
ESSAY

Reconsidering Money Bail in Immigration Detention

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INTRODUCTION

Immigration detention and family separation have shaken our country's conscience in the past weeks and months but immigration detention is not a new concept. The federal government has long asserted the authority to detain noncitizens pending removal proceedings. Immigration detention is civil and is not supposed to be a punishment for a crime. The government justifies detention for two

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reasons: preventing noncitizens from fleeing pending removal proceedings and reducing harm to society. The Department of Homeland Security (“DHS”) detains over 440,000 noncitizens each year.¹ Immigrant detainees comprise the fastest growing federal prison population.²

The immigration detention scheme relies heavily on money bond. Detained noncitizens or their family members typically must pay thousands of dollars to obtain release from custody. Those who cannot afford bond languish in immigration detention facilities across the country. Recent reports suggest that the number of noncitizens forced to pay high bonds to obtain release from detention has grown during the Trump Administration.³

Extensive social science research from the pretrial criminal context demonstrates, however, that there is no proven correlation between money bond and an individual’s likelihood of fleeing or reoffending. Based on this research, some criminal jurisdictions have rejected a focus on money bond, relying instead on evidence-based practices such as actuarial risk assessment and the use of alternatives to detention like electronic monitoring.

This Essay examines the immigration detention system’s reliance on money bond. The Essay reviews the lessons learned about money bond in the pretrial context and applies those lessons to immigration detention. The Essay then examines the institutional incentives that animate immigration judge bond decisions, and ends with modest proposals to reduce the immigration system’s reliance on money bond.

I. A BRIEF OVERVIEW OF IMMIGRATION DETENTION

The Immigration and Nationality Act grants DHS the authority to detain any noncitizen in removal proceedings.⁴ This includes asylum-seekers at the border seeking to enter the country, undocumented migrants who are already here, and visa holders who DHS seeks to

¹ Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2142 & n.1 (2017) (collecting sources).

² See, e.g., Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, PBS NEWS (Oct. 18, 2011), <https://www.pbs.org/wgbh/frontline/article/map-the-u-s-immigration-detention-boom/>.

³ Mica Rosenberg & Reade Levinson, *Trump’s Catch-and-Detain Policy Snares Many Who Have Long Called America Home*, REUTERS (June 20, 2018), <https://www.reuters.com/investigates/special-report/usa-immigration-court>; *Three-Fold Difference in Immigration Bond Amount by Court Location*, TRACIMMIGRATION (July 2, 2018), <http://trac.syr.edu/immigration/reports/519> [hereinafter *Three-Fold Difference*].

⁴ See generally 8 U.S.C. §§ 1225-26 (2018).

deport.⁵ In FY 2018, Congress has approved spending \$3.1 billion for 40,520 detention beds,⁶ and the Trump Administration has indicated that it wishes to expand detention substantially beyond that number.⁷

To trigger detention, a DHS official arrests a noncitizen and then makes an initial determination about whether the individual should be released or detained.⁸ The official may release the individual on his own recognizance, release him on bond or conditions of supervision, or detain him without bond.⁹ According to recent reports, DHS officials under the Trump Administration are increasingly denying bond to noncitizens, even if the noncitizens have strong family ties and no criminal history.¹⁰

In cases where DHS agents deny bond, noncitizens who are placed into removal proceedings may request a bond redetermination hearing before an immigration judge.¹¹ At the bond hearing, the immigration judge may order that the individual be released, set an amount of bond, or order that he be detained without bond.¹² According to Professor Fatma Marouf, “[o]ver the past two decades, [immigration judges] have granted roughly half of the motions requesting bond redetermination.”¹³ A noncitizen may appeal the immigration judge’s

⁵ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 833 (2018) (summarizing detention statutes).

⁶ HOUSE COMM. ON APPROPRIATIONS, FY 2018 OMNIBUS: HOMELAND SECURITY (2018), https://appropriations.house.gov/uploadedfiles/03.21.18_fy18_omnibus_-_homeland_security_-_one_pager.pdf.

⁷ See, e.g., Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NPR (Oct. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers>.

⁸ 8 U.S.C. § 1226(a) (2018); 8 C.F.R. § 236.1(c)(8) (2018). DHS may arrest individuals in a range of ways, including without a warrant, or by assuming custody over individuals who are in jail or prison, or who have recently completed criminal sentences. See 8 C.F.R. §§ 287.5(c), 287.8(b)(2) (2018).

⁹ 8 C.F.R. §§ 236.1(c)(8), 236.1(d) (2018). Some noncitizens do not receive this process, namely “arriving aliens” who have passed a credible fear interview at the border and noncitizens with prior orders of removal seeking certain protection from persecution abroad. According to DHS interpretation of the law, these individuals do not receive a DHS custody determination; rather, they qualify only for release on “parole” under certain conditions. See 8 U.S.C. §§ 1182(d)(5), 1231(a)(2)-(3) (2018); 8 C.F.R. §§ 212.5, 241.5 (2018).

¹⁰ Rosenberg & Levinson, *supra* note 3.

¹¹ 8 C.F.R. §§ 1003.19, 1236.1(d) (2018).

¹² 8 U.S.C. § 1226(a).

¹³ Marouf, *supra* note 1, at 2146 (citing TRACImmigration data).

bond redetermination to the Board of Immigration Appeals, an administrative body within DOJ.¹⁴

To decide whether to release an individual (on recognizance, bond, or conditions) or detain him, both DHS and DOJ consider whether the individual is a danger or a flight risk, with the noncitizen bearing the burden of proof.¹⁵ Dangerousness refers to whether the individual will be a danger to society if he is released pending proceedings. Flight risk refers to the likelihood of whether the individual will show up for his immigration court hearings, and if ordered removed, for removal from the country. Detainees are not entitled to appointed counsel at bond hearings (or for that matter, throughout their removal proceedings).¹⁶ If they cannot afford counsel or find someone to represent them for free, they must represent themselves.¹⁷ This is so even though the majority of detained noncitizens speak a language other than English.¹⁸

Most noncitizens are not represented by counsel. According to data drawn from 2007 to 2012, only 37% of all noncitizens secured legal representation in their removal cases.¹⁹ Only 14% of detained noncitizens have legal counsel.²⁰ Not surprisingly, noncitizens forced to proceed pro se fare poorly when litigating against a federal government agency that is always represented by counsel. The 2007-2012 study found that detained noncitizens were “ten-and-a-half times more likely to succeed” with counsel than without.²¹

Noncitizens forced to proceed pro se also fared more poorly in securing release from detention. Emily Ryo’s recent study of prolonged immigration detainees concluded that immigration judges were 3.5 times more likely to grant bond to detainees with counsel as compared to similarly-situated detainees who lacked counsel.²² A different study

¹⁴ 8 C.F.R. § 1236.1(d)(3). The INA bars federal judicial review of discretionary bond determinations. 8 U.S.C. § 1226(e).

¹⁵ 8 C.F.R. § 236.1(c)(8) (2018); *In re Guerra*, 24 I. & N. Dec. 37, 41 (BIA 2006); *In re Adeniji*, 22 I. & N. Dec. 1102, 1125 (BIA 1999).

¹⁶ See 8 U.S.C. § 1229a(b)(4)(A) (2018) (“[A]lien[s] shall have the privilege of being represented, at no expense to the Government.” (emphasis added)); 8 U.S.C. §1362 (2018) (same).

¹⁷ See generally Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

¹⁸ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2016 STATISTICS YEARBOOK, at E1 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

¹⁹ Eagly & Shafer, *supra* note 17, at 16.

²⁰ *Id.* at 32.

²¹ See *id.* at 50.

²² Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC’Y

by Eagly and Shafer found that “represented detainees were almost seven times more likely than their pro se counterparts to be released from [detention] (48% versus 7%).”²³ For those noncitizens who are eligible for bond hearings, this statistic is in part due to representation at bond hearings, and in part due to the various types of informal advocacy that an attorney can assist with to obtain release.²⁴

These statistics leave out a large group of noncitizens in removal proceedings who the government subjects to mandatory detention. Under the Supreme Court’s recent decision in *Jennings v. Rodriguez*, the immigration statutes bar a sub-group of noncitizens in removal proceedings from bond hearings.²⁵ These individuals include those with certain convictions and individuals seeking to enter the United States.²⁶ DHS’s position is that it can detain these individuals without providing them bond hearings for prolonged periods of time (or as long as their removal proceedings last).²⁷

For those individuals who DHS agrees are eligible for bond, immigration judges have broad discretion to decide whether to require money bond and the amount of bond. Per the precedent of the Board of Immigration Appeals (the appellate administrative body governing immigration adjudications), immigration judges should balance several factors relating to a noncitizen’s danger or flight risk, including:

- (1) whether the alien has a fixed address in the United States;
- (2) the alien’s length of residence in the United States; (3) the alien’s family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration violations; (8) any attempts by

REV. 117, 119 (2016) [hereinafter *Detained*].

²³ Eagly & Shafer, *supra* note 17, at 70. “Of those respondents with custody hearings . . . 44% of represented respondents were released, compared to only 11% of pro se respondents.” *Id.* at 71.

²⁴ *See id.* at 72 (noting that “attorney representation could make a difference . . . including through informal advocacy to secure release from the detention officer and by assisting family members in gathering and posting the required bond amount”).

²⁵ *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018).

²⁶ *See id.* at 837-38.

²⁷ *See, e.g.*, Supplemental Brief for the Petitioners at 15-21, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204).

the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.²⁸

The noncitizen bears the burden of proof.²⁹

Many noncitizens languish in detention because they cannot afford to pay the bond amounts set by immigration judges. In bond hearings during the first half of FY 2018, the median bond amount set was \$7,500, and nearly 40% of detainees were required to post a bond of \$10,000 or more to obtain release.³⁰ These numbers represent an increase from past years. And those subjected to prolonged periods of detention typically must pay higher bond amounts. An ACLU report concludes that the average bond in the Central District of California for individuals subjected to prolonged immigration detention was \$15,883, with a median of approximately \$10,000.³¹ Emily Ryo's prolonged detention study observed that "average bond amounts ranged from \$10,667 to \$80,500."³²

Immigration detention means incarceration in prison-like conditions.³³ DHS houses immigration detainees in private detention facilities, federally owned detention facilities, and county jails.³⁴ Detainees are confined to jail cells, eat prison food, and are restricted in their movement and communication with the outside world.³⁵ They can only see their friends and family during official visiting hours,³⁶

²⁸ *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

²⁹ 8 C.F.R. § 236.1(c)(8) (2018); *In re Adeniji*, 22 I. & N. Dec. 1102, 1125 (BIA 1999).

³⁰ *Three-Fold Difference*, *supra* note 3.

³¹ AM. CIVIL LIBERTIES UNION, RESTORING DUE PROCESS: HOW BOND HEARINGS UNDER *RODRIGUEZ V. ROBBINS* HAVE HELPED END ARBITRARY IMMIGRATION DETENTION 4 (2014), <https://www.aclu.org/sites/default/files/assets/restoringdueprocess-aclusocal.pdf>.

³² Ryo, *Detained*, *supra* note 22, at 119.

³³ See Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1007-08 & nn. 26-29 (2017) [hereinafter *Fostering Legal Cynicism*] (collecting sources). See generally HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. IMMIGRATION DETENTION SYSTEM (2012), https://www.humanrightsfirst.org/wp-content/uploads/pdf/immigration_detention_blueprint.pdf (noting that current detention facilities are prison-like in nature).

³⁴ See DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>; Marouf, *supra* note 1, at 2142-43.

³⁵ See AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 29-43 (2009), <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>; Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1525-26 (2011).

³⁶ See Chelgren, *supra* note 35, at 1495.

often through plate glass windows on telephones. Detainees typically have limited access to law libraries within the facility, and many experience difficulties communicating with their attorneys because of limited phone access, the high cost of making phone calls, detention center mail policies and other restrictions.³⁷ Some detainees are subject to solitary confinement.³⁸ A recent article noted, for example, that detainees in Georgia were placed into solitary confinement sometimes arbitrarily and sometimes in retaliation for making complaints about conditions or human rights abuses.³⁹ DHS regularly transfers detainees between facilities, and some detainees are incarcerated far from home and family.⁴⁰ Human rights organizations and even the Office of Inspector General at DHS have criticized detention facilities for inadequate medical care, spoiled food, overuse of strip searches and lockdowns, and other abuses.⁴¹

II. MONEY BOND

The immigration detention system relies heavily on money bond. In FY 2016, immigration judges completed 61,976 bond redetermination hearings.⁴² In one nationwide study of bond redetermination hearings

³⁷ See, e.g., Order Granting Class Certification, *Lyon v. U.S. Immigration & Customs Enft.*, 300 F.R.D. 628 (No. C-13-5878-EMC) (N.D. Cal. 2014) [hereinafter Certification Order] (complaint alleging detainees “cannot complete calls . . . to offices that use ‘voicemail trees’”); AMNESTY INT’L, *supra* note 35, at 29-35.

³⁸ See generally Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243 (2013).

³⁹ *Id.* at 247-250.

⁴⁰ See, e.g., *Sasso v. Milhollan*, 735 F. Supp. 1045, 1047 (S.D. Fla. 1990) (noting that detainee transferred to El Paso facility even though evidence in his case was located in Florida); see also Certification Order, *supra* note 37, at 632 (complaint alleges detainees “cannot complete calls . . . to offices that use ‘voicemail trees’”); AMNESTY INTERNATIONAL, *supra* note 35, at 29; HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES, at pt. IV (2011) [hereinafter A COSTLY MOVE], <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united>.

⁴¹ See, e.g., AMNESTY INT’L, *supra* note 35, at 37-43; HUMAN RIGHTS WATCH, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN THE US IMMIGRATION DETENTION (2017) [hereinafter SYSTEMIC INDIFFERENCE], <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>; Marouf, *supra* note 1, at 2151-52; Press Release, Office of Inspector Gen., Dep’t of Homeland Sec., DHS OIG Inspection Cites Concerns with Detainee Treatment and Care at ICE Detention Facilities (Dec. 14, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/pr/2017/oigpr-121417-dhs-oig-inspection-cites-concerns-detainee-treatment-detention-facilities.pdf>.

⁴² U.S. DEP’T. OF JUSTICE, *supra* note 18, at A8.

in immigration court, Ingrid Eagly and Steven Schafer observed bond amounts between \$1,500 to \$50,000.⁴³ For bonds set by immigration judges, the median bond amount in FY 2015 was \$6,500.⁴⁴ These numbers have increased under the Trump Administration. The median bond amount is now \$7,500, and 40% of detainees must post a bond of \$10,000 or more to obtain release.⁴⁵

These immigration court numbers likely drastically undercount the total bond numbers because it is likely that many noncitizens pay bond amounts set by ICE, and never request a bond redetermination hearing before a judge.⁴⁶ Because ICE does not publicly release bond data, it is difficult to obtain reliable estimates of bond amounts. What we know is the aggregate: in FY 2013 (the last year for which such data are available), ICE collected 45,179 bonds totaling \$243 million.⁴⁷

When noncitizens pay bond, in approximately 90% of cases, they pay it in cash or check up front.⁴⁸ This means that few noncitizens rely on commercial surety companies to pay the bond amount up front, with a contract to pay the amount in the case of a breach.⁴⁹ At least one bail bond company has required onerous conditions, including ankle monitors, for noncitizens seeking its services.⁵⁰

Detention and the use of money bail has always been part of the deportation and enforcement regime. Under the Immigration Act of 1882 and the Chinese Exclusion Act of 1882, private shipping companies detained noncitizens arriving in the U.S.⁵¹ Eventually, the

⁴³ Eagly & Schafer, *supra* note 17, at 69 n.220.

⁴⁴ *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?*, TRACIMMIGRATION (Sept. 14, 2016), <http://trac.syr.edu/immigration/reports/438/>.

⁴⁵ *Three-Fold Difference*, *supra* note 3.

⁴⁶ See Eagly & Schafer, *supra* note 17, at 69-72 (estimating that only 37% of noncitizens released on bond during removal proceedings between 2007-12 were released after a bond redetermination hearing).

⁴⁷ U.S. IMMIGRATION & CUSTOMS ENF'T, ENFORCEMENT AND REMOVAL OPERATIONS: BOND MANAGEMENT HANDBOOK 1-2 (2014), <http://www.aila.org/File/Related/16051730f.pdf>.

⁴⁸ *Id.* at 5.

⁴⁹ See *id.* at 5-6.

⁵⁰ Michael E. Miller, *This Company is Making Millions from America's Broken Immigration System*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html?utm_term=.5f4253fcd04c ("In exchange for their freedom, immigrants sign contracts promising to pay Libre \$420 per month while wearing the company's GPS devices. But these contracts are the subject of lawsuits and allegations of fraud by immigrants . . . who claim they didn't understand them.").

⁵¹ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882); Chinese Exclusion Act of May

detaining entity became the U.S. Marshal, who incarcerated Chinese entrants pending judicial hearings as to deportation and expulsion.⁵² Noncitizens were entitled to release on bail after a bond hearing before a judge.⁵³ As deportation and exclusion moved to the Bureau of Immigration, an administrative agency, so did the authority to detain during proceedings, including the ability to set bond.⁵⁴ Bond amounts were often very high.⁵⁵

Broadly, the American concept of bail derives from English roots.⁵⁶ Tim Schnacke has explained that, in the criminal justice system, the “history of bail in America . . . represents an intersection of . . . two historical phenomena.”⁵⁷ A personal surety system flourished until the 1800s, under which a reputable person (the surety) expressed willingness to pay an amount if a defendant forfeited his obligation (for example, if he failed to show for proceedings).⁵⁸ In the late 1800s, commercial surety companies opened, and defendants were required to self-pay their financial conditions to obtain release.⁵⁹ The up-front payment was typically a percentage of the total bail amount set by a criminal court.⁶⁰ Historically, the bail system has rested on the “bail/no bail dichotomy,” basically a legal requirement (or presumption) identifying a narrow set of charges that are not bailable (or presumed to not be bailable), with liberty being the “norm.”⁶¹ Over the years, bail reform resulted in alternatives to commercial sureties, including

6, 1882, ch. 126, 22 Stat. 58 (1882).

⁵² Geary Act, ch. 60, § 6, 27 Stat. 25 (1892).

⁵³ LUCY E. SALYER, *LAWS HARSH AS TIGERS* 88 (1995).

⁵⁴ See *id.* at 136; see also JANE PERRY CLARK, *DEPORTATION OF ALIENS* 308-10 (1932); WILLIAM C. VAN VLECK, *ADMINISTRATIVE CONTROL OF ALIENS* 35 (1931).

⁵⁵ See SALYER, *supra* note 53, at 88. For a historical sketch of immigration detention, see generally Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 *INTERCULTURAL HUM. RTS. L. REV.* 11 (2010).

⁵⁶ See Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 *U. RICH. L. REV.* 795, 797 (2018) (summarizing history of bail).

⁵⁷ TIMOTHY R. SCHNACKE, *FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM* 32 (2014) [hereinafter *FUNDAMENTALS OF BAIL*], <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>; see also Dean A. Dabney et al., *American Bail and the Tinting of Criminal Justice*, 56 *HOW. J. CRIME & JUST.* 397, 397 (2017) (“[T]he spread of neoconservative and neoliberal rationalities . . . had a ‘tinting effect’ on bail, intensifying and altering that which already existed.”).

⁵⁸ SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 57, at 22-23.

⁵⁹ *Id.* at 26.

⁶⁰ See *id.* at 26.

⁶¹ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

nonfinancial commercial release, such as release on recognizance.⁶² Bail is now widely used in the criminal justice system.⁶³ As Professors Calaway and Kinsley summarize in examining those subject to pretrial detention while awaiting criminal proceedings: “[o]n any given day, more than sixty percent of the United States jail population is composed of people who are not convicted but are being held in detention as they await the resolution of their charge.”⁶⁴

III. THE CASE AGAINST MONEY BAIL

There is a growing consensus among academics, judges, prosecutors, and other stakeholders in the criminal justice system that money bond is unnecessary to secure the appearance of defendants, and harmful to their case and life outcomes.⁶⁵ An increasing number of jurisdictions have started to move away from a reliance on money bail in the pretrial system.⁶⁶

As I explain below, many of the reasons why money bail is ineffective in the criminal justice system apply with equal force to immigration detention. Both systems impose civil detention — that is, detention without a criminal process — and both are justified by the same governmental interests: in avoiding danger to the community

⁶² SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 57, at 33.

⁶³ See PRISONER REENTRY INST., CITY UNIV. OF N.Y., PRETRIAL PRACTICE: BUILDING A NATIONAL RESEARCH AGENDA FOR THE FRONT END OF THE CRIMINAL JUSTICE SYSTEM 5-8 (2015), http://johnjaypri.org/wp-content/uploads/2016/05/ArnoldReport2_webversion.pdf (demonstrating that even though arrests and convictions have gone down, the percentage of people detained has increased and the percentage with surety bonds has increased); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 419-20 (2016) [hereinafter *Fixing Bail*] (collecting sources).

⁶⁴ Calaway & Kinsley, *supra* note 56, at 798. For a succinct summary of the constitutional limits on bail, see *id.* at 800-03; see also Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 21 (Erik Luna ed., 2017) (“Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last 20 years.”).

⁶⁵ See STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4 (AM. BAR ASS’N 2002); John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 143 n.1 (2006); Stevenson & Mayson, *supra* note 64, at 21-22.

⁶⁶ See Amber Widgery, *Guidance for Setting Release Conditions*, NAT’L CONF. ST. LEGISLATURES (May 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx> (collecting pretrial release practices). Some states have enacted statutory provisions barring unaffordable money bail. See, e.g., HAW. REV. STAT. § 804-9 (2018); KAN. STAT. ANN. § 22-2801 (2018); MASS. GEN. LAWS ch. 276, § 58A (2018).

and flight pending resolution of proceedings (whether criminal or immigration).⁶⁷ Both systems incorporate — at least in some cases — bond hearings before an impartial adjudicator. And the conditions of confinement are very similar if not the same in both contexts: immigrant detainees and pretrial criminal detainees are sometimes held in the very same county jails under similar conditions of confinement.⁶⁸

A. *Money Bail Is Not Correlated to Reducing Danger or Flight Risk*

There are no studies demonstrating that money bond actually works to reduce flight risk or danger.⁶⁹ To the contrary, jurisdictions that have eliminated reliance on money bond during the pretrial period have shown appearance and recidivism rates comparable to those that rely on money bond. The jurisdiction that leads this trend is the District of Columbia, which has largely moved away from a reliance on money bond in its pretrial system.⁷⁰ Instead, a range of pretrial supervision and services is tailored to each criminal defendant based on assessment of an individual's risk of danger and/or flight.⁷¹ In FY 2015, the arrest-free rate during the pretrial period was 89% and the appearance rate was 88% (defined as defendants who make all scheduled court appearances during the pretrial period).⁷² Jurisdictions like Kentucky and Colorado, which have reduced their

⁶⁷ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (immigration proceedings “are civil, not criminal”); see *United States v. Salerno*, 481 U.S. 739, 746-49 (1987) (“[P]retrial detention . . . is regulatory, not penal . . .”).

⁶⁸ See Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet> (stating 29% of immigrant detainees in November 2017 were held in county jails).

⁶⁹ See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 856-57 (2016) (citing SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 57, at 91-92); KRISTIN BECHTEL ET AL., *DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH* 15 (2012), https://pdfs.semanticscholar.org/199c/ed3713d5dbe7b5ffd3b3db121c184274e316.pdf?_ga=2.266011471.1723266577.1530249398-376765705.1530249398.

⁷⁰ PRETRIAL JUSTICE INST., *THE D.C. PRETRIAL SERVICES AGENCY: LESSONS FROM FIVE DECADES OF INNOVATION AND GROWTH* 2, <https://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf> (last visited Aug. 27, 2018).

⁷¹ See PRETRIAL SERVS. AGENCY FOR D.C., *CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST FISCAL YEAR 2017*, at 25 (2016), <https://www.csosa.gov/about/financial/budget/2017/FY17-PSA-Budget-Submission.pdf> (describing range of services).

⁷² *Id.* at 23.

reliance on money bond (releasing more individuals on unsecured bonds and/or with conditions), have been able to maintain (or even improve) their failure to appear and recidivism rates.⁷³

The experiences of the District of Columbia and other jurisdictions have contributed to a broad-scale call for reform by a range of players in the criminal justice system, ranging from judges to prosecutors and defense attorneys.⁷⁴ There is a growing consensus against the use of money bond, as well as more empirical support for various pretrial release schemes (including various forms of monitoring and treatment).⁷⁵ One recent report, for instance, observed that pretrial supervision (as compared to release without supervision) decreased both failure to appear rates and the prevalence of arrests during the pretrial period.⁷⁶ And if money bond is to be imposed, studies have shown that unsecured bonds (promises to pay if an individual fails to appear) are just as successful as secured bonds (up-front payments).⁷⁷

The District of Columbia and the other jurisdictions that have reduced their reliance on money bond have relied on two empirically supported practices: use of a risk assessment tool based on actuarial data and use of alternatives to detention ranging from telephone reminders for hearings to (in a narrow range of cases) GPS ankle monitors.

B. Risk Assessment

Criminal jurisdictions that have rejected money bond have embraced the idea of permissible risk — that there will be some level of flight and danger — and that the goal of civil detention is to reduce (not eliminate) that risk.⁷⁸ As Tim Schnacke puts it: “we know that

⁷³ See DENVER DEP'T OF PUB. SAFETY, DENVER PRETRIAL SERVICES PROGRAM: CY15 ANNUAL REPORT 6 (2015); KY. PRETRIAL SERVS., REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS 6 (2012). For a summary of Colorado's evolution toward evidence-based pretrial practices, see generally TIMOTHY R. SCHNACKE, BEST PRACTICES IN BOND SETTING: COLORADO'S NEW PRETRIAL BAIL LAW (2014), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2013-07-03_BondSetting-ColoradoCCJJ.pdf.

⁷⁴ See BECHTEL ET AL., *supra* note 69, at 2.

⁷⁵ See *id.* at 15; see also PRISONER REENTRY INST., *supra* note 63, at 20.

⁷⁶ CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 17 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_Supervision_FNL.pdf.

⁷⁷ See, e.g., MICHAEL R. JONES, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 11 (2013), <https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf>.

⁷⁸ See TIMOTHY R. SCHNACKE, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE'S DECISION TO RELEASE OR DETAIN A

out of every one hundred released defendants, some number of them will fail to appear for court or commit some new offense after being released.⁷⁹ Jurisdictions like the District of Columbia rely on actuarial risk assessment tools to predict how much of a danger or flight risk an individual poses.⁸⁰

A risk assessment instrument assesses and weighs certain criteria about an individual based on prior data showing how those criteria map onto the risk of flight or re-arrest if released pending proceedings.⁸¹ These factors include criminal history, current charge, employment, drug history, and family ties.⁸² The instrument typically generates an overall risk score as well as a brief summary of the characteristics of an individual that correspond with risk of failure to appear or re-arrest.⁸³ In the pretrial context, jurisdictions like the District of Columbia, Kentucky, Colorado, and others have employed risk assessment instruments as a way to inform judges about actuarial risk and encourage them to release individuals based on risk scores.⁸⁴ While many jurisdictions have adopted these tools, they are not

DEFENDANT PRETRIAL 43 (2014), <https://nicic.gov/money-criminal-justice-stakeholder-judge-s-decision-release-or-detain-defendant-pretrial>.

⁷⁹ *Id.*

⁸⁰ See PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 71, at 25. Jurisdictions develop their own risk assessment tools or use those developed by national organizations such as the Arnold Foundation's Public Safety Assessment-Court Tool. The Arnold Foundation risk assessment instrument drew from the data of over 300 U.S. Jurisdictions. See ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 [hereinafter RISK FACTORS], <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> (last visited Aug. 27, 2018).

⁸¹ PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT 101: SCIENCE PROVIDES GUIDANCE ON MANAGING DEFENDANTS 2 (2012), https://www.bja.gov/publications/pji_pretrialriskassessment101.pdf.

⁸² Calaway & Kinsley, *supra* note 56, at 809.

⁸³ PRETRIAL JUSTICE INST., *supra* note 81. See generally ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf (discussing how a risk assessment is created).

⁸⁴ See, e.g., MARIE VANNOSTRAND & KENNETH J. ROSE, VA. DEP'T OF CRIMINAL JUSTICE SERVS., PRETRIAL RISK ASSESSMENT IN VIRGINIA 4 (2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf>; Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)**, 74 FED. PROB. 16, 16 (2010). See generally Anne Milgram et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENT'G REP. 216 (2015) (discussing the importance of pretrial decision making and the effects of pretrial detention).

perfect. Among other challenges, the tools have been criticized for resulting in over-incarceration, particularly of people of color.⁸⁵

C. Alternatives to Detention and Unsecured Bonds

Studies in the pretrial context demonstrate that alternatives to detention such as phone supervision, telephone reminders in advance of hearings, house arrest, and GPS ankle monitoring are incredibly effective in ensuring that pretrial defendants appear for hearings.⁸⁶ Use of alternatives to detention stems from the risk principle: because detainees can be classified according to the risk they represent, resources for supervision can be allocated such that higher risk individuals receive greater degree of supervision and attention. Effective use of alternatives to detention bolster the case for eliminating money bail: rather than detaining individuals who cannot afford bond (unnecessarily in many cases, and to the detainee's detriment), alternatives to detention can successfully address concerns about risk of reoffending or of flight.

Expanding the use of alternatives to detention — including phone monitoring, in-person check-ins, and in some cases, more restrictive alternatives — requires resources. Many pretrial systems accomplish this through pretrial services programs.⁸⁷ Staffers in these programs collect information about criminal defendants, including residence, employment status, family ties, and criminal history to conduct a pretrial investigation.⁸⁸ The pretrial program then provides the information to judicial officers as they make bond decisions.⁸⁹ Pretrial services also provide monitoring and support of any pretrial

⁸⁵ Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94-99 (2017); see also CYNTHIA A. MAMALIAN, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 36 (2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821 (2014). ProPublica published a study in 2016 supposedly discovering that COMPAS, a major risk assessment tool was “biased against blacks.” Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

⁸⁶ See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J., 1344, 1363-64 (2014); LOWENKAMP & VANNOSTRAND, *supra* note 76, at 14; PRISONER REENTRY INST., *supra* note 63, at 24-25.

⁸⁷ See Calaway & Kinsley, *supra* note 56, at 807-08 (summarizing pretrial service options).

⁸⁸ See *id.*; see also, e.g., DENVER DEP'T OF PUB. SAFETY, *supra* note 73, at 5 (listing alternatives to detention including electronic monitoring, reminder calls, and case management).

⁸⁹ See DENVER DEP'T OF PUB. SAFETY, *supra* note 73, at 5.

conditions imposed on defendants who are released such as phone or electronic monitoring, resources for drug/alcohol treatment, and assistance with tracking defendants who fail to appear for court hearings.⁹⁰

Numerous reports and studies make the case for the use of alternatives to detention in the pretrial context. In Virginia, for example, which places individuals into alternative conditions based on evidence-based risk assessment, 96.3% of defendants in alternatives appeared as scheduled in a given study year.⁹¹ Other jurisdictions including Kentucky, Colorado, Florida, Ohio, and the District of Columbia have seen similar positive results.⁹²

Behavioral studies of pretrial detainees demonstrate the benefits of even low-cost interventions such as text, peer and family reminders; simplified language and rules regarding expectations; and small incentives and consequences to promote desired pretrial behavior.⁹³ One county in Arizona, for example, reduced its failure to appear rate by 12% after instituting a call reminder program.⁹⁴ A county in Colorado experienced similar reductions by using a live caller program.⁹⁵ And studies in Nebraska demonstrate that even postcard reminders have a positive effect on failure to appear among misdemeanor defendants.⁹⁶ Reminder notifications have also reduced failure to appear rates in Multnomah County, Oregon; King County, Washington; and New York City, New York.⁹⁷ Other forms of pretrial supervision, including reporting requirements, have reduced failure to appear and re-arrest rates.⁹⁸

⁹⁰ *Id.* Pretrial service programs have not been rigorously studied. See Stevenson & Mayson, *supra* note 64, at 16-17 (showing few comprehensive studies have been completed).

⁹¹ KENNETH ROSE, A “NEW NORM” FOR PRETRIAL JUSTICE IN THE COMMONWEALTH OF VIRGINIA 6 (2013), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/new-norm-pretrial-justice-commonwealth-virginia.pdf>.

⁹² Calaway & Kinsley, *supra* note 56, at 809-10, 810 n.105.

⁹³ PRISONER REENTRY INST., *supra* note 63, at 24-25.

⁹⁴ WENDY WHITE, COURT HEARING CALL NOTIFICATION PROJECT 4 (2006), <https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34fdeae8-c04e-a57d-9cca-e5a8d4460252>.

⁹⁵ Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 88-89 (2012).

⁹⁶ Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, NEB. LAW., Sept. 2010, at 11-13.

⁹⁷ MAMALIAN, *supra* note 85, at 7, 16-17.

⁹⁸ LOWENKAMP & VANNOSTRAND, *supra* note 86, at 12 (discussing the results of

Even as to defendants with higher risk scores, jurisdictions have demonstrated success in reducing failure to appear and re-arrest rates with increased pretrial supervision.⁹⁹ In fact, according to one study, “the effect of pretrial supervision appears to matter even more as risk level increases” as to failure to appear.¹⁰⁰ Preliminary research indicates that longer-term pretrial supervision is associated with lower re-arrest rates.¹⁰¹ And studies suggest that electronic monitoring is effective in assuring appearance at hearings even for higher risk populations.¹⁰²

D. *Avoiding the Harms of Unnecessary Over-Detention*

One driver of expanding the use of alternatives and risk assessment instruments in the pretrial justice context are studies demonstrating that time in pretrial detention — even for brief periods — correlates with poorer case outcomes as well as an increase in future arrests.¹⁰³ Several studies have compared criminal case outcomes for individuals when detained or released (with other factors remaining the same). As the Pretrial Justice Institute summarizes: “These studies show that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period.”¹⁰⁴ And this is true even controlling for other causes: “something about detention (awaiting trial) itself leads to harsher outcomes.”¹⁰⁵ These studies show the correlation between

supervision versus non-supervision); *see also* MAMALIAN, *supra* note 85, at 31-32.

⁹⁹ LOWENKAMP & VANNOSTRAND, *supra* note 86, at 13-15; CLIFFORD T. KENNAN, PRETRIAL SERVS. AGENCY FOR D.C., ORGANIZATIONAL ASSESSMENT FISCAL YEAR 2013, at 17 (2013), <https://www.psa.gov/sites/default/files/FY%202013%20PSA%20Org%20Assessment%20January%202014-FINAL.pdf>.

¹⁰⁰ LOWENKAMP & VANNOSTRAND, *supra* note 86, at 15.

¹⁰¹ *Id.* at 16-17.

¹⁰² *See* MAMALIAN, *supra* note 85, at 27-28. Further research is necessary to confirm across jurisdictions that electronic monitoring effectively reduces recidivism and failure to appear in high risk cases. *See id.*

¹⁰³ *See* CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 10, 19 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (detention for even two or three days correlated with future failure to appear in court and recidivism).

¹⁰⁴ BECHTEL ET AL., *supra* note 69, at 2; *see also* Stevenson & Mayson, *supra* note 64, at 1-2.

¹⁰⁵ BECHTEL ET AL., *supra* note 69, at 2.

time in detention and worse case outcomes as well as greater recidivism.¹⁰⁶

A recent large, multi-state study demonstrated that defendants who are detained for the entire pretrial period are over four times more likely to receive a jail sentence and over three times more likely to receive a prison sentence.¹⁰⁷ These defendants are also more likely to receive longer sentences.¹⁰⁸ Similarly, a recent empirical analysis of a large sample of pretrial detainees in Philadelphia and Pittsburgh by Arpit Gupta and his colleagues demonstrated that, all else being equal, the assignment of money bail caused a 12% increase in the likelihood of a conviction and a 6% to 9% increase in recidivism (defined as whether a defendant is charged with a future crime).¹⁰⁹ According to the study, the fact of money bond, and not its amount, corresponded with these harm. As Gupta and his co-authors explain: “[S]imply lowering required bail amounts will not ameliorate harms imposed by money bail.”¹¹⁰ Similar studies in other jurisdictions confirm that pretrial detention causes increase in likelihood of conviction and increase in recidivism at even greater rates.¹¹¹ Studies have also found that individuals detained for the entire pretrial period receive longer jail and prison sentences, and the effect is particularly pronounced for low-risk defendants.¹¹²

¹⁰⁶ See Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 655 (1964); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 60 (2014).

¹⁰⁷ CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2013) [hereinafter INVESTIGATING THE IMPACT], http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472-73 (2016).

¹¹⁰ *Id.* at 473.

¹¹¹ LOWENKAMP ET AL., *supra* note 107, at 3; Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017) (analyzing misdemeanor cases in Harris County, TX, and finding that detained defendants are 25% more likely to be convicted and 43% more likely to be sentenced to jail); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 26 (Nov. 8, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777615.

¹¹² See LOWENKAMP ET AL., *supra* note 107, at 4, 18-19; James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 CRIME & DELINQ. 313, 328 (2017).

Criminal defendants who are detained are more likely to take worse terms in their guilty pleas so that they can end their detention.¹¹³ Detention also limits individuals' ability to access counsel, gather exculpatory evidence and otherwise prepare for trial.¹¹⁴ A detained defendant — who appears in handcuffs and a prison jumpsuit — might be more likely to convey guilt or criminality to the judge presiding over his criminal case. Detained individuals may be less willing to ask for continuances that could help increase the chances of case success.¹¹⁵ Periods of detention also disrupt social bonds such as those related to employment, housing, supportive family and community networks, contributing to recidivism.¹¹⁶ These harms fall disproportionately on people of color.¹¹⁷

E. Immigration, Detention Effects, Risk, and Alternatives

While there is no empirical research as yet on the effect of the assignment of money bail on immigration case outcomes, there is reason to think that many (if not all) of the harms of pretrial detention apply to immigration detention as well. Detained immigrants are less likely to be represented and less likely to prevail in their proceedings than immigrants who are not detained pending removal proceedings.¹¹⁸ Immigrant detainees — who are often housed in remote facilities — experience difficulties obtaining counsel and developing their cases.¹¹⁹ Anecdotal reports suggest that detention pressures some noncitizens to give up their cases, even if the consequences are banishment from family or return to persecution.¹²⁰ Immigrant detainees suffer separation from family, community, employment, and other bonds that might contribute to future ability to form positive psycho-social relationships.¹²¹

¹¹³ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2547 (2004); Calaway & Kinsey, *supra* note 56, at 798.

¹¹⁴ See Heaton et al., *supra* note 111, at 774-75.

¹¹⁵ *Id.* at 784.

¹¹⁶ See, e.g., Milgram et al., *supra* note 84, at 217.

¹¹⁷ PRISONER REENTRY INST., *supra* note 63, at 15.

¹¹⁸ See Eagly & Shafer, *supra* note 17, at 9 (finding a ten-to-one ratio on unrepresented immigrants having poor outcomes); Srikantiah et al., *Access to Justice for Immigrant Families and Communities: A Study of Legal Representation of Detained Immigrants in Northern California*, 11 STAN. J.C.R. & C.L. 207, 212-13 (2015) (showing a three-to-one ratio of poorer results than those represented).

¹¹⁹ Marouf, *supra* note 1, at 2150-51; AMNESTY INT'L, *supra* note 35, at 6.

¹²⁰ See Marouf, *supra* note 1, at 2151.

¹²¹ See *id.* at 2151-52, 2154-55; Kalina M. Brabeck et al., *The Psychosocial Impact of*

We do not have data about the effect of terms in immigration detention on recidivism and failure to appear in removal proceedings (if released). But immigrant detainees are often housed in the very same jails as pretrial detainees and suffer the same conditions of confinement, including limited telephone and in-person access to the outside world, restrictions on movement, and innumerable hours behind bars, sometimes in solitary confinement.¹²² It is possible that for immigrant detainees too, the restriction of detention itself leads to poor outcomes. This may particularly be true for those detained for longer periods of time, who suffer more lengthy separation from family and community.

Given these likely harms, can the lessons from the pretrial context be applied directly to immigration? Is a move away from money bond, and toward the use of risk assessment and alternatives to detention possible? As Mark Noferi and Robert Koulish have explained, a properly-validated risk assessment tool that is tailored to the population and structure of the immigration system could reduce unnecessary detention of noncitizens pending proceedings.¹²³

But while ICE has experimented with both risk assessment tools and alternatives to detention, it has done so in flawed ways. Since March, 2013, ICE has used a Risk Classification Assessment (“RCA”) tool, an algorithm that assigns a risk score based on a range of factors, including criminal history, family and community ties, employment history and the like.¹²⁴ A recent Reuters report suggests that under the Trump Administration, ICE has eliminated the release option from its risk assessment tool, essentially resulting in an “assessment” that most detainees should be detained.¹²⁵ The tool is now basically meaningless.

Detention and Deportation on U.S. Migrant Children and Families, 84 AM. J. ORTHOPSYCHIATRY 496, 497-99 (2014).

¹²² See Marouf, *supra* note 1, at 2150-55; AMNESTY INT’L, *supra* note 35, at 40-41.

¹²³ See generally Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45 (2015). An immigration-specific risk assessment tool requires different data and analysis than a pretrial tool. *See id.* at 78. For example, a recent entrant fleeing persecution abroad with a colorable claim to asylum might actually pose a very low flight risk, for instance, when compared to a recent entrant with no colorable defenses to removal. *See id.* at 72-73. And flight risk in removal proceedings is not static: an individual who is a low risk of flight pending proceedings may become a higher flight risk if he is ordered removed (and has no other claims against removal). *See id.* A risk assessment based on actuarial data collected in the immigration context might be able to more effectively account for the unique nature of removal proceedings. *See id.* at 77.

¹²⁴ Marouf, *supra* note 1, at 2144-45 (describing RCA).

¹²⁵ Rosenberg & Levinson, *supra* note 3.

Even prior to this development, Koulish and Noferi identified numerous problems with ICE's Risk Classification Assessment tool. First, because ICE interprets the immigration statute as requiring mandatory detention without bond for a large category of individuals, the risk assessment instrument did not result in the release of individuals covered by the mandatory detention provisions who were determined to be a low risk of danger and flight.¹²⁶ Second, even as to those eligible for bond, ICE did not validate its risk assessment instrument, in that it has not adjusted the instrument based on the data collected through the risk assessment process.¹²⁷ Third, DHS is not transparent about its data and algorithm (such that it could be independently verified) and does not appear to calibrate or update its tool for the specifics of the immigration context. Fourth, the tool is used by ICE agents in initially setting bond, and is not shared with immigration judges during subsequent bond hearings. Fifth, the RCA decisions are not binding, so ICE agents can (and do) override them.¹²⁸ As a result of these and other problems, deployment of ICE's risk assessment tool — even prior to the Trump Administration's elimination of the release option — resulted in over-detention, even though empirical evidence in other contexts suggests that noncitizens in removal proceedings are on average, neither a high danger nor a high flight risk.¹²⁹ For some of these reasons, a 2015 Office of Inspector General Report concluded that ICE's risk assessment instrument is “time consuming, resource intensive, and not effective in determining which aliens to release or under what conditions.”¹³⁰ As a result, even before the Trump Administration eliminated the release option, use of the risk assessment instrument resulted in DHS

¹²⁶ See Noferi & Koulish, *supra* note 123, at 75-76; Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, LAWS, June 2016, at 2, <http://www.mdpi.com/2075-471X/5/3/30/pdf>.

¹²⁷ See Noferi & Koulish, *supra* note 123, at 62. For a detailed description of the validation process in one jurisdiction (Florida), see JAMES AUSTIN ET AL., JFA INST., FLORIDA PRETRIAL RISK ASSESSMENT INSTRUMENT (2012), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=58add716-5e41-eba3-0a3d-f9298f7e1a54&forceDialog=0>.

¹²⁸ Marouf, *supra* note 1, at 2144-45 (citing evidence to demonstrate that ICE officers override recommendations of the RCA 7.6% of the time).

¹²⁹ ICE detains noncitizens who are in formal removal proceedings as well as those who are ordered removed through less formal processes and who typically do not appear before immigration judges.

¹³⁰ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 2 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

detaining 82% of those assessed.¹³¹ By comparison, in the pretrial justice context, judges recommend release in 70% to 80% of cases after using risk assessment.¹³²

ICE's use of alternatives to detention has also been flawed. ICE has broad discretion to release noncitizens on conditions less restrictive than detention, such as house arrest, phone monitoring, mandatory check-ins, and ankle shackles.¹³³ DHS contracts with GEO Group to run its most restrictive alternative, a program called the Intensive Supervision Appearance Program ("ISAP").¹³⁴ Noncitizens in the program are released on conditions pending their removal proceedings under two options, "full service" or "technology only."¹³⁵ Electronic monitoring under "technology only" happens through an ankle monitor or telephonic reporting.¹³⁶ Advocates contend that the program has operated as an alternative to release rather than (as described) an alternative to detention.¹³⁷ In other words, DHS has placed ankle shackles and other restrictions on those whom it would otherwise have released on no conditions instead of employing alternatives on those it would otherwise have detained. Individuals who do not require interventions (up to the most onerous restrictions such as ankle monitors) are nonetheless subject to such conditions.¹³⁸ The result is the over-supervision of populations who do not pose a sufficient risk to justify such supervision (and this appears to be increasing under the Trump Administration, under which ICE has requested additional funds for its alternatives to detention program).¹³⁹ Not surprisingly, DHS's alternatives program — the Intensive Supervision Appearance Program — has been a statistical success. From FY 2011 to 2013, for example, 99% of participants appeared at scheduled court hearings.¹⁴⁰

¹³¹ Noferi & Koulisch, *supra* note 123, at 50.

¹³² *Id.*

¹³³ See U.S. GOV'T ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 7 (2014), <http://www.gao.gov/assets/670/666911.pdf>. See generally Marouf, *supra* note 1, at 2155-70 (summarizing ICE alternatives to detention).

¹³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 133, at 9 n.23.

¹³⁵ *Id.* at 4 n.8.

¹³⁶ Marouf, *supra* note 1, at 2162.

¹³⁷ *Id.* at 2164.

¹³⁸ *Id.*

¹³⁹ U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., BUDGET OVERVIEW: FISCAL YEAR 2019, at 92 (2018), <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.

¹⁴⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 133, at 30; see also JUSTICE FOR

Ultimately, ICE's use of risk assessment and alternatives to detention amount to a rejection of the risk principle (that the goal is to reduce, but not eliminate, the risk of recidivism and flight). A risk instrument that categorizes most noncitizens as dangers or flight risks (resulting in a very high detention rate), and that results in the unnecessary over-use of alternatives to detention on those who may require no restrictions at all, effectively disfavors the assumption of a necessary amount of risk.

IV. CONSEQUENCES AND IDEAS FOR REFORM

DHS's failure to effectively implement risk assessment and alternatives to detention (despite evidence to the contrary) means that bond decisions rest almost exclusively on the discretion of DHS agents (who initially set bond amounts) and immigration judges (who can redetermine certain of those amounts in bond hearings).

Especially in the current political environment, it is unlikely that DHS or Congress will move toward a scheme involving less use of money bond. The Department of Homeland Security — which serves the arrest, prosecutorial and detention functions for immigrant detainees — has actually lobbied for more detention. DHS has incentives to lobby.¹⁴¹ Detention means that DHS is more likely to win in removal proceedings, and more likely to convince noncitizens to give up even meritorious claims when the alternative is detention pending resolution of those claims. By contrast, noncitizen detainees and their families — many of which are not citizens — cannot vote and are in a poor position to lobby against funding for detention. As Rachel Barkow has convincingly explained in the criminal sentencing context, “[t]he regulated entity is ill-positioned to argue on its own behalf, whereas the forces in favor of regulation are extremely powerful and unified . . . [and] [t]he public . . . is easily mobilized to

IMMIGRANTS, THE REAL ALTERNATIVES TO DETENTION (2016), <https://justiceforimmigrants.org/2016site/wp-content/uploads/2017/07/The-Real-Alternatives-to-Detention-FINAL-06.27.17.pdf> (discussing the benefits and drawbacks of various alternatives to detention).

¹⁴¹ Compare Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (describing lobbying of prosecutors in support of stricter sentences), with Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1967-68 (2005) (describing judge incentives in pretrial detention). Because immigration courts run detained and non-detained dockets separately, imposing a higher bond amount (or requiring detention) does not necessarily benefit the judge by moving a case more quickly on his docket except if it encourages noncitizens to give up their cases and accept deportation. *Id.*

side with the pro-regulatory forces.”¹⁴² This is particularly true because, as in the pretrial context, the burden of immigration detention “falls disproportionately on the poor and racial minorities.”¹⁴³

Litigation is important but not a complete solution to the overuse of money bond. Lawsuits have focused not on eliminating a reliance on money bond, but rather on requiring immigration judges to consider a noncitizen’s ability to pay when setting bond amounts. The ACLU’s path-breaking class action lawsuit, *Hernandez v. Sessions*, has raised due process, equal protection, and Eighth Amendment excessive bail claims based on immigration judges’ failure to consider ability to pay.¹⁴⁴ Detainees in *Hernandez* have argued that, under due process, if a judge does not consider ability to pay when setting bond, detention is not reasonably related to the government’s goals of reducing danger and flight.¹⁴⁵ Likewise, detainees have argued that under equal protection, failure to consider ability to pay impermissibly discriminates against poor people. The idea is that there is no rational justification for discriminating against people without means to pay bond.¹⁴⁶ Finally, detainees argued that, under the Supreme Court’s decision in *Stack v. Boyle*, detention because of a too-high bond is excessive under the Eighth Amendment’s Excessive Bail Clause.¹⁴⁷ *Hernandez* built on the successes of challenges to state pretrial “bail

¹⁴² Barkow, *supra* note 141, at 730; see also Calaway & Kinsley, *supra* note 56, at 818 (discussing “political realities and outside stakeholders” who inhibit bail reform). The structure of the immigration statute protects immigration judges from any meaningful judicial review of bond amounts. An immigration judge’s discretionary decision to set a particular bond amount is largely insulated from judicial review through the 1996 amendments to the Immigration and Nationality Act. See 8 U.S.C. § 1226(e) (2011), *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011). While a noncitizen detainee may appeal the immigration judge’s decision to the Board of Immigration Appeals, an administrative appellate body, he may not appeal that decision to a federal court of appeals. See *id.*

¹⁴³ Manns, *supra* note 141, at 1956; Stevenson & Mayson, *supra* note 64, at 8 (“[B]lack defendants [make] up [forty-three percent] of the pretrial detainee population despite constituting only [thirteen percent] of the total [U.S.] population.”).

¹⁴⁴ See Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. REV. 69, 85-87 (2017).

¹⁴⁵ *Id.* at 79-81; see also *Bearden v. Georgia*, 461 U.S. 660, 676 (1983).

¹⁴⁶ Tan & Kaufman, *supra* note 144, at 81.

¹⁴⁷ *Id.* at 82-83. Although *Stack v. Boyle*, 342 U.S. 1 (1951) is a criminal case, immigrant detainees have argued that the Eighth Amendment’s Excessive Bail Clause should apply in immigration as well. Tan & Kaufman, *supra* note 144, at 82-83.

schedules” that caused pretrial detention based on poverty.¹⁴⁸ While this litigation is certainly important in reducing detention solely based on an individual’s ability to pay, it does not seek to eliminate the use of money bond altogether. As in the pretrial context, litigation is important, but only part of the solution in the effort to eliminate reliance on money bond.¹⁴⁹

Given the limits of what litigation can accomplish and the pro-detention political incentives at the federal level, the focus must be on incremental reform at the immigration judge level. One way to improve immigration judge decision-making relating to risk is to provide immigration judges with accurate risk assessment analyses for detainees. Take a detainee who DHS decides to hold on \$10,000 bond because of a past conviction. He may be able to convince the immigration judge to release him on a lower bond amount — and to overcome the immigration judge’s concerns about dangerousness — by providing the results of a risk assessment analysis. While a verified risk assessment tool is not available for immigration (as discussed above), the detainee could provide his risk score on the Arnold Risk Assessment instrument or one of the other widely-used tools.¹⁵⁰ This information could provide the immigration judge with more information on which to base a finding of dangerousness (and risk of recidivism). At least until IJs start incorporating a validated risk assessment tool into their own analysis, this information could provide them with a more accurate basis for assessing risk, and serve as a counterweight to a concern that someone with a past conviction might recidivate.

Of course, the big challenge with providing such risk assessment information is that it is not free. To properly apply a risk assessment tool, and contextualize the results, the detainee would have to hire an expert criminologist. For a detainee who lacks legal representation and resources, this is unrealistic and cost prohibitive.

In addition, even with information about risk, immigration judges may choose to over-detain. Professor Samuel Wiseman has examined the pressures that animate pretrial bond decision-making in the criminal context, resulting in continued reliance on money bond in

¹⁴⁸ For a summary of this litigation, see Calaway & Kinsley, *supra* note 56, at 811-15.

¹⁴⁹ See *id.* at 815-24 (discussing why litigation is necessary but not sufficient for bail reform).

¹⁵⁰ ARNOLD FOUND., RISK FACTORS, *supra* note 80, at 1-4; PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT CAN PRODUCE RACE-NEUTRAL RESULTS, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5cebc2e7-dfa4-65b2-13cd-300b81a6ad7a&forceDialog=0> (last visited Sept. 5, 2018).

some jurisdictions despite overwhelming social science research about its ineffectiveness.¹⁵¹ In fact, even as to jurisdictions that have rules requiring the adoption of risk assessment tools, recent studies show that judges override risk scores more often than not.¹⁵² Professor Wiseman explains that judges fear erroneous decisions to release a defendant who might reoffend prior to trial, whereas there are no similar negative consequences for erroneous decisions to unnecessarily detain.¹⁵³ According to Wiseman, “judges do not internalize any of the costs of pretrial detention, nor do they receive rewards for correctly releasing defendants pretrial.”¹⁵⁴ Wiseman explains that judges may choose not to release defendants because the judges “bear blame for releasing a defendant who flees justice or commits a violent crime while on bail.”¹⁵⁵ Judges are unlikely to consider the cumulative costs of such decision-making — whether of providing bed space for detainees or the societal cost of over-incarceration — because they are focused on the individual detain-or-release decision in a given case.

These pressures exist in the immigration context as well. Immigration judges bear no responsibility for the overall administration of the immigration detention and bail system, but they are blamed when they make a decision to release an individual who reoffends or flees upon release from custody. One news story about a noncitizen released on bond, who then is arrested for a violent offense, may be enough to prompt immigration judges to err on the side of setting a high money bond amount (resulting in detention). As with criminal court judges, a decision to detain, however punitive, has no consequences for an immigration judge, but a decision to release an individual who later flees or reoffends could be the next story on the evening news.

Individual judges are also informed by various pressures to make quick — and often inaccurate — judgments.¹⁵⁶ Studies document that

¹⁵¹ Wiseman, *Fixing Bail*, *supra* note 63, at 477-78.

¹⁵² Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. (forthcoming 2018) (manuscript at 55), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088 (examining Kentucky adoption of risk assessment).

¹⁵³ Wiseman, *Fixing Bail*, *supra* note 63, at 422.

¹⁵⁴ *Id.* at 422-23.

¹⁵⁵ *Id.* at 428.

¹⁵⁶ See, e.g., John C. Dolores & Richard E. Redding, *The Effects of Different Forms of Risk Communication on Judicial Decision Making*, 8 INT'L J. FORENSIC MENTAL HEALTH 142, 142-46 (2009); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787 (2001) (reviewing anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric judicial biases).

in brief hearings — like the typical five- or ten- minute immigration bond hearing — judges are likely to make quick decisions based on a single factor, such as a defendant’s past conviction or a stereotype about what constitutes deceptive behavior.¹⁵⁷ In such a short time, judges are not able to engage sufficiently with a detainee to gather accurate information about danger or flight risk.¹⁵⁸ Judges, like all decision-makers, are also prone to numerous other errors, including relying too heavily on an initial impression, focusing on available narratives as anchors, and being influenced by biases, both explicit and implicit.¹⁵⁹

An intervention that improves outcomes given this decision-making bias is appointed counsel. Through interviews and study of records in prolonged detention bond hearings provided pursuant to the Ninth Circuit’s decision in *Rodriguez v. Robbins*, Professor Emily Ryo has shown that detainees with counsel are more likely to prevail in bond hearings.¹⁶⁰ Professor Alina Das makes the case for counsel in bond hearings in her analysis applying institutional design principles to immigration detention.¹⁶¹ Das explains that because detained noncitizens are often unrepresented and detained far from home, they

¹⁵⁷ See Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 119, 119-34 (2009) (U.K.); see also Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 43 (because of their very high caseloads, immigration judges are more likely to rely on heuristics).

¹⁵⁸ See Wiseman, *supra* note 63, at 465-69. But see Stevenson & Mayson, *supra* note 64, at 9 (asserting “[r]isk assessment tools may be helpful in identifying good candidates”).

¹⁵⁹ Craig E. Jones, *The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision-Making*, 41 ADVOC. Q. 49, 122 (2013) (discussing persuasive manipulation); Daniel P. Mears & Sarah Bacon, *Improving Criminal Justice Through Better Decision Making: Lessons from the Medical System*, 37 J. CRIM. JUST. 142, 145-46 (2009). Judges also vary in imposing sentences depending on the race of the defendant. See, e.g., David S. Abrams et al., *Do Judges Vary in their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (finding “at least some judges treat defendants differently on the basis of their race”). The challenges in immigration judge decision-making are compounded by heavy caseloads and frequent burnout. See generally Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 57 (2008) (explaining that burnout is unavoidable due to “enormous caseloads consist[ing] of one horrific story of human suffering after another”).

¹⁶⁰ Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC’Y REV. 117, 121-22 (2016).

¹⁶¹ Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 146-47 (2013).

may lack the resources necessary to present an effective case for release.¹⁶² Representation by counsel might increase the length of bond hearings, which likely contributes to more considered decision-making. Local funding for representation of indigent noncitizens in removal proceedings has been established in New York, San Francisco, and other localities.¹⁶³ These local efforts represent a response to the political failure to establish reform at the federal level. They also exemplify an opportunity to study the effect of representation on bond outcomes (both as to duration of proceedings and as to other factors that might result in release, such as a more robust presentation of evidence). Greater study of the incentives and influences that permeate immigration judge decision-making in cases with appointed counsel may shed light on training or incentives that might increase immigration judge movement away from money bond.¹⁶⁴

Until the system relies far less on money bond, another important development is the increased creation of community bail funds.¹⁶⁵ These funds post bail for indigent noncitizens and then assume responsibility for the individual's return to court. Private bail funds exist in the pretrial context, and there are nascent efforts in the immigration realm as well.¹⁶⁶ This may be an area of expansion for localities such as New York and San Francisco that are already providing funding for representation of noncitizens in removal proceedings. Until immigration judges start ordering more noncitizens

¹⁶² *Id.* at 144-45.

¹⁶³ See, e.g., JENNIFER STAVE ET AL., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf (describing New York universal representation efforts); Rachel Swan, *SF Mayor Now Supports Legal Fund for Immigrants Facing Deportation*, S.F. CHRON. (Mar. 1, 2018, 10:16 AM), <https://www.sfchronicle.com/bayarea/article/S-F-mayor-now-pushes-to-fund-lawyers-for-12718206.php> (describing the politics behind this program's establishment in SF); see also Stevenson & Mayson, *supra* note 64, at 10 (recommending counsel as a way to increase accuracy in pretrial bail hearings).

¹⁶⁴ See Stevenson & Mayson, *supra* note 64, at 10 (recommending similar reform to reduce pretrial detention).

¹⁶⁵ See Calaway & Kinsley, *supra* note 56, at 826-27.

¹⁶⁶ See, e.g., *id.* (detailing private bail funds); RAICES Family Reunification and Bond Fund: Free Our Families, ACTIONNETWORK.ORG, https://actionnetwork.org/fundraising/bondfund?source=direct_link (donation page for a community funded Bond Fund) (last visited Sept. 5, 2018); BAY AREA IMMIGR. BOND FUND, <https://www.bayareaimmigrationbondfund.org/> (showing a private bond fund) (last visited Sept. 5, 2018).

be released pending proceedings, community and government bail funds can increase release (which would also permit further data collection as to recidivism and flight for those released on bond).

CONCLUSION

The criminal justice system is moving away from a reliance on money bond. An increasing number of jurisdictions across the country employ risk assessment instruments and alternatives to detention. Studies suggest that these changes have reduced the number of criminal defendants who are detained during the pretrial period.

This Essay makes the case for adopting these reforms in the immigration context as well. But given the political pressures at the national level, meaningful movement away from the use of money bond is unrealistic, at least right now. The Essay identifies three reforms at the immigration-judge level that may begin a movement away from money bond. First, noncitizens (especially those with resources and who are represented by counsel) could submit risk assessment analysis results to immigration judges in bond hearings, enabling judges to consider statistically relevant information about recidivism in deciding dangerousness. Second, localities can continue to fund removal defense representation, and the effects of that representation on bond amounts should be studied. Finally, an expansion of bond funds will allow those detainees ordered to pay bond to have the opportunity to obtain release.