

TMI REPORT JANUARY 2022

PRETRIAL JUSTICE WITHOUT MONEY BAIL OR RISK ASSESSMENTS

PRINCIPLES FOR
RACIALLY JUST
BAIL REFORM

LDF
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By Kesha Moore, PhD

PRETRIAL JUSTICE WITHOUT MONEY BAIL OR RISK ASSESSMENTS

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“There is no pretrial justice without racial justice.”
— Pretrial Justice Institute (PJI)



Racial disparities in money bail disproportionately subject Black and Latinx individuals to the economic, familial, and social disruptions associated with pretrial incarceration.

Introduction

Lavette Mayes, a single mother of two, was arrested after an altercation with the mother of her soon-to-be ex-husband. Lavette did not have any prior arrests and was the sole provider for her 5-year-old son and 14-year-old daughter, yet her life — and the lives of her children — was devastatingly and permanently disrupted by the imposition of money bail. To stay out of jail before her trial, the court required Lavette to pay a cash bail of \$25,000. Because she could not afford the bail amount, Lavette was locked up for 14 months while waiting for her court date. Pretrial incarceration caused Lavette to lose her small business and be separated from her children. After 14 months in jail, Lavette took a plea. She did not accept the plea bargain because she thought her case was unwinnable, but because she wanted to reunite with her children.¹ For the nearly half a million people, like Lavette, who are incarcerated before trial, their lives and their families are disrupted and permanently damaged.² Sixty-six percent of the women who cannot afford bail are mothers.³ Although Black people comprise only 13% of the U.S. population, 43% of the people held in pretrial incarceration are Black.⁴ Likewise, Latinx people represent approximately 13% of the U.S. population, but 20% of people experiencing pretrial incarceration.⁵ Racial disparities in money bail disproportionately subject Black and Latinx people to the economic, familial, and social disruptions associated with pretrial incarceration.

The Constitution establishes the presumption of innocence and the right to liberty for persons who have not been convicted of a crime. Pretrial incarceration runs directly against these bedrock constitutional principles, which is why courts must restrict its use to only the most exacting and narrow

circumstances. Money bail and pretrial detention are ostensibly intended to ensure court appearances and to protect public safety. Yet, the evidence shows that this system is an ineffective and discriminatory approach to accomplishing those goals.

Central to money bail's ineffectiveness is that it creates a two-tiered justice system: those with money can buy their way to freedom, while those without money are made to languish in jail.⁶ In Fairfax, Virginia, a circuit court judge recently ruled that keeping an indigent defendant in jail in place of a cash bond is unconstitutional. This practice “is considered a violation of the Due Process Clause because it incarcerates poor people, while the wealthy walk free.”⁷ In his court opinion, Judge David Berhard writes:

This does not mean that the [c]ourt has released the dangerous. Removing cash from the equation merely has allowed the [c]ourt to focus on risk, unclouded by the false comfort that cash terms may somehow warrant the dangerous safe for release.⁸

The cash bail system provides a false sense of security that masks the dangers it poses to public safety while also perpetuating racial and wealth bias. Our nation incarcerates almost half a million Americans who have not been convicted of a crime, but are denied their liberty because of their inability to pay bail.⁹ Pretrial incarceration is a

critical vector of mass incarceration, contributing to most of the 20% increase in the nation's jail population between 2000 and 2012.¹⁰ Between 1990 and 1998, the number of people required to pay money bail increased by 12%, and the number of people released on their own recognizance (ROR) decreased by the same percentage.¹¹ The median money bail amount for a felony is \$10,000, while the average yearly income of a person who cannot afford bail is \$16,000 for men and \$11,000 for women.¹² Although people who work with a bail bond agent usually have to come up with only 10% of the total bail amount, that is still an unreasonably large share of the annual income of many people accused of a crime. The money bail system is also punitive and unjust because money paid for a bail bond is non-refundable, even if the individual who paid it has been acquitted of the crime in question.¹³ Thus, the money bail system helps drive mass incarceration and harms people disproportionately based on wealth, race, and gender, often with disastrous consequences on their lives.

A growing recognition of the many problems with money bail has led to a movement across the country to abolish the system.¹⁴ Unfortunately, many states have replaced their money bail system with equally problematic risk assessment instruments that attempt to use statistical measures to identify and designate some individuals as safe for release, while categorizing others as meriting close scrutiny, and perhaps pretrial detention, because they purportedly pose a serious risk to the public. Unfortunately, risk assessment instruments rely on opaque and biased algorithms that are vulnerable to the same racial biases and disparities that make the money bail system so dangerous.

For over 50 years, the NAACP Legal Defense and Educational Fund, Inc. (LDF) has called for broad decarceration and the end of racial disparities in the pretrial justice system.¹⁵ Given the problems with both money bail and risk assessments, we

believe that our criminal legal system should exclude both. The best way to respect the constitutional principle that an individual is presumed innocent until proven guilty is to design a system where the default position is ROR – where pretrial incarceration is the exception, not the rule. As described more fully below, we can protect public safety and ensure appearance at trial without money bail, risk assessments, or widespread pretrial incarceration. Given the substantial harms to accused individuals, their families, and our wider society caused by pretrial incarceration, it should be a rare occurrence. Pretrial detention should only occur after a prompt adversarial hearing, where the accused has the right to counsel, the prosecution must meet its burden of demonstrating that the individual poses a significant threat of harm to others, and the accused has a right to a prompt appeal.

THE MEDIAN MONEY BAIL AMOUNT FOR A FELONY IS

\$10,000

THE AVERAGE YEARLY INCOME OF A PERSON WHO CANNOT AFFORD BAIL IS

FOR MEN

\$16,000

FOR WOMEN

\$11,000

What is Wrong with Money Bail?

The extensive use of pretrial incarceration is a direct violation of the principle that a person is presumed innocent until proven guilty and should not be denied liberty without conviction of a crime. The U.S. Supreme Court has affirmed that “liberty is the norm” in our country and that detention before a criminal trial should occur only in “carefully limited” circumstances.¹⁶

Pretrial incarceration leads to higher rates and longer terms of imprisonment. Several studies establish that individuals subjected to pretrial incarceration are more likely to be convicted and serve time in prison than those released prior to trial.¹⁷ And that incarceration itself induces innocent people to plead guilty to gain their freedom instead of remaining in jail during the lengthy trial

process.¹⁸ A study of Philadelphia's pretrial justice system revealed that pretrial detention led to a 42% increase in sentencing length.¹⁹ Individuals experiencing pretrial incarceration are also less likely to obtain private counsel, have less ability to assist in the preparation of their defense, and may be perceived as having a more negative “demeanor” during the trial due to having experienced difficult and often harrowing living conditions in jails.²⁰ The strong correlation between pretrial incarceration and prison sentences is alarming, given that lack of wealth keeps many individuals in pretrial confinement. A person's access to money should not determine the likelihood or extent of their freedom.

The racial biases embedded in our criminal legal system and, by extension, the money bail regime

FIGURE 1.

Detention Status After Arraignment for Felony Defendants

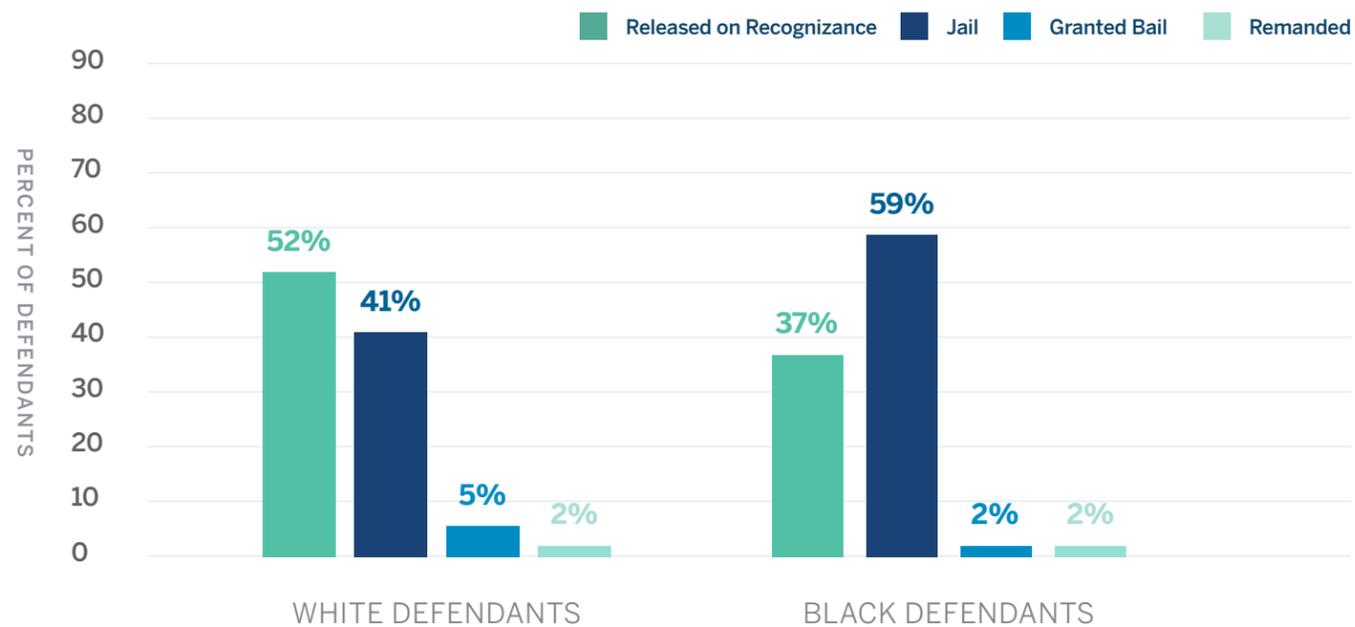


Figure 1. Documents the racial disparities in the treatment of Black and White Defendants. (Source: Vera Institute of Justice)

cause pretrial incarceration to disproportionately harm Black and Latinx people. A 2014 study revealed that Black people were 10% more likely to experience pretrial incarceration than White people accused of the same crime.²¹ For misdemeanor property offenses, Black people had a 20% higher chance of receiving pretrial incarceration than White people charged with the same offense.²² Figure 1 documents racial biases in pretrial incarceration decisions. The underlying research by the Vera Institute of Justice found that judges were more likely to overestimate the risk of committing future crimes while awaiting trial posed by Black defendants and underestimate that of White defendants.²³ This bias led to increased use of money bail and higher bail amounts for Black people relative to White people accused of a similar crime.²⁴ While the courts released most White defendants (52%) charged with felony crimes on their own recognizance, most of the Black defendants (59%) accused of the same crimes were incarcerated while awaiting trial.

The harms caused by pretrial incarceration are many. Incarcerated people have less access to healthcare and are more vulnerable to illness, including infections from the coronavirus.²⁵ Jails are particularly vulnerable to rapid and severe outbreaks of COVID-19 because of the frequent movement in and out of jails from detainees and staff; the aggregation of people from a variety of geographic locations; the limited space available for medical isolation; the limited ability to practice disease prevention measures (e.g., handwashing) due to restrictions in access to soap, paper towels, and hand sanitizers; and the inability to practice social distancing given the volume of people and the architectural design of the facilities.²⁶ Pregnant and post-partum women are especially vulnerable to COVID-19 in jails, as well as other poor health outcomes, while experiencing pretrial detention.²⁷ Individuals in pretrial incarceration are at risk of losing their jobs, their homes, and custody of their children.²⁸ The fact that family members or friends

END PRETRIAL INCARCERATION

The close correlation between pretrial incarceration and prison sentences is alarming, given that low wealth keeps many individuals in pretrial confinement.



Access to money should not determine the extent of your freedom.

TAXPAYERS SPEND
APPROXIMATELY

**\$14
BILLION**

annually on
pretrial detention

44%

of surveyed county jails reported
that reducing jail costs is currently
one of their most pressing issues

80%

of defendants released were not
arrested for a crime and appeared
at the appointed court date

98%

of defendants released from jail
do not endanger public safety by
committing a violent crime while
awaiting trial

of the accused often put up their assets (e.g., homes) as collateral means that the larger family and social system experiences a drain on resources and becomes even more economically vulnerable.²⁹ In some jurisdictions where pretrial services fund the court system, the courts require the accused to pay thousands of dollars in pretrial services fees even after being acquitted or having the charges dropped.³⁰ Given the high health, social, and economic costs of pretrial incarceration, the racial bias in its use disproportionately harms Black persons, their families, and communities.

Pretrial incarceration is costly to the public as well. Taxpayers spend approximately \$14 billion annually on pretrial detention.³¹ The over-incarceration of persons detained before trial requires taxpayers to spend limited resources on individuals who could otherwise be released and economically self-sufficient. Forty-four percent of surveyed county jails reported that reducing jail costs is currently one of their most pressing issues.³² Counties that experience a high pretrial detention rate were more likely to identify lowering the jail population and jail costs as a top priority.³³ Given the poor conditions of many U.S. jails and the intense demands on these facilities, reducing the jail population is the best way to achieve cost savings.³⁴

Despite the extensive use of money bail and pretrial incarceration, these systems are not effective in achieving their intended purposes. While pretrial detention fuels a false public perception that everyone arrested for a crime is a danger to society, the data show that the overwhelming majority of people charged with a crime, but released pretrial, are not likely to commit a crime while awaiting trial.³⁵ They are even less likely to be rearrested for a violent crime.³⁶ In a national study using the Bureau of Justice's Processing Statistics, almost 80% of defendants released prior to trial were not arrested for a crime and appeared at the appointed court date.³⁷ Ninety-eight percent of defendants released from jail do not endanger public safety by committing a violent crime while awaiting trial.³⁸ Money bail also undermines public safety.³⁹ For example, our current pretrial system routinely incarcerates low-wealth individuals who pose very low public safety risks.⁴⁰ In contrast, high-wealth

END PRETRIAL INCARCERATION

Incarceration is harmful, and those forced to experience it, even for a short time, are more economically, socially, and likely psychologically vulnerable afterward.

individuals who pose high risks to public safety can often purchase their release.⁴¹ Although individuals released while awaiting trial are unlikely to commit a future crime, research indicates that the unnecessary pretrial incarceration of low and moderate risk defendants increases their likelihood of being arrested for a future crime.⁴² In other words, the act of incarcerating a person while they are awaiting trial increases the likelihood that they will go on to commit a crime in the future.⁴³ Pretrial incarceration also increases the likelihood that a person will be a victim of a crime. According to the Bureau of Justice Statistics, 3.2% of people incarcerated in U.S. jails report one or more incidents of sexual assault.⁴⁴ These negative impacts of pretrial incarceration, which run counter to its purported public safety purpose, occur even for

detention stays as short as two days.⁴⁵ Incarceration is harmful, and those forced to experience it, even for a short time, are more economically, socially, and psychologically vulnerable afterward.

Money bail is an inefficient and ineffective method to ensure public safety. Money bail privileges individuals with economic stability and wealth and creates more instability in the lives of those already struggling at the margins of the economy. Money bail fuels the growth in mass incarceration, including its pervasive racial disparities. We can no longer afford to carry the social and financial costs associated with money bail. For that reason, many policymakers, criminal justice actors, and community advocates have mobilized to abolish the practice of money bail.

The Political Movement for Bail Reform and the Turn to Risk Assessments

Recently, bail reform has received bipartisan support in Congress⁴⁶ and has garnered support from a wide array of stakeholders in the criminal justice system, including the American Bar Association, the National Association of Pretrial Services Agencies, the Conference of State Court Administrators, the National Association of Counties, the Conference of Chief Justices, the American Jail Association, the International Association of Chiefs of Police, the Association of Prosecuting Attorneys, and the National Association of Criminal Defense Lawyers.⁴⁷ Unfortunately, this turn away from money bail has led to an equally problematic turn towards risk assessments.

The movement to abolish money bail led to the “The Pretrial Integrity and Safety Act of 2017” – a bipartisan bill introduced by then-Senator Kamala Harris (D-CA) and Senator Rand Paul (R-KY). This legislation authorized a three-year, \$10 million grant to help states restructure their pretrial process without money bail.⁴⁸ Numerous civil rights organizations, including LDF, supported this legislation as a first step to much-needed bail reform. Although this legislation stalled in Congress, it advanced discussion and support for bail reform at the state and national levels.⁴⁹ Unfortunately, this legislation also facilitated an association between

the abolition of money bail with greater reliance on risk assessments.

In 2017, the American Council of Chief Defenders, Gideon’s Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association “strongly endorse[d] and call[ed] for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias,” along with a detailed list of checks and balances.⁵⁰

Risk assessments are statistical tools to categorize people based on perceived risk for a specific behavior, such as failure to appear for trial, or dangerousness. They are commonly used in the criminal legal system for making decisions on pretrial release, incarceration, parole, and related measures. There is a long history of the use of psycho-social instruments to assess an individual’s risk level for a particular behavior.⁵¹ Algorithmic risk assessments are the latest version of these instruments, and they have gained support because of their perceived efficiency and accuracy. They rely on historic criminal justice system data patterns



Risk assessments are statistical tools to categorize people based on perceived risk for a specific behavior, such as failure to appear for trial, or dangerousness.

APPROXIMATELY

25%

of U.S. residents now live in a jurisdiction that uses pretrial risk assessments



that correlate with the desired behavior, such as a court appearance and a lack of arrests during the pretrial period. Risk assessments score people based on factors that put them into categories based on their risk score, ordered from “low” to “high.” The construction of each of these categories is somewhat arbitrary and reflects the limits set or chosen by the risk assessment developer.⁵² The primary algorithmic risk assessments used in the U.S. are the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), Public Safety Assessment (PSA), and the Virginia Pretrial Risk Assessment Instrument (VPRAI).

Approximately 25% of U.S. residents now live in a jurisdiction that uses pretrial risk assessments to determine whether to incarcerate a defendant while awaiting trial.⁵³ Risk assessments promised to provide an efficient and standardized process for determining pretrial outcomes, with more accuracy and less bias than judicial determinations of risk.⁵⁴ Supporters of risk assessments expected them to lower the overall numbers of people in jail awaiting trial without jeopardizing public safety. They also expected risk assessments to reduce racial disparities in pretrial incarceration by making evidence-based decisions, rather than determinations influenced by biases of individual judges.⁵⁵

After extensive evaluation, LDF and other prominent civil rights organizations, including the Leadership Conference on Civil and Human Rights, American Civil Liberties Union, and the Civil Rights Corps, began to warn policymakers about the potential dangers of risk assessments. We identified problems with biased data that informs statistical algorithms, the conflation of future arrest with “danger,” and the lack of transparency and accountability in these tools that ultimately lead to over-incarceration of people of color. In July 2018, LDF joined a coalition of 100+ civil rights, digital justice, and grassroots organizations to issue a shared statement of civil liberties concerns about using risk assessments as a substitution for money bail.⁵⁶ In this statement, the organizations identified the problematic and discriminatory impact of risk assessments and stated that we should not use these tools in pretrial decision-making.

“We believe that jurisdictions should not use risk assessment instruments in pretrial decision[-] making, and instead move to end secured money bail and decarcerate most accused people pretrial.”⁵⁷

In recognition of the widespread use of risk assessments in pretrial decision-making, the authors of the statement also identified six principles to reduce the harm to individuals and communities in jurisdictions using risk assessments. The principles are:⁵⁸

#1 If in use, a pretrial risk assessment instrument must be designed and implemented in ways that reduce and ultimately eliminate unwarranted racial disparities across the criminal justice system.

#2 If in use, a pretrial risk assessment instrument must never recommend detention; instead, when a tool does not recommend immediate release, it must recommend a pretrial release hearing that observes rigorous procedural safeguards.

#3 Neither pretrial detention nor supervision conditions should ever be imposed, except through an individualized, adversarial hearing.

#4 If in use, a pretrial risk assessment instrument must be transparent, independently validated, and open to challenge by an accused person’s counsel. The design and structure of such tools must be transparent and accessible to the public.

#5 If in use, a pretrial risk assessment instrument must communicate the likelihood of success upon release in clear, concrete terms.

#6 If in use, a pretrial risk assessment instrument must be developed with community input, regularly revalidated by independent data scientists with that input in mind, and subjected to regular, meaningful oversight by the community.

In 2019, a coalition of public defense legal organizations – the American Council of Chief Defenders, Gideon’s Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association – revised their prior statement of support for risk assessments in response to the challenges identified by civil rights groups regarding the inherent racial biases. The 2019 statement explicitly discusses the need for an evaluation of the racial bias of risk assessments. It states that they “support the use of a validated pretrial risk assessment as a component of a fair pretrial release system.”⁵⁹

In 2020, the Pretrial Justice Institute (PJI) reversed its support of risk assessments as a bail reform component based on the civil rights community’s critiques.⁶⁰ PJI affirms that “there is no pretrial justice without racial justice.” PJI explained their revised position on the use of pretrial risk assessment tools:

“We now see that pretrial risk assessment tools, designed to predict an individual’s appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems. Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity.”⁶¹

SHARED STATEMENT

“ We believe that jurisdictions should not use risk assessment instruments in pretrial decision[-] making, and instead move to end secured money bail and decarcerate most accused people pretrial.”

PJI asserts that, in the places where bail reform has been successful, “success hasn’t hinged on an assessment tool; it has been driven by a commitment to decarceration, values-based discussions about the purpose of detention, a willingness to acknowledge the humanity of everyone, and each system’s openness to change.”⁶² Philadelphia’s district attorney and chief public defender have withdrawn support for a risk assessment tool that the city previously sought funding to implement.⁶³ Instead, they proposed a plan for bail reform that enables the city to achieve its goals of decarceration and reducing racial disparities in the pretrial justice system without the use of risk assessments.⁶⁴

While it is promising that many state legislators and criminal justice system actors recognize the need to reform the unsafe and discriminatory practice of money bail, the speedy turn to discriminatory algorithmic risk assessments is troubling. Algorithmic risk assessments uncritically incorporate biased data infused with structural racism into what becomes biased decisions about pretrial incarceration.



The Problems of Risk Assessments

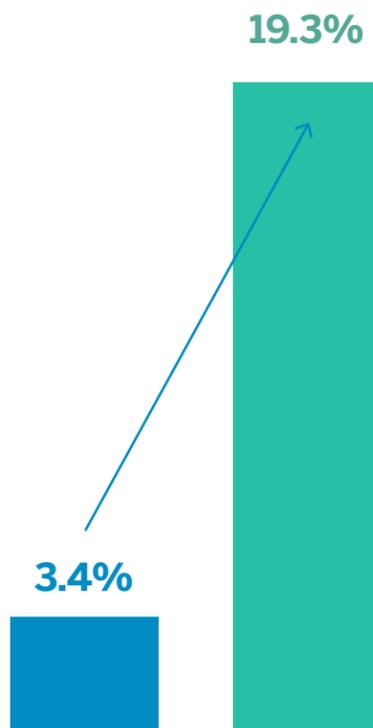
Risk assessments overestimate risk

Risk assessments overpredict risk by design because they attempt to predict statistically rare outcomes (e.g., failure to appear and violence while awaiting trial).⁶⁵ Predicting rare events is very difficult because there is insufficient historical data on such events, and standard statistical techniques are not reliable when used in this manner. The developers of algorithms try to account for the absence of sufficient data by assigning weights to relevant categories. Risk assessments are reported as a recommendation to the judge (i.e., “not recommended for release”) or with a seemingly neutral label (i.e., “high-risk”). However, the thresholds that determine who qualifies as low- or high-risk are arbitrary and set by the tool’s designers. Many of the validation studies of risk assessments do not reveal how individual variables are weighted or how the tool categorizes people into specific risk levels.⁶⁶ Such opaque practices undermine public scrutiny and accountability and encourage decision-makers to accept the instrument’s label uncritically.

Risk assessments also typically rely on data collected before changes to the pretrial incarceration system and, therefore, do not account for more recent interventions that could reduce risks such as failure to appear for trial. This practice is referred to as “zombie prediction” because it ignores how interventions can reduce predicted risk.⁶⁷ If people are given appropriate support, such as court reminders, transportation assistance, and substance abuse treatment, the actual outcomes can be much better than those predicted by a risk assessment tool.⁶⁸ Predictions of risk in this context lead to over-incarceration and unnecessarily intrusive conditions of release because the instrument overestimates an individual’s risk.

Despite the hopes that risk assessments would broadly decrease pretrial incarceration, there is no national study showing that to be true. Several studies of local counties using risk assessments indicate that pretrial detention actually increased after those counties implemented risk assessments. In Montgomery County, Maryland, for example, the percentage of people held without bail soared from 3.4% to 19.3% within a year of implementing Maryland’s statewide risk assessment tool.⁶⁹ A similar pattern of increases in pretrial incarceration occurred across New Jersey and in Lucas County, Ohio after implementing the PSA risk assessment instrument as part of bail reform.⁷⁰ The increase in pretrial detention in some jurisdictions employing risk assessments is not surprising because, as explained above, risk assessment instruments overpredict individual risks.

Despite overprediction of actual risks, judges are more likely to override a risk assessment recommendation for release in favor of pretrial incarceration. Many risk assessments use the label of high-risk without reporting the corresponding rates of predicted future activity. For example, 89-91% of individuals identified as high-risk for “new violent criminal activity” by the PSA were not arrested for a violent crime while awaiting trial.⁷¹ Even though such labels do not accurately reflect the probability of committing future crimes, judges are more likely to override a risk assessment’s release recommendation than a detention recommendation. A false negative is when the tool predicts “success” for an individual, but that individual fails to appear in court, or the person is rearrested while on release. The false negatives pose a public image problem to political actors. Judges may be more likely to detain individuals labeled as low-risk by the tool because



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89% - 90%

of individuals identified as high risk for “new violent criminal activity” by the PSA were not arrested for a violent crime while awaiting trial.

of fear of a public backlash if the person commits a crime while on release.⁷²

In 2018, judges in Santa Cruz, California, only released slightly more than half (56%) of the defendants recommended for release according to the risk assessment but incarcerated the majority (85%) of people recommended for detention.⁷³ Given that judges are more likely to override a risk assessment’s recommendation for release than for imprisonment, it is easy to see how risk assessments can lead to increases in pretrial incarceration.

Racial biases within risk assessments

Not only do risk assessments overpredict risk, they are also racially biased. Therefore, risk assessments are not an improvement or correction for the racially discriminatory system of money bail that they are replacing.

In a study of the COMPAS risk assessment tool used in Broward County, Florida, researchers found that the algorithm was twice as likely to flag Black defendants than White defendants as high-risk for future criminal activity. The tool was also more likely to misclassify (false positive) White defendants as a low risk than people of color.⁷⁴ The responses to this research have included an assertion that the instrument is not biased because the algorithm results accurately reflect racial differences in arrest rates and efforts by developers to make structural adjustments to the assessments to make them more “fair.”⁷⁵ Both responses fail to consider adequately the structural racial bias in the criminal justice system and underestimate what it means to be racially “fair.”

There is no statistical adjustment measure that can produce an accurate and fair estimate of risk within a racially biased system. Risk assessments are statistical algorithms that attempt to predict the likelihood of a particular outcome (i.e., rearrests) based on other known information (i.e., prior offenses). High-intensity policing in urban neighborhoods have generated a pattern of Black and Latinx people being arrested and convicted at higher rates than White people who commit the same offenses.⁷⁶ This data is the foundation of the predictions made by

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RISK ASSESSMENTS ARE RACIALLY BIASED

“ There is no statistical adjustment measure that can produce an accurate and fair estimate of risk within a racially biased system.

—Dr. Kesha Moore, Senior Researcher and Development Specialist Thurgood Marshall Institute

the risk assessments. The historic patterns of discriminatory policing lead to the risk assessment instrument overestimating a Black defendant's risk relative to that of a White defendant.⁷⁷ Since the results of discretionary decisions on where to deploy police officers and the discretionary decisions of officers on whether to make arrests are embedded in the measures of risk assessment, "it is perhaps more accurate to describe the tools as predicting the behavior of law enforcement."⁷⁸ Thus, risk assessments could increase the racial disparities in pretrial incarceration primarily because most risk assessment instruments heavily weigh prior criminal activity to predict risk. Given the racial inequity in policing and contact with the criminal justice system, the use of previous criminal history as a variable will disproportionately disadvantage Black people.⁷⁹ The racial bias in criminal records that stems from the over-policing of communities of color has led to the "Ban the Box" movement challenging the use of criminal records in employment applications.⁸⁰

Efforts to make risk assessments racially fair also have serious shortcomings. For example, in considering whether risk assessments are racially fair, researchers identified six different fairness types: predictive fairness, overall fairness, model fairness, use fairness, cost-ratio fairness, and total fairness. All definitions of fairness statistically relate to each other, which means maximizing one form of fairness will have tradeoffs for the others. Moreover, increasing most definitions of fairness will lower the predictive accuracy of the risk assessment.⁸¹

Finally, a recent study revealed how a risk assessment that performed similarly across racial and ethnic groups and was overall robust in its predictive accuracy was still much more likely to misclassify Black defendants as high-risk than Latinx and White defendants.⁸² Because Black people have higher rates of arrests, a risk assessment instrument can demonstrate "predictive parity" meaning that being assigned to a risk level (high, med, low) has similar rates of pretrial success. Thus, Black defendants assigned the category of

4 ("high-risk") and White defendants assigned to the category of 4 both have 83% chance of pretrial success if released. However, this measure of fairness does not account for false positives. False positives refer to misclassifying a person as high-risk. Given the over-policing of Black communities and the resulting high arrests rates, Black defendants are more likely to be misclassified by risk assessments as high-risk. Therefore, a risk assessment instrument considered fair in predictive parity could still be unfair in terms of false positive errors. Such a pattern would reinforce (and may increase) racial disparities in pretrial outcomes.

Risk assessments make judgments about individuals based on group stereotypes

It is important to emphasize that algorithmic risk assessments are incapable of making individualized predictions and are essentially an effort to use statistics to predict how likely "people like you" perform a particular outcome. This overly broad group generalization is at the heart of all stereotypes and racial profiling.⁸³

Up until the 1960s, risk assessments used race as an explicit predictor of future criminality. Since then, criminal justice actors use prior correctional contacts (arrests, conviction, and incarceration) as one of the strongest predictors of recidivism.⁸⁴ This shift occurred during the beginning of the growth of mass incarceration of Black and Latinx people in the United States. Figure 2 below documents this stark and fast-growing trend over the past 50 years and underscores how reliance on prior convictions to predict risk and justify detention will disproportionately harm Black and Latinx communities.

Another concern with risk assessments is that, despite their inherent racial bias, they are commonly perceived as presenting "non-racial" purely statistical or accurate information. This false perception reinforces and provides an unwarranted aura of legitimacy to a system that is fundamentally discriminatory.

Proponents of risk assessments have framed bail reform into a binary choice of risk assessments or money bail. But there is another approach. We can end the flawed practice of money bail and achieve the goals of lowering pretrial incarceration rates, promoting public safety, and improving racial equity without relying on risk assessment instruments. Instead, we must replace money bail

and risk assessment systems with a system that releases all individuals charged with misdemeanors and non-violent felony offenses on their own recognizance (ROR), provides speedy adversarial court hearings for individuals accused of violent felonies to make detention determinations, and provides community-based supports to released individuals awaiting trial.

FIGURE 2.

Correctional Institution Population by Race

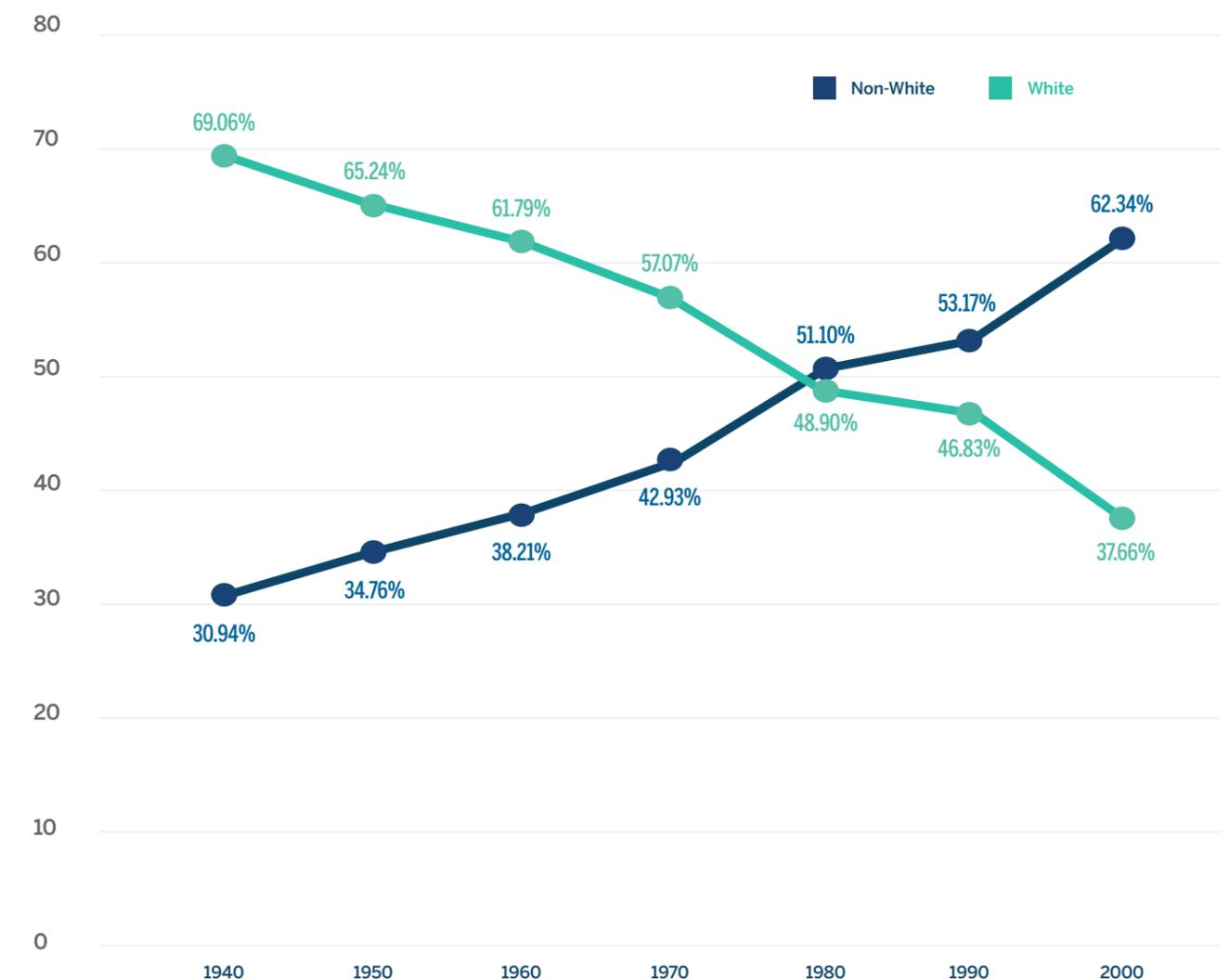


Figure 2. Changes in the Racial Composition of U.S. Correctional Institutions⁸⁵

Principles of an Effective and Just Bail Reform Platform

LDF has called for major reforms of the pretrial system, including eliminating money bail and risk assessments.⁸⁶ Given the significant problems with both, it is best to design a pretrial system that genuinely respects the constitutional presumption of innocence and defaults to a position of releasing the accused on their own recognizance, absent a strong showing that the accused poses a significant risk of imminent physical danger to another and/or a strong likelihood of willful flight. Implementing a comprehensive network of pretrial services can ensure the individual's appearance at the appointed court date and data show that pretrial incarceration does not improve public safety in the overwhelming majority of cases.

... it is best to design a pretrial system that genuinely respects the constitutional principle that an individual is presumed innocent until proven guilty...

Thus, pretrial incarceration should be used only under limited and circumscribed conditions to preserve public safety where there is a significant risk of severe and imminent physical danger.

A comprehensive bail reform that both lowers the number of people in jail and diminishes the racial disparities in pretrial incarceration should:

Mandate ROR for all misdemeanor and non-violent felony crimes.

Provide speedy court hearings with counsel within 24 hours of detention and the right to a prompt appeal for individuals charged with violent felonies.

Provide community-based support to the greatest extent possible.

Establish pretrial services that operates independently of probation and law enforcement agencies to ensure court appearance.

Sever the ideological connection between Blackness and dangerousness.

END CASH BAIL

66%

of the women who cannot afford bail are mothers

Mandate ROR for all misdemeanors and non-violent felonies

Approximately 90% of arrests are for misdemeanor charges.⁸⁷ Treating all misdemeanor charges as automatic ROR would significantly improve the pretrial system's efficiency while preserving an individual's constitutional presumption of innocence and protecting public safety. We can achieve significant reductions in pretrial incarceration without risk assessments through the automatic release of broad categories of defendants.⁸⁸

Given that most people on pretrial release appear for their appointed court dates and are not rearrested while awaiting trial,⁸⁹ the use of ROR is reasonable for most defendants. Automatic ROR for misdemeanors could take the form of a cite and release. The police officer gives the individual a summons to appear in court without a formal arrest. Courts could also use something like a bail schedule to automatically mandate ROR for individuals charged with misdemeanors and non-violent felonies, similar to New York's model of bail reform.⁹⁰ Both approaches would avoid the discriminatory racial and wealth disparities caused by a money bail system and allow a maximum number of individuals to maintain their liberty until being tried in court.

Wisconsin's recent bail reform plan restricts the possibility of pretrial incarceration to individuals accused of violent crimes and other specified circumstances such as violating conditions of release or committing a new crime while on pretrial release.⁹¹ New York's 2019 bail reform mandates release for misdemeanors and non-violent felonies, with only a handful of exceptions (e.g., sex offenses, witness tampering, terrorism, and domestic violence). New York's bail reform also includes a mandate that police officers issue a citation and release ("cite and release") for most misdemeanors or class E felony arrests, with only a few exceptions. By mandating release for a large group of offenses, New York's bail reform is poised to produce a more

considerable decrease in pretrial incarceration rates than other states that have enacted bail reform. Even with the new amendments made to New York's bail reform, New York City is projected to have approximately 84% of individuals charged with a crime be released without bail.⁹²

Some proponents of risk assessments who are concerned about racial equity recommend that risk assessments only be used with persons charged with violent crimes.⁹³ This is based on research that suggests prohibiting risk assessments for individuals accused of low-level, non-violent offenses reduces both pretrial incarceration rates and racial disparities.⁹⁴ However, the goals of decreased pretrial incarceration and racial disparities in outcomes can be accomplished without using risk assessments for any level of charge. Eliminating the use of risk assessments across the board is important because even in states with bail reform legislation focused on "evidence-based decision making" (as articulated through risk assessments), judges substantially depart from release recommendations provided by the evidence-based tool.⁹⁵ Judicial discretion that often leads to over-incarceration can be minimized by automatically releasing individuals charged with misdemeanors and non-violent felonies and offering speedy court hearings to determine release for the remaining defendants. A list of specific charges for which ROR is the default also lightens the administrative burden of the pretrial justice system. This approach will serve the goals of protection of constitutional rights and public safety, while also producing a pretrial system that is efficient and less racially biased.

It is also important to recognize that ROR should include full release and not an attempt to replace a jail cell's walls with a different form of jail, like electronic monitoring bracelets. Electronic monitoring should rarely be used as a condition of release. It significantly compromises an individual's ability to get and maintain employment, creates an expensive service (that often defendants must pay for), and fails to improve public safety or increase

MANDATE ROR FOR ALL MISDEMEANORS AND NON-VIOLENT FELONIES

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PRETRIAL COMMUNITY SUPPORT

↑ 90%

of people released through the Bail Project show up for their court appointments, even without being personally liable for the bond.

appearance at trial.⁹⁶ Electronic monitoring is still a form of punishment, and there is no empirical evidence that it prevents future crime or reduces the risk of flight.⁹⁷ Moreover, the devices can fail for reasons unrelated to recidivism or flight risk, such as difficulties in keeping the bracelets charged given work or family responsibilities.⁹⁸ The increased surveillance of people through electronic monitoring is likely to increase pretrial detention due to technical violations, not new criminal offenses.⁹⁹

A pretrial justice system that defaults to full ROR for all misdemeanors and non-violent felonies and prompt adversarial hearings for all others would respect the constitutional presumption of innocence while promoting public safety.

Provide prompt adversarial court hearings for individuals accused of violent felonies

An equitable and just pretrial system would honor the constitutional principle of presumed innocence by allowing most people to remain

free while awaiting trial. Pretrial detention should be strictly limited to individuals charged with violent felonies who present a significant risk, as determined through an adversarial court hearing, of imminent physical danger to another and/or a strong likelihood of willful flight. A violent felony charge alone should not serve as a proxy for this determination because no data suggests that a charge is a sufficient predictor of future arrests.¹⁰⁰ Approximately 90% of persons accused of violent crimes are not likely to be rearrested awaiting trial,¹⁰¹ so they should not automatically be relegated to pretrial incarceration under the guise of public safety. Still, those charged with violent crimes who are rearrested are more likely to be rearrested for violent crimes.¹⁰² Thus, for individuals charged with violent felonies, it is necessary to provide prompt adversarial court hearings where the accused is represented by counsel to determine pretrial release. Steps must be taken to ensure that these hearings are not tainted by a presumption of detention as the outcome not only because that would deny the individual the constitutional presumption of

innocence and is not necessary to protect public safety, but also because it creates a perverse incentive to police and prosecutors to overcharge to assure pretrial incarceration.¹⁰³ Preliminary research suggests that local prosecutors can be excessively punitive by overcharging. This practice is similar to the use of threats of long sentences on certain charges to gain leverage in the plea bargaining process.¹⁰⁴ An adversarial pretrial release hearing without the use of cash bail, risk assessments, or a presumption of detention for those charged with violent felonies protects constitutional rights and may mitigate the abusive practice of overcharging.

Scholars at the Harvard Law School's Criminal Justice Policy Program have recommended that pretrial incarceration should occur only after a speedy court hearing (within 24 hours) where the accused has counsel present and that the burden of proof should be on the prosecutor to establish by "clear and convincing evidence" that release of the individual would pose a significant risk of physical danger to members of the public or that there is a strong likelihood the individual will engage in willful flight.¹⁰⁵ Having legal counsel for the accused at pretrial release hearings has been shown to decrease pretrial detention rates substantially.¹⁰⁶ Several states, including Wisconsin, New Jersey, and New Mexico, and the District of Columbia have adopted hearings before a decision on pretrial release as part of their bail reform measures.¹⁰⁷

Provide an appropriate level of community-based care and support

The goal of reforming our pretrial system is to provide respect for individual liberty and avoid the harm caused by pretrial incarceration, whenever possible. Community-based care and support for those awaiting trial is a critical component of an effective and just pretrial system. Scholars at

the UCLA School of Law Criminal Justice Program advocate for establishing a community care and support agency (CASA) to provide individuals awaiting trial with the needed support and resources.¹⁰⁸ A CASA is *focused on connecting individuals to supportive resources*, not supervising them, and does not work with law enforcement. All participation is voluntary, building upon an individual's needs and strengths and the strengths of their community.¹⁰⁹

Santa Clara County, California, has established a promising form of community-based care and support that they've labeled "community-sponsored release." This serves as an alternative to pretrial incarceration and other limiting types of conditional release like electronic monitoring. Under community-sponsored release, a community-based organization (e.g., church or community group) chosen by the defendant agrees to provide needed services (e.g., court date reminders, transportation, referrals to needed social services) that will support the individual's success while awaiting trial.¹¹⁰

The Bail Project demonstrates the success that can be achieved through community-based care and support. The Bail Project calls its model "community release with support."¹¹¹ Working in over a dozen jurisdictions, the Bail Project posts bail for individuals who cannot afford it and provides them with a voluntary, community-based pretrial support structure. The Bail Project staff, known as Bail Disruptors, talk with individuals released on bail about potential "obstacles to court return" (e.g., transportation, unstable housing, health concerns). They then work collaboratively to design a support system to help individuals overcome these potential barriers.¹¹² Over 90% of people released through the Bail Project show up for their court appointments, even without being personally liable for the bond.¹¹³

Establish supportive pretrial services independent of probation and law enforcement agencies

Pretrial services including automated communications, substance and mental health referrals, and community-sponsored release are currently used to protect public safety and ensure appearance for court appointments and trial in numerous jurisdictions. In Santa Clara County, California, a working group assembled to study bail reform concluded that “most defendants who are released from custody pending trial will appear for their court dates without any financial incentive” [i.e., without bail].¹¹⁴ Many defendants “who miss a court date do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice.”¹¹⁵ Washington, DC, a city that does not use money bail, releases 94% of people awaiting trial, and 90% of them make their appointed court dates.¹¹⁶

Phone and text message reminders of court dates are a proven, cost-effective method to increase court appearance rates.¹¹⁷ In 2007, Multnomah County, Oregon, implemented a pilot program that placed automatic reminder calls to all persons awaiting trial to alert them of upcoming court dates.¹¹⁸ In just eight months, this pilot program increased court appearance rates by 31% and saved the county over one million dollars. Other jurisdictions in Oregon, New York, and Wisconsin have implemented similar programs to provide automated communications with individuals and confirmed their success.¹¹⁹

To optimize the benefits of pretrial services, the agency must operate independently from probation and parole functions.¹²⁰ Referrals for substance abuse and mental health counseling to individuals with those needs should be non-mandatory.¹²¹ Research suggests that mandating these services can be ineffective and increase rearrests and failure to appear for low-risk defendants.¹²²

Sever the ideological connection between Blackness and dangerousness

Sandra Mayson, Assistant Professor of Law at the University of Georgia, argues for reformulating how the criminal justice system conceives of and responds to risk.¹²³ Too often, we engage in a discussion about whether an individual is “high-risk” or “low-risk” without the necessary preceding discussion of what risks matter and what level of risks we are willing to tolerate. All individuals can pose some risk. *What are the risks that matter? Can we accurately measure those risks without racial distortion? If not, are we willing to accept those risks without state coercion? How can we use measures of risks to respond with support to individuals rather than a constraint?* Such thoughtful public engagement is not only the core of significant bail reform but the necessary foundation for a more just and equitable criminal justice system.

Such a conversation needs to examine the relationship between race, dangerousness, and citizenship critically. From the beginning, “[p]rison and slavery defined the boundaries of citizenship and, in this sense, were two sides of the same coin.”¹²⁴ Both the institution of slavery and mass incarceration were organized along racial lines and justified by cultural beliefs about Black people’s dangerousness.¹²⁵ There is a long tradition in criminal justice to use the latest scientific theories and methods to identify and contain individuals believed to be “dangerous” and remove them from society.¹²⁶ Unfortunately, bail reform discussions have moved from the harms and unconstitutionality of denying someone their “right to liberty” to a focus on the “risks” an individual poses to society.

We can learn a lot from the mental health system about how a focus on “dangerousness” can lead to a discriminatory, institutional targeting of Black people that denies them their freedom. During the deinstitutionalization movement of the 1970s, mental health practitioners and policymakers made significant attempts to move people out of

mental health hospitals and into community-based services. In this process, they focused on assessing “dangerousness” to justify admissions to and release from mental health institutions. This focus on dangerousness increased racial disparities in institutionalization because of the racially biased misperception that Black people are inherently more dangerous than White people. The percentage of White people admitted to mental institutions during the deinstitutionalization era decreased from 82% in 1968 to 68% in 1970. During the same period, the percentage of admitted people of color almost doubled, increasing from 18% to 32%.¹²⁷ Bernard Harcourt, Professor of Law and Criminology at the Columbia University, presents this example as a cautionary tale of how an institution’s focus on “dangerousness” can increase racial disparities.¹²⁸ He concludes:

“[T]he track record is damning: mental hospitals were deinstitutionalized by focusing on dangerousness and the result was a sharp increase in the black representation in asylums and mental institutions.”¹²⁹

We must think critically about the racialization of the concept of “dangerousness.” We must also challenge its use within the criminal justice system.¹³⁰

As Jeffery Adler, Professor of History and Criminology at the University of Florida, states, “crime rates exerted far less influence on incarceration rates than did the politics of crime.”¹³¹ By the politics of crime, Professor Adler was explicitly referring to how Black people were used as the face of crime and increasingly became the target of crime-fighting techniques. The law-and-order rhetoric and policies that emerged in the period between World War I and World War II focused on Black

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people even though their participation in criminal activity was lower than White people, and overall crime rates were shrinking.¹³² The focus on “risk” and “dangerousness” of an individual is problematic because it may lead to a strong(er) commitment to pretrial detention¹³³ and reinforce the racial disparities currently seen in the criminal justice system.¹³⁴

Conclusion

Money bail is one of the many well-established practices in our criminal justice system that unjustly punishes people based on low-wealth and race. As we look to the much-needed reform of this unsafe, unconstitutional, and discriminatory practice, we must ensure that the reform does not preserve the underlying unjust racial structure. Algorithmic risk assessments uncritically rely on data that is the product of structural racism, such as data produced by racially biased policing, and use racially biased perceptions of dangerousness to justify detention of persons from disadvantaged groups. Rather than accept either of these flawed approaches to our pretrial system, we must restructure it to make ROR the default for most persons accused of a crime. This would allow us to replace the widespread use of pretrial detention with community-based, social support. Now is the time to rethink our assumptions about race, poverty, crime, safety, and justice. We can create transformative structures, policies, and practices that bring an end to the horrors of mass incarceration while protecting public safety and individual liberty, equality, and justice for all.



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