# Injustice and the Disappearance of Discretionary Detention under Trump: Detaining Low Risk Immigrants without Bond

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This Report demonstrates that the Immigration and Customs Enforcement (ICE) violates legal requirements to provide immigrants with an individualized custody determination. Trump's enforcement policies brought a surge of low-risk immigrants into ICE custody. The detention risk tool was supposed to train officers and strongly discourage them from detaining low-risk immigrants who posed no harm to society and were not a flight risk. Data received pursuant to FOIA show the opposite result. ICE has failed to perform the individualized assessment and restrict its use of civil detention to only those whose high levels of dangerousness and risk of flight justify their incarceration. The data show that officers have manipulated the risk tool by subjecting low-risk immigrants to blanket detention, which has come to define the no-release Trump immigration policy in the New York City area.

## Introduction[1]

Since 2013, immigrants in ICE custody have been assessed by a risk classification assessment (RCA) algorithm to determine whether they will be detained, subject to release on bond or released on community supervision. Since its implementation, the Department of Homeland Security (DHS)'s RCA has become the federal government's largest risk tool and accompanies the world's largest immigration detention operation. The system was originally intended to pair detention with risk and to detain only individuals who posed a risk severe enough to warrant physical incarceration as opposed to release.

This report is a qualitative and quantitative analysis of ICE detention in the New York City Area of Operation (AOR) from 2013-2019, using 33,413 cases received from a Freedom of Information request to ICE. The New York City Area of Operation includes the five boroughs of New York City, plus Duchess, Nassau, Putnam, Suffolk, Sullivan, Orange, Rockland, Ulster, and Westchester counties. Decisions regarding the custody of immigrants in this geographic region are made by ICE's New York City Field Office. Specifically, the report analyzes the ICE New York City Field Office's practice of using the risk tool to detain low-risk immigrants, who are eligible for release under statute and regulations, without bond. Using data provided by ICE, we demonstrate that ICE fails to make individualized custody determinations for those low-risk immigrants eligible for release. The no-release detention policy instead mandates the detention of individuals for whom bond and other conditions of release are available. Consequently, ICE has detained almost every noncitizen in custody, including those who, like Julian, pose no real threat to public security, nor risk of flight.

The no-release, no-bond policy was created in two steps. In February 2015, Obama attached a no-bond policy to the risk tool. It stopped recommending individuals be given the opportunity for release on bond. In June 2017, Trump added a no-release component to the risk tool removing the risk tool's ability to recommend release for even the lowest risk immigrants. When combined with the Obama policy, under Trump, the risk assessment tool could only make one substantive recommendation: detention without bond. The current system detains, as a matter of policy, individuals that a neutral magistrate would likely order released from custody with few conditions. The logic behind individualized determinations fell apart as individuals who should be singled out for release were instead detained without bond.

The immigration statute and regulations for discretionary detention require that ICE make an individualized custody determination. Detained immigrants under this scheme can then challenge ICE's custody decision before an immigration judge, but that process can take weeks, if not months; meanwhile they languish in jail.[2] Scholars have shown individuals languishing in prolonged detention can be forced to suffer physical and psychological trauma (Ryo, 2016). These harms are further exacerbated by the covid-19 pandemic, which exposes immigrants in civil detention to life threatening illness without access to testing, masks, or even soap.[3]

Trump seems bent on imposing needless trauma upon as many immigrants as possible. Almost everybody is detained

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[2]Matter of Guerra, 24 I. & N. Dec. 37 (BIA 2006).

[3]*See, e.g.*, Order on Plaintiffs' Emergency Motion for Provisional Class Certification, Fraihat v. U.S. Immigration & Customs Enf't, No. 19-cv-01546-JGB-SHK (C.D. Cal. Apr. 20, 2020); Order Granting Motion for Temporary Restraining Order, Pimentel-Estrada v. Barr, No. C20-cv-00495-RSM-BAT (W.D. Wash. Apr. 28, 2020); Memorandum and Order, Basank v. Decker, No. 20-cv-0251-AT (S.D.N.Y Mar. 26, 2020). *See also, e.g.*, Rose (2020); Jenkins and Katz (2020); Levin (2020).

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### Significance Statement

This research examines significant changes in Trump's immigration detention release policy starting after his inauguration in January 2017. We provide evidence that changes in release started with immigration officers dissenting from the algorithmic risk recommendation in February 2017 which led to a shift in the algorithm in June 2017, which formalized the no-release policy under Trump. The analysis draws data from immigration detention cases between 2013 and 2019 received pursuant to the Freedom of Information Act (FOIA).

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without bond in the custody of the DHS, with outliers that are subject to release on excessively high bond.

The data in this report were obtained from ICE by the New York Civil Liberties Union (NYCLU) pursuant to a Freedom of Information Act (FOIA) request, and have been analyzed by Professor Robert Koulish, Joel J. Feller Research Professor at the University of Maryland, and founding director of MLAW Programs; Kate Evans, Clinical Professor of Law and director of the Immigrant Rights Clinic at Duke University School of Law; and Ernesto Calvo, professor of government and politics at the University of Maryland. It is part of a larger project conducted by Koulish, et al. on risk and immigration detention. Additional information released by DHS included the RCA's original risk assessment algorithms, changes to its scoring rubrics, training materials and data for thousands of risk cases nationally.[4] These materials are available online and are analyzed by Evans and Koulish (Evans and Koulish, 2020) in a separate publication.

### The Legal Framework for Immigration Detention

In 1996, Congress enacted a series of changes to immigration laws that made it more difficult for immigrants with any criminal history to remain in the United States. At the same time, Congress expanded the grounds of mandatory immigration detention. The mandatory detention provision in section 236(c) of the Immigration and Nationality Act (INA) increased the category of no-bond detention for persons convicted of specific enumerated offenses to include minor misdemeanor offenses alongside serious violent crimes. The justification for mandatory detention was to incapacitate dangerous individuals who posed the greatest flight risk without bond to ensure their removal from the country.[5]

Detention of other immigrants awaiting a decision on their removal is governed by section 236(a) of the INA. Section 236(a) allows for discretionary detention and provides ICE with three options: 1) to continue to detain the arrested alien "pending the removal proceedings"; 2) to "release the alien" on "bond of at least $1,500"; or 3) to release the alien on "conditional parole." The regulations implementing INA § 236(a) require a case-by-case determination based on whether the individual poses a risk to public safety or to flight.[6] Categorical detention is thus not permitted by statute or regulation for this group of immigrants.

Because certain people are mandatorily detained based on their removal charges, the timing of their apprehension, or the presence of a final removal order in their cases, regardless of risk,[7] the RCA is most useful in assessing risk for noncitizens who are discretionarily detained under INA § 236(a). Consequently, the majority of this study is limited to individuals who are not identified in the data as subject to mandatory detention, i.e. they do not have final removal orders and do not have criminal offense that fall within 236(c). This report shows that as much as mandatory detention contributes to mass detention of mostly Latinx immigrants (Ryo and Peacock, 2018), the second classification of detention, INA § 236(a), has

been turned into an accomplice to ICE's efforts to widen the net of immigrants forced to endure prolonged detention.

### Processing Immigrants into Custody

Decisions about detention are made as part of the custody determination process following initial intake as follows:

- The immigrant is arrested and brought into ICE custody.

- ICE makes an initial custody determination within 48 hours.

- As part of the initial intake process, ICE enters all information into the risk classification assessment to generate a detain/release recommendation as well as a bond amount (until bond was eliminated from the algorithm).

- The ICE officer, and then supervisor, agree/disagree with the risk tool's recommendation.

While individuals 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 (HSI), Criminal Alien Program (CAP) officers in state and federal prisons, or state and local officers designated to enforce immigration law through the 287(g) program. ICE must decide whether to place an individual in removal proceedings within 48 hours unless there is an emergency or other extraordinary circumstance.[8] The RCA is applied either by the external arresting agency or at the point of transfer to ICE custody. Data gathered through intake is combined with the migrant's responses to structured interview questions to determine public safety and flight risk levels and to generate a custody recommendation. Data from the risk tool informs us whether ICE has engaged in an individualized determination or blanket detention based on whether detention correlates with risk.

### The Risk Classification Assessment (RCA)

In January 2013, DHS launched the RCA—the largest risk assessment tool in the country—as part of its expanding detention regime (Nofferi and Koulish, 2014). 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.[9]

The RCA is an automated risk tool designed to help determine whether to detain or release non-citizens pending their deportation proceedings. Modeled on evidence-based criminal justice reforms (Lowenkamp et al., 2013; VanNostrand and Keebler, 2009), the RCA combines database records and interview information into a weighted scoring system that produces security and flight assessments—low, medium, high—and issues custody and supervision recommendations. The RCA was originally programmed to generate one of four recommendations: (1) detain in the custody of DHS (no bond); (2) detain, but as eligible for bond, with an accompanying recommended bond amount; (3) supervisor to determine; (4) release.

The ICE officer and supervisor respond to the recommendation. The officer must specify if he or she agrees with the RCA

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[4] For more information on the FOIA requests and the documents provided, see Evans and Koulish (2020) available at https://ssrn.com/abstract=3576175. The underlying FOIA results discussed in the article are available here: https://scholarship.law.duke.edu/faculty_scholarship/3994/.

[5] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. 110 Stat. 3009-546 (codifie at 8 U.S.C. § 1226(c)); Demore v. Kim, 538 U.S. 510 (2003).

[6] 8 C.F.R. § 1236.1(c)(8) (2019).

[7] See INA §§ 236(c), 235(b)(1), 238(b), 241(a)(2) (2018).

[8] 8 C.F.R. § 287.3(d).

[9] See Office of Inspector Gen., U.S. Dep't of Homeland Sec., OIG-15-22, U.S. Immigration and Customs Enforcement Alternatives to Detention (Revised) 4–5 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

recommendation and provide reasons for any disagreement. Then an ICE supervisor must review the RCA recommendation along with the ICE officer's comments and make a final decision with respect to the person's custody and any conditions for detention or release.

The RCA has four sections. The first section requires the ICE officer to identify any "special vulnerability" the migrant has through an interview and observations. The special vulnerabilities section is a response to mounting reports of men and women dying or suffering severe harm in immigration custody. The RCA contains a discrete list of vulnerabilities, which include: "serious physical injury, serious mental illness, disability, elderly, pregnant, nursing, sole caretaking responsibility, risk based on sexual orientation/gender identity, victim of persecution/torture, victim of sexual abuse or violent crime, victim of human trafficking." As it turns out the data we present below shows that very few immigrants are identified with special vulnerabilities, despite the broad characteristics, e.g., sole caretaker or trauma survivor, the tool is supposed to flag.
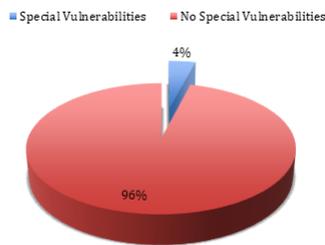


Chart 1: Percent of Total Cases Identified as Having a Special Vulnerability, 2013-2019

Most of the immigrants with special vulnerabilities are still detained without bond, by ICE. As seen in Figure 1 by 2019 about 85% of immigrants with special vulnerabilities (including both mandatory and non-mandatory detention) are detained without bond. In the section marked "findings", we break down the custody outcomes and risk classifications for individuals in non-mandatory detention.
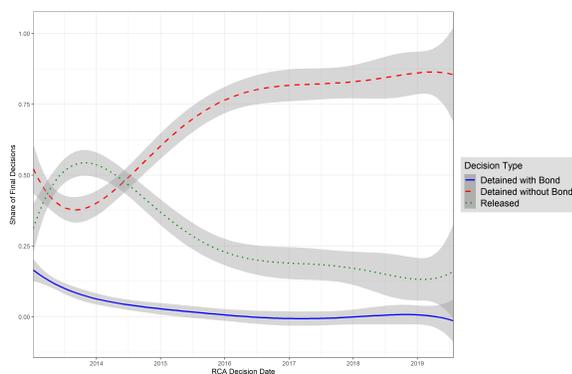


Fig. 1. Share of Decisions for Immigrants in Custody with Special Vulnerabilities, 2013-2019

The second section of the RCA requires an evaluation of mandatory detention. The inputs for mandatory detention are

derived from the various ICE databases, including immigration history and the FBI's National Crime Information Center (NCIC) database, which aggregates criminal history across jurisdictions. If the person has a final order of removal, he will be identified as subject to mandatory detention, with a few exceptions. Likewise, if the person was not authorized to enter the U.S. and was arrested within 14 days of entry near the border, he or she will be mandatorily detained. ICE officers must also review the criminal history and ensure that the removal charges are correct. The removal charges are then evaluated through the RCA to see if they trigger mandatory detention under INA § 236(c) and, if they do, the RCA recommends that the immigrant be detained without bond. A glimpse at the empirical data we present below in Chart 2 shows the mandatory detention category was responsible for detaining about a third (35%) of the immigrants in the New York field office during the time of this study. Because individuals who meet any of the mandatory detention criteria are detained regardless of risk, the remainder of this report focuses on individuals who are eligible for bond but are nonetheless detained.
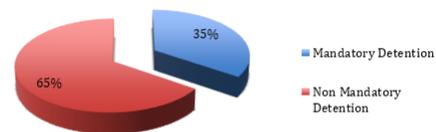


Chart 2: Percent of Total Immigrants Detained Subject to Mandatory Detention, 2013-2019.
*N=33,412*

Third is the section that requires an evaluation of public safety, and fourth is the section that evaluates flight risk. These factors generate a score that correlates to a high/medium/low public safety risk level and high/medium/low flight risk level. The risk levels are then combined to provide the risk tool's ultimate custody recommendation. Public safety factors document a migrant's criminal history, including the severity and number of crimes along with recentness of the offense. The goal was to align the scoring methodology to criminological classifications of dangerousness. Much of the information is drawn automatically from the FBI NCIC database. Risk factors are scored, and the RCA then assigns a risk level based on the public safety score. The RCA, however, disproportionately weighs certain charges so that some low-severity offenses, regardless of conviction, make release nearly impossible.[10]

Flight factors originally covered more dynamic information about the migrant's family and community relationships in this country. Information relevant to flight risk is generated for the most part during ICE intake interviews with the migrant. Scoring factors included family stability, property ownership, military service, work authorization, legal representation, and a stable address. The key flight factors initially emphasized length of residence and community ties. These factors were

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[10] Evans & Koulish, *supra* note 5.

manipulated over time, though, to neutralize community ties and instead tie flight risk to date of entry, date of removal order, or visa overstay.[11]

The RCA originally was programed to recommend release for people designated as a low risk for both flight and danger. Immigrants in the "low risk" category generally do not have criminal histories, but could have convictions for immigration offenses like illegal entry, or low-severity crimes like traffic violations (though having both within the last five years garnered a medium risk classification to public safety). Immigrants categorized as medium risks may have prior immigration violations or lack family ties, or they may have a low-level criminal offense on their record, including drug possession, prostitution, or shoplifting, plus a single traffic offense. Throughout the duration of the RCA, the risk tool has deferred a significant number of medium risk combinations to a supervisor for a final decision. By 2015, however, individuals with medium risk assessments in both public safety and flight were recommended for detention without bond. The RCA recommended that individuals classified as high-risk for both flight and danger be detained with bond initially, and then eliminated the bond recommendation. These individuals may be categorized as a high risk of danger because of their criminal history score or as a high risk of flight simply because of their recent arrival.

Scholars and immigrant advocates hoped that the RCA would serve as a check on mass immigration detention and push ICE to popularize alternatives to detention.[12]

In the early pre-launch days of the RCA, the Lutheran Immigration and Refugee Service (LIRS) had argued for the least restrictive means of custodial supervision for immigrants (imm, 2011).

Noferi and Koulish have documented the bipartisan support for alternatives to detention (ATD), along with substantial cost saving.[13] Amaral (Amaral, 2013) has documented the psychological benefits to the immigrant of using ATD rather than physical detention. Still, as Koulish and Calvo (Koulish and Calvo, 2020) show, the human alternatives to detention effectively tend to be overrun by punitive bias in the decision making process.

Scholars have also documented the impact that prolonged detention has on immigrants, particularly low-risk detainees. First, many low-risk refugees are traumatized before entering the U.S. immigration system (Keller et al., 2017). Second, studies have shown that individuals who do not pose harm are themselves traumatized by detention or incarceration. In particular, time spent in detention can cause psychological decline and trauma (Peterie, 2018). Unfortunately, the data described below show that the RCA did not result in a reduc-

tion in detention and has thus failed to prevent the severe and pervasive harm civil immigration detention inflicts.

## Manipulating the RCA

The RCA was designed to be highly malleable, responsive to changing enforcement and detention priorities,[14] and other factors. The risk system has been manipulated in four ways since 2012 by changing the scores assigned to each factor; the severity of every criminal offense; the scoring thresholds associated with high, medium, or low risk levels; and the ultimate recommendation generated for various combinations 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. These changes are represented by two themes: 1) accommodating enforcement priorities and, 2) accommodating officer preferences.

In addition, the changes can be divided into four separate time periods. The first version was in effect from October 2012 to December 2013.[15] This period covers from the beginning of the pilot period for the risk tool through the national launch in late January 2013. The algorithm translated Obama enforcement priorities, known as the "Morton memos" issued in 2011,[16] into factors to be weighted for the purpose of recommending detention and release. The second scoring system spanned December 2013 to January 2015. These changes accommodated internal disagreements between the RCA recommendation and final supervisor decisions. These significant changes to the risk algorithm are explained elsewhere by Koulish and Calvo (2020) and Evans and Koulish (2020). The third major shift again accommodated changing enforcement priorities announced in November 2014 with the label "felons, not families", and appeared in version 6.3 of the risk tool during February 2015. Finally, the fourth time period starts with version 6.4 in June 2017. This shift in the algorithm represents Trump's no-release detention policy. Evans and Koulish (2020) explain the manipulation of the risk algorithm and its departure from accepted indicia of risk in a separate article.[17]

## The Shifting Policy to Eliminate Bond under the Obama Administration

President Obama entered office with ideas for reforming immigration detention. The new Administration commissioned a national study of the conditions of detention centers nationwide, instigated by a series of highly publicized detention abuses. The Schriro Report (Schriro, 2009) documented management flaws, lack of oversight, medical attention, and pervasive abuse, and included risk classification assessment among its recommendations. The risk tool was piloted July 2012, and was deployed nationally by the end of January 2013.

Since 2011, the risk tool accommodated ICE enforcement priorities, starting with the Morton Memo in 2011, and in November 2014, Obama proposed the "*Felons, Not Families*" priorities. President Obama's November 2014 announcement of a new priority enforcement policy prompted major revisions

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[11] *Id.*

[12] *See, e.g.*, Das (2013) (arguing that a potential risk assessment tool's "impact is limited. Where it does apply, its effectiveness will undoubtedly turn on which criteria are used and how these criteria are weighted. In reviewing an early version of the tool, the United Nations High Commissioner for Refugees expressed concern that the tool 'risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones' and that its methodology "appears heavily weighted in favour of detention.'"); Koulish and Noferi (2013) ("ICE's new risk-assessment technology allows Congress to take those three steps — ending mandatory detention; imposing criteria and decreasing funding for discretionary detention; and enacting civil detention standards — while empirically demonstrating the lack of additional risk."); 201 (2012) (recommending the use of a "risk classification assessment tool to identify and properly place any detainees who present safety risks in custody"); mig (2015) ("While the RCA generally seeks to assess dangerousness, flight risk and vulnerability . . . ICE has not publicized the actual (evolving) criteria used to make "automated" custody and placement decisions. Thus, it remains difficult to assess whether this new enforcement tool will meaningfully alter custody rates and placement patterns, or will instead automatize continued overreliance on detention.").

[13] Noferi & Koulish, *supra note 12.*

[14] Evans & Koulish, *supra* note 5.

[15] Specific risk versions are noted for each case in the RCA database and on each risk classification summary form. Period 1 is July 2012–December 2013 (v 1.0–2.33); Period 2 is January 2014–February 2015 (3.0–5.0); Period 3 is February 2015–October 2016 (6.0–6.3).

[16] Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All Field Office Dirs. et al., U.S. Immigration & Customs Enf't (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[17] Evans & Koulish, *supra* note 5.

to the RCA's factors and scoring methodology in February 2015 to align the RCA with the new prosecutorial priorities.[18] Each significant change in enforcement translated into a new risk algorithm that was increasingly stringent for immigrants. As a result of algorithmic changes in February 2015, the RCA no longer used classic indicia of flight risk. Instead, date of entry was the prime determinant of flight risk level, earning a detention-no bond recommendation for recent entrants.

Public safety risk changed so that the scoring of certain crimes like drug possession, previously categorized as low severity, would now generate a medium public safety risk assessment followed by a recommendation for no-bond detention. Moreover, during the final year and a half of the Obama Administration, the RCA recommendations based on combined public safety and flight risk scores no longer generated a bond recommendation for anyone and only the low/low risk combination resulted in the recommendation for release. The result was a dramatic increase in individuals who were statutorily eligible for release but nonetheless detained without bond by ICE.

The changes under Obama became increasingly punitive with low-severity offenses pushed into higher risk categories and reductions in the scoring thresholds tied to low and medium risk levels. The risk tool's detention recommendations thus increasingly reflected political enforcement priorities, rather than indicia of flight risk or risk to public safety to justify civil detention.

## The No-Release Policy under the Trump Administration

Under Trump, even low-risk individuals are trapped in detention without bond. About three weeks after Trump issued Executive Order 13768 in January 2017, then-DHS Secretary John Kelly issued two enforcement memoranda that instructed enforcement officers to treat all immigration violations alike, regardless of criminal history or risk level. As a result, ICE enforcement priorities ceased as low-risk immigrants were arrested indistinguishably along with medium and high-risk individuals. This policy can be traced to Trump's antipathy towards immigrants well documented elsewhere. By late spring 2017, Kelly's enforcement memo was translated for risk purposes as the RCA algorithm was modified to ensure low-risk individuals were as likely as high-risk individuals to be detained without bond.

While the Obama Administration eliminated bond eligibility from the recommendations given by the RCA for anyone with a medium or high-risk level in either category, the Trump Administration went further. In 2017, Reuters News reported that DHS eliminated the release recommendation altogether (Rosenberg and Levinson, 2018). With this additional manipulation, a person seeking to leave immigration detention, regardless of their low risk of flight and low risk to public safety, had to rely on a supervisor's final decision or wait weeks to challenge their detention in immigration court. Not surprisingly, the rate of detention of individuals with no criminal history tripled after the Trump Administration struck the

release recommendation.[19]

## Training the Risk Algorithm

While enforcement priorities were one of several factors responsible for changing the algorithm, as important was the rate at which ICE supervisors disagreed with the algorithm's custody recommendations. Such disagreements came in the form of the override rate, which 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/release recommendation. Since override rates became the stock and trade of internal evaluations of 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 accommodates officer preference. The RCA became an example of the tail wagging the dog with the loss of liberty for thousands of people as a result.

A separate study by Koulish and Calvo (2020) shows that ICE officers have punitive bias, which is shown in patterns of dissent (overrides). Overrides of low risk recommendations were more prevalent than of high-risk recommendations, causing ICE to narrow the scope of the low risk categories, pushing people with the same histories from low risk categories to medium and high-risk categories. The RCA is changed to lower overrides by making the same history result in medium/high risk levels AND by changing the outcomes to recommend detention without bond for more risk categories. This occurred by making changes at each level of the algorithm, including the scores assigned to various factors; the severity levels for certain criminal offenses; the range of scores designating high, medium, or low risk levels; and the ultimate recommendation generated for various combinations of flight and public safety risk levels.[20] Under Obama, training the algorithm resulted in fewer immigrants assessed as low public safety and flight risk. However, the tool retained a release recommendation for those who were assessed as low risk in both categories. Under Trump, high numbers of low-risk individuals were ushered into custody by combining a policy of widening the net of immigrants apprehended with the elimination of the release recommendation for those with the lowest risks. As a result, we see higher rates of individuals with low level or no criminal records in immigration detention under Trump.

## FINDINGS

**Obama's No Bond Policy.** Bond eligibility plays a crucial role for immigrants who find themselves detained under INA § 236(a) by limiting the duration of detention and allowing immigrants to ascertain counsel and pursue relief from removal (Ryo, 2016; Gilman, 2016) The report, from this point forward, focuses on the custody decisions for those immigrants Congress has designated as eligible for release with or without conditions, such as bond.

In February 2015 the RCA was modified to remove its ability to recommend bond. Unbeknownst to the general public,

this modification was a creature of the Obama Administration, following at the heels of Obama's most pro-immigrant administrative reform, Deferred Action for Parents of Americans (DAPA), the expansion of Deferred Action for Childhood Arrivals (DACA) and the announcement of new enforcement priorities to focus on "felons, not families." It is significant that a focus on detaining and deporting recent arrivals, many of whom were women and children seeking asylum, accompanied these enforcement reforms. In brief, the algorithm version 6.0 that followed these policy announcements, effective February 2015, significantly changed detention and release criteria. In exchange for dropping enforcement against people with long-standing ties to the U.S. and parents of U.S. citizens and permanent residents, DHS under Obama jerry-rigged the risk tool to deny release to any unauthorized immigrant who entered the country after January 1, 2014. It was at this moment that the RCA stopped being useful to measure risk. It had been completely subsumed by Obama's enforcement priorities, as humane as the public was led to believe they were.

**Obama's No-Bond Policy Meets Trump's No-Release Policy.**
Consequently, Table 1 and Chart 3 (below) show final decisions by "Detain Without Bond"; Detain With Bond"; and "Release", by year from 2013-2019 (N=20,433). We show the constant rate of detention overall along with significant changes in the detention with bond decision starting February 2015 and no release starting June 2017. Both Obama and Trump dramatically shifted the RCA algorithm to coincide with policy considerations.

Table 1 is significant for two reasons: it demonstrates the overwhelming majority of detained-no bond cases since 2013, followed by the disappearance of bond after 2015 (February 2015) and release in 2017 (June 2017). No cases were recommended for bond after February 2015. This included both RCA recommendations and final decisions by supervisors. The shift in the rate of cases with detain without bond recommendations versus cases with detain with a bond recommendations demonstrates a shift in policy intended to minimize release of individuals eligible for release under statute by requiring all migrants to seek review of the no-bond decisions in front of an immigration judge.

Looking at these final decisions, the shift is particularly noticeable from 2014, during which 60% (2,336 of 3,920) of individuals were detained without bond, to 2015, when this percentage jumped significantly to 92% (1,765 of 2,316). This change coincided with the Obama Administration's decision to eliminate bond from any detention recommendation generated by the RCA. The rate of detention without bond then inched up to 94% in 2016 (1,447 of 1,532), 97% in 2017 (2,917 of 2,994), and 98% in both 2018 and 2019 (3,243 of 3,295). See the Appendix to this report for further details.

Viewed in the reverse, the data show the near elimination of bond from ICE's custody decisions. In 2013, 21% (1,112 individuals) were designated for detain with bond. In 2014, 14% (559) were detained with bond. In 2015, 2.3% (45) were designated detain with bond. In 2016, the rate dropped to 0% with 1 person receiving a detain with bond decision. The rate of 0% for bond eligibility decisions remained steady through 2019.

Finally, Table 1 also shows outcomes from Trump's no-release policy in 2017. Release, with or without community

**Table 1. Migrants Detained By Final Decisions for Bond in the New York City Area by Year**

|       | No Bond | Bond  | Total  |
|-------|---------|-------|--------|
| 2013  | 4,048   | 1,111 | 5,159  |
| %     | 78.46   | 21.54 | 100    |
| 2014  | 3,361   | 559   | 3,920  |
| %     | 85.74   | 14.26 | 100    |
| 2015  | 1,881   | 45    | 1,926  |
| %     | 97.66   | 2.34  | 100    |
| 2016  | 1,524   | 1     | 1,525  |
| %     | 99.93   | 0.07  | 100    |
| 2017  | 2,965   | 4     | 2,969  |
| %     | 99.87   | 0.13  | 100    |
| 2018  | 3,287   | 1     | 3,288  |
| %     | 99.97   | 0.03  | 100    |
| 2019  | 1,347   | 1     | 1,348  |
| %     | 99.93   | 0.07  | 100    |
| Total | 18,413  | 1,722 | 20,135 |
| %     | 91.45   | 8.55  | 100    |

supervision, has been underutilized throughout the life of the risk tool. The already depressed rate of release during early years of the risk tool stand in stark relief to the rate of release under Trump: from 19% (960) of individuals in 2013 and 26% (1,025) in 2014, to 2% in 2017 and 1.54% in 2018.

ICE's treatment of low risk immigrants demonstrates the cruelty and unlawfulness of its detention policy. In February 2015, the algorithm is changed to eliminate bond from the RCA's recommendations. The table below shows the resulting drop off in bond recommendations by ICE, with 21% granted bond in 2013, down to .07% in 2016.

In 2017, Trump's no-release policy compounded the deleterious effects for immigrants. During the first several months of the Trump Administration, journalists from Reuters investigated the RCA because very few individuals were being released. As it turns out, the risk tool had been in use since Day 1 of the Trump administration, but was hampered by the removal of the recommendation of release for people assessed as low flight risk and low public safety risks and we believe replaced the "release" option with either a "Defer to Supervisor" or "Detain with bond" option. The RCA then reserved very high bond recommendations for individuals with low/low risk level combinations, resulting in a skyrocketing rate of immigrants assessed as low flight risk and low risk to public safety held in civil detention.

Immigrants eligible to receive bond under Trump constituted cases that came through the final supervisor decision (the risk tool allows for a supervisor to determine options for individuals assessed with mid-level risks). As a result, the RCA has functioned as a risk tool in name only. Zero tolerance enforcement plus zero release detention sealed the fate of low-risk individuals who encounter ICE: almost everyone ends up detained without bond.

By examining the category of migrants with low/low-risk assessment levels, we show significant increases in detention without bond beginning in 2015. In 2014, 35% of individuals with low/low-risk assessments were detained without bond. By February 2015, with the algorithm making it difficult to score a low/low risk level combination—the only group who received a release recommendation—about two-thirds (67%) of the low/low risk group were detained without bond. Beginning

in 2017, between 80% and 100% of people assessed with low flight risk and low risk to public safety were detained without bond
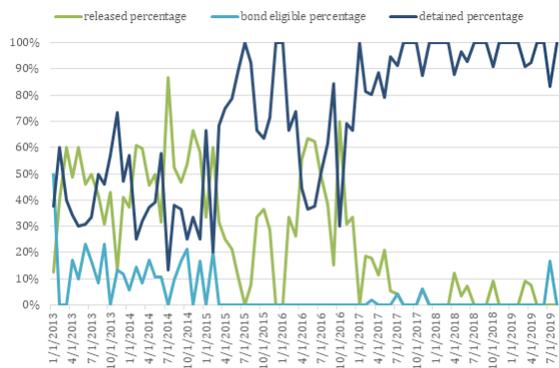


**Fig. 2.** Final Custody Decisions for Low/Low Risk Individuals by Month, 2013-2019



**Fig. 3.** Change in Share of Low Risk Individuals Released by ICE

**Drop in Release Rate for Low-Risk Immigrants.** When analyzing individuals who are detained without bond, it is startling to see such a high rate of low-risk individuals, who pose no threat to their communities or risk of flight. These are the people that individualized custody determinations under INA § 236(a) are intended to serve, allowing them to continue living productively in the community as their immigration cases journey towards completion. And yet, our analysis shows an extremely high rate of detention without bond for low-risk immigrants, particularly after Trump became president. As a result, immigrants are forced to wait weeks in order to plead their cases before an immigration judge, while experiencing the harms associated with that delay: loss of work, no income to support family members, mental illness, poor medical services, and far greater difficulty in securing legal assistance.

Accompanying the loss of bond recommendations is a significant drop in low-risk immigrants being released from detention altogether. Graph 3[21] below depicts the percentage of individuals with Low Public Safety/Low Flight Risk Assessments who are released. With the RCA versions 6.4-6.6, created under the Trump Administration, we show the steep reduction in individuals released on community supervision or their own recognizance, despite ICE's assessment that they represent little risk. For RCA versions in effect up to February 2015, between 50%-70% of Low/Low individuals were released. In 2015, this rate dropped to 30-40%. Recent entrants couldn't get low risk of flight after February 2015, so we surmise that low public safety (not low risk of flight) is the driver of the increase of detention in the low/low group. But under Trump, less than 5% of people assessed as low risk on both factors have been released.
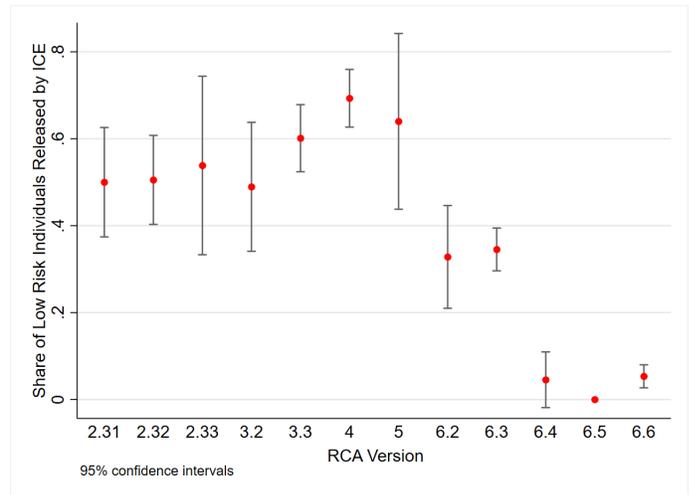
**The Growing Rate of Detention for Low-Risk Immigrants in New York City under Trump and the Erasure of Individualized Determinations.** Graph 4 shows a dramatic shift in the number of low-risk immigrants detained during the last year of the Obama Administration compared with the beginning of the Trump Administration. The y-axis is the percentage of total individuals detained without bond who were assessed with low public safety/low flight risk levels. The graph shows the significant shift in the percentage of detained immigrants with low levels of risk beginning with Trump's inauguration. At the end of the Obama Administration, approximately 15% of individuals detained without bond by ICE in the New York City area were assessed as low flight risk and low public safety risk. Soon after Trump's inauguration, the share of the detained population representing a low risk to public safety and a low risk of flight doubled to more than 30%.

We attribute the shift to a change from a tiered priority enforcement policy to zero tolerance immigration policing, keeping in mind that Obama detained many low-risk families during 2015 and 2016 with his focus on recent entrants. With Trump's dragnet enforcement policy, large numbers of low-risk immigrants were brought into the immigration enforcement system and the simultaneous changes to the RCA meant that they were not recommended for release. The lack of case-based determinations, in which ICE officers exercise their discretion to detain or release according to risk, pops out with alarming clarity in the RD Plot below. Once Trump's zero-tolerance policing is combined with the elimination of a release recommendation, the share of total immigrants detained who have the lowest risk combinations jumps from 15% to 30%.

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[21] An RD plot implements several data-driven Regression Discontinuity (RD)(plots), using evenly-spaced or quantile-spaced partitioning. The plot facilitates the accumulation of R-D based empirical evidence. The vertical lines on the diagram represent variance; the smaller the population N, the larger the variance. The red circle represents the mean.
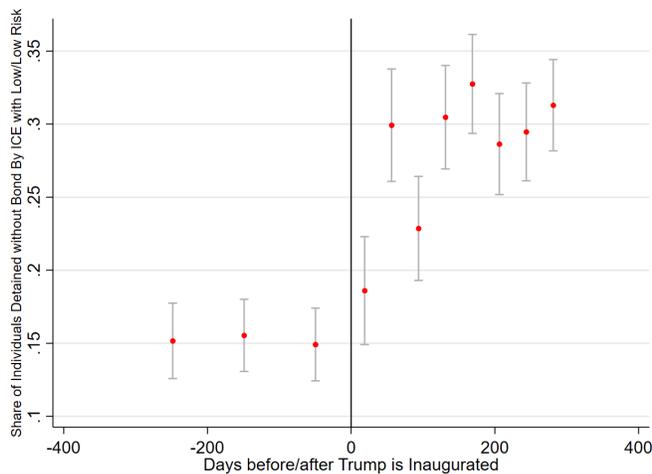
**Fig. 4.** Change in Share of Individuals Detained without Bond by ICE with Low/Low Risk

**The Growing Rate of Detention for Low-Risk Immigrants in New York City under Trump and the Erasure of Individualized Determinations.** In the findings below, we empirically demonstrate ICE's blanket no-release policy under Trump as risk level no longer correlates with detention rate and nearly everyone is detained. Table 2 below, shows a significant increase in the rate of low public safety risk detainees who had been arrested under zero tolerance and then detained without bond under Trump. Table 1 shows a doubling of detention for low-risk immigrants from Obama in 2016 (14.3%) to Trump in 2017 (28.6%). After 2013, the rate of low risk individuals drops off dramatically until Trump takes office. Then the proportions start to flip. The rate of low-risk migrants detained without bond then further increased in 2018 (32%), and again in 2019 (34%). By 2019, the share of individuals detained is approximately evenly distributed across public safety risk levels, demonstrating the irrelevance of risk to ICE's custody decisions.

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

Figure 5 demonstrates that ICE officers trained the risk algorithm with dissents (overriding the risk recommendation). Overrides were seen as indicators of dysfunction in the algorithm, ICE corrected for dysfunction by modifying the algo-

rithm, in a more punitive direction. Here, we show the shift in officer dissent rates from Obama's algorithm version 6.3 to Trump's version 6.4 in June 2017 that helped drive changes to the algorithm and then reflect assent to those changes.

Although Obama removed the bond recommendation from version 6.3 in February 2015, immigrants with low flight and low public safety risk assessments were still recommended for release. Trump's zero-tolerance policing trained the algorithm to move yet further away from its original purpose. Immigrants were arrested and brought into custody regardless of risk level as an expression of zero-tolerance enforcement, starting in February 2017. Expressions of discontent with the Obama algorithm and its release recommendation were subsequently registered in officer overrides of the RCA recommendation to release these low risk individuals. The officer overrides led to the detention of low-risk immigrants starting that month. The no-release policy was then formalized in June 2017 through further manipulation of the RCA's recommendations.

Graph 5 shows an abrupt increase in supervisor overrides of risk recommendations for individuals who are a low risk to public safety. The override rate (share of officer disagreement), climbs from about 15% in February 2017 to almost 40% 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 Growing Rate of Detention for Low-Risk Immigrants in New York City under Trump and the Erasure of Individualized Determinations.** Chart 4 lists public safety risk and flight risk level combinations and the associated rate of detention between 2013 and 2019.

**Table 2. Total Immigrants Detained without Bond by the ICE New York City Field Office by Public Safety Risk Level**

| Public Safety Risk Level | | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
|---|---|---|---|---|---|---|---|---|---|
| Low | # | 3,530 | 1,490 | 363 | 425 | 1,693 | 2,083 | 929 | 10,513 |
| | % | 38.13 | 21.18 | 9.57 | 14.3 | 28.57 | 31.68 | 33.62 | 27.43 |
| Medium | # | 4,123 | 3,228 | 1,233 | 943 | 1,833 | 2,191 | 860 | 14,411 |
| | % | 44.53 | 45.88 | 32.5 | 31.72 | 30.94 | 33.32 | 31.13 | 37.6 |
| High | # | 1,606 | 2,317 | 2,198 | 1,605 | 2,399 | 2,301 | 974 | 13,400 |
| | % | 17.35 | 32.94 | 57.93 | 53.99 | 40.49 | 35 | 35.25 | 34.97 |
| Total | | 9,259 | 7,035 | 3,794 | 2,973 | 5,925 | 6,575 | 2,763 | 38,324 |
| | % | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 |

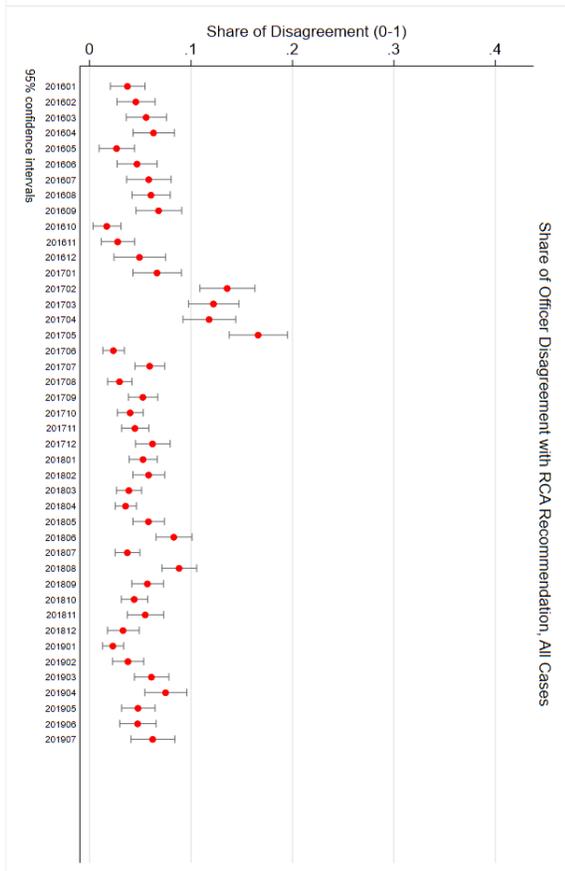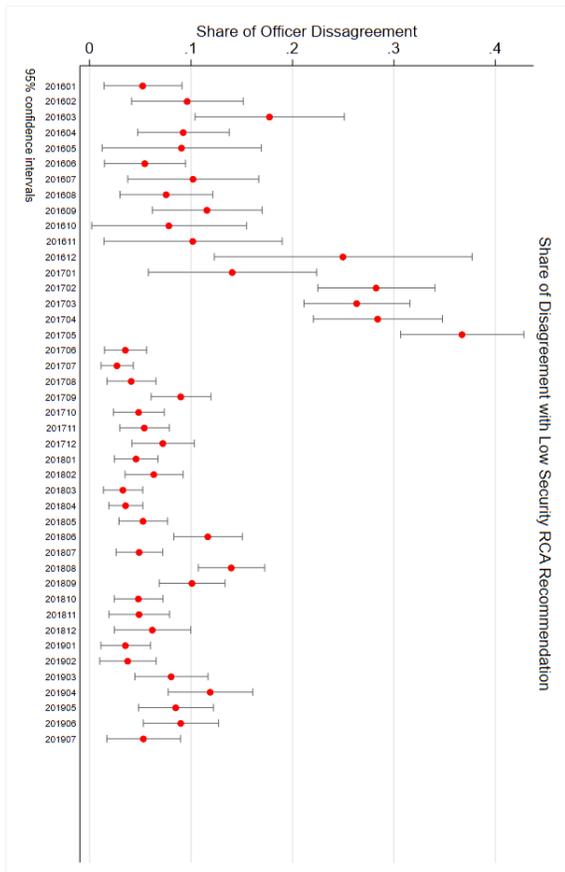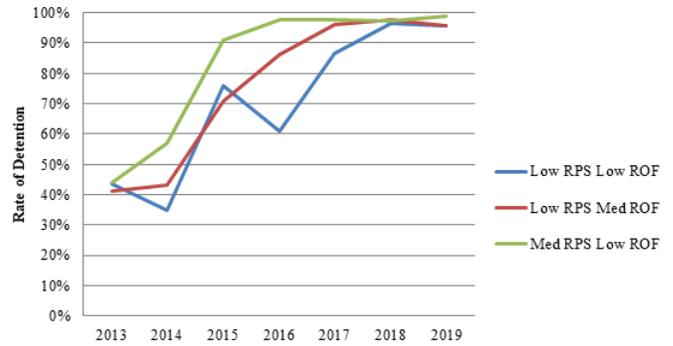*et al.*

Figure 6: Detention without Bond by Risk of Public Safety (RPS) and Risk of Flight (ROF) Combination

**The Growing Rate of Detention for Low-Risk Immigrants in New York City under Trump and the Erasure of Individualized Determinations.** The graph shows a remarkable spike in no bond detention for almost every low-risk individual. The rate for the combination of low public safety risk and low flight risk went from a 40% detention rate in 2013, to about 35% in 2014, and then rounding out at 100% by 2018 and 2019. This approach to near total detention without bond for low-risk immigrants highlights ICE's undoubted commitment to a no-release policy under Trump. Among those immigrants eligible for release by law, risk no longer drives detention. ICE officers have abdicated their obligations to assess each case and tailor the use of detention accordingly. Instead, everyone is detained.

## Conclusion

Although the risk algorithm is a reform that has been intended to make detention decisions increasingly objective and transparent over time, it has had the opposite effect on immigration detention. Since 2012, when the risk algorithm started as a pilot program until 2019, the risk algorithm and subsequent detention decisions have become increasingly punitive. ICE has mistreated immigrants in custody in the New York City region. By denying an individualized determination of custody status it has violated federal regulations, statutes and constitutional norms and hence stymied the non-criminalizing objectives of civil detention. ICE has misused the risk classification assessment tool, which was designed to ensure a more objective and accurate reading of flight and public safety risk. The categorical denial of bond for huge swaths of immigrants, despite their eligibility for release by statute, is anathema to the expectations citizens and immigrants have of the U.S. justice system.

This Report shows that ICE violates the regulatory requirement to provide an individualized determination. Trump's enforcement policies had the consequence of bringing a surge of low-risk immigrants into ICE custody. The risk system should strongly discourage the detention of low-risk immigrants who posed no danger to society and no risk of flight. Such individuals should be released on community supervision or on their own recognizance. The data show the opposite result. ICE detains immigrants regardless of risk. The results show that ICE has failed to perform the individualized assessment required and restrict its use of civil detention to only those

**Fig. 5.** Officer Dissent rates

whose high levels of dangerousness and risk of flight justify their incarceration.

The risk algorithm was supposed to train officers to accommodate their behavior to objective terms of the risk tool. Instead officer bias has trained the algorithm rather than have the algorithm train human behavior. As a result, ICE tightened the screws against low-risk immigrants by subjecting them to blanket detention, which has come to define the no-release Trump immigration policy in the New York City area. By using officers' rate of dissent to drive changes to the risk algorithm, the tool moved detention decisions away from rationality and instead reinforced the bias against immigrants. The few immigrants who were deemed eligible for bond by ICE supervisors were subjected to extraordinarily high bonds, adding another punitive layer to Trump's already expansive and unjustified detention policy.

**Recommendations:**

- End the no-release immigration detention policy. Trump's no-release policy detains without bond immigrants who should never have been detained in the first place. Almost no immigrants have been released since 2018. At a minimum, ICE should release low risk immigrants from immigration detention. This call for release is all the more urgent in the face of Covid-19 and ICE's inadequate response.

- ICE should provide an individualized determination of custody status to every immigrant in immigration custody. ICE has deprived immigrants of the right to an individualized custody determination, leaving many immigrants needlessly detained until they assert their right to a bond redetermination hearing before an immigration judge. For the majority of immigrants without counsel this right is even more likely to go unexercised.

- ICE should stop the over-detention of immigrants with special vulnerabilities. One of the initial objectives of the risk classification assessment tool was the humane response it promised for immigrants with special vulnerabilities. This report has shown how this promise has gone unmet.

- Individual risk for immigrants in custody rises and falls over time. The risk tool should be responsive to these changes in risk--increases and decreases. The tool should document favorable and unfavorable changes in risk; individuals should be reassessed for risk, and detention or release decisions should be updated accordingly.

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**Table 3. RCA Recommendations and Final Decisions by Year**

| RCA recommendation | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
|---|---|---|---|---|---|---|---|---|
| Detain in the Custody | 2,576 | 2,082 | 1,439 | 1,100 | 2,365 | 2,848 | 1,473 | 13,883 |
| % | 0.49932157 | 0.53112245 | 0.74714434 | 0.72178478 | 0.7965645 | 0.86618005 | 0.88949275 | 0.67914098 |
| Detain with Bond | 1,341 | 580 | 26 | 0 | 0 | 0 | 0 | 1,947 |
| % | 0.2599341 | 0.14795918 | 0.01349948 | 0 | 0 | 0 | 0 | 0.09524508 |
| Release on Community | 61 | 292 | 80 | 83 | 148 | 0 | 5 | 669 |
| % | 0.011824 | 0.0744898 | 0.04153686 | 0.05446194 | 0.04984843 | 0 | 0.00301932 | 0.03272674 |
| Supervisor to Determine | 1,181 | 966 | 381 | 341 | 456 | 440 | 178 | 3,943 |
| % | 0.22892033 | 0.24642857 | 0.19781931 | 0.22375328 | 0.15358707 | 0.13381995 | 0.10748792 | 0.19288719 |
| Total | 5,159 | 3,920 | 1,926 | 1,524 | 2,969 | 3,288 | 1,656 | 20,442 |
| % | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |

| RCA Final Decision | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
|---|---|---|---|---|---|---|---|---|
| 1. Detain, No Bond | 3,087 | 2,336 | 1,765 | 1,447 | 2,917 | 3,243 | 1,611 | 16,406 |
|  | 0.59837178 | 0.59591837 | 0.91640706 | 0.94451697 | 0.9742819 | 0.98421851 | 0.97695573 | 0.80126984 |
| 2. Detain with Bond | 1,112 | 559 | 45 | 1 | 4 | 1 | 1 | 1,723 |
|  | 0.21554565 | 0.14260204 | 0.02336449 | 0.00065274 | 0.00133601 | 0.00030349 | 0.00060643 | 0.0841514 |
| 8. Community Supervision | 960 | 1,025 | 116 | 84 | 73 | 51 | 37 | 2,346 |
|  | 0.18608257 | 0.26147959 | 0.06022845 | 0.05483029 | 0.0243821 | 0.015478 | 0.02243784 | 0.11457875 |
| Total | 5,159 | 3,920 | 1,926 | 1,532 | 2,994 | 3,295 | 1,649 | 20,475 |
|  | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |

| Detained, eligible and not eligible for bond | 4,199 | 2,895 | 1,810 | 1,448 | 2,921 | 3,244 | 1,612 | 18,129 |
|---|---|---|---|---|---|---|---|---|
|  | 0.81391743 | 0.73852041 | 0.93977155 | 0.94516971 | 0.9756179 | 0.984522 | 0.97756216 | 0.88542125 |

**Table 4. Percent Detained, no Bond by Risk Level by Year**

|  | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 |
|---|---|---|---|---|---|---|---|
| Low RPS Low ROF | 66 | 116 | 94 | 73 | 230 | 158 | 67 |
|  | 0.43708609 | 0.35045317 | 0.75806452 | 0.60833333 | 0.86466165 | 0.96341463 | 0.95714286 |
| Low RPS Med ROF | 254 | 54 | 17 | 31 | 76 | 132 | 68 |
|  | 0.41033926 | 0.432 | 0.70833333 | 0.86111111 | 0.96202532 | 0.97777778 | 0.95774648 |
| Med RPS Low ROF | 86 | 383 | 469 | 383 | 372 | 221 | 97 |
|  | 0.43877551 | 0.57078987 | 0.90891473 | 0.97704082 | 0.97637795 | 0.97356828 | 0.98979592 |
| Med RPS Med ROF | 369 | 156 | 55 | 50 | 80 | 89 | 42 |
|  | 0.48425197 | 0.50649351 | 0.93220339 | 0.90909091 | 0.96385542 | 0.98888889 | 0.97674419 |
| Low RPS, High ROF | 855 | 219 | 34 | 77 | 512 | 724 | 355 |
|  | 0.69738989 | 0.49772727 | 0.87179487 | 0.97468354 | 0.99610895 | 0.9797023 | 0.95174263 |
| High RPS, Low ROF | 33 | 277 | 879 | 626 | 470 | 178 | 78 |
|  | 0.38823529 | 0.54743083 | 0.93610224 | 0.978125 | 0.98739496 | 0.9726776 | 1 |
| Med RPS, High ROF | 895 | 518 | 27 | 17 | 436 | 764 | 363 |
|  | 0.68320611 | 0.65239295 | 0.9 | 1 | 0.99316629 | 0.99479167 | 0.98373984 |
| High RPS, Med ROF | 149 | 145 | 96 | 96 | 99 | 87 | 53 |
|  | 0.4775641 | 0.75129534 | 0.96 | 0.97959184 | 0.97058824 | 0.98863636 | 0.98148148 |
| High RPS, High ROF | 353 | 437 | 50 | 59 | 606 | 867 | 441 |
|  | 0.75751073 | 0.84038462 | 1 | 1 | 0.99181669 | 0.98859749 | 0.98878924 |