

# RE: THE PRETRIAL RISK ASSESSMENT – HOW NEW JERSEY’S BAIL OVERHAUL IS SHAPING BAIL REFORM ACROSS THE COUNTRY

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## I. INTRODUCTION

At just seventeen years old, Pedro Hernandez was arrested on conspicuous charges and detained in notorious Riker’s Island for over a year because he could not afford his \$255,000 bail.<sup>1</sup> He was being held on charges, connected to a neighborhood shooting, of criminal possession of a weapon, criminal possession of a firearm, assault and reckless endangerment.<sup>2</sup> Despite eight witnesses near the scene of the shooting maintaining that Hernandez was not the shooter and the victim’s uncertainty

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<sup>1</sup> Bella Ramalho, *How Pedro Hernandez Managed to Avoid the Same Fate as Kalief Browder*, CASSIUS LIFE (Aug. 2, 2017), <https://cassiuslife.com/15966/pedro-hernandez-kalief-browder-rikers/>.

<sup>2</sup> *Id.*

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about the identity of the shooter, Hernandez remained incarcerated, refusing to agree to a plea deal in order to maintain his innocence.<sup>3</sup>

Hernandez's story became national headlines when word spread that he was going to lose his college scholarship over the matter.<sup>4</sup> Thanks to many generous donations, *Daily News'* Shaun King and the Robert F. Kennedy Human Rights advocacy organization, Hernandez was able to avoid the same fate as infamous Kalief Browder<sup>5</sup>, a young man who was arrested at the age of sixteen for stealing a backpack based on nothing but the uncorroborated allegation of one man and the unfortunate fate of being in the wrong place at the wrong time.<sup>6</sup> Browder remained in Riker's Island for three years without a trial, two of which were spent in solitary confinement.<sup>7</sup> After his release, Browder attempted to regain his autonomy but tragically ended his life when he committed suicide by pulling the air conditioner out of the wall, wrapping a cord around his neck and hoisting himself out through the hole created by the air conditioning unit.<sup>8</sup>

What is the difference between Kalief Browder and Pedro Hernandez? Is it that Hernandez was lucky enough to have his case noticed by a prominent civil rights activist with a large following, and Browder wasn't noticed until it was too late? How can something like personal freedom of some individuals be treated so arbitrarily by the "system?" There are many deeply rooted and perpetually systematic reasons why low-income, minority individuals are cast aside and inherently depersonalized when it comes to their rights, and within the criminal justice system, too many low-income and minority defendants remain in jail awaiting a trial they may never even see.<sup>9</sup>

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

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

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

<sup>6</sup> D. Marvin Jones, *A Bronx Tale: Disposable People, The Legacy of Slavery, and the Social Death of Kalief Browder*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 31, 32 (2016) (citing Jennifer Gonnerman, *Before the Law: A boy was accused of taking a backpack. The court took three years of his life*, THE NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>).

<sup>7</sup> *Id.* at 33.

<sup>8</sup> *Id.* at 34 (citing Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Riker's Island for 3 years Without Trial*, N.Y. TIMES (June 8, 2015), [http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?\\_r=0](http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=0)).

<sup>9</sup> Gonnerman, *supra* note 6. New York, like other states, has its own version of speedy-trial laws called the "ready rule," which guarantee that felonies except homicides must be ready for trial within six months of arraignment or the charges can be dismissed. In practice, however, many technicalities stop time from running. In 2011, the Bronx felony cases over the six-month deadline totaled a whopping 74%. *Id.*

In New York, only 12% of defendants can afford to post bail upfront, and the other 88% are shipped directly to Riker's Island.<sup>10</sup> These staggering numbers can be seen across the country, and yet the reasons for them had not been questioned until recently, when the Pedro Hernandez's and Kalief Browers' of the world became known, and entire communities began resisting these socially engrained but outdated ways of dealing with criminal justice and bail.<sup>11</sup> *Guidelines for Analyzing State and Local Pretrial Laws* from the Pretrial Justice Institute in 2017 reports that, "[s]pecifically, the use of secured money bail—an amount the arrested person must pay prior to release—results in de facto detention for a large percentage of lower-risk people,<sup>12</sup> while many higher-risk, dangerous individuals pay high money bail amounts intended to restrict their release."<sup>13</sup> Further, cash bail is a massive expense for states. Taxpayers shell out about \$38 million a day, or \$14 billion a year, on pretrial detention.<sup>14</sup> This is not to mention the extreme difficulty a detainee faces while they are imprisoned simply based on inability to afford bail. They may lose their jobs, homes, and can face insurmountable difficulties with familial and childcare strains.<sup>15</sup> These situations are so dire that they are difficult to articulate, and inevitably lead to innocent individuals accepting guilty plea bargains without a full understanding of the host of collateral consequences and impact a guilty verdict will have on their life and those dependent on them, all so they can return home to their families to avoid months or even years imprisoned while awaiting trial.<sup>16</sup>

Jurisdictions across the country have begun the shift away from cash bail. Though this is nothing that can be considered new, eliminating cash bail has certainly gained traction in the last several years. It should be noted that pretrial risk assessment tools are not just now being discovered. Six states including Virginia, the District of Colombia, the federal court system and

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<sup>10</sup> Jonathan Lippman, *Ex-New York Chief Judge: It's time to end cash bail*, FOX NEWS (July 13, 2018), <http://www.foxnews.com/opinion/2018/07/13/ex-new-york-chief-judge-its-time-to-end-cash-bail.html>.

<sup>11</sup> Ramalho, *supra* note 1.

<sup>12</sup> Timothy R. Shnacke, GUIDELINES FOR ANALYZING STATE AND LOCAL PRETRIAL LAWS, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f8c73743-57bc-5065-4b85-324e2bb28ba6&forceDialog=0> (last visited Oct. 9, 2018), citing Arita Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, *Journal of Legal Studies*, 45 JOURNAL OF LEGAL STUDIES 471, 486 (2016).

<sup>13</sup> *Id.* (Citing LAURA & JOHN ARNOLD FOUND., *Developing a National Model for Pretrial Risk Assessment* (2013) <http://www.arnoldfoundation.org/>).

<sup>14</sup> *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1128 (2018) [hereinafter, *Bail Reform and Risk Assessment*] (citing PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017)).

<sup>15</sup> *Id.* (citing SANTA CLARA CTY. HUMAN RELATIONS COMM'N, REPORT ON THE "PUBLIC FORUM FOR FAMILY AND FRIENDS OF INMATES," 36-37 (2016)).

<sup>16</sup> *Id.* (citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714-716 (2017)).

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roughly three dozen jurisdictions across fifteen states had already implemented risk based tools to aid in pretrial services.<sup>17</sup> In fact, Washington D.C. has seen great success with its pretrial system—94% of defendants are released pending trial.<sup>18</sup> Of those, 90% make their court appearance and 98% of these individuals are not rearrested for new violent criminal activity.<sup>19</sup> But like any massive legislative overhaul, backlash has been rampant as well. Naturally, bail bondsmen and those who have invested in the industry are disheartened.<sup>20</sup> Many bondsmen questioned before these laws went into effect whether states participating, like New Jersey, would be able to sustain the resources needed to keep constant tabs on those released pending trial.<sup>21</sup> Challenges and criticisms of these statutes are hardly surprising, given that cash bail has been a means of ensuring a defendant will appear in court since the 1800s.<sup>22</sup> But while the Eighth Amendment to the United States Constitution has been interpreted frequently to mean there is a constitutional right to bail<sup>23</sup>, nothing in the Constitution indicates a right to *cash* bail.<sup>24</sup>

Now in 2019, several states and dozens of jurisdictions have moved away from cash bail and the systematic repression of low-income and minority defendants it creates. On January 1st, 2017, New Jersey was the first to roll out statewide bail reform.<sup>25</sup> Since then, many other jurisdictions and even entire states have followed suit.<sup>26</sup> Again, while some jurisdictions

<sup>17</sup> Matthew DeMichele et al., *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky*, LAURA & JOHN ARNOLD FOUND. (2018) at 8-10, <https://www.arnoldfoundation.org/wp-content/uploads/3-Predictive-Utility-Study.pdf>.

<sup>18</sup> Bail Reform and Risk Assessment, *supra* note 14, at 1130 (citing PRETRIAL SERVS. AGENCY FOR D.C., RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC (2017)).

<sup>19</sup> *Id.* (citing *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., [https://www.psa.gov/?q=data/performance\\_measures](https://www.psa.gov/?q=data/performance_measures) [<https://perma.cc/AT9Y-V4EL>]).

<sup>20</sup> Joe Hernandez, *Who is losing out under New Jersey's criminal justice changes?* WHY (Dec. 29, 2015), <https://why.org/articles/who-is-losing-out-under-new-jerseys-criminal-justice-reforms-bail-bondsmen/>.

<sup>21</sup> *Id.*

<sup>22</sup> Stephanie Wykstra, *Bail reform, which could save millions of unconvicted people from jail, explained*, VOX (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

<sup>23</sup> U.S. Const. amend. VIII.

<sup>24</sup> It should be noted that this question has yet to reach the Supreme Court, however the 3<sup>rd</sup> Circuit for the United States Court of Appeals did not construe the Eighth Amendment as entitling a defendant to the right to make a cash deposit or secure a bond to gain pretrial release. Debra Cassens Weiss, *There is no constitutional right to cash money bail, 3<sup>rd</sup> circuit rules*, ABA JOURNAL (July 9, 2018), [http://www.abajournal.com/news/article/there\\_is\\_no\\_constitutional\\_right\\_to\\_cash\\_money\\_bail\\_federal\\_appeals\\_court\\_r](http://www.abajournal.com/news/article/there_is_no_constitutional_right_to_cash_money_bail_federal_appeals_court_r).

<sup>25</sup> N.J. STAT. ANN. § 2A:162-15 to -26 (West 2017).

<sup>26</sup> Kate Patrick, *Opinion: Should algorithm decide who gets criminal bail?* ATLANTA. NEWS. NOW. (Aug. 18, 2018), <https://www.ajc.com/news/opinion/opinion-should-algorithm-decide-who-gets-criminal-bail/zB9mBjP8NdcN9eJ4vV0V0N/>

had looked into and even implemented alternative systems, New Jersey became the front-runner with an amended state constitution aimed at completely overhauling their bail procedures.<sup>27</sup> Some jurisdictions have followed in New Jersey's footsteps, while others have implemented their own versions of a risk-based algorithm to better suit their own judicial systems.<sup>28</sup>

Part I of this Note describes an introduction into some of the reasons behind implementing these risk-based algorithms. Part II of this Note will give a background of New Jersey's research and thinking behind their legislation reform. Part III will look to New Jersey's implementation of the Public Safety Assessment ("PSA") to analyze risk-based algorithms as tools for courts in deciding which kind of pre-trial monitoring to adopt, as well as a side-by-side comparison with Alaska in Part IV, who has implemented a similar risk-based tool that tailors specifically to the state's individual needs. Part V of this Note will explore critiques and if there is any merit to these arguments, as well as considerations taken into account with this kind of bail reform. Finally, Part VI will propose a more durable version of the PSA by considering many sides of the arguments both for and against algorithms as pretrial tools to replace cash bail and closing loopholes that tend to prevent the PSA from working to its potential. This Note will argue that all states ought to adopt some version of a risk-based algorithm that: (1) excludes certain socio-economic and personal factors; (2) enables each state to take into consideration its own unique circumstances and needs in forming these tools; and (3) eliminates entirely the need for cash bail. Further, this Note will argue that states like New Jersey, who have adopted statutes that allow for prosecutorial loopholes by permitting unrestrained motions for detention despite the defendant's eligibility for release<sup>29</sup> should be constrained by appropriate legislation, and further, that specific crimes not appropriate for use with the PSA should be dealt with by further legislation tailored to those crimes in particular.

## II. BACKGROUND

### *A. The Laura And John Arnold Foundation—How Does New Jersey Use The PSA?*

The Laura and John Arnold Foundation ("LJAF") was founded in 2008, when a very wealthy couple decided to donate a large percentage of their

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<sup>27</sup> Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES, Feb. 6, 2017, <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>.

<sup>28</sup> ALASKA STAT. ANN. § 33.07.030 (West 2018); AZ ST CJA § 5-201 (West 2014); N.J. STAT. ANN. § 2A:162-15 to -26 (West 2017); KY. REV. STAT. ANN. § 431.066 (West 2012).

<sup>29</sup> N.J. Stat. Ann. § 2A:162-15 (West).

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income to philanthropic causes, including criminal justice reform.<sup>30</sup> The LJAF recruited ex-New Jersey Attorney General Anne Milgram to be the Vice President of criminal justice at the Foundation.<sup>31</sup> Soon after, the LJAF rolled out a Web-based tool designed to help courts determine who should and should not be incarcerated pending trial.<sup>32</sup>

With the implementation of this new tool came many changes for the state's law enforcement and judicial systems. Before the adoption of the PSA in 2017, the New Jersey Attorney General distributed a directive, and several revised versions thereafter, to prepare and assist the state in making these changes.<sup>33</sup> Knowing the new statutes would be rolling out soon, anticipation surrounding how exactly New Jersey would accomplish such a massive change in its state constitution raised a great number of pertinent questions that will be looked at in this Note in more depth. The most recent version of the directive, released on September 27, 2017, acknowledged the fact that money bail has little to do with the dangerousness of the defendant and everything to do with whether or not a given defendant has the financial ability to post bail.<sup>34</sup> This system is inherently discriminatory against the poor, and creates an uneven playing field for those whose livelihood is at stake.<sup>35</sup> The directive reorganizes prosecutorial and judicial resources with the intent that low-risk defendants who would be unable to make bail under a cash bail scheme will be released in New Jersey pending trial. The directive accomplishes this with the intent of establishing uniformity throughout the state by utilizing the PSA while simultaneously allowing New Jersey's twenty-one counties some discretion in this process.<sup>36</sup>

The PSA was created by analyzing 1.5 million cases from approximately 300 jurisdictions across the United States.<sup>37</sup> From this, researchers were able to pinpoint nine factors that best aid courts in predicting whether a defendant will return to court and whether they will commit a new

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<sup>30</sup> Caroline Preston, *A Thirtysomething Billionaire Couple Take on Tough Issues Via Giving*, THE CHRONICLE OF PHILANTHROPY (Oct. 16, 2011), <https://www.philanthropy.com/article/A-Thirtysomething-Billionaire/157613>.

<sup>31</sup> Jenny B. Davis, *Ex-NJ attorney general works to reform the pretrial process with a Texas foundation's backing* ABA JOURNAL (Nov. 2013), [http://www.abajournal.com/magazine/article/ex-nj\\_attorney\\_general\\_works\\_to\\_reform\\_the\\_pretrial\\_process\\_with\\_a\\_texas\\_fo](http://www.abajournal.com/magazine/article/ex-nj_attorney_general_works_to_reform_the_pretrial_process_with_a_texas_fo).

<sup>32</sup> *Id.*

<sup>33</sup> Memorandum from Christopher S. Porrino, N.J. Att'y Gen. Law Enf't Directive 2016-6 v3.0: Modification of Directive Establishing Interim Pol'y, Practices, and Proc. to Implement Crim. Just. Reform Pursuant to P.L. 2015, c. 31 (Sept. 27, 2017) [hereinafter, NJ Att'y Gen Directive].

<sup>34</sup> *Id.* at 13.

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

<sup>36</sup> *Id.* at 12-15.

<sup>37</sup> LAURA & JOHN ARNOLD FOUND., PRETRIAL JUSTICE, <http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice/> (last visited Jan. 5<sup>th</sup>, 2019).

crime if released pending trial.<sup>38</sup> They compiled these factors into an algorithm that produces two scores and one potential flag.<sup>39</sup>

The PSA relies on the following nine factors:<sup>40</sup>

### RELATIONSHIP BETWEEN RISK FACTORS AND PRETRIAL OUTCOMES

Risk Factor	FTA	NCA	NVCA
1. Age at current arrest		X	
2. Current violent offense			X
<i>Current violent offense &amp; 20 years old or younger</i>			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction		X	
<i>Prior conviction (misdemeanor or felony)</i>	X		X
6. Prior violent conviction		X	X
7. Prior failure to appear in the past two years	X	X	
8. Prior failure to appear older than two years	X		
9. Prior sentence to incarceration		X	

*Note: Boxes where an "X" occurs indicate that the presence of a risk factor increases the likelihood of that outcome for a given defendant.*

The way in which the PSA information is gathered is important, since one mishap has the potential to lead to undesirable impacts on the individual being arrested. However, due to New Jersey's pretrial statutes, the longest an individual could be wrongly held before getting in front of a Judge for a first hearing has been capped by the Supreme Court at 48 hours.<sup>41</sup>

<sup>38</sup> The PSA is not meant to be a replacement for judicial discretion. Judges still retain the ultimate decision-making power. The PSA is meant to be used as a tool in assisting Judges. PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA at 4, <https://www.psapretrial.org/about/factors> (last visited Feb. 20, 2019). [hereinafter, PSA Risk Factors and Formula]

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.*

<sup>41</sup> N.J. Ct. R. 3:4-2. The Chief Justice of New Jersey insisted this be cut down to 24 hours given that the state makes 80% of its recommendations in 24-hour time period, but legislation has yet to reflect a change. Derek du Preez, *New Jersey automates risk profiling of arrestees to help judges decide if they*

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When an individual is initially arrested in New Jersey, their criminal complaint is filled out by police, and their fingerprints are taken electronically and scanned in a system called eCDR.<sup>42</sup> The eDCR automatically produces the arrestee's information—meaning their name, age, address, and more importantly—any previous charges.<sup>43</sup> The charges for the current arrest are also entered, which generates the Preliminary Safety Assessment (PSA) guiding police as to whether to issue a summons, under which the individual is released until their court date, or a warrant, under which the individual is detained until they see a judge for their first hearing within a maximum timeframe of two days.<sup>44</sup> A local prosecutor is on call at all times because, if police wish to issue a warrant when the assessment indicates that a summons should be recommended, a sign-off from the prosecutor's office is usually necessary, though counties have discretion in this area both in summons and waiver recommendation and protocol.<sup>45</sup>

The nine factors compiled from this information-gathering process produce two numbers which constitute the defendant's likelihood of returning to court or failing to appear ("FTA") and their likelihood of committing new criminal activity ("NCA").<sup>46</sup> The PSA also considers new violent criminal activity ("NVCA"), and flags a defendant who raises this particular concern.<sup>47</sup> These two raw scores are converted into numbers from 1 through 6; 1 at the low end of the spectrum and 6 indicating the highest amount of risk (see charts 1 and 2 below).<sup>48</sup> These scores lay the groundwork for the trial judge to determine what kind of pretrial restraints each defendant needs, rather than setting an arguably arbitrary cash amount that some can afford but that an overwhelming majority cannot. The charts below help to show exactly how these figures are calculated and how they work to produce consistent results for each given defendant.

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*walk free or go to jail* DIGINOMICA (June 8, 2018), <https://government.diginomica.com/2018/06/08/new-jersey-automates-risk-profiling-of-arrestees-to-help-judges-decide-if-they-walk-free-or-go-to-jail/>; "[A] jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>42</sup> NJ Att'y Gen Directive, *supra* note 33, at 18.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 18-20; N.J. Ct. R. 3:4-2; N.J. Stat. Ann. § 2A:162-16 (West).

<sup>45</sup> For example, a Nov. 1, 2017 Directive issued to all Bergen County, New Jersey police and prosecutors sets out the procedure required to overcome the presumption of complain-summons or complaint-warrant for a particular charge where the on-call prosecutor must take certain steps, such as checking criminal history in and out of state, juvenile history, domestic violence and sexual assault history, and expunged records before making a determination. Bergen County Prosecutor's Off. Law Enf't. Directive No. 2017-7 Modifying the Sys. of Complaint Approval, at 2-6 (Nov. 1, 2017); NJ Att'y Gen Directive, *supra* note 33, at 21-24.

<sup>46</sup> PSA Risk Factors and Formula, *supra* note 38, at 2.

<sup>47</sup> *Id.* at 2-3.

<sup>48</sup> *Id.* at 3-4.

Chart 1:<sup>49</sup>**HOW RISK SCORES ARE CONVERTED TO THE SIX-POINT SCALES AND NVCA FLAG**

<b>Risk Factor</b>	<b>Weights</b>
<b>Failure to Appear (maximum total weight = 7 points)</b>	
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 2; 2 or more = 4
Prior failure to appear pretrial older than 2 years	No = 0; Yes = 1
<b>New Criminal Activity (maximum total weight = 13 points)</b>	
Age at current arrest	23 or older = 0; 22 or younger = 2
Pending charge at the time of the offense	No = 0; Yes = 3
Prior misdemeanor conviction	No = 0; Yes = 1
Prior felony conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 1; 2 or more = 2
Prior sentence to incarceration	No = 0; Yes = 2
<b>New Violent Criminal Activity (maximum total weight = 7 points)</b>	
Current violent offense	No = 0; Yes = 2
Current violent offense & 20 years old or younger	No = 0; Yes = 1
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2

<sup>49</sup> *Id.* at 3.

Chart 2:<sup>50</sup>

<b>FTA Raw Score</b>	<b>FTA 6 Point Scale</b>	<b>NCA Raw Score</b>	<b>NCA 6 Point Scale</b>	<b>NVCA Raw Score</b>	<b>NVCA Flag</b>
0	1	0	1	0	No
1	2	1	2	1	No
2	3	2	2	2	No
3	4	3	3	3	No
4	4	4	3	4	Yes
5	5	5	4	5	Yes
6	5	6	4	6	Yes
7	6	7	5	7	Yes
		8	5		
		9-13	6		

Moreover, the New Jersey court system has developed a step-by-step guide, titled *Pretrial Release Recommendation Decision Making Framework (DMF)*, which divides individuals into different levels of pretrial release (see chart 3 below).<sup>51</sup>

<sup>50</sup> *Id.* at 4.

<sup>51</sup> Pretrial Release Recommendation Decision Making Framework (DMF) [hereinafter, DMF] (March 2018) at 4, <https://njcourts.gov/courts/assets/criminal/decmakframwork.pdf?cacheID=h215e3t>.

Chart 3:<sup>52</sup>

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	Risk Level Green – Recommendation ROR	Risk Level Green – Recommendation ROR				
FTA 2	Risk Level Green – Recommendation ROR	Risk Level Green – Recommendation ROR	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	
FTA 3		Risk Level Light Green – Recommendation PML 1	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Red – No Release Recommended
FTA 4		Risk Level Light Green – Recommendation PML 1	Risk Level Light Green – Recommendation PML 1	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Red – No Release Recommended
FTA 5		Risk Level Yellow – Recommendation PML 2	Risk Level Yellow – Recommendation PML 2	Risk Level Light Orange – Recommendation PML 3	Risk Level Dark Orange – Recommendation PML 3 + EM/HD	Risk Level Red – No Release Recommended
FTA 6				Risk Level Red – No Release Recommended	Risk Level Red – No Release Recommended	Risk Level Red – No Release Recommended

The DMF sets out a step-by-step guide to reaching the PSA recommendation figures. The steps involve determining the level of crimes committed and whether or not release should be recommended.<sup>53</sup> Step one is to complete the PSA to generate the scores for FTA and NCA as well as to determine if there is an NVCA flag.<sup>54</sup> The second step is to determine if any charge being brought against the defendant is subject to life imprisonment, New Jersey’s most severe penalty.<sup>55</sup> For example, if an individual commits murder or felony murder,<sup>56</sup> crimes in New Jersey that are punishable by life imprisonment, the recommendation is detention—which can be seen under Risk Level Red—No Release Recommended.<sup>57</sup> If the defendant is not eligible for life imprisonment, the third step is to determine if the PSA resulted in a score of 6, the highest score, in either the FTA or NCA

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

<sup>53</sup> *Id.* at 1-2.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> *Id.*

<sup>56</sup> N.J.S.A. STAT. ANN. § 2C:11-3(a)(1)-(3) (2013).

<sup>57</sup> DMF, *supra* note 51, at 1.

categories.<sup>58</sup> Again, if this is the case, the recommendation is for detention.<sup>59</sup> Step four, if this does not apply, is to determine whether the NVCA flag is applicable *and* whether the crime is violent.<sup>60</sup> If so, again, the recommendation is for no release.<sup>61</sup> If this does not apply, the fifth step is to determine whether the crime being charged falls into a designated list of particularly harmful or violent crimes, and if so, no release will be recommended.<sup>62</sup> Moving on, the sixth step is to “determine if the defendant has been arrested previously on two separate occasions and those charges were still pending at the time of the current offense,” and if so, no release recommended.<sup>63</sup> Finally reaching step seven, the FTA and NCA scores are applied to the DMF chart (see chart 3 above).<sup>64</sup> In step eight, if the No Early Release Act does not apply<sup>65</sup>, the DMF is used to reach a Pretrial Monitoring Level of 1, 2 or 3, or in some cases, Release on Recognizance (ROR) is recommended.<sup>66</sup> In step nine, if any weapons charges apply, the recommendation reached from either steps seven or eight is elevated one level on the DMF.<sup>67</sup> Finally in step ten, a determination is reached based on whether the highest current charge is an indictable offense or a disorderly persons offense related to domestic violence: “[i]f yes, the preliminary recommendation from Steps 3, 4, or 6 is the final recommendation. If no, any preliminary recommendation of Release PML 3 + EM/HD [electronic monitoring/home detention] or No Release Recommended is decreased to Release with PML 3—Not Legally Eligible for Detention.”<sup>68</sup>

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

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> N.J. Stat. Ann. § 2C:43-7.2 (West) provides that an individual convicted and given a first or second degree sentence must serve 85% of the sentence before they can be eligible for parole. The statute also imposes a mandatory five-year term of parole supervision for first degree crimes subject to the 85% eligibility rule and a three year mandatory term of parole for a second degree crime.

<sup>66</sup> DMF, *supra* note 51, at 2.

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

<sup>68</sup> *Id.* at 2-3.

Chart 4:<sup>69</sup>

Table 1. Pretrial Monitoring Level Contacts and Conditions Monitoring

Pretrial Monitoring Level	Phone Contact	Face to Face Contact	Conditions Monitoring
PML 1	1 per month	None	Yes
PML 2	1 per month	1 per month	Yes
PML 3	1 every other week	1 every other week	Yes
PML 3 + EM/HD	1 every other week	1 every other week	Yes

*B. Research By Marie VanNostrand*

The technological progression that leads to the PSA is, as many would agree, a breakthrough in creating a level playing-field for defendants facing pretrial incarceration.<sup>70</sup> However, the question often arises—how did we get here? Dr. Marie VanNostrand, one of the key researchers in bringing the PSA to life, published a March 2013 report homing-in on and analyzing New Jersey’s jail population.<sup>71</sup> In the analysis, titled *New Jersey Jail Population Analysis*, VanNostrand studied New Jersey’s jail population with the intent of identifying areas for possible reduction in a responsible manner while maintaining judicial integrity.<sup>72</sup> VanNostrand found that in 2012, 89.7% of inmates in New Jersey were male, and of those males, nearly 50% were under the age of thirty.<sup>73</sup> Van Nostrand also found in 2012 that 53.4% of the inmates being held presented no imminent danger to themselves or others.<sup>74</sup> The significance of this is that many defendants are held arbitrarily on a cash bail system despite the fact that they are not violent and often times, are young individuals with the possibility of being rehabilitated provided they do not remain incarcerated for prolonged periods of time.

Van Nostrand’s research further revealed that a large portion of the jail population in New Jersey in 2012 consisted of those awaiting trial in Superior Court—a whopping 66.3%.<sup>75</sup> Of this number, over 5,000 inmates being held

<sup>69</sup> *Id.* at 3.

<sup>70</sup> Arthur Rizer and Caleb Watney, *New Jersey sets example in data-driven justice*, northjersey.com (Sept. 26, 2017), <https://www.northjersey.com/story/opinion/contributors/2017/09/26/new-jersey-sets-example-data-driven-justice/704371001/>.

<sup>71</sup> Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (2013), [https://www.drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf).

<sup>72</sup> *Id.* at 14.

<sup>73</sup> *Id.* at 8.

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.* at 11.

had the option to post bail but did not have the ability.<sup>76</sup> This means that 38.5% of the total inmate population was imprisoned for the simple reason that they could not afford some form of bail.<sup>77</sup> New Jersey at this time had a Cash or Bond option, as well as the 10% Deposit Option, allowing for 10% payment for release to a private surety.<sup>78</sup> Statistically, this meant that about 800 inmates could have secured release by posting \$500 or less, and another 259 inmates could have secured release by posting between \$501-\$1,000, and another 489 for between \$1,001 and \$2,500.<sup>79</sup> In the aggregate, this meant that 1,547 or 12% of the inmate population was being held due to an inability to pay \$2,500 or less.<sup>80</sup>

Despite the complexities of the state's jail system—with twenty-one counties operating twenty-two public and three private facilities housing 15,000 inmates, one common theme has emerged: most of the New Jersey inmates in 2012 in the county jail system were there because they were awaiting trial.<sup>81</sup> 66% of inmates in Superior Court and 7% in Municipal Court, or nearly three-fourths of New Jersey inmates, were incarcerated because they were pending trial or sentencing.<sup>82</sup>

### III. OTHER JURISDICTIONS UTILIZING RISK-BASED ALGORITHMS—A COMPARISON WITH ALASKA

The PSA or similar risk-based tools have been adopted by New Jersey, Arizona, Kentucky and now Alaska, as well as in various other jurisdictions across the country including larger cities like Chicago, Charlotte and Pittsburgh.<sup>83</sup> As an alternative to cash bail, the PSA seeks to exclude certain factors from ever being considered during pretrial procedure.<sup>84</sup> Contrary to jurisdictions that measure socioeconomic status<sup>85</sup>, the PSA expressly excludes information that can be considered potentially discriminatory such as ethical background, income or education level, employment status, neighborhood or any personal or demographic information aside from age.<sup>86</sup>

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<sup>76</sup> *Id.* at 13.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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

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

<sup>81</sup> *Id.* at 14.

<sup>82</sup> *Id.*

<sup>83</sup> Press Release, Arnold Found., *Data-driven tool gives Harris County judges new way to assess defendants' pretrial risk level* (May 24, 2016), <http://www.arnoldfoundation.org/data-driven-tool-gives-harris-county-judges-new-way-assess-defendants-pretrial-risk-level/>.

<sup>84</sup> *Id.*

<sup>85</sup> DeMichele, *supra* note 17, at 9.

<sup>86</sup> Press Release, *supra* note 83.

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A jurisdiction currently implementing massive pretrial reform that can be looked at juxtaposed to New Jersey is Alaska. Alaska signed a state-wide reform bill into legislation in July of 2016, and went fully into effect on January 1st, 2018.<sup>87</sup> Previously, Alaska, like many states, had a bail system centered around money.<sup>88</sup> If a given defendant could provide bail, they were released.<sup>89</sup> If not, the defendant was detained.<sup>90</sup> Alaska was facing a growing financial burden that it could no longer ignore; nearly two out of every three people released from prisons in Alaska were incarcerated again within three years.<sup>91</sup> Moreover, between 2004 and 2014, Alaska's pretrial inmate population grew by 81%.<sup>92</sup> The bill, known as SB-91, was to go into effect in three stages over the course of three years: sentencing reforms in July 2016, community supervision and parole policies in January 2017, and pretrial reforms in January 2018.<sup>93</sup>

The Crime and Justice Institute reports that:

Alaska's geography and the remote location of many villages and tribal areas further complicated the situation. In these areas, the closest detention facility or court can be hundreds of miles away. As a result, even defendants charged with minor offenses had to be transported to regional hubs for arraignment, at significant expense to the state. Those who were unable to make bail were detained, separated from their families and communities for long periods of time. Those who did make bail were often forced to remain in the regional hub community (the largest town in the region) pending trial, given the high costs of travel and the lack of pretrial monitoring services in the rural areas.<sup>94</sup>

Alaska's legislature was able to create a risk assessment tool that caters to their individual geographic needs, and takes into account the unique juxtaposition of the state.<sup>95</sup> Developed by the Crime and Justice Institute, Alaska's pretrial system, like New Jersey's, delivers two numbers: one based on the likelihood that the defendant will fail to appear (FTA), and one based on the likelihood that the defendant will be arrested for new criminal activity (NCA).<sup>96</sup> The tool enables officers trained by the Crime and Justice Institute to conduct time-efficient assessments prior to the defendant's first appearance using certain empirical information.<sup>97</sup> Once the FTA and NCA

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<sup>87</sup> *Alaska's Pretrial Transformation*, CRIME & JUSTICE INSTITUTE (June 2018), [http://www.crj.org/assets/2018/07/AlaskaPretrial\\_20180713\\_FINAL.pdf](http://www.crj.org/assets/2018/07/AlaskaPretrial_20180713_FINAL.pdf).

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> ALASKA CRIMINAL JUSTICE COMMISSION ANNUAL REPORT, <http://www.ajc.state.ak.us/acjc/docs/ar/2018.pdf> at 15 (last visited March 30, 2020).

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

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

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are calculated, the information may be accessed online by judges, defense attorneys, and prosecutors.<sup>98</sup>

The statute provides for a lengthy list of duties that pretrial service officers must provide, including a:

rating of low, moderate, or high and a recommendation regarding release and release conditions, including a recommendation concerning a defendant's dependency on, abuse of, or addiction to alcohol or controlled substances, to the extent those factors are indicated by the offense or criminal history, before the defendant's first appearance before a judicial officer.<sup>99</sup>

Also under the new legislation, certain non-violent, non-sex misdemeanors and Class C Felonies in addition to some low-risk defendants are presumptively released on their own recognizance.<sup>100</sup> If it is in the interest of public safety, a judge can still order financial conditions on these types of crimes, and can further order non-monetary release conditions for all defendants.<sup>101</sup> The exception for financial conditions is for those that score "Mandatory OR" on Alaska's grid system, meaning the defendant "must be released on recognizance or unsecured bond."<sup>102</sup> Contrary to New Jersey's statute,<sup>103</sup> Alaska's framework does not allow for judicial or prosecutorial loopholes and ensures that certain lower risk defendants that are not accused of violent crimes or sex crimes are released no matter what.<sup>104</sup> For example, a defendant charged with a misdemeanor such as trespassing in Alaska and who is also low-risk must be released on their own recognizance.<sup>105</sup> The defendant will not pay money bond, but may have to abide by certain pretrial conditions set by the judge if the judge decides they are warranted.<sup>106</sup>

What makes Alaska's pretrial system individualistic is the way in which the legislature was able to take into account Alaska's sparse population and unique geography, which makes traveling to pretrial hearings more difficult and more costly than in many other areas of the country.<sup>107</sup> The state's Pretrial Enforcement Division works with local law enforcement to allow defendants to be monitored from home, as well as to use video conferencing more frequently to cut down on travel costs for both the defendant and the state.<sup>108</sup> The 2017 Annual Report validates this in that "[r]esearchers pored

<sup>98</sup> *Id.*

<sup>99</sup> ALASKA STAT. ANN. § 33.07.030 (2018).

<sup>100</sup> Alaska's Pretrial Transformation, *supra* note 87, at 4.

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

<sup>102</sup> ALASKA'S NEW PRETRIAL RELEASE SYSTEM, [http://www.correct.state.ak.us/pnp/pdf/pretrial\\_fact\\_sheet.pdf](http://www.correct.state.ak.us/pnp/pdf/pretrial_fact_sheet.pdf) at 2 (last visited Nov. 26<sup>th</sup>, 2018).

<sup>103</sup> N.J. STAT. ANN. § 2A:162-15 (2014).

<sup>104</sup> Alaska's New Pretrial Release System, *supra* note 102, at 2.

<sup>105</sup> *Id.*

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

<sup>107</sup> Alaska's Pretrial Transformation, *supra* note 87, at 5.

<sup>108</sup> *Id.*

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over large quantities of data on Alaska's defendants to determine which factors are most predictive of whether a defendant will be successful on pretrial release. It is important to note that Alaska's Pretrial Risk Assessment Tool is developed from, and validated for, the Alaska population."<sup>109</sup>

Alaska's prison population in the first year of SB-91 and before the pretrial reforms went into place caused the state's prison population to decrease by 9.38%.<sup>110</sup> With an overall budget of \$25 million, the state invested over half of their funding, \$13.5 million, in developing the Pretrial Enforcement Division,<sup>111</sup> demonstrating the dedication the state has towards properly training law enforcement officials to make the implementation of the reform as smooth and as fair as possible. Alaska further invested \$2.5 million to "increase the availability of substance abuse treatments in DOC facilities."<sup>112</sup> An additional \$6 million is being invested to enhance re-entry support for those being released and for violence preventing programming.<sup>113</sup>

The 2017 annual report, which was gathered *before* the pretrial reforms went into effect, shows that SB-91 has already saved Alaska \$3.8 million in annual prison growth costs and \$5.6 million from the closing of one of the state's corrections centers.<sup>114</sup> What is even more staggering is that between 2005 and 2014, those who returned to prison for violations of probation conditions increased by 32%, but from January 2015 to April of 2017, the number of inmates incarcerated due to probation violations decreased by 5.6%.<sup>115</sup> Alaska's 2017 annual report also includes a lengthy list of recommendations from the Committee based on continuous feedback from the community.<sup>116</sup>

Alaska is one of the only states to look at their own individual needs and modify their pretrial tools accordingly.<sup>117</sup> Moreover, Alaska plans to re-validate SB-91 after one year with data it is currently monitoring in order to ensure the most efficient and cost-effective algorithm that will work to promote a more even-handed and appropriate criminal procedure for defendants overall.<sup>118</sup>

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<sup>109</sup> Alaska Criminal Justice Commission Annual Report, *supra* note 91, at v.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at vi.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 52.

<sup>115</sup> *Id.* at vii.

<sup>116</sup> *Id.* at ix-x.

<sup>117</sup> Alaska's Pretrial Transformation, *supra* note 87, at 5.

<sup>118</sup> Alaska has further established a Pretrial Stakeholders Committee, meeting regularly to collect public feedback that is used to better the system. *Id.*

## IV. CRITIQUES AND CONSIDERATIONS

Though many will agree that a risk-based algorithmic tool is far superior to the cash bail system, these tools are not without their faults. As the authors of *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky* put it:

[t]he instruments rely mostly on measures of criminal history, but also tend to include community ties, residential stability, substance abuse, employment and education, and age. These factors are specifically at the heart of the controversy regarding using pretrial risk assessment because critics argue that the poor, people of color, and the most vulnerable are further penalized, as these items do not have anything to do with an individual's criminal offense even if they are correlated with future crimes.<sup>119</sup>

Despite this, this Note argues that using objective data relating to past and present criminal history to create an algorithm is a much more equitable way of handling pretrial assessments. Cash bail is exceedingly dangerous in that it threatens the livelihood of so many low-income and minority individuals, not to mention the enormous cost it puts on states still using it.<sup>120</sup> A marriage to bail bondsman, as can be seen as long as cash bail has been around, is not a healthy solution to this issue. States such as Alaska, which allows judges to continue to add pretrial monitoring but mandates pretrial release of certain low-risk defendants,<sup>121</sup> ensures that prosecutorial and judicial discretion is not being abused and further ensures the release of defendants who have jobs, children, and a myriad of other responsibilities and obligations that are jeopardized when they are detained based on nothing but the financial inability to pay cash bail. By keeping low-risk defendants detained pending trial, their lives are irreparably damaged in ways that can and should be voided using an algorithm such as the PSA.

Though the PSA does not consider socioeconomic factors such as employment status, income level, or education, the point that resonates is this: inherent biases are at the heart of skewed criminal justice practices. Until those who carry inherent bias can acknowledge it within themselves, it will be extraordinarily difficult to completely eliminate bias within pretrial reform. An algorithm comprised of clinical and mostly numeric information is, this Note argues, a great place to begin. Not only this, but if state legislatures combine Alaska's approach of tailoring their algorithms and pretrial systems to their individual needs and keeping lines of communication

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<sup>119</sup> DeMichele, *supra* note 17, at 10 (citing Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. CHICAGO, IL: UNIVERSITY OF CHICAGO PRESS (2008); Sonja Starr, *The new profiling: Why punishing based on poverty and identity is unconstitutional and wrong*, FEDERAL SENTENCING REPORTER 27:229–36 (2015)).

<sup>120</sup> Starr, *supra* note 119.

<sup>121</sup> Alaska's New Pretrial Release System, *supra* note 102, at 2.

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open regarding feedback and improvement<sup>122</sup> with New Jersey's methodology of identifying and implementing alternatives to the PSA (discussed later) for specific crimes which the PSA is not best-suited to deal with<sup>123</sup>, this country could see a turnaround in pretrial criminal justice reform in a very short amount of time.

Further, it is expected and even anticipated from any massive legislative overhaul, that some alternations will need to, and should, be made. For example, New Jersey has manipulated their pretrial system regarding gun charges after seeing an increase in gun crimes post-adoption of the PSA.<sup>124</sup> Regardless of any additional statutes adopted and precautions taken, people are going to commit crimes. So long as some individuals are being released pending trial, a small number of those individuals will engage in new criminal activity. Those that are noteworthy will support the ultimate manipulation of how those charges are handled.<sup>125</sup>

Another issue facing this massive change lies within the ability to consistently monitor those who are release due to their score generated by the algorithm.<sup>126</sup> According to an Alaskan news source, within a two-month span, two defendants released pending trial went unaccounted for despite orders to wear GPS tracking devices.<sup>127</sup> One of the defendants, a known repeat domestic violence suspect, showed up with a firearm to his ex-wife's residence.<sup>128</sup> The other defendant alerted the Pretrial Enforcement Division when he exceeded the bounds of his pretrial restraints and beat the owners of the Anchorage Suit Lodge with a towel rod he broke off from the bathroom.<sup>129</sup> The same defendant's tracking device ceased operating when the defendant failed to replace a dead battery.<sup>130</sup> According to arrest warrants, the Pretrial Enforcement Division in both instances attempted to contact the respective defendants but ultimately could not reach them.<sup>131</sup>

The concern for many, and especially victims of domestic violence and crime, is that they are not quite as safe as authorities and proponents of SB-

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<sup>122</sup> Alaska Criminal Justice Annual Report, *supra* note 91.

<sup>123</sup> ODARA SCORING FORM, <https://www.nj.gov/lps/dcj/agguide/directives/ODARA-Scoring-Form.pdf> (last visited Feb. 20, 2019).

<sup>124</sup> Bail Reform and Risk Assessment, *supra* note 14, at 1139.

<sup>125</sup> *Id.*

<sup>126</sup> Danielle Rivera, *Experts say there is 'no excuse' for errors made by Pretrial Enforcement while supervising violent suspects*, KTVA (Oct. 18, 2018), <https://www.ktva.com/story/39316234/pretrial-enforcement-division-made-errors-supervising-violent-assault-suspects>.

<sup>127</sup> *Id.*

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

91 and other algorithm forms of pretrial bail tools claim.<sup>132</sup> However, there are various ways in which to deal with and prevent these issues, especially as it pertains to domestic violence. New Jersey has implemented a separate scoring system, to be taken into consideration alongside, and not in lieu of, the PSA scores and flags.<sup>133</sup> This separate scoring tool, known as the ODARA, is completed when a defendant has committed certain crimes including terroristic threats, criminal sexual conduct, sexual assault, and others.<sup>134</sup> The ODARA is filled out by law enforcement officers who question the victim of the defendant regarding various previous incidents.<sup>135</sup> The form features questions pertaining to domestic and criminal police reports, instances of abuse to the victim, possible children between the defendant and victim, substance abuse by the defendant, the victim's access to communication, the nature of the relationship between the parties, and the defendant's relationships with others, as well as any violations of conditional release or a restraining order.<sup>136</sup> With a maximum score of 13, a score of 6 or 7 is an indication of high risk that the aggressor will commit future violence.<sup>137</sup> Further, New Jersey has implemented two presumptions for any individual scoring above a three on the ODARA in any domestic violence case.<sup>138</sup> The first is that the officer will issue an arrest warrant and the latter is that when a score of 5 or higher is reached using the ODARA, the prosecutor must motion for detention.<sup>139</sup> The New Jersey Attorney General Law Enforcement Directive issued from September 27, 2017 notes that “[c]ases involving domestic violence are a notable exception in that well-designed systems and procedures have been implemented to protect domestic violence victims through the issuance and enforcement of restraints and other special conditions to control the conduct of defendants released pending disposition of charges.”<sup>140</sup>

With adequate safeguards in place, the potential for manipulation of these tools can be mitigated. The fact that some defendants who are released pretrial will still commit crimes is inevitable, and ultimately this is not a reason to keep other defendants locked up based on a financial inability, nor is it factor that should supersede the rights of a non-violent defendant who has committed a misdemeanor. Further, the use of cash bail does not, in any

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

<sup>133</sup> NJ Att’y Gen Directive, *supra* note 33, at 2.

<sup>134</sup> ODARA Scoring Form, *supra* note 123.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1-4.

<sup>137</sup> *Id.* at 5.

<sup>138</sup> NJ Att’y Gen Directive, *supra* note 33, at 2.

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

<sup>140</sup> *Id.* at 13.

way, prevent defendants who can make bail and are released pending trial from committing further crimes more—so than using a risk-based tool such as the PSA.

## V. PROPOSAL

A major concern in pretrial reform is the loopholes that prosecutors and judges have at their disposal. This creates a fear of potential manipulation and misuse. Continuing with New Jersey as a lead example, there exists a statutory provision allowing a prosecutor to move for detention if the prosecutor believes the defendant poses a serious risk in not showing up to court or is too dangerous for release.<sup>141</sup> Judges may also impose additional conditions that exceed the recommendation made by the PSA.<sup>142</sup> Not only this, judges may also decide to detain a particular defendant for a multitude of discretionary reasons.<sup>143</sup> This can lead to potential constitutional law questions of liberty violations due to over-restrictions on certain defendants.<sup>144</sup>

Judicial discretion is a part of the criminal justice system and is arguably necessary in order for it to function properly. Judges must have some discretion in releasing and detaining defendants due to the array of unusual circumstances that can present themselves in criminal court on a case-by-case basis, but is not the most pressing matter. Prosecutors, on the other hand, pose a different issue. More judicial as opposed to prosecutorial discretion is preferable. The open nature of courtrooms coupled with court records being public information subjects judges to a level of transparency that prosecutors simply do not experience. New Jersey's law provides that a prosecutor may file a motion for detention, before or after an eligible defendant's release for:

(7) any other crime for which the prosecutor believes there is a serious risk that: (a) the eligible defendant will not appear in court as required; (b) the eligible defendant will pose a danger to any other person or the community; or (c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.<sup>145</sup>

This statute places zero restriction on the ability of prosecutors to motion for detention, and further requires no evidence or even reasoning as to why the given prosecutor feels they must motion for detention.<sup>146</sup> Loopholes akin to New Jersey's are problematic because they may have the effect of watering-

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<sup>141</sup> Bail Reform and Risk Assessment, *supra* note 14, at 1141 (citing N.J. STAT. ANN. § 2A:162-19(7)(a)-(c)).

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

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1141 (citing N.J. STAT. ANN. § 2A: 162-17b(2)(I)).

<sup>145</sup> N.J. STAT. ANN. §2A:162-19(7)(a)-(c) (2014).

<sup>146</sup> *Id.*

down the use of the algorithm. The argument can certainly be made that, if a prosecutor can still motion for detention regardless of what the given algorithm produces, what is the point of having the algorithm in the first place? This kind of prosecutorial discretion goes too far in this respect. Judges still retain control and may impose additional conditions if they feel is it warranted.<sup>147</sup> However, this discretion should lie with the *judge*, not the prosecutor. The Alaska statute sets out of a grid similar to New Jersey's:<sup>148</sup>

Judicial Release Decision Grid

	Misdemeanors [exceptions <sup>2</sup> ]	Class C felonies [exceptions <sup>3</sup> ]	DUI/refusal	FTA/VCOR	Other
Low-risk	Mandatory OR	Mandatory OR	Presumptive OR	Presumptive OR	Presumptive OR
Mod-risk	Mandatory OR	Presumptive OR	Presumptive OR	Presumptive OR	No Presumption
High-risk	Presumptive OR	Presumptive OR	Presumptive OR	No Presumption	No Presumption

<sup>2</sup> Exceptions: person offenses, sex offenses, domestic violence offenses, driving under the influence / refusal to submit to a chemical test, failure to appear in court, violation of a condition of release.

<sup>3</sup> Exceptions: person offenses, sex offenses, domestic violence offenses, driving under the influence / refusal to submit to a chemical test, failure to appear in court, violation of a condition of release.

The major difference from New Jersey's algorithm, however, is that defendants that score low-risk or moderate-risk under the misdemeanor column and who do not fall into the listed exceptions, *must* be released on their own recognizance.<sup>149</sup> While the judge may impose conditions, the judge may not impose any *monetary* conditions.<sup>150</sup>

New Jersey's pretrial statutes, along with any other jurisdictions adopting the PSA or any form of pretrial algorithm, should formulate their statutes based on Alaska's in terms of restricting the ability of a prosecutor to be able to motion for detention depending on how a given defendant scores and the charges they may face.<sup>151</sup> This would ensure that certain low-risk defendants who have committed misdemeanor crimes are not held unjustly pending trial. Prosecutorial discretion in this area is unnecessary and unneeded, as judges may still impose conditions on the defendants if they

<sup>147</sup> Bail Reform and Risk Assessment, *supra* note 14, at 1141 (citing N.J. STAT. ANN. § 2A:162-19(7)(a)-(c)).

<sup>148</sup> Alaska's New Pretrial Release System, *supra* note 102, at 2.

<sup>149</sup> *Id.*

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

<sup>151</sup> *Id.*

feel it is warranted.<sup>152</sup> More importantly, this allows defendants with minor records to continue working, supporting their families, and remaining at home where they may lead more productive and fulfilling lives, as opposed to the myriad of hardships that inevitably occur from incarceration.

Not only this, but states seeking to adopt a pre-trial, risk-based algorithm should adopt New Jersey's approach in implementing a tool similar to the PSA in that it excludes socio-economic factors such as income, race, and education-factors irrelevant to determining whether a defendant is at risk for committing new criminal activity or is a flight-risk.<sup>153</sup>

The statutes adopting pretrial risk assessment tools must be written in such a way that certain misdemeanor crimes that score low-risk and do not raise any flags within the system must be released on their own recognizance. Further, the kind of legislative overhaul taken by states like New Jersey and Alaska must make room for changes, feedback, and improvement to be made along the way.

## VI. CONCLUSION

By focusing on New Jersey's background and implementation of the PSA through the Arnold Foundation, we can see a way in which cash bail becomes quickly out-dated. Further, by looking to another jurisdiction, Alaska, we can see a state using similar technology in order to ensure low-risk defendants can maintain their autonomy without the enormous risk that those detained face regarding their families and livelihood. A closer look into the critiques of risk-based algorithms provides discussion of the appropriate ways of dealing with them in a way that does not preclude an algorithm from being utilized in a majority of criminal circumstances.

All states, to benefit public safety and lower their pretrial incarcerated population, should adopt some version of a risk-based algorithm. States should do this collectively so as not to create a patch-work system that becomes ultimately unworkable. States, in creating this legislation, should adopt a version of the PSA that: (1) excludes certain socioeconomic and personal factors such as race, gender, and income level; (2) enables each state to take into consideration its own unique circumstances and needs in forming these tools such as population density like Alaska; (3) recognizes that an algorithm is not the appropriate tool in specific crimes, like those having to do with domestic violence, and implements further instruction for law enforcement and; (4) eliminates entirely the need for cash bail. Further, states like New Jersey and Alaska, who have adopted statutes that allow for judicial,

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<sup>152</sup> Bail Reform and Risk Assessment, *supra* note 14, at 1141 (citing N.J. STAT. ANN. § 2A:162-19(7)(a)-(c)).

<sup>153</sup> PSA Risk Factors and Formula, *supra* note 38.

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but especially prosecutorial loopholes by permitting unrestrained motions for detention despite the defendant's score utilizing the tool,<sup>154</sup> should be constrained by appropriate legislation. Looking to Alaska's version of a pretrial algorithm<sup>155</sup> helps to guide states in order to ensure certain misdemeanor and low-risk defendants can get back to their lives before further destruction is done. Combining this with New Jersey's protocol ranging from their PSA<sup>156</sup> to the ODARA<sup>157</sup> in instances of domestic violence and other crimes that must be handled differently, jurisdictions looking to implement a pretrial algorithm are readily equipped to do so in the most fair and efficient way.

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<sup>154</sup> N.J. STAT. ANN. § 2A:162-15 (West).

<sup>155</sup> Alaska's New Pretrial Release System, *supra* note 102, at 2.

<sup>156</sup> Laura and John Arnold Found., *supra* note 37.

<sup>157</sup> ODARA Scoring Form, *supra* note 123.