

## Pretrial Risk Assessment and Immigration Status: A Precarious Intersection

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**IN APRIL 2009**, Luminosity, an independent research agency, completed a study sponsored by the Office of the Federal Detention Trustee (OFDT) with the support of the Administrative Office of the U.S. Courts and issued a report entitled *Pretrial Risk Assessment in the Federal Court*. The purpose of the research was to identify statistically significant and policy relevant predictors of pretrial outcome to identify defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community ([VanNostrand, 2009](#)). Based on the study's predictors, the Office of Probation and Pretrial Services of the Administrative Office of the U.S. Courts has developed a risk assessment tool designed specifically for federal pretrial defendants. This type of assessment tool provides pretrial services officers and, through them, the courts with valuable information for determining whether or not an individual should be incarcerated until the trial or released, and if the latter, whether the defendant should be required to post bond or be subject to an alternative to detention (ATD).

Although the newly developed Risk Prediction Index (RPI) for federal pretrial services incorporates information such as criminal history, demographics, drug use, and residency, it intentionally does not give significant consideration to immigration status. This is because the defendant's likelihood of committing a new offense or failing to appear is statistically unaffected by the individual factor of his or her immigration status. Therefore, while the public at large may share concerns over the number of crimes committed by illegal aliens in the United States, formulators of this risk prediction tool have determined that it is not necessary for this tool to address a defendant's immigration status. In addition, districts should continue to use the PSA tool when interviewing defendants who are known illegal aliens.

According to Lowenkamp, Lemke, and Latessa ([2008](#)), offender assessment tools are necessary in part because of limited resources to house an increasing jail population. Locked jails are currently at 96 percent capacity, with no decline in growth in the jail population over the last decade. From 2000 to 2008, the number of jail inmates per 100,000 U.S. residents rose from 226 to 258. Additionally, in 2008, jails reported adding 14,911 beds during the previous 12 months, bringing the total rated capacity to 828,413, according to the U.S. Department of Justice Bureau of Justice Statistics.

Risk assessment tools provide several important benefits to both the defendant and the individuals charged with deciding the defendant's fate as he or she awaits trial. These benefits include minimizing personal bias in decision-making, improving placement of individuals for

treatment and safety purposes, protecting against legal scrutiny, and improving allocation of resources.

However, in spite of these benefits, successful use of a PSA risk assessment depends upon its being first validated in the jurisdiction using the tool, to demonstrate that it can successfully predict outcomes for the population served. To accomplish these goals, the assessment should contain items based upon relevant theory, multiple measures of the constructs tested, and test domains that are empirically related to the behavior being predicted ([Lowenkamp, Lemke, & Latessa, 2008](#)).

It is the last of these three requirements—domains empirically related to the outcomes assessed—that is most relevant to the issue of immigration status. Research indicates that factors related to citizenship are not among those most correlated with failure to appear at trial and new arrest while under pretrial supervision. The relevant factors that statistically correlate with both types of failure are age of defendant at first arrest, the number of previous failures-to-appear, three or more prior jail incarcerations, any history of drug use, severity of problems arising from drug use, and employment status at time of arrest ([Lowenkamp, Lemke, & Latessa, 2008](#)).

Other research supports the irrelevance of citizenship status to failure to appear or arrest during the pretrial period. VanNostrand and Keebler ([2009](#)) reported on predictors of pretrial outcome relevant in identifying defendants most suited for pretrial release without jeopardizing the safety of the surrounding community. Of the defendants included in this study from 2001-2007, 31 percent were illegal aliens (p.16). A variety of statistical analyses were performed to determine relevant predictors of pretrial risk, including a univariate analysis of the dependent (pretrial outcome success or failure) and independent variables (risk factors), a bivariate analysis to gain insight into the relationships between pretrial outcome and each risk factor, and a multivariate analysis to identify statistically significant predictors of pretrial risk (p.20). These analyses indicated nine statistically significant predictors of pretrial outcome: pending charges, prior misdemeanor arrests, prior felony arrests, prior failures to appear, employment status, residence status, substance abuse type, primary charge category, and primary charge type. It should be noted that residence status does not specifically address citizenship status, but rather refers to whether the defendant owned or rented a home or had no residence (p. 21).

Approaching this topic from a slightly different angle, and drawing on statistics concerning new arrest and failure-to-appear rates for pretrial cases during the years 2001 to 2008, we find that, overall, illegal aliens do not pose a serious problem in this regard. The percentage of illegal aliens who have new arrest violations after release ranges from 0.0 percent to 3.2 percent during that time period. For comparison, the percentages of United States citizens with new arrest violations during the pretrial period range from 1.9 percent to 4.5 percent.

In spite of the evidence that supports excluding citizenship status from the pretrial risk prediction tool, a number of issues do exist that are associated with illegal immigration and the failure to consider it within the context of the assessment tool. In recent years, the media has drawn attention to illegal immigrants as a source of crime in the United States, perhaps resulting in concern among citizens and other legal residents. These concerns may not be entirely unfounded; according to Clark and Anderson ([2000](#)), federal data indicate that the number of illegal aliens within the criminal justice system has increased dramatically. This may be due in part to improved border enforcement, more effective identification of illegal aliens, or increases in the resident illegal alien population. It is important that we consider the validity of the PSA risk assessment instrument with this growing population of defendants.

Other issues related to excluding immigration status from the PSA tool center on obtaining accurate information for the individual so that the tool is effective in determining pretrial risks. Law enforcement professionals face a number of problems involving illegal immigrants, including identifying individuals who may have multiple aliases, dealing with language barriers, setting probation conditions that can actually be met by illegal immigrants, finding rehabilitation services for illegal immigrants, tracking individuals who fail to appear for trial due to immigration holds, and obtaining testimony of witnesses who are reluctant to step forward out

of fear of deportation ([Weller & Martin, 2009](#)). The first of these issues, identifying individuals who have multiple aliases, may be particularly problematic when trying to ascertain the existence of prior misdemeanor or felony arrests, both of which are significant predictors of failure to appear and new arrests during the pretrial period.

While these issues are significant and must be addressed, the PSA tool is not the proper forum in which to do so. The questions on the assessment tool must be based upon empirical evidence that demonstrates a statistically significant correlation between the construct assessed by the question and the outcome variable. Research indicates that citizenship is not a significant predictor of either failure to appear or new arrest during the pretrial period. Therefore, in spite of the increases in the number of illegal immigrants within the criminal justice system and the issues surrounding illegal immigration, particularly the ability to correctly identify the individual, the tool should not currently or in any future version incorporate illegal immigration. Districts should continue to use the tool to interview individuals of any status, including those whose citizenship status is unknown or in question. Problems arising from illegal immigrants must be addressed through means other than the risk assessment tool, as these individuals do not present any significant obstacles in effectively determining pretrial risk. In the future a number of pretrial services districts will be collecting data for testing purposes to determine if ties to foreign countries predict failure to appear. Currently there is no data that supports this claim.

[back to top](#)

## [References](#)

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[back to top](#)

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[back to top](#)

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[back to top](#)

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