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## CHAPMAN LAW REVIEW

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Citation: Yara M. Wahba, *Risk Assessments are the Diagnosis not the Cure: How Using Algorithms as Diagnostic Tools Can Prevent the Bait-And-Switch of Unconstitutional Pretrial Practices*, 24 CHAP. L. REV. 575 (2021).

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# Risk Assessments are the Diagnosis not the Cure: How Using Algorithms as Diagnostic Tools Can Prevent the Bait-And-Switch of Unconstitutional Pretrial Practices

Yara M. Wahba\*

## INTRODUCTION

*“In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.”<sup>1</sup>*

While the Supreme Court has emphasized the exceptional nature of infringements on any individual’s liberty, the reality of our criminal justice system contradicts this sentiment. Marginalized people,<sup>2</sup> whether because of race or socioeconomic status, disproportionately find themselves as the exception to this rule—the exception to laws that are intended to protect all Americans equally.<sup>3</sup> Where liberty is the norm, it is not the norm for people of color.<sup>4</sup> Where pretrial detention is the carefully limited exception, it is not the carefully limited exception for people of color.<sup>5</sup> Where the presumption of innocence is a tenet to be fiercely protected, it is not fiercely protected for people of color.<sup>6</sup>

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<sup>1</sup> United States v. Salerno, 481 U.S. 739, 755 (1987).

<sup>2</sup> Throughout this Article, marginalization refers to racial identification and socioeconomic status—often times race and socioeconomic status interplay. This Article is not generalizing that all people of color are of low socioeconomic status or that all people of low socioeconomic status are people of color. However, U.S. history and the laws set in place because of that history make it difficult to address one without the other.

<sup>3</sup> See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, 132 HARV. L. REV. 2098, 2107 (2019).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> These sentiments describe overall trends in the criminal justice system, with the understanding that there will always be outliers. See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, *supra* note 3 at 2098; see also Bryce Covert, *A Bail Reform Tool Intended to*

In *United States v. Salerno*, quoted above, the Supreme Court held that in certain situations, the Government's regulatory interest in community safety outweighs an individual's interest in liberty.<sup>7</sup> For this reason, the Court found the Bail Reform Act of 1984<sup>8</sup> facially valid and not a violation of a defendant's constitutional rights.<sup>9</sup> It did not infringe upon the carefully limited exception the Court delineated in *Salerno*.<sup>10</sup> But while this Act and others like it are not facially invalid and are—in theory—designed to protect all people equally, in practice these laws do not perform as they are intended.<sup>11</sup> As for the reality of the cash bail system, indigent individuals' liberties are not protected at all costs and detention is not the carefully limited exception. In fact, the opposite is true: detention is the norm, and liberty is the carefully limited exception.

In an effort to remedy this harsh reality and even the playing field regarding enforcement of these laws, bail reform has increasingly shifted toward pretrial risk assessments—the tool designed to “replace judicial instincts with validated algorithms and . . . reserve detention for high-risk defendants.”<sup>12</sup> Modern criminal justice reform literature discusses at length the propriety and impropriety of risk assessments, but there is a gap in the literature as to a solution that combines the ideas and concerns of both critics and advocates.<sup>13</sup>

Part I of this Article surveys the history of bail, which dates back to Anglo-Saxon England with the use of “bots” to pay

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*Curb Mass Incarceration has only Replicated Biases in the Criminal Justice System*, INTERCEPT (July 12, 2020, 5:00 AM), <http://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform/> [<http://perma.cc/RQ4Q-52VE>].

<sup>7</sup> *United States v. Salerno*, 481 U.S. 739, 751–52 (1987).

<sup>8</sup> The Bail Reform Act of 1984 mandated “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person (as required) and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes. TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INSTITUTE, THE HISTORY OF BAIL AND PRETRIAL RELEASE 17–18 (Sept. 24, 2010), [http://b.3cdn.net/crjustice/2b990da76de40361b6\\_rzm6ii4zp.pdf](http://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf) [<http://perma.cc/K3B2-7AKJ>].

<sup>9</sup> *Salerno*, 481 U.S. at 755.

<sup>10</sup> *Id.*

<sup>11</sup> See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, *supra* note 3 at 2098; see also Covert, *supra* note 6.

<sup>12</sup> Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1125 (2018).

<sup>13</sup> Critics of risk assessments propose complete abandonment of the tool, while advocates support its use. The literature is underdeveloped with solutions that meaningfully combine the efforts and concerns of both sides.

reparations to victims.<sup>14</sup> With the Norman Conquest of England, the system shifted its focus away from victims toward pretrial detention and punishment for the offender.<sup>15</sup> To prevent the unchecked discretion sheriffs and judges exercised over pretrial decisions, the British wrote a prohibition against excessive bail into the English Bill of Rights.<sup>16</sup> Colonial American States then penned this same language into their state constitutions.<sup>17</sup> However, with the emergence of bail bondsmen, bail in the U.S. morphed into an industry that functions more as a corporate machine than a public service.<sup>18</sup>

Part II of this Article addresses the problems caused by cash bail, including the large number of individuals—more than 550,000 at last count—in jail awaiting trial or sentencing, notwithstanding the presumption of ‘innocent until proven guilty’.<sup>19</sup> Many defendants who cannot post bond face only minor charges and spend more time behind bars during the pretrial phase, where they “enjoy” the presumption of innocence, than they ever would if convicted.<sup>20</sup>

Part III discusses modern efforts at bail reform, specifically SB 10—California’s recent proposal. SB 10 was a product of the Chief Justice of California’s charge for reevaluation of California’s current bail system.<sup>21</sup> Chief Justice Cantil-Sakauye tasked a working group of diverse judges with researching and reporting on the current cash bail system.<sup>22</sup> This bill acts as a model of how risk assessments can be used to release all low-risk offenders who do not present a threat to public safety and detain high risk offenders who do. Risk assessments are a tool used to enhance judicial discretion, not replace it.<sup>23</sup>

Due to the difficulty in implementing reform that resolves problems and the lack of a workable solution, Part IV of this Article evaluates the two main schools of thought on bail reform: advocates and critics of risk assessments. Those who advocate for risk assessments urge it is prudent to replace human subjectivity with a

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<sup>14</sup> See *infra* Part I.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (Mar. 24, 2020), <http://www.prisonpolicy.org/reports/pie2020.html> [<http://perma.cc/EZ6G-U6KU>].

<sup>20</sup> Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 935–36 (2013).

<sup>21</sup> Bail Reform Act of 2018, S.B. 10, 2019-2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018); *State of the Judiciary March 2016*, CAL. COURTS (Mar. 8, 2016, 4:00 PM), <http://www.courts.ca.gov/34477.htm> [<http://perma.cc/BDE4-6LN6>].

<sup>22</sup> *State of the Judiciary March 2016*, *supra* note 21.

<sup>23</sup> *Id.*

consistent algorithm,<sup>24</sup> while those who criticize these assessments argue that by using racially entrenched data, risk assessments further perpetuate racially discriminatory practices.<sup>25</sup> Champions of risk assessments have valid concerns about the efficacy and constitutionality of the cash bail system, while critics of risk assessments have valid concerns about the efficacy and constitutionality of these proposed algorithms.

Often with reform, the lack of a perfect solution inhibits change. Part V of this Article proposes a comprehensive solution by taking the best arguments from both sides of the risk assessment aisle and compiles them into a three-fold working solution that recognizes the value of risk assessments while discouraging its potential for discriminatory effects.<sup>26</sup> This three-part solution is to be implemented as one cohesive operation—each component depends on the other functioning properly.

First, risk assessments should be used diagnostically prior to arraignment to direct a defendant's next step in the pretrial release process, ultimately releasing defendants charged with misdemeanors assessed as "low risk" within a matter of hours after their arrest. Second, the agency that administers the risk assessments should be a Pretrial Assessment Services Agency that is a separate, independent branch under the umbrella of the court, not the probation department. Finally, to encourage risk assessments as an enhancement rather than a replacement to judicial discretion, judges must be trained on how to recognize bias both in the courtroom and in the data.<sup>27</sup> Judges should be required to make tentative rulings on the record given all the information about a defendant on paper, before ever confronting the defendant. A judge wishing to change the tentative ruling must state her reasons for doing so on the record at the bail hearing. Additionally, there must be an effort to diversify the bench itself. If judges are to retain their discretion, it is imperative they recognize how their decisions may be disparately impacting people of color and perpetuating marginalization.

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<sup>24</sup> See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 317 (2018).

<sup>25</sup> Vienna Thompkins, *What Are Risk Assessments—and How Do They Advance Criminal Justice Reform?*, BRENNAN CTR. FOR JUST. (Aug. 23, 2018), <http://www.brennancenter.org/our-work/analysis-opinion/what-are-risk-assessments-and-how-do-they-advance-criminal-justice-reform> [<http://perma.cc/GYY2-PYDF>].

<sup>26</sup> See *infra* Part V.

<sup>27</sup> Biased data refers to data that may not be probative of a person's flight risk, either because they are part of a demographic more likely to be accused of crimes, and in turn more likely to be arrested, and thus, more likely to receive an inflated assessment of risk.

## I. HISTORY OF BAIL

“Bail emerged to solve a problem we still grapple with today—balancing the general right of defendants to pre-trial freedom with the need of society to protect against flight and ensure punishment.”<sup>28</sup> The concept of bail has its origins in Anglo-Saxon England. Criminal wrongs were settled through “bots,” which were amends or reparations paid to the victim or person wronged.<sup>29</sup> Crimes were private affairs and were not prosecuted in the name of the state as they are today.<sup>30</sup> Wrongs were righted with money, not imprisonment.<sup>31</sup> However, in a select number of cases, persons considered dangerous or a threat to the public were mutilated or executed.<sup>32</sup>

Anglo-Saxons had two primary motivations: securing public safety and ensuring the accused did not escape the consequences of their actions.<sup>33</sup> “Thus, a system was created in which the defendant was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction.”<sup>34</sup> That pledge was quantified to equal the amount of the penalty.<sup>35</sup> This was called “bail.”<sup>36</sup>

This bail system ensured that if the “accused were to flee, the responsible surety would pay the entire amount to the private accuser, and the matter was done.”<sup>37</sup>

Since the amount of the pledge and the possible penalty were identical, the effect of a successful escape would have been a default judgment for the amount of the bot. To the extent the accused left behind sufficient property to pay the bot, he would have had no incentive for flight. To the extent the surety bore the financial responsibility for the payment, he had every incentive to ensure the appearance of the accused.<sup>38</sup>

Perhaps “[t]he Anglo-Saxon bail process was . . . the last entirely rational application of bail.”<sup>39</sup>

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<sup>28</sup> JOHN-MICHAEL SEIBLER & JASON SNEAD, THE HISTORY OF CASH BAIL, HERITAGE FOUNDATION 6, 8 (2017).

<sup>29</sup> SCHNACKE ET AL., *supra* note 8, at 1.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 1–2.

<sup>33</sup> *See id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520 (1983).

<sup>39</sup> *Id.*

Beginning in 1066 with the Norman Conquest of England, the bail system shifted away from reparations and toward confinement and corporal punishment.<sup>40</sup> Executions and mutilations were phased out, but corporal punishment escalated.<sup>41</sup> The possibility of corporal punishment heightened the criminal's desire to flee.<sup>42</sup> With the formation of juries,<sup>43</sup> wrongs became less of a private affair and more of a criminal process that involved more than just the oppressed and their oppressor.<sup>44</sup> Criminals were held in confinement by the shire's reeve, equivalent to a county sheriff, and magistrates travelled from shire to shire making determinations about who would be confined and who would be released.<sup>45</sup> Sheriffs were unchecked in their pretrial detention decisions and judges unchecked in their bail determinations.<sup>46</sup> Abuse and corruption were rampant.<sup>47</sup>

In response to this widespread abuse, Parliament passed the Statute of Westminster, which took a different approach to bail than the Anglo-Saxons but still rearticulated the underlying notion "that the bail process must mirror the outcome of the trial."<sup>48</sup> The Statute established three criteria that governed a bail decision: (1) the nature of the offense; (2) the probability of conviction; and (3) the criminal history of the accused.<sup>49</sup> "[T]his standard governed English bail bond determinations for the next five centuries," but not without continued abuse.<sup>50</sup> Judges set bail extremely high to place additional obstacles in the way of a defendant's release.<sup>51</sup> This abuse eventually led to the prohibition against "excessive bail" in the English Bill of Rights of 1689—"a phrase similar to that found in the Eighth Amendment to the U.S. Constitution."<sup>52</sup>

In 1791, the Framers translated this principle into the Eighth Amendment of the U.S. Constitution, which guaranteed a right to

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<sup>40</sup> See SCHNACKE ET AL., *supra* note 8, at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> "The exact time of the introduction of the jury trial into England is a question much discussed by historians, some of them contending it was developed from laws brought over by William the Conqueror, while others point to . . . its existence . . . among the Anglo-Saxons prior to the Norman Conquest." Robert von Moschzisker, *Historic Origin of Trial by Jury*, 70 U. PA. L. REV. & AM. L. REG. 1, 2 (1921).

<sup>44</sup> See *id.* at 4.

<sup>45</sup> SCHNACKE ET AL., *supra* note 8, at 3.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.*

be free of excessive bail, not a right to bail itself.<sup>53</sup> But language from the Northwest Ordinance of 1787 guaranteeing a right to bail itself made its way into most state constitutions by the mid-19th century. Section 14, Article 2 stated, “All persons shall . . . be bailable by sufficient sureties, except for capital offenses, where proof is evident, or presumption great.”<sup>54</sup> State constitutions interpreted this language as making “risk of flight the only legitimate factor . . . in denying bail in non-capital cases.”<sup>55</sup> Thus, any sort of “infringement on the presumption of innocence was justified on the grounds” that the accused was a flight risk.<sup>56</sup>

The Supreme Court affirmed this practice in *Stack v. Boyle*.<sup>57</sup> The Court proclaimed that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>58</sup> In the same vein, “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant” at trial.<sup>59</sup>

Laws regarding bail seek to accommodate two primary concerns: the presumption of innocence and the risk of flight. The former must be protected, and the latter must be protected against. However, a shift occurred in the 20th century. “As the nation grew and urbanized,” the bail bond system morphed into a political and lucrative for-profit industry.<sup>60</sup> The U.S. is only one of two countries that allows for-profit bail bonding (the Philippines is the other).<sup>61</sup> Beginning in the mid-20th century, independent commercial bail companies and bail bond

<sup>53</sup> While some argue that the right to bail is inherent in the Eighth Amendment’s protection against non-excessive bail, the Supreme Court has never explicitly held that the Constitution affords a right to bail itself. See Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 945 (1985). In fact, in *United States v. Salerno*, the Court held that the Eighth Amendment does not create a right to bail. 481 U.S. 739, 755 (1987). See also *Thirty-Third Annual Review of Criminal Procedure, Bail*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 291, 291 (2004).

<sup>54</sup> *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, OUR DOCUMENTS, [http://www.ourdocuments.gov/document\\_data/document\\_transcripts/document\\_008\\_transcript.html](http://www.ourdocuments.gov/document_data/document_transcripts/document_008_transcript.html) [<http://perma.cc/M5QX-9AVS>]; Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT’L L. REV. 399, 405 (1996).

<sup>55</sup> Metzmeier, *supra* note 54, at 406.

<sup>56</sup> See *id.*

<sup>57</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> Metzmeier, *supra* note 54, at 406.

<sup>61</sup> Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT (Oct. 9, 2018), <http://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/> [<http://perma.cc/T84F-BMJV>]; see also PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 33 (2017).



associations began to industrialize and institutionalize the bail system.<sup>62</sup> Bail bondsmen, unencumbered by any legal restriction, “stalked the corridors of city police courts and county houses” to arbitrarily set bail on a defendant-by-defendant basis.<sup>63</sup> In many states, particularly in the South, this practice detrimentally affected African Americans because of their lower socio-economic status, and became just one building block of their systemic disenfranchisement.<sup>64</sup> Having no true understanding of “risk,” bail bondsman relied on personal judgment and prejudice to make these determinations.<sup>65</sup> “[W]ealthy and politically connected defendants were released, while the poor” were not.<sup>66</sup> Those who fell prey to the commercializing tactics of the industry often spent as much time in jail awaiting trial as the time they would likely have served if actually convicted.<sup>67</sup>

The presumption of innocence that was once so highly valued increasingly became overshadowed by the corporate machine that is the American cash bail system. Currently, about seventy-four percent of American inmates have not been convicted of a crime.<sup>68</sup> Many of these detainees present no flight risk or risk to public safety if released.<sup>69</sup> So why are these defendants still locked up? As has been true for decades, their financial and socioeconomic conditions do not afford them an ability to pay the money necessary to post bond.<sup>70</sup> “If they could pay their bail or bail bondsman’s fee, they could walk out the front door and go home.”<sup>71</sup>

## II. PROBLEMS WITH THE CASH BAIL SYSTEM

Pretrial detention interrupts a defendant’s life in ways that have drastic, lasting impacts. For defendants who pose a risk to the safety of their community, this interruption can be justified. But for defendants who are shackled to a jail cell because of an inability to pay, and not because they present a risk to the community, this interruption cannot be justified. Ability to post

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<sup>62</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61.

<sup>63</sup> Metzmeier, *supra* note 54, at 407.

<sup>64</sup> *Id.* at 406–07.

<sup>65</sup> *Id.* at 407.

<sup>66</sup> *Id.* at 406.

<sup>67</sup> *Id.*

<sup>68</sup> Wendy Sawyer & Peter Wagner, *supra* note 19.

<sup>69</sup> See PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 69.

<sup>70</sup> See, e.g., SUPERIOR CT. OF CAL. CNTY. OF ORANGE, 2020 UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR), at 1 (2020); SUPERIOR CT. OF CAL. CNTY. OF L.A., 2020 BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS, at 1 (2020).

<sup>71</sup> *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 12, at 1127.

bond is a socioeconomic issue that directly correlates with race.<sup>72</sup> Bail determinations are not color-blind.<sup>73</sup> The current cash bail system uses a defendant's financial situation, rather than risk of flight, to determine appropriateness of detention.<sup>74</sup>

Uprooting a person from their daily routine can destroy their employment and housing stability, leave children parentless, and instigate and perpetuate idleness.<sup>75</sup> Seventy-five percent of pretrial detainees have been charged with minor, non-violent crimes such as drug offenses,<sup>76</sup> yet the impact of pretrial detention is anything but minor. Just as punishment should be proportional to the harm committed, so should detention prior to trial. But what our current cash bail system does is anything but proportional.<sup>77</sup>

Not only does pretrial detention disrupt the flow of a defendant's life, but prolonged periods of pretrial detention actually increase the defendant's likelihood of committing another crime.<sup>78</sup> Even if a defendant is low-risk, when held two to three days in detention, that person is almost forty percent more likely to commit new crimes than a similarly situated defendant who was held no longer than twenty-four hours.<sup>79</sup> As the number of days in detention increases, so does the likelihood of the defendant committing a new crime.<sup>80</sup>

Pretrial detention can also affect the outcome of a defendant's case.<sup>81</sup> Extended periods of detention effectively force defendants into pleading guilty at an early stage in the

<sup>72</sup> See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 8 (May 2018), <http://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<http://perma.cc/B7XQ-55AF>] (“A 2013 review of 50 years of studies on racial disparities in bail practices found that black people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges. Studies documented this disparity in state and federal cases as well as juvenile justice proceedings, and in all regions of the country.”).

<sup>73</sup> See Jones, *supra* note 20, at 938–42.

<sup>74</sup> See *id.* at 921.

<sup>75</sup> See PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 13.

<sup>76</sup> Jones, *supra* note 20, at 935.

<sup>77</sup> See, e.g., SUPERIOR CT. OF CAL. CNTY. OF ORANGE, 2020 UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR), *supra* note 70, at 1; SUPERIOR CT. OF CAL. CNTY. OF L.A., 2020 BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS, *supra* note 70, at 1.

<sup>78</sup> Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, LJAF 3 (Nov. 2013), [http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf) [<http://perma.cc/J6JV-ZK2U>].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. 2–3 (April 2019), <http://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<http://perma.cc/D2BF-RC8Y>].

proceedings when they otherwise may not have in order to “secure their release from custody.”<sup>82</sup> Many of these defendants, especially first-time offenders, will do whatever it takes to get out of jail while awaiting trial.<sup>83</sup>

Bail is not only problematic on a micro level, but also on a macro level, revealing a larger broken criminal justice system. The multitude of people subject to pretrial confinement exacerbates the national crisis of jail overcrowding.<sup>84</sup> Six out of ten people in jail are awaiting trial.<sup>85</sup> As such, if we wish to remedy the problem of mass incarceration, reforming the bail system is a necessary predicate. Our cash bail system is not only disrupting individuals’ personal lives—it is perpetuating a larger system of injustice.

### III. SB 10 AS A SPRINGBOARD FOR BAIL REFORM

As evidenced by its history, the American bail system is riddled with injustices which persist to this day. Legislators and community activists continue to seek reform. “In 2016, state lawmakers in 44 states and the District of Columbia enacted 118 new laws regarding pretrial detention and release.”<sup>86</sup> In an effort to decrease the historical disparities endemic in the pretrial process, California advanced SB 10, a bill aiming to address bail reform. This bill would have effectively eliminated cash bail and relied instead on risk assessments for pretrial determinations. SB 10 models a bail system that reflects the principle that cash bail is inherently flawed, that risk assessments are beneficial when utilized in a limited fashion, and that judges cannot be completely removed from the process.

#### A. History of SB 10

During her State of the Judiciary address in 2016, Chief Justice Tani Cantil-Sakauye called for a review of California’s current cash bail system:<sup>87</sup>

I think it’s time for us to really ask the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor. Bail—does it really ensure public safety? Does it in fact assure

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<sup>82</sup> PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 14.

<sup>83</sup> *See id.*

<sup>84</sup> SCHNACKE ET AL., *supra* note 8, at 10.

<sup>85</sup> *Why are People in Jail Before Trial?*, PRETRIAL JUST. INST., <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/> (last visited Nov. 27, 2020) [<http://perma.cc/7877-SMEX>].

<sup>86</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61, at 18.

<sup>87</sup> *State of the Judiciary March 2016*, *supra* note 21.

people's appearance in court, or would a more effective risk assessment tool be as effective for some cases?<sup>88</sup>

Motivated by these concerns, Chief Justice Cantil-Sakauye established a Pretrial Detention Reform Workgroup in October of 2016.<sup>89</sup> This Reform Workgroup consisted of a diverse task force<sup>90</sup> of nine judges and one court executive officer from across the state who “studied the bail system, listened to all interested stakeholders, discussed the issues and unanimously reached these recommendations in the report.”<sup>91</sup> After the task force spent a year critically studying these issues, “it became clear that the current system of money bail fails to adequately address public safety and the profound negative impacts on those individuals who should not be detained before trial.”<sup>92</sup> The recommendations of this task force eventually became part of SB 10, introduced by Senator Robert Hertzberg on December 05, 2016.<sup>93</sup>

After several amendments on the floor of the Assembly and the Senate, SB 10 was signed into law by Governor Brown on August 28, 2018.<sup>94</sup> This law was to take effect on October 01, 2019.<sup>95</sup> However, the day after it was signed, Thomas W. Hiltachk, backed by the Californians Against the Reckless Bail Scheme, introduced and filed veto referendum 1856 to overturn this law.<sup>96</sup> The bail bond industry was able to garner opposition

<sup>88</sup> *Id.*

<sup>89</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61, at 1.

<sup>90</sup> This group is diverse in many senses of the word, including their education, background, and ethnicity.

<sup>91</sup> Merrill Balassone, Jud. Council Pub. Affs., *Chief Justice Workgroup: Money Bail is “Unsafe and Unfair,”* CAL. CTS. NEWSROOM (Oct. 24, 2017), <https://newsroom.courts.ca.gov/news/chief-justice-workgroup-money-bail-is-unsafe-and-unfair> [<http://perma.cc/HS3B-U2B6>].

<sup>92</sup> *Id.*

<sup>93</sup> The Pretrial Detention Reform Workgroup's ten recommendations were: (1) implement a robust risk-based pretrial assessment and supervision system to replace the current money bail system, (2) expand the use of risk-based preventive detention, (3) establish pretrial services in every county, (4) use a validated pretrial risk assessment, (5) make early release and detention decisions, (6) integrate victim rights into the system, (7) apply pretrial procedures to violations of community supervision, (8) provide adequate funding and resources, (9) deliver consistent and comprehensive education, and (10) adopt a new framework of legislation and rules of court to implement these recommendations. *Id.*

<sup>94</sup> *Governor Signs SB 10, Eliminating Money Bail in California*, SENATE MAJORITY LEADER SENATOR ROBERT HERTZBERG (Aug. 28, 2018), <https://sd18.senate.ca.gov/news/8282018-governor-signs-sb-10-eliminating-money-bail-california> [<http://perma.cc/5V6L-TBJX>].

<sup>95</sup> See Michael McGough, *The Fate of California's Cash Bail Industry will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 1:04 PM), <https://www.sacbee.com/news/california/article224682595.html> [<http://perma.cc/5DK4-3VMQ>].

<sup>96</sup> See *id.*; see also *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTEDIA [https://ballotpedia.org/California\\_Proposition\\_25\\_Replace\\_Cash\\_Bail\\_with\\_Risk\\_Assess](https://ballotpedia.org/California_Proposition_25_Replace_Cash_Bail_with_Risk_Assess)

to this bill by labeling its proposed reforms as a system that would jeopardize the safety of the community and implement a discriminatory risk assessment system—concerns that are widely held by critics of risk assessments in general.<sup>97</sup> Claiming that SB 10 would single-handedly decimate a \$2-billion nationwide industry by abolishing cash bail in California, the bail industry did everything it could to halt its implementation.<sup>98</sup> For SB 10's opponents to successfully take it out of the hands of the legislature, they needed to collect five percent of the total votes cast for Governor Brown in the 2014 general election, which totaled 365,880 signatures.<sup>99</sup> The coalition succeeded, gathering far more signatures than necessary.<sup>100</sup> By November 20, 2018, the coalition had collected more than 575,000 signatures.<sup>101</sup> After the signatures were verified, the Secretary of State certified the initiative on January 16, 2019.<sup>102</sup> In less than three months, SB 10's opponents had snatched it from the hands of the legislature that had toiled over it for years, and placed it instead into the hands of voters for the 2020 general election in the form of Proposition 25.<sup>103</sup>

Just as private interest groups were able to fund a veto referendum to secure Proposition 25 a spot on the November ballot, they further employed their wealth and influence to ensure Proposition 25 did not pass, an effort aided by divisions among pro-reform advocates.<sup>104</sup> A “yes” vote on Proposition 25 would have upheld the contested legislation and effectively abolished cash bail. A “no” vote would repeal the legislation and

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ments\_Referendum\_(2020) [http://perma.cc/27E6-C9DC] (last visited Feb. 14, 2021).

<sup>97</sup> See e.g., *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96; BlackLivesMatter–LA (@BLMLA) Twitter, (Aug. 18, 2018, 4:37 PM), <https://twitter.com/blmla/status/1030961861234122752?lang=en> [http://perma.cc/8CSS-78BA].

<sup>98</sup> 2020 California Ballot Propositions, CAL. RENTAL ASS'N <https://www.naylornetwork.com/ria-nwl/articles/index-v3.asp?aid=570461&issueID=65741> [http://perma.cc/NGB2-NW5J] (noting there are over 3,000 registered bail agents in California alone).

<sup>99</sup> McGough, *supra* note 96.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96.

<sup>103</sup> See *id.*

<sup>104</sup> See Matt Brannon, *Props 20 and 25 Failed. What Does That Tell Us About Criminal Justice Reform in California?*, RECORD SEARCHLIGHT (Nov. 5, 2020, 3:36 PM), <https://www.redding.com/story/news/local/2020/11/05/california-prop-20-25-criminal-justice-reform-shasta-county-jail/6180378002/> [http://perma.cc/ZHA5-ST88]; Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, is Rejected by Voters*, L.A. TIMES (Nov. 3, 2020, 8:49 PM), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results> [http://perma.cc/Y7TX-J4TP].

maintain the current cash bail system.<sup>105</sup> On November 3<sup>rd</sup>, 2020, during one of the most contentious election years, California voters voted to repeal SB 10.<sup>106</sup> Although 43.59% of voters voted to uphold SB 10, 56.41% voted to strike it down.<sup>107</sup>

There are two main reasons the proposition did not pass: opposition by bail coalition groups<sup>108</sup> and opposition by progressive activist groups.<sup>109</sup> Unsurprisingly, bail coalitions did not want their industry and livelihood to collapse. Perhaps more surprisingly, progressive activist groups were fragmented in their support of SB 10, with some believing the proposed alternative to cash bail would actually further racial discrimination within the criminal justice system.<sup>110</sup> Because Proposition 25 failed, California finds itself back at square one in regard to bail reform. Now, more than ever, a meaningful solution is required, one that anticipates the criticisms and opposition the Proposition encountered that ultimately led to its demise.

## B. What the Bill Proposed

SB 10 sought to condition a defendant's eligibility for release on their *risk* rather than their *charge*.<sup>111</sup> The goal was to achieve a "just and fair pretrial release and detention system [that] provides due process, recognizes the presumption of innocence, and advances the government's fundamental role in protecting public safety."<sup>112</sup> The current bail system does not treat pretrial detention as a "carefully limited exception" to the presumption of innocence across all racial groups alike. SB 10 aimed for counties to impose the least-restrictive nonmonetary condition (or combination of conditions) that would have reasonably assured public safety and the suspect's return to court.<sup>113</sup>

<sup>105</sup> *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See 2020 California Ballot Propositions, CAL. RENTAL ASS'N, <https://www.naylornetwork.com/ria-nwl/articles/index-v3.asp?aid=570461&issueID=65741> [<http://perma.cc/GH4R-FXSR>] (last visited Jan. 2, 2021).

<sup>109</sup> Marisa Lagos, *Proposition 25 Would End Cash Bail. So Why Are Some Progressive Groups Against It?*, KQED (Oct. 7, 2020), <https://www.kqed.org/news/11841209/proposition-25-would-end-cash-bail-so-why-are-some-progressive-groups-against-it> [<http://perma.cc/X7RV-32TS>] (last visited Jan. 2, 2021).

<sup>110</sup> See Anabel Munoz, *California Prop. 25 Explained: Voters to Decide Whether to End State's Cash-Bail System*, ABC (Oct. 30, 2020), <https://abc7.com/prop-25-cash-bail-proposition-california/7482465/> [<http://perma.cc/M4UY-8CYG>] (last visited Jan. 2, 2021).

<sup>111</sup> See S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

<sup>112</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 52.

<sup>113</sup> See S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

The law contemplates bail through four pretrial stages: (1) book and release, (2) pre-arraignment review, (3) arraignment hearing, and (4) preventive detention hearing.<sup>114</sup>

### 1. Book and Release

The law attempted to effectuate its purpose of safely releasing as many defendants as possible in part by providing the opportunity for most misdemeanants to be released within twelve hours of booking.<sup>115</sup> A person arrested or detained for a misdemeanor would be released by the booking agency within twelve hours of booking, unless any of the ten enumerated exceptions applied.<sup>116</sup> If one of these exceptions applied, then the law deemed the suspect ineligible for immediate<sup>117</sup> book and release and mandated that he or she be held until pre-arraignment review.<sup>118</sup> At this stage of detention, risk assessments were not implemented. Instead, arrestees were separated based upon set criteria—the ten exceptions. If an arrestee was charged with a misdemeanor and one of the ten exceptions did not apply, they would be released. If charged with a felony, the arrestee was ineligible for immediate release and had to undergo pre-arraignment review.

### 2. Pre-Arraignment Review

The next stage was pre-arraignment review, which applied to any rollover misdemeanants from *book and release* who were ineligible for immediate release, and to most people charged with felonies.<sup>119</sup> These two categories of people were to be assessed by Pretrial Assessment Services (“PAS”) within twenty-four hours of booking.<sup>120</sup> As defined by the bill:

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<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.* The statute carves out the following exceptions from the automatic release provisions: (1) Any offense found in Cal. Penal Code section 290; (2) the suspect is charged with a domestic violence crime such as 273.4, 243(e)(1), and certain violations of domestic violence restraining order like 273.5 or stalking; (3) the suspect is charged with their third DUI at a BAC of .20 or higher; (4) the suspect has been arrested for a restraining order violation within the last five years; (5) the suspect has three or more prior warrants for “failure to appear” within the past 12 months; (6) the suspect is pending trial or sentencing on a misdemeanor or a felony; (7) the suspect is on formal probation or post-conviction supervision; (8) the suspect has intimidated, dissuaded, or threatened retaliation against a witness or victim of the current crime; (9) the suspect has violated a condition of pretrial release within the past five years; or (10) the person has a serious or violent felony prior within the last five years. *Id.*

<sup>117</sup> *See* S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018) (the term “immediate” in this context means within 12 hours).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

“Pretrial Assessment Services” means an entity, division, or program that is assigned the responsibility . . . to assess the risk level of persons charged with the commission of a crime, report the results of the risk determination to the court, and make recommendations for conditions of release of individuals pending adjudication of their criminal case, and as directed under statute or rule of court, implement risk-based determinations regarding release and detention.<sup>121</sup>

PAS would then use the suspect’s information to conduct a risk assessment based on a validated tool<sup>122</sup> which would assign the suspect a score, and that would categorize them as low risk, medium risk, or high risk based on that score.<sup>123</sup> It is at this stage of review that the risk assessment tool would be used “diagnostically.” PAS would input the arrestee’s data into the tool, and the algorithm will then “diagnose” the arrestee’s risk and *direct* the next step.<sup>124</sup>

For suspects deemed “high risk,” their next step would be to await arraignment, where a judge could review their detention status because they could not, by law, be released by Pretrial Services.<sup>125</sup> For suspects whom the algorithm deemed low risk,<sup>126</sup> their next step would be release on their own recognizance (“OR”) by PAS.<sup>127</sup> Finally, for suspects whom the algorithm deemed “medium risk”,<sup>128</sup> their next step was further review either by

<sup>121</sup> *Id.*

<sup>122</sup> S.B.10, 2019-2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

‘Validated risk assessment tool’ means a risk assessment instrument, selected and approved by the court, in consultation with Pretrial Assessment Services or another entity providing pretrial risk assessments, from the list of approved pretrial risk assessment tools maintained by the Judicial Council. The assessment tools shall be demonstrated by scientific research to be accurate and reliable in assessing the risk of a person failing to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of his or her current criminal offense and minimize bias.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

‘Low risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, was categorized as having a minimal level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

<sup>127</sup> This did not apply if the individual meets one of the ten exceptions discussed above. *Id.*

<sup>128</sup> *Id.*

‘Medium risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, was categorized as



PAS or by the courts. If PAS conducted the review, it would gather more information and then determine whether the suspect be released on their own recognizance or, alternatively, under supervised own recognizance (“SOR”).<sup>129</sup> If the courts conducted the pre-arraignment review,<sup>130</sup> either a judge on-call or a judicial officer would further analyze and determine whether the suspect would be released OR or SOR, or else be detained until arraignment.<sup>131</sup>

### 3. Arraignment Hearing

All suspects still in custody and not released through the previous two stages were entitled to a release or detention determination at arraignment.<sup>132</sup> At this stage, victims were notified and given an opportunity to be heard.<sup>133</sup> The court had the discretion to modify the conditions of release upon request by either party.<sup>134</sup> It is also at this stage that the District Attorney was able to file a motion for preventive detention, which would allow the court to detain the defendant pending a hearing.<sup>135</sup> There were only certain enumerated circumstances, usually involving heightened danger of the suspect, that allowed a prosecutor to seek preventive detention.<sup>136</sup> Once this motion was

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having a moderate level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

<sup>129</sup> If reviewed by PAS, the suspect was required to be detained if they met one of the ten criteria discussed in footnote 116, *supra*. If not, then the suspect had to be released either on their own recognizance or supervised own recognizance, “with the least restrictive nonmonetary condition or combination of conditions that [would] reasonably assure public safety and the person’s return to court.” *Id.*

<sup>130</sup> “Medium risk” suspects and those that fell within the 10 criteria had to be either detained by PAS until arraignment or reviewed by the court, and the court had to use the pretrial assessment services information and consider their options for release. *Id.*

<sup>131</sup> For a medium risk defendant who is further reviewed by the court prior to arraignment, a judge could decide to detain the defendant until arraignment only if there is a substantial likelihood that no condition will reasonably assure public safety or the defendant’s return to court. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Note that the court cannot initiate a preventive detention hearing on its own motion. *See id.*

<sup>136</sup> (1) The crime for which the person was arrested was committed with violence against a person, threatened violence, or the likelihood of serious bodily injury, or was one in which the person was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or was one in which he or she personally inflicted great bodily injury in the commission of the crime.

(2) At the time of arrest, the defendant was on any form of postconviction supervision other than informal probation or court supervision.

(3) At the time of arrest, the defendant was subject to a pending trial or sentencing on a felony matter.

(4) The defendant intimidated or threatened retaliation against a witness or victim of the current crime.

filed, the court had to determine whether to release the defendant or else detain him pending the preventive detention hearing. If the court determined there was a “substantial likelihood that no nonmonetary condition or combination of conditions of pretrial supervision” could reasonably assure either the appearance of the defendant at the preventive detention hearing or reasonably assure public safety prior to the preventive detention hearing, the court could detain the defendant pending this hearing, but it had to state its reasons for doing so on the record.<sup>137</sup>

#### 4. Preventive Detention Hearing

A suspect found to need preventive detention was either violent or high-risk as defined by the statute.<sup>138</sup> They were entitled to a hearing within three days of arraignment.<sup>139</sup> At this stage, there was a rebuttable presumption that the defendant needed to be detained.<sup>140</sup> For the court to find it necessary for a suspect to be preventively detained, the court had to make two findings: (1) there was probable cause to believe the defendant committed the charged crime where there was no indictment and the defendant challenged the sufficiency of the evidence, and (2) there was clear and convincing evidence that no condition or combination of conditions could reasonably assure the protection of the public or the appearance of the defendant in court.<sup>141</sup> The court had to then state the reasons for its determination on the record.<sup>142</sup> This assured that the court was recognizing and working to protect both the suspect’s presumption of innocence (by finding that there is probable cause) while also protecting the community against danger and assuring the defendant’s return to court.<sup>143</sup>

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(5) There is substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or a victim, or the appearance of the defendant in court as required. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

‘High risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, is categorized as having a significant level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

A court could consider many of the same factors they would consider under California Penal Code section 1275 when deciding whether to release a suspect on bail:<sup>144</sup> the nature and circumstances of the crime charged as well as the risk to the community posed by the defendant's release, the weight of evidence against the defendant, the defendant's past conduct, family and community ties, criminal history, and record for court appearances.<sup>145</sup> The court could also consider if the defendant was on probation, parole, or some other type of supervised release pending trial, sentencing or appeal. Additionally, the court could look to the recommendation of Pretrial Assessment Services obtained using a validated risk assessment instrument.<sup>146</sup> The court could then evaluate the "impact of detention on the defendant's family responsibilities and community ties, employment, and participation in education."<sup>147</sup> In this way, SB 10 would have allowed considerations that have never been statutorily recognized.<sup>148</sup>

SB 10 proposed that the Judicial Council should maintain a list of validated risk assessments from which each county could choose.<sup>149</sup> It also proposed that these pretrial assessment services be performed by either court employees or a third party qualified local public agency.<sup>150</sup>

Although this bill may not perfect—as few pieces of legislation ever are—it is evident that the Task Force thoughtfully considered the multiple levels and layers to bail and the consequences of reforming our current system. At best, SB 10 protects the presumption of innocence by generously limiting pretrial detention, while combining algorithmic tools with modified judicial discretion. At worst, SB 10 provides a solid platform from which other states can build, as it clearly takes

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<sup>144</sup> See CAL. PENAL CODE § 1275 (2020).

<sup>145</sup> *Id.*

<sup>146</sup> S.B.10, 2017-2018 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

<sup>147</sup> *Id.*

<sup>148</sup> While California Penal Code section 1272.1 gives judges the ability to evaluate the defendant's ties to the community and his/her family "attachments," the word "responsibilities" is never mentioned in the statute. The word "responsibilities" indicates to the judge that other people, not just the defendant, will be impacted by pretrial detention. For example, it is possible that the defendant is the sole caregiver for young children or elderly parents, and SB 10 would have allowed the judge to account for such responsibilities when making his/her decision. Additionally, the present statutes do not currently permit judges to consider participation in education when determining pretrial release. CAL. PENAL CODE § 1272.1 (2020).

<sup>149</sup> S.B.10, 2017-2018 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

<sup>150</sup> *Id.*

into consideration the multitude of problems our current cash bail system presents.

#### IV. THE MULTIPLE GOALS OF BAIL REFORM

Bail reform is a complex and arduous process in large part because it does not have one singular goal.<sup>151</sup> As an illustration, consider a sports team that continually loses games. The team would be foolish not to adapt its strategy in response to failure, because ultimately, its goal is to win. Of course, achieving that ultimate goal requires first achieving several smaller goals such as greater teamwork, tightening up the team's defense, and better anticipating the other team's plays. There is one ultimate goal, and all sub-goals work toward it. The same cannot be said about bail reform.

Not only does the fight to reform the bail system contain multiple goals, but some of these goals clash with each other. Accomplishing one goal may come at the expense of another.<sup>152</sup> Bail reform seeks to accomplish a myriad of objectives, ranging from "preserving the presumption of innocence for people charged with crimes, imposing the least restrictive conditions on release, protecting the public from people charged with crimes, ensuring that people return to court, imposing detention in a racially and economically fair way, and reducing America's astounding pretrial incarceration rate."<sup>153</sup> The presence of multiple, competing goals naturally generates intense debate regarding what bail reform ought to look like.

Given this division, it is unsurprising that politicians and activists cannot reach a consensus.<sup>154</sup> Danny Montes, the Alliances Director for Californians for Safety and Justice tweeted in support of SB 10, "Why Californians Need #BailReform 'If someone can afford their bail even though they are a threat to public safety, they're free to go.'" Taking an opposing view, New York Legal Aid's Decarceration Project responded: "Sorry, you have it backwards. Our bail system should prioritize release and decarceration above all else."<sup>155</sup> This exchange is just one example of how reform-minded, anticipated allies can spiral into stalemate based upon which bail reform goals matter most to them.

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<sup>151</sup> *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 12, at 1144.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> *Id.*; *see also* DecarcerationProject (@DecarcerateNYC), TWITTER (Aug. 17, 2017, 2:07 PM), <https://twitter.com/DecarcerateNYC/status/898290148550389760> [<http://perma.cc/A7YN-M3M5>].

## V. RISK ASSESSMENT ADVOCATES

The arguments in favor of implementing risk assessments for pretrial decisions are intuitive. One well-supported argument for adopting risk assessments is that replacing human judgment with algorithms produces more consistent results.<sup>156</sup> To this point, one author noted, “[F]ormal, actuarial, and algorithmic methods of prediction perform better than the intuitive methods used by judges or other experts.”<sup>157</sup> By replacing human discretion with formulaic algorithms, pretrial detention decisions can be standardized and streamlined.<sup>158</sup> The idea that actuarial tools perform better than human intuition at predicting crime comes from 1950s–1980s psychology research.<sup>159</sup> A meta-analysis of the literature in this area<sup>160</sup> shows that algorithms are ten percent more accurate than human clinical predictions.<sup>161</sup>

However, not all these advocates of risk assessments believe they are a perfect tool. “Santa Barbara Probation Chief Tanja Heitman, whose county has been experimenting with alternatives to money bail, said she believes risk assessments can actually help reduce racial disparities.”<sup>162</sup> Although youth of color are 2.6 times more likely to get arrested than their white counterparts in Santa Barbara County, their release rates are identical.<sup>163</sup> Heitman has seen the risk assessment tool erase certain racial biases in the juvenile criminal justice system in her county.<sup>164</sup> Notwithstanding the tool’s lack of perfection, risk assessment advocates still support the tool’s ability to weed out racial biases present within determination decisions.

The second argument in favor of risk assessments is that pretrial detention decisions should be conditioned upon true risk, not ability to pay. These advocates have a particular problem with the cash aspect of the current bail system. Supporters of the Detention decisions should be made based on true risk of flight and likelihood of committing another crime while out on bail, not on ability to pay an arbitrary sum of money.<sup>165</sup> “Conversely,

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<sup>156</sup> See Stevenson, *supra* note 24, at 317–22.

<sup>157</sup> *Id.* at 321.

<sup>158</sup> See CHARLES SUMMERS & TIM WILLIS, BUREAU OF JUST. ASSISTANCE U.S. DEP’T OF JUST., RESEARCH SUMMARY: PRETRIAL RISK ASSESSMENT 1 (2010).

<sup>159</sup> Stevenson, *supra* note 24, at 322.

<sup>160</sup> This meta-analysis consolidates the data from ten papers that compare algorithms to human prediction. *Id.*

<sup>161</sup> *Id.*; William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCH. ASSESSMENT 19, 19 (2000).

<sup>162</sup> Lagos, *supra* note 109.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Stevenson, *supra* note 24, at 317.

wealthy defendants who pose a high risk of serious crime should not be released simply because they can afford bail.”<sup>166</sup> They argue that “conditioning release on money results in racial and wealth-based disparities in detention, a waste of taxpayer money, and harm to public safety.”<sup>167</sup>

## VI. RISK ASSESSMENT CRITICS

Unlike risk assessment advocates who find value in replacing human judgement with a consistent algorithm, risk assessment critics believe the algorithm is just as damning as the data it utilizes and is skewed by discriminatory practices. Robin Steinberg, The Bail Project’s Chief Executive Officer, argues that “these algorithmic assessments are only as good as the data they use.”<sup>168</sup> This data will inevitably reflect the “deeply imbedded racism and economic inequity that has driven mass incarceration in the first place.”<sup>169</sup> While the risk assessment may seem to eliminate the evil of cash bail, it simply repackages the type of inequity presented. “Whereas defendants were condemned to pre-trial detention prior to the bill’s passage due to their poverty and inability to make bail, they will now be in pre-trial detention due to their risk assessment—which will inevitably be based on their poverty, plus their race.”<sup>170</sup>

### A. Racism Entrenched in the American Criminal Justice System

To understand the staunch opposition to risk assessments, it is necessary to understand just how engrained with racism the American criminal justice system is, dating back to the 1800s. From Jim Crow laws which “codified discrimination and second-class status for African Americans”<sup>171</sup> to the fight for African American suffrage,<sup>172</sup> “[r]acial disparities in the criminal justice system have deep roots in American history and penal policy.”<sup>173</sup> The War on Drugs illustrates a law or policy that appears neutral on its face but systemically disenfranchised people of color in its effect. Under the administration of President Nixon and subsequently of President

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<sup>166</sup> *Id.* at 318.

<sup>167</sup> *Id.* at 317–18.

<sup>168</sup> Arvind Dilawar, *What Should Replace Cash Bail?*, PAC. STANDARD (Apr. 9, 2019) <https://psmag.com/social-justice/what-should-replace-cash-bail> [<http://perma.cc/CZL5-XNFBV>].

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 166 (2010).

<sup>172</sup> Sarah Pruitt, *When Did African Americans Actually Get the Right to Vote?*, HIST. (Jan. 29, 2020), <https://www.history.com/news/african-american-voting-right-15th-amendment> [<http://perma.cc/E9YL-2JUT>].

<sup>173</sup> Hinton et al., *supra* note 72, at 2.

Reagan, the War on Drugs was declared an effort to eradicate “public enemy number one”: drugs.<sup>174</sup> Notwithstanding the genuine objectives underlying the War on Drugs, the delivery and enforcement of these laws proved disproportionately detrimental to people of color because of drug-free zone laws.<sup>175</sup> Residential segregation had pushed low-income African Americans to high density areas of the city, which often included schools, playgrounds, and public housing projects.<sup>176</sup> The influx of low-income African Americans caused the exodus of white people from those areas and into the less densely populated suburbs.<sup>177</sup> Drug-free zone laws prohibited the use or sale of drugs in proximity to certain “zones” which were protected areas such as schools, playgrounds, and public housing projects.<sup>178</sup> This necessarily meant that the majority of people affected by these laws were African-Americans since they were the ones living in those zones.

The punishment for using or selling drugs in one of these zones could earn someone a punitive sentence, including mandatory minimums and sentencing enhancements.<sup>179</sup> In certain states, defendants convicted of drug-free zone offenses faced a fixed mandatory minimum penalty enhancement, which was added to any sentence imposed upon them for the underlying drug offense.<sup>180</sup> While in other states, defendants faced enhancements to their presumptive sentencing guidelines range.<sup>181</sup> Yet, in some states, convictions of offenses within drug-free zones raised the felony class of the underlying offense which exposed the defendant to a more severe penalty.<sup>182</sup> Lastly, drug-free zone offenses elevated youth from being prosecuted as juveniles to being prosecuted as adults.<sup>183</sup>

The War on Drugs is just one example of a law that is neutral on its face but racist in its impact. Our history is laden with laws that are facially neutral, like the Bail Reform Act evaluated in *United States v. Salerno*, but racially discriminatory

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<sup>174</sup> *War on Drugs*, HIST. (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<http://perma.cc/VST8-SWCG>]; Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/> [<http://perma.cc/E3YG-LX36>].

<sup>175</sup> Hinton et al., *supra* note 72, at 3.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Punishments for offenses within the drug-free zones were double the punishment for the same offenses committed outside these zones. JUDITH GREENE, KEVIN PRANIS, & JASON ZIEDENBERG, *DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY—AND FAIL TO PROTECT YOUTH* 5 (Just. Pol'y Inst. eds., 2006).

<sup>180</sup> *Id.* at 7.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

in effect.<sup>184</sup> Cash bail and the myriad of pretrial detention laws that come with it are no exception.

Such laws have scarred our criminal justice system. People of color, particularly African Americans, are disproportionately overrepresented in the criminal justice system.<sup>185</sup> “Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people.”<sup>186</sup> For African American men, the incarceration rate is more than 3,000 per 100,000 citizens.<sup>187</sup> This is approximately four times the national average and approximately six times the rate among white men.<sup>188</sup> Where an African American male has a thirty-two percent chance of serving time in prison at some point in his life, a white male born at the same time would only have a six percent chance of being sent to prison.<sup>189</sup> The same rings true for African American women. Forty-four percent of incarcerated women are black even though only about thirteen percent of the female population is black.<sup>190</sup>

“[T]hese racial disparities are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality.”<sup>191</sup> While some argue that these disparate numbers are a result of disparate crime rate because men and women of color simply commit more crimes than White men and women,<sup>192</sup> such claims have no factual or statistical basis.

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<sup>184</sup> See S. 1070, 49 Leg., 2d Sess. (Ariz. 2010) (allowing officers who possess “reasonable suspicion” that an individual is unlawfully present in the United States to make reasonable attempts to determine the immigration status of that person under the Support our Law Enforcement and Safe Neighborhoods Act); see also *McClesky v. Kemp*, 481 U.S. 279, 286–87, 320 (1987) (explaining a study that showed the death penalty was more often imposed in Georgia on black defendants and killers of white victims than on white defendants and killers of black victims); *City of Memphis v. Greene*, 451 U.S. 100, 126–28 (1981) (showing that the road closure had a racially discriminatory effect because the only drivers who were inconvenienced by the action were black); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (finding that section 182 of the Alabama Constitution, which provided for the disenfranchisement of persons convicted of crimes involving moral turpitude, violated equal protection because even though it was racially neutral on its face, the original enactment was motivated by a desire to discriminate against blacks on account of race, and the provision had a racially discriminatory impact since its adoption).

<sup>185</sup> See John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 378 (2013).

<sup>186</sup> Hinton et al., *supra* note 72, at 2.

<sup>187</sup> Conyers, *supra* note 185, at 378.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Hinton et al., *supra* note 72, at 2.

<sup>191</sup> *Id.*

<sup>192</sup> Conyers, *supra* note 185, at 378.



Despite society's recent progress on social justice issues, racism remains entrenched in our criminal justice system. Just last year, the San Francisco District Attorney's Office began a process of "blind charging."<sup>193</sup> The office removed all demographic and racial information from incident reports before they reached the hands of prosecutors in an effort to correct the overcharging of African Americans and the undercharging of similarly situated white people.<sup>194</sup> This was the office's effort to "directly confront [] ingrained racial bias" that leads some prosecutors to charge African Americans for low-level drug offenses more frequently than their similarly situated white counterparts, "even though studies show that white people use illicit drugs at higher rates."<sup>195</sup>

## B. The Unintended Racist Consequences of Risk Assessments

If, as critics argue, algorithms are entrenched with racially biased data, then the assessments they produce will inevitably be discriminatory as well. Can an egg be separated from a cake that has already been baked? Of course not. This is exactly how critics of the pre-trial risk assessments view the efficacy of these tools—these algorithms "bake in" longstanding practices of bias that cannot be extracted.<sup>196</sup> Matt Watkins, senior writer for the Center for Court Innovation, explains "[t]here's no way to square the circle there, taking the bias out of the system by using data generated by a system shot through with racial bias" is simply impossible.<sup>197</sup>

Critics explain the push for risk assessments as "entrenching racial disparities and hiding them behind the rhetoric of science"<sup>198</sup> If the data used in the risk assessment algorithms is heavily engrained with systemic and institutional racism, then the output of that algorithm is not going to be a neutral evaluation or an accurate representation of the person's risk.<sup>199</sup>

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<sup>193</sup> Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<http://perma.cc/WE2K-GNVU>].

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Thompkins, *supra* note 25.

<sup>197</sup> Beth Schwartzapfel, *Can Racist Algorithms be Fixed?*, MARSHALL PROJECT (July 1, 2019, 6:00 AM), <http://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed> [<http://perma.cc/LU53-VVA5>].

<sup>198</sup> Robin Steinberg, *Cash Bail Must be Eliminated, but 'Risk Assessments' Aren't the Tool to do it*, USA TODAY (Sept. 1, 2018, 12:26 AM), <http://www.usatoday.com/story/opinion/policing/2018/08/30/california-law-risk-assessments-bail-justice-system-policing-usa/1043956002/> [<http://perma.cc/3GM2-RECF>].

<sup>199</sup> See generally CTR. ON RACE, INEQ., + THE L. & ACLU, WHAT DOES FAIRNESS LOOK LIKE? CONVERSATIONS ON RACE, RISK ASSESSMENT TOOLS, AND PRETRIAL JUSTICE (2018) <http://www.law.nyu.edu/sites/default/files/Final%20Report--ACLU->

This issue was examined by ProPublica, a non-profit news group whose mission is to “expose abuses of power and betrayals of the public trust by government, business, and other institutions, using the moral force of investigative journalism.”<sup>200</sup> In May of 2016, ProPublica published a study called *Machine Bias*, which criticized risk assessments for their inability to accurately predict future risk for defendants detained pre-trial.<sup>201</sup> Specifically, this inaccuracy is skewed toward black defendants. ProPublica found the COMPAS risk assessment tool<sup>202</sup> produced great error in misclassifying black defendants as high risk when it did not similarly misclassify white defendants.<sup>203</sup>

Bernard Parker, an African American man, and Dylan Fugett, a White man, both arrested on drug charges, received massively different risk assessment scores. Dylan was rated as a three (low risk) and Bernard was rated as a ten (high risk).<sup>204</sup> Looking at these numbers, one would not know that Fugett had a prior attempted burglary conviction whereas Parker only had a non-violent resisting arrest conviction.<sup>205</sup> After release, Fugett re-offended three times with possession of drugs while Bernard did not reoffend even once.<sup>206</sup> This further confirmed the notion that White people do not commit less crimes than their African American counterparts, and drugs are not a “black problem.”<sup>207</sup>

The following example will, to a certain extent, explain why these misclassifications occur.<sup>208</sup> If racial group A is arrested at a higher rate than racial group B, then a tool that uses arrest rate as a factor for future re-arrest will undoubtedly find anyone in

NYU%20CRIL%20Convening%20on%20Race%20Risk%20Assessment%20%20Fairness.pdf [http://perma.cc/7BKF-73W5].

<sup>200</sup> *About Us*, PROPUBLICA, <http://www.propublica.org/about/> [http://perma.cc/W9YC-RRBP] (last visited May 10, 2020).

<sup>201</sup> Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [http://perma.cc/33BE-NK3W].

<sup>202</sup> COMPAS, which stands for Correctional Offender Management Profiling for Alternative Sanctions, is a risk and needs assessment instrument that was first developed in 1998 and has evolved several times to reach its most current model—the fourth generation. NORTHPOINTE, PRACTITIONER’S GUIDE TO COMPAS CORE 1 (2019) <http://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf> [http://perma.cc/TD6K-WGP9].

<sup>203</sup> See Angwin et al., *supra* note 201; SARAH PICARD ET AL., CTR. FOR CT. INNOVATION, BEYOND THE ALGORITHM 4 (2019) <http://www.courtinnovation.org/publications/beyond-algorithm> [http://perma.cc/FD5U-TSM6].

<sup>204</sup> Angwin et al., *supra* note 201.

<sup>205</sup> *Id.*

<sup>206</sup> See *id.*

<sup>207</sup> *Id.*

<sup>208</sup> This example is not used to undermine the importance of individuality in risk assessments. It is used solely to show how the data plugged into risk assessments can be biased from the get-go.

group A as higher risk.<sup>209</sup> Group A represents African Americans and group B represents Caucasians. Caucasians escape high risk determinations because the criminal justice system does not target them like it targets African Americans. Certain communities, specifically communities of color, have greater contact with the criminal justice system simply because of the heightened policing that occurs in those communities.<sup>210</sup> The statistics that result from those interactions do not indicate the dangerousness of people of color; if anything, they indicate just how targeted police behavior can be.<sup>211</sup> Consequently, although risk assessments themselves are not biased tools since they are merely math equations, these equations are applied to infected data. Just as what goes up must come down, what goes in must come out. If racially biased data goes in, racially biased results must come out.

### VII. A LOOK TO THE FUTURE: A 3-IN-1 SOLUTION

One might argue that risk assessments should be removed entirely from the bail reform discussion, given their potential to over-detain and to make false predictions. Risk assessments may exacerbate rather than alleviate the issues inherent in the cash bail system.<sup>212</sup> But eliminating them from the picture is not the proper solution. These algorithms can be used as a force to even the playing field and not as a math equation that disproportionately hurts defendants of color, provided they are not used in a vacuum.<sup>213</sup> Risk assessments are exactly what their name suggests: tools. They are not a magical device that will single-handedly solve our country's discriminatory pre-trial detention system. While these tools have the potential to further racism and inequality, if used correctly, they could alleviate these problems. Consequently, the question is—*how* do we use them correctly?

The following solution is three-fold. First, these tools must be used diagnostically. Second, there must be a system of pretrial services dedicated solely to implementing these risk assessments and offering pretrial services that will stand in place of detention. Third, judges must undergo training that works to undo the implicit bias that often permeates pretrial decisions.

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<sup>209</sup> CTR. ON RACE, INEQ., + THE L. & ACLU, *supra* note 199, at 12.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 13.

<sup>212</sup> Steinberg, *supra* note 198.

<sup>213</sup> CTR. ON RACE, INEQ., + THE L. & ACLU, *supra* note 189, at 12.

### A. Solution 1: Using Risk Assessments Diagnostically

Risk assessments are simply algorithms, but as discussed above, they can produce impartial results. To use this double-edged sword for good, risk assessments must be used only as diagnostic tools to direct either release, further review, or holding until arraignment. Risk assessments should not be used as the sole determining factor for pretrial detention. Using the tool diagnostically means the algorithm is used to *diagnose and direct* the defendant's next step in the pretrial detention decision process, rather than *conclusively determine* their confinement. Because the data used in these algorithms is not always probative of a defendant's flight risk or danger to the community, courts should not rely *solely* on these algorithms to make their pretrial decision or use them as a replacement for judicial discretion.<sup>214</sup> Using risk assessments conclusively without regard for human discretion or without implementing various layers of review will inevitably lead to skewed results and could very well further entrench the process in discriminatory results.

The Center for Court Innovation conducted an analysis that explained what happens when risk assessment tools are used diagnostically and what happens when they are used conclusively.<sup>215</sup> The Center for Court Innovation's study used real data from a sample of New York City defendants from 2015.<sup>216</sup> They tested the data through three models and found that the hybrid model, which used the risk assessment diagnostically—as explained above—yet still gave judges discretion, produced the most racially equivalent results.<sup>217</sup>

The study focused on assessing what *types* of errors the risk assessment tool makes.<sup>218</sup> After interpreting the findings, the Center for Court Innovation concluded not that we should eliminate risk assessments, but that we should restrict pretrial detention only to defendants charged with violent crimes and scored as high-risk.<sup>219</sup> This method actually reduces overall incarceration and also alleviates racial disparities. Jurisdictions need not be confined to their risk assessment tools, but rather should utilize them as powerful tools for bail reform; hence, *Beyond the Algorithm*.<sup>220</sup>

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<sup>214</sup> Steinberg *supra* note 188.

<sup>215</sup> PICARD et al., *supra* note 203, at 3.

<sup>216</sup> The data used in this study was not actually used to inform pretrial decisions; it was simply used for research purposes. *See id.* at 5.

<sup>217</sup> *Id.* at 12–13.

<sup>218</sup> *Id.* at 3–4.

<sup>219</sup> *Id.* at 12.

<sup>220</sup> *Id.* at 13–14.

The Center for Court Innovation's findings demonstrate why it is important to look beyond the math equation within risk assessments and use them to diagnose, not determine. This study involved an empirical test of racial bias in risk assessment tools and evaluated "whether there are policy-level solutions that could conserve the benefits of risk assessment, while also addressing valid concerns over racial fairness."<sup>221</sup> The study evaluated a risk assessment tool that employs an algorithm that combines a defendant's prior convictions, jail or prison sentences, FTAs,<sup>222</sup> probation status, charge type, charge severity, concurrent open cases, as well as age and gender to generate a risk score.<sup>223</sup> These categories are weighted and combined to generate a numerical score which then translates into one of five risk categories: minimal, low, moderate, moderate-high, and high-risk categories.<sup>224</sup>

This study collected a sample of all arrests made in New York City in 2015.<sup>225</sup> This included more than 175,000 defendants: 49% Black, 36% Hispanic, and 14% white.<sup>226</sup> While the tool does not explicitly include race as a category because of the constitutional problems that would present, the study is conscious of the fact that race is embedded into each one of these categories.<sup>227</sup> Additionally, while it may seem strange that gender is included as a category, its inclusion "mitigates the tendency of the tool to over-classify female defendants as high-risk."<sup>228</sup>

Ultimately, the study showed that the tool was accurate in its predictions of re-arrest regardless of race or ethnicity. Defendants classified as high-risk were rearrested at rates of 72% for Blacks, 71% for Hispanics, and 70% for Whites.<sup>229</sup> Similarly, defendants categorized at "minimal risk" were only re-arrested at rates of 11%, 9%, and 10% respectively for those three groups.<sup>230</sup> However, there were substantial racial differences in re-arrest in the low and moderate risk categories.<sup>231</sup> The data was then placed into three different models of decision-making and the results were calculated and analyzed.<sup>232</sup>

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<sup>221</sup> *Id.* at 3.

<sup>222</sup> FTA stands for failure to appear. *See id.* at 15.

<sup>223</sup> *See id.*

<sup>224</sup> *See id.* at 6.

<sup>225</sup> *Id.* at 5.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* at 4.

<sup>228</sup> *Id.* at 5.

<sup>229</sup> *Id.* at 6.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *See id.* at 10.

### 1. Scenario 1: Business as Usual

The first scenario “*Business as Usual*” involves a system where judges maintain their subjective judicial discretion, and risk assessments are merely present as suggestions, no matter what risk category the defendant is placed in.<sup>233</sup> In this scenario, real-world differences that exist in pre-trial detention based on the person’s race persisted.<sup>234</sup> For example, in New York in 2015, defendants who were held in detention were 31% Black, 25% Hispanic, and 22% White.<sup>235</sup> A total of 27% of defendants were detained.<sup>236</sup> False positives, representing the individuals who were classified as high-risk but were not in fact re-arrested on a new charge, were found to be rather high. They averaged at 19%, with the rate for Blacks 6% higher than the rate for Whites.<sup>237</sup>

### 2. Scenario 2: Risk-Based Approach with an Adjusted High-Risk Threshold

In the second scenario, “*Risk-Based Approach with an Adjusted High-Risk Threshold*,” pretrial detention is based solely on the risk-assessment tool and not on judicial discretion.<sup>238</sup> Only defendants in the highest risk category would be detained, thereby reducing the proportion of defendants who would be exposed to pretrial detention.<sup>239</sup> In this scenario, overall detention decreased by 9% for a total detention rate of 18%.<sup>240</sup> Additionally, the false positive rate decreased to 8%.<sup>241</sup> However, even though false positives decreased overall, there still existed a disparity of 7% in the false positives between Black defendants and White defendants.<sup>242</sup>

### 3. Scenario 3: Hybrid Charge and Risk Based Approach

In the final scenario, “*Hybrid Charge and Risk Based Approach*,” pretrial detention was reserved exclusively for defendants who fell into the highest two risk categories and were charged with a violent felony or domestic violence.<sup>243</sup> This assumes that “most misdemeanor and non-violent defendants are not appropriate candidates for bail or detention consideration,

<sup>233</sup> *See id.*

<sup>234</sup> *See id.* at 11.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 12.

<sup>237</sup> False positives for black defendants was 21%, 17% for Hispanic defendants, and 15% for white defendants. *Id.* at 11, 13.

<sup>238</sup> *See id.* at 11.

<sup>239</sup> *See id.*

<sup>240</sup> *Id.* at 11–12.

<sup>241</sup> *Id.* 13.

<sup>242</sup> *Id.* at 11–13.

<sup>243</sup> *Id.* at 11. Also, note the similarity of this approach to the one suggested by SB 10.

regardless of risk level.”<sup>244</sup> Controversially so, this hybrid approach recognized that “charge alone is not a good proxy for risk, and that some individuals with violent charges can be safely supervised in the community.”<sup>245</sup>

For example, in 1999, Tom May, a 75-year old man, faced a murder charge for the “mercy killing” of his terminally ill wife.<sup>246</sup> May and his wife shared 50 years of a loving, happy marriage, but May’s wife begged to be put out of her misery once her condition began to deteriorate due to Lou Gehrig’s disease.<sup>247</sup> One day, May gave his wife an overdose of her medication and then carried her into the car in the garage and started the engine.<sup>248</sup> He sat beside his dying wife for hours hoping to also die with her, but he lived.<sup>249</sup> He was arrested and freed on \$100,000 bail.<sup>250</sup> The seventy-six-year-old retired Navy officer later committed suicide.<sup>251</sup> May’s situation is a prime example of a defendant facing a serious charge that presents virtually no risk to the community whatsoever.<sup>252</sup> This is why the individual’s circumstances, rather than just their ability to post bond based on their charge, matter.

This hybrid approach suggests a reduction in overall pretrial detention rates by 51% when compared to the other two scenarios.<sup>253</sup> In contrast to the 27% overall detention rate presented by the “business as usual” model, only 13% would be detained under this “hybrid” model.<sup>254</sup> Additionally, this model greatly alleviates racial prejudice in false positives: 16% for Blacks and Hispanics alike, and 14% for Whites.<sup>255</sup> While the overall false positive rate is not as low as the “risk-based approach” model, the disproportionate detention by race is greatly decreased, and that is of utmost importance.

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See Tony Perry, *Man, 75, May Face Charges in Mercy Killing of Wife*, L.A. TIMES (Oct. 13, 1999), <https://www.latimes.com/archives/la-xpm-1999-oct-13-mn-21770-story.html> [http://perma.cc/G58K-ETGX].

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Tony Perry, *Man Facing ‘Mercy Killing’ Trial Commits Suicide*, L.A. TIMES (Feb. 29, 2000), <https://www.latimes.com/archives/la-xpm-2000-feb-29-mn-3718-story.html> [http://perma.cc/8RBP-K9VV].

<sup>251</sup> *Id.*

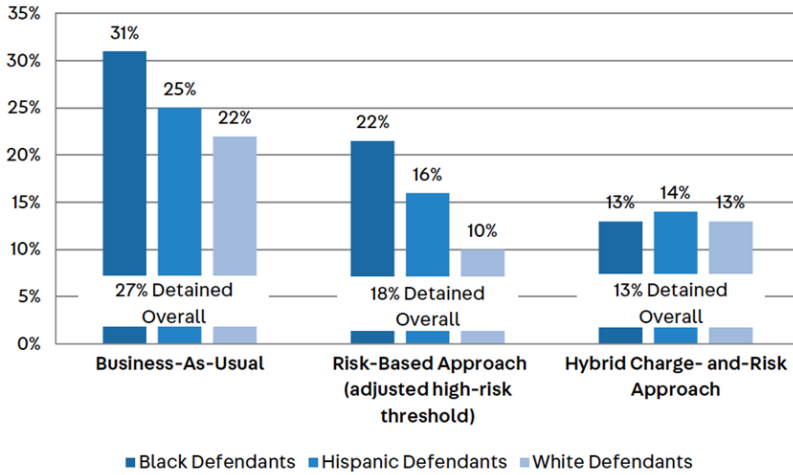
<sup>252</sup> See *id.*

<sup>253</sup> PICARD et al., *supra* note 203, at 12.

<sup>254</sup> *Id.*

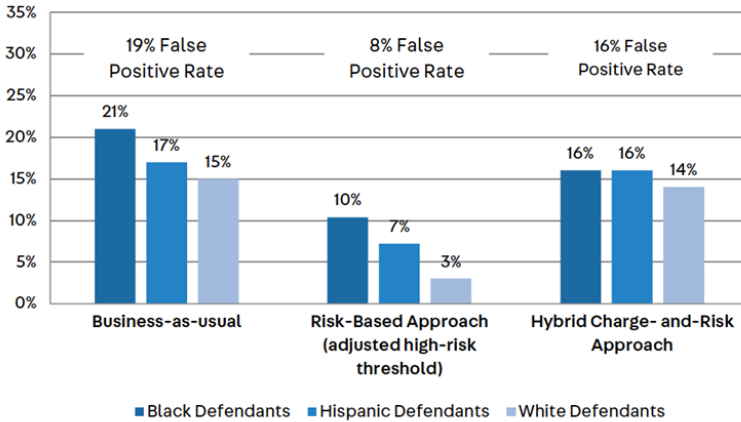
<sup>255</sup> *Id.* at 13.

**Exhibit 5. Pretrial Detention by Race Under Three Decision-Making Scenarios**  
 New York City Defendants, 2015



256

**Exhibit 6. False Positive Rates by Race Under Three Decision-Making Scenarios**  
 New York City Defendants, 2015



257

256 *Id.*  
 257 *Id.*



Not only does this show that operating on a “business as usual” basis will continue to perpetuate racial inequalities present within the bail system, but it also proves that risk assessments can be used to even the playing field when used diagnostically.<sup>258</sup> It is true that risk assessments used in isolation and without proper understanding of how destructive they can be can actually perpetuate these racial biases, especially in “jurisdictions where [B]lack, Hispanic, or other racial or ethnic groups have disproportionate contact with the justice system.”<sup>259</sup> However, this study substantiates that the argument ‘*risk assessments perpetuate racial inequalities, and thus should be abandoned*’ cannot actually withstand the statistics that prove the power of risk assessments when used correctly.

“For more than two centuries, the key decisions in the legal process, from pretrial release to sentencing to parole, have been in the hands of human beings guided by their instincts and personal biases.”<sup>260</sup> The Center for Court Innovation said it best:

“Too often the debate over risk assessments portrays them as either a technological panacea, or as evidence of the false promise of machine learning. The reality is they are neither. Risk assessments are tools with the potential to improve pretrial decision-making and enhance fairness. To realize this potential, the onus is on practitioners to consider a deliberate and modest approach to risk assessment, vigilantly gauging the technology’s effects on both racial fairness and incarceration along the way.”<sup>261</sup>

Diagnostic risk assessments do just that. This approach realizes that risk assessments can be a helpful tool when used modestly. They aim to release suspects early and often as long as it is safe for the community, and as long as pretrial services can assure the suspect will return to court. Gone are the days of pre-arraignment situations where defendants must frantically call their family members to help them post bond. Using the risk assessments diagnostically protects a defendant’s presumption of innocence if they are unlikely to harm others or evade court proceedings.

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Angwin, *supra* note 201.

<sup>261</sup> PICARD et al., *supra* note 203, at 14.

## B. Solution 2: Form Pretrial Services as an Independent Branch

### 1. Pretrial Services Should Not Be Under the Probation Department

For the risk assessment tool to perform properly as a diagnostic, there must be a system of pretrial services in place. Ideally, these services would be provided by a stand-alone agency under the auspices of the court, *separate from* probation. Probation officers are not the best equipped to uphold one of the most significant pillars of our criminal justice system: innocent until proven guilty. Although probation was originally created with the intent to rehabilitate offenders, over the years, probation officers have increasingly taken on the tasks of law enforcement.<sup>262</sup> Probation officers deal with defendants who have already been convicted of a crime and now must be monitored in lieu of serving time in prison.<sup>263</sup> A probation officer's primary role is to "ensure that the offender does not engage in illegal or prohibited behavior."<sup>264</sup> While true that probation officers also help defendants find employment, stay out of trouble, and re-integrate into society, a probation officer's relationship with their client exists *because* their client committed a crime; their presumption of innocence has already been rebutted. It would be a disservice to defendants to task probation officers with unlearning all their probationary skills to administer risk assessments and pretrial services to defendants at an entirely different stage in the criminal justice process.<sup>265</sup> This would require a huge mental jump on the part of the probation officer and could lessen the efficacy and purpose of pretrial services.

The same is true with peace officers. Peace officers are trained to detect crime.<sup>266</sup> When a person gets arrested, is booked, and then seen by pretrial services, a peace officer will likely not presume innocence by default. Because of these reasons, it is of utmost importance that pretrial services are an

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<sup>262</sup> Marcus Purkiss et al., *Probation Officer Functions - A Statutory Analysis*, 67 FED. PROBATION 12, 12 (2003).

<sup>263</sup> See *Probation and Pretrial Officers and Officer Assistants*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> [<http://perma.cc/T6CU-W75M>] (last visited Jan. 3, 2021).

<sup>264</sup> *Probation Officer Career*, PROBATION OFFICER EDU, <https://www.probationofficeredu.org/probation-officer/> [<http://perma.cc/R5E3-6N7H>] (last visited Jan. 9, 2021).

<sup>265</sup> See COLLIN DOYLE, CHIRAAG BRAINS & BROOK HOPKINS, *BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS* 25 (2019).

<sup>266</sup> See *Peace Officer Basic Training*, POST COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, <https://post.ca.gov/peace-officer-basic-training> [<http://perma.cc/6GXT-XAGW>] (last visited May 20, 2020).

independent agency under the auspices of the court, not the probation department.

## 2. What Services Should a Pretrial Service Agency Offer?

It is vital for a pretrial service agent to have a background in social work. The goal of using risk assessment diagnostically as an enhancement, not a replacement, for judicial discretion is to put the “human” back into the process. Therefore, understanding the complexities of a person’s life is crucial.

Additionally, it is important for pretrial services to operate independently, so it has the capacity not only to perform risk assessments, but to supervise defendants upon release. Additionally, the agency can offer mental health services run by professionals trained specifically in criminality, and it can oversee defendants released on Supervised Own Recognizance in a way that encourages the defendant to return to court. Further, the agency can offer phone call or text message reminders for low-level offenders, transportation services, and counseling.

Following through with defendants is inevitably more work than handing them a paper stating their next hearing date and ordering them to appear in court. Probation and police agencies are already bombarded with other tasks and will not have the ability to carry out pretrial services to their full potential as a designated, stand-alone Pretrial Service Agency would. As such, the task must be entrusted to an agency equipped to handle it.

## C. Solution 3: Educate Judges

### 1. Recognition of Bias

Because risk assessments are only to be used diagnostically, judges will still retain their discretion if they find the defendant high-risk, or in some situations, medium-risk. Most, if not all judges will openly agree that racism is wrong. However, race may unintentionally factor into a judge’s decision. The concept that all individuals hold certain stereotypes and attitudes without conscious awareness is called implicit bias.<sup>267</sup> Even judges who have taken an oath to be impartial protectors of the law struggle with implicit bias.<sup>268</sup>

In a study performed on bail-setting in Connecticut, researchers found that judges set bail for African American

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<sup>267</sup> See Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 314 (2015).

<sup>268</sup> See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009).

suspects at an amount 25% higher than similarly situated white defendants.<sup>269</sup> Killers of whites are more likely to receive longer sentences than killers of blacks.<sup>270</sup> Federal judges impose sentences 12% longer on black defendants than on similarly situated white defendants.<sup>271</sup> Judges cannot dismiss that implicit racial bias infects the entire criminal justice system. Even if judges do not actively make racially charged decisions, their subconscious biases still contribute to these racial disparities. Consequently, the question is not “*if* a judge holds implicit bias,” but “*how* do we unfold and unravel these biases.” The first step in undoing bias is simply recognizing that it exists.

The good news is that the effects of these implicit biases can be remedied by making judges aware of their existence and prevalence.<sup>272</sup> In a study where judges sensed their implicit bias was being tested, white judges consciously attempted to manipulate their determinations to cognitively correct any appearance of bias.<sup>273</sup> This study shows that merely identifying the existence of implicit bias can have a positive impact, through self-correction.

## 2. Implicit Bias Trainings

Although it is proven that racial prejudice permeates judicial decisions, training must focus more on helping judges correct their *bias* rather than their *racism*. Judges want to protect their reputation and defend their morals. A judge who is supposed to act as a neutral magistrate does not want to admit they hold racist beliefs. Although implicit biases often manifest in racially biased actions, a judge will be more likely to participate in trainings that address bias than racism—a more politically charged concept. Simply calling these trainings “implicit bias trainings” might encourage judges to genuinely participate and learn, rather than make them defensive and unwilling to attend.

## 3. Tentative Rulings on the Record

Aside from acknowledging bias and dealing with it through training, further concrete actions must be taken when a person's liberty is on the line *before* they have been adjudged guilty. If a suspect is not released prior to arraignment, or is held for a preventive detention hearing, the judge should first be required to make a tentative determination about release or detention on

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<sup>269</sup> *Id.* at 1196.

<sup>270</sup> *See id.*

<sup>271</sup> *Id.*

<sup>272</sup> *See id.* at 1203.

<sup>273</sup> *See id.* at 1223.

the record *before* the suspect ever steps into the courtroom. Judges will base this tentative ruling on the risk assessment, recommendation from Pretrial Services, and all case facts that exist at the time and presented to them.

When a judge faces a defendant, his or her appearance, including their race, automatically signals to the judge their perceived likelihood of committing crime and their risk to the community. To illustrate, judges tend to view black men as “aggressive, criminal, dangerous, irresponsible, and intimately connected to drug use and trade.”<sup>274</sup> Drug use and distribution are portrayed as “ghetto pathologies” that have invaded “White space[s],” instead of being an issue that both Black people and White people deal with.<sup>275</sup> This makes it imperative for judges to be given all the case facts, incident reports, and any other necessary documents, with the defendant’s name and racial identification removed, and be asked to make a determination from the facts they have received from Pretrial Services without ever laying eyes on the defendant.<sup>276</sup> Based on the information on paper, they must make a tentative ruling. Once the defendant is brought into the courtroom, and if the judge decides to change their tentative ruling, they must then state their reasoning on the record.

This process does three things. First, it strips the suspect’s file of any explicit pieces of information that indicate their race.<sup>277</sup> This eliminates the possibility of race being used as a factor for the judge to use when making his or her decision.<sup>278</sup> In the absence of this information first presented on paper, the pure fact that the defendant is standing before the judge presupposes their criminality in a way that is more readily apparent, and thus, makes the judge more likely to err on the side of detention.<sup>279</sup> Second, this method forces the judge to indicate *real reasons* apart from an amorphous and abstract sense of “danger”

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<sup>274</sup> Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 172 (2005).

<sup>275</sup> *Id.*

<sup>276</sup> As previously mentioned, this is why it is imperative for the solution to be a mesh of three solutions combined, the second one being a solid system of pretrial services. Ideally, pretrial services would be so well equipped that judges should not need to deviate from pretrial recommendations except in special circumstances. In New York City, once risk assessments were implemented, judges became more likely to follow pretrial recommendations and “when they did, subsequent court appearance rates improved significantly.” N.Y.C. CRIM. JUST. AGENCY, ANNUAL REPORT 2016, 1 (2016).

<sup>277</sup> Of course, this statement is made with the understanding that certain pieces of data can be racially entrenched even if they do not facially indicate this discrimination. See Schlesinger, *supra* note 274, at 171–72.

<sup>278</sup> See *id.* at 172.

<sup>279</sup> See *id.*

that emanates from the defendant's physical appearance.<sup>280</sup> It forces them to look at the situation objectively. Third, this tentative ruling will make judges more aware of the effects their racially biased decisions can have. If a judge is unable to state a legitimate reason on the record for changing his or her ruling, the judge risks being overturned on appeal. Fourth, it will help judges further recognize his or her implicit bias. What many judges tend to do now is overestimate risk and overincarcerate pre-trial.<sup>281</sup> If a defendant appears to be a good candidate for release on paper, but the judge feels the urge to detain them once the defendant steps into the courtroom, this is certainly telling of implicit bias. A tentative ruling on the record will require judges to introspectively examine their decisions.

#### 4. Diversity on the Bench

Finally, to use risk assessments to enhance judicial discretion, there must be more diversity on the bench—diversity of gender, race, color, and thought. *In the entirety of American history*, only two of 113 Supreme Court Justices have been African-American men.<sup>282</sup> *In the entirety of American history*, only five of the 114 Supreme Court Justices have been women.<sup>283</sup> Neither have ever been appointed Chief Justice.<sup>284</sup> However, throughout American history, 107 of the 114 Supreme Court Justices have been White males.<sup>285</sup> Thus, when our country portrays judicial authority, women and minorities are not in that picture, and are simply referred to as the “other.”<sup>286</sup> If one of the

<sup>280</sup> See *id.*

<sup>281</sup> Ted Gest, *Are Pretrial Risk Assessments Biased? The Debate Sharpens*, CRIME REPORT (Feb. 18, 2020), <http://thecrimereport.org/2020/02/18/are-pretrial-risk-assessments-biased-the-debate-sharpens/> [<http://perma.cc/CU8G-ZQRY>].

<sup>282</sup> The two men of color to serve on our Supreme Court are Thurgood Marshall (1967–1991) and Clarence Thomas (1991–present). See Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN POLITICS (Sept. 5, 2018), <http://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html> [<http://perma.cc/UV67-82BB>].

<sup>283</sup> The five female Supreme Court Justices: Sandra Day O'Connor (1981–2005), Ruth Bader Ginsburg (1993–2020), Sonia Sotomayor (2009–present), Elena Kagan (2010–present), and Amy Coney Barrett (2020–present). See *Women's Underrepresentation in the Judiciary*, REPRESENT WOMEN (Nov. 21, 2017), [http://www.representwomen.org/women\\_s\\_underrepresentation\\_in\\_the\\_judiciary](http://www.representwomen.org/women_s_underrepresentation_in_the_judiciary) [<http://perma.cc/W3LF-CXMS>]; *Senate Confirms Amy Coney Barrett for Supreme Court*, LAW & JUSTICE (Oct. 26, 2020), <http://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/> [<http://perma.cc/9QJ-H5EF>]. Note that this Article was written prior to Barrett's confirmation.

<sup>284</sup> *Meet the Four Women Who Preceded Amy Coney Barrett on the Supreme Court*, USA TODAY (Oct. 27, 2020), <https://www.usatoday.com/in-depth/life/women-of-the-century/2020/10/26/four-women-preceded-amy-coney-barrett-us-supreme-court-sonia-sotomayor-ruth-bader-ginsburg/3710518001/> [<http://perma.cc/7R98-4HEB>].

<sup>285</sup> See *id.*; Campisi, *supra* note 282.

<sup>286</sup> See Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP.

goals of bail reform is to put the human component back into the process, then it is vital to fill the bench with individuals who span various walks of life. At the end of the day, judges carry their life experiences, thought processes, and identities into the courtroom—which inevitably spill over into pretrial decisions.

### VIII. CONCLUSION

“You are where you came from. There are no disembodied selves. There are only humans embedded in practices, places, and cultures.”<sup>287</sup>

It seems our cash bail system has lost sight of the fact that the humans filtered through the criminal justice system come from communities that raised them, families waiting at home for their return, and jobs that cannot wait until they are released. Our cash bail system assumes that a blanket monetary amount based on the crime charged is the fairest way to determine pretrial release. It fails to realize that these “practices, places, and cultures,” have contributed to the factors a judge weighs when determining risk. Because our cash bail system neglects this, we must ensure that any system we implement as part of bail reform does not. We cannot employ risk assessments at face value and neglect judicial discretion that allows for a holistic view of the facts. We must use these tools diagnostically to release as many as is safely possible. To prevent risk assessments from reducing the complexities of the human experience to group data, we must perfect the human element involved in the process.<sup>288</sup>

Our current system does not presume a defendant innocent. It presumes them indigent, whether because of their race or not.<sup>289</sup> If bail reform has any true hope of eradicating these racial inequalities, we must use risk assessments to guarantee that liberty is the norm *for all*, that pretrial detention is the carefully limited exception *for all*, and that the presumption of innocence is fiercely protected *for all*.

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RESOL. 43, 64 (2015).

<sup>287</sup> Godsil, *supra* note 267, at 313.

<sup>288</sup> See Steinberg, *supra* note 198.

<sup>289</sup> David J. Reimel III, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN ST. L. REV. 193, 216 (2019).