

THE IMPACT OF PRETRIAL DETENTION ON
IMMIGRATION PROCEEDINGS:
AN EMPIRICAL ANALYSIS

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As immigration courts work through never-ending dockets and as detention centers operate beyond capacity, scholars and advocates have raised questions about the effects of pretrial immigration detention on outcomes for noncitizens. While pretrial detention is studied frequently in the criminal context, few empirical studies have addressed the consequences of pretrial immigration detention in particular. To help fill this gap in the literature, this Note presents a large-scale empirical study of immigration case data produced by the Executive Office of Immigration Review (EOIR) to draw conclusions about the impact of pretrial immigration detention on immigration cases. Using applied regression analysis, this Note specifically examines whether immigration detention causes noncitizens to voluntarily depart, whether attorney representation during bond hearings positively affects case outcomes, and whether money bail is correlated with reducing flight risk. This Note finds that, while detention lengths cannot be shown to lead to voluntary departure and that money bail likely reduces a noncitizen's flight risk, attorney representation during pretrial detention may positively impact case outcomes and high bond amounts may not be much more effective at ensuring a noncitizen's court appearance than the minimum bond amount.

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* J.D. Candidate 2021, Columbia Law School. The author would like to thank Professor Kellen Funk for his guidance, colleagues and mentors in the Immigrants' Rights Clinic for their thoughtful feedback, and the staff of the *Columbia Law Review* for their exceptional editorial assistance. This Note is dedicated to the memory of the author's father, whose love and encouragement was unsurpassed.

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INTRODUCTION

In July 2019, the Office of the Inspector General of DHS issued a memo urging that DHS take “immediate steps to alleviate dangerous overcrowding and prolonged detention of children and adults” in detention facilities throughout the Rio Grande Valley.¹ Like the detention centers subject to the memorandum, others across the United States have run out of space, and some are operating at triple or quadruple capacity.² Highly backlogged immigration court dockets are further intensifying the problem of overcrowded detention centers.³ Recently, U.S. immigration

1. Jennifer L. Costello, Off. of the Inspector Gen., DHS, OIG-19-51, Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted) 1 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf [<https://perma.cc/8M3K-6PKM>].

2. Annalisa Merelli, U.S. Immigrant Detention Centers Are So Crowded Border Patrol Is Running Out of Storage Space, Quartz (Sept. 18, 2019), <https://qz.com/1709887/detention-centers-are-so-crowded-border-patrol-ran-out-of-storage> [<https://perma.cc/T932-SKH5>].

3. See Marissa Esthimer, Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?, Migration Info. Source, Migration Pol’y Inst. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking->

court dockets totaled over one million pending removal cases, and the largest courts were tremendously underresourced,⁴ causing some individual removal hearings to be scheduled as far out as August 2023.⁵

As more asylum seekers enter the United States and remain detained in overpopulated detention facilities, and as immigration dockets continue to pile high, pretrial release plays a key role in reducing the strain on the broader immigration system.⁶ Detained noncitizens can be released from detention until their removal proceedings if they can show they (1) would not pose a danger to other people or property, (2) would not pose a threat to national security, and (3) would attend hearings if released.⁷ But in 2017 alone, more than 300,000 noncitizens were held in initial custody in U.S. Immigration and Customs Enforcement (ICE) facilities,⁸ nearly double the amount of people held in federal prisons that same year.⁹ The sheer number of detainees, coupled with steep increases in median bond prices—from \$5,000 in FY2007 to \$8,000 in FY2018—has led to unduly long stays in overcrowded detention facilities.¹⁰

Advocates and scholars argue that prolonged detention before removal proceedings dampens detainees' opportunities to secure legal representation and even incentivizes them to self-deport.¹¹ Moreover, the rising costs of immigration bond can be scrutinized in light of recent legal

point [<https://perma.cc/9DM3-DLW3>]; Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times, Transactional Recs. Access Clearinghouse Immigr. (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579> [<https://perma.cc/3AKA-8R8U>].

4. Michelle Hackman, U.S. Immigration Courts' Backlog Exceeds One Million Cases, *Wall St. J.* (Sept. 18, 2019), <https://www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885> (on file with the *Columbia Law Review*).

5. Burgeoning Immigration Judge Workloads, Transactional Recs. Access Clearinghouse Immigr. (May 23, 2019), <https://trac.syr.edu/immigration/reports/558> [<https://perma.cc/7PYE-93D4>] [hereinafter TRAC Immigr., Burgeoning Immigration Judge Workloads] (“The three largest immigration courts were so under-resourced that hearing dates were being scheduled as far out as August 2023 in New York City, October 2022 in Los Angeles, and April 2022 in San Francisco.”).

6. See, e.g., Kari Paul, Advocates Say the Fastest Way to Help Immigrants Separated from Their Children: Post Their Bail, *Mkt. Watch* (July 6, 2019), <https://www.marketwatch.com/story/this-is-what-it-costs-to-free-one-immigrant-from-detention-2018-06-20> [<https://perma.cc/F2N7-H24F>] (describing the development of nonprofit “community bond funds” to help finance detainee bail bonds in the context of detention center overcrowding).

7. See *In re Guerra*, 24 I&N Dec. 37, 38 (B.I.A. 2006).

8. Katherine Witsman, Off. of Immigr. Stat., DHS, Immigration Enforcement Actions: 2017, at 10 tbl.5 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [<https://perma.cc/UJ8N-V8XW>].

9. Past Inmate Population Totals, Statistics, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops [<https://perma.cc/4LKY-LBHJ>] (last visited Jan. 12, 2021).

10. Stef W. Kight & Felix Salmon, The Cost of Bail for Immigrants Is Surging, *Axios* (July 21, 2019), <https://www.axios.com/immigrant-bail-bonds-costs-rising-ice-judges-2e3a06b6-9802-4157-a282-ac9e9587a10d.html> [<https://perma.cc/7HAD-2RZP>].

11. See *infra* sections I.D.1–.2.

scholarship on bail in the criminal context, which suggests that money bail is prohibitively expensive for defendants¹² and ineffective in ensuring their court appearances.¹³ Much of the literature concerning pretrial detention deals with the criminal pretrial context, and few empirical studies have assessed the causal effects of pretrial immigration detention on several immigration-specific outcomes.¹⁴ In particular, no studies have examined the relationships between (1) time spent in detention and a noncitizen's propensity to opt to voluntarily return to their country of origin, (2) attorney representation at the bond redetermination stage and immigration proceeding outcomes, or (3) bond and a noncitizen's flight risk.¹⁵

As an initial step in addressing this gap in the literature, this Note applies empirical methods commonly deployed in pretrial detention and bail scholarship to case data published by the Executive Office for Immigration Review (EOIR) in order to assess the impact of pretrial detention on immigration case outcomes. Through regression analysis of over eight million immigration cases, this Note tests three prevalent hypotheses about pretrial immigration detention: that prolonged immigration detention discourages noncitizens to pursue their cases and thus encourages them to self-deport, that attorney representation in a noncitizen's bond reconsideration hearing is correlated with favorable immigration proceeding outcomes, and that money bail is not correlated with a reduction in flight risk. This Note concludes that there is not a strong association between detention lengths and voluntary departure decisions, that access to counsel at the bond redetermination stage may positively impact removal proceeding outcomes, and that, while money bond may help prevent flight risk, bail amounts may have only minimal effects on a noncitizen's propensity to fail to appear in immigration court.

This Note proceeds in three parts. Part I presents an overview of bail generally, explores pretrial immigration detention, describes the impact that detention may have on immigration case outcomes, and explains the need for additional exploration. Part II lays out the empirical methods employed in this Note's study and presents the study's findings. Last, Part III discusses the study's conclusions and implications, proposes policy and advocacy recommendations, and suggests avenues for further study.

12. John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, *Hum. Rts. Mag.*, Nov. 2019, at 6, 6 (stating that "money bail or cash bail has led to a form of wealth-based incarceration" in which "people are held . . . in local jails because of their inability to pay bail").

13. See *infra* section I.D.3.

14. See *infra* section I.D.

15. See *infra* section I.D.

I. IMMIGRATION DETENTION IN THE UNITED STATES

Part I of this Note describes pretrial detention and release in the United States immigration system. Section I.A lays out a brief overview of pretrial release in the criminal context to undergird the discussion of bail in immigration detention. Section I.B outlines immigration detention and pretrial release, beginning with the relevant statutes and case law and then detailing how bond is granted in practice. Section I.C summarizes recent changes to immigration policy, including the decisions that have led to overcrowding in detention centers, backlogged court dockets, and reductions in the availability of bond for detainees. Last, section I.D details the effects of the current pretrial immigration detention regime on noncitizens themselves and notes the need for continued study.

A. *Bail*

Bail is a transfer of custody from the state to sureties (including self-sureties) in order to ensure a defendant's appearance at trial.¹⁶ In criminal law, bail is the amount of money ordered by a judge or magistrate that a defendant must pay, or a surety must pledge, in order to be released before their trial.¹⁷ As a matter of law, bail is not a fine or a punishment, and the amount is returned to defendants when their trial concludes.¹⁸ Bail procedures vary between the federal and state systems, but generally, a judge or magistrate determines the amount of bail—if bail is granted—by weighing various factors, including the risk of the defendant fleeing the jurisdiction, the type of crime charged, the defendant's dangerousness, and the safety of the community.¹⁹ The judge or magistrate may also release defendants through other forms of bond, including unsecured

16. See Timothy R. Schnacke, Michael R. Jones & Claire M. B. Brooker, *Pretrial Just. Inst.*, *The History of Bail and Pretrial Release 2* (Sept. 24, 2010), https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf (on file with the *Columbia Law Review*) (explaining that bail was originally conceived of as a system in which “the defendant was required to find a surety who would provide a pledge to guarantee . . . the appearance of the accused in court”).

17. *Steps in a Trial: Bail*, Div. for Pub. Ed., ABA, (2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail [<https://perma.cc/C43V-LTPF>].

18. *Id.* See *United States v. Salerno*, 481 U.S. 739, 751–52 (1987) (holding that pretrial detention, as a regulatory measure on the grounds of community danger, does not implicate due process); *Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979) (noting that a person may be detained until trial if they pose a flight risk). While the principal is returned to defendants, premiums and fees to sureties are not. See Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, *Vox* (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> (on file with the *Columbia Law Review*) (noting that defendants commonly pay 10% of the bail amount to a commercial agent and this fee is not returned to the defendant).

19. ABA, *supra* note 17.

appearance bonds,²⁰ nonmonetary conditions placed on a defendant upon release,²¹ or a defendant's promise to appear at future court appointments on their own recognizance.²²

In the United States, the practice of releasing detained individuals charged with a crime until their court hearing has been commonplace in criminal law since the colonial and post-independence periods.²³ The Supreme Court has long recognized that the right to release from pretrial detention "permits the unhampered preparation of a defense and prevents inflicting punishment prior to conviction."²⁴ While the Eighth Amendment protects defendants from excessive bail, Congress possesses the authority to define which crimes are bailable and which defendants are eligible for release from custody.²⁵ There is, however, no absolute right to bail under federal law.²⁶ In fact, the Court has ruled that there are legit-

20. Unsecured appearance bonds do not require bail to be paid upfront in exchange for release, but monetary penalties are levied against defendants who fail to appear at subsequent court proceedings. Alison M. Smith, Cong. Rsch. Serv., R45533, U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants 3 (2019), <https://crsreports.congress.gov/product/pdf/R/R45533> [<https://perma.cc/4WBS-2D6Z>].

21. Instead of being released in exchange for money, defendants can be released in exchange for their participation in noncarceral pretrial supervision programs or enrollment in a treatment program. See *id.* at 4.

22. Like an unsecured appearance bond, defendants released on personal recognizance are not required to post bail in exchange for release and are not penalized for failing to appear. *Id.*

23. See Schnacke et al., *supra* note 16, at 4 ("Generally, the early colonies applied English law verbatim, but differences in beliefs about criminal justice . . . , differences in colonial customs, and even differences in crime rates . . . led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail."); see also U.S. Const. amend. VIII ("Excessive bail shall not be required . . ."); 22 Journals of the Continental Congress, 1774–1789, at 340 (Roscoe R. Hill ed., 1936) (recording "An Ordinance for the Government of the Territory of the United States North West of the River Ohio" (1787)) (documenting the Continental Congress's creation of a presumptive right to bail in the Northwest Territory unless a defendant committed a capital offense). For examples of states adopting this presumptive right to bail, see Pa. Const. of 1776, ch. ii, § 27 (incorporating the right to bail); Va. Const., Bill of Rights of 1776 § 9 (protecting against excessive bail); The Body of Liberties, 18, reprinted in William H. Whitmore, *The Colonial Laws of Massachusetts* 36 (1889) (codifying the right to bail in colonial Massachusetts).

24. *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

25. U.S. Const. amend. VIII; Jane Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517, 533 & n.78 (1983) (noting the federal rights to bail provided by the Judiciary Act of 1789 and the Bail Reform Act of 1966).

26. See *United States v. Salerno*, 481 U.S. 739, 754–55 (1987) ("We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail."). For a pre-*Salerno* argument that the Eighth Amendment implies a right to bail, see generally Caleb Foote, *The Coming Constitutional Crisis in Bail*: I, 113 *U. Pa. L. Rev.* 959 (1965).

imate government interests in curtailing the availability of pretrial release²⁷ while also acknowledging that there are detrimental consequences for defendants in detention.²⁸

B. *Immigration Detention and Pretrial Release*

In immigration proceedings, noncitizens may also be detained for civil immigration violations, and some are eligible for pretrial release.²⁹ The statutory grant of authority for both detention and pretrial release of noncitizens in immigration proceedings rests in the Immigration and Nationality Act (INA).³⁰ The INA empowers DHS with the authority to arrest, detain, and release noncitizens, as well as to revoke their bond or parole, whether at the border or within the United States.³¹ As with bond in the criminal context, release of most noncitizens is contingent upon the belief that they “will not pose a danger to the safety of other persons or of property and [are] likely to appear for any scheduled proceeding.”³²

Before there is even a question as to whether a noncitizen may be released, there is a custody determination process that sets out whether a noncitizen will be detained by DHS in the first place.³³ When noncitizens are placed into removal proceedings, they may be detained by agents of DHS subagencies, including ICE and the United States Border Patrol (USBP).³⁴ DHS agents make case-by-case determinations as to whether the noncitizen will be taken into custody.³⁵ Agents use a Risk Classification

27. *Salerno*, 481 U.S. at 755 (holding that defendants who are found to pose a threat to the wellbeing of a community may be detained until their trial).

28. *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) (detailing the detrimental impacts of detention on a defendant’s employment opportunities, family relationships, rehabilitation, and ability to prepare an adequate defense in their proceedings).

29. See 8 U.S.C. § 1226 (2018) (codifying the procedures for apprehension and detention of noncitizens).

30. *Id.*

31. See 8 U.S.C. § 1226(a)–(c); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837–38 (2018) (describing the type of noncitizens that may be detained by immigration officials).

32. 8 U.S.C. § 1226(c)(2); see also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (reiterating that the authorizing statute for pretrial detention before immigration proceedings aims to (1) ensure the appearance of detained immigrants at future proceedings and (2) prevent danger to the community).

33. 8 U.S.C. § 1226(a).

34. See *id.* Noncitizens who are facing removal proceedings may be arrested after an administrative warrant has been issued. *Id.*; 8 C.F.R. § 236.1(b)(1) (2020). In cases in which a DHS agent believes a noncitizen is present in the United States in violation of any law or regulation and is likely to escape before a warrant is issued, the agent is authorized to detain the noncitizen without a warrant. 8 U.S.C. § 1357(a)(2). DHS must also determine whether a noncitizen is subject to the INA’s mandatory detention bar, which requires automatic detention for particular noncitizens, including those convicted of certain crimes or designated as suspected terrorists. *Id.* § 1226(a), (c).

35. 8 U.S.C. § 1226(a). Discretionary custody determinations must be made within forty-eight hours following arrest unless there is a prior removal order or warrant. 8 C.F.R. § 287.3(d).

Assessment (RCA) tool to assist them in making their custody decisions.³⁶ The RCA provides recommendations for: (1) a noncitizen's detention or release; (2) the custody classification level; (3) the immigration bond amount, if bond is granted; and (4) the community supervision level.³⁷ Apprehended noncitizens may also be released by other means:³⁸ on recognizance,³⁹ on Orders of Supervision,⁴⁰ or on conditional parole.⁴¹ But despite these alternatives, DHS usually opts to detain the noncitizen nearly as a matter of course, even when the RCA does not recommend detention.⁴² If a noncitizen is deemed detainable, DHS may either continue to detain the noncitizen or issue a bond of at least \$1,500.⁴³ If the bond set by DHS is paid in full, a detained noncitizen may be released.⁴⁴

Unlike bailsetting in the criminal context, both the decision to detain and the initial bond determination in immigration detention are made by a DHS agent and not a neutral decisionmaker.⁴⁵ If a detained noncitizen disputes the bond amount, however, they may seek review of the determination by an immigration judge.⁴⁶ Immigration judges serve under the Attorney General in EOIR, a subagency of DOJ,⁴⁷ and are authorized

36. Off. of the Inspector Gen., DHS, U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised) 4–5 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf [<https://perma.cc/M6TM-N2Z9>].

37. *Id.*

38. 8 U.S.C. § 1226(a).

39. Am. Immigr. Council, Seeking Release from Immigration Detention 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_release_from_immigration_detention.pdf [<https://perma.cc/K2AG-3A79>] (“ICE may release an individual on his or her own recognizance, meaning that he or she signs paperwork committing to appear for scheduled immigration court hearings . . .”).

40. *Id.* (“ICE may release an individual on Orders of Supervision (OSUP). OSUPs contain additional conditions of release, such as electronic monitoring (i.e., wearing a GPS ankle monitor), periodically reporting to an ICE officer in person or by telephone, and travel restrictions.”).

41. *Id.* (“ICE may release an individual on parole, which is permission to reside in the United States for a finite period of time. ICE also may place a parolee on an OSUP requiring him or her to meet certain conditions to remain on parole.” (footnote omitted)).

42. Mark Noferi & Robert Koulish, The Immigration Detention Risk Assessment, 29 *Geo. Immigr. L.J.* 45, 50 (2014) (detailing a 91% detention rate in initial custody determinations despite DHS's internal risk assessment tools only recommending detention in 70% of cases). Recently, the RCA has come under fire for an alleged recalibration that has removed the option to recommend release from custody, in effect ensuring that detention for noncitizens is the norm. Manuel Madrid, ICE Now Locks Up Everyone, *Am. Prospect* (Jan. 3, 2019), <https://prospect.org/power/ice-now-locks-everyone> [<https://perma.cc/5QBA-5J6P>] (citing media reports concerning the quiet policy change).

43. 8 U.S.C. § 1226(a).

44. *Id.*

45. See 8 C.F.R. § 236.1(c)(8) (2020).

46. See *id.* § 236.1(d).

47. *Id.* § 1003.10. Several subagencies and offices nested under DHS and DOJ effectuate the executive's broad immigration policy as it pertains to bond and detention and together coordinate the management of immigration caseloads. Moreover, immigration judges are highly deferential to DHS custody determinations, leading to

to modify a bond determination made by a DHS officer or release a detainee on recognizance.⁴⁸ Noncitizens, or attorneys on their behalf, must proactively request a redetermination hearing at any point before an immigration judge enters a final order.⁴⁹

If an immigration judge grants a request for a bond redetermination hearing, the noncitizen must present their case before the court and prove that (1) they do not pose a danger to the community and (2) they are not a flight risk.⁵⁰ In practice, immigration judges typically weigh a detainee's danger to the community based on their criminal history or evidence of their illegal or questionable conduct, as well as evidence of rehabilitation.⁵¹ When considering a detainee's flight risk, immigration judges consider factors defined as "bond equities" that may be correlated with the likelihood that a noncitizen shows up for subsequent court proceedings.⁵² In *In re Guerra*, the Board of Immigration Appeals (BIA) outlined the factors that immigration judges should consider:

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

concerns about neutrality and the adequacy of review in immigration court. For a discussion of the paucity of independent review in redetermination hearings, see Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 *Ind. L.J.* 157, 186–90 (2016).

48. See 8 C.F.R. § 236.1(d) (“[T]he immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond.”).

49. See *id.* Typically, requests for a bond redetermination hearing are made after a detained noncitizen is issued a Form I-286, the Notice of Custody Determination, from the ICE officer making a custody determination. Immigrant Legal Res. Ctr., *Representing Clients in Bond Hearings: An Introductory Guide 5* (2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf [<https://perma.cc/QQW9-228W>]. Form I-286 contains a box indicating “I do . . . request a determination of this custody decision by an immigration judge.” *Id.* But detainees, or their attorneys or accredited representatives, may also request to schedule a bond hearing orally, by written motion, or telephonically, at the immigration judge's discretion. *Id.*

50. 8 C.F.R. § 236.1(c)(3) (requiring that noncitizens “demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property”); see also *In re Guerra*, 24 *I&N Dec.* 37, 40 (B.I.A. 2006) (detailing the factors a court should use to assess flight risk).

51. See *Immigr. L. Res. Ctr.*, *supra* note 49, at 7–8.

52. *Id.* at 8–9.

prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.⁵³

The burden rests on detainees to demonstrate that they are not a flight risk according to the *Guerra* factors.⁵⁴

While bond in immigration proceedings and bail in the criminal pretrial context are rooted in the same principles, there are substantive and practical differences between the two schemes. Most importantly, immigration detention is not considered a criminal detention but rather a civil detention for administrative violations of the law.⁵⁵ Consequently, a detainee's right to counsel is implicated since the INA explicitly establishes that detainees have no right to court-appointed counsel, even though detainees take part in bond hearings and removal adjudications that are analogous to criminal bail hearings and trials.⁵⁶ Moreover, while criminal defendants can usually pay a commercial bond agent 10% of the bail set by a judge to be released, cash for the whole amount upfront is typically

53. *Guerra*, 24 I&N Dec. at 40 (citing *In re Saelee*, 22 I&N Dec. 1258, 1262–63 (B.I.A. 2000); *In re Drysdale*, 20 I&N Dec. 815, 817 (B.I.A. 1994); *In re Andrade*, 19 I&N Dec. 488, 489 (B.I.A. 1987)).

54. *Id.*

55. *Zadydas v. Davis*, 533 U.S. 678, 690–91 (2001) (noting that though removal proceedings are “nonpunitive in issue and effect” and take place in civil proceedings, the goals of pretrial detention in criminal law guide pretrial detention in immigration proceedings).

56. 8 U.S.C. § 1229a(b)(4)(A) (2018) (“[A]lien[s] shall have the privilege of being represented, at no expense to the Government.”). The Sixth Amendment provisions for government-appointed counsel in criminal prosecutions do not apply in removal proceedings in light of the language in the INA. See U.S. Const. amend. VI. The Fifth Amendment, however, guarantees that “[n]o person . . . be deprived of life, liberty, or property, without due process of law” and noncitizens’ rights to counsel in removal proceedings are generally upheld. U.S. Const. amend. V; see also *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) (“The right to be represented by counsel at one’s own expense is protected as an incident of the right to a fair hearing under the Due Process Clause of the Fifth Amendment.”); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“[S]ince deportation . . . proceedings are civil, they are ‘not subject to the full panoply of procedural safeguards accompanying criminal trials,’ including the right to counsel under the Sixth Amendment Instead, . . . assistance of counsel during these proceedings is governed by the *Fifth Amendment due process right* to a fair hearing.” (quoting *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986))); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (“Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings.”). While noncitizens may have the right to be represented by counsel, the sheer difficulty of securing counsel while in detention may implicate a noncitizen’s Fifth Amendment rights. For a discussion of access to counsel, see *infra* section I.D.2. For additional discussion of the constitutional and statutory frameworks that limit the right, see generally Kate M. Manuel, Cong. Rsch. Serv., R43613, *Aliens’ Right to Counsel in Removal Proceedings*: In Brief (2016), <https://fas.org/sgp/crs/homesec/R43613.pdf> [<https://perma.cc/VYU5-R8LE>].

required of noncitizen detainees.⁵⁷ The financial burden placed upon detained noncitizens may subject them to prolonged detention even if they are not deemed a flight risk or a danger to the community.⁵⁸

C. *Recent Developments in Immigration Policy*

In recent years, the executive branch has enacted, or attempted to enact, policies designed to limit the availability of pretrial release in immigration proceedings.⁵⁹ Moreover, case-by-case decisions by DHS officials and immigration judges have yielded higher bond amounts and declining grant rates across the board.⁶⁰

The recent reopening of immigration cases has had perhaps the most drastic impact on case backlogs. In an attempt to reduce the growing backlog in immigration court dockets, the Obama Administration ordered prosecutors to request that immigration judges administratively close pending cases concerning individuals without criminal records.⁶¹ The policy permitted judges to avoid ruling on a large number of cases and to

57. See Meagan Flynn, *ICE Is Holding \$204 Million in Bond Money, and Some Immigrants Might Never Get It Back*, Wash. Post (Apr. 26, 2019), https://www.washingtonpost.com/immigration/ice-is-holding-204-million-in-bond-money-and-some-immigrants-might-never-get-it-back/2019/04/26/dcaa69a0-5709-11e9-9136-f8e636f1f6df_story.html (on file with the *Columbia Law Review*); see also Griselda Zetino, *Immigration Bonds Getting More Expensive in Arizona*, KTAR News (July 25, 2019), <https://ktar.com/story/2667273/immigration-bonds-getting-more-expensive-in-arizona> [<https://perma.cc/4XR2-YA2X>] (describing how most noncitizens have low incomes and cannot afford to pay the full bond amounts).

58. See Daniel Bush, *Under Trump, Higher Immigration Bonds Mean Longer Family Separations*, PBS News Hour (June 28, 2018), <https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations> [<https://perma.cc/C76C-WZA5>] (reporting the consistently rising immigration bond amounts set since the beginning of the Trump Administration and noting that it is not uncommon for some judges to set \$25,000 bonds); Paul, *supra* note 6 (denoting the development of community bond funds, which are used to post bail for noncitizen detainees who are unable to afford bond).

59. See Paul Ingram, *'Insane' Immigration Bonds: Spiraling Costs, Trump Policies Strain Migrant Families*, Tucson Sentinel (Dec. 15, 2019), http://www.tucson sentinel.com/local/report/121519_immigration_bonds/insane-immigration-bonds-spiraling-costs-trump-policies-strain-migrant-families [<https://perma.cc/7WQW-XZSU>] (describing several Trump Administration actions that have sought to curb or have diminished the availability of pretrial release for noncitizens). Among these policies are two precedential opinions issued by Attorneys General Jeff Sessions and William Barr described in this section. *Id.*

60. Bush, *supra* note 58 (describing a cognizable difference between discretionary decisions in bond hearings made by DHS officials and immigration judges during the Obama Administration compared to decisions made under the Trump Administration).

61. See Memorandum from Riah Ramlogan, Acting Principal Legal Advisor, ICE, to OLPA Attorneys 2 (Apr. 6, 2015), https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf [<https://perma.cc/M5HQ-Y6KF>] (instructing DHS lawyers on how to manage cases in light of the administrative closure policy).

drop them from their dockets in order to make room for high-priority removal proceedings.⁶²

In May 2018, Attorney General Jeff Sessions issued a precedential opinion ruling that the Obama Administration's case closure policy was illegal.⁶³ Sessions argued that neither immigration judges nor the BIA had the authority to administratively close cases and concluded that the INA directed immigration judges and the BIA to adjudicate cases in a timely manner, "[a] requirement that conflicts with a general suspension authority."⁶⁴ As a result, 350,000 removal cases that had been administratively closed were allowed to be reopened, adding to the already enormous number of pending immigration cases across court dockets nationwide.⁶⁵

Despite the growing number of noncitizens in immigration detention, as well as the rising costs of detaining them, the Trump Administration continued to enact policies which would cause the population in detention to swell even more.⁶⁶ In April 2019, Attorney General William Barr issued an opinion overturning a prior BIA decision, which held that asylum seekers who had established a credible fear of persecution or torture in their home country were eligible for bond.⁶⁷ In his ruling, Barr reversed course and ruled that a particular class of asylum seekers—those who are first placed in expedited removal proceedings but later transferred to full proceedings after meeting the burden of proving a credible fear—were ineligible for bond.⁶⁸ Consequently, asylum seekers could only gain release through parole by DHS, meaning that many asylum seekers would be required to remain in detention indefinitely as they awaited their removal hearings.⁶⁹ Barr's decision, however, was

62. *Id.*

63. *In re Castro-Tum*, 27 I&N Dec. 271, 272 (A.G. 2018).

64. *Id.* at 285.

65. Dara Lind, Jeff Sessions Just Reopened the Door to Deporting 350,000 Immigrants Whose Cases Had Been Closed, *Vox* (May 21, 2018), <https://www.vox.com/2018/5/21/17376398/jeff-sessions-immigration-ruling-courts> (on file with the *Columbia Law Review*) ("[Sessions's] wording seems to imply that it's not a matter of if a given case will be reopened, but when: 'I expect the recalendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets[.]' . . .").

66. See Emily Kassie, Detained: How the U.S. Built the World's Largest Immigration Detention System, *Guardian* (Sept. 24, 2019), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump> [<https://perma.cc/A5CP-4PCV>] (detailing the growing number of detained noncitizens, number of detention facilities, and federal spending on detention).

67. *In re M-S-*, 27 I&N Dec. 509, 518–19 (A.G. 2019).

68. *Id.* at 515.

69. *Id.* at 510.

enjoined in July 2019 by a federal judge,⁷⁰ and the injunction was upheld by the Ninth Circuit that same month.⁷¹

Last, bond amount decisions made by DHS agents and immigration judges also contribute to the staggering numbers of noncitizens in immigration detention. Average bond amounts have increased consistently in both initial bond determinations and bond reconsideration hearings.⁷² In redetermination hearings, “all bail bonds issued by judges to immigrants were less than \$2,000” in 2005, but in 2018, only “5% of bonds were less than \$2,000, and 40% were \$10,000 or more.”⁷³ DHS agents are also denying bond more frequently, which correlates with higher bond amounts set by immigration judges in redetermination hearings.⁷⁴ However, only about half of bond reconsideration requests are actually granted.⁷⁵ Moreover, the growing backlog of immigration cases is causing removal proceedings in the nation’s busiest immigration courts to be scheduled up to three years after initial scheduling hearings.⁷⁶ Therefore, increasingly large numbers of detainees are being held for increasingly long periods of time.

D. *The Consequences of Immigration Detention*

Reports of overpopulated detention centers in July 2019 generated widespread awareness about the poor conditions faced by noncitizen detainees housed in facilities throughout the United States.⁷⁷ Beyond presenting visceral images of crowded and filthy detention centers, immigration advocates highlight other, perhaps less obvious,

70. *Padilla v. U.S. Immigr. & Customs Enf’t*, 387 F. Supp. 3d 1219, 1222 (W.D. Wash. 2019), *aff’d in part, vacated in part, remanded sub nom. Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134 (9th Cir. 2020), *cert. granted, remanded*, 141 S. Ct. 1041 (2021) (granting a motion for a preliminary injunction ensuring that asylum seekers are entitled to bond hearings).

71. *Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134, 1139 (9th Cir. 2019), *cert. granted, remanded*, 141 S. Ct. 1041 (2021).

72. See Kight & Salmon, *supra* note 10 (detailing the rise in median bond amounts for immigrants from 2001 to 2008).

73. *Id.*

74. *Id.*

75. See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?, Transactional Recs. Access Clearinghouse Immigr. (Sept. 14, 2016), <https://trac.syr.edu/immigration/reports/438> [<https://perma.cc/2JKB-89GW>] (finding immigration judges granted bond reconsideration requests 45% of the time from 1996 to 2016).

76. See TRAC Immigr., *Burgeoning Immigration Judge Workloads*, *supra* note 5.

77. Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, N.Y. Times (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html> (on file with the *Columbia Law Review*) (highlighting DHS’s findings on living conditions in detention facilities and summarizing reactions from public officials to the report).

consequences of immigration detention.⁷⁸ Among these consequences, commentators frequently call attention to harms tied to questions of pretrial detention and release in particular, including detainees deciding to voluntarily depart the United States, inadequate access to counsel, and expensive money bail.⁷⁹ Consequently, the downstream consequences of detention on outcomes for detainees should also be gauged to inform discussions on pretrial immigration detention.⁸⁰ This section provides background on the three hypotheses tested in this Note. Section I.D.1 examines the role detention might play in a noncitizen's decision to voluntarily depart from the United States pending their removal hearing. Section I.D.2 summarizes views on the impact of access to counsel on immigration proceedings. Last, section I.D.3 surveys the relationship between costly money bail and the prevention of flight risk, drawing insights from the criminal pretrial context.

1. *Voluntary Departure.* — Up until their final removal proceeding, noncitizens without prior removal orders may request to voluntarily depart the United States.⁸¹ Noncitizens file these requests with the immigration judge assigned to their case and, if found eligible, the immigration judge may enter an order granting voluntary departure.⁸² Though a noncitizen would be required to leave the United States, voluntary departure offers a strategic advantage for noncitizens who are not optimistic about their case outcome: Whereas noncitizens who are ordered removed are barred from applying for a visa to reenter the United States for ten years, noncitizens

78. Many of these discussions address factors beyond the scope of this Note but that nonetheless warrant further study. See Nora Ellmann, Ctr. for Am. Progress, *Immigration Detention Is Dangerous for Women's Health and Rights* 4–17 (2019), <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights> [https://perma.cc/CHB6-C6D3] (finding worse health conditions for women and girls in detention as well as inadequate maternal care resources); Julie M. Linton, Marsha Griffin, Alan J. Shapiro & Am. Acad. of Pediatrics Council on Cmty. Pediatrics, *Detention of Immigrant Children*, *Pediatrics* 6 (2017), <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf> [https://perma.cc/5B9R-R4QY] (concluding that immigration detention is associated with harmful emotional and physical health effects among children and adults); Caitlin Palter, UCLA Inst. for Rsch. on Lab. and Emp., *The Economic Impacts of Long-Term Immigration Detention in Southern California* 2–4 (2015), https://irle.ucla.edu/old/publications/documents/CaitlinPalterReport_Full.pdf [https://perma.cc/QP68-GZJ6] (surveying 562 previously detained noncitizens and estimating \$11.9 million in lost wages as well as increased financial insecurity as a result of bond payments and detention itself).

79. See generally Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 *U.C. Davis L. Rev.* 521 (2018) (summarizing critiques of overdeterrence and money bail in the U.S. immigration system).

80. An empirical study on the effects of pretrial detention in misdemeanor cases on case outcomes and future crime served as a model for this Note and is discussed in *infra* note 97 and accompanying text. See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 714 (2017).

81. 8 U.S.C. § 1229c (2018).

82. *Id.* § 1229c(a)–(c).

who are given the opportunity to voluntarily depart may return to the United States with a visa as soon as three years after they leave the country.⁸³

Recent increases in the amount of requests for voluntary departure suggest, however, that detention may encourage detained noncitizens to self-deport.⁸⁴ In 2017, the number of departure requests increased 50% from the prior year⁸⁵ as the number of detained noncitizens topped 300,000.⁸⁶ Anecdotal evidence shows that some detainees who are initially confident about their case outcomes eventually decide that voluntary departure is a better alternative to being held in custody until their hearing.⁸⁷ While no empirical study has assessed the effects of prolonged detention lengths on a noncitizen's choice to voluntarily depart, studies on the effects of pretrial detention in the criminal context find that pretrial detention may prompt guilty pleas and may negatively affect ultimate case outcomes.⁸⁸ A study focused on pretrial immigration detention could use similar methods as those used in the criminal context.

2. *Inadequate Access to Counsel.* — Detained noncitizens face both structural and practical barriers when seeking representation. From a statutory perspective, the INA does not grant the right to a government-

83. Id. § 1182(a)(9)(B)(i) (codifying a three-year bar against readmission into the United States for noncitizens who voluntarily depart); see also Christie Thompson & Andrew R. Calderón, More Immigrants Are Giving Up Court Fights and Leaving the U.S., Marshall Project (May 8, 2019), <https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s> [<https://perma.cc/A7Q6-NZMT>].

84. Thompson & Calderón, *supra* note 83.

85. Id. (finding an upward trend in voluntary departure requests since the beginning of the Trump Administration).

86. See Witsman, *supra* note 8, at 10 tbl.5.

87. See Monsy Alvarado, As Trump Crackdown Continues, More Undocumented Immigrants Are Choosing to 'Self-Deport', N. Jersey (Apr. 27, 2018), <https://www.northjersey.com/story/news/2018/04/27/trump-crackdown-continues-more-undocumented-immigrants-choosing-self-deport/547939002> [<https://perma.cc/44CH-RX99>] (last updated Apr. 28, 2018) (detailing the case of a family that opted to return to their home country after a lengthy detention); Thompson & Calderón, *supra* note 83 (describing a noncitizen's choice to self-deport that was motivated by the strong desire to leave a detention facility after spending several months in custody).

88. See Léon Digard & Elizabeth Swavola, Vera Inst. of Just., Justice Denied: The Harmful and Lasting Effects of Pretrial Detention 4 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/X4Y5-GYYJ>] (using regression analysis to conclude that detained criminal defendants are more likely to be convicted and receive longer sentences). Guilty pleas in criminal proceedings are apt analogues to voluntary departure because, in both contexts, full proceedings may be curbed in exchange for the surrender of certain rights or privileges. For an example of a study of the effects of detention on a defendant's decision to enter a guilty plea, see Emily Leslie & Nolan G. Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments, 60 Chi. J.L. & Econ. 529, 546 (2017) (finding that being detained is positively correlated with a defendant choosing to plead guilty as well as with a defendant being convicted).

appointed attorney during any removal proceedings, so detained noncitizens must secure their own representation while in custody.⁸⁹ Moreover, many noncitizens may never have the opportunity to seek counsel before being taken into custody, and the physical limitations inherent to detention centers, such as distance from population centers and limited access to telephones, computers, or meeting rooms for consultations, as well as cultural and linguistic barriers to communication, may further hinder access to counsel.⁹⁰

The vast majority of noncitizens in removal proceedings are not represented by counsel,⁹¹ and data suggest access to counsel dramatically improves the likelihood of success on the merits in removal proceedings.⁹² Several empirical studies have assessed the effects of attorney representation in removal hearings and found that representation generally has a positive effect on case outcomes.⁹³ Considering the recent spikes in initial bond denials and growing median bond amounts, detainees face an uphill battle in acquiring representation.⁹⁴ A better understanding of representation in bond redetermination hearings—an early, but crucial, juncture in a noncitizen’s case—is key for any discussion on pretrial detention reform.

3. *Expensive Money Bail.* — In the immigration context, money bail is the most common means by which a detained noncitizen may be granted pretrial release.⁹⁵ However, rising bond amounts across the board suggest

89. 8 U.S.C. § 1229a(b)(4)(A) (2018).

90. See Ingrid Eagly & Steven Shafer, Am. Immigr. Council, Access to Counsel in Immigration Court 6 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/LG75-LMMB] (“[I]mmigration enforcement has become increasingly reliant on detention. Today, federal funding allows for approximately 34,000 noncitizens to be held in federal detention centers, jails, and prisons each day. This heavy reliance on detention to facilitate deportation only exacerbates the serious problems noncitizens have obtaining legal counsel.”).

91. *Id.* at 23 (finding that, during a six-year period, 86% of detained noncitizens lacked access to counsel).

92. *Id.* (using logistic regression to conclude that detained noncitizens with counsel, compared to detained noncitizens without attorneys, were 10.5 times more likely to succeed in removal hearings).

93. See *id.*; Emily Ryo, Detained: A Study of Immigration Bond Hearings, 50 Law & Soc. Rev. 117, 127, 144 (2016) (using survey data collected from a group of 565 detainees and employing regression analysis to argue that attorney representation at bond redetermination hearings has a positive effect on the granting of bond); Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc & Noelle Smart, Vera Inst. of Just., Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 30 (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [https://perma.cc/D5XW-ANZD] (showing through regression analysis that noncitizens are likely to receive a favorable case outcome if they are represented by the organization’s attorneys).

94. See *supra* notes 72–76 and accompanying text.

95. See *supra* section I.B.

that more noncitizens are deemed to be flight risks or dangerous to the community and that fewer detainees are able to overcome the financial burden imposed by DHS agents and immigration judges.⁹⁶ Though there are no empirical studies of the effects of bail on a noncitizen's court appearance, studies in the criminal field have concluded that pretrial release based on money bail is not an effective measure for ensuring a defendant's court appearance, or at least is not more effective than non-financial alternatives.⁹⁷ One study found that there were no differences in court appearance rates between defendants who were assigned secured cash bail and defendants who were released through unsecured bonds.⁹⁸ Additionally, a report evaluating the elimination of money bail for certain offenses in Philadelphia found that noncash bail alternatives had zero effect on court appearance rates.⁹⁹ An applied study that gauges whether bail or particular bail amounts meaningfully prevent flight risk in immigration proceedings would fill a substantial gap in the literature.

II. EMPIRICAL ANALYSIS OF PRETRIAL IMMIGRATION DETENTION

Part I laid a foundation for understanding immigration detention and discussed some of the possible downstream consequences of detention on case outcomes. Part II attempts to answer the questions posed in Part I through an empirical study using data published by EOIR. Section II.A describes how the immigration case data were collected and how the

96. See supra section I.C; see also Paul, supra note 6 (noting the considerable financial and mental health burdens produced by immigration detention).

97. See Digard & Swavola, supra note 88, at 2 (“Moreover, there is little evidence to support the efficacy of monetary bail in achieving the intended goals of reducing harm to the community and increasing court appearances.”); Heaton et al., supra note 80, at 759–68 (analyzing the effects of pretrial detention on the likelihood of future crime and finding that those who are detained before their trial are more likely to commit future crime). While that study concerns recidivism rather than flight risk, both of these outcomes deal with the foundational elements of bond, and a study using similar methodology can be used to assess the effectiveness of bail on ensuring a detainee's court appearance. See Michael R. Jones, Pretrial Just. Inst., Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option 11 (2013), https://www.ncsc.org/__data/assets/pdf_file/0017/1655/unsecured-bonds-the-as-effective-and-most-efficient-pretrial-release-option.ashx.pdf [https://perma.cc/HFN9-DSYW] (finding unsecured bonds to be as effective for ensuring court appearance as secured bonds). But see Will Dobbie, Jacob Goldin & Crystal S. Yang, The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges, 108 Am. Econ. Rev. 201, 203 (2018) (finding that pretrial release increases the probability of failing to appear in court by 15.6% among defendants from two major urban counties).

98. See Jones, supra note 97, at 11 (“[U]nsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds. The lack of benefit from using one financial bond type versus another is not surprising given that both bond types carry the potential for the defendant to lose money for failing to appear.”).

99. Phila. Dist. Att’y’s Off., Prosecutor-Led Bail Reform: Year One 8 (2019), <https://medium.com/philadelphia-justice/prosecutor-led-bail-reform-year-one-transparency-report-76574546049c> (on file with the *Columbia Law Review*).

dataset was constructed. Section II.B presents frequency tables that summarize relationships between particular variables in order to highlight salient trends from the data. Last, section II.C presents the results of several multivariate regression models that will test three hypotheses: (1) that detention discourages detainees to pursue their cases and thus incentivizes self-deportation, (2) that attorney representation during a detainee's bond reconsideration hearing positively impacts removal proceeding outcomes, and (3) that money bail does not impact a detainee's court appearance.

A. *Methodology and Dataset Construction*

The data used in this Note are published by EOIR, the DOJ subagency tasked with adjudicating immigration cases.¹⁰⁰ This study is centered on the effects of pretrial detention on a number of outcomes that are recorded in EOIR's case data, and four comma-separated values (CSV) files produced by EOIR were used to create the final dataset used in this study. One CSV file contained data on more than eight million immigration removal proceedings and associated each proceeding with useful variables that were retained in this study's final dataset: a unique case identifier common to all of the CSV files produced by EOIR, the immigration judge's final disposition (including whether the immigration judge ordered voluntary departure), whether the proceeding was held in absentia, whether the noncitizen was released, detained, or never detained at the time of the proceeding, whether there were criminal charges against the noncitizen, and the dates the noncitizen was detained and released—if they were detained before their proceedings.¹⁰¹ Three collated CSV files

100. EOIR compiles data from immigration cases and proceedings into a zip file on its website and releases periodic updates to the dataset roughly every month. EOIR Case Data, DOJ, <https://www.justice.gov/eoir/foia-library-0> [<https://perma.cc/D7BU-QSWU>]. EOIR's zip file is split up into various comma-separated value (CSV) files, each of which contains tabulated information on millions of unique immigration cases. The final dataset used in this study uses data from a zip file published on September 3, 2019. The final dataset and a readme file explaining how the dataset was constructed are available from the *Columbia Law Review* upon request.

101. This CSV file is labeled "B_TblProceeding.csv" and is the largest file included in EOIR's production, containing 8,815,630 unique immigration proceedings. While the table consists of data on several types of proceedings, including Nicaraguan Adjustment and Central American Relief Act (NACARA) adjustments, continued detention reviews, and withholding only reviews, only removal proceedings (as well as older proceedings labeled as deportation proceedings in the EOIR table) were retained for this study, since removal is the most common form of immigration adjudication in the dataset and removal cases usually report a final disposition. After dropping a number of observations reflecting clear clerical errors, a total of 8,421,297 removal proceedings were retained in this study. See *supra* note 100.

In the final dataset, the two date variables were replaced by a single variable calculating the difference between the dates to reflect the number of days a noncitizen was detained. Moreover, because there are several types of favorable dispositions, including relief from deportation, administrative closing, and prosecutorial termination, a binary variable was

contained data on over one million bond proceedings, and several relevant variables from those files were used in this study's final dataset: a unique case identifier common to all of the CSV files, the party who filed a bond reconsideration request on behalf of a detainee, and the bond amounts set by a DHS official during an initial custody determination and by an immigration judge following a bond reconsideration hearing.¹⁰² The removal proceedings and bond CSV files were merged and keyed to the case identifier found in both datasets. Thus, each case reported by EOIR in which a noncitizen in removal proceedings was issued a bond determination became easily identifiable and relationships between variables in removal proceedings and pretrial release could be better determined.¹⁰³

The study uses logistic regression models to draw conclusions on the questions surrounding the relationship between pretrial detention and immigration case outcomes.¹⁰⁴ Given the robust dataset and the numerous variables available for analysis, logistic regression is an appropriate tool for

created to represent whether the outcome in each observation was favorable or unfavorable. Finally, a binary variable associated with voluntary departure was cast out of the variable representing the immigration judge's disposition by grouping all observations into two groups: respondents who were given a voluntary departure order and respondents who received all other types of decisions.

102. The EOIR dataset contained three CSV files—"D_TblAssociatedBond1-000.csv," "D_TblAssociatedBond1-001.csv," and "D_TblAssociatedBond1-002.csv"—which were merged into a single file that rendered data on 1,273,166 bond proceedings. See *supra* note 100.

In the final dataset, a binary variable associated with attorney representation at the bond redetermination stage was cast out of the variable recording the party who filed the request by pooling the observations into two groups: requests filed by attorneys and requests filed by all other parties, including DHS. Additionally, the tables contained a number of observations reporting bond amounts lower than the statutory minimum of \$1,500. See 8 U.S.C. § 1226(a) (2018). Previously, the minimum bond amount for all initial bond determinations was \$500 for cases that began on or after April 1, 1997, and this dataset includes observations from that period. Compare 8 U.S.C. § 1226(a) (2018), with 8 U.S.C. § 1252 (1995) (showing that both statutes are virtually identical except for the changes to the minimum bond amounts). As such, values below \$500 in both the initial and redetermined bond variables may indicate missing or incorrect data and were recoded to contain a missing value so that those determinations would not be considered in the statistical analysis.

103. Of the 1,273,166 bond proceedings in the tables, only 4,522 observations could not be matched to a case identifier in the removal proceedings CSV file. Moreover, the majority of the observations in the final dataset did not report a value for each variable after the tables were merged. This is expected since each immigration case runs a different course. For example, an observation showing a noncitizen in removal proceedings who was never held in custody would not report a value for the amount of days in custody and would not be matched to a bond proceeding. Similarly, a noncitizen who made bond after paying the initial bond amount set by DHS would not seek a redetermination from an immigration judge, and thus, the observation would be missing a value for the variable reporting the redetermined bond amount. Accordingly, the tables and models below describe relationships between specified subgroups of the nearly nine million proceedings in the dataset but do not draw conclusions about the population as a whole. See *infra* sections II.B–C.

104. See *infra* sections II.C.1–3.

measuring the impact of particular variables while controlling for other factors.¹⁰⁵ In this study, several regression models were constructed to analyze variables of interest associated with immigration cases in order to help fill gaps in immigration law scholarship.

Though the EOIR dataset offers a wealth of information concerning immigration proceedings, the dataset presents some issues that complicate the analysis. The largest CSV files contain millions of observations, but there were clear clerical errors throughout the tables.¹⁰⁶ Immigration researchers have discovered “gross irregularities” throughout recent EOIR data releases, leading to broader concerns about EOIR’s inability or unwillingness to administrate proper record collection and maintenance in the future.¹⁰⁷ As a result, the dataset did not include some suspect observations, meaning that this study cannot account for the entire population of people who have been subject to removal proceedings. Still, the dataset provides a very large sample size, which helps to limit the influence of any outliers.

Moreover, the study’s conclusions must be qualified by the use of proxy variables in the regression models. First, the EOIR dataset reports the cases in which an immigration judge ordered voluntary departure during proceedings, but it does not differentiate between voluntary departure requests made outside of detention, during detention, or at the outset of a noncitizen’s removal proceedings. Consequently, this may over- or understate the impact of detention on a noncitizen’s decision to self-deport. Second, the attorney representation variable is a proxy variable drawn from a variable in the dataset that specifies the party that filed the detainee’s bond redetermination hearing request. This variable is not a perfect indicator of attorney representation during the rest of the bond reconsideration process, but it does suggest some kind of access to counsel

105. As the court in *Reed Construction Data, Inc. v. McGraw-Hill Cos.* puts it:

The fundamental goal of regression analysis is to convert an observation of correlation (*e.g.*, apartments in Manhattan cost more than those in Queens) into a statement of causation (apartments in Manhattan cost more than those in Queens because they are in Manhattan, not because they are larger or more luxuriously appointed).

49 F. Supp. 3d 385, 397 (S.D.N.Y. 2014).

106. Some observations in the final dataset were dropped if they clearly reflected clerical errors. For example, several observations reported a noncitizen being released from custody many years before the date on which they were detained. Since such instances could not be properly corrected, obviously erroneous observations were dropped from the final dataset.

107. Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy, Transactional Recs. Access Clearinghouse Immigr. (Oct. 31, 2019), <https://trac.syr.edu/immigration/reports/580> [<https://perma.cc/F8J7-HBP8>] [hereinafter TRAC Immigr., Incomplete and Garbled Immigration Court Data] (explaining that EOIR’s release of immigration case data is usually inaccurate or incomplete and is likely the result of formatting mistakes when CSV files are produced, unintentional or intentional data removal in each data release, or potential deletions of data in master databases).

in the pretrial detention setting.¹⁰⁸ Finally, the variable corresponding to whether or not the trial was held in absentia is a proxy variable used to represent whether a noncitizen failed to appear at their removal hearing. Neither this variable, nor any other variables in the dataset, account for instances in which cases may have been administratively closed without requiring the respondent's appearance in court or situations in which the trial was held in absentia but was later reopened.

Last, there are issues related to the verifiability of some of the data given the inherent nature of the immigration system itself. The EOIR dataset does not account for cases of noncitizens who have reentered the United States after removal or who have been assigned multiple Alien Registration Numbers throughout their lifetime, and these factors may impact decisions in bond proceedings or ultimate case outcomes if evidence of such is introduced during a detainee's proceedings.¹⁰⁹ Despite the drawbacks, the large number of observations helps minimize the effects of these cases on the study's overall conclusions, and the data's general limitations are outweighed by the potential for answers to timely questions in immigration law.

B. *Summary Statistics*

This study aims to determine which variables associated with pretrial detention may influence outcomes in immigration proceedings. This section presents frequency tables that detail interactions between several relevant variables. The use of frequency tables is an initial step in summarizing any relationships between variables before applying regression analysis to discern between correlation and causation.¹¹⁰ Each table lists a variable in the row and a variable in the column and the cells report the possible outcomes, as well as the frequency of each outcome, between the two variables.

108. The final dataset shows that 60.61% of bond reconsideration requests were filed by a respondent's attorney.

109. Alien Registration Numbers, or A-numbers, are assigned to noncitizens whenever their case files are created and are used to identify them in each immigration proceeding. Glossary, USCIS, <https://www.uscis.gov/tools/glossary> [<https://perma.cc/B6BF-7Q9U>] (last visited Jan. 20, 2021).

110. See *Reed*, 49 F. Supp. 3d at 397.

1. *Voluntary Departure.* —

		Table 1: Voluntary Departure Decision vs. Days Spent in Detention ¹¹¹									
		Days in Detention									
Voluntary Departure	Less than 1	1-7	8-14	15-30	31-90	91-180	181-365	366-730	731 or more	Total	
No	Count %	11,637 4.52%	27,810 10.8%	29,633 11.51%	60,967 23.68%	90,617 35.2%	22,945 8.91%	9,669 3.76%	2,525 0.98%	1,634 0.63%	257,437 100%
Yes	Count %	3,320 6.28%	8,703 16.46%	7,851 14.84%	14,720 27.83%	14,990 28.34%	2,967 4.29%	707 1.34%	194 0.37%	135 0.26%	52,887 100%

111. For clarity, the “days in detention” variable in Table 1 was converted into a categorical variable grouped into amount ranges due to the enormous variability between the amounts of days spent in detention. The original continuous variable was used in the logistic regression model in section II.C.1.

Table 1 describes the interaction between a detained noncitizen's voluntary departure and the amount of time they spent in detention and shows that as detention lengths trend toward 31–90 days, a detainee may be more likely to receive a voluntary departure decision. Yet, this likelihood drops significantly after detention exceeds ninety days. In both groups, the largest proportions of observations are contained among the cohorts that spent 1–7, 8–14, 15–30, and 31–90 days in detention. Additionally, in both groups the proportions of observations fall drastically when moving from the 31–90 column to the 91–180 column. Moreover, only 1.97% of those who were ordered to voluntarily depart spent more than six months in detention, compared to 5.37% of those who received some other decision and also spent over six months in detention. At first glance, this analysis somewhat supports the hypothesis that a detainee is more likely to opt to leave the United States as they spend more time in detention, but it may also suggest that detainees may not be compelled to request, or may not receive, voluntary departure after spending more than three months in detention.

2. Pretrial Attorney Representation. —

Table 2: Removal Proceeding Outcome vs. Redetermination Request Filing Party

Proceeding Outcome		Filing Party		
		Nonattorney	Attorney	Total
Unfavorable	Count	304,039	299,081	603,120
	%	50.41%	49.59%	100%
Favorable	Count	80,737	85,115	165,852
	%	48.68%	51.32%	100%

Table 2 displays the interaction between removal proceeding outcomes and the party who filed a bond redetermination request and shows that there is no apparent correlation between the two variables. When noncitizens who received a bond hearing later received an unfavorable disposition at their removal proceeding, 49.59% of them had used attorneys to file their reconsideration request. When they received a favorable decision in their removal proceeding, 51.32% had filed a bond reconsideration request through an attorney. However, the proportions in each cell all hover around 50%, which suggests a weak association between the two variables.

3. *Flight Risk.* —Table 3: Released or Never Detained vs. Proceeding Held in Absentia¹¹²

		Proceeding Held in Absentia		
		No	Yes	Total
Released or Never Detained	Count	1,609,493	231,111	1,840,604
	%	87.44%	12.56%	100%
Never Detained	Count	2,241,367	897,449	3,138,816
	%	71.41%	28.59%	100%

Table 3 shows the interactions between the custody history of nondetained noncitizens and whether their removal proceeding was conducted in absentia. While Table 3 does not shed much light on the effects of pretrial release on the likelihood of a case being conducted in absentia, it is useful to compare two groups of nondetained noncitizens to better understand the effects of custody determinations on ensuring in-person appearance in court. Among noncitizens who were released from custody, 12.56% had cases adjudicated in absentia. However, among noncitizens who were never held in immigration detention, 28.59% of the cases were adjudicated in absentia. The results show that a greater proportion of noncitizens who were never detained had their removal proceedings conducted in absentia compared to noncitizens who were released from detention.

112. For the purposes of frequency table analysis and logistic regression, a binary dummy variable (“notdetained”) was created to represent whether a nondetained noncitizen was either released from custody or never held in detention, and the values were coded as either 0 (“Never Detained”) or 1 (“Released”). This variable was cast out of the “custody” variable, which reports whether a noncitizen was detained, released, or never detained prior to their removal proceeding and helps determine whether there is any association between making bond and having removal proceedings conducted in absentia or never being detained and having removal proceedings conducted in absentia.

Table 4: Proceeding Held in Absentia vs. Initial Bond Amount ¹¹³										
Initial Bond (in dollars)										
In Absentia	500-1,500	1,501-5,000	5,001-7,500	7,501-10,000	10,001-15,000	15,001-20,000	20,001-25,000	25,001 or more	Total	
	No	Count 7,818 3.07%	89,493 35.19%	38,143 15%	52,605 20.68%	20,420 8.03%	19,901 7.83%	12,171 4.79%	13,766 5.41%	254,317
Yes	Count 1,454 3.46%	16,934 40.29%	7,425 17.67%	8,743 20.8%	2,618 6.23%	2,552 6.07%	1,246 2.96%	1,056 2.51%	42,028	100%

Table 5: Proceeding Held in Absentia vs. Redetermined Bond Amount										
Initial Bond (in dollars)										
In Absentia	500-1,500	1,501-5,000	5,001-7,500	7,501-10,000	10,001-15,000	15,001-20,000	20,001-25,000	25,001 or more	Total	
	No	Count 78,456 11.08%	330,984 46.74%	113,265 16%	95,208 13.45%	46,767 6.6%	20,832 2.94%	13,068 1.85%	9,538 1.35%	708,118
Yes	Count 9,750 12.81%	42,750 56.17%	11,925 15.67%	6,974 9.16%	2,731 3.59%	952 1.25%	550 0.72%	477 0.63%	76,109	100%

113. As in Table 1, the bond amount variables in Tables 4 and 5 were converted into categorical variables grouped into amount ranges due to the variability between bond amounts. The continuous variables were used in the logistic regression model in section II.C.3.

Table 4 presents interactions between a noncitizen's removal hearing being held in absentia and the bond amounts set at the initial DHS custody determination, and Table 5 presents the relationship between in absentia hearings and the bond amounts set at the immigration judge's bond redetermination hearing, if a hearing was granted.¹¹⁴ Tables 4 and 5 both present similar trends and show that among the noncitizens who made bond, most observations were contained in the \$1,501–5,000, \$5,001–7,500, and \$7,501–10,000 ranges, whether the hearings were conducted in absentia or not. Moreover, in both tables, the proportion of observations within the range of the old and new statutory minimum bond amounts, \$500–1,500, are smaller than those contained in the \$1,501–5,000 range. Strikingly, 56.17% of noncitizens who were issued a redetermined bond but whose removal hearings were adjudicated in absentia were issued bond amounts in the \$1,501–5,000 range.

C. *Regression Analysis*

The frequency tables offered an initial glimpse of the potential relationships between various variables. These tables do not, however, fully account for the relationships or the effects of other variables on the relationships, and thus further analysis is required. The regression models in this study help determine whether outcomes may be caused by particular factors as well as the degree of the effect. In logistic regression models, confounding variables that may also have an impact on the outcome can be identified and selected as control variables to account for any potential bias.¹¹⁵ To identify these variables, each outcome variable used in the study's models was analyzed one-to-one with each predictor in the dataset using logistic regression.¹¹⁶

114. The population measured in Tables 4 and 5 consists only of noncitizens who were actually released from custody by the time the removal hearing was held in absentia. Noncitizens who were either never detained or who were detained at the time of their removal hearing were excluded. Since both tables deal with bond amounts, it follows that the observations only include noncitizens who made bond.

115. David W. Hosmer, Jr., Stanley Lemeshow & Rodney X. Sturdivant, *Applied Logistic Regression* 444 (3d ed. 2013) (detailing how confounding variables may be discerned and explaining that a multivariate logistic regression model may include a set of confounding variables in order to assess the strength of any association shown in a regression model containing only a dependent variable and an independent variable).

116. *Id.* at 89–94 (recommending the inclusion of variables as control variables in regression models if their independent relationship with the outcome variable is found to be statistically significant through purposeful selection in order to ensure a parsimonious regression model).

Table 6: Logistic Regression of all Predictors¹¹⁷

Voluntary Departure		Proceeding Outcome		Proceeding Held in Absentia	
Variable	p-value	Variable	p-value	Variable	p-value
Days Detained	<0.001***	Filing Party	<0.001***	Not Detained	<0.001***
Proceeding Outcome	N/A	Proceeding Held in Absentia	<0.001***	Initial Bond Amount	0.827
Filing Party	<0.001***	Not Detained	<0.001***	Redetermined Bond Amount	<0.001***
Proceeding Held in Absentia	<0.001***	Initial Bond Amount	0.657	Voluntary Departure	<0.001***
Not Detained	<0.001***	Redetermined Bond Amount	<0.001***	Days Detained	<0.001***
Initial Bond Amount	0.282	Voluntary Departure	N/A	Proceeding Outcome	<0.001***
Redetermined Bond Amount	<0.001***	Days Detained	<0.001***	Filing Party	<0.001***
Criminal Charges	<0.001***	Criminal Charges	<0.001***	Criminal Charges	<0.001***

For each of the outcome variables central to this study, multiple predictors are significant when analyzing the relationship between each predictor and the outcome variable. Table 6 marks predictors with p-values lower than 0.05 (the significance level used for the models in this study) with asterisks.¹¹⁸ These variables are deemed significant and may be used to mitigate biases in the final regression models. Thus, the predictors that are associated with a p-value of less than 0.05 in Table 6 were all used in their respective final logistic regression models as control variables.

The tables in the following sections each present three regression models: one using only the control variables, one using only the main predictor selected for the model, and one combining the main predictor and all of the selected control variables. The regression model using only the control variables helps to discern any causal effects among the variables.¹¹⁹ The regression model using only the main predictor offers preliminary conclusions about potential relationships between the main

117. A binary categorical variable (“crim”) from the dataset reflects whether there were criminal charges filed against the respondent and, unlike the other variables in this study, it was selected purely as a control variable.

118. Significance levels, or alpha levels, are measurements of the “probability of rejecting the null hypothesis when the null hypothesis is true” or, in plain English, “the probability of making a wrong decision.” Alphas, P-Values, and Confidence Intervals, Oh My!, Minitab Blog (Oct. 1, 2012), <https://blog.minitab.com/blog/alphas-p-values-confidence-intervals-oh-my> [<https://perma.cc/UW5W-FXGZ>]. When a significance level (a number between 0 and 1) is chosen, it is used as a threshold to which a model’s p-values, or “the probability of obtaining a result as extreme as, or more extreme than, the result actually obtained” can be compared. *Id.* The lower the p-value, the better the significance of a statistical model can be determined. *Id.* Low alpha level thresholds like 0.05 are commonly chosen in empirical studies to minimize the risk of making the wrong decision. *Id.* It must be noted that, in Table 6, two cells do not report a p-value because the “voluntary” variable was cast out of the “decision” variable, so the outcomes between both variables do not vary.

119. Hosmer et al., *supra* note 115, at 444.

predictor and outcome variable.¹²⁰ The combined regression model helps confirm possible relationships when controlling for other confounding variables.¹²¹ Each model reports odds ratios that quantify the strength of association between each predictor and the outcome variable.¹²² The models also include asterisks alongside a variable's p-value if that variable is shown to be significant.¹²³ Last, each model contains a pseudo R² value to assess how well the model fits the observations.¹²⁴

1. *Voluntary Departure.* — In the models below, the variable associated with whether or not a noncitizen received an order to voluntarily depart was selected as the outcome variable.¹²⁵ The main predictor, a variable representing the amount of days a noncitizen spent in detention, was chosen to determine whether longer detention lengths incentivize noncitizens to voluntarily leave the United States.¹²⁶

		Regression on Controls (n=288,241)		Regression on Main Predictor (n=310,324)		Combined Regression (n=125,478)	
		Odds Ratio	p-value	Odds Ratio	p-value	Odds Ratio	p-value
Main Predictor	Days Detained			0.997	<0.001***	0.998	<0.001***
Controls	Filing Party	0.565	<0.001***			0.863	<0.001***
	Proceeding Held in Absentia	0.005	<0.001***			0.001	<0.001***
	Not Detained	0.953	0.080			1.16	0.626
	Redetermined Bond Amount	0.999	0.035***			0.999	0.211
	Criminal Charges	0.059	<0.001***			0.216	<0.001***
Pseudo R²		0.22		0.01		0.14	

Table 7 presents the results from the regression models and suggests that increased detention lengths may not cause detainees to voluntarily

120. Id. at 35–45.

121. Id. at 444.

122. Odds ratios are compared to a value of 1. If the odds ratio equals 1, there is no association between the two variables. If the odds ratio is greater than 1, there is a positive association between the two variables. If the odds ratio is lower than 1, there is a negative association between the two variables. Id. at 51–56.

123. See Alphas, P-Values, and Confidence Intervals, Oh My!, supra note 118.

124. A higher pseudo R² value generally indicates a better goodness-of-fit between the model and the observations. In logistic regressions models with the same outcomes on the same dataset, the pseudo R² values of each model can be compared to one another to determine which of them best predicts the outcome. FAQ: What Are Pseudo R-Squareds?, UCLA Inst. for Digit. Rsch. & Educ., Stat. Consulting, <https://stats.idre.ucla.edu/other/mult-pkg/faq/general/faq-what-are-pseudo-r-squareds> [https://perma.cc/M6YJ-CQJW] (last visited Jan. 24, 2021).

125. This variable (“voluntary”) is a binary categorical variable coded as either 0 (“No”) or 1 (“Yes”).

126. This variable (“days”) is a continuous variable.

leave the United States. In the control variable model, all but one predictor is shown to be statistically significant. This implies that each of those factors may impact whether or not a noncitizen chooses to voluntarily depart. In the main predictor model, the reported odds ratio is less than 1 and thus indicates a negative relationship between the main predictor and the outcome variable. Because days spent in detention is a continuous variable, the odds ratio can be interpreted as a calculation of the odds that a relationship occurs per each unit increase in the number of days in detention. Here, the odds of voluntary departure decrease by 0.3% each day that a detainee remains in detention. These results are qualified in the combined model: The odds ratio in this model also shows a negative relationship but calculates the odds of voluntary departure as decreasing by 0.2% each day a noncitizen remains detained. Additionally, the pseudo R^2 value of 0.14 indicates a relatively good fit compared to the main predictor model.

2. *Pretrial Attorney Representation.* — In the regression models below, the variable associated with whether or not a noncitizen received a favorable decision in their removal proceedings was selected as the outcome variable.¹²⁷ The main predictor, a binary variable representing whether an attorney or another party filed a detained noncitizen’s bond reconsideration request, was selected to determine whether some level of attorney representation in bond proceedings influences ultimate case outcomes.¹²⁸

		Regression on Controls (n=97,954)		Regression on Main Predictor (n=768,972)		Combined Regression (n=97,954)	
		Odds Ratio	p-value	Odds Ratio	p-value	Odds Ratio	p-value
Main Predictor	Filing Party			1.07	<0.001***	1.17	<0.001***
Controls	Proceeding Held in Absentia	0.001	<0.001***			0.001	<0.001***
	Not Detained	0.652	0.207			0.659	0.217
	Redetermined Bond Amount	0.999	0.086			0.999	0.085
	Days Detained	0.999	0.099			0.999	0.180
	Criminal Charges	1.29	0.001***			1.33	<0.001***
Pseudo R²		0.34		0.0002		0.34	

The results from the models in Table 8 support the proposition that assistance from counsel when requesting a bond redetermination is associated with a slight positive effect on a detainee’s subsequent removal

127. This variable (“decision”) is a binary categorical variable coded as either 0 (“No”) or 1 (“Yes”).

128. This variable (“attorney”) is a binary categorical variable coded as either 0 (“No”) or 1 (“Yes”).

proceeding outcomes. In the control variable model, only the variables representing whether a removal proceeding was held in absentia and whether criminal charges were filed against a noncitizen are statistically significant, meaning these variables may also influence case outcomes. In the main predictor model, the odds ratio is greater than 1 and indicates a positive relationship between favorable proceeding outcomes and attorney representation. Attorney representation is a binary variable, so the odds ratio can be interpreted as the odds that noncitizens receive a favorable disposition when comparing noncitizens with some representation in the bond redetermination phase against those without counsel.

As such, the regression output shows that detainees who are represented by attorneys in bond reconsideration requests have 1.07 times greater odds of receiving a favorable disposition from an immigration judge compared to detainees without representation in bond reconsideration requests, though the model's pseudo R^2 value of 0.0002 indicates a much poorer fit compared to the pseudo R^2 value of 0.34 in the combined model. In the combined model, the odds of favorable outcomes for those who have attorney representation increase to 1.17 times compared to detainees without lawyers during the bond reconsideration process, even when controlling for confounding variables.

3. *Flight Risk.* — In the regression models below, the variable associated with whether or not a noncitizen's case was tried in absentia was selected as the outcome variable.¹²⁹ Three main predictors were chosen to determine whether bond affects the odds of a noncitizen's removal hearing being held in absentia: (1) a binary variable representing whether nondetained noncitizens were released or never detained, (2) a continuous variable representing the bond amount issued in DHS's custody determination if bond was granted, and (3) a continuous variable representing the redetermined bond amount issued by an immigration judge.¹³⁰

129. In the dataset, the variable associated with whether or not a noncitizen's case was tried in absentia ("absentia") is a binary categorical variable coded as either 0 ("No") or 1 ("Yes").

130. While the study is primarily focused on money bond amounts, it is helpful to include models using a predictor that details a noncitizen's custody history in order to understand more about the relationship between pretrial release and court appearance generally.

Table 9: Logistic Regression Models on Proceeding Held in Absentia
(Using Not Detained)

		Regression on Controls (n=133,074)		Regression on Main Predictor (n=4,939,420)		Combined Regression (n=133,025)	
		Odds Ratio	p-value	Odds Ratio	p-value	Odds Ratio	p-value
Main Predictor	Not Detained			0.359	<0.001***	1.75	0.126
Controls	Voluntary Departure	1	<0.001***			1	<0.001***
	Days Detained	0.999	<0.001***			0.999	<0.001***
	Proceeding Outcome	0.002	<0.001***			0.002	<0.001***
	Filing Party	0.900	<0.001***			0.897	<0.001***
	Criminal Charges	0.120	<0.001***			0.122	<0.001***
Pseudo R²		0.37		0.03		0.37	

Table 9 presents the output from the regression models exploring the relationship between in absentia hearings and a nondetained noncitizen's custody history, but the results are not entirely conclusive. In the control variable model, all control variables were shown to be significant. The main predictor model reports an odds ratio of 0.359 and suggests a negative relationship between the two variables. Since the custody history variable is binary, the odds ratio can be understood as the odds that a noncitizen's hearing is held in absentia when comparing noncitizens who were released against those who were never detained. As such, the main predictor model suggests that being released from detention corresponds with lower odds of an in absentia proceeding compared to noncitizens who were never detained.

However, the main predictor model reports a low pseudo R² value of 0.03, which puts into question the model's viability as compared with the combined model. Moreover, the results do not track with the combined model's output. When controlling for other variables, the odds ratio in the combined model is reported as 1.75, meaning that noncitizens who are released from detention have 1.75 times greater odds of having their case adjudicated in absentia than noncitizens who were never detained. This model reports a pseudo R² value of 0.37, which is considerably higher than the pseudo R² value in the main predictor model and suggests a better goodness-of-fit. However, while all of the control variables in the combined model report p-values lower than the study's significance threshold of 0.05, the main predictor reports a p-value of 0.126, suggesting that the variable is not statistically significant when interacting with the outcome variable.

Table 10: Logistic Regression Models on Proceeding Held in Absentia (Using Initial Bond Amount)							
		Regression on Controls (n=132,956)		Regression on Main Predictor (n=296,345)		Combined Regression (n=18,921)	
		Odds Ratio	p-value	Odds Ratio	p-value	Odds Ratio	p-value
Main Predictor	Initial Bond Amount			1	0.305	0.999	<0.001***
Controls	Voluntary Departure	1	<0.001***			1	<0.001***
	Days Detained	0.999	<0.001***			1	<0.001***
	Proceeding Outcome	0.002	<0.001***			0.002	<0.001***
	Filing Party	0.896	<0.001***			0.883	<0.001***
	Criminal Charges	0.122	<0.001***			0.175	<0.001***
Pseudo R²		0.37		0		0.42	

Table 11: Logistic Regression Models on Proceeding Held in Absentia (Using Redetermined Bond Amount)							
		Regression on Controls (n=132,956)		Regression on Main Predictor (n=784,227)		Combined Regression (n=97,898)	
		Odds Ratio	p-value	Odds Ratio	p-value	Odds Ratio	p-value
Main Predictor	Redetermined Bond Amount			0.999	<0.001***	0.999	0.001***
Controls	Voluntary Departure	1	<0.001***			1	<0.001***
	Days Detained	0.999	<0.001***			0.999	0.498
	Proceeding Outcome	0.002	<0.001***			0.001	<0.001***
	Filing Party	0.896	<0.001***			0.913	0.007
	Criminal Charges	0.122	<0.001***			0.236	<0.001***
Pseudo R²		0.37		0.01		0.37	

Tables 10 and 11 present the results from the regression models that explore the relationship between a noncitizen's removal proceeding being held in absentia and bond amounts set by DHS officials and immigration judges. Both tables suggest that initial and redetermined bond amounts have little to no impact on a detainee's trial being held in absentia. In order to capture information about noncitizens who made bond, the regressions in Tables 10 and 11 include cases in which a noncitizen was released from custody and exclude cases in which a noncitizen was either never detained or was held in immigration detention at the time of their removal hearing. In both tables, every variable in the control variable models was significant.

Since bond amounts are continuous variables, the odds ratios in these tables can be interpreted as the odds that a released noncitizen's removal hearing was adjudicated in absentia per each dollar increase in bond amounts. Table 10 reveals an odds ratio of 1 in the main predictor model,

indicating that no relationship exists between initial bond amounts and proceedings held in absentia. Table 11 reports an odds ratio of 0.999 in the main predictor model, indicating a 0.1% decrease in the odds that a noncitizen's case is adjudicated in absentia per every dollar increase in the redetermined bond amount. In the combined models, the regression output shows identical odds ratios of 0.999 for both the initial and redetermined bond amounts. This suggests that, when controlling for other variables, there is a 0.1% decrease in the odds of a noncitizen's removal proceeding being held in absentia per every dollar increase in either bond amount. Finally, both combined models reflect viable R^2 values that are higher than those in the corresponding main predictor models.

III. IMPLICATIONS, RECOMMENDATIONS, AND FUTURE STUDY

Having provided empirical conclusions for vital questions in immigration law scholarship, Part III contextualizes the study's results and deals with potential next steps. Section III.A addresses the findings and the implications of the study's results. Section III.B proposes recommendations for immigration detention reform and suggests best practices in light of political constraints and the executive branch's historical approach to immigration policy. Last, section III.C addresses the gaps in this Note's analysis and suggests a path forward for future empirical work.

A. *Implications*

1. *Time Spent in Detention Does Not Impact Voluntary Departure.* — The results from the regressions do not support the hypothesis that the length of detention itself influences detainees to self-deport.¹³¹ Though anecdotal evidence suggests prolonged detention may lead to a lower willingness for detainees to pursue their cases, this study finds that an increase in the amount of days spent in immigration detention is associated with lower odds of receiving an order for voluntary departure.¹³² One explanation is that voluntary departure may be a strategic alternative to detention or a removal order.¹³³ Noncitizens who are advised about the ability to self-deport, either by counsel, DHS officials, or the immigration judge assigned to their case, may be more aware about their chances in removal proceedings and could be better positioned to request to voluntarily leave.

Still, the results may also be qualified by several considerations. First, Table 7 shows that the odds ratio is close to 1, suggesting that the decrease in the odds of receiving a voluntary departure order is relatively slight per each additional day spent in detention. Moreover, as Table 1 shows, the largest cohorts of detained noncitizens spent 1–7, 8–14, 15–30, and 31–90

131. See *supra* section I.D.1.

132. Thompson & Calderón, *supra* note 83; *supra* section II.C.1.

133. See *supra* note 83 and accompanying text.

days in detention, indicating that a detainee's willingness to voluntarily depart may peak early in what could turn out to be a lengthy detention. Second, the conclusions may also be impacted by EOIR's recording capabilities, since the dataset does not record whether a voluntary departure request was made while a noncitizen was detained.¹³⁴ Last, no variables readily account for differences in conditions among detention centers, which may also muddle the relationship between time spent in detention and voluntary departure.¹³⁵

2. *Attorney Representation During Bond Reconsideration Positively Impacts Proceeding Outcomes.* — The regression models studying attorney representation support the hypothesis that attorney representation during bond redetermination hearings leads to favorable outcomes in removal proceedings.¹³⁶ Table 8 shows that the odds of a favorable outcome are slightly higher for noncitizens who are assisted by attorneys in requesting a bond redetermination compared to those who are not.¹³⁷ Intuitively, increased access to counsel at any stage of a noncitizen's immigration proceedings would likely improve their chances of success in their removal hearing since they are receiving at least some legal advice.¹³⁸ Moreover, as one commentator noted, "Representation by counsel might increase the length of bond hearings, which likely contributes to more considered decision-making."¹³⁹

Bond hearings may also address questions and issues that are later tried in removal proceedings.¹⁴⁰ Since an immigration judge can preside over both a noncitizen's reconsideration hearing and their removal proceedings unless the venue is changed, one explanation may be that judges have the opportunity to assess a detainee's chances of success on the merits before the case is ever tried and may glean preparedness from a bond case presented with carefully crafted legal arguments and evidentiary submissions.¹⁴¹ A simpler answer is that, for many noncitizens, bond reconsideration hearings are the first proceedings they will be

134. For a discussion of the study's limitations, see *supra* section II.A. Future studies may explore other factors that impact voluntary departure, especially in light of dramatic increases in detainee requests to self-deport over the last several years. See Thompson & Calderón, *supra* note 83 (noting that the number of noncitizens who have applied for voluntary removal has dramatically increased since the election of Donald Trump).

135. See *infra* note 159 and accompanying text for recommendations on potential avenues for further study of voluntary departure.

136. See *supra* section I.D.2.

137. See *supra* section II.C.2.

138. See Eagly & Shafer, *supra* note 90, at 17–22 (presenting results from frequency tables indicating that noncitizens with legal representation are more likely to be released from detention, appear in court, win their removal cases, and seek and obtain relief from deportation).

139. Srikantiah, *supra* note 79, at 547.

140. See *supra* section I.B (explaining the nature of bond redetermination hearings).

141. See *supra* notes 50–54 and accompanying text (detailing the factors used by immigration judges to determine danger to the community and flight risk).

subject to as they face removal, and early access to counsel may encourage a noncitizen to continue seeking counsel when defending their case on the merits.¹⁴²

3. *Pretrial Release Leads to Absenteeism, but Bond Amounts Do Not Affect Propensity to Appear in Court.* — The study cannot support the hypothesis that money bond does not prevent flight risk among released noncitizens. However, it does conclude that a relationship between money bail amounts and a noncitizen's propensity to fail to appear in court may either be weak or nonexistent.¹⁴³ Though the results in Table 9 suggest that noncitizens who were released from custody have higher odds of having their case adjudicated in absentia compared to noncitizens who were never released, the conclusions must be qualified by the combined model's predictive limitations given the high p-value associated with the main predictor. These results, as well as the trends in Table 3 that show that a higher proportion of noncitizens who were never detained have their removal cases adjudicated in absentia compared to those who released from custody, cannot be used to support the hypothesis that money bail is ineffective at securing a court appearance. Intuitively, released noncitizens may fail to appear at a proceeding in order to avoid an unfavorable decision in their case, but absenteeism can also result from other factors that may affect one's court appearance.¹⁴⁴

The results in Tables 10 and 11, however, show that bond amounts issued by both DHS officials and immigration judges appear to have a minimal impact—0.1% lower odds of a removal proceeding being conducted in absentia per dollar increase in the bond amount—on minimizing flight risk among released noncitizens.¹⁴⁵ This means that, while DHS agents and immigration judges may base their custody decisions on standardized measurements of flight risk, the study's findings support the proposition that increasingly unaffordable bond amounts are not any more effective than the statutory minimum bond amount at ensuring court appearances.¹⁴⁶

142. See *supra* notes 46–49 and accompanying text (noting that bond reconsideration hearings are adjudicated by immigration judges).

143. See *supra* section I.D.3.

144. Kenji Kizuka, Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings, Hum. Rts. First (Jan. 25, 2019), <https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings> [<https://perma.cc/7TT5-Y4UD>] (noting numerous issues, including that immigration agencies often fail to provide language-appropriate information regarding hearings, court obligations are not specified, medical issues or cognitive disabilities prevent attendance, and noncitizens sometimes believe they must have attorneys present in all court proceedings).

145. See *supra* section II.C.3.

146. See *supra* note 50 and accompanying text (determining the measurements of flight risk).

B. *Recommendations*

In light of this Note's findings, immigration advocates can develop legal strategies and legislative approaches that may improve outcomes for detained noncitizens, even as early as their bond redetermination hearings. First, counsel may base arguments for reducing bond amounts on this study's findings about the effects of cash bail amounts on failure to appear in court. Alternatively, attorneys representing detained noncitizens who are unable to pay a high initial bond amount and who expect to be unable to reduce it at redetermination hearings may request conditional parole from the immigration judge.¹⁴⁷ Historically, immigration judges have been loath to release detainees on conditional parole despite the INA's clear grant of authority.¹⁴⁸ A federal court in a recent class action lawsuit, however, ruled that immigration judges are permitted to grant parole in lieu of money bond.¹⁴⁹ While the holding is limited to immigration judges in the court's jurisdiction, the case may be persuasive in arguments made at redetermination hearings. Moreover, since this study supports the theory that access to counsel early in removal proceedings has positive effects on immigration case outcomes, immigration lawyers and organizations should focus on operating in remote areas and detention centers with policies that inhibit access to counsel.¹⁵⁰ Last, immigrants' rights advocates should also be aware of the limited potential of litigation¹⁵¹ and should work to strengthen their political efforts to reform immigration law and create other types of pretrial release schemes that may reduce reliance on monetary bond.¹⁵²

Moreover, immigration officials may also implement policies that would help reduce the number of detainees in immigration detention at a given time. First, DHS should adopt an alternative risk measurement tool that does not overwhelmingly recommend detention of noncitizens.¹⁵³

147. 8 U.S.C. § 1226(a)(2)(B) (2018) (codifying the authority for immigration judges to grant conditional parole).

148. *Id.*; see also Sarah Lakhani & Erin Quinn, Immigrant Legal Res. Ctr., Representing Detained Clients in Bond Hearings at the San Francisco and Los Angeles Immigration Courts 6, https://www.ilrc.org/sites/default/files/resources/represent_detain_clients_bond_hearings-20180629v2.pdf [https://perma.cc/2S94-YFJP] (last visited Jan. 24, 2021) (noting that judges do not commonly grant requests for release on nonmonetary bond).

149. *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015) ("The Court sees no reason to stay the instant case, because it finds § 1226(a) unambiguous. While defendants emphasize that the statute, regulations and precedent fail to define 'conditional parole,' § 1226(a) clearly presents it as an alternative to releasing an alien subject to a bond.").

150. See Eagly & Shafer, *supra* note 90, at 6 (describing the barriers against access to counsel in detention centers).

151. See *supra* note 47 and accompanying text (discussing immigration judges' deference to DHS decisions and, thus, the current presidential administration's broader immigration policy).

152. See *supra* notes 20–22.

153. See *supra* note 42 and accompanying text.

Alternatively, since the current risk assessment tool also plays a significant role in informing bond amounts, the default bond amounts could be reconfigured to recommend amounts approaching the statutory minimum and, given this Note's findings, this would likely not impact the odds of nonappearance.¹⁵⁴ Second, in light of the findings concerning attorney representation's role in case outcomes, immigration judges presiding over cases of detainees who lack attorney representation should ensure that their court rules do not unduly burden such detainees.¹⁵⁵

C. *Future Study*

Despite several logistical and data limitations, this Note fills a gap in immigration law literature and leaves room for studies that can overcome some of these obstacles. First, the EOIR case data itself contains clerical issues and further assessment is required to determine whether the data is suitable for applied empirical analysis.¹⁵⁶ Future studies must consider the state of EOIR's record maintenance or may choose to use alternative datasets altogether.¹⁵⁷ Additionally, sophisticated statistical methods appropriate for studying large datasets can be used in future studies of EOIR case data or other large administrative datasets.¹⁵⁸

Moreover, other studies can adopt approaches similar to the kind used in this Note to address collateral issues in immigration law. In order to continue exploring the effectiveness of monetary bond, a small-scale longitudinal study that surveys noncitizens released from detention through different forms of pretrial release can help to better determine whether alternatives to monetary bond are equally as effective as money bond at protecting against danger to the community and ensuring one's court appearance. In such a study, nondetained noncitizens could be routinely interviewed to find out if they have been charged with a crime or

154. See *supra* note 37 and accompanying text (establishing that the RCA also calculates the appropriate bond amount for a noncitizen who is granted bond).

155. See Eagly & Shafer, *supra* note 90, at 6 (discussing the difficulties many noncitizens face in obtaining representation); Innovation L. Lab & S. Poverty L. Ctr., *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* 13–15 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [<https://perma.cc/8LEA-JJW3>] (offering notable examples of immigration judges' power to "enact sub-regulatory and arbitrary rules, creating disuniformity and impeding fair adjudication" such as requiring that asylum applications be handwritten and filed within a week of a detainee's master calendar hearing and generally restricting opportunities to present evidence).

156. See *supra* notes 106–108 (discussing issues with the EOIR case data).

157. See TRAC Immigr., *Incomplete and Garbled Immigration Court Data*, *supra* note 107. For an example of an empirical study using original data collected through surveys of long-term noncitizen detainees, see generally Ryo, *supra* note 93.

158. See generally *Advanced Statistical Methods for the Analysis of Large Data-Sets (Studies in Theoretical and Applied Statistics)* (Agostino Di Ciaccio, Mauro Coli & Jose Miguel Angulo Ibañez eds., 2012) (describing approaches for handling large datasets and guiding proper visualization and record linkage).

failed to appear at any immigration court proceedings. Second, in order to more closely evaluate the findings on voluntary departure in this Note, an independent study that combines data on voluntary departure and survey data on living conditions and treatment within detention centers may help account for the varied experiences faced by detained noncitizens.¹⁵⁹

CONCLUSION

Previously, the effects of pretrial detention on immigration proceeding outcomes were not fully explored and hypotheses relied mainly on conclusions drawn from the criminal pretrial setting. This Note helps address some of the gaps in the literature, and its findings support the theories that attorney representation at the bond hearing stage positively impacts ultimate case outcomes and that higher amounts of money bail are not correlated with detainees appearing in court. While the findings did not support the theories that prolonged detention itself caused detainees to leave voluntarily and that release from custody is not at all correlated with flight risk, the entire study helps inform both a broader understanding of immigration detention as well as recommendations that can work to curb the harmful effects of pretrial immigration detention.

159. One potential data source would be a dataset constructed by the National Immigrant Justice Center, which “includes data on types of contracts, demographics, medical care providers, and inspections history for more than 1,000 federal facilities that detain immigrants, including county jails, Bureau of Prisons facilities, Office of Refugee Resettlement (ORR) centers, hospitals, and hotels” though “Customs and Border Patrol facilities are not included in the data.” ICE Detention Facilities as of November 2017, Nat’l Immigrant Just. Ctr., <https://immigrantjustice.org/ice-detention-facilities-november-2017> [<https://perma.cc/YM6Z-N5XR>] (last visited Jan. 24, 2021).