ARTICLES

ZERO TOLERANCE FOR PRETRIAL RELEASE OF UNDOCUMENTED IMMIGRANTS

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ABSTRACT

More than ever, undocumented immigrants are being criminalized regardless of their place in the fabric of American society. The Bail Reform Act generally presumes the pretrial release of federal defendants, regardless of immigration status. Decades of aggressive immigration enforcement have resulted in more undocumented defendants possessing strong ties to the United States and little to no criminal history—equities which favor release. Yet the pretrial detention rate of undocumented immigrants continues to rise and is nearing 100%. The unyielding rate of detention is partly explained by judicial officers who misapply the bail statute and detain undocumented immigrants clearly eligible for release.

Overlooked, however, is the role Pretrial Services plays in the mass pretrial incarceration of undocumented immigrants. Under the Pretrial Services Act, pretrial services officers must timely inform judicial officers of information pertaining to pretrial release. But under an exclusionary policy, pretrial services officers conduct minimal investigation of undocumented defendants, leaving judicial officers unable to make accurate and timely release decisions. As a result, undocumented immigrants must waive their right to a timely detention hearing and endure prolonged criminal detention. In many cases, undocumented immigrants become so discouraged that they surrender their pretrial release rights altogether.

This Article is the first to discuss the exclusionary policy against undocumented immigrants. The exclusionary policy violates the Pretrial Services Act, subverts decision-making on pretrial release, and infringes upon undocumented immigrants' rights under the Bail Reform Act. Fortunately, attorneys can counter the policy and safeguard the besieged rights of undocumented immigrants through zealous advocacy.

INTRODUCTION

The family of the accused pour into the gallery of the courtroom. A woman in shackles watches them from afar. Her spouse, a United States citizen, sits on the edge of his seat, tapping his heel in rhythm with the ticks of the clock. Her American-born daughters, lost in anxious wonder, gaze up at the cathedral-high ceiling of the courtroom. Her elderly mother, fiddling with a wireless headset, gives a thumbs-up to the court's Spanish interpreter. Three strikes from a gavel and an "all rise" call everyone to attention. Just as quickly as the detention hearing begins, it ends with an all-too-predictable result. The magistrate judge denies the woman's motion for bond and orders her jailed pending trial. The reason the woman is behind bars: she is undocumented.

For over thirty years, the tendency to detain federal defendants pending trial has intensified.[1] Pretrial release has become more elusive for undocumented

[1] *See infra* Cohen & Austin, note 84 (examining recent trends in pretrial release rates); Section I.B (reviewing the immediate impact of the BRA on pretrial release rates).

immigrants than for any other category of defendants.[2] This glaring disparity has complex causes.[3] Chief among them is an oft-alleged lack of community ties, a crucial factor in determining a defendant's risk of flight under the Bail Reform Act of 1984 ("BRA"), the primary piece of legislation regulating pretrial release determinations.[4] Yet millions of undocumented immigrants have lived in the United States for years, even decades.[5] They go to school in the United States, marry United States citizens, and raise American-born children. Undocumented immigrants often work in sectors that are critical to the United States' economy and run their own businesses. Aggressive immigration enforcement has, perhaps counterintuitively, encouraged many undocumented immigrants to cement their ties to American communities.[6]

In an age of zero tolerance enforcement of immigration laws, more undocumented immigrants, largely Hispanic,[7] are being funneled through the federal criminal justice system, regardless of the degree to which they have immersed themselves in their communities.[8] The BRA contains a general presumption of release for defendants regardless of immigration status, especially when defendants possess strong community ties and do not pose a danger to the community.[9] Yet the rate of pretrial detentions among undocumented immigrants is rising, nearing an astounding 100%.[10] Justifications from judicial officers, pretrial services officers, and prosecutors follow the same line of reasoning: undocumented immigrants are unmanageable

[2] *See infra* Part I (reviewing the rise in pretrial detention of undocumented immigrants since 1984).

[3] *See infra* Sections I.A–B (analyzing the temporary detention provision of the Bail Reform Act of 1984 ("BRA") and its effect on undocumented immigrants); Section I.E (detailing the unlawful presumption against the pretrial release of undocumented immigrants); note, 170 (noting the history of racial animus in criminal immigration prosecutions); Part II (reviewing pretrial services' unlawful exclusionary policy against evaluating undocumented immigrants for pretrial release and how prolonged detention discourages undocumented immigrants from seeking pretrial release).

[4] *See* 18 U.S.C. § 3142(g) (2006); *infra* Section I.A (reviewing the BRA).

[5] *See* Bryan Baker, *Estimates of the Illegal Alien Population Residing in the United States: January 2015*, DEP'T OF HOMELAND SEC. (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf (referencing table 1).

[6] *See infra* note 150 (describing how aggressive immigration enforcement intensifies social ties to the United States).

[7] Almost all defendants charged with immigration offenses identify as Hispanic. *See, e.g.*, MARK MOTIVANS, BUREAU OF JUST. STATS., IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE *SYSTEM*, 2010 (2012), https://www.bjs.gov/content/pub/pdf/iofjs10.pdf (reporting 96% in 2010).

[8] *See infra* Section I.D (detailing the rise in prosecution of long-time resident undocumented immigrants).

[9] *See infra* Section I.A (providing the legislative history and overview of the BRA).

[10] *See infra* Section I.D.

flight risks—even dangerous—and must be kept behind bars.[11] Scholars and practitioners have criticized this pretrial detention practice as constituting an unlawful presumption of detention against undocumented immigrants as they await trial.[12] But failure to correctly and fairly apply the BRA is only part of the reason why pretrial release is nearly impossible for undocumented immigrants.

From the moment of arrest, undocumented immigrants are met with calculated disregard by pretrial services officers.[13] Pretrial services officers are employees of judicial agencies ("Pretrial Services") charged under the Pretrial Services Act of 1982 ("PSA") with collecting and verifying information relevant to the risk of flight or dangerousness, and reporting this information to judicial officers in a timely manner.[14] However, when tasked with evaluating undocumented defendants, pretrial services officers often abdicate their statutory duties. Pursuant to what has been described as an exclusionary policy,[15] pretrial services officers neither interview undocumented defendants nor conduct individualized risk assessments, leaving judicial officers unable to make informed and individualized release decisions under the time constraints demanded by the BRA.[16] As a result, undocumented immigrants seeking pretrial release endure prolonged pretrial detention in order to obtain an "informed" pretrial release determination.[17] The time undocumented immigrants needlessly spend in jail stalls the criminal proceedings, delays their requests for immigration relief, and gives prosecutors more time to indict and try undocumented immigrants.[18] Many undocumented immigrants clearly eligible for release become so discouraged they acquiesce to pretrial detention with the hope of resolving their case sooner.[19] The exclusionary policy, thus, strong-

[11] *See infra* Section I.E (discussing misapplications of the BRA to undocumented immigrants); Section II.D (analyzing erroneous pretrial risk assessments of undocumented immigrants).

[12] *See infra* note 166, listing examples.

[13] *See infra* Part II (reviewing the duties of pretrial services officers and the unlawful exclusionary policy against evaluating undocumented immigrants for pretrial release).

[14] 18 U.S.C. § 3154(1) (1982). *See infra* Section II.A (examining the Pretrial Services Act of 1982 ("PSA") and the duties of pretrial services officers).

[15] *See* MAHONEY ET AL., *infra* note 191, at 26 (describing an exclusionary policy as excluding a certain category of defendants from pretrial release consideration); SEGEBARTH, *infra* note 198, at 45–46.

[16] *See infra* Section II.B (discussing how the exclusionary policy applies to undocumented immigrants).

[17] *See infra* Section II.D (discussing untimely pretrial release investigations for undocumented immigrants).

[18] *See infra* Section II.D (describing the consequences of the exclusionary policy for undocumented immigrants).

[19] *See infra* Section II.E (discussing undocumented defendants' waiver of pretrial release rights).

arms undocumented immigrants into giving up their rights under the BRA[20]—and their right to liberty itself.[21]

This Article is the first to shed light on the role of pretrial services officers in the unbridled pretrial incarceration of undocumented immigrants.[22] Part I of this Article reviews the BRA, trends in immigration policy and enforcement, and the unlawful presumption of detention against undocumented immigrants. Part II reviews the PSA, the investigatory duties and practices of pretrial services officers, and the unlawful exclusionary policy against undocumented immigrants. Part III contends that zealous defense advocacy from a case's inception would counter the exclusionary policy and enable undocumented immigrants to exercise their pretrial release rights unhindered. Specifically, this Article recommends early screening of equities favoring pretrial release, active participation by attorneys in initial appearances in order to obtain timely pretrial interviews, and utilizing Pretrial Services' own risk assessment tool to establish the low risks undocumented immigrants pose when released.

First, in order to understand the impact of the exclusionary policy on undocumented immigrants seeking pretrial release, it is necessary to review trends in pretrial detention and immigration enforcement.[23] For the past thirty-six years, the proportion of undocumented defendants detained pretrial has risen in tandem with increasingly stringent immigration reforms and enforcement, culminating in today's zero tolerance prosecution of immigration offenses.[24]

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[20] *See infra* Section II.E (explaining how the exclusionary policy discourages undocumented defendants from seeking pretrial release).

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

[22] While other articles have discussed the unlawful presumption of pretrial detention against of undocumented immigrants, to the author's knowledge, none have discussed Pretrial Services's exclusionary policy against undocumented immigrants.

[23] This Article only addresses the pretrial release and detention of undocumented immigrants charged with federal crimes. However, given the legislative attempts by states to keep undocumented immigrants in jail pending trial, analogous issues may be present at the state level. *See, e.g.*, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 792 (9th Cir. 2014) (finding Arizona bail statute barring undocumented immigrants accused of a serious offense from pretrial release unconstitutional); Lopez-Matias v. State, 504 S.W.3d 716, 720 (Mo. 2016) (finding Missouri bail statute barring undocumented immigrants from pretrial release unconstitutional).

[24] This Article does not discuss the predicament undocumented defendants face when detained by immigration authorities while on pretrial release. *See infra* note 164 (citing cases upholding the immigration detention of undocumented defendants released pretrial). However, it is worth noting that undocumented immigrants who have reentered the country and seek withholding of removal may request an immigration bond after passing a reasonable fear interview. *See* 8 U.S.C. § 1226(a) (2016); 8 C.F.R. § 208.31 (2007); Guzman Chavez v. Hott, 940 F.3d 867, 882 (4th Cir. 2019); Guerra v. Shanahan, 831 F.3d 59, 62–64 (2d Cir. 2016). *But see* Padilla-Ramirez v. Bible, 882 F.3d 826, 832–3 (9th Cir. 2017) (holding that

I. MASS PRETRIAL INCARCERATION OF UNDOCUMENTED IMMIGRANTS

The BRA signaled the beginning of a worsening trend in the federal criminal justice system.[25] Since the law's passage in 1984, federal courts have increasingly jailed defendants pending trial.[26] At first glance, this is unsurprising. Congress enacted the BRA in response to public concern over a perceived connection between pretrial release and rising crime during the 1960s, 1970s, and 1980s.[27] The law fundamentally changed the purpose of pretrial detention, from ensuring that defendants showed up to court, to also protecting the public from defendants whom the court deemed dangerous.[28] While an initial increase in pretrial detention following the BRA's enactment was predictable, the pretrial detention rate has continued to climb for the last three decades, especially among undocumented immigrants.[29]

Additionally, criminal and immigration policy premised on public safety and national security concerns resulted in increased deportation and criminalization of undocumented immigrants in the years following the BRA's enactment.[30] As the rate of prosecution for illegally crossing into the United States rose, the pretrial detention rate increased even further.[31] However, recently the number of undocumented immigrants entering the country has dropped to historic lows.[32] Over the last fifteen years, the focus of immigration prosecution has shifted to undocumented immigrants with strong ties to the United States and

mandatory detention under 8 U.S.C. § 1231(a) applies to aliens in "withholding-only" proceedings); Mohamed T. Hegazi, *To Be or Not to Be Detained: Why Reinstated Removal Orders during Withholding-Only Proceedings Are Not Administratively Final*, 15 SETON HALL CIR. REV. 57, 67–73 (2018) (discussing circuit split). Further, immigration authorities have the authority to stay the reinstatement of a prior order of removal and temporarily release the alien where "continued detention is not in the public interest." *See* 8 C.F.R. §§ 212.5(b), 241.6 (2012). *See infra* Sections I.A–B (reviewing changes and immediate impact of the BRA on pretrial release and detention); note 329 (listing examples of relief from removal); note 331 (listing cases in which undocumented defendants sought immigration relief during the pendency of their federal case).

[25] *See infra* Section I.B (reviewing the immediate impact of the BRA on pretrial release rates).

[26] *See infra* Sections I.B–D (analyzing pretrial detention rates since passage of the BRA).

[27] *See* Donald Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 936 (1985); *infra* Section I.A (discussing the legislative history of the BRA).

[28] *See infra* Sections I.A–B (explaining changes and immediate impact of the BRA to pretrial release and detention).

[29] *See infra* Sections I.C–D (discussing trends in the prosecution and detention of undocumented immigrants following passage of the BRA).

[30] *See infra* Sections I.C–D (detailing the impact of policies enacted to bolster safety and national security on prosecution and deportation of undocumented immigrants following passage of the BRA).

[31] *See infra* Section I.C.

[32] *See infra* Section I.D.

with little to no criminal history.[33] Nonetheless, the pretrial detention rate of undocumented immigrants continues to rise, nearing 100%.[34] To understand this extraordinary reliance on pretrial detention, it is first necessary to review the BRA and how it applies to undocumented immigrants.

A. *The Bail Reform Act of 1984—History and Provisions*

The BRA is best understood in the context of its legislative history. The law was passed as a component of the Comprehensive Crime Control Act of 1984 ("CCCA"), one of the most extensive overhauls of the federal criminal justice system in recent history.[35] As its name suggests, the CCCA was intended to curtail increasing crime and violence.[36] Its passage was also motivated by the perception that judges had become too lenient in their treatment of defendants.[37] Accordingly, the CCCA introduced a host of "tough-on-crime" measures,

[33] *See infra* Section I.D.

[34] *See infra* Section I.D.

[35] Included in the omnibus bill were the BRA, the Sentencing Reform Act of 1984, and the Controlled Substances Penalties Amendments Act of 1984, among other pieces of legislation. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837–2199 (1984).

[36] The national violent crime rate rose through most of the 1960s, 1970s, and 1980s. *See* NATHAN JAMES, CONG. RESEARCH SERV., R45236, RECENT VIOLENT CRIME TRENDS IN THE UNITED STATES 2 (2018), https://fas.org/sgp/crs/misc/R45236.pdf. Criminologists were divided on whether to provide greater rehabilitation services or punishment to deter criminal behavior. *Compare* FRANCIS CULLEN & KAREN GILBERT, REAFFIRMING REHABILITATION 91 (1982) ("[A] criminal justice system rooted in retributive principles will be neither more just, more humane, nor more efficient than a system that, at least ideologically, had offender reform as its goal . . . [R]ehabilitation should not be so readily cast aside but rather reaffirmed."), *with* JAMES WILSON, THINKING ABOUT CRIME 145 (rev. ed. 1983) ("[T]here is one great advantage to incapacitation as a crime control strategy—namely, it does not require us to make any assumptions about human nature . . . . Rehabilitation works only if the values, preferences, or time-horizon of criminals can be altered by plan . . . . Incapacitation, on the other hand, works by definition: its effects result from the physical restraint of the offender and not from his subjective state."). Ultimately, the school of retribution persuaded lawmakers, and the CCCA passed both houses of Congress with strong bipartisan support. *See* S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182 (Westlaw) ("The [CCCA] is the product of a decade long bipartisan effort of the Senate Committee on the Judiciary, with the cooperation and support of successive administrations, to make major comprehensive improvements to the federal criminal laws.").

[37] *See, e.g.*, Ronald Reagan, Remarks at the Annual Conference of the National League of Cities (Mar. 5, 1984) (transcript available at The Ronald Reagan Presidential Library) ("The scales of criminal justice are still tilted towards protecting the rights of criminals. I believe it's high time we restore a proper balance and start doing more to protect our law-abiding citizens. Lenient judges are only lenient on crooks; they're very hard on society."); Lay & De La Hunt, *supra* note 27, at 930 n.5 ("Former Attorney General Smith blamed 'lenient judges' and 'the weak court system' for the granting of bail to defendants[.]") (citing ST. PAUL DISPATCH, Nov. 21, 1984, at A2, col. 2).

including mandatory minimum sentences for certain offenses,[38] increased penalties for drug crimes,[39] abolition of parole,[40] and a requirement that sentencing courts follow United States Sentencing Commission guidelines.[41] The CCCA took bail reform in the same direction: towards greater reliance on incarceration.[42]

Prior to the CCCA, pretrial detention in the federal criminal justice system was regulated by the Bail Reform Act of 1966.[43] Congress passed the Bail Reform Act of 1966 in response to a rising sentiment that jailing an individual who was presumed innocent and could not afford bail was unconstitutional.[44] Accordingly, the old bail statute created a presumption in favor of pretrial release in all but capital cases.[45] Courts were required to release defendants on their personal recognizance or upon execution of an unsecured appearance bond,

[38] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(2), 98 Stat. 1992 (codified as 18 U.S.C. § 3561 (1996)) (requiring mandatory sentences of imprison for Class A and Class B felonies in addition to a minimum of 1 year of probation for all felonies); 1005(a), 98 Stat. 2138 (codified as 18 U.S.C. § 924(c) (2006)) (requiring mandatory minimum sentences for certain firearm offenses)).

[39] Pub. L. No. 98-473, title II, §§ 502–504, 98 Stat. 2068–70 (1984) (amending 21 U.S.C. § 841(b) (1982)).

[40] Pub. L. No. 98-473, title II, § 218(a)(5), 98 Stat. 2027 (1984) (repealing 18 U.S.C. § 4201 (1984)).

[41] 18 U.S.C. §§ 3553(b)(1), 3742(e) (2006). *Contra* United States v. Booker, 543 U.S. 220, 245 (2005) (finding mandatory sentencing guidelines under 18 U.S.C. §§ 3553(b)(1), 3742(e) (2006) unconstitutional in violation of Sixth Amendment).

[42] Within a decade of the passage of the CCCA, the number of inmates in BOP custody rose approximately 166%. *See* FED. BUREAU OF PRISONS, PAST INMATE POPULATION TOTALS (last visited Aug. 1, 2020), https://www.bop.gov/about/statistics/population_statistics.jsp. The national population, meanwhile, only grew slightly over 10% during the same period. *See* U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (Apr. 11, 2000), https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt.

[43] Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 2–6, 80 Stat. 214–17 (1966) (codified as 18 U.S.C. §§ 3141–3151 and repealed 1984). To avoid confusion, this Article will refer to the repealed statute by its full name, the Bail Reform Act of 1966, or simply "the old bail statute," where appropriate.

[44] *See* S. REP. NO. 89-750, at 6 (1965) ("The principle that a person is presumed innocent until proven guilty by a court of law is perhaps the most basic concept of American criminal justice . . . There is no doubt . . . that each year thousands of citizens accused of crimes are confined before their innocence or guilt has been determined by a court of law, not because there is any substantial doubt that they will appear for trial if released, but merely because they cannot afford money bail. There is little disagreement that this system is indefensible."); Warren Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 19, 24 (1970) ("Two fundamental premises were established by the Act: (1) that a person's financial status should not be a reason for denying pretrial release; and (2) that danger of nonappearance at trial should be the only criterion considered when bail is assessed.").

[45] 18 U.S.C. § 3146(a) (1966) (repealed 1984).

unless such conditions would not reasonably assure their appearance in court.[46] When a defendant posed a high risk of flight, courts were empowered to impose a partially secured appearance bond or non-financial conditions of release, such as designated placement with a third-party, restrictions on travel, or a curfew.[47] The old bail statute also listed specific criteria for gauging a defendant's flight risk, including: the nature and circumstances of the offense, weight of the evidence, family and community ties, employment, financial resources, character and mental condition, criminal record, and prior record of failing to appear in court.[48] If no conditions of release would reasonably assure the defendant's appearance, the court could order that the defendant be detained without bond.[49] However, courts found detention without bond to be an extreme measure to ensure the defendant's appearance.[50] Lack of immigration status, standing alone, did not pose such a risk of flight as to warrant detention without bond.[51]

Non-financial conditions and objective criteria for release were novelties of the Bail Reform Act of 1966. The law incorporated research revealing that, given verified information regarding a defendant's background and community ties, the overwhelming majority of defendants could be trusted to appear in court

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 ("The purpose of this act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not *needlessly* be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." (emphasis added)); Jack Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 342 (1994) ("[T]he 1966 Act . . . denied bail only to ensure the appearance of a defendant at trial."); Patricia Wald & Daniel Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, AM. B. ASS'N J. 630, 638 (1966), https://dcchs.org/wp-content/uploads/2018/11/Judge-Wald-on-Bail-Reform-Act-33-JBDC-1966.pdf ("Defense counsel who argues that release is required should be prepared for a contrary argument by the prosecuting attorney: The act's statement of purpose assures only that persons are 'not needlessly detained . . . when detention serves neither the ends of justice nor the public interest.' Consistent with this, several provisions of the statute expressly contemplate detention of some persons resulting from 'inability to meet the conditions of release.'").

[50] *See, e.g.*, United States v. Abrahams, 575 F.2d 3, 8 (1st Cir. 1978) (affirming the denial of bond in a noncapital case where the defendant was an escaped felon who had "lived a life of subterfuge, deceit, and cunning" while warning that this was a "rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); United States v. Melville, 306 F. Supp. 124, 127 (S.D.N.Y. 1969) ("While the statute . . . does not say this in so many words, it has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance for trial.").

[51] *See infra* Section I.B (noting the low rate of pretrial detention in immigration cases prior to the BRA relative to today).

without financial conditions.[52] Thus, following the 1966 law's passage, the proportion of felony defendants being released pretrial soared.[53] This dramatic increase in pretrial releases, however, coincided with a decades-long rise in violent crime,[54] creating a causal connection in the minds of the public between pretrial release and increased crime.[55] By 1980, crime had risen to the top of the public's domestic concerns.[56] Despite evidence to the contrary,[57] politicians blamed the rise in crime on defendants released pending trial.[58] Undocumented immigrants were also incorporated into the narrative of rising crime based on

[52] *See* Lay & De La Hunt, *supra* note 27, at 931–32 ("In 1961, the Manhattan Bail Project by the Vera Institute in New York City paved the way for the reform of the federal bail system. The Project discovered that when judges had access to verified information on an accused's background and community ties, the overwhelming majority of defendants could be released on their own recognizance and would appear in court.").

[53] *Id.* at 932.

[54] *See* JAMES, *supra* note 36.

[55] *See* Lay & De La Hunt, *supra* note 27, at 933.

[56] *See* Julian Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 129 (1992) (citing 1980 mail survey identifying crime as most serious domestic problem after economic issues).

[57] In drafting the BRA, the Senate found that the rise in criminal activity during the 1960s, 1970s, and 1980s was a result of simple demographics. *See* S. REP. NO. 225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 1983 WL 25404, at *292–*93 ("Another factor behind the growth in prisoners has been the rise in the general population between the ages of 18 and 25, where criminal activity is historically most common . . . . Crime statisticians forecast that the Baby Boom following the Korean War will keep the number of offenders high throughout the 1980s."); *see also* Lay & De La Hunt, *supra* 27, at 944 ("Between July 1975 and June 1983, for example, only 2.7% of the released defendants in the ten pilot districts where pretrial services were available failed to appear at trial. A well-known study by the National Bureau of Standards found that pretrial felony crimes represented only 5% of those committed by defendants on release.").

[58] *See, e.g.*, Ronald Reagan, *Radio Address to the Nation on Proposed Crime Legislation* (Feb. 18, 1984) (transcript available at The American Presidency Project), https://www.presidency.ucsb.edu/node/261578 ("The judge can only consider whether it's likely the defendant will appear for trial if granted bail. Recently, a man charged with armed robbery and suspected of four others was given a low bond and quickly released. Four days later he and a companion robbed a bank, and in the course of the robbery a policeman was shot. This kind of outrage happens again and again, and it must be stopped. So, we want to permit judges to deny bail and lock up defendants who the government has shown pose a grave danger to their communities."); S. REP. NO. 225, 1983 WL 25404, at *3 ("Many of the changes in the bail reform act incorporated in this bill reflect the committee's determination that federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."); *see also* Miller, *supra* note 44, at 31–34 (criticizing the Bail Reform Act of 1966 but also warning that any bail reform to expand a court's authority to detain defendants pending trial should be limited to cases involving violence).

scant empirical evidence and media coverage vilifying immigrants, particularly Mexican immigrants.[59] Accordingly, in 1984, Congress replaced the old bail statute with the BRA,[60] "mark[ing] a significant departure from the basic philosophy of the Bail Reform Act [of 1966]."[61]

The BRA vests courts with substantially greater authority in overcoming the presumption of release pending trial.[62] First, the law permits courts to detain or impose additional non-financial conditions of release on defendants who pose a danger to themselves or the community.[63] The law also authorizes a greater breadth of non-financial conditions by allowing judicial officers to impose any release condition that is reasonably necessary to assure the defendant's appearance and the safety of others.[64] These allowances include: requiring that defendants maintain or actively seek employment, seek education, refrain from possessing dangerous weapons, refrain from abusing alcohol or drugs, and

[59] *See, e.g.*, Paul Walters, *Future Impact of Illegal Alien Population on Law Enforcement*, CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING iii, 2, 37 (1986), https://www.ncjrs.gov/pdffiles1/Digitization/109610NCJRS.pdf (noting the non-existence of a comprehensive empirical study on the relationship between crime and undocumented immigrants and that, of forty-eight law enforcement agencies surveyed, only three kept actual crime statistics on undocumented immigrants); L.A. POLICE DEPT. ILLEGAL ALIEN COMM., THE ILLEGAL ALIEN PROBLEM AND ITS IMPACT ON LOS ANGELES POLICE DEPARTMENT RESOURCES 9 (1977), https://www.ncjrs.gov/pdffiles1/Digitization/82050NCJRS.pdf (tying undocumented immigrants in Los Angeles to rising crime based on mere opinion surveys from police officers); Douglas Massey & Karen Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPUL. DEV. REV. 4–6 (2012) (discussing how undocumented immigrants from Mexico, largely outside the public's consciousness during the 1960s, became the subject of negative media coverage during the 1970s and 1980s that framed Mexicans as invaders and criminals). This was not the first time Mexicans were indiscriminately blamed for criminal activity. *See, e.g.*, Ron Grossman, *The 1954 deportation of Mexican migrants and the 'wetback airlift' in Chicago*, CHI. TRIB. (Mar. 4, 2017), https://www.chicagotribune.com/opinion/commentary/ct-flash-deportation-migrant-mexican-0305-20170303-story.html. (quoting Attorney General Herbert Brownell in 1953 as stating, "an uncontrolled wave of crime remindful of the prohibition era is sweeping the southwest in the wake of the illegal entry of hundreds of thousands of alien Mexicans across the border."); W. F. Kelly, *Wetbacks: Can the States Act to Curb Illegal Entry?*, 6 STAN. L. REV. 287, 291 n.28 (1954) (noting a sheriff's accusations that undocumented immigrants not seeking agricultural work were "bent on theft and robbery").

[60] Comprehensive Criminal Control Act of 1984, Pub. L. No. 98-473, title II, § 203(a), 98 Stat. 1976 (codified as 18 U.S.C. §§ 3141–3156).

[61] *See* S. REP. NO. 225, 1983 WL 25404, at *3.

[62] The BRA also parted ways with the old bail statute by authorizing courts to presumptively detain defendants pending appeal. *Compare* 18 U.S.C. § 3148 (repealed 1984), *with* 18 U.S.C. § 3143 (1984).

[63] The Bail Reform Act of 1966 permitted courts to detain defendants in non-capital cases only if they were unmanageable risks of flight. *Compare* 18 U.S.C. § 3146(a) (repealed 1984), *with* 18 U.S.C. §§ 3142(c), (e)(1) (1984).

[64] *Id.* § 3142(c)(1).

undergo medical, mental health, or substance abuse treatment.[65] However, the BRA limits courts to imposing the least restrictive condition or combination of conditions necessary.[66] Pretrial release and detention determinations must also be based on an individualized analysis.[67]

Further, the BRA provides a host of rebuttable presumptions in favor of pretrial detention, depending on the offense alleged and the defendant's criminal history.[68] However, the BRA's sole reference to undocumented immigrants is a provision discussing temporary detention of certain noncitizens.[69] The law requires courts to detain non-citizen defendants, who have not been lawfully admitted for permanent residence, for up to ten days and to direct the prosecutor to notify immigration authorities. The ten-day detention period stemmed from the concern that notifying immigration authorities over long distances would require an extended period of time.[70] In order to temporarily detain an undocumented defendant, the court must also find that the defendant "may flee" or pose a danger to others.[71] While potentially reading as mandatory, the temporary detention provision does not apply if immigration authorities already know of the undocumented defendant's presence in the country.[72] The BRA's temporary detention provision "is primarily a 'notice provision designed to give other agencies an opportunity to take custody of a defendant before a BRA

[65] *Id.*

[66] *Id.* § 3142(c)(1)(B).

[67] *See, e.g.*, United States v. Diaz-Hernandez, 943 F.3d 1196, 1199 (9th Cir. 2019) ("[T]he Bail Reform Act mandates an individualized evaluation guided by the factors articulated in § 3142(g)."); United States v. Santos-Flores, 794 F.3d 1088, 1091–92 (9th Cir. 2015); United States v. Stone, 608 F.3d 939, 946 (6th Cir. 2010) ("[E]ach defendant is entitled to an individualized determination of bail eligibility."); United States v. Tortota, 922 F.2d 880, 888 (1st Cir. 1990) ("Detention determinations must be made individually and, in the final analysis, must be based on the evidence which is before the court regarding the particular defendant."); United States v. Hurtado, 779 F.2d 1467, 1472 (11th Cir. 1985).

[68] A rebuttable presumption of detention applies in certain cases involving drugs and violence, conspiracy to commit murder or kidnapping outside the United States, acts of terrorism, and certain offenses against minors. 18 U.S.C. § 3142(e)(1). A rebuttable presumption of detention also applies if, while on pretrial release within the last five years, the defendant has been convicted of a crime of violence for which the maximum term of imprisonment is at least 10 years, an offense for which the maximum sentence is life imprisonment or death, drug offenses for which the maximum term of imprisonment is at least 10 years, or any felony involving a minor victim, the possession use of a dangerous weapon, or failing to register as a sex offender. *Id.* § 3142(e)(2).

[69] The temporary detention provision also applies to defendants on probation or parole, or on release pending trial, execution of a sentence, or appeal. *Id.* § 3142(d).

[70] *See* S. REP. NO. 225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 1983 WL 25404, at *17.

[71] § 3142(d)(2).

[72] *See* United States v. Lett, 944 F.3d 467, 472 (2d Cir. 2019); *see also* S. REP. NO. 225, 1983 WL 25404, at *17.

release order is issued.'"[73] Accordingly, if immigration authorities transfer custody of an undocumented immigrant for criminal prosecution or file a detainer, the temporary detention provision does not apply, and courts must apply the BRA as they would to a citizen.[74]

The judicial officer does not necessarily hold a detention hearing in each case. The prosecutor must first move to detain the defendant on the basis of the offense charged or because the offense charged involves a serious risk of flight or obstruction of justice.[75] The judicial officer may also move *sua sponte* for a detention hearing on the basis of risk of flight or obstruction of justice.[76] If either the prosecutor or judicial officer move to detain the defendant, then the judicial officer must hold the detention hearing at initial appearance, unless the prosecutor or defendant requests a continuance.[77]

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[73] *Lett*, 944 F.3d at 472 (quoting United States v. Soriano Nunez, 928 F.3d 240, 246 (3d Cir. 2019)). *See* S. REP. NO. 225, 1983 WL 25404, at *17 ("The ten-day period is intended to give the government time to contact the . . . immigration official and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate.").

[74] *See* § 3142(d)(2) ("If the official fails or declines to take such person into custody during that period, *such person shall be treated in accordance with the other provisions of this section*, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." (emphasis added)); United States v. Ailon-Ailon, 875 F.3d 1334, 1338 n.2 (10th Cir. 2017) ("Because Ailon-Ailon was initially arrested by ICE, it does not appear that the notice provision of subsection (d) applies to this case."); United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 964 (E.D. Wis. 2008) (". . . ICE has been notified of defendant's presence and has not taken him into custody, instead lodging a detainer. That being the case, § 3142(d) requires me to treat defendant like any other offender under the Bail Reform Act."); United States v. Adomako, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) ("The Court could have ordered Adomako temporarily detained for not more than ten days, and could have directed the attorney for the government to notify the appropriate INS official. However, when the matter first came to the undersigned duty magistrate judge's attention, the INS already knew of his arrest and the parties were prepared for a dispositive detention hearing. Therefore, as directed by Congress in § 3142(d), this Court properly applied the normal release and detention rules to the deportable alien without regard to the laws governing release in INS deportation proceedings."); *see also* Lena Graber & Amy Schnitzer, *The Bail Reform Act & Release from Criminal & Immigration Custody for Federal Criminal Defendants*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYERS GUILD 1, 4 (2013), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_Jun_federal-bail.pdf ("Because of a detainer, or because the case was referred by DHS, federal courts often skip the ten day temporary detention period and go straight to a bail hearing.").

[75] § 3142(f).

[76] *Id.* § 3142(f)(2).

[77] *Id.* § 3142(f) ("The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance."); FED. R. CRIM. P. 5(d)(3) (at initial appearance, "[t]he judge must detain or release the defendant as provided by statute or these rules.").

In assessing the defendant's risk of flight and dangerousness, the judicial officer must consider the factors laid out under § 3142(g), which track many of those listed in the Bail Reform Act of 1966 with added consideration for dangerousness.[78] The judicial officer must consider, among other factors, the nature and circumstances of the offense charged, weight of the evidence, danger posed by the defendant's release, and the defendant's history and characteristics.[79] The defendant's history and characteristics include family ties, employment, financial resources, community ties, and criminal history.[80] In order to inform the judicial officer of the presence of § 3142(g) factors, pretrial services officers must investigate the defendant's background and draft a report to the judicial officer prior to the detention hearing.[81] In practice, however, pretrial services officers conduct minimal investigation of undocumented immigrants and systematically fail to individually assess them for release, as discussed below.[82]

B. *The Immediate Impact of the BRA on Pretrial Release*

The BRA tightened the screws on federal pretrial release for citizen and undocumented defendants alike.[83] However, of the major categories of defendants, those charged with immigration offenses experienced one of the greatest immediate rises in pretrial detention, second only to those charged with violent offenses involving firearms.[84] In 1983, a year before the passage of the

[78] *Compare* 18 U.S.C. § 3142(g), *with* § 3146(b) (repealed 1984).

[79] § 3142(g).

[80] *Id.*

[81] *See infra* Section II.A (reviewing the statutory duties of pretrial services officers).

[82] *See infra* Section II.B (discussing the exclusionary policy applied to undocumented defendants).

[83] *See* BUREAU OF JUST. STATS., PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984, at 1 (Feb. 1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf ("The Bail Reform Act of 1984 made substantial changes in Federal pretrial release and detention practices.…[P]retrial detention has largely been used as an alternative to bail as a means of holding defendants.").

[84] *See id.* at 3 tbl.4 (comparing pretrial detention rates in 1983 and 1985). The precise pretrial detention rate of undocumented defendants is difficult to ascertain due to sparse historical data specific to undocumented immigrants. Annual reports from the Bureau of Justice Statistics (BJS) tend to record pretrial release rates by offense category. Immigration offenses include the smuggling, harboring, and hiring of undocumented immigrants. *See* MARK MOTIVANS, BUREAU OF JUST. STATS., FEDERAL JUSTICE STATISTICS 2009 – STATISTICAL TABLES 49 (Jan. 26, 2012), https://www.bjs.gov/content/pub/pdf/fjs09st.pdf (defining "immigration offense" for BJS data-collection purposes). As such, immigration defendants may include defendants who are citizens and non-citizens legally in the country. Nonetheless, the vast majority of immigration offenses have historically consisted of illegal reentries, illegal entries, and immigration document fraud—offenses necessarily committed by undocumented immigrants. *See* JUDICIARY DATA AND ANALYSIS OFFICE, TABLE 5.3 U.S.

BRA, 23.8% of defendants were detained pending trial, almost all due to failing to post bond, rather than being denied bond.[85] In fact, only 1.7% were ordered detained without bond.[86] For immigration defendants, the detention rate was 50.6%.[87] Similarly, very few immigration defendants were detained without bond—only 3%.[88] Most immigration defendants remained detained for failure to post bond.[89] Evidently, courts in 1983 did not consider undocumented immigrants to be so great a flight risk as to deny them pretrial release en masse, per current practices.[90]

In 1985, a year after the BRA went into effect, the general pretrial detention rate rose to 28.9%.[91] This modest increase belied fundamental changes in pretrial detention resulting from the BRA. While the general rise in pretrial detention was small, the use of detention without bail skyrocketed, from 1.7%

DISTRICT COURTS – CRIMINAL DEFENDANTS FILED, BY OFFENSE 1–4 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jff_5.3_0930.2018.pdf (reflecting that, from 1995 to 2018, between 76% and 89% of immigration offenses in district court consisted of illegal entries, illegal reentries, and immigration document fraud). Accordingly, the pretrial detention rate of immigration defendants serves as the best proxy for the detention rate of undocumented immigrants where precise data on undocumented immigrants is unavailable. *See* Thomas Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82 FED. PROBATION J. 3, 6 tbl.1 (2018) (providing pretrial release rates of undocumented immigrants from 2008 to 2017).

[85] *See* BUREAU OF JUST. STATS., THE BAIL REFORM ACT OF 1984, *supra* note 83, at 2 tbl.1. In the past, BJS has included in the pretrial detention rate individuals who were detained after the initial appearance but subsequently released pending trial. *See* BUREAU OF JUST. STATS., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1990, at 22 tbl.2.1 (Sept. 1993), https://www.bjs.gov/content/pub/pdf/cfjs90.pdf (noting the "[p]ercentage of defendants who at any time after initial appearance were: detained" and that "some defendants who were initially detained eventually raised bail or had the conditions of their bail changed"). This Article is concerned with undocumented defendants ordered detained without the opportunity for release. Accordingly, some of the pretrial detention rates cited in this Article are based on subtracting the pretrial *release* rate from 100%, thereby capturing only those defendants detained through the pendency of their case.

[86] *See* BUREAU OF JUST. STATS., THE BAIL REFORM ACT OF 1984, *supra* note 83, at 3 tbl.4.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See infra* Sections I.D–E (reviewing the extremely high pretrial detention rate of undocumented immigrants and misapplications the BRA that unlawfully keep them jailed pending trial). Immigration detention was also rare until the late 1980s. *See* Heidi Altman, *Alternatives to Immigrant Incarceration: A Discussion Guide*, NAT'L IMMIGRANT JUST. CTR. (Apr. 22, 2019), https://immigrantjustice.org/staff/blog/alternatives-immigrant-incarceration-discussion-guide.

[91] *See* BUREAU OF JUST. STATS., THE BAIL REFORM ACT OF 1984, *supra* note 83, at 3 tbl.4.

to 18.8%.[92] This increase reflects the application of the BRA's presumptions of detention in certain cases as well as the heightened consideration of a detainee's dangerousness in pretrial release determinations.[93] The pretrial detention rate of non-immigration defendants has continued to rise over the years.[94]

In contrast, the pretrial detention rate of immigration defendants soared immediately following the BRA, from about 50% to 67.1% of defendants.[95] Consequently, the percentage of detained Hispanic defendants also jumped, from about a third to nearly *half* of all defendants.[96] Much of this increase is attributable to the BRA's temporary detention provision, rather than to findings of dangerousness.[97] In fact, immigration defendants tended to have less criminal history, including less history of violent offenses, than other defendants.[98] Nonetheless, the BRA marked the beginning of a decades-long trend towards nearly universal pretrial incarceration of undocumented immigrants.

C. *Closing the Back Door on Undocumented Immigrants*

Just as the CCCA sought to curtail rising crime, immigration reform in the late 1980s and 1990s aimed at "closing the back door" on undocumented immigrants.[99] These laws were often intertwined with "tough-on-crime" legislation and rhetoric associating undocumented immigrants with crime and terrorism.[100] The Anti-Drug Abuse Act of 1986 imposed mandatory minimum sentences of imprisonment for many drug offenses and expanded the types of

[92] *See id.* (illustrating pretrial detention with no bond jumped exponentially for defendants charged with violent crimes with a firearm, from 4.6% to 53.2%, and for defendants charged with drug offenses with a ten-year maximum sentence, from 1.0% to 25.4%).

[93] *Id.* at 3 ("Between 1983 and 1985 . . . the likelihood increased that defendants who showed indications of being dangerous to the community would be held until trial."); *see also* 18 U.S.C. § 3142(e)(3) (2008).

[94] *See* Cohen & Austin, *supra* note 84, at 6 fig.1 (reflecting a pretrial detention rate of 45% in 2008 and 53% in 2017).

[95] *See* BUREAU OF JUST. STATS., THE BAIL REFORM ACT OF 1984, *supra* note 83, at 3 tbl.4.

[96] *Id.* at 4 tbl.7.

[97] *Id.* at 3.

[98] *Id.* at 4.

[99] *See* George H. W. Bush, Remarks on Signing the Immigration Act of 1990 (Nov. 29, 1990) (transcript available in The American Presidency Project) ("Immigration reform began in 1986 with an effort to close the back door on illegal immigration.").

[100] *See* 142 CONG. REC. H2259-60 (daily ed. Mar. 14, 1996) (statement of Rep. McCollum) (while debating the Antiterrorism and Effective Death Penalty Act, stated: "[O]ften times we find that terrorists or would-be terrorists are criminal aliens and we are not deporting them in a proper fashion. The sooner we get them out of the country, the better procedures we have for that, the less likely we are to have that element in this country either create the actual acts of terrorism or directing them in some manner. We need to kick these people out of the country.").

drugs that make immigrants inadmissible.[101] A 1988 amendment to the law further expanded the power of immigration authorities to deport immigrants by creating a new classification of deportable offenses—"aggravated felonies."[102] Immigrants convicted of an aggravated felony were subject to expedited deportation proceedings, doubled waiting times for applying to reenter the country, and enhanced criminal penalties for illegal reentry.[103] Under the amendment, immigrants convicted of an aggravated felony were subject to mandatory detention.[104]

As Congress strengthened the immigration consequences of criminal convictions, the number of deportations surged.[105] The number of border apprehensions also fell at the close of the 1980s, reflecting a drop in unauthorized immigration.[106] However, border apprehensions were again on the

[101] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1751, 100 Stat. 3207 (amending 8 U.S.C. §§ 1182(a)(23), 1251(a)(11), 21 U.S.C. § 841(b)(1)).

[102] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7344, 102 Stat. 4181 (Nov. 18, 1988) (amending 8 U.S.C. §§ 1101(a), 1252(a)). The law originally defined an "aggravated felony" as murder, drug trafficking, or any illicit trafficking in firearms or destructive devices. However, the statute has since been amended to include many more offense categories and has engendered a family of case law over what specific offenses the term encompasses. *See* Moncrieffe v. Holder, 569 U.S. 184 (2013) (holding that a state conviction for possession of marijuana with intent to distribute is not an aggravated felony under the Immigration and Nationality Act).

[103] Anti-Drug Abuse Act of 1988, *supra* note 102 at §§ 7345, 7347, 7349 (amending 8 U.S.C. §§ 1182(a)(17), 1252(a), 1326).

[104] *Id.* at § 7343.

[105] *See* Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. SOC. 1786, 1802 fig.1 (2012) (displaying an exponential increase in criminal deportations beginning in 1986).

[106] *See* U.S. BORDER PATROL, NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2019 (Jan. 2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Apprehensions%20%28FY%201925%20-%20FY%202019%29.pdf (reflecting a drop in apprehensions by Border Patrol between 1986 and 1989, from 1,692,544 to 891,147). Due to the irregular nature of unauthorized immigration, there are no precise statistics on the yearly flow of undocumented immigrants into the United States. While the number of border apprehensions does not entirely encapsulate the number of undocumented immigrants entering the United States, it does parallel trends in authorized immigration from Mexico. *Compare* Ana Gonzalez-Barrera, *Apprehensions of Mexican Migrants at U.S. Borders reach Near-Historic Low*, PEW RES. CTR. (referencing chart entitled "Apprehensions of Mexicans at U.S. borders fall to near-historic lows in 2015") (Apr. 14, 2016), https://www.pewresearch.org/fact-tank/2016/04/14/mexico-us-border-apprehensions, *with* JEFFREY PASSEL ET AL., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS, PEW RES. CTR. 8 fig.1.3 (Apr. 23, 2012), https://www.pewresearch.org/hispanic/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/ (providing examples such as both measures saw peaks in 1995, 2000, and 2004 and subsequent declines). This is unsurprising as most undocumented immigrants have historically come from Mexico. *See*

upswing by 1990.[107] The pretrial detention rate of immigration defendants rose to nearly 80%,[108] possibly due to the influx of recent arrivals with few ties to the country and increased prosecution of immigration offenses.[109]

Amidst a flurry of popular hostility towards undocumented immigrants in the mid-1990s,[110] Congress and the President attempted to seal the "back door" on undocumented immigrants by fortifying the southern border with Mexico.[111]

JEFFREY PASSEL & D'VERA COHN, U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE, PEW RES. CTR. 5 (referencing chart entitled "Those from Mexico have decreased") (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/. Accordingly, trends in border apprehensions are a useful, though imperfect, measure for gauging the flow of unauthorized immigration into the United States.

[107] *See* U.S. BORDER PATROL, *supra* note 106 (reflecting an increase in border apprehensions between years 1989 to 1990, from 891,147 to 1,103,353).

[108] *See* BUREAU OF JUST. STATS., COMPENDIUM, 1990, *supra* note 85, at 22 tbl.2.1 (reflecting that 20.6% of immigration defendants were released at some point during their case).

[109] *Id.* (reflecting a total of 4,804 immigration defendants in 1990); BUREAU OF JUST. STATS., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1989, at 22 tbl.2.1 (May 1992), https://www.bjs.gov/content/pub/pdf/cfjs89.pdf (3,791 immigration defendants in 1989); BUREAU OF JUST. STATS., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1988, at 22 tbl.2.1 (Dec. 1991), https://www.bjs.gov/content/pub/pdf/cfjs88.pdf (3,014 immigration defendants in 1988).

[110] In 1994, a majority of California voters approved Proposition 187, a ballot initiative stripping undocumented immigrants of access to public education, nonemergency health care, and other social services. *See* Cal. Gov't Code § 53069.65 (West 2012); Cal. Educ. Code § 48215(a) (West 2006); Cal. Welf. & Inst. Code § 10001.5 (West 2001); Cal. Health & Safety Code § 130(a) (West 1990). Also known as the "Save Our State" initiative, Proposition 187 spawned similar legislative efforts across the country. *See* Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1356–78 (2013) (discussing Prop. 187 and other state efforts to regulate immigration policy). These legislative efforts reflected the dim view that most Americans held at the time on immigration. *See Immigration*, GALLUP.COM, https://news.gallup.com/poll/1660/immigration.aspx (last accessed on Aug. 1, 2020) (referencing graph entitled "In your view, should immigration be kept at its present level, increased or decreased?").

[111] Border Patrol intensified deterrence efforts along the southern border with Operations Gatekeeper in California, Operation Safeguard in Arizona, and Operation Hold The Line in Texas. *See* William Jefferson Clinton, Remarks on the Immigration Policy Initiative and an Exchange with Reporters (Feb. 7, 1995) (transcript available in The American Presidency Project); Press Release, Reno Announces New Agents & Resources to Secure Texas Border & Cut Illegal Immigration, Department of Justice (Jan. 6, 1995), https://www.justice.gov/archive/opa/pr/Pre_96/January95/9.txt.html; Press Release, AG Reno Announces New Agents and Resources to Strengthen Operation Gatekeeper and Cut Illegal Immigration, Department of Justice (Jan. 4, 1995), https://www.justice.gov/archive/opa/pr/Pre_96/January95/3.txt.html; *Reno Initiative Aims to Control Immigration*, N.Y. TIMES (Sept. 18, 1994), https://www.nytimes.com/1994/09/18/us/reno-initiative-aims-to-control-

Fortification of the southern border was accompanied by even more stringent immigration reform. First, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[112] Ostensibly responding to the Oklahoma City and 1993 World Trade Center bombings, the law made amendments to immigration laws that had little to do with the threat of terrorism.[113] Among other measures, the law removed habeas corpus review over deportation orders of immigrants with certain criminal convictions; restricted eligibility for visas; expanded the list of deportable offenses, including aggravated felonies and crimes of moral turpitude; drastically limited the grounds for collateral attack of prior orders of removal in criminal illegal reentry cases; and restricted judicial review of deportation orders.[114] Soon after, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the most extensive—and punitive—immigration legislation in recent memory.[115] The law extended both expedited removal and mandatory detention to immigrants deemed inadmissible; stripped courts of judicial review over prior orders of removal and discretionary forms of relief, including cancellation of removal, adjustment of status, and voluntary departure; vastly expanded the scope of aggravated

immigration.html. With military assistance, Border Patrol also constructed new border fencing near urban border areas. *See* D&D Landholdings v. United States, 82 Fed. Cl. 329, 332–33 (2008) (discussing Operation Gatekeeper in detail); President's Report Reviews Initiatives, "Accepts Immigration Challenge," 71 No. 43 Interpreter Releases 1469 (Nov. 7, 1994); *see also* CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 2–3 (Mar. 19, 2009), https://fas.org/sgp /crs/homesec/RL33659.pdf.

[112] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[113] *See* William Jefferson Clinton, President of the United States, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *in* WHITE HOUSE ARCHIVES ("This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents and restrict a key protection for battered spouses and children. The provisions will produce extraordinary administrative burdens on the Immigration and Naturalization Service. The Administration will urge the Congress to correct them in the pending immigration reform legislation."); Antiterrorism and Effective Death Penalty Act of 1996: Conference Report on S. 735, CONG. REC., vol. 142, no. 55, 104th Cong., 2nd Sess., E645 (Apr. 18, 1996) (statement by Rep. Mink) ("I am deeply concerned that these provisions expand authorization for deportation of aliens without any association with crimes of violence or terrorism.").

[114] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 412, 423, 435, 440–442, 110 Stat. 1269, 1271–80 (1996).

[115] Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, titles I–VI, 110 Stat. 3009–546 (1996).

felonies to include even some misdemeanors; and increased the penalties for entering the country illegally.[116]

Despite aggressive immigration legislation and enforcement, unauthorized immigration continued to rise.[117] In 2000, border apprehensions reached a fourteen-year high.[118] Criminal prosecution of immigration violations increased substantially, and the pretrial detention rate of immigration defendants rose to nearly 90%, again, possibly due to the influx of recent arrivals being prosecuted as well as the curtailing of protections from removal.[119] While the flow of undocumented immigrants into the country has since fallen, this unprecedented reliance on pretrial detention became the new normal well into the new century.

D. *Zero Tolerance Immigration Enforcement and Prosecution*

Following the terrorist attacks of September 11th, 2001, unauthorized immigration came under renewed scrutiny.[120] Border apprehensions had already begun to drop before the attacks as part of a long-term decline in unauthorized immigration.[121] Nonetheless, premised on the perceived threat of terrorists infiltrating into the country, the newly-created Department of Homeland Security ("DHS") allocated large increases of funds and personnel to border security.[122] Criminal immigration prosecutions also increased considerably over

[116] *Id.* at 3009-546, 3009-575, 3009-579, 3009-607, 3009-627; *see* Dawn Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. of LEGIS. 477 (2001). For a detailed evaluation of the IIRIRA's long term consequences, see Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION AND HUM. SEC. 192 (2018).

[117] *See* BUREAU OF JUST. STATS., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2000 41 tbl.3.1 (Aug. 2002), https://www.bjs.gov/content/pub/pdf/cfjs00.pdf.

[118] *Id.* (reflecting 1,646,438 border apprehensions in 2000).

[119] *See* COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2000, *supra* note 117, at 41 tbl.3.1 (reflecting that 11.1% of 13,523 immigration defendants were released at some point during their case).

[120] Following the attacks, the proportion of Americans against immigration, whether it be authorized and unauthorized, soared from 41% to 58%. *See Immigration*, *supra* note 110 (graph entitled "In your view, should immigration be kept at its present level, increased or decreased?").

[121] *See* U.S. BORDER PATROL, *supra* note 106 (reflecting an approximately 25% decrease in border apprehensions between 2000 and 2001).

[122] *See* CHAD HADDAL, CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 5–6 (2010), https://fas.org/sgp/crs/homesec/RL32562.pdf ("In the wake of 9/11, the [Border Patrol] refocused its priorities to place greater emphasis on protecting against terrorist penetration. As security efforts at official ports of entry become more sophisticated and stringent, it is believed that terrorists and other criminals may attempt to illegally enter the country between points of entry . . . . Appropriations for the Border Patrol has grown steadily, from $1.06 billion in FY2000 to $3.58 billion requested in FY2011—an increase of 238%. The bulk of this increase has taken place since the formation of DHS in

the following years.[123] In 2005, however, the target of immigration prosecutions began to change.

Prior to 2005, U.S. Attorneys limited the prosecution of unlawful crossings into the country to immigrants with criminal records.[124] Those crossing into the country simply seeking employment were generally not charged.[125] In 2005, DHS and the Department of Justice ("DOJ") instituted a policy called Operation Streamline.[126] The joint policy criminalized all illegal entries and reentries in districts along the border with Mexico, regardless of the defendant's criminal or immigration history.[127] As a result, the rate of immigration prosecutions rose even further.[128] The proportion of immigrants removed with no criminal history also increased, reflecting the indiscriminate prosecution of immigration offenders in border districts.[129] By 2009, the pretrial detention rate of undocumented defendants reached approximately 95%.[130]

Although unauthorized immigration had long been in decline,[131] the early 2010s saw an unprecedented number of removals.[132] However, the surge in removals coincided with measures to protect certain undocumented immigrants from removal, including Deferred Action for Childhood Arrivals ("DACA").[133]

FY2003 and demonstrates Congress's interest in enhancing the security of the U.S. border post 9/11. Accompanying the budget increase, Border Patrol manpower has more than doubled over the past decade.").

[123] *See* U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2017 (2017), https://www.uscourts.gov/sites/default/files/data_tables/jff_5.3_0930.2017.pdf (reflecting 18,322 immigration defendants in 2005).

[124] *See In re* Approval of Judicial Emergency Declared in Dist. of Ariz., 639 F.3d 970, 974 (9th Cir. 2011).

[125] *Id.*

[126] *Id.*

[127] *Id.* ("Operation Streamline II contemplates a 'zero tolerance' policy. The government attempts to file criminal charges against virtually all persons apprehended for entering the country without authorization.").

[128] *See* MOTIVANS, *supra* note 84, at 10 tbl.8 (reflecting a total of 32,623 immigration defendants in 2009).

[129] In 2003, approximately 47% of immigrants removed had no criminal history. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LATEST DATA: IMMIGRATION AND CUSTOMS ENFORCEMENT REMOVALS (last accessed on Aug. 1, 2020), https://trac.syr.edu /phptools/immigration/remove/ (finding by 2008, approximately 66% of immigrants removed had no criminal history).

[130] *See* MOTIVANS, *supra* note 84, at 10 tbl.8; Cohen & Austin, *supra* note 84.

[131] *See* U.S. BORDER PATROL, *supra* note 106 (reflecting 340,252 border apprehensions in 2011, down from 1,676,438 in 2000 and from a spike of 1,189,075 apprehensions in 2005).

[132] *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 129 (reflecting 407,821 removals in 2012, the highest number of removals in a single year).

[133] Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al. 1 (June 15, 2012).

In 2014, the focus of immigration enforcement ostensibly shifted to "felons, not families."[134] In reality, the vast majority of immigrants removed had little to no criminal history.[135] The proportion of illegal reentry offenders with scant criminal records also rose.[136] However, criminal prosecution of immigration offenses declined considerably, in tandem with falling border apprehensions.[137] That would soon change.

In 2018, DOJ announced a zero tolerance policy against unauthorized immigration.[138] Inspired by Operation Streamline, DOJ's zero tolerance policy

[134] Barack Obama, President of the United States, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), *in* WHITE HOUSE ARCHIVES ("[W]e're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids. We'll prioritize, just like law enforcement does every day."); *see* DEP'T OF HOMELAND SEC., PRIORITY ENFORCEMENT PROGRAM – HOW DHS IS FOCUSING ON DEPORTING FELONS (July 30, 2015), https://www.dhs.gov/blog/2015/07/30/priority-enforcement-program-%E2%80%93-how-dhs-focusing-deporting-felons (establishing a priority system of administrative prosecutions of immigration violations aimed at "keeping our streets safe").

[135] Between 2010 and 2016, approximately 40% to 50% of immigrants removed had no criminal history. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 129. Most other immigrants removed were "level 3" offenders, or immigrants with only a misdemeanor conviction. *Id.; see* DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ALIEN CRIMINAL RESPONSE INFORMATION MANAGEMENT SYSTEM (ACRIME) & ENFORCEMENT INTEGRATED DATABASE (EID) 2 (Sept. 29, 2010), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-020-a-eidacrime-september2010.pdf.

[136] In 2012, 18.3% of illegal reentry offenders scored in Criminal History Category I of the United States Sentencing Commission Guidelines. *See* U.S. SENTENCING COMM'N, QUICK FACTS – ILLEGAL REENTRY OFFENSES 1 (2013), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf; U.S. SENTENCING GUIDELINES MANUAL. §§ 4A1.1, 4A1.2 (U.S. SENTENCING COMM'N 2018) (rules for computing criminal history points), 5A (guideline sentencing table assigning defendants with zero to one criminal history point to Category I). By 2015, the percentage of Category I offenders had risen to approximately 25%. *See* U.S. SENTENCING COMM'N, QUICK FACTS – ILLEGAL REENTRY OFFENSES 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry_FY15.pdf.

[137] *See* U.S. BORDER PATROL, *supra* note 106 (reflecting 310,531 border apprehensions in 2017, the lowest level since 1971); U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2017 (2017), https://www.uscourts.gov/sites/default/files/data_tables/jff_5.3_0930.2017.pdf (reflecting 20,438 immigration defendants in 2017, down from 29,149 in 2010); U.S. SENTENCING COMM'N, QUICK FACTS—ILLEGAL REENTRY OFFENSES 1 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY16.pdf (reflecting a decline in illegal reentry prosecutions between 2012 and 2016, from 19,257 to 15,744 defendants).

[138] *See* Press Release, Dep't of Justice, Att'y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.

went even further in attempting to deter unauthorized immigration based on the notion that undocumented immigrants significantly threatened national security and public safety.[139] Families that illegally entered the United States were forcibly separated in order to prosecute and jail adult family members.[140] Consequently, thousands of minor children were isolated from their parents and other family members and detained in immigration camps.[141]

Though family separation has ended on paper, zero tolerance prosecution of immigration offenses continues.[142] As the policy implies, prosecutions of

[139] *See* Julie Davis & Michael Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES, June 16, 2018, at A1 ("Discussions began almost immediately after Mr. Trump took office about vastly expanding Operation Streamline, with almost none of those limitations."); Press Release, Dep't of Justice, Att'y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry ("To those who wish to challenge the Trump Administration's commitment to public safety, national security, and the rule of law, I warn you: illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice."); *see also* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety."). Zero tolerance prosecution of immigration offenses also followed legislative attempts to increase the criminal penalties for illegally reentering the country and force state and local law enforcement entities to assist the federal government enforce immigration laws. *See* Kate's Law, H.R. 3004, 115th Cong. (2017); No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017).

[140] *See* Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018) ("[T]he Attorney General of the United States announced a 'zero tolerance policy,' under which all adults entering the United States illegally would be subject to criminal prosecution, and if accompanied by a minor child, the child would be separated from the parent.").

[141] The precise number of children separated from their families is still undetermined, and there continue to be instances of family separation. *See, e.g.*, Defendant's Emergency Motion to Compel Reunification of Family Unit at 1–2, United States v. Lara, ECF No. 18, 19-CR-02140-DCG (W.D. Tex. 2019) (prosecuting the illegal reentry of an asylum-seeker who presented at the United States-Mexican border with his 8-year-old daughter and was forcibly separated from her and jailed); Michelle Hackman, *Number of Family Separations at U.S. Border Higher than Previously Known*, WALL ST. J. (Oct. 24, 2019), https://www.wsj.com/articles/number-of-family-separations-at-u-s-border-higher-than-previously-known-11571975720; John Washington, *The Government Has Taken At Least 1,100 Children From Their Parents Since Family Separations Officially Ended*, THE INTERCEPT (Dec. 9, 2019), https://theintercept.com/2019/12/09/family-separation-policy-lawsuit.

[142] *See* Exec. Order No. 13841, 83 Fed. Reg. 29435, 29435 (June 20, 2018) ("This Administration will initiate proceedings to enforce [§ 1325(a)] and other criminal provisions of the INA until and unless Congress directs otherwise."). During the writing of this Article, COVID-19 has ravaged the United States, particularly jails and prisons. *See* FED. BUREAU OF PRISONS, COVID-19 CONFIRMED CASES, https://www.bop.gov/coronavirus/ (reflecting over 11,000 infections and 100 deaths due to COVID-19 in BOP facilities since the pandemic

immigration offenses are not limited to serious criminal offenders.[143] As a result, 2019 saw a record high number of illegal reentry prosecutions.[144] A large majority of illegal reentry defendants now have a relatively minor criminal record, if any record at all.[145] In addition, more undocumented defendants today have strong ties to the United States.[146] According to DHS, approximately 80% of undocumented immigrants have lived in the country for over a decade.[147] As

began). In response to the pandemic, the government has ceased criminally prosecuting most illegal border crossings. *See* Ryan Devereaux, *Mass Immigration Prosecutions on the Border are Currently on Hold. What Comes Next Is Uncertain*, THE INTERCEPT (Mar. 18, 2020), https://theintercept.com/2020/03/18/immigration-border-prosecution-coronavirus/. This drastic change in policy is likely only temporary. Even amidst the COVID-19 pandemic, the government has doubled down on the construction of a wall along the southern border. *See* Alfredo Corchado et al., *Crews still Hard at Work on Trump's Border Wall, Despite Stay-home orders and Coronavirus Pandemic*, DALLAS MORNING NEWS (Apr. 2, 2020), https://www.dallasnews.com/news/politics/2020/04/02/crews-still-hard-at-work-on-trumps-border-wall-despite-stay-home-orders-and-coronavirus-pandemic/. More recently, the government has resumed large-scale removals of undocumented immigrants. *See* Miriam Jordan, *ICE Resumes Nationwide Deportation Arrests After Pausing Due to the COVID-19 Pandemic*, THE BALTIMORE SUN (Sept. 14, 2020), https://www.baltimoresun.com/news/nation-world/ct-nw-nyt-ice-deportation-arrests-covid-pandemic-20200914-riaqzaf32beexgqe33ghofcyva-story.html. The upcoming presidential transition also does not necessarily portend fundamental change in immigration enforcement.

[143] *See* Exec. Order No. 13841, 83 Fed. Reg. 29435, 29435 (June 20, 2018) (ordering the "rigorous" prosecution of immigration violations without exception).

[144] *See* U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2019 (2019), https://www.uscourts.gov/file/27825/download (reflecting 26,825 illegal reentry prosecutions in 2019); U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2018 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jff_5.3_0930.2018.pdf (reflecting 2,654 to 23,250 illegal reentry prosecutions from 1995 to 2018).

[145] In 2019, 62.4% of illegal reentry offenders fell in Criminal History Categories I and II. *See* U.S. SENTENCING COMM'N, QUICK FACTS – ILLEGAL REENTRY OFFENSES 2019 1 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf (adding 39.2% in I and 23.2% in II). A single 60-day jail sentence for a misdemeanor, for example, would place a defendant in Category II. *See* U.S. SENTENCING GUIDELINES MANUAL. §§ 4A1.1(b), 5A (U.S. SENTENCING COMM'N 2018). Before "zero tolerance," less than half of illegal reentry offenders fell in Categories I and II. *See* U.S. SENTENCING COMM'N, QUICK FACTS – ILLEGAL REENTRY OFFENSES 2017 1 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY17.pdf (finding 25.7% in I and 23.8% in II in 2017).

[146] *See* United States v. Villatoro-Ventura, 330 F. Supp. 3d 1118, 1137–38 (N.D. Iowa 2018) (finding an undocumented defendant's negligible criminal history and strong community ties weighed in favor of pretrial release); United States v. Rangel, 318 F. Supp. 3d 1212, 1217 (E.D. Wash. 2018) (finding an undocumented defendant's strong ties to the community strongly favored pretrial release).

[147] *See* BAKER, *supra* note 5, at 43 tbl.1.

zero tolerance prosecution coincides with historically low levels of border apprehensions,[148] the policy falls harshly on undocumented immigrants already living in the country. In fact, the policy drastically increased illegal reentry prosecutions in non-border districts.[149] Such "found in" prosecutions naturally tend to involve immigrants with stronger ties to the country than prosecutions of immigrants apprehended at the border. Additionally, decades of increasingly punitive immigration policies have discouraged undocumented immigrants from traveling back to their country of origin, deepening their social ties to the United States and furthering their resolve to remain in the country.[150] Such "unauthorized permanent residents"[151] and undocumented immigrants, who are culturally American, are being funneled into the federal criminal justice system at record numbers.[152]

[148] The increased number of border apprehensions in 2019 was still only half that seen in 2000. *See* U.S. BORDER PATROL, *supra* note 106.

[149] Unlike illegal entry under §§ 1325(a), 1326 criminalizes the act of being in the United States without authorization, provided that the defendant has been previously removed. *See* 8 U.S.C. § 1326(a)(2) (2020) ("Any alien who enters, attempts to enter, or is at any time found in, the United States"). Such "found in" illegal reentry offenses have soared, as reflected by a 57.2% rise of illegal reentry prosecutions outside the five southern border districts between 2017 and 2019). *See* U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2019 (2019), https://www.uscourts.gov/file/27825/download; U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS, FILED BY OFFENSE DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1995 THROUGH 2017 (2017), https://www.uscourts.gov/file/24225/download.

[150] Aggressive immigration enforcement created a "caging" effect in which undocumented immigrants cemented their familial ties in the United States rather than risk traveling back and forth between countries. *See* Jeremy Slack et al., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. ON MIGRATION AND HUM. SEC. 109, 110 (2015). Once deported, undocumented immigrants with strong ties to the country are much more resilient in their resolve to reenter, regardless of the immigration and criminal consequences. *See* Daniel E. Martínez et al., *Repeat Migration in the Age of "Unauthorized Permanent Resident": A Quantitative Assessment of Migration Intentions Post Deportation*, 52 INT'L MIGRATION REV. 1186, 1210 (2018).

[151] *See* Martínez et al., *supra* note 150, at 1187 ("[Unauthorized permanent residents] are a subgroup of the unauthorized population that possess similar cultural, social, and emotional ties to the United States as legal permanent residents . . . but lack legal status, and in our sample, have been removed from the country.").

[152] *See* Michael Neal, *Brown and Dangerous: How the Trump Administration Sees Immigrants*, U. PA. J. L. & SOC. CHANGE ONLINE (Apr. 30, 2020), https://www.law.upenn.edu/live/news/10046-brown-and-dangerous-how-the-trump-administration (citing the illegal reentry of a nineteen-year-old Guatemalan asylum-seeker with no criminal history who grew up in the United States, where most of his family lived); Riley Yates & Peter Hall, *'There's such an allure here for you.' Court records reveal the stories of Pennsylvania immigrants arrested for illegally returning to the U.S.*, THE MORNING CALL (Sept. 18, 2019), https://www.mcall.com/news/police/mc-nws-pennsylvania-immigration-prosecutions-illegal

With greater prosecutions of undocumented immigrants deeply rooted in the United States and possessing little to no criminal history, one would reasonably expect a leveling off in the pretrial detention rate from its astronomical heights. Instead, over 98% of undocumented immigrants are now being jailed pretrial, compared to just 53% of non-immigration defendants.[153] The disturbing rate of pretrial detention among undocumented immigrants greatly exacerbates racial disparities. Today, *nine* of every ten Hispanic defendants are jailed pending trial—a level without precedent or compare.[154]

E. *The Unlawful Presumption Against the Release of Undocumented Immigrants*

The nearly complete pretrial incarceration of undocumented defendants cannot be explained by characteristics often ascribed to immigrants, such as foreign ties.[155] As noted, the Bail Reform Act of 1966 permitted pretrial detention on the basis of flight risk, yet undocumented immigrants were rarely ordered detained pending trial.[156] The BRA's provision for temporary detention of certain non-citizens—the law's only reference to undocumented

-reentry-20190918-ldgqjb2b3vailnnrsjgviqb7gy-story.html (reviewing more than 200 illegal reentry cases from the Eastern District of Pennsylvania, revealing "many undocumented immigrants who have jobs, deep roots in the U.S. and minor, old or in some cases nonexistent criminal records"). *See infra* Section II.B.1 (examples of immigration defendants possessing strong community ties and little to no criminal history).

[153] *See* Cohen & Austin, *supra* note 84, at 6 fig.1 & tbl.1. Meanwhile, 69.5% of violent offenders and 71.4% of weapons offenders were detained pretrial in 2017. *Id.* at 8 tbl.2. The pretrial detention rate of undocumented immigrants surpasses even that of alleged murderers. *See* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STATS. SPECIAL REPORT: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 3 (2007), https://www.bjs.gov /content/pub/pdf/prfdsc.pdf (reflecting, in table 2, that less than half of defendants charged with murder in state court were denied bail between 1990 and 2004).

[154] In 2018, 88% of Hispanic defendants were detained pretrial compared to 60% of Black defendants and 45% of non-Hispanic White defendants. *See* Matthew Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROBATION J. 13, 14 fig.2, 15 fig.5 (2018).

[155] *See, e.g.*, United States v. Manuel-Duarte, No. 5:08CR10-7-V, 2008 WL 1775267, at *2 (W.D.N.C. Apr. 15, 2008) (presuming undocumented defendant lacked strong community ties due to immigration status despite evidence of family and employment in the district); BUREAU OF JUST. STATS., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 (2006), https://www.bjs.gov/content/pub/pdf/cfjs04.pdf ("Suspects in immigration offenses also often lack the community ties which would assure their appearance in court"); Rowland, *supra* note 154, at 18 ("The high detention rate for immigration cases is in large part because the defendants have ties outside the United States and usually no verifiable connections to the district of prosecution.").

[156] *See supra* Section I.B.

immigrants—scarcely applies in practice.[157] And after decades of increasingly aggressive immigration policies and enforcement, more undocumented defendants than ever possess strong ties to the United States and little to no criminal history, equities which favor pretrial release.[158]

Misapplication of the BRA partly explains the unyielding level of pretrial detention among undocumented immigrants. The BRA does not prescribe a presumption of detention of undocumented immigrants, much less an irrebuttable one.[159] Such a presumption would eviscerate the defendant's right to an individualized risk assessment and is logically inconsistent with the BRA. Congress specifically considered the risks, if any, undocumented immigrants pose when drafting the temporary detention provision under § 3142(d).[160] Even then, Congress required that judicial officers first determine whether the defendant may flee, independent of immigration status.[161] Accordingly, courts have held that while a defendant's immigration status is relevant, it is not dispositive of flight risk.[162] Neither the existence of an immigration detainer nor

[157] *See* BUREAU OF JUST. STATS., COMPENDIUM, 2004, *supra* note 155, at 49 (noting, in table 3.4, that only 5.2% of immigration defendants were held under the § 3142(d) in 2004). Even if the temporary detention provision applied, the judicial officer would first have to find that the defendant may flee or pose a danger to others, independent of their undocumented status. *See supra* Section I.A.

[158] *See* United States v. Villatoro-Ventura, 330 F. Supp. 3d 1118, 1137–38 (N.D. Iowa 2018) (finding an undocumented defendant's negligible criminal history and strong community ties weighed in favor of pretrial release); United States v. Rangel, 318 F. Supp. 3d 1212, 1217 (E.D. Wash. 2018) (finding an undocumented defendant's strong ties to the community strongly favored pretrial release).

[159] A law permitting the categorical detention of undocumented immigrants pending trial would pose very serious substantive due process concerns. *See* United States v. Salerno, 481 U.S. 739, 746–48 (1987) (describing a defendant's interest in liberty as fundamental in nature and applying a substantive due process analysis to the BRA). *But see* Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson II*), 732 F. App'x 624, 630 (10th Cir. 2018) (holding that a defendant's interest to be free from pretrial detention is a non-fundamental right) *cert. denied*, 139 S. Ct. 862 (2019); *see also* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 789 (9th Cir. 2014) (holding that a defendant's interest in pretrial release is a fundamental right and, therefore, a bail statute requiring pretrial detention of certain undocumented immigrants violated substantive due process).

[160] *See* United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015) ("Congress chose not to exclude removable aliens from consideration for release or detention in criminal proceedings. *See* 18 U.S.C. § 3142(a)(3), (d).").

[161] *See* 18 U.S.C. § 3142(d)(2) (2008); United States v. Adomako, 150 F. Supp. 2d 1302, 1304 (M.D. Fla. 2001) ("Thus, a determination as to whether the alien may flee is essential even to a decision to impose temporary detention.").

[162] *See* United States v. Soriano Nunez, 928 F.3d 240, 244–45 (3d Cir. 2019); United States v. Ailon-Ailon, 875 F.3d 1334, 1338 (10th Cir. 2017) ("The Bail Reform Act directs courts to consider a number of factors and make pre-trial detention decisions as to removable aliens 'on a case-by-case basis.'") (citation omitted); *Santos-Flores*, 794 F.3d. at 1090 (observing

the threat of removal by immigration authorities are sufficient to keep an undocumented immigrant detained under the BRA,[163] though the likelihood of being detained by immigration authorities also contributes to the high rate of pretrial detention.[164] Indeed, one district court judge even scolded magistrate judges, pretrial service officers, and attorneys—prosecutors *and* defense counsel—for presuming that undocumented immigrants must be detained under the BRA, describing the practice as an "abuse in the administration of justice."[165]

Despite the BRA's clear terms, scholars and practitioners attest to the tendency of judicial officers to detain undocumented immigrants pending trial based on the presumption that they are unmanageable flight risks.[166] In the

that immigration status is not listed as a factor under § 3142(g) but may be taken into account); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) ("[A]lienage . . . may be taken into account, but it does not point conclusively to a determination that Motamedi poses a serious risk of flight."); United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 968–69 (E.D. Wis. 2008) ("[D]efendant's status as a deportable alien does not mandate detention."); *Adomako*, 150 F. Supp. 2d at 1307; *see also Lopez-Valenzuela*, 770 F.3d at 787 ("The federal criminal justice system does not categorically deny bail to undocumented immigrant arrestees.").

[163] *Soriano Nunez*, 928 F.3d at 245 n.4; *Ailon-Ailon*, 875 F.2d at 1338–39; *Santos-Flores*, 794 F.3d at 1091; *see* United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1176–77 (D. Or. 2012) ("In numerous cases throughout the United States, the government has argued . . . that the existence of the ICE detainer and the possibility that the person may be removed or deported by ICE before trial is sufficient under the BRA to satisfy the government's burden of showing that there are no conditions that will reasonably assure the appearance of the defendant . . . . The government's argument has been rejected by many courts.").

[164] Courts of appeal have held that immigration authorities can still act on an immigration detainer while a defendant is on pretrial release. *See* United States v. Berrera-Landa, 964 F.3d 912, 923 (10th Cir. 2020) (citing *Ailon-Ailon*, 875 F.2d at 1339); United States v. Pacheco-Poo, 952 F.3d 950, 952–53 (8th Cir. 2020); United States v. Lett, 944 F.3d 467, 470–73 (2d Cir. 2019); *Soriano Nunez*, 928 F.3d at 246–47; United States v. Vasquez-Benitez, 919 F.3d 546, 552 (D.C. Cir. 2019); United States v. Veloz-Alonso, 910 F.3d 266, 270 (6th Cir. 2018); *infra* Section II.E (discussing the tendency of undocumented immigrants to acquiesce to pretrial detention).

[165] United States v. Mendez Hernandez, 747 F. Supp. 846, 850 (D.P.R. 1990) ("[A]ttorneys for the parties, Pretrial Services, and the U.S. Magistrates, all governmental entities, are creating a de facto 'presumption' of detention and are not adequately following the mandates of the statutory scheme laid out in the Bail Reform Act of 1984 . . . .").

[166] *See, e.g.*, Dan Kesselbrenner & Lory D. Rosenberg, IMMIGR. LAW & CRIMES § 8:8, (Summer 2020 ed.) ("Judges deny bond because they believe the [illegal reentry] defendant may consent to removal and 'escape' the criminal case."); Eric Brickenstein, *Making Bail and Melting ICE*, 19 LEWIS & CLARK L. REV. 229, 231, 242–44 (2015) ("Courts' consistent and seemingly unquestioning willingness to consider immigration status in the flight risk calculus is dubious given the significant statutory arguments against it."); Walter I. Gonçalves, Jr., *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 14 (2020); Patrick Kirby Madden, *Illegal*

author's experience, failure to correctly and fairly apply the BRA in cases where the defendant is an undocumented immigrant is rampant to the point of habit.[167] Conditions of release are hardly ever explored, and extensive community ties are of no avail. In one egregious case, a magistrate judge used an undocumented immigrant's thirty-two years of family, community, and financial ties to the United States as justification *for* jailing her pending trial.[168] Some judicial officers have even gone so far as to find undocumented immigrants dangerous despite having relatively minor or no criminal history.[169] Such decisions reflect

Reentry and Denial of Bail to Undocumented Defendants: Unjust Tools for Social Control of Undocumented Latino Immigrants, 11 HASTINGS RACE & POVERTY L. J. 339, 357–61 (2014); Graber & Schnitzer, *supra* note 74, at 5 n.25 ("[J]udges have mistaken detainers for deportation orders and for notices of deportation proceedings, as well as for evidence that the subject of the detainer is a deportable alien and a flight risk.") (citations omitted).

[167] When judicial officers do cite an additional ground for finding an undocumented immigrant to be a flight risk, it is difficult to determine whether it actually tipped the balance towards detention, rather than their immigration status. *See* Gonçalves, *supra* note 166, at 14. In the author's experience, weight of the evidence is commonly cited to justify the jailing of undocumented immigrants with strong community ties and no criminal record. Not only is weight of the evidence considered the weakest of release factors, see United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990), the guideline range of imprisonment is low for illegal reentry offenders with no criminal record, see U.S. SENTENCING GUIDELINES MANUAL §§ 2L1.2, 5A (U.S. SENTENCING COMM'N 1987) (reflecting a guideline range of imprisonment of zero to six months). The risk that a defendant would suddenly abandon their spouse and children, uproot themselves from their community of many years, and flee the jurisdiction to avoid such a minor sentence is minimal and does not tip the balance in favor of detention. *See Vasquez-Benitez*, 919 F.3d at 551 (holding the undocumented defendant was not a flight risk even if the weight of the evidence was strong); *Motamedi*, 767 F.2d at 1408.

[168] The defendant's husband, a United States citizen, left the courtroom so aghast that he suffered a heart attack shortly after. *See* Motion to Set Bond at 1, United States v. Arevalo-Roman, No. 3:19-CR-02929-DB (W.D. Tex. Sept. 4 Aug. 16, 2019); Attorney Matters & Preliminary/Detention Hearing at 20–21, United States v. Arevalo-Roman, No. 3:19-CR-02929-DB (W.D. Tex. Aug. 26, 2019); *see infra* Section II.B.1 (examples of undocumented immigrants detained or recommended detention pending trial despite having strong community ties and little to no criminal history).

[169] *See, e.g.*, Preliminary/Detention Hearing, United States v. Apodaca, 3:19-CR-03647-KC (W.D. Tex. Nov. 7, 2019); Defendant's Motion to Revoke Detention, United States v. Apodaca, 3:19-CR-03647-KC (W.D. Tex. Nov. 13, 2019); Order, United States v. Apodaca, 3:19-CR-03647-KC (W.D. Tex. Nov. 18, 2019) (denying appeal of detention order on the ground that that no conditions of release would reasonably assure the safety of the community where defendant from Mexico was charged with illegal reentry and had no criminal history); Transcript of Preliminary Examination and Detention Hearing, United States v. Ramos-Ordonez, 4:17-CR-00389-DC (W.D. Tex. Jan. 2, 2018) (noting magistrate judge made unwritten finding that defendant from Guatemala charged illegal reentry was dangerous, though his criminal record only placed him in Criminal History Category I, the lowest under the sentencing guidelines).

the racial animus underpinning the criminalization of immigration violations, particularly towards Hispanics.[170]

As disturbing as these decisions are, the failure of judicial officers to correctly and fairly apply the BRA is only part of the reason why undocumented immigrants, clearly eligible for release, are systematically jailed pending trial.

II. THE UNLAWFUL EXCLUSIONARY POLICY AGAINST UNDOCUMENTED IMMIGRANTS

Fair decision-making on pretrial release and detention depends on the work of pretrial services officers.[171] The PSA requires pretrial services officers to timely collect, verify, and report to judicial officers information pertaining to pretrial release.[172] Judicial officers rely on this information to assess the risk of

[170] *See, e.g.*, Donald Trump, *Presidential Announcement Speech* (June 16, 2015) ("When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."). The criminalization of unauthorized immigration derives in large part from Senators Coleman Livingston Blease and James J. Davis, self-avowed racists concerned with the influx of Mexicans into the United States during the early 20th century. *See* Mae M. Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 67 (2004) ("During the 1920s, immigration policy rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before."); Gonçalves, *supra* 166, at 36–47 (reviewing the racist origins of criminal immigration legislation and policy); Alina Das, *Inclusive Immigration Justice: Racial Animus and the Origins of Crime-Based Deportations*, 52 U.C. Davis L. Rev. 171, 182 (2018) (arguing that racial animus has historically motivated crime-based deportations and immigration-based criminal prosecutions). More recently, punitive immigration reforms and enforcement have coincided with negative public sentiment towards immigrants. *See supra* Sections I.C–D. Simultaneously, pretrial release for undocumented immigrants has become almost impossible, resulting in almost every Hispanic defendant in the federal criminal justice system jailed pending trial. *See id.*; *see generally* Madden, *supra* note 166, at 340 (arguing that systematic denial of bail to undocumented immigrants, along with over-prosecution of immigration offenses, are "two harsh tools in a larger system of control of undocumented Latino immigrants.").

[171] United States v. Chaparro, 956 F.3d 462, 474 (7th Cir. 2020) ("A core duty of Pretrial Services is to '[c]ollect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense.' 18 U.S.C. § 3154(1) (2018). Judges rely on these reports when deciding whether to release defendants pending trial under the Bail Reform Act[.]"); *see* Donna Makowiecki, *U.S. Pretrial Services: A Place in History*, 76 FED. PROBATION J 10, 13 (2012) ("The [PSA] promised federal magistrate and district court judges throughout the country an enhanced ability to make truly informed decisions regarding the prospects of pretrial release and to more carefully adhere to the promises of the Eighth Amendment.").

[172] 18 U.S.C. § 3154(1) (2018); *see infra* Section II.A (reviewing the PSA).

flight and danger posed by the defendant's release.[173] Accurate risk assessments, therefore, hinge on pretrial services officers fulfilling their duties under the PSA.[174] However, pursuant to an exclusionary policy, pretrial services officers generally do not investigate undocumented immigrants as they would citizens.[175] Against their own research and guidance, these officers conduct minimal investigation of undocumented immigrants and fail to conduct individualized risk assessments.[176] As a result, pretrial services officers routinely misinform judicial officers in violation of their statutory obligations.[177] When judicial officers do order full investigations, undocumented immigrants must wait in jail longer, discouraging undocumented immigrants from exercising their rights under the BRA.[178]

This section sheds light on the unlawful exclusionary policy against undocumented immigrants. It begins with review of the background and relevant provisions of the PSA and the investigatory duties and practices of pretrial services officers. From there, the discussion turns to the exclusionary policy and its trampling of the PSA. This section concludes with an exploration of how the exclusionary policy infringes upon undocumented immigrants' rights under the BRA and contributes to their high rate of pretrial detention.

A. *The Pretrial Services Act of 1982 and the Investigatory Duties of Pretrial Services Officers*

Today's sprawling system of federal pretrial services agencies grew out of earlier programs created in the aftermath of the Bail Reform Act of 1966. Following the repeal of the old bail statute, the number of defendants released pending trial surged amid public anxiety about rising crime.[179] In addition, Congress expressed concern that the lack of pretrial investigation and supervision resulted in both unnecessary detention and a rise in the number of fugitives.[180] In response to these worries, Congress experimented with several

[173] *Chaparro*, 956 F.3d at 475.

[174] *See infra* Section II.A (reviewing pretrial services officers' investigatory duties under the PSA).

[175] *See infra* Section II.B (reviewing the exclusionary policy against undocumented immigrants).

[176] *See infra* Sections II.B–II.C (discussing the flawed rationale behind the exclusionary policy).

[177] *See infra* Section II.A (reviewing pretrial services officers' investigatory duties under the PSA).

[178] *See infra* Sections II.D–E (discussing the consequences of the exclusionary policy).

[179] *See supra* Section I.A (reviewing the legislative history of the BRA).

[180] *See* S. REP. NO. 97-77, at 1 (1981) ("Judges without sufficient information on a defendant's eligibility for pretrial release either detain the defendant until trial or guess at the defendant's likelihood to remain in the jurisdiction . . . . In 1968 there were only 1,495 cases pending for more than a year involving a fugitive defendant while in 1971 there were 4,124 such cases.").

"demonstration pretrial services agencies."[181] The agencies were charged with conducting pretrial investigations, supervising defendants, enforcing conditions of release, and assisting defendants with securing employment as well as medical, legal, and social services.[182] Districts home to the "demonstration pretrial services agencies" saw fewer rearrests for felony offenses than other districts.[183] The agencies were also popular among judicial officers who, supplied with the defendant's background information, were able to make informed decisions on pretrial release and detention.[184]

Accordingly, in 1982, Congress passed the PSA.[185] The law ordered the Judiciary to establish pretrial services agencies in each of the country's ninety-four judicial districts.[186] Congress charged the chief officer in each district with appointing frontline pretrial services officers responsible for effectuating the PSA.[187] Pretrial services officers have two main functions: investigation and supervision.[188] After conducting an investigation, pretrial services officers must formulate recommendations on whether to detain or release the defendant and,

[181] Act of Jan. 23, 1975, Pub. L. No. 93-619, tit. II, § 201, 88 Stat. 2086 (1975) (codified as amended at 18 U.S.C. §§ 3152–3156 (1982)).

[182] 18 U.S.C. § 3154(1) (2018).

[183] *See* S. REP. NO. 97-77, at 4 ("We found a difference in their pre to post change in crime of bail, specifically [pretrial service agency] districts had fewer rearrests for felony offense than did comparison districts, although there was not a difference in their pre to post change in misdemeanor rearrests.").

[184] *Id.* at 5–6 (quoting Chief Judge Edward Northrop) ("The judicial offices of the court have benefited greatly from having timely information provided for bail hearings, and needless to say, the availability of detailed information has inured to the benefit of defendants appearing before the court . . . . All of the judges and magistrates have been able to release individuals who might otherwise have been confined for lack of adequate background data.").

[185] Act of Sept. 27, 1982, Pub. L. No. 97-267, § 923, 96 Stat. 1136 (1982) (codified as amended at 18 U.S.C. §§ 3152–3155 (2008)).

[186] 18 U.S.C. § 3152 (2008) (placing the administration of pretrial services under the Administrative Office of the United States Courts, the administrative agency of the federal courts system). There 93 probation and pretrial services offices; the Districts of Guam and the Northern Mariana Islands share the same office. *See* PROBATION AND PRETRIAL SERVICES – MISSION (Jan. 15, 2020), https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission.

[187] *See* § 3153(a)–(b).

[188] *See* Thomas Wolf, *What United States Pretrial Services Officers Do*, 61 FED. PROBATION J. 19, 19 (1997). Pretrial services officers' supervisory duties include assisting defendants in securing employment and medical, legal, and social services as well as operating or contracting for the operation of residential halfway houses, addict and alcohol treatment centers, and counseling services. *See* §§ 3154(3)–(7). Thus, when judicial and pretrial services officers unlawfully exclude undocumented immigrants from pretrial release consideration, they also unlawfully deprive undocumented immigrants of services afforded by the PSA. *See supra* Section I.E (discussing misapplications of the BRA by judicial officers); Section II.B (discussing the exclusionary policy applied by pretrial services officers).

if release is recommended, the appropriate conditions of release.[189] Recommendations must be based on an individualized risk assessment of the defendant.[190] Pretrial services investigations are, therefore, fundamental to fair pretrial release determinations.[191] A pretrial services investigation may be divided into five components: a background check, an interview, verification of information, an actuarial risk assessment, and a pretrial services report providing recommendations to the judicial officer.[192]

Once informed of the defendant's arrest, the pretrial services officer assigned to the case conducts a criminal records check.[193] Pretrial services officers may access the National Crime Information Center or the National Law Enforcement Telecommunications System in search of any history of criminal convictions.[194] In cases where the defendant is an immigrant, the pretrial services officer may send Immigration and Customs Enforcement ("ICE") an Immigrant Alien Query to ascertain the defendant's immigration status and history.[195] Afterwards, subject to the defendant's consent, the pretrial services officer may request records concerning the defendant's health, mental health, education, and finances.[196] The pretrial services officer may conduct additional record checks

[189] § 3154(1).

[190] *See* cases cited *supra* note 67.

[191] *See* BARRY MAHONEY ET AL., NAT'L INST. OF JUST., PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL (2001), https://www.ncjrs.gov/pdffiles1/nij/181939.pdf ("[R]isk assessment[] is a key step in the court's decision making process and, if the defendant is released, in managing the risks of nonappearance and pretrial crime."); Wolf, *supra* note 188, at 19 ("An important function of pretrial services officers is to assist the court in identifying defendants who may pose serious risks to the community and recommending release conditions to address these risks or recommending a defendant be detained before trial.").

[192] *See* Marie VanNostrand & Gena Keebler, *Our Journey Toward Pretrial Justice*, 71 FED. PROBATION J. 33, 39 (2007) ("Recommended components of a pretrial investigation include an interview with the defendant; verification of specified information; a local, state and national criminal history record; an objective assessment of risk of failure to appear and danger to the community; and a recommendation for terms and conditions of bail.").

[193] *See* U.S. PROBATION & PRETRIAL SERVICES, PRETRIAL SERVICE OFFICERS (Sept. 2000), http://www.ilnpt.uscourts.gov/pretrial_services_officers.pdf; Wolf, *supra* note 188.

[194] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, WESTERN DISTRICT OF NORTH CAROLINA, FIELD TRAINING OFFICER-CLERICAL TRAINING PROGRAM (Sept. 15, 2015), https://info.nicic.gov/virt/sites/info.nicic.gov.virt/files/GE%20FTO-CT%20Program%20Manual.pdf.

[195] *Id.* at 9; DEP'T OF HOMELAND SEC., DHS STATE AND LOCAL LAW ENFORCEMENT RESOURCE CATALOG (2016), https://www.dhs.gov/sites/default/files/publications/oslle-resource-catalog-volumeiv-2-24-2016_1.pdf ("[T]he most efficient method to request and receive immigration information is by submitting an Immigration Alien Query (IAQ)[.]").

[196] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194.

either to verify information provided by the defendant during the interview or to acquire information if the defendant refuses to be interviewed.[197]

The core of pretrial investigations is the interview.[198] Naturally, defendants are the primary sources of information about themselves and can provide the contact information for their family and employers, who can verify the defendant's background.[199] The pretrial services officer will meet with the defendant in a United States Marshals holding cell or the facility where the defendant is detained.[200] When interviewing the defendant, the pretrial services officer's top priority is to obtain background information from which the judicial officer can make an individualized risk assessment.[201] The pretrial services officer will ask the defendant about their personal history, family ties, place of residence, employment history, financial resources, health, mental health, substance abuse, and criminal history.[202] The pretrial services officer may then interview family members and employers to verify the defendant's residence, employment, and family and community ties.[203] Verifying information provided by the defendant is critical for the judicial officer to make an informed decision between pretrial release or detention.[204] Without verified ties to the community, it is very unlikely pretrial services or judicial officers will agree to release an undocumented immigrant pending trial.[205]

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[197] *See id.*; Wolf, *supra* note 188, at 20.

[198] *See* SEGEBARTH, PRETRIAL SERVICES AND PRACTICES IN THE 1990S FINDINGS FROM THE ENHANCED PRETRIAL SERVICES PROJECT 45 (1991), https://www.ncjrs.gov/pdffiles1/Digitization/155071NCJRS.pdf ("In conjunction with criminal history checks and references, the pretrial interview constitutes the single most important element of the background investigation that is forwarded to the judicial officer so that an informed release/detention decision can be made.").

[199] *See* MAHONEY ET AL., *supra* note 191, at 1.

[200] *See* U.S. PROBATION & PRETRIAL SERVICES, *supra* note 193 ("The interview may take place in the U.S. marshal's holding cell, the arresting law enforcement agency's office, the local jail, or the pretrial services office."); Wolf, *supra* note 188.

[201] *See* MAHONEY ET AL., *supra* note 191, at 12.

[202] *See* Timothy Cadigan et al., *The Re-Validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 FED. PROBATION J. 3, 8 (2012); U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 15–18.

[203] U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 17.

[204] *See* Lay & De La Hunt, *supra* note 27, at 931–32 (discussing study finding pretrial release decisions based on verified information resulted in lower failures to appear); MAHONEY ET AL., *supra* note 191, at 30 ("[M]any pretrial services practitioners believe that verifying defendant information is the most important function their programs perform."); Wolf, *supra* note 188 ("The purpose of a pretrial services investigation and report is to provide the court with verified information on which to base an informed release or detention decision.").

[205] *See, e.g.*, United States v. Ibrahim, No. 94-10004, 1994 WL 57582, at *1 (5th Cir. 1994) (citing United States v. Valenzuela-Verdigo, 815 F.2d 1011, 1012 (5th Cir. 1987)) (finding

Pretrial services officers also employ an actuarial tool to guide pretrial release recommendations, the Pretrial Services Risk Assessment Tool ("PTRA").[206] Pretrial Services developed the PTRA with the goal of reducing disparities in pretrial risk assessments.[207] The tool has since been implemented in almost every judicial district.[208] Essentially, the PTRA is a point-based questionnaire regarding aspects of the defendant's background determined to be relevant to risk of flight and dangerousness. It consists of eleven questions regarding the following: the number of felony convictions, the number of prior failures to appear, the number of pending criminal charges, the current offense type, whether the current offense is a felony or a misdemeanor, the age of the defendant, level of education, employment status, whether the defendant owns their own home, current substance usage, and citizenship status.[209] Each answer generates a numerical value, ranging from zero to two.[210] The sum ranges from zero to fourteen points and places the defendant in one of five risk categories.[211] Each risk category is associated with varying rates of failures to appear, new criminal arrests, and technical violations of release conditions.[212]

Pretrial Services places great confidence in the PTRA's reliability.[213] Data from the Administrative Office of the United States Courts reflects that the tool's

undocumented immigrant to be an unmanageable flight risk because nearly all her ties were in Mexico); United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1109 (D. Minn. 2009) ("Absent an interview, pretrial services suggested defendant was a flight risk and a danger to the community."); United States v. Cos, No. CR 05–1619JB, 2006 WL 4093034, at *1 (D.N.M. May 5, 2006) (denying a motion to reconsider an order to detain an undocumented defendant where the pretrial services officer did not interview the defendant and, consequently, the court had a "lack of information the Court has about his family, about what he is doing in the community, about his employment, and about his financial ties."); *see also* U.S. COURTS, TABLE H-3 U.S. DISTRICT COURTS—PRETRIAL SERVICES RECOMMENDATIONS MADE FOR INITIAL PRETRIAL RELEASE (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf.

[206] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 20.

[207] *See* VanNostrand & Keebler, *supra* note 192, at 8 ("The use of a standardized instrument will assist in reducing the disparity in risk assessment practices and provide a foundation for evidence-based practices relating to release and detention recommendations and the administration of the alternatives to detention program.").

[208] *See* Cohen & Austin, *supra* note 84, at 5 ("[T]he PTRA is now used nearly universally in the federal pretrial system.").

[209] The PTRA also includes unscored questions included for research purposes that do not affect the defendant's classification. *See* Cadigan et al., *supra* note 202, at 7.

[210] *Id.* at 6.

[211] *Id.* at 7 tbl.3, 8.

[212] *See id.* at 6–7.

[213] *See* Rowland, *supra* note 154, at 17 ("The PTRA has been statistically validated and revalidated; it also continues to track release rates and release outcomes very well."); LISA HAY, FEDERAL PUBLIC DEFENDER'S OFFICE, DISTRICT UPDATE: RESTITUTION, FORFEITURE, &

risk categories roughly correspond to a defendant's risk of flight and potential to engage in criminal behavior while on pretrial release.[214] Of the released defendants who fell in risk category I, approximately 2% violated a condition of pretrial release.[215] In contrast, of those who comprised category V, approximately 26% violated a release condition.[216] Risk categories also correlate with pretrial release rates: 91% of the defendants in category I were granted pretrial release compared to only 17% of those in category V.[217] However, actuarial risk assessment tools like the PTRA are not without their critics.[218]

Generally, pretrial services officers must complete the pretrial investigation before the defendant's initial appearance.[219] The pretrial investigation must be thoroughly summarized in a report addressing the risk factors listed under the BRA.[220] The pretrial services report must also include recommendations to the judicial officer on pretrial release and conditions of release.[221] A recommendation for release or detention should be based on the PTRA score, though pretrial services officers may depart from the tool's recommendation

PRETRIAL RELEASE – PRETRIAL RISK ASSESSMENT (PTRA) FREQUENTLY ASKED QUESTIONS (Feb. 22, 2017), http://or.fd.org/sites/or.fd.org/files/pdfs/2017-02-22%20Restitution%2C%20Forfeiture%2C%20and%20Release_A.pdf ("The PTRA is an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear (FTA), new criminal arrest (NCA), and revocations due to technical violations (TV) while on pretrial release.").

[214] *See* Rowland, *supra* note 154, at 18 fig.7.

[215] *Id.* at 18 fig.6.

[216] *Id.*

[217] *Id.*

[218] The author takes no position on the effectiveness of the PTRA. However, as discussed below, the PTRA gives little weight to immigration status, a fact practitioners should use to their advantage when confronting pretrial services officers' blanket recommendations for detaining undocumented immigrants. *See infra* Section II.C, Part III. For criticisms of actuarial risk assessment tools, *see* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L. J. 59, 63–65 (2017); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 689 (2015).

[219] *See* 18 U.S.C. § 3142(f) (2019) (requiring the detention hearing to be held upon initial appearance); § 3154(1) (requiring pretrial release officers report to judicial officers their findings and recommendations prior to the pretrial release hearing); FED. R. CRIM. P. 5(d)(3) (requiring judicial officers order defendants released or detained at initial appearance); Wolf, *supra* note 188, at 19 ("The pretrial services officer conducts the investigation before the defendant's initial appearance or pretrial release hearing before the court.").

[220] *See* § 3142(g); U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 23 ("A pretrial services report is written to stand on its own merit. The officer should not have to explain or further supplement it unless new information is received. The court may consult with the officer to clarify information, but such clarification should not require elaboration or formal testimony."). However, pretrial services officers do not take into account the weight of the evidence. *See* Wolf, *supra* note 188, at 20.

[221] § 3154(1); *see* Wolf, *supra* note 188, at 20.

with their supervisor's approval.[222] Consistent with the BRA, pretrial services officers must recommend the least restrictive conditions that would reasonably assure the defendant's appearance in court and the safety of others, if they identify risks of flight or danger to others.[223]

At the detention hearing, the judicial officer relies on the pretrial services report in deciding whether to release or detain the defendant pending trial.[224] In 2019, pretrial services officers recommended the detention of 71% of defendants, and almost 75% were detained.[225] When tasked with evaluating undocumented immigrants, however, pretrial services officers routinely fail to accurately and timely advise judicial officers, in violation of the PSA.

B. *Calculated Disregard for Undocumented Immigrants*

Despite judicial officers' reliance on pretrial investigations, pretrial services officers perform almost no investigation when it comes to undocumented immigrants. Generally, pretrial services officers do not interview, or even make contact with, undocumented defendants.[226] Pretrial services officers do not

[222] *See* Cadigan et al., *supra* note 202.

[223] § 3142(c)(1)(B); Wolf, *supra* note 188, at 20.

[224] *See* United States v. Chaparro, 956 F. 3d 462, 475 (7th Cir. 2020); U.S. PROBATION & PRETRIAL SERVICES, *supra* note 193; Wolf, *supra* note 188, at 19 ("The purpose of a pretrial services . . . report is to provide the court with verified information on which to base an informed release or detention decision."); SEGEBARTH, *supra* note 198, at 45 ("In conjunction with criminal history checks and references, the pretrial interview constitutes the single most important element of the background investigation that is forwarded to the judicial officer so that an informed release/detention decision can be made.").

[225] *Compare* U.S. COURTS, *supra* note 205, at tbl.H-3, *with* U.S. COURTS, U.S. DISTRICT COURTS – PRETRIAL SERVICES RELEASE AND DETENTION 1 tbl.H-14 (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2019.pdf.

[226] *See, e.g.*, United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *1 (D. Ariz. May 11, 2020) ("Defendant requested a preliminary hearing be set and moved to continue the detention hearing so that Pretrial Services could interview him."); United States v. Torres-Ramirez, No. 4:18-CR-40050-LLP, 2018 WL 4232998, *1 (D.S.D. Sept. 5, 2018) ("Pretrial services did not interview Mr. Torres-Ramirez in preparation for the hearing, so the only information the court had about this gentleman was his criminal history, which is extremely minimal."); United States v. Medina, No. 14-CR-00359-RM, 2014 WL 4966220, at *l (D. Colo. Oct. 2, 2014) ("The United States Probation Office did not conduct a bail interview with Defendant prior to the detention hearing because the United States Bureau of Immigration and Customs Enforcement ("ICE") had filed an immigration detainer against the Defendant."); *see also* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 18 ("[I]f the defendant has been determined to be an illegal alien, an interview is not necessary as release is not likely."). However, there are exceptions. *See* United States v. Mendez Hernandez, 747 F. Supp. 846, 847 (D.P.R. 1990) (noting that Pretrial Services interviewed an undocumented defendant at the initial appearance).

speak with the defendant's family or employer to verify ties to the community.[227] Pretrial services officers do not conduct a financial records or property check to verify the defendant's residence and financial ties in the country.[228] Without information from the defendant and collateral sources, pretrial services officers cannot—and do not—perform a PTRA or any other objective risk assessment;[229] nor can they conduct an individualized risk assessment as demanded by the BRA.[230]

Instead, pretrial services officers limit their investigations of undocumented immigrants to an automated criminal and immigration records check.[231] Rather than draft a complete pretrial services report, pretrial services officers draft a "modified" report with only basic biographic information and the results of the automated records check.[232] In these barebones reports, pretrial services officers almost always recommend detention for undocumented immigrants on the basis of risk of flight or dangerousness, regardless of potential familial and community ties, lack of criminal history, or other § 3142 factors.[233]

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[227] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 76 ("In some cases, it may be possible to make an assessment of the defendant's risk to the community and risk of nonappearance without the benefit of a comprehensive investigation . . . These [reports] pertain to defendants who are determined to be illegal aliens. The content of the report is limited to the automated record check and any inquiry with U.S. Immigration and Customs Enforcement.").

[228] *Id.*

[229] *See* HAY, *supra* note 213 ("The PTRA is in sync with completion of the initial intake interview. All of the information the officer requires to complete the PTRA is obtained during that initial interview."). A Pretrial Services policy carves out an exception to the use of PTRA as applied to undocumented immigrants. *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 20 ("For PTRA scores, Category 1 through 3 with recommendations for detention, officers will need to staff the recommendation with SUSPO/designated senior officer and make a chronological entry. This staffing requirement does not apply to illegal aliens."). This is despite the fact that the PTRA was specifically designed for use on undocumented immigrants. *See infra* Section II.C.

[230] *See* United States v. Diaz-Hernandez, 943 F. 3d 1196, 1199 (9th Cir. 2019); United States v. Lizardi-Maldonado, 275 F. Supp. 3d 1284, 1290 (D. Utah, 2017) ("Without that [Pretrial Services] report, defense counsel and the Court lack any information about the defendant beyond that provided by the United States."); United States v. Santos-Flores, 794 F.3d 1088, 1091–92 (9th Cir. 2015); United States v. Stone, 608 F. 3d 939, 946 (6th Cir. 2010); United States v. Tortota, 922 F.2d 880, 888 (1st Cir. 1990); United States v. Hurtado, 779 F. 2d. 1467, 1472 (11th Cir. 1985).

[231] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 24.

[232] *See* David Martin & James Metcalf, *Pretrial Services Along the Border: A District of Arizona Perspective*, 76 FED. PROBATION J. 21, 21 (2012) ("These reports contain the defendant's basic identifying information, charges, immigration status, criminal history, assessments of nonappearance and danger, and a recommendation.").

[233] *See* James Byrne & Jacob Stowell, *The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants*, 71 FED. PROBATION

Pretrial services officers' minimal investigation of undocumented defendants is not the result of mere neglect. It is the manifestation of an exclusionary policy.[234] Under this exclusionary policy, pretrial services officers deliberately fail to conduct a pretrial interview or individual risk assessment of undocumented defendants. Instead, officers categorically deem undocumented defendants to be unmanageable flight risks. In essence, the exclusionary policy effectuates an unlawful presumption of detention for undocumented immigrants from the case's outset. Before the judicial officer even has an opportunity to review the circumstances of an undocumented immigrant's detention, the exclusionary policy deprives the court of the very means to investigate familial and community ties and portrays undocumented immigrants as bent on breaking the law.[235] The exclusionary policy lays the foundation for depriving undocumented immigrants of their rights under the BRA, as well as their right to liberty itself.[236]

This calculated disregard toward undocumented immigrants has resulted in egregiously erroneous risk assessments. A wife of a United States citizen who had lived in the United States for thirty-two years, owned a home, owned a registered business, paid taxes, and had no criminal history—deemed a flight risk.[237] A husband and father of United States citizens who had lived in the country since the age of three and had a single, decade-old misdemeanor conviction—deemed a flight risk.[238] A mother of four minor American-born

J. 31, 33, 35 (2007) ("[It] can be argued that offense driven pretrial detention policies (e.g. *detaining almost every individual charged with an immigration violation*) result in racial disparity in pretrial decision-making . . . . [T]he pretrial detention rate for Hispanic origin defendants . . . increased from 82% to 94% during our review period. This is likely due to our current presumption of detention for defendants charged with immigration violations." (emphasis added)).

[234] *See* MAHONEY ET AL., *supra* note 191, at 16, 25–26 (describing an exclusionary policy as excluding a certain category of defendants from pretrial release consideration and noting the exclusion of immigration law offenders from pretrial interviews); SEGEBARTH, *supra* note 198, at 45–47, n.58 (discussing and listing exclusionary policies employed by pretrial services agencies, including in illegal reentry cases).

[235] Defendants who fail to appear in court may be charged with a felony offense. *See* 18 U.S.C. § 3146. Judges warn defendants of the criminal penalties for failing to appear in court. *See, e.g.*, Appearance and Compliance Bond, United States v. Goiburo, No. 3:20-MJ-01900-MAT (W.D. Tex. Mar. 20, 2020), ECF No. 11 ("Penalties and Consequences for Failure to Appear at a Proceeding"). Nonetheless, pretrial services officers presume undocumented defendants are such a flight risk that they will break the law by not appearing in court or complying with other conditions of release.

[236] *See supra* Section I.A (reviewing provisions of the BRA); United States v. Salerno, 481 U.S. 739, 750 (recognizing liberty as a fundamental right).

[237] Defendant's Motion to Revoke Detention Order at 1–2, United States v. Arevalo-Roman, No. 19-MJ-07829-ATB (W.D. Tex. Aug. 30, 2019).

[238] Bond Memorandum at 2, United States v. Gracida-Infante, 4:19-CR-00317-DC (W.D. Tex. May 20, 2019).

children who had lived in the country for over twenty years, owned her own home, and had no criminal history—deemed a flight risk.[239] A husband of a United States citizen and father of two minor American-born children who lived in the United States for twenty-five years and had no criminal history—deemed a flight risk.[240] A wife of a United States citizen and mother of American-born children who lived in the United States for over a decade, owned a home, volunteered at her church, and had no criminal history—deemed a *dangerous* flight risk.[241]

In perpetuating this practice, pretrial services officers systematically abdicate their "core duty" in violation of the PSA.[242] Due to the exclusionary policy, judicial officers receive deliberately incomplete and inaccurate information on undocumented defendants. Such a policy is irreconcilable with the PSA's mandate to inform judicial officers and undermines informed decision-making on pretrial release.[243]

C. *The Flawed Rationale Behind the Exclusionary Policy*

The exclusionary policy against undocumented immigrants can be attributed, at least in part,[244] to the scarcity of resources. Pretrial Services has limited resources, and immigration prosecutions continue to mount.[245] Undocumented immigrants have historically been less likely to be released than other defendants, though the disparity has not always been so vast, as discussed above.[246] By reducing investigations to mere records checks, Pretrial Services expends fewer resources on investigating undocumented defendants.[247] This rationale fails to justify a categorical exclusion of undocumented defendants, who increasingly have strong ties to the United States and little criminal history, from a proper pretrial investigation.[248]

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[239] Motion to Set Bond at 1, United States v. Perez-Hernandez, No. 3:19-CR-01415-KC (W.D. Tex. Apr. 25, 2019).

[240] Bond Memorandum at 1–2, United States v. Apodaca, No. 3:19-CR-03647-KC (W.D. Tex. Dec. 2, 2019).

[241] Motion to Set Bond at 1, United States v. Sanchez-Herrera, No. 3:19-CR-03868-DCG (W.D. Tex. 2019).

[242] United States v. Chaparro, 956 F. 3d 462, 474 (7th Cir. 2020).

[243] *See* 18 U.S.C. § 3154(1) (2019).

[244] *See supra* note 170 (references discussing the racial animus surrounding the criminalization of unauthorized immigration).

[245] *See supra* Section II.A (reviewing the Pretrial Services Act of 1982 ("PSA") and the duties of pretrial services officers).

[246] *See supra* Section I.B.

[247] *See supra* Section II.A.

[248] *See supra* Section I.D.

Leading up to the PSA, "demonstration pretrial services agencies" struggled to deliver verified information by the initial detention hearing.[249] Pretrial services officers were not timely notified by arresting agencies of the defendant's arrest or allowed to set the times of initial detention proceedings.[250] As a result, pretrial services officers often did not have enough time to interview defendants and provide verified information to judicial officers.[251] Since the establishment of Pretrial Services, the federal prosecution rate has soared, placing greater demands on resources devoted to pretrial investigations.[252] In 1985, the American Bar Association ("ABA") acknowledged the limited resources available to pretrial services agencies and recommended limiting pretrial interviews to only felony defendants.[253] The ABA's rationale was that defendants charged with misdemeanors had a greater chance of being released without needing a pretrial investigation.[254] By the 1990s, however, the use of exclusionary policies greatly exceeded the ABA's prescription and excluded entire categories of defendants, including immigration offenders.[255] Rather than concentrating resources on the defendants who most need them,[256] pretrial services agencies have taken the opposite approach—categorical disregard.

By their very nature, all undocumented immigrants have at least nominal ties outside the United States, even if only by being born abroad. Courts have found that the existence of significant foreign ties, in conjunction with other § 3142(g) factors, may create a risk of flight sufficient to justify detention.[257] In the past,

[249] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GGD-78-105, COMPTROLLER GENERAL: THE FEDERAL BAIL PROCESS FOSTERS INEQUITIES 31 (1978); *supra* Section II.A (discussing Congress's experimentation with "demonstration pretrial services agencies" prior to the PSA).

[250] *Id.*

[251] *Id.* at 38.

[252] *See supra* Sections I.C–D (reviewing the recent history of criminal immigration prosecutions).

[253] *See* SEGEBARTH, *supra* note 198, at 45 n.54 (citing ABA Standards for Criminal Justice, Pretrial Release Standard, revised 1985, 10-4.3–10-4.5, pp.68–80).

[254] *Id.*

[255] *Id.* at 46–47, n.58.

[256] *Id.* ("[L]imited staff and resources may dictate that programs concentrate on interviewing defendants least likely to be released by local judges or magistrates without program intervention.").

[257] *See, e.g.*, United States v. Quartermaine, 913 F.2d 910, 917 (11th Cir. 1990) ("Quartermaine's ties to the community do not outweigh the presumption plus the evidence of his financial assets outside the country, his family tie to Honduras, and his statement to a law enforcement officer suggesting that he would flee, particularly in light of the potential maximum sentence of life plus sixty years that he faces under the indictment."); United States v. Koenig, 912 F.2d 1190, 1193 (9th Cir. 1990) ("His absence of substantial ties to his community, his foreign contacts, and his employment history all support the district court's determination."); United States v. Bikundi, 47 F. Supp. 3d 131, 137 (D.D.C. 2014) ("The

Pretrial Services has observed a slightly higher failure to appear rate among immigration defendants than that among other defendants.[258] A defendant's undocumented status may also hinder the pretrial service officer's ability to find non-custodial placement, especially if they have no ties to the community.[259] Moreover, pretrial services officers assume undocumented immigrants will not be granted release and that, if undocumented immigrants are released, then they will be taken into immigration custody.[260] Amid zero tolerance prosecution of immigration offenses, undocumented immigrants can expect to be taken into immigration custody if released.[261] Accordingly, Pretrial Services shifts resources away from investigating undocumented immigrants, including conducting interviews and individualized risk assessments.[262]

None of these arguments justify the categorical exclusion of undocumented immigrants from pretrial release investigation. While undocumented immigrants necessarily have some level of foreign ties, the prosecution of immigration offenses has changed over the years. From Operation Streamline and onward, prosecutors have cast an increasingly wide net, catching undocumented immigrants who have lived in the United States for decades and possess extensive familial, community, and financial ties to the country.[263] Such defendants are more likely to live in and own their own homes, have extensive family support, and not require the assistance of pretrial services officers in obtaining placement outside of jail. Moreover, as previously noted, foreign ties

Court finds that the defendant has continuing significant foreign ties to her country of origin, including potential access to funds located in Cameroon, and that this raises a significant concern about her serious risk of flight."); United States v. Giordano, 370 F. Supp. 2d 1256, 1263–64 (S.D. Fla. 2005) ("In a case such as this, that examination requires a court to take into account whether a defendant has substantial foreign ties, has access to considerable funds to finance flight from the jurisdiction, or has manifested or demonstrated an intent to flee if arrested.").

[258] *See* Byrne & Stowell, *supra* 233 (noting in 2003 a failure to appear rate of 4.3% for immigration defendants, 3.1% for drug defendants, and 2.8% for defendants charged with violent crimes). *But see* Cohen, *infra* note 265 (citing more recent data reflecting a failure to appear rate equal or lesser to that of other defendants).

[259] *See* James Johnson & Laura Baber, *State of the System: Federal Probation and Pretrial Services*, 79 FED. PROBATION J. 34, 35 (2015).

[260] *See* Rowland, *supra* note 154 ("The high detention rate for immigration cases is in large part because the defendants have ties outside the United States and usually no verifiable connections to the district of prosecution. Therefore, the risk of flight is escalated. Moreover, even if those defendants were released pending trial, most would simply be taken into custody by [ICE] for deportation proceedings."); U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 18 ("[I]f the defendant has been determined to be an illegal alien, an interview is not necessary as release is not likely").

[261] *See supra* Sections I.D–E, note 164 (citing cases upholding the immigration detention of undocumented defendants released pretrial).

[262] *See supra* Sections I.D–E.

[263] *See supra* Section I.D.

are not dispositive of risk of flight, especially when other § 3142(g) factors are strongly in their favor.[264] The fact that undocumented immigrants granted pretrial release would likely be taken into immigration custody does not justify detention under the BRA and, therefore, does not justify the pretrial services officers' failure to individually assess their risk of flight.

The contention that undocumented immigrants pose a greater risk of flight than other defendants is also disputable. Recent data from Pretrial Services reflects a similar, if not lower, failure to appear rate among immigration defendants than that among other defendants.[265] Even if there is a higher chance that an undocumented immigrant will fail to appear in court, as Pretrial Services has observed in the past, the difference is marginal.[266] The BRA does not permit the pretrial detention of a defendant that poses any level of flight risk—the risk must be serious.[267] Even when serious, the risk of flight must be so unmanageable that no condition or combination conditions would "reasonably assure" the defendant's appearance.[268] Surely, a one to two percentage point difference in the chance of failing to appear does not eviscerate all possible conditions of release, especially when immigration defendants are significantly less dangerous while on pretrial release than other defendants.[269]

The greater danger lies in disregarding an entire category of defendants from pretrial release consideration.[270] In 1978, the National Association of Pretrial Services Agencies criticized the notion of excluding defendants from release consideration solely on the basis of the offense charged.[271] Foreshadowing the passage of the BRA, the Association urged that pretrial release recommendations be individualized.[272] The Association later cautioned against

[264] *See supra* Section I.E.

[265] *See* THOMAS COHEN, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010 13 (2012), https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf (reflecting, in table 11, a 1% failure to appear rate among immigration offenders versus a 2% failure to appear rate for weapons and drug offenders and a 1% failure to appear rate for violent, property, and public order offenders).

[266] *See* Byrne & Stowell, *supra* note 233, at 35 (noting in 2003 a failure to appear rate of 4.3% for immigration defendants, 3.1% for drug defendants, and 2.8% for defendants charged with violent crimes).

[267] 18 U.S.C. § 3142(f)(2) (2006).

[268] *Id.* § 3142(e)(1).

[269] *See* Byrne & Stowell, *supra* note 233, at 35 (noting in 2003 that only 2.3% of immigration defendants committed a new crime while on pretrial release compared to 6.9% of defendants charged with weapon offenses and 4.9% of drug defendants).

[270] *See* MAHONEY ET AL., *supra* note 191, at 26 ("[T]he effect of broad exclusionary policies is likely to mean the unnecessary detention of persons who are unable to make even a low money bail but who do not pose serious risks of flight or dangerousness.").

[271] *See* SEGEBARTH, *supra* note 198, at 45 n.52 (citing *Performance Standards and goals for Pretrial Release and Diversion*, at 64, National Association of Pretrial Services Agencies (July 1978)).

[272] *See id.*

"arbitrary exclusion polic[ies]" that were based on "practical considerations" and advised that any exclusionary policy be grounded in research.[273]

Pretrial Services's own research undercuts the rationale behind its exclusionary policy against undocumented immigrants. Prior to the rollout of the PTRA, Pretrial Services utilized a postconviction risk assessment tool, the Risk Prediction Index ("RPI"), for individually assessing defendants for pretrial release.[274] The RPI proved very effective in predicting the success of defendants released pending trial.[275] However, the RPI did not give significant consideration to immigration status.[276] This was intentional.[277] The tool's developers found that immigration status did not significantly affect the defendant's likelihood of failing to appear in court or committing a new offense.[278] Accordingly, Pretrial Services specifically recommended that districts apply the RPI on undocumented immigrants and avoid using risk assessment tools that incorporate undocumented immigration status as a risk factor.[279]

In developing the PTRA, Pretrial Services specifically contemplated its application on undocumented immigrants.[280] The PTRA asks if the defendant is a citizen or an alien.[281] If the defendant is an alien—"legal or illegal"—the PTRA assesses a single point, reflecting a slight increase in the risk of failing to appear in court.[282] In other words, the PTRA does not treat undocumented immigrants any differently than documented immigrants, and only slightly different from citizens.[283] In fact, the PTRA gives greater consideration to youth, lack of education, and multiple prior failures to appear than to immigration status.[284]

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[273] *Id.* at 48.

[274] *See* Cadigan et al., *supra* note 202, at 6.

[275] *See* Timothy Cadigan, *Implementing Evidence-Based Practices in Federal Pretrial Services*, 73 FED. PROBATION J. 64, 66 (2009).

[276] *See* Allyson Theophile, *Pretrial Risk Assessment and Immigration Status: A Precarious Intersection*, 73 FED. PROBATION J. 93, 93 (2009).

[277] *Id.*

[278] *Id.*

[279] *Id.* at 95.

[280] *See* OFFICE OF PROBATION AND PRETRIAL SERVICES, FEDERAL PRETRIAL RISK ASSESSMENT SCORING GUIDE 16 (Mar. 2013), https://federaldefendersny.org/pdfs/Exh%20F.pdf.

[281] *Id.* (question 2.5).

[282] *Id.* ("Being a legal or illegal alien might be associated with ties to a foreign country and therefore an increase in FTA risk").

[283] The maximum score under the PTRA is 14 points. *Id.* Thus, the single point scored against undocumented defendants keeps them within the lowest risk categories, even if they score an additional point for being charged with an immigration offense.

[284] *Id.* at 6, 10, 12 (questions 1.2, 1.6, 2.1).

The following hypotheticals illustrate what little weight the PTRA gives to immigration status. A fifty-five-year-old undocumented immigrant charged with illegal reentry who is employed, owns his own home, has a high school degree, and has no other criminal history or failures to appear, would fall in the lowest risk category.[285] A thirty-year-old undocumented immigrant charged with illegal reentry who is employed, rents an apartment, has vocational training, has a prior misdemeanor conviction, and has no prior failures to appear, would fall in the second lowest risk category.[286] A forty-seven-year-old undocumented immigrant charged with illegal reentry who is employed, rents an apartment, has a GED and some training, has three prior felony convictions, and has no failures to appear, would still fall in the second lowest risk category.[287] A twenty-five-year-old undocumented immigrant charged with illegal reentry who has a college degree, works part-time, lives with their parents, and has a juvenile criminal record, would also fall in the second lowest risk category.[288]

Ongoing modifications to the PTRA further undercut the rationale underpinning the exclusionary policy. Prior to 2013, the PTRA included numerous questions regarding foreign ties.[289] Pretrial Services did not score the questions and only included them for research purposes.[290] They asked, *inter alia*, whether the defendant maintained contact with individuals outside of the United States, possessed a valid or expired passport, had any financial interest outside of the United States, or had travelled outside of the United States during the past ten years.[291] After evaluating the data, Pretrial Services determined that the questions regarding foreign ties "produced no increase in the predictive ability of the PTRA."[292] Consequently, Pretrial Services removed the questions.[293]

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[285] *See id.*

[286] *See id.*

[287] *See id.*

[288] *See id.*

[289] *Compare* HAY, *supra* note 213, at 17–18 (Federal Pretrial Risk Assessment Instrument from Mar. 1, 2010, questions 2.7(A)–(G)), *with* FEDERAL PRETRIAL RISK ASSESSMENT SCORING GUIDE, *supra* note 280 (Federal Pretrial Risk Assessment Instrument from Mar. 27, 2013).

[290] *See* HAY, *supra* note 213 ("[F]oreign ties are not scored at this time. The un-scored items will be analyzed for future revisions aimed at improving the tool.") (FAQ to a sample PTRA worksheet published by Pretrial Services).

[291] *Id.*

[292] *See* Cadigan et al., *supra* note 202, at 9.

[293] *Id.* ("Therefore, the authors recommend to the decision-making body that the nine unscored items not be added to the PTRA and the collection of those items be discontinued."); *see* FEDERAL PRETRIAL RISK ASSESSMENT SCORING GUIDE, *supra* note 280 (reflecting the removal of questions regarding foreign ties); *see also* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 709 (2018) ("Foreign ties may be predictive of whether a defendant remains in the jurisdiction or flees, but for defendants who remain in the

Accordingly, the exclusionary policy against undocumented immigrants is empirically baseless. Even if a substantial share of undocumented defendants lack ties to the country, pretrial services officers exercise no mechanism to screen undocumented defendants for those who do have familial and community ties. As a result, pretrial services officers systematically fail to apprise judicial officers of equities strongly favoring the release of undocumented immigrants and make unfounded recommendations for their mass detention.

D. *Untimely Pretrial Release Investigations*

At first glance, the cure to the exclusionary policy seems straightforward: request a pretrial interview at the detention hearing.[294] This has been the standard response by attorneys representing undocumented immigrants seeking pretrial release.[295] A court-ordered pretrial investigation forces pretrial services officers to comply with their statutory obligations to inform judicial officers.[296] However, this standard response results in undocumented immigrants waiving their right to a timely detention hearing and needlessly prolongs their criminal detention, with important consequences.

A timely detention hearing is "necessary, and the time limitations of the [Bail Reform] Act must be followed with care and precision."[297] Upon arrest, the defendant must be taken before a judicial officer "without unnecessary delay" for initial appearance.[298] In practice, the initial appearance may take place several days after arrest.[299] The initial detention hearing is intended to occur at the initial appearance hearing, during which the pretrial services officer must

jurisdiction, foreign ties are irrelevant to the likelihood that the defendants will appear for court, except to the extent that they may correlate with language or cultural barriers to information about court processes or schedules.").

[294] *See, e.g.*, United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *1 (D. Ariz. May 11, 2020) ("Defendant requested a preliminary hearing be set and moved to continue the detention hearing so that Pretrial Services could interview him."); United States v. Torres-Ramirez, No. 4:18-CR-40050-LLP, 2018 WL 4232998, *1 (D.S.D. Sept. 5, 2018) ("Pretrial services did not interview Mr. Torres-Ramirez in preparation for the hearing . . . Following the filing of the instant motion for release, Mr. Torres-Ramirez was interviewed by pretrial services."); U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 76 ("[T]here are limited times when the defendant's attorney asks that the defendant be interviewed and the outcome is favorable for release.").

[295] *See* U.S. PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 194, at 76.

[296] *See supra* Section II.A (outlining the investigatory duties of pretrial services officers under the PSA).

[297] United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990).

[298] FED. R. CIV. P. 5(1).

[299] *See, e.g.*, United States v. Garcia-Zamarron, No. 3:20-CR-00111-FM (W.D. Tex. Jan. 8, 2020) (two days); United States v. Sanchez-Herrera, No. 3:19-CR-03868-DCG (W.D. Tex. Nov. 26, 2019) (one day); United States v. Gracida-Infante, No. 4:19-CR-00317-DC (W.D. Tex. Apr. 11, 2019) (four days); United States v. Gonzalez-Rodriguez, 621 F.3d 354, 358 (5th Cir. 2010) (three days).

report to the judicial officer their findings and recommendations.[300] In cases involving undocumented defendants, however, the prosecutor often continues the initial detention hearing.[301] Under the BRA, the prosecutor generally cannot continue the hearing for more than three days after initial appearance, which is the amount of time typically requested.[302] The BRA's strict timing requirements are an acknowledgment of the defendant's interest in liberty and the presumption of innocence.[303]

Accordingly, by the time of the "second detention hearing" an undocumented defendant will have been in custody for about a week without a release decision.[304] Pursuant to the exclusionary policy, however, the pretrial services officer will not have conducted a pretrial interview or an individualized risk

[300] 18 U.S.C. §§ 3142(f), 3154(1) (2018); FED. R. CRIM. P. 5(d)(3).

[301] 18 U.S.C. § 3142(f); *see, e.g.*, Motion to Detain, *Garcia-Zamarron*, No. 3:20-CR-00111-FM (W.D. Tex. Dec. 17, 2019), ECF No. 4; Motion to Continue, *Garcia-Zamarron*, No. 3:20-CR-00111-FM (Dec. 20, 2019), ECF No. 9; Motion to Detain, United States v. Sanchez-Herrera, No. 3:19-CR-03868-DCG (W.D. Tex. Oct. 31, 2019), ECF No. 2; Motion to Detain, United States v. Arevalo-Roman, No. 3:19-CR-02929-DB (W.D. Tex. Aug. 12, 2019), ECF No. 2; Motion to Continue, *Arevalo-Roman*, No. 3:19-CR-02929-DB (Aug. 15, 2019), ECF No. 9.

[302] § 3142(f) (a longer continuance is permitted only where there is good cause); *see* United States v. Singleton, 182 F. 3d 7, 12 (D.C. Cir. 1999) ("Congress strictly limited the availability of continuances."); *see also* cases cited *supra* note 294. In cases where the judicial officer temporarily detains an undocumented defendant under § 3142(d), the prosecutor may ask to continue the detention hearing for ten days. *See, e.g.*, United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *2 (D. Ariz. May 11, 2020). However, as discussed, the BRA's temporary detention provision for noncitizens scarcely applies in practice. *See supra* Sections I.A, E.

[303] *See* S. REP. NO. 98-225, at 7, 22 (1983) ("The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial . . . [T]he period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact that the defendant will be detained during such a continuance."); *see also* United States v. Hurtado, 779 F.2d 1467, 1474–75 (11th Cir. 1985) ("Congress considered how much time was needed to prepare for and to contest the relatively simple issues raised at such hearings. It determined that the government could have up to three days and that the defendant could have no more than five. Congress could have made this requirement elastic, permitting such delays as are reasonable and necessary, had it so chosen; it did not. It delimited the process as part of a plan to effectuate a larger purpose: the difficult balancing of a public interest in detaining certain types of suspected offenders as against the private interest in remaining at liberty until proven guilty.").

[304] *See, e.g.*, *Garcia-Zamarron*, No. 3:20-CR-00111-FM (Dec. 20, 2019) (six days); *Sanchez-Herrera*, No. 3:19-CR-03868-DCG (Nov. 5, 2019) (seven days); United States v. Apodaca, No. 3:19-CR-03647-KC (W.D. Tex. Oct. 23, 2019) (seven days); *Arevalo-Roman*, 3:19-CR-02929-DB, (Aug. 15, 2019) (five days). Throughout this Article, "second detention hearing" refers to the detention hearing following the continuance of the initial detention hearing at the initial appearance.

assessment.[305] While defense counsel may proffer evidence of community ties,[306] it is unlikely that the judicial officer would release an undocumented immigrant without first verifying those ties through a pretrial investigation, as noted above.[307] Thus, the standard response of attorneys has been to request a pretrial interview at the second detention hearing.[308] To enable the interview, however, the defendant is required to request yet another continuance.[309] Essentially, the exclusionary policy forces undocumented immigrants seeking pretrial release to waive their right to a timely detention hearing. However, such a waiver must be knowing and voluntary.[310] Having to waive one's right to a timely detention hearing solely to exercise one's right to seek pretrial release under the BRA is not voluntary under the plain meaning of the word[311], and offends due process.[312] Yet such continuances are a commonplace due to the exclusionary policy.[313]

As a result, by the "third detention hearing" undocumented immigrants may have waited weeks in jail for an informed release decision that should have been

[305] *See supra* Section II.B (discussing the exclusionary policy against undocumented defendants).

[306] *See* United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987) ("[T]he government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing").

[307] *See* cases cited *supra* note 205.

[308] *See* cases cited *supra* note 294.

[309] *See, e.g.*, Order Resetting Preliminary Detention Hearing, United States v. Garcia-Zamarron, No. 3:20-CR-00111-FM (W.D. Tex. Dec. 20, 2019), ECF No. 10; Order Resetting Bond Matters/Detention Hearing, United States v. Sanchez-Herrera, No. 3:19-CR-03868-DCG, (W.D. Tex. Nov. 5, 2019), ECF No. 9; Order Resetting Preliminary Detention Hearing, United States v. Apodaca, No. 3:19-CR-03647-KC (W.D. Tex. Oct. 23, 2019), ECF No. 10; Order Resetting Preliminary/Detention Hearing, United States v. Arevalo-Roman, 3:19-CR-02929-DB, (W.D. Tex. Aug. 15, 2019), ECF No. 10.

[310] *See* United States v. Clark, 865 F.2d 1433, 1436–37 (4th Cir. 1989) (holding that both the time requirements and the detention hearing itself are waivable provided the waiver is knowing and voluntary); United States v. Coonan, 826 F.2d 1180, 1184 (2d Cir. 1987) (holding same).

[311] *See Voluntary*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/voluntary?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Aug. 1, 2020) ("unconstrained by interference"); *Voluntary*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Unconstrained by interference; not impelled by outside influence"); *Voluntary*, BLACK'S LAW DICTIONARY FREE ONLINE, https://thelawdictionary.org/voluntary/ (last visited Nov. 14, 2020) ("without compulsion").

[312] *See* cases cited *supra* note 159 (illustrating due process case law in context of pretrial release).

[313] *See* cases cited *supra* note 301.

made shortly after their arrest.[314] Even when the judicial officer grants pretrial release, prosecutors may appeal release decisions and request a stay of the release order on the basis that undocumented immigrants are unmanageable flight risks.[315] The appeals process alone may take one to two months.[316] Waiving the right to a timely detention hearing exacerbates the delay undocumented immigrants suffer while waiting in jail for the ultimate decision on their release.[317]

Repeated continuances also erode undocumented immigrants' rights under the Speedy Trial Act.[318] Pursuant to the Speedy Trial Act, a defendant has the right to be charged by information or indictment within thirty days after the day of the arrest, and the right to a jury trial no later than seventy days thereafter.[319] However, certain time periods are excludable from this Speedy Trial "clock," including delays due to pretrial motions and certain continuances.[320] Numerous circuits have held that continuances of the initial detention hearing and subsequent defense continuances are excludable and, therefore, do not count towards the Speedy Trial clock.[321] Continuing the detention hearing gives the

[314] *See, e.g.*, Order Resetting Preliminary Detention Hearing, *Garcia-Zamarron*, No. 3:20-CR-00111-FM (Dec. 20, 2019) (detention hearing held fifteen days after arrest); United States v. Goiburo, No. 3:20-MJ-01900-MAT (W.D. Tex. Mar. 20, 2020) (detention hearing held eleven days after arrest); United States v. Perez-Hernandez, No. 3:19-CR-01415-KC (W.D. Tex. May 8, 2019) (detention hearing held twelve days after arrest). While intervening weekends and holidays do not count for purposes of the BRA, *see* 18 U.S.C. § 3142(f) (2018), the human cost to the defendant is all the same.

[315] *See, e.g.*, United States v. Vasquez-Benitez, 919 F.3d 546, 549 (D.C. Cir. 2019); United States v. Figueroa-Ramos, No. 18-50352 (5th Cir. June 7, 2018); United States v. Gracida-Infante, No. 19-50421 (5th Cir. June 6, 2019); United States v. Acosta-Leyva, No. 18-51059 (5th Cir. Feb. 27, 2019); United States v. Stone, 608 F. 3d 939, 944 (6th Cir. 2010); United States v. Espinoza-Ochoa, 371 F. Supp. 3d 1018, 1020 (M.D. Ala. 2019); United States v. Soto, 2017 WL 2838193, at *1 (S.D. Ind. July 2, 2017).

[316] *See, e.g.*, *Figueroa-Ramos*, No. 18-50352 (bail appeal decided sixty-nine days after release decision); *Gracida-Infante*, No. 19-50421 (bail appeal decided fifty-three days after release decision); United States v. Sanchez-Barrios, No. 3:19-CR-01857-PRM (W.D. Tex. June 12, 2019) (bail appeal decided forty-two days after release decision); *Acosta-Leyva*, No. 18-51059 (bail appeal decided 56 days after release decision).

[317] *See Sanchez-Barrios*, No. 3:19-CR-01857-PRM (W.D. Tex.) (undocumented defendant who waited in jail forty-two days for a district judge to affirm the magistrate judge's decision to release him also had to wait 10 days in jail for a proper pretrial investigation).

[318] *See* 18 U.S.C. §§ 3161–3174 (2018).

[319] *Id.* §§ 3161(b)–(c).

[320] *Id.* §§ 3161(h)(1)(D), (h)(7)(A).

[321] *See, e.g.*, United States v. Hughes, 840 F.3d 1368, 1378 (11th Cir. 2016) (holding that delay caused by oral motion to detain and continue initial detention hearing was excludable); United States v. Gonzalez-Rodriguez, 621 F.3d 354, 368–69 (5th Cir. 2010) (holding that government's oral motion for pretrial detention at initial appearance, thereby continuing initial detention hearing, constitutes a pretrial motion for Speedy Trial purposes and the

government more time to indict and try undocumented defendants, through no fault of the defendants.

E. *Caving in to Captivity*

In drafting the PSA, Congress acknowledged that the "benefits of having accused persons maintain their jobs, family and social relationships are immeasurable."[322] The deleterious effects of pretrial detention are just as profound as the benefits of release, ranging from increased conviction and recidivism rates to longer sentences of imprisonment.[323] The recent outbreaks in jails and prisons of COVID-19 serve as important reminders of the health risks inherent in incarceration.[324] Moreover, the Supreme Court has specifically recognized the "vital liberty interest" at stake when individuals are detained pretrial, going as far as to describe it as fundamental in nature.[325] Yet most undocumented immigrants waive their right to a detention hearing altogether.[326]

As noted, defendants with little to no ties to the United States are unlikely to be released pending trial, and the likelihood of being detained by ICE on a detainer dissuades immigrants from seeking release.[327] But for growing numbers of undocumented defendants possessing strong ties to the United States and marginal criminal history, the BRA's release factors are strongly in their

resulting delay is excludable); United States v. Vo, 413 F.3d 1010, 1014–16 (9th Cir. 2005) (affirming a district court's ruling that excludable delay resulted from detention motion because of defendant's requested continuance of detention hearing); United States v. Moses, 15 F.2d 774, 777 (8th Cir. 1994) (holding that delay caused by government's continuance of initial detention hearing is excludable); United States v. Bowers, 834 F.2d 607, 609 (6th Cir. 1987) (excluding pretrial detention motions from 30-day filing clock) *abrogation on other grounds recognized in* United States v. White, 920 F.3d 1109, 1111 (6th Cir. 2019).

[322] *See* S. REP. NO. 97-77, at 6 (1981) (quoting Chief Judge Edward Northrop).

[323] *See* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUSTICE, 2–5 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf; Jacob Goldin et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–240 (2018); Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, LAURA & JOHN ARNOLD FOUND. (2013), https://nicic.gov/investigating-impact-pretrial-detention-sentencing-outcomes.

[324] *See* Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

[325] United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990); United States v. Salerno, 481 U.S. 739, 746–48 (1987).

[326] *See* Stephanie H. Didwania, *The Immediate Consequences of Federal Pretrial Detention*, AM. L. & ECON. REV. (forthcoming 2020) (manuscript at 7 n.11) (on file with author), https://ssrn.com/abstract=2809818.

[327] *See supra* notes 164, 205.

favor.[328] For undocumented defendants clearly eligible for release, the procedural hoops, prolonged criminal detention, and stalling of both criminal and immigration proceedings created by the exclusionary policy discourages them from exercising their pretrial release rights and strong-arms them into acquiescing to detention. Such defendants could have spent time otherwise wasted in jail seeking various forms of immigration relief[329], and if successful, return to their families and employment.[330] Instead, undocumented defendants needlessly languish in jail, subjected to all the ills of incarceration.

III. COUNTERING THE EXCLUSIONARY POLICY THROUGH ZEALOUS ADVOCACY

Congress once found it "intolerable" that judicial officers lacked the means to make appropriate decisions regarding pretrial release.[331] Yet by abdicating their investigatory duties under the PSA, pretrial services officers deprive judicial officers of the means to make such decisions. Therefore, undocumented immigrants face a two-fold dilemma when seeking pretrial release. Judicial officers often presume they are unmanageable risks of flight in violation of the BRA.[332] And even if judicial officers correctly and fairly apply the bail statute, the exclusionary policy subverts informed decision-making, prolongs the pretrial detention of undocumented immigrants, and pressures these defendants into abdicating rights provided for by the BRA.[333] This systematic deprivation of undocumented immigrants' pretrial release rights cannot continue unchecked.

Without any changes to pretrial services officers' practices, undocumented immigrants need a safeguard to counter the exclusionary policy. That safeguard

[328] *See supra* Section I.D.

[329] *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(T) (2006) (visa for human trafficking victims), 1101(a)(15)(U) (visa for certain victims of crimes), 1158 (asylum), 1229b(b) (cancellation of removal and adjustment of status), 1231 (withholding of removal), 1401 (acquired citizenship), 1431 (derivative citizenship); 8 C.F.R. §§ 208.16 (2007) (Convention Against Torture), 212.5(b) (humanitarian parole), 241.6 (stay of removal).

[330] *See, e.g.*, Appearance Bond, United States v. Parga-Flores, 3:19-CR-03708-FM (W.D. Tex. June 26, 2020) (illegal reentry defendant who applied for derivative citizenship granted bond and subsequently released from immigration custody); Appearance and Compliance Bond, United States v. Goiburo, 3:20-MJ-01900-MAT (W.D. Tex. Mar. 25 2020) (undocumented defendant granted bond, initiated asylum process, and subsequently released from immigration custody pending his asylum claim); Order of Detention Pending Trial, United States v. Valdez, 3:20-cr-01663-PRM (W.D. Tex. July 16, 2020) (illegal reentry defendant denied bond despite DNA evidence and government documents proving he acquired citizenship at birth, resulting in his incarceration through the citizenship adjudication process).

[331] S. REP. NO. 98-225, at 4 (1983), 1983 WL 25404 ("[I]t is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.").

[332] *See supra* Section I.E.

[333] *See supra* Sections II.B–E.

is found in zealous pretrial advocacy. Immediately after prosecutors decide to charge undocumented immigrants, federal defenders should screen undocumented immigrants for equities favoring release, particularly ties to the community.[334] Federal defenders should actively participate in initial appearance hearings and, immediately upon appointment, move for a pretrial interview of undocumented defendants identified as potentially having strong community ties. In advocating for pretrial release, attorneys should also assert the PTRA, which strongly favors the release of undocumented immigrants, against pretrial services officers' blanket recommendations for detention. Zealous advocacy in the earliest stages of a case would force pretrial services officers to accurately inform judicial officers, and, therefore, spare undocumented immigrants eligible for release from prolonged pretrial detention.

The first step necessary to providing zealous pretrial advocacy is identifying as early as possible who among undocumented defendants would actually benefit from a complete pretrial investigation. Every person has a fundamental right to liberty itself.[335] Simultaneously, courts have found that immigration status, though not dispositive, is relevant in pretrial release determinations and have upheld bond denials of undocumented defendants with no verified ties to the United States.[336] Attorneys should not disregard such defendants from release consideration. As discussed below, there are situations in which defendants with few ties to the country, such as recent arrivals apprehended crossing the border, would be eligible for release. Moreover, a lack of ties does not foreclose the availability of residential placement, such as migrant shelters and halfway houses, or release conditions that mitigate the risk of flight, such as electronic monitoring. That judicial officers rarely explore such release conditions when faced with undocumented immigrants is only more reason to challenge each and every attempt to detain an undocumented immigrant pending trial.[337]

As a practical matter, however, defenders operating on tight resources should prioritize identifying undocumented defendants with strong familial, community, and financial ties as they would more likely benefit from a complete

[334] Due to the scale of screening new cases, the onus of requesting pretrial interviews at initial appearance naturally falls on the district's respective Federal Public and Community Defenders, who represent most federal defendants. *See Defender Services*, U.S. COURTS, https://www.uscourts.gov/services-forms/defender-services (last visited Aug. 1, 2020) ("Nationwide, federal defenders receive approximately 60% of CJA appointments, and the remaining 40% are assigned to the CJA panel.").

[335] *See* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780; (9th Cir. 2014); United States v. Salerno, 481 U.S. 739, 746–50 (1987).

[336] *See* United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) (articulating examples of bond denials).

[337] *See supra* Section I.E (discussing the practice of judicial officers to presumptively order the pretrial detention of undocumented immigrants).

pretrial investigation.[338] The earliest opportunity defenders have to screen for ties is the filing of the criminal complaint. The complaint initiates the criminal case and is filed with the court prior to the defendant's initial appearance.[339] Though often sparse on detail, affidavits attached to complaints may entail clues as to the defendant's background. For example, undocumented immigrants charged with a "found in" illegal reentry offense often enjoy strong familial, community, and financial ties to the United States.[340] Further, as more long-time residents are prosecuted for "found in" illegal reentry offenses, the greater the likelihood of jurisdictional and venue challenges to their prosecution.[341] For example, the "found in" prosecution of a continuously-present undocumented immigrant who had applied for immigration relief over five years prior would be time-barred by the statute of limitations.[342] Separately, the prosecution of a continuously-present undocumented immigrant who had already encountered immigration authorities in a different district would be barred for improper

[338] It should be noted that there is no "right" to a pretrial interview; rather, the defendant has a right to an informed pretrial release decision, and pretrial services officers are legally required to inform judicial officers on information relevant to pretrial release. *See supra* Sections I.A, II.A. Accordingly, if an undocumented defendant with no community ties requests a pretrial services interview, the judicial officer could simply deny the request as unnecessary to further inform the court as to the defendant's risk of flight.

[339] FED. R. CRIM. P. 3; *see* Peter G. McCabe, *A Guide to the Federal Magistrate Judges System*, FED. BAR ASS'N, 1, 23 (last updated Oct. 2016), https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf ("A criminal complaint is the initiating document in a federal felony criminal case, unless a defendant is first indicted by a grand jury. The complaint must be presented under oath to a magistrate judge. It consists of a written statement by the government setting forth the essential facts constituting the offense charged.").

[340] *See, e.g.*, Criminal Complaint at 1–2, United States v. Sanchez-Herrera, No. 3:19-CR-03868-DCG (W.D. Tex. Oct. 31, 2019) (undocumented defendant who was married to a United States citizen, had American-born children, and owned a home arrested leaving her home and charged with illegal reentry); Criminal Complaint at 1–2, United States v. Parga-Flores, 3:19-CR-03708-FM (W.D. Tex. Oct. 23, 2019) (undocumented defendant who was eligible for derivative citizenship arrested leaving his home and charged with illegal reentry); Criminal Complaint at 1–2, United States v. Apodaca, 3:19-CR-03647-KC (W.D. Tex. Oct. 18, 2019) (undocumented defendant who was married to a United States citizen and had American-born children arrested leaving his home and charged with illegal reentry).

[341] *See supra* Section I.D (discussing how zero tolerance enforcement of immigration offenses has resulted in a growing number of immigration defendants with strong ties to the United States).

[342] *See, e.g.*, Motion to Dismiss, *Apodaca*, 3:19-CR-03647-KC, ECF No. 25, *dismissed*. Illegal reentry is a continuing offense until the defendant is discovered by immigration authorities. *See* United States v. Santana-Castellano, 74 F. 3d. 593, 598 (5th Cir. 1996). The five-year statute of limitations for illegal reentry begins to run upon the defendant's discovery and, if expired, the indictment is time-barred. *See* 18 U.S.C. § 3282 (2006); United States v. Gunera, 479 F.3d 373, 376 (5th Cir. 2007).

venue.[343] Identifying such challenges early on could tip the scale in favor of pretrial release, if not accomplishing case dismissal at the preliminary hearing.[344]

Complaints alleging an immigration offense may also include an admission that the defendant intended to reunite with their family in the United States.[345] Complaints often include a description of the defendant's prior immigration history and may evince a pending or prior family-based immigration petition.[346] Similarly, complaints often include a description of the defendant's criminal history, or lack thereof.[347] Such information may serve to "mark" defendants with ties to the United States who do not pose a danger, warranting a pretrial interview or, at the very least, further inquiry at initial appearance.

The initial appearance hearing can be easily overlooked. Not all defender offices participate in the proceeding.[348] To counter the exclusionary policy, however, defenders must play an active role in initial appearances for they provide the earliest opportunity to bind pretrial services officers to their statutory obligations.[349] Defenders appointed to defendants "marked" in the screening

[343] *See* Motion to Dismiss, United States v. Correa-Reyes, 19-CR-00587-KC (W.D. Tex. Apr. 11, 2019), ECF Nos. 39, 67, *dismissed*. Venue for illegal reentry is only proper in the district where the offense ended, i.e., where the defendant was discovered by immigration authorities. *See* 8 U.S.C. § 1329 (2016); United States v. Hernandez, 189 F.3d 785, 789–91 (9th Cir. 1999); *see also* United States v. Delgado-Nuñez, 295 F.3d 494, 503–05 (5th Cir. 2002) (Dennis, J., dissenting); United States v. Asibor, 109 F. 3d 1023, 1037 (5th Cir. 1997). *But see* United States v. Orona-Ibarra, 831 F.3d 867, 873 (7th Cir. 2016) (holding that venue is proper in whichever district an illegal reentry defendant is found).

[344] The magistrate judge must conduct a preliminary hearing to determine probable cause "within a reasonable time, but no later than 14 days after initial appearance if the defendant is in custody[.]" FED. R. CRIM. P. 5.1(c)–(e). In immigration cases, the preliminary hearing tends to be held in tandem with the detention hearing.

[345] *See* Criminal Complaint at 2, United States v. Rodriguez-Valdivia, No. 3:20-MJ-02595-MAT (W.D. Tex. June 29, 2020) (noting undocumented defendant admitted he purchased and used a United States passport card in order to enter the country and reunite with his family); Criminal Complaint at 2, United States v. Acosta-Levya, No. 4:18-CR-00849-DF (W.D. Texas Dec. 7, 2019) (noting undocumented defendant admitted he purchased and presented a false document to travel to the United States in order to seek employment and reunite with his family).

[346] *See, e.g.*, Criminal Complaint at 2, United States v. Ramirez-Sanchez, No. 3:20-MJ-02543-RFC (W.D. Tex. June 18, 2020) (noting defendant had previously entered the country as a part of a family unit in order to apply for asylum); Criminal Complaint, United States v. Arevalo-Roman at 2, No. 3:19-CR-02929-DB (W.D. Tex. Sept. 4, 2019) (noting defendant had been denied a petition to adjust status).

[347] *See* cases cited *supra* note 330.

[348] Where the author practices, for example, a defender's first contact with the defendant is just prior to the second detention hearing, held after the government's three-day continuance of the initial detention hearing at initial appearance.

[349] Once appointed counsel, the defendant cannot be denied access to counsel during initial appearance. FED. R. CRIM. P. 5(d)(2) ("The judge must allow the defendant reasonable opportunity to consult with counsel.").

process should take advantage of the proceeding to obtain information substantiating their ties to the community. When the prosecutor moves to continue the initial detention hearing,[350] defenders should request the judicial officer to order Pretrial Services to interview the defendant if their ties appear substantial. If defenders do not intervene at the initial appearance hearing, the pretrial services officer will simply apply the exclusionary policy, depriving the defendant of their right to a timely and informed pretrial release decision.[351]

That being said, there are situations in which undocumented immigrants with no ties to the country would also benefit from a court-ordered interview. As noted above, zero tolerance enforcement of immigration offenses has resulted in the separation of thousands of minor children from their parents.[352] Despite lacking ties to the United States, some parents were granted pretrial release in light of the cruelty created by their prosecution.[353] However, although the criminal complaint may indicate that the defendant is seeking asylum,[354] it may be silent as to the existence of accompanying family members. For example, in June 2019, an asylum-seeker arriving with his eight-year-old daughter at the United States-Mexico border was arrested and prosecuted for illegal reentry.[355] Despite possessing legal documents proving his paternity and lack of criminal history, immigration authorities separated him from his daughter.[356] The complaint made no mention of the defendant's daughter, and the prosecutor

[350] The prosecutor need not give a reason for the three-day continuance of the initial detention hearing. *See* United States v. Madruga, 810 F.2d 1010, 1012, 1016 (11th Cir. 1987) (finding that the government is entitled to a three-day continuance); United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir. 1985); United States v. Hughes, 840 F.3d 1368, 1379 n.9 (11th Cir. 2016) (commenting that a defense continuance of the initial detention hearing for up to five days does not require cause); United States v. Hurtado, 779 F. 2d. 1467, 1474 n.7 ("full right to a continuance under the terms of the [BRA]"); *supra* Section II.D.

[351] *See supra* Section II.B.

[352] *See supra* Section I.D, note 141.

[353] *See* Jacob Weisberg, *"We Don't Know Because They Won't Tell Us,"* SLATE (June 20, 2018), https://slate.com/news-and-politics/2018/06/a-federal-public-defender-on-child-separations-and-immigration-cases-on-the-texas-border-right-now.html (reporting that at least three separated parents in El Paso, Texas, had been granted release, though U.S. Attorney immediately appealed the grants and requested a stay).

[354] *See* Criminal Complaint at 2, United States v. Perez-Hernandez, No. 3:19-CR-01415-KC (W.D. Tex. Apr. 18, 2019) (noting that defendant attempted to enter the United States in order to claim asylum).

[355] Defendant's Emergency Motion to Compel Reunification of Family Unit, United States v. Lara, 19-CR-02140-DCG (W.D. Tex. July 12, 2019) ("The agents handcuffed Mr. Lara and separated him from Dariana. He remained handcuffed for twelve hours. He last saw his daughter through the window of a Border Patrol vehicle; he could see Dariana's face as she was driven away.").

[356] *Id.* ("Mr. Lara was carrying official documents proving that he is the biological father of Dariana, and the arresting agents seized these documents.").

denied her existence, much less any relationship with the defendant.[357] When concealed by the government, such compelling circumstances may be difficult to detect by the initial appearance hearing.[358]

Moreover, not all undocumented immigrants arrested crossing into the United States, as opposed to being "found in," lack strong ties to the country.[359] Accordingly, speaking with undocumented defendants immediately after their initial appearance is crucial to catching those eligible for release from falling through the cracks. Attorneys should inquire about their ties to the United States, potential claims for immigration relief, prior encounters with immigration authorities, and collateral circumstances that may warrant release, such as family separation.[360] Attorneys should then file a motion requesting a court-ordered pretrial interview for those defendants potentially eligible for release. Thus, by the second detention hearing, judicial officers would have complete, verified information from which to base an informed pretrial release decision.

Finally, a pretrial interview is no guarantee that pretrial services officers will conduct an individualized risk assessment, as required by the BRA.[361] Pretrial services officers may still presumptively recommend that an undocumented defendant be detained, regardless of the extent of ties verified by the pretrial

[357] The defendant's daughter was later found in a shelter for separated children. *See Targeting El Paso*, PBS FRONTLINE (Jan. 7, 2020), https://www.pbs.org/wgbh/frontline/film/targeting-el-paso/ (minute 46:00). They were reunited months later. *Id.*

[358] Information in a complaint for immigration offenses relies on the Form I-213, Record of Deportable/Inadmissible—the arrest report issued by the CBP or ICE officer. *See* Sample Form I-213, Catholic Legal Immigration Network. Immigration attorneys and experts regularly encounter incorrect information on I-213s, including whether the immigrant claimed fear of returning to their home country. *See* John Washington, *Bad Information*, THE INTERCEPT (Aug. 11, 2019, 12:20 PM), https://theintercept.com/2019/08/11/border-patrol-asylum-claim/ ("[I]n '86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered.'").

[359] *See, e.g.*, United States v. Garcia-Zamarron, No. 3:20-CR-00111-FM (W.D. Tex. Jan. 8, 2020) (border crosser was a former DACA recipient who had lived in the United States for years and had most of her family in the country); United States v. Arevalo-Roman, No. 3:19-CR-02929-DB (W.D. Tex. Sept. 4, 2019) (border crosser had lived in the United States for decades and was married to a citizen); *Perez-Hernandez*, 3:19-CR-01415-KC (border crosser had American-born children, was married to a legal permanent resident, and owned a home in the United States).

[360] As noted, instances of government-forced separation of migrant families continue to occur. *See* cases cited *supra* note 141.

[361] *See* United States v. Diaz-Hernandez, 943 F.3d 1196, 1199 (9th Cir. 2019); United States v. Santos-Flores, 794 F.3d 1088, 1091–92 (9th Cir. 2015); United States v. Stone, 608 F.3d 939, 946; (6th Cir. 2010); United States v. Tortota, 922 F.2d 880, 888; (1st Cir. 1990); United States v. Hurtado, 779 F.2d 1467, 1472 (11th Cir. 1985).

interview and collateral investigation.[362] Accordingly, attorneys themselves should apply the PTRA on undocumented defendants. Notwithstanding questions surrounding its validity,[363] the PTRA gives only slight weight to immigration status and strongly favors the release of undocumented immigrants. The PTRA is a simple instrument that can be applied in a matter of minutes utilizing information verified by the court-ordered pretrial interview, as illustrated above.[364] The pretrial services officer could not, in good faith, dispute the release recommendations produced by their own risk assessment tool specifically designed for use on undocumented immigrants.[365]

Undocumented immigrants need not waive any of their rights under the BRA or wait weeks in jail in order to seek pretrial release.[366] Through preemptive screening and active participation in initial appearances, defenders can swiftly identify undocumented defendants potentially eligible for release and compel pretrial services officers to fulfill their PSA obligations in a timely manner. By utilizing Pretrial Services's own risk assessment tool, attorneys can also provide judicial officers with an objective and individualized risk assessment strongly supportive of the pretrial release of undocumented immigrants. In this manner, attorneys can neutralize the unlawful exclusionary policy effectuated against undocumented immigrants.

CONCLUSION

Neither the passage of time nor presidential administrations have favored undocumented immigrants seeking pretrial release.[367] An extreme measure prior to the BRA, the jailing of undocumented immigrants without bail pending trial is now almost a certainty in the federal criminal justice system regardless of defendants' strong ties to the United States and marginal criminal histories.[368] A pervasive presumption of detention against undocumented immigrants keeps them behind bars, in violation of the BRA.[369] Pretrial Services, however, also plays a key role in the mass pretrial incarceration of undocumented immigrants.[370] Through an exclusionary policy, pretrial services officers systematically misinform judicial officers and conduct minimal pretrial

[362] *See* United States v. Apodaca, No. 3:19-CR-03647-KC (W.D. Tex. Dec. 2, 2019) (pretrial services officer recommending detention despite their own report confirming strong community ties and lack of a criminal history).

[363] *See supra* note 218.

[364] *See supra* Section II.C (listing examples of PTRA applications).

[365] *See supra* Section II.A (discussing the PTRA's application on undocumented immigrants and Pretrial Services's confidence in the instrument).

[366] *See supra* Sections II.D–E (discussing the impact of the exclusionary policy on undocumented immigrants held in detention).

[367] *See supra* Sections I.A, C–D.

[368] *See supra* Section I.D.

[369] *See supra* Section I.E.

[370] *See supra* Part II.

investigation of undocumented defendants, in abdication of their PSA obligations.[371] Undocumented immigrants seeking release must waive their right to a timely detention hearing and endure prolonged criminal detention while others, so discouraged, waive their pretrial release rights altogether.[372]

Undocumented immigrants need not surrender their rights under the BRA or acquiesce to detention. Through zealous pretrial advocacy, attorneys can neutralize the exclusionary policy and safeguard the rights of undocumented immigrants.[373] Early screening for community ties would help identify which undocumented defendants are potentially eligible for pretrial release by the initial appearance hearing.[374] Requesting court-ordered pretrial interviews at initial appearance would force pretrial services officers to comply with their PSA obligations to timely and accurately inform judicial officers.[375] Meeting with undocumented defendants immediately after initial appearance would also help identify equities favoring release not readily apparent or disclosed by arresting agents.[376] Further, incorporating the PTRA in pretrial release arguments would provide judicial officers with an objective risk assessment that strongly favors the release of undocumented immigrants with strong community ties and refutes pretrial services officers' blanket recommendations for detention.[377] By countering the exclusionary policy from the case's inception, attorneys can prevent the needless detention of undocumented immigrants who have become fixtures in their communities.

At a time when undocumented immigrants are treated in a manner contrary to human dignity, the path to pretrial release is extremely arduous. The brazenness with which judicial and pretrial services officers disregard their liberty discourages not only undocumented immigrants but also their attorneys. Yet no matter how disheartening the times, attorneys have a duty to challenge "abuse in the administration of justice," wherever they find it.[378]

[371] *See supra* Section II.B.

[372] *See supra* Sections II.D–E.

[373] *See supra* Part III.

[374] *See supra* Part III.

[375] *See supra* Part III.

[376] *See supra* Part III.

[377] *See supra* Section II.A, Part III.

[378] United States v. Mendez Hernandez, 747 F. Supp. 846, 850 (D.P.R. 1990).