DETENTION, RELEASE FROM JAIL, AND COMPUTERIZED BAIL JUSTICE IN CALIFORNIA:

Is it 1984 All Over Again? What Can California Learn From the Last 30 Years of Bail Reform?

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Introduction

As California and other states consider reforming the process of detention and release from jail, it is worth looking back on the last thirty years of bail reform, including what one commentator has called "the third generation of bail reform."[1] The third generation of bail reform is not beginning, however. We are squarely in it. And, as this Article hopes to make clear, the arguments upon which the third generation of bail reform are premised, suffer from the same infirmities as previous generations of bail reform. The goal of reform is to reduce jail populations while simultaneously reducing failures to appear in court and arrests for new crimes while on bail. Proposed reforms seem unlikely to achieve those goals without significant costs.

The current bail reform movement principally relies on computerized risk algorithms that purport to predict human behavior. Those algorithms, however, raise serious questions about the efficacy of the systems that rely upon them and ultimately how they affect the rights of defendants, including questions of protected-class discrimination. Civil libertarians ought to be concerned that bail reform will use computers to sort persons into rights-trammeling categories, with the higher the computer risk score, the more the trammeling. Bail is the right of a presumptively innocent person to be free from jail pending trial, not the right to be labeled as risky and therefore subjected to intrusive conditions assigned by what purports to be an evidence-based, scientific computer algorithm, but in the end is merely based on value-based judgments often hidden and insulated from public view.

I. Reformed Jurisdictions (Federal, Kentucky, and New Jersey), and the California Reform Plans That Use Them as a Model

Proponents of bail reform tend to advocate for a no-money bail system where an accused is detained based on risk and released based on the absence of risk. Thus, a risk assessment is used to determine whether the accused, if released, is likely to commit a new crime (including witness intimidation) and is likely to appear in court. Preventative detention (along with other holds as permitted by law, *e.g.*, probation holds, parole holds, etc.) would serve as the only mechanism to keep an accused in jail pretrial. Today, if a defendant cannot secure release from jail by posting the applicable bail bond, the defendant remains in jail awaiting trial.[2] Assessing whether an accused is or is not "risky" is obviously not

1. Timothy R. Schnacke et al., *The Third Generation of Bail Reform*, DLR Online (Mar. 14, 2011), http://www.denverlawreview.org/dlr-onlinearticle/2011/3/14/the-third-generation-of-bail-reform.html [https://perma.cc/35A8-U9VG].

2. This is a key legal question in the bail reform debate and is the subject of a series of lawsuits. Advocates for bail reform argue that a defendant who does not post bail ought to be presumed to be unable to "afford" bail. Therefore, imposing financial conditions of bail impermissibly discriminates against indigent defendants in violation of the equal protection clause. Four judges have applied three levels of review under the Equal Protection Clause analysis—rational basis,

a question of science, although that is precisely what is being proposed: using big data to predict human behavior. One official in New Jersey even described such a system as being no different than an application on a smart phone.

In federal court, financial conditions of release are rarely used and bail bond agents seldom post bonds for defendants.[3] Although financial conditions were widely used in the federal bail system prior to the Bail Reform Act of 1984, the act expanded the power of preventative detention and applied a rebuttable presumption of detention for certain offenses (primarily violent crimes and felony drug offenses).[4] The government must therefore prove, by clear-and-convincing evidence, that the defendant poses a risk of flight or is a danger to the community and that no conditions of bail are sufficient to protect the community from such risk.[5] In order to meet this standard, the federal system utilizes local

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intermediate scrutiny, and strict scrutiny. Two such cases are currently pending before the United States Court of Appeals for the Fifth and Eleventh Circuits (*O'Donnell v. Harris County*, *Texas* and *Walker v. Calhoun, Georgia*), and two more are working their way up to the United States Court of Appeals for the Ninth Circuit. The counterargument is that the excessive bail prohibition of the Eighth Amendment governs the constitutionality of bail when a defendant does not post bond. Thus, the mere fact that a bail is not posted, does not automatically render it excessive. In California, the simple inability to procure a bail bond has never been the dispositive factor. As the California Supreme Court noted in 1879:

> The able counsel for the prisoner, who has exhausted every means that ingenuity and learning could suggest for the relief of his client, argues that the mere fact that the prisoner is unable to procure the bail demanded of him shows that it is excessive in amount, and should therefore be reduced. But I am unable to assent to that proposition. Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance.

Ex Parte Duncan, 54 Cal. 75, 77–78 (Cal. 1879).

3. The federal system does not generally require a secured bond, meaning when financial conditions of bail are imposed they are typically an unsecured promise to forfeit a certain amount of money (which, incidentally, does not serve to detain since defendants simply sign it). *See* U.S. Dep't of Justice, Office of the U.S. Att'ys, Release And Detention Pending Judicial Proceedings (18 U.S.C. 3141 Et Seq.), https://www.justice.gov/usam/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et [https://perma.cc/JTT4-VEH5] (last visited Apr. 18, 2018). In state courts, a release without a requirement to post financial security is often known as a "recognizance bond" or a "signature bond."]
4. 18 U.S.C. § 3142 (2008).
5. According to the U.S. Attorneys' Manual, "[i]n a pretrial detention hearing, the government's burden is to establish by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community . . . . The

pretrial services programs, which are part of the federal court system and rely on pretrial service officers to investigate the criminal histories of defendants awaiting trial, interview such defendants, gather and verify information concerning the defendants, and ultimately issue a report and recommendation to the judicial officer setting bail.[6] Pretrial service officers will also supervise defendants if they are released pretrial to ensure compliance with any conditions imposed, including house arrest, GPS monitoring, maintaining employment, and regular drug testing.

Although Kentucky is not a no-money bail state, the state has made numerous efforts to take money out of the bail and the system it now uses is widely viewed as evidence that a no-money bail system can work.[7] As such, it has served as model for California Senate Bill 10,[8] which is currently pending before the California legislature. Kentucky has come to serve as an example for the bail reform movement in part because there are no private bail agents in Kentucky.[9] Rather, bail is posted in cash and there are no surety bail agents who bring defendants to court either within Kentucky or from foreign jurisdictions.[10] Kentucky utilizes a statewide pretrial services program that administers a risk assessment tool and supervises defendants. Specifically, Kentucky uses the Public Safety Assessment risk assessment tool created by the Laura and John Arnold Foundation[11] to assess the risk of defendants for purposes of bail.

In 2014, voters in New Jersey amended the state's constitution to change its bail system to model the federal system. This change makes all persons eligible for pretrial release "with or without posting bail, depending upon the decision of the court."[12] While it is not clear that the

issue in such a hearing is whether releasing a defendant would pose a danger to the community that would not exist were [the defendant] detained." U.S. Dep't of Justice, Office of the U.S. Att'ys, *supra* note 3 (citation omitted).

6. *Id.*
7. *See* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, Marshall Project (Nov. 12, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail [https://perma.cc/7XY2-YZY4].
8. *To Fix "Unfair" Bail System, Will California Copy Kentucky?*, L.A. Daily News (Aug. 13, 2017, 4:00 PM, updated Aug. 28, 2017, 5:37 AM), https://www.dailynews.com/2017/08/13/to-fix-unfair-bail-system-will-california-copy-kentucky [https://perma.cc/MVC6-JHJK].
9. *Frequently Asked Questions*, Ky. Ct. Justice, https://courts.ky.gov/courtprograms/pretrialservices/Pages/FAQs.aspx [https://perma.cc/7FRA-KAC3] (last visited Feb. 12, 2018).
10. *Pretrial Services*, Ky. Ct. Justice, https://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx [perma.cc/W5PE-JH3L] (last visited Mar. 10, 2018).
11. *Public Safety Assessment: Risk Factors and Formula*, Laura and John Arnold Foundation, http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/7VGA-JW36] (last visited Apr. 18, 2018).
12. *New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, Ballotpedia, https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014) [https://perma.cc/CZ2U-6ZGK] (last

legislative proposal intended to eliminate all financial conditions of bail[13] that was the result.[14] New Jersey has now implemented a version of the federal system, where preventative detention functions as the only barrier to release from jail. Accordingly, bail has essentially been put behind the emergency glass like a fire alarm that is only to be used as a last resort.[15] New Jersey is also using the Public Safety Assessment tool to assess risk and to recommend detention or release.[16]

Building on these reforms, in October 2017, the California Pretrial Detention Reform Workgroup of the California Judicial Council issued

visited Feb. 12, 2018).

13. The constitutional amendment allows a court to deny pretrial release "if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process." *Id.* That language contemplates that judges would have the option to impose financial conditions of release when making bail decisions. The decision to implement the federal system in favor of general elimination of financial conditions of bail and bail agents was based on a combination of the Public Safety Assessment tool, court rules, and Attorney General directives, all of which have restricted judicial discretion. There is pending legislation, however, that would restore discretion to set bail. That bill authorizes judges to preventatively detain defendants in accordance with the constitutional amendment, but authorizes judges to impose "any combination of monetary bail and non-monetary conditions" that would achieve the purpose of bail when preventative detention is not imposed. Restoring Judicial Discretion in Bail Setting Act, A. 2806, 218th Leg. (N.J. 2018). The New Jersey Association of Counties opposed the constitutional amendment because it anticipated that counties would bear a large increase in the cost of supervising all of the defendants blanketed with conditions by judges who were obliged to release defendants if they did not impose preventative detention. The Chris Christie Administration dodged the objection by persuading a political court called the Council on Unfunded Mandates to reject the Association's claim that bail reform constituted an unfunded mandate, concluding that there was no proof that bail reform would cause significant financial hardship to counties. *See* Maddie Hanna, *N.J. Rethinks Bail—Who Gets Out, Who Stays Jailed*, The Inquirer (Jan. 1, 2017, 11:59 PM), http://www.philly.com/philly/news/local/20170101_N_J__rethinks_bail_-_who_gets_out__who_stays_jailed.html [https://perma.cc/2L5H-NANF]. Accordingly, local governments must bear the costs of supervision, which as of this writing are still unfunded but somehow constitutionally required.
14. *See* Joe Hernandez, *It's Been One Year since New Jersey Ditched Cash Bail. Here's How It's Going*, WHYY (Dec. 26, 2017), https://whyy.org/segments/one-year-since-n-j-ditched-cash-bail-heres-going [https://perma.cc/6HD3-NG76].
15. *See* Reply Brief in Support of Motion for Preliminary Injunction at 11, Holland v. Rosen, No. 1:17-cv-04317-JBS-KMW (D.N.J. Aug. 7, 2017) ("The New Jersey system alone puts bail behind the break-only-in-an-emergency glass and categorically denies bail whenever other options—including serious pretrial deprivations like ankle bracelets—are feasible.").
16. Ephrat Livni, *In the US, Some Criminal Court Judges Now Use Algorithms to Guide Decisions on Bail*, Quartz (Feb. 28, 2017), https://qz.com/920196/criminal-court-judges-in-new-jersey-now-use-algorithms-to-guide-decisions-on-bail [https://perma.cc/N6VG-LN6D].

recommendations to the Chief Justice.[17] The Workgroup did not hide the fact that it was recommending a move toward the federal and New Jersey systems. In fact, the report recommended that California "implement a robust risk-based pretrial assessment and supervision system to *replace the current monetary bail system*."[18] Of course, that recommendation anticipated an expansion of preventative detention, which the report notes in the second recommendation.[19]

The report does stop short of calling for a change to the California Constitution. It attempts to skirt the issue by arguing that California allows for consideration of public safety in the setting of bail[20] and therefore the California Constitution would not need to be changed in order to implement a no-money bail system. That analysis is difficult to square with the language of the California Constitution, which provides that persons "shall be released on bail by sufficient sureties," subject to certain exceptions including:

- capital offenses;
- violent felonies and felony sexual assaults if "the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others"; and
- other felonies when "the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released."[21]

Even when an exception potentially applies, release may be denied only when "the facts are evident or the presumption great."[22] In contrast to the requirement that defendants "shall be released on bail by sufficient sureties" unless an exception applies, the California Constitution also provides that a defendant "may be released on his or her own recognizance in the court's discretion."[23]

It is difficult to see how a no-money bail system that makes release contingent on risk rather than the severity of the charged crime would be consistent with the state's constitutional directive that, except in limited instances, defendants "shall be released on bail by sufficient sureties." When comparing California's constitution to New Jersey's, it seems apparent that to truly implement the no-money bail system recommended

17. Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (2017), http://www.courts.ca.gov/documents/PDRReport-20171023.pdf [https://perma.cc/L7TM-VGV8].
18. *Id.* at 2 (emphasis added).
19. *Id.*
20. *Id.* at 20.
21. Cal. Const. art. I, § 12.
22. *Id.*
23. *Id.* Excessive bail is also prohibited. Bail decisions must take into account the seriousness of the charged crime, the defendant's criminal record, and the risk of the defendant's nonappearance for future proceedings. *Id.*

by the Workgroup, California would need to amend its constitution by adopting language similar to New Jersey's constitutional amendment.[24]

California Senate Bill 10, sponsored by Senator Robert Hertzberg and Assemblyman Rob Bonta, is another proposal to reform California's bail system. Senate Bill 10, unlike the Workgroup report, does not call for expanded preventative detention although it does include many features of a risk-based system, such as imposing a risk assessment for all but violent felonies, creating a pretrial services program in each of California's fifty-eight counties, and generally allowing release without financial bail conditions for all felonies and misdemeanors except for specified crimes.[25] Importantly, judges would be given wide latitude to impose nonmonetary conditions of bail, which could include supervision, rides to court, drug screening, GPS monitoring, and house arrest, all of which would be paid either by the defendant or a county program in the event that a defendant could not afford them.

II. Changing California's Constitution to Expand Preventative Detention—From Unconstitutional and Ineffective Policy to a Now Desirable General Crime Control Policy

Bail reformers, who are advocating for a shift to the federal bail system, often quote *United States v. Salerno* for the proposition that in our country "liberty is the norm" and detention the carefully limited exception.[26] Every time I hear a call for states to go the federal bail system

24. New Jersey originally allowed detention without bail only in capital cases if the proof was evident or the presumption great. That language was deleted from the constitution and replaced with language stating that the pretrial release of a person may be denied where "no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process." A. Con. Res. 2806, 218th Leg. (N.J. 2018).

25. The specified crimes include serious felonies, violent felonies, felony witness intimidation, spousal rape, domestic violence, stalking, violation of protective orders, or any felony allegedly committed while the person was on pretrial release for a separate offense. *See Assembly Comm. on Public Safety*, S.B. 10, 2017–2018 Leg., (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB10# [https://perma.cc/KCF9-XASF].

26. United States v. Salerno, 481 U.S. 739, 755 (1987). The majority in *Salerno* rather dismissively determined that the Eighth Amendment prohibition against excessive bail does not prohibit preventative detention because the Amendment "says nothing about whether bail shall be available at all." *Id.* at 752. Justice Marshall's dissenting opinion castigated the majority's reasoning:

> If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether . . . . It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk

and have this quote spewed at me yet again, I cringe knowing how wrong Justice Rehnquist turned out to be.

Preventative detention—the detention of a defendant who is considered a flight risk or danger to the community—was not generally thought to be constitutional in this country prior to 1970,[27] when the District of Columbia first began implementing a no-money bail system.[28] In fact, various civil liberties groups opposed the 1984 federal Bail Reform Act provisions regarding preventative detention and claimed in *Salerno* that preventative detention was inconsistent with the federal constitution.[29] Chief Justice Rehnquist, writing for the majority, held that the government could detain a criminal defendant without setting bail—in this case, the under-boss and speculated "front boss" Anthony "Fat Tony" Salerno of the Genovese crime family[30]—if the government proved by clear and convincing evidence that the defendant posed a danger or flight risk,[31] subject to the other procedural and substantive protections contained in the act.[32]

> of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."

Id. at 760–61 (Marshall, J., dissenting).

27. *See generally*, Timothy Schnacke et al., The History of Bail and Pretrial Release (Sept. 24, 2010), https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf [https://perma.cc/LD37-XYSD] (discussing history of bail and preventative detention).
28. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 473 (1970).
29. *Amici* briefs were in fact filed by the ACLU, American Bar Association, and National Association of Criminal Defense Lawyers, among others, in support of Salerno. *See* United States v. Salerno, ProCon.org (Dec. 30, 2009, 8:33 AM), https://aclu.procon.org/view.resource.php?resourceID=002489 [https://perma.cc/H7TT-24E8] (listing amici).
30. *Anthony Salerno*, Wikipedia, *https://en.wikipedia.org/wiki/Anthony_Salerno* [https://perma.cc/X3FX-BBXQ] (last visited Feb. 13, 2018).
31. United States v. Salerno, 481 U.S. 739 (1987). Interestingly, in a paper published for the Federal Judicial Center on the Bail Reform Act of 1984, David N. Adair, Jr. suggests that the standard for preventative detention for dangerousness is clear and convincing evidence, but that since the U.S. Code is silent on the standard for risk of flight cases, the burden of proof is only a preponderance of the evidence in-flight only cases, and cites a number of cases for that proposition. David N. Adair, Jr., The Bail Reform Act of 1984 8 (3d ed. 2006), https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf [https://perma.cc/4FS4-9FY3].
32. United States v. Salerno, 481 U.S. 739, 755 (1987). The safeguards include the following: (1) detention is limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing with stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) a "fullblown adversary hearing," which required the government to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a right to counsel and could testify or present information and cross-examine witnesses at the hearing; (6) judges were guided by statutorily

The arguments for preventative detention are quite simple. It begins with the assumption that we can scientifically sort people into two categories—risky and not as risky—and then detain the risky while releasing the not as risky on conditions of bail. Many a reformer has said that the goal is to keep the right people in jail.[33] Rich gangsters, like "Fat Tony" Salerno, will always be able to post bail, so financial conditions of bail inherently discriminate on the basis of wealth. By basing detention decisions on risk however, the judicial system can reduce crime because judges will detain the dangerous offenders, who might otherwise be released due to their ability to pail bail. Other commentators argue that it is intellectually dishonest to impose de facto preventative detention by setting higher bail than an offender can reasonably be expected to post. Preventative detention is also seen as more fair to the indigent because their inability to post financial bonds will not serve as grounds for detention (although typically bail is a third-party provided benefit, and the indigent, like their rich counterparts, will still face aggressive preventative detention policies based on risk assessments). Well-intentioned challengers of state overreaches, like charitable bail funds or other community groups, would be powerless to take responsibility as the jailer of choice for the defendant.[34] Of course, proponents of bail reform also argue that ending money bail is necessary to end mass incarceration in the United States,[35] generally without acknowledging that pretrial detention of federal defendants increased after Congress passed the Bail Reform Act.[36]

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enumerated factors; (7) judges were to include written findings of fact and a statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review. *See* Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 29 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf [https://perma.cc/5K7H-MCSL].

33. *Editorial: Keeping the Right People in Jail*, Bulletin (June 6, 2014, 12:01 AM), http://www.bendbulletin.com/home/2136314-151/editorial-keeping-the-right-people-in-jail [https://perma.cc/2PW7-FY3W].

34. The U.S. Supreme Court defines release on a bail bond as being released to the custody of the surety, which in the modern day can be a third-party or a private bail agent. Of course, this has to be a choice by both the defendant and the surety, and in that way it has been said to be the right to select the jailer of one's choice. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment." Taylor v. Taintor, 83 U.S. 366, 371 (1872).

35. *See e.g.*, Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/mass-incarceration/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail [https://perma.cc/BP6J-7PBN].

36. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Pretrial Release and Detention: The Bail Reform Act of 1984 1 (1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf [https://perma.cc/2AQ5-MHVK] ("The percent of Federal defendants held for the entire time prior to trial, either on pretrial detention or for failure to make bail, increased from 24% before the Act to 29% after the Act."). Rates of detention escalated dramatically in the years that followed.

The arguments against preventative detention are well articulated in a pre–*Salerno* article, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*.[37] The article notes that even with the most vigorous due process and risk assessment instruments available, the rate of false positives range from forty to fifty percent in one study to as high as 88 percent in another.[38] A false positive occurs when a prediction of dangerousness results in detention, when in fact, the person would not have committed a new crime if released. In addition, from a resources perspective, preventative detention hearings are expensive because they require proof by clear and convincing evidence and trigger a litany of safeguards. Finally, those who oppose the expansion of preventative detention typically argue that we cannot predict risk with sufficient certainty to be sure that we are detaining the right people. In his dissent in *Salerno*, Justice Blackmun argued that even our most highly trained professionals cannot predict risk. This squared with the position of the American Psychiatric Association that even psychiatrists are unable to make accurate predictions of long-term future criminality.[39]

Justice Thurgood Marshall's dissent in *Salerno* makes the argument that preventative detention erodes civil rights and is inconsistent with American constitutional tradition:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.[40]

Justice Marshall predicted the future as he concluded his dissent:

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day,

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See note 45 *infra* and accompanying text.

37. Scott D. Himsell, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Crime*, 77 J. Crim. L. & Criminology 439 (1986).

38. *Id.* at 455 n.127.

39. *See* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) ("The American Psychiatric Association (APA), participating in this case as *amicus curiae,* informs us that '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.' . . . The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong.").

40. United States v. Salerno, 481 U.S. 739, 755–756 (1986) (Marshall, J., dissenting).

> the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.
>
> Throughout the world today, there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. *Theirs is truly a decision which will go forth without authority, and come back without respect*.[41]

Justice Marshall's forecast has come true. Governments have abused and misapplied the power of preventative detention since they obtained it.[42] Denying individuals a right to bail is now a central cause of mass incarceration in the federal system.

In 1983, prior to the passage of the Bail Reform Act, the federal government detained 24 percent of persons prior to trial, primarily because they were unable to post bail.[43] Only about two percent of defendants were held without bail.[44] Justice Marshall's prediction came true. A 2015 study determined that 72.7 percent of all defendants in the federal system were detained prior to trial.[45] This represents a 303 percent increase in the rate of preventative detention since the Bail Reform Act went into effect.

It should be pointed out, however that the rate of preventative detention is extremely variable, depending upon the jurisdiction. Federal Public Defender Jeffrey A. Aaron, who published an article in the *San Francisco Daily*, which is not available online and cannot be

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41. *Id.* at 767 (emphasis added).
42. Pretrial incarceration is not the only example of preventative detention based on predictions of future misconduct. Many states have enacted laws that detain sex offenders for indefinite periods after they complete their sentences based on predictions that the offenders will be unable to control their criminal impulses and will thus commit new sex crimes if released. The Supreme Court has rejected constitutional challenges to such laws. *See e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding Kansas' Sexually Violent Predator Act); Kansas v. Crane, 534 U.S. 407 (2002) (indefinite detention permitted even if lack of self-control results from personality or emotional disorder rather than volitional impairment).
43. U.S. Dep't of Justice, *supra* note 36, at 1.
44. *Id.*
45. *Table H-14: U.S. District Courts—Pretrial Services Release and Detention for the 12-Month Period Ending September 30, 2015*, U.S. Courts 1 (2015), http://www.uscourts.gov/sites/default/files/data_tables/H14Sep15.pdf [https://perma.cc/HGE8-GEPA]. The percentage of defendants detained varies significantly by Circuit. The Ninth Circuit had the highest rate of detention, at 85.5 percent, while the Third Circuit had the lowest rate of detention, at 46.7 percent. *Id.*

redistributed,[46] has noted that the preventative detention statistics are available on the U.S. Courts' webpage. He notes that the disparities in detention rates are highly variable and not easily explainable. He gives the District of New Jersey as one example, with 36 percent detained, and compares that detention rate to Maine (63.2 percent), Delaware (65 percent) and Arizona (95.1 percent).

New Jersey's experiment with preventative detention appears to be trending in a similar direction as the federal experiment. While statistics prior to the law's passage are not readily available, the latest statistics on preventative detention indicate that prosecutors are filing detention motions in 43.67 percent of cases, and are succeeding a little less than half of the time with approximately 18 percent of all defendants detained.[47] Of course, if no resources are provided for preventative detention, then judges will be less likely to order it. This has been the case in New Mexico's Bernalillo County, where detention motions are filed in less than fifteen percent of eligible felony cases and detention is obtained in less than five percent of cases.[48] The New Jersey data also shows that the trend in jail population reductions has slowed slightly under bail reform. In 2016, the year before bail reform was implemented, the non-sentenced pretrial jail population declined by 20.68 percent, while in 2017, the first full year of bail reform, the non-sentenced pretrial population declined by 19.5 percent.[49]

Upon further review, in the no-money bail system, *detention becomes the norm*, or at least may threaten to become the norm. The collective distaste for the constitutional right to bail by sufficient financial sureties, combined with collective fear that presumptively innocent defendants will commit crimes if released, has convinced the public that the problem of mass incarceration can be solved by giving the government the power to detain with no bail. The decision to implement a risk-based preventative detention system in the federal system is one that, in the words of Justice Marshall, came forth "without authority" and will go back "without respect."[50] It is not clear that the results would be any different in California, although success would certainly depend on funding, which has proven to be quite expensive.

46. Jeffrey Aaron, *Do As DOJ Says, Not As It Does*, San Francisco Daily J. (2017) (on-file with the author).
47. *Criminal Justice Reform Data*, N.J. Courts 1 (2018), https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf [https://perma.cc/2G8K-GXX6].
48. Susan Montoya Bryan, *New Mexico District Attorneys Push for Changes to Bail Rules*, Las Cruces Sun News (Sept. 28, 2017, 4:42 PM, updated Sept. 29, 2017, 10:29 AM), http://www.lcsun-news.com/story/news/local/new-mexico/2017/09/28/new-mexico-district-attorneys-push-changes-bail-rules/714831001 [https://perma.cc/3NNS-RYDF].
49. *Criminal Justice Reform Data*, *supra* note 47, at 5.
50. United States v. Salerno, 481 U.S. 739, 767 (1986) (Marshall, J., dissenting).

III. Reforming the Bail and Criminal Justice System by Using Computers to Predict Risk and Recommend Outcomes—Criticisms and Safeguards

The central component underlying the proposed reforms discussed above is utilizing computer science to perform risk assessment. For more than a generation, courts, practitioners, and others have rejected the accuracy of these dangerously unreliable predictions. For example, research has shown that, "[t]he accuracy with which clinical judgment predicts future events is often little better than random chance. The accumulated research literature indicates that errors in predicting dangerousness range from 54% to 94%, averaging about 80%."[51] The U.S. Supreme Court has also appeared to endorse the view of the American Psychiatric Association that, "predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts."[52]

Risk assessment legislation is currently underway in several states.[53] Senate Bill 10 in California is one example of such legislation. This follows proposed legislation and court rules newly implemented in as many as fifteen states over the last twelve months. The most popular risk assessment—the Public Safety Assessment (PSA)—developed by the Laura and John Arnold Foundation, is now used in as many as thirty-eight jurisdictions, including three states (New Jersey, Kentucky, and Arizona).[54] And most bail reform legislation at both the state and local level either requires the use of risk assessments prior to setting bail, or at a minimum encourages and permits the use of such assessments by adding it to the existing statutory factors for setting bail.

This Part examines several key issues that have been raised regarding the use of risk assessments including: (a) legal issues, (b) questions of

51. Terence W. Campbell, *Challenging Psychologists and Psychiatrists as Expert Witnesses*, 73 Mich. B.J. 68, 68 (1994).

52. Estelle v. Smith, 451 U.S. 454, 472 (1981).

53. *See, e.g.*, S.B. 1490, 2018 Reg. Session (Fla. 2018) (the amended version from February 6, 2018 https://www.flsenate.gov/Session/Bill/2018/1490/Amendment/648186/HTML, that legislation created a presumption against secured bail and implemented a risk assessment regime. From the legislative declaration. "The Legislature finds that the use of actuarial instruments that evaluate criminogenic based needs and classify defendants according to levels of risk provides a more consistent and accurate assessment of a defendant's risk of noncompliance while on pretrial release pending trial."); H.B. 439, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (Ohio H.B. 439 would have required the Ohio Sentencing Commission to approve and issue a list of validated risk instruments for use in the pretrial context within 90 days of the legislation becoming law).

54. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City,* 20 Yale J.L. & Tech. 103, 137 (2018); *See also Pretrial Justice*, Laura and John Arnold Foundation, http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice [https://perma.cc/HEJ8-Z949] (last visited Apr. 19, 2018) (noting that [o]ver 40 jurisdictions have either adopted the PSA or are engaged in implementation).

transparency and black-box algorithms, (c) potential for discrimination, (d) separation of powers issues, and (e) ethical and moral questions.

A. *Legal Issues—Pretrial Risk Assessments*

One of the motivations underlying bail reform is that a criminal defendant's presumption of innocence, which has no direct application at the pretrial phase of a criminal case,[55] is lost when a criminal defendant is required to post money bail. Yet, risk assessments in practice must be more antithetical to the presumption of innocence than bail.[56] Risk assessments classify people based on what they have done in the past and are not based on what they are accused of doing in a present action. In fact, many risk assessments do not consider the current charge in making the assessment. Although critics claim that a bail schedule based on the charge is fundamentally unfair, in reality, judges typically assign higher bail, more liberty-restricting conditions, and—in the case of the federal government and Washington, D.C.—preventative detention on the basis of two unrelated factors: the defendant's age and how many prior convictions or breaches of bail conditions they have in their past.[57]

The National Legal Aid and Defender Association (NLADA) has noted several key legal issues with the use of risk assessments.[58] First, are safeguards against self-incrimination.[59] Because many risk assessments

55. Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.") (citation omitted). This is a relatively recent understanding of the presumption of innocence. "At common law, the presumption of innocence had a wider meaning. It also protected defendants during the time between charge and conviction, ensuring that most individuals would remain at liberty prior to trial . . . ." Ram Subramanian et al., vera inst. of just., Incarceration's Front Door: The Misuse of Jails in America 48 n.4 (2015).

56. "Moreover, the threat of an unwarranted restraint on an individual's liberty is at its greatest where the decision being made is predictive in nature. To deprive an individual of his freedom on the basis of speculation about his future conduct is contrary to the presumption of innocence that 'lies at the foundation' of our judicial system. Such decision making is also peculiarly subject to abuse and threatens to undermine the respect and confidence of the community in the uniform application of the criminal law. Van Atta v. Scott, 613 P.2d 210, 218 (1980) (citation omitted).

57. *See supra* note 11 (While there are nine factors, eight are prior convictions (including whether or not served in prison) and then age. The other risk assessments are not so heavily reliant on these two factors. However, these two categories, age and prior criminality and failures as an umbrella category, are the two general reasons why scores go up. In Colorado, roughly 62 percent of the total score is based on these two umbrella categories.); *infra* note 98.

58. *See generally* Nat'l Legal Aid & Defender Ass'n, Risk & Needs Assessments: What Defenders and Chief Defenders Need to Know (2015), http://www.nlada.org/sites/default/files/pictures/NLADA_Risk_and_Needs_Assessments-What_Public_Defenders_Need_to_Know.pdf [https://perma.cc/4G2S-MYJ3].

59. *Id.* at 4–5.

require an interview, individual's Fifth Amendment rights against self-incrimination are implicated This is almost impossible to avoid because many legislative proposals assume that *all* defendants will be required to submit to a risk assessment. An assessment report cannot be completed without an interview because the data required to complete the assessment is generally not available to government agencies, such as an individual's, history of mental health issues.

Second, the NLADA report notes that, "[u]se of an assessment instrument which has not been validated to make decisions impacting a defendant's liberty may violate due process or, if used at sentencing, the 8th amendment."[60] An assessment instrument, according to the report, should be "validated by testing it with the population in question before adoption for general use."[61] The report also calls for periodic revalidation. Validation is a question of limitation—an instrument should not be used for purposes for which it was not validated. The Colorado legislature amended the state's pretrial services law by permitting pretrial assessment tools to be used "solely for the purpose of assessing pretrial risk" in response to this problem.[62] Some prosecutors and defense lawyers were using the risk assessment for purposes of plea negotiations, a purpose for which it was not validated.

There have also been serious due process concerns with risk assessments, leading one group of researchers to call for core public agencies to stop using certain types of risk assessments.[63] Although there has been little litigation in the pretrial context, *State v. Loomis*,[64] a recent case decided by the Wisconsin Supreme Court, would not permit the use of the risk assessment unless it met particular safeguards designed to protect due process rights. While *Loomis* was decided in the sentencing context, the due process concerns in the pretrial context are similar. The decision permitted the use of COMPAS, a proprietary algorithm operated by a private company, but "circumscribed" its use.[65]

The Court noted one important limitation on the use of COMPAS' algorithm, which is that its "risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated."[66] Of course, in the pretrial context, the Arnold Foundation's PSA tool and many other tools, combined with the judgment of a pretrial services worker, will recommend preventative detention or liberty-restricting

60. *Id.* at 5.
61. *Id.*
62. *See* S.B. 14-212, Gen. Assemb., Reg. Sess. (Col. 2014).
63. Alex Compolo et al., AI Now, AI Now 2017 Report 1 (2017), https://ainowinstitute.org/AI_Now_2017_Report.pdf [https://perma.cc/7TJF-XMEY] (noting that the "unreviewed or unvalidated use of pre-trained models, AI systems licensed from third party vendors, and algorithmic processes created in-house . . . raise[] serious due process concerns).
64. State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
65. *Id.* at 757.
66. *Id.* at 755.

conditions while an individual is released from jail pending trial. In New Jersey, for example, the PSA will recommend, via a grid, various categories of supervision based on the risk scores. For the highest risk cases, the tool recommends detention. The Wisconsin Supreme Court went a step further by saying that to pass due process, a tool "may not be considered as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community."[67]

In the name of protecting due process, the court developed a series of required instructions designed to temper the blind application of the risk assessment as scientific. The court required that presentence investigation reports using the risk assessment tool include a series of warning, which include the following:

> (1) The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined.
> (2) A COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed.
> (3) Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.[68]

The Wisconsin Supreme Court then issued one final warning to circuit courts, based on evidence in the record that risk assessments serve to group offenders but cannot identify whether a particular defendant falls within any statistical grouping:

> However the due process implications compel us to caution circuit courts that because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual. Accordingly, a circuit court is expected to consider this caution as it weighs all of the factors that are relevant to sentencing an individual defendant.[69]

The Court also noted that Loomis had not challenged the use of the risk assessments under an equal protection theory.[70]

B. *Questions Regarding Proprietary and Black-Box Algorithms*

As the push toward algorithm-based justice has gained steam, those designing algorithms range from college professors, to government employees and staffs, nonprofits, and for-profit corporations. As noted, the purpose of risk-prediction algorithms is to sort individuals into categories by identifying specific factors that may correlate with a greater likelihood of committing a new crime while on release and/or failing to appear in

67. *Id.* at 760.
68. *Id.* at 769.
69. *Id.* at 765.
70. *Id.* at 766.

court as required. The process of building an algorithm is an onerous one: it starts with collecting raw data, verifying the accuracy of such data, making certain data assumptions, conducting a mathematical analysis, correlating a particular set of factors into categories, assigning point values based on the magnitude of each factor, making specific decisions about the categories, and then designing a system to assign recommendations as to the non-monetary conditions that may be appropriate for defendants who fall within each risk category.[71]

Through the process of building and calibrating such algorithms, questions have arisen. Many researchers see the value of requiring proprietors of algorithms to be completely transparent as to the process by which they arrived at the algorithm. Proponents of algorithms often maintain that the factors used to score an algorithm are completely transparent, but in reality the data and process used to build them is beyond public view. In a report on regulating algorithms in criminal justice, AI Now Institute at New York University explained why black box algorithms, like the Arnold Foundation Public Safety Assessment, should not be permitted:

> Core public agencies, such as those responsible for criminal justice, healthcare, welfare, and education (e.g. "high stakes" domains) should no longer use "black box" AI and algorithmic systems. This includes the unreviewed or unvalidated use of pre-trained models, AI systems licensed from third-party vendors, and algorithmic processes created in-house. The use of such systems by public agencies raises serious due process concerns, and at a minimum they should be available for public auditing, testing, and review, and subject to accountability standards.[72]

The need for complete algorithmic transparency is necessary not only to protect due process rights, as the court recognized in *Loomis*, but also to prevent the danger of bias: "The danger of bias increases when these systems are applied, often in non-transparent ways, to critical institutions like criminal justice and healthcare."[73]

Rebecca Wexler of Yale Law School, recently wrote an article on the increasing use of trade secrets in criminal justice that are used to shield algorithms from transparency in policing, bail, and sentencing.[74] Many provisions protecting intellectual property are also contained in the contracts between nonprofit or for-profit corporations with various state and local entities. Wexler noted that, aside from the pros and cons of implementing a risk assessment regime (which remains an open debate),

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71. *See, e.g.*, Mesa County Pretrial Stakeholder Group, Mesa County Pretrial Smart Praxis Version 3 (2013), https://www.pretrial.org/download/risk-assessment/Mesa%20County%20SMART%20Praxis.pdf [https://perma.cc/9X-GF-ATLP].
72. Compolo et al., *supra* note 63, at 1.
73. *Id.* at 14.
74. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 Stan. L. Rev. (forthcoming 2018).

one fundamental piece of the analysis is missing: ownership.[75] She noted that privatization of the justice system is a growing concern as a result of the acceleration of the deployment of these systems:

> Automation is intensifying the privatization of the justice system. Similar to private prisons that have been found to under-maintain safety and security, or private police who operate with minimal training and oversight, new criminal justice technologies are primarily privately owned. Developers often assert that details about how their tools function are trade secrets. As a result, they claim entitlements to withhold that information from criminal defendants and their attorneys, refusing to comply even with those subpoenas that seek information under a protective order or under seal.[76]

Wexler is concerned that secrecy is a continuing and growing trend:

> To date, scholars and practitioners have largely overlooked the fact that new technologies entering criminal proceedings are bringing intellectual property claims with them. But conflicts surrounding this doctrinal trend are likely to multiply. The Defend Trade Secrets Act of 2016 established the first federal civil cause of action for trade secret misappropriation, while the Supreme Court's 2014 decision in *Alice Corporation v. CLS Bank International* made it harder to patent software. Future developers of data-driven systems are therefore likely to depend ever more heavily on trade secret protections.[77]

As a general rule, trade secret protections for software in the criminal justice system are simply presumed at this point. As Wexler notes, "[t]he dearth of scholarly attention has been accompanied by uncritical acceptance of trade secret evidence in criminal cases."[78]

The question then becomes, what changes are needed to force transparency? Wexler's research is primarily focused on an individual criminal proceeding rather than the broader legal and policy questions of transparency raised by the AI Now Institute report. She calls on the courts to change rules of evidence and on legislatures to enact laws that essentially allow for the discovery of the underlying information used to construct the algorithm:

> But trade secret holders should wield no special power to block criminal defendants' access to evidence altogether. Courts should refuse to extend the privilege wholesale from civil to criminal cases, and legislatures should pass new laws that limit safeguards for trade secret evidence in criminal proceedings to protective orders and nothing more.[79]

In the broader debate on bail reform, this issue is often lost in favor of debating the merits of risk algorithms as a determinant of pretrial liberty without considering the fairness of basing decisions about liberty on

75. *Id.* at 6.
76. *Id.* at 6–7 (footnotes omitted).
77. *Id.* at 7 (footnotes omitted).
78. *Id.* at 9.
79. *Id.* at 10 (footnotes omitted).

"secret evidence" that neither the defendant nor the decisionmaker is entitled to view.

Yet, these issues are real. Researchers in one study made sixteen public information requests to find out how the Arnold Foundation tool was built.[80] While noting that the Arnold Foundation tool does disclose the factors that are scored, which many others do not, the researchers discovered that the Foundation still cloaks its algorithm in secrecy:

> However, the Arnold Foundation has not revealed how it generated the algorithms, or whether it performed pre- or post-implementation validation tests, and if so, what the outcomes were. Nor has it disclosed, in quantitative or percentage terms, what "low risk" and "high risk" mean: is the chance that a "low risk" defendant will fail to appear one in ten or one in five hundred? Is the chance that a "high risk" defendant will fail to appear twice that of a low risk defendant or fifty times?[81]

Ultimately, the researchers succeeded in obtaining information from only one of the sixteen counties from which the information was requested. Some did not respond at all. About a fourth informed the researchers that, "they could not provide information about PSA because that information was owned and controlled by the Arnold Foundation."[82] Thus, after all of these efforts, the researchers aptly noted that we still know nothing about how the tool was developed:

> From the Foundation's website, the documents provided by the Seventh Judicial Circuit, and the statement the Foundation produced for us, we know that the Foundation created the PSA algorithms by analyzing data in about 750,000 cases. We know nothing about how it analyzed that data, what alternatives it tried, or how those alternatives compared to the PSA algorithms it ultimately adopted.[83]

The Arnold Foundation has said that this practice was only limited to "early adopting jurisdictions" and that the Foundation will now be transparent. Yet, according to the researchers, "[a]s far as we can tell, however, the confidentiality provisions are not limited to 'early adopting

80. *See* Brauneis & Goodman, *supra* note 54, at 138.

81. *Id.* While the Arnold Foundation has disclosed the based risk percentages, each individual jurisdiction may have different percentages as noted in example of the Seventh Judicial Circuit of Florida. While the base percentages have been disclosed, the percentages in the risk matrix that are constructed in each jurisdiction are not disclosed nor is the process, records, or deliberations related thereto. In other words, under the purview of typically the judicial branch, a stakeholder group will go into a room and assign the percentages and decide other issues like which crimes qualify as violent under the definition of the tool. Laura & John Arnold Foundation, Developing a National Model for Pretrial Risk Assessment, http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf [https://perma.cc/CG5X-N9MM] (last visited Oct. 2. 2018).

82. *See* Brauneis & Goodman, *supra* note 54, at 138.

83. *Id.* at 141.

jurisdictions,' and the provisions all say that they require confidentiality in perpetuity."[84]

The issues of secret algorithms and a lack of transparency among such algorithms are real. As discussed above, the largest proprietor of a bail algorithm—The Arnold Foundation—has failed to meet basic transparency requirements recommended by the AI Institute and as recommended by Wexler. Yet, state legislators and local governments, with one notable exception,[85] continue to promote the use of algorithms without concrete evidence of success, assuming that the science is good enough that we need not worry about an algorithm's accuracy. While Senate Bill 10 in California does provide some safeguards regarding the deployment of such risk assessments, such as requiring validation and encouraging them to be racially fair, fundamental issues, including those associated with the use of proprietary and black-box algorithms, and not requiring full transparency, remain of utmost concern. Of course, these issues are not limited to algorithms used in the setting of bail, but they are of heightened concern when algorithms play a key role in potentially depriving presumptively innocent defendants of their freedom.

C. *Potential for Discrimination*

As previously noted, transparency is a critical safeguard that allows the public and the parties to a criminal case to assess the potential for bias or unlawful discrimination in the operation of a risk assessment regime. It is difficult to reach a generalized conclusion regarding any bias that might be inherent in algorithms and whether they contribute to unlawfully discriminatory detention decisions. Assessments of bias will vary with the particular jurisdiction's reliance on algorithms, the particular algorithm, or even the particular case. At this point, it is probably fair to conclude with a cliché: the jury is out on whether the algorithms can be bias-free or are actually able, as some claim, to reduce bias. Uncertainties aside, bias is a worthy topic of consideration and California Senate Bill 10 imposes significant requirements that represent a reasonable attempt to address this issue.

It may be pointless to ask whether the use of risk assessments in the criminal justice system imposes more bias than a system that does not employ such algorithms. As one scholar recently noted:

> Determining whether or not a risk tool is racially biased is probably redundant . . . . " Machines are trained on human data. And humans are biased." The important question is whether the use of actuarial risk assessment tools results in more disparate outcomes than the status quo, or other viable alternatives. Outside of the

84. *Id.*

85. Zoë Bernard, *The First Bill to Examine 'Algorithmic Bias' in Government Agencies Has Just Passed in New York City*, Bus. Insider (Dec. 19, 2017, 1:03 PM), http://www.businessinsider.com/algorithmic-bias-accountability-bill-passes-in-new-york-city-2017-12 [https://perma.cc/TAZ8-EJQG].

research presented in this study, the empirical research on this is next to nonexistent.[86]

Unsurprisingly, the results of empirical research in several studies confirm that risk assessments are discriminatory. In one study, researchers found that "software used across the country to predict future criminals [is] biased against blacks."[87] In another, researchers concluded that, "[a]s algorithms increasingly make decisions based on historical and societal data, existing biases and historically discriminatory human decisions risk being 'baked in' to automated decisions."[88]

As legislators recognize the problem of bias in predictive algorithms, they may be inclined to study or restrict their use rather than adopting them wholesale. This has already happened in New York. New York City recently adopted a bill to address algorithmic discrimination in city government[89] and one hundred community groups across New York authored a letter to Governor Cuomo, demanding that the state not rely on risk assessments in criminal justice because "the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state."[90]

The Arnold Foundation boldly asserts that its Public Safety Assessment is both race and gender neutral[91] but this has not been evaluated by independent researchers.[92] It is one thing to assert that there is no impermissible bias; it is another to prove the existence of absolute neutrality.

While the Arnold Foundation's Public Safety Assessment was previously discussed, the reality is that many courts and policymakers regard

86. Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev 29 (forthcoming 2018) (footnote omitted).

87. Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/9PUZ-4CA9].

88. Nicholas Diakopoulos & Sorelle Friedler, *How to Hold Algorithms Accountable*, MIT Tech. Rev. (Nov. 17, 2016), https://www.technologyreview.com/s/602933/how-to-hold-algorithms-accountable [https://perma.cc/2JNZ-W62G].

89. Lauren Kirchner, *New York City Moves to Create Accountability for Algorithms*, ProPublica (Dec. 18, 2017, 12:08 PM), https://www.propublica.org/article/new-york-city-moves-to-create-accountability-for-algorithms [https://perma.cc/3HRS-D7HQ].

90. Letter from Over 100 Community & Advocacy Groups across New York State to Andrew Cuomo, Governor, N.Y. (Nov. 2017), https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/1242/attachments/original/1511364954/FINAL_Bail_Letter_to_Governor_Cuomo_-_11.22.2017_-_10.30am.pdf?1511364954 [https://perma.cc/TU7G-NFQ9].

91. Laura & John Arnold Foundation, Results from the First Six Months of the Public Safety Assessment—Court in Kentucky 4 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf [https://perma.cc/CW7A-D84F].

92. For example, the Arnold Foundation states the PSA "accurately classifies defendants' risk levels *regardless* of their race or gender, meaning it does not have a discriminatory impact." *Id.* Yet, this assertion comes from a report authored by the Foundation, not an independent researcher.

it as transparent and as a sort of gold-standard. When it comes to other risk assessments, some designed even at the local level, the issues raised in this Part become even more important.

D. *Separation of Powers*

As I have sat in the halls of legislatures and local policy forums listening to calls from judiciaries to contract with third-party vendors and approve their own algorithms for purposes that affect the rights of litigants in a criminal case, I have wondered whether it was appropriate for the judiciary to engage in this exercise. These calls have been fueled by proclamations from national court associations, such as the Conference of Chief Justices or the Conference of State Court Administrators.[93]

The power to make court rules in the federal system, upon which many state systems are modeled, is defined as "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."[94] Of course, this power is subject to an important limitation: "Such rules shall not abridge, enlarge or modify any substantive right."[95]

Although a full analysis of these questions is beyond the scope of this Part, instead, I pose a simple question: Does the use of an algorithm to determine pretrial release decisions abridge, enlarge, or modify any substantive right of criminal defendants? While not every use of an algorithm will significantly affect the substantive rights of a criminal defendant, algorithms that inform and make recommendations regarding direct questions of substantive rights are concerning. Such recommendations have nothing to do with procedure or practice. Instead they are designed to categorize defendants and intentionally impose a more or less harsh restraint on their liberty (whether it be incarceration or a mixed-bag of electronic monitoring and supervision) based on that categorization. My reasons for concern are set forth below.

First, it is important to note that the decision to employ an algorithm is a policy choice. As one commentator has noted:

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93. The adopted resolution by the Conference of Chief Justices states that the Conference stands resolved to "accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of nonfinancial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes." *Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, Conference of Chief Justices (Jan. 30, 2013), http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf [https://perma.cc/G56K-UNGJ]; Conference of State Court Administrators, 2012–2013 Policy Paper Evidence-Based Pretrial Release (2012–2013), http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf [https://perma.cc/G56K-UNGJ].

94. 28 U.S.C. § 2072(a) (2012).

95. 28 U.S.C. § 2072(b) (2012).

> When an entity chooses to create and proliferate an algorithm in furtherance of its own objectives, it also necessarily makes a value judgment about what matters and what does not. Choices about whether and how to employ algorithms are a business decision like any other. Values and choices are embedded in the design of the algorithm, just as they are reflected in a company's policy manual, board room, and standard operating practices. And like any decision, the choice to employ an algorithm—whether in pursuit of profits or efficiency or any other goal—entails the possibility of unknown consequences, both risks and rewards.[96]

Thus, for courts to decide to either obtain an algorithm or to go into the business of approving one for statewide use is to make a value judgment and accept the embedded value choices of such an algorithm.

Second, because the choices that drive algorithms are based on value judgments, they are not scientific. The supervision matrix of the Arnold Foundation's tool can serve as an example of why this is problematic because the framework is typical of those used in the pretrial services context.[97] The Arnold Foundation decisionmaking framework, as used in Florida, creates six categories based on "the percentages of defendants by risk score who were released and failed to appear." The results, based on risk score, were: "1 (12%), 2 (16%), 3 (18%), 4 (23%), 5 (27%), 6 (30%)."[98] There has been no publicly disclosed scientific basis for making these the cut-off points.[99] Rather, these categories represent two value judgments: (1) how flexible a jurisdiction is willing to be in risking that defendants will miss court appearances, thereby wasting resources and delaying justice; and (2) how tolerant a jurisdiction will be in assessing the rates of new crimes committed by defendants who have been released from jail while awaiting trial. Of course, this is part of the Arnold Foundation's argument—that the decisionmaking framework localizes these decisions.

Thus, the question becomes whether it is appropriate for the courts to make these policy decisions about public risk rather than elected officials. Typically, courts will form a committee, in some cases open to the public and in some cases not, comprised of members selected and appointed by the courts to make such substantive decisions. But risk tolerance might just as easily be considered a legislative and not a judicial decision.

Imagine a scenario under the Arnold Tool where a defendant is classified as risk six instead of five. In New Mexico and New Jersey, this defendant would be detained without bail, and yet defense lawyers are

96. Rebecca J. Krystosek, Note, *The Algorithm Made Me Do It and Other Bad Excuses*, 101 Minn. L. Rev. (May 17, 2017), http://www.minnesotalawreview.org/2017/05/the-algorithm-made-me-do-it-and-other-bad-excuses/?platform=hootsuite [https://perma.cc/K7VS-6X75].

97. *See, e.g.*, Mesa County Pretrial Stakeholder Group, *supra* note 71. The Mesa County, Colorado "Smart Praxis" risk category scores range from one to four.

98. Brauneis & Goodman, *supra* note 54, at 29.

99. See *id.*

not yet challenging these cut-off points. In other states, this could be the difference between house arrest or not. In the Mesa County, Colorado example, discussed above, the differences between a two, three, and four are significant in terms of increasing restrictions on liberty.[100] Moreover, high-risk scores have another significant impact on individuals—higher bail, which can lead to additional pretrial incarceration. Yet, a court using the Arnold Foundation tool may impose preventative detention because a particular defendant is classified among a cadre of defendants who will commit new crimes or fail to appear in 30 out of 100 cases (a risk 6) versus a defendant classified in a different less-risky group of defendants who will fail to appear in 27 out of 100 cases (a risk 5).

When it comes to time for defendants to challenge these results, which they should, it will be difficult to establish that a three percent difference merits detention or a more stringent conditions of release, especially when courts have absolutely no way to determine which thirty of the 100 are the bad guys and which are the good guys. Basing decisions about liberty on such small differences is a far cry from scientific.

The Colorado Pretrial Assessment Tool, upon which the Mesa County tool is based, is even more forgiving to defendants, although the scoring weights do show how one factor can move a defendant from one risk category to another.[101] The four risk tolerances that the Colorado tool utilizes bear on either the risk of failing to appear or the risk of committing a new crime. It is not clear whether the overlap has been removed, so looking just at the risk of committing a new crime, the subcategories are as follows (with percentages representing a "public safety rate"): 1 (91 percent); 2 (80 percent); 3 (69 percent); 4 (58 percent).[102] The points for each category from the scoring sheet are: 1 (17 or less); 2 (18–37); 3 (38–50); 4 (51–82).[103]

If a defendant is under thirty-four years-old at the time of his or her first arrest, that factor alone will increase the score by ten to fifteen

100. *See* Mesa County Pretrial Stakeholder Group, *supra* note 71 (The differences between a two, three and four could range from supervision as low as getting a phone call reminding you to come to court all the way up to a combination of electronic home monitoring, GPS monitoring, substance abuse screening, and other correctional technologies in addition to differing rates of supervision charges passed on to defendants that increase based on supervision level and risk score.).

101. Colo. Ass'n Pretrial Servs., The Colorado Pretrial Assessment Tool (CPAT): Administration, Scoring, and Reporting Manual Version 2, at 9 (2015), https://www.pretrial.org/download/risk-assessment/CPAT%20Manual%20-%20CAPS%202015-06.pdf [https://perma.cc/Y65Y-BYP9] (last visited Oct. 2, 2018) (The age at first arrest below age 19 is a score of 15 and having another pending case is a score of 13, each of which are nearly enough to cause someone to be in risk category 2. Thus, if someone was already at a risk score of 37 in risk category two, either factor being present would leapfrog category 3 and make that person a category 4 risk.).

102. *Id.* at 9.

103. *Id.*

points, which could move the defendant from risk category two to risk category four.[104] Similarly, nine points will be assessed if the defendant is not "contributing to residential payments."[105] This can quickly bring someone into a higher risk category simply because they are poor or living in a domestic partner's home. Colorado further strives to protect the presumption of innocence by adding thirteen points if the defendant has another *pending* case, which is almost enough to move a defendant from category two to category four.[106]

The decision to contract with proprietors of algorithms to build these tolerances into a decisionmaking framework is plainly a policy question more than a question of court procedure. It also directly affects the substantive rights of the litigants to a criminal case, as both the People and the defendant must live with the categorizations, recommendations based thereon, and subsequent decisions to either under-restrain or over-restrain liberty. Without these categorizations, judges would not sort people into such rigid categories. Instead, judges would make decisions based on information that is not weighted by a machine and forces no categories. The bail reform movement today does not soften these rigid categories. Instead, it perpetuates them. Thus, the question becomes, are there legal or other considerations that must be addressed when deciding whether algorithms should be used at all or at least regulated in some basic respects?

When it comes time for a defendant to challenge an algorithm approved by a State Supreme Court rule or other state judicial body, the defendant will face some difficult challenges. First, as we have seen, the proprietors of the algorithms will try to keep the underlying information used to construct the model secret. Second, a defendant will be asking a trial judge to find that the state's highest court adopted an invalid algorithm or adopted one that is impermissibly discriminatory. This is a difficult position to put a trial judge in; indeed, trial court judges should not be placed in such a difficult position that requires them to consider whether higher courts have either signed a contract to conceal information from defendants in a criminal case or whether higher courts adopted an algorithm that is either invalid or impermissibly discriminatory.

As a new algorithm society, we are defining with particularity how much risk of crime and how many failures to appear we will tolerate. That is not a scientific decision. What is alleged to be scientific is that we can use the categories to approach the results that policymakers want. Courts then determine the rights of the defendants based on groupings within these "scientific" systems, while we have no present ability to distinguish whether any particular defendant will fall within or outside the dominant group. These are not decisions that should be made either in secret or by agencies or departments of state or local courts, even if

104. *Id.* at 3.
105. *Id.*
106. *Id.*

they are open to the public and have a transparent process. Whether it is legally permissible or ethical for the courts to recommend adoption of these systems, including a presumption against one form of bail or another, is a separate issue, but as a question of appropriate legal policy, there is no doubt that the courts are playing a legislative role.

IV. Do Risk-Based Systems Work Better than Financial Bail? Assessing the Costs and Goals of Bail Reform

Many, who are against the current bail reform movement claim that it is impossible to move to a no-money bail system. While perhaps not desirable, it certainly is possible. One can assess desirability through a cost-benefit analysis by analyzing the specific goals that previous reforms attempted to achieve, whether the goals were actually achieved, and then comparing what was achieved to the costs of implementing the reforms in order to determine in the end if reform was worth it.

Those who advocate for bail reform are primarily seeking to achieve three goals: (1) the reduction of mass incarceration; (2) similar or better appearance rates in court; and (3) a similar or reduced rate of new crimes while on bail. To achieve these goals, the reforms rely on one or both prongs of a two-pronged approach: (1) expanding preventative detention in order to reduce the use of financial conditions of bail; and (2) using risk assessments to release those who are determined to be low risk. In New Jersey and New Mexico, as in Washington, D.C. and the federal system, both prongs are used. In states like Colorado and Kentucky, only the first prong is used because these states still permit courts to set financial conditions of bail.

This Part looks at both the costs of implementing the no-money bail system or other systems designed to replace the financial conditions of bail and the benefits such systems have achieved.

A. *New Jersey*

In 2016, the New Jersey Association of Counties sued the state, alleging that forcing the counties to create a pretrial program was an unfunded mandate.[107] They alleged that the cost of implementation just for the portion paid by the counties would be between one and two million dollars on average per county,[108] with the Executive Director forecasting a fifty million dollar total expenditure annually just for county shares of the costs of bail reform.[109] The decision rendered in the case, however,

107. Complaint, In re Complaint Filed by the New Jersey Association of Counties Challenging Provisions of the Criminal Justice Reform Act as an Unfunded Mandate, No. COLM-0004-15 (N.J. Council on Local Mandates Dec. 6, 2016).

108. Caren Chesler, *New Jersey Counties Seeing Sticker Shock ahead of Bail Reform*, WHYY (Nov. 30, 2016), https://whyy.org/articles/is-criminal-justice-in-nj-about-to-become-an-unfunded-mandate [https://perma.cc/C2NW-NT8L].

109. Andrew Schmertz, *Bail Reform to Begin Despite Cost Concerns*, N.J. Ass'n Counties (Dec. 29, 2016), http://njac.org/bail-reform-to-begin-despite-cost-concerns [https://perma.cc/M7RA-Q4FT].

was that the constitutional amendment required the counties to implement the new system and was not a legislative unfunded mandate.[110]

Unfortunately, there is no state or local cost estimate as to what the total cost has been to implement the no-money bail system in New Jersey. In fact, the New Jersey Attorney General was tasked with creating a cost estimate in 2017, and concluded that "we have no idea how much massive bail overhaul will cost NJ."[111] There has, however, been at least one academic cost estimate, projecting the costs of the system to be approximately $379 million annually, the savings to be $164 million, resulting in a net annual cost of $215 million.[112] Acting Administrative Judge Grant made the following statement regarding the funding of bail reform:

> Sufficient funding, of course, remains a concern. Right now, the Criminal Justice Reform funding stream relies entirely on the increases in filing fees that the Legislature authorized. Last year, though, filings were down and therefore, as might be expected, revenue from those fees dropped as well.
>
> If these filing trends continue, we project that starting with FY 2019, the Pretrial Services Program will begin to experience an actual deficit, not just the structural deficit that we already are facing. In other words, we project that we will have exhausted all of the program's carryover balances from prior fiscal years and that the fee revenue will fall short, thereby leaving an unfunded negative balance.[113]

While one academic study estimated there would be savings to offset some of the costs, there has been, as noted, a drop in the jail population during the first year of bail reform. However, because this reduction came about prior to the bail reform, there is no proof that it was caused by bail reform. Indeed, in the calendar year before bail reform was implemented—2016—the non-sentenced pretrial population declined by 20.68 percent, and in the first full calendar year of bail reform—2017—the non-sentenced pretrial population declined by 20.3 percent.[114] As one expert has noted, "one shift" in policy cannot be said to have driven such numbers, instead it is more accurate to "attribute[e] much of it to

110. In re Complaint Filed by the New Jersey Association of Counties, No. COLM-0004-15 (N.J. Council on Local Mandates Apr. 26, 2017).

111. S.P. Sullivan, *Attorney General: We Have No Idea How Much Massive Bail Overhaul Will Cost N.J.*, NJ.com (Dec. 8, 2016, 8:30 AM), http://www.nj.com/politics/index.ssf/2016/12/ag_we_have_no_idea_how_much_massive_nj_bail_overha.html [https://perma.cc/U53K-3VM5].

112. Daraius Irani & Zachary Jones, Regional Economic Studies Institute, Estimating the Cost of the Proposed New Jersey Pretrial Service Unit and the Accompanying Legislation 5 (2014), http://www.americanbailcoalition.org/wp-content/uploads/2016/06/new-jersey-pretrial-final-report.pdf [https://perma.cc/L5GW-3EQD].

113. Remarks before the Assembly Budget Committee by Judge Glenn A. Grant, Acting Admin. Dir. of Courts (Apr. 24, 2017), http://www.njleg.state.nj.us/legislativepub/budget_2018/JUD_Grant_testimony.pdf [https://perma.cc/SRK8-B4C5].

114. *Criminal Justice Reform Data*, *supra* note 47, at 5.

the creation of the state's drug courts that focus on diverting people from prison, as well as changes in the parole system that make it less likely someone will be put back behind bars for minor technical violations of their parole."[115]

Finally, while it would be nice to know what the New Jersey numbers look like in terms of new crimes while on bail, failures to appear while on bail, and new crimes while on a summons or failure to appear while on a summons, New Jersey, despite being thirteen months in on the reforms, has not released any data regarding outcomes that would allow anyone to conclude that the anticipated benefits were realized or that they outweigh the massive cost of paying for the new system.

Is the new system is fairer? Only 7.5 percent of defendants in New Jersey will be released on their own recognizance,[116] while 70.1 percent of defendants will face some form of supervision as a condition of their release.[117] Is it fairer to supervise those defendants and make them pay for their own blood chemistry monitoring or let them post a bail bond? In other words, are financial conditions proving to be more or less restrictive of liberty than the old system? It really is impossible to say without any understanding of the current jail population versus the jail population prior to the reforms.

B. *Washington, D.C.*

Washington, D.C. spends around $63.48 million annually on its pretrial supervision program.[118] This represents an increase in spending of roughly 28 percent over the last ten years in a city of less than one million residents.[119] The program's goal in 2018 was to release 85 percent of all defendants.[120] Among those released, the goal was to have 87 percent make all court appearances and 88 percent remain crime-free.[121] Of course, using the 87 percent figure for court appearances masks the true failure-to-appear rate because of those not making *all* court appearances many will fail to appear more than once. In addition, in FY 2016, 28

115. Ted Sherman, *Why is the N.J. Prison Population Shrinking? (It's Not Just about Less Crime . . .)*, NJ.com (Sept. 27, 2017, 4:33 PM), http://www.nj.com/news/index.ssf/2017/09/why_is_the_nj_prison_population_shrinking_its_not.html [https://perma.cc/63QL-GYFQ].
116. *Criminal Justice Reform Data*, *supra* note 47, at 2.
117. *Id.*
118. Pretrial Servs. Agency for D.C., Congressional Budget Justification and Performance Budget Request Fiscal Year 2018 4 (2017), https://www.csosa.gov/about/financial/budget/2018/FY18-PSA-CBJ-Performance-Budget-05232017.pdf [https://perma.cc/NX2Z-T5MA].
119. *See* District of Columbia Pretrial Servs. Agency, Congressional Budget Justification and Performance Information: Fiscal Year 2008 9 (2007), https://www.psa.gov/sites/default/files/FY2008%20PSA%20Congressional%20Budget%20Justification.pdf [https://perma.cc/9HNM-DVC3].
120. Pretrial Servs. Agency for D.C., *supra* note 118, at 16.
121. *Id.*

percent of defendants were out of compliance with their terms of pretrial supervision at the conclusion of their cases.[122]

Because the current system in D.C. dates back to 1963,[123] it is almost impossible to compare it to the previous system. But it is clear from looking at this system that it is both expensive and labor intensive. States that implement a system modeled on the D.C. system should therefore expect to make a substantial investment of public funds. While the D.C. data can be compared to other programs, it is hard to say that the expense is worth the results.

C. *Kentucky*

In a forthcoming article that studied risk assessments in practice, the author concluded the following:

> [T]here is a sore lack of research on the impacts of risk assessment in practice. There is no evidence on how the use of risk assessment affects racial disparities. There is no evidence that the adoption of risk assessment has led to dramatic improvements in either incarceration rates or crime without adversely affecting the other margin.[124]

Stevenson reached this conclusion after reviewing data and studies from as many as eight jurisdictions. The article's main focus, however, was Kentucky.

The Kentucky model, which proponents of bail reform point to as a success, was clearly debunked. Using six years' worth of data, Stevenson came to a variety of conclusions. Importantly, she found that the use of the Arnold Foundation Pretrial Safety Assessment in Kentucky actually increased failures to appear in court. As she noted:

> Figure 7 shows a sharp jump up in the failure-to-appear rate (defined as the fraction of all defendants who fail to appear for at least one court date) from before the legislation was introduced to after the new law was implemented. The size of the increase—about 3 p.p.—was not large in and of itself, but it is large relative to the base level: about a 40 percent increase over the mean. The introduction of the PSA did not lead to a decline in failures-to-appear. If anything, the FTA rate is slightly higher after the PSA was adopted than before.[125]

Regarding the rearrest rates for new crimes, which proponents expect to go down, Stevenson also found that the opposite was true:

> Inferring that HB 463 led to an increase in rearrests requires inferring that the drop in rearrests right before the introduction of the legislation was indicative of a meaningful change in trend that would have continued in the absence of the law. One could also argue

122. *Id.* at 22.
123. The system is now in its fifty-fifth year of operation. *See PSA's History*, Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=about/history [https://perma.cc/Y86Q-72R6].
124. Stevenson, *supra* note 86, at 27.
125. *Id.* at 41.

> that the drop down in rearrests towards the end of 2010 was just an idiosyncratic fluctuation in the rearrest rate, and the rise after the legislation was introduced was simply more idiosyncratic fluctuation. Alternative analysis, shown in the appendix, suggests that the former interpretation is more likely. *Regardless, it is clear that the increased use of risk assessments as a result of the 2011 law did not result in a decline in the pretrial rearrest rate*.[126]

Despite all of the promises that expanding risk assessments would deliver fantastic results, in fact "the large gains that many had assumed would accompany the adoption of the risk assessment tool were not realized in Kentucky."[127] In assessing what lessons other jurisdictions can learn from Kentucky, Stevenson explained that, "Kentucky's experience with risk assessment should temper hopes that the adoption of risk assessment will lead to a dramatic decrease in incarceration with no concomitant costs in terms of crime or failures to appear."[128]

D. *New Mexico*

New Mexico has released no data indicating that its no-money bail system is a success. Rather, the state has simply asserted that the new court rules necessary to implement the no-money bail system did not increase crime.[129] Unfortunately, no funding was provided to implement the new system at the state or local level. With no such funding, it is proving difficult to implement the old bail system by implementing widespread preventative detention and supervision.

In addition, there are clear signs that the program is not working. One district attorney in New Mexico has said that in the six months prior to bail reform, 150 failure-to-appear warrants were issued, for an average of twenty-five warrants per month.[130] But in the three months after bail reform was implemented, 230 warrants were issued, for an average of seventy-six warrants per month.[131] These numbers represent a 324 percent spike in failure-to-appear warrants.

As to its reductions in jail populations, New Mexico has provided no data. In February 2017, the average daily jail population in Bernalillo County (Albuquerque) was 1,200.[132] New Mexico's bail reform went into

126. *Id.* at 41–42 (emphasis added) (footnote omitted).
127. *Id.* at 51.
128. *Id.* at 53.
129. Admin. Office of the Courts of N.M., Key Facts and Law Regarding Pretrial Release and Detention 7 (2017), https://www.nmcourts.gov/uploads/files/REVISED-Pretrial%20Release%20and%20Detention%20Key%20Facts%209_28.pdf [https://perma.cc/2FVS-WMBE].
130. Bryan, *supra* note 48.
131. *Id.*
132. Soyoung Kim, *Albuquerque's Jail Population Drops to Lowest Levels Since it Was Built*, KRQE (Feb. 24, 2017, 5:28 PM), http://krqe.com/2017/02/24/albuquerques-jail-population-drops-to-lowest-levels-since-it-was-built [perma.cc/473S-KZMA].

effect on July 1, 2017.[133] As of February 10, 2018, the Bernalillo jail population was 1,376.[134] Although this change is probably not significant since the jail population has previously ranged from 1,100 to 1,400, this nonetheless represents a 14.6 percent increase in the jail population in one year, suggesting that no dramatic decrease in jail populations followed implementation of the new system.

In addition, there is no data indicating the number of crimes committed while on bail. But, Governor Martinez has said that the system had "devastating effects,"[135] citing some high-profile cases for that proposition.[136] Some state legislators have also found that something is wrong with the system. As one state senator noted, "[t]he public is expecting something to be done."[137] It is probably a fair conclusion to say that the public is generally not concerned with failures to appear and is more concerned with new crimes committed while on bail.

Absent any numbers, New Mexicans continue to be exposed to a system created by the courts, not funded by the legislature, and not endorsed by the Governor for which there is no statistical data indicating that it has met any of the tripartite goals that it was designed to achieve.

E. *California*

On May 15, 2017, the California State Senate's appropriations committee staff issued a fiscal analysis of California Senate Bill 10, which as noted above, would implement a risk-based supervision system without expanding preventative detention. In its fiscal analysis, the staff noted the first significant cost: "Major likely-reimbursable costs in the hundreds of millions of dollars annually (local funds/General Fund) to counties to establish and operate pretrial services agencies with all the entailing responsibilities imposed by this measure."[138] There were also several other significant categories of costs in the hundreds of

133. *Rule Set 6—Rules of Criminal Procedure for Magistrate Courts*, N.M. Compilation Commission (Rule 6-409), http://www.nmcompcomm.us/nmrules/NMRules/6-409_6-5-2017.pdf [https://perma.cc/FL6V-4VWW].

134. There is no indication there has been a drop and the population has been within the range of 1100 to 1400 and thus any changes are insignificant. However, refer to this link, https://app.bernco.gov/custodylist/CustodyListInter.aspx, then click submit. It shows 1518 persons in custody as of 6/9/18, thus indicating that there has been an increase.

135. Fernanda Lopez & Chris McKee, *Lawmakers Talk Solutions to "Bail Reform" Constitutional Amendment Problem*, KQRE News 13 (Oct. 27, 2017, 12:56 PM, updated 10:15 PM), http://krqe.com/2017/10/27/legislative-criminal-justice-subcommittee-discusses-bail-reform-friday [https://perma.cc/N6KP-GW4C].

136. Colleen Heild, *Governor Invokes High-Profile Cases in Bail Reform Attack*, Albuquerque Journal (Oct. 22, 2017, 10:22 PM), https://www.abqjournal.com/1081592/gov-invokes-high-profile-cases-in-bail-reform-attack.html [https://perma.cc/H9CD-UZJU].

137. Lopez & McKee, *supra* note 135.

138. Cal. S. Comm. on Appropriations, Report, S.B. 10, 2017–2018 Reg. Sess., at 1 (May 15, 2017).

thousands and millions of dollars.[139] Although the report did note the possibility of cost savings, the analysis concluded that the amount of costs that might be saved was "unknown."[140]

Clearly, California will devote significant resources to implementing this program, and the results of other states give scant reason to suspect that the results, either in terms of reduction in jail populations, maintaining levels of new crimes on bail or appearance in court, or making the system fairer for defendants, will be sufficient to offset those costs.

Conclusion

Based on the available literature, it remains unknown whether moving to the federal or New Jersey no-money bail systems can produce sufficient benefits to offset the overwhelming costs. The most comprehensive and recent research produced by independent third parties suggests that the risk-assessment process has not been proven to achieve any of the tripartite goals that bail reform intends to achieve. Despite all of the advances in computing technology, it is fair to say when it comes to bail reform it is 1984 all over again.

139. *See id.* (These costs include creating pretrial agencies, training, supervision services (drug screening, electronic home monitoring, etc.), additional attorneys to represent defendants at bail hearings, data reporting and compliance monitoring.).

140. *Id.*