immigration Enforcement System*, VIMEO (Sept. 22, 2021), <https://perma.cc/DLL5-HY3N>.

348. *Id.*

349. See Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t to All ICE Employees 5 (Feb. 18, 2021), <https://perma.cc/6U6U-X7DL>.

350. See Memorandum from Alejandro N. Mayorkas, Sec’y, U.S. Dep’t Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, 5 (Sept. 30, 2021), <https://perma.cc/U5Z2-NRU4>.

to defeat an administration's policy goals through their intransigence and ability to manipulate its implementation. Second, ICE's culture is fundamentally punitive. Rather than political appointees wearing down the intransigence of frontline agents, frontline agents won out over the political appointees. Punitive bias subsumed and subverted efforts to challenge mass detention. Consequently, migrants are unlikely to be treated humanely without subjecting ICE to radical and wholesale change.

Launched on the promise of reducing immigration detention, the RCA ended up permitting and even encouraging the detention of nearly everyone within ICE's grasp. For the Biden administration to make good on its promises of decarceration, racial justice, and a humane immigration system, it must learn from the mistakes in this decade-long, multi-million dollar experiment and heed the calls to dismantle the current enforcement apparatus and put an end to its reliance on immigration incarceration.