

## REFORMING THE ALREADY REFORMED

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### I. INTRODUCTION

One of the most important and complex issues facing the criminal justice system is the decision of whether or not to allow a defendant to be released via pretrial bail. On one hand, the defendants deemed dangerous and those with a higher risk of not appearing in court have more reason to be detained pretrial while low level criminals with minor offenses may not necessarily need to be detained. Ultimately, society is harmed and the criminal justice system is hindered when defendants are incorrectly released pretrial. Alternatively, when there are defendants detained when no risk is present, there are not only serious moral and public policy implications, but also constitutional ones. This is why a court's ability to correctly and accurately make decisions to release or detain defendants is not only important, but vital.

Most courts across the United States implement a cash bail system where an amount of money is set based on the offense and other determining factors, depending on the jurisdiction.<sup>1</sup> If the defendant is able to pay the sum, he or she is released during the period leading up to their hearing date.<sup>2</sup> While most jurisdictions still implement cash bail systems, many have started to move away from cash bail by creating or implementing statistical risk assessment tools that are developed to determine a score for a defendant that helps courts determine whether a defendant has a likelihood to commit another crime while their case is pending or if they will fail to appear at their hearing.<sup>3</sup>

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1. HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 9 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

2. *Id.* at 4.

3. *Id.* at 18–19.

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One of the leading states that has implemented this risk-based analysis system is New Jersey. New Jersey introduced the Criminal Justice Law Reform (“CJLR”) and now uses what is called a Public Safety Assessment (“PSA”) that uses an algorithm to give a defendant a score.<sup>4</sup> This score attempts to accurately predict whether a defendant will commit a new criminal activity, a new violent activity, or fail to appear in court if released.<sup>5</sup> However, the system that New Jersey has implemented is skewed and seemingly inaccurate which impacts the ability to accurately predict when a defendant should be detained or released pretrial. This Commentary explains where these inaccuracies lie and suggests ways to tweak the system in order to ensure that a defendant’s constitutional rights are protected and maintained while also insuring the safety of the community as a whole.

### II. THE IMPORTANCE OF AN ACCURATE SYSTEM OF DETERMINING PRETRIAL RELEASE

As mentioned *supra*, cash bail is still widely used across the United States. With this type of system, defendants, usually the poor, are unable to pay their set bails and are ultimately forced to stay in jail for long periods of time awaiting their case to be heard. These defendants suffer innumerable consequences, such as missing work, causing a further financial deficit and likely termination, being away from family, and more.<sup>6</sup> The Department of Justice announced in a 2015 court filing that “[i]t is the position of the United States that [financial bond, set] without any regard for indigence, not only violates the 14<sup>th</sup> Amendment’s equal protection clause but also constitutes bad public policy.”<sup>7</sup> The cash bail system “needlessly imprison[s] poor defendants who pose no threat. Meanwhile, wealthy [defendants] may go free regardless of what danger they might pose.”<sup>8</sup> In other words, those who *should be* detained due to their being a threat to the public or the possibility that they may not appear in court, may not be detained only due to their ability to pay, whilst those who are not necessarily a threat to the community or will likely appear to their court date may be

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4. ACLU OF NEW JERSEY ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 6 (2016), [www.nacdl.org/njpretrial/](http://www.nacdl.org/njpretrial/).

5. *Id.* at 7.

6. Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, ABA JOURNAL (Apr. 1, 2016), [http://www.abajournal.com/magazine/article/courts\\_are\\_rethinking\\_bail](http://www.abajournal.com/magazine/article/courts_are_rethinking_bail).

7. Statement of Interest of the United States at 1, *Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (No. 2:15cv00034).

8. Laird, *supra* note 6.

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detained until the hearing date. In sum, “[t]his practice is deeply inequitable: wealthy criminal defendants benefit from pretrial release . . . while poor defendants are detained.”<sup>9</sup>

Additionally, defendants that “are released have better outcomes than those who stay in jail pending resolution of their cases.”<sup>10</sup> For example, one study found that “defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial” and the sentences they received were “almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison.”<sup>11</sup> The study also uncovered

. . . strong correlations between the length of time low and moderate risk defendants were detained before trial and the likelihood that they would re-offend in both the short term and the long term. Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period—and were also more likely to do so during the two years after their cases ended.<sup>12</sup>

Likewise, as detention increases, “the defendant’s place in the community becomes more destabilized,” which increases the risk of recidivism.<sup>13</sup> This means that those forced to remain incarcerated prior to trial have a higher chance of committing crimes after eventual release even if they were innocent of the crime in which they had their original pretrial detainment for.

The Supreme Court of the United States has even commented on the effects of pretrial release. The Court explained that “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”<sup>14</sup> The Court stated that “[i]mposing those consequences on anyone who has not yet been convicted is serious”<sup>15</sup> but it is especially unfortunate to impose them on

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9. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 434 (2016).

10. ACLU OF N.J. ET AL., *supra* note 4, at 12.

11. *Id.*; see also *Report of the Joint Committee on Criminal Justice*, N.J. COURTS (Mar. 10, 2014), <https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf>.

12. ACLU OF N.J. ET AL., *supra* note 4, at 12.

13. Laird, *supra* note 6, citing LAURA AND JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION* 3 (2013), [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf).

14. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

15. *Id.*

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those persons who are ultimately found to be innocent. An inability to pay the money for bail may also “coerce people to plead guilty so that they can get out of jail sooner despite being innocent” and the defendant is “under greater pressure to enter a plea bargain, which has become the de facto standard in resolving more than 95 percent of cases each year.”<sup>16</sup>

Evidently, a defendant’s pretrial detainment not only affects a defendant’s employment and home life, but can also affect their permanent criminal record and overall quality of life. This is why it is so important that systems that determine pretrial release are as accurate as possible.

### III. NEW JERSEY’S MOVE AWAY FROM CASH BAIL

The Laura and John Arnold Foundation (“LJAF”) created the PSA, aiming to “fundamentally change how the system operated by developing objective, evidence-based tools, piloting and evaluating innovations, and performing foundational research . . . to arrive at more effective decisions.”<sup>17</sup> The LJAF explained that because the PSA was “developed and validated using data from diverse jurisdictions from across the country, it can be used anywhere in the United States.”<sup>18</sup> However, as explained later, this may not necessarily be the case.

The PSA is a complex system that produces a score for a defendant and allows judges to make the determination of releasing the defendant pretrial or keeping them detained. To summarize, nine factors are taken into account by the system including the defendant’s age at the time of arrest, whether the arrest was for a violent crime, the defendant’s prior offenses, and the defendant’s prior failures to appear in court.<sup>19</sup> Then for each of the “risks,” including failure to appear, likelihood of committing a new criminal activity, and likelihood of committing a new violent activity, there are over ten additional factors in addition to a potential “flag” for violence that is taken into account.<sup>20</sup>

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16. JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 25 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>.

17. *The Front End of the Criminal Justice System*, LAURA & JOHN ARNOLD FOUND., <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment> (last visited Nov. 5, 2018) [hereinafter *Public Safety Assessment*].

18. *Id.* LJAF has since updated its website to include more comprehensive information of its validation systems and the implementation process. This information was not available as for the public until recently. PUBLIC SAFETY ASSESSMENT, *Implementing the PSA*, <https://www.psapretrial.org/implementation/implementing-psa>.

19. See ACLU ET AL., *supra* note 4, at 8.

20. *Id.* at 8–9.

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A second analysis called the Decision Making Framework is then implemented which is an additional four step process that ultimately gives a judge the recommendation regarding conditions of release or detention.<sup>21</sup> A judge will then receive a score and holds the discretion to determine whether they will release the defendant or not.

However, even with a judge's discretion, the New Jersey statutes for the non-cash bail system gives "strong deference to the recommendations of the Pretrial Services Program" and, while judges may go against the recommendation, they must explain their reasons for doing so.<sup>22</sup> However, judges "may be hesitant . . . to depart from the Pretrial Services recommendations, either due to fear of being held responsible for a defendant's misconduct if they release on lesser conditions than recommended, or [a] desire to avoid additional paperwork."<sup>23</sup> Thus, the score that the PSA calculates and what condition of release is recommended for that score is an extremely important and influential factor in deciding a defendant's pretrial circumstance.

### IV. THE CHOICE BETWEEN LOCAL DATA AND NATIONWIDE DATA

When it comes to the decision to implement a risk-based assessment tool that is utilized by a state or jurisdiction, some states opt to implement a national tool, while other states implement a state specific tool. However, according to the Pretrial Justice Institute, a pretrial risk assessment is developed "by collecting and analyzing *local* data to determine which factors are predictive of pretrial success . . . and to determine their appropriate weight."<sup>24</sup> Because of differences within each state due to the availability of release, statutes in place, and more, there should be "statistical analysis on local data [to] help[] ensure these [differences] are taken into account."<sup>25</sup> The Pretrial Justice Institute explains that there are several ways a jurisdiction can establish a locally valid instrument.<sup>26</sup> For example, states may have

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21. *Id.* at 10.

22. *Id.* at 11; *see* N.J. STAT. ANN. § 2A:162-23(a)(2) (West 2019) ("If the court enters an order that is contrary to a recommendation made in a risk assessment when determining a method of release or setting release conditions, the court shall provide an explanation in the document that authorizes the eligible defendant's release.").

23. ACLU OF N.J. ET. AL., *supra* note 4, at 11 n.29; *see also* N.J. STAT. ANN. § 2A:162-23 (West 2019).

24. *Risk Assessment: Evidence Based Pretrial Decision-Making*, PRETRIAL JUSTICE INST. 1, <https://studylib.net/doc/18308078/risk-assessment—pretrial-justice-institute> (last visited Mar. 20, 2019) (emphasis added).

25. *Id.*

26. *Id.*

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local universities and researchers create an assessment tool specific to their state.<sup>27</sup>

New Jersey's implementation of the PSA, although validated in the state, would be more accurate if it only used data specifically from New Jersey courts and defendants. Methods of "empirical validation say[] nothing about the construction of the tool itself"<sup>28</sup> and "[d]ifferences in bail statutes, court rules, release options available to the court, and other factors cause variations from site to site."<sup>29</sup> This is something that other states on the forefront of risk based analysis tools have taken into account as they transition from a cash bail system to a risk based analysis system.

When Alaska's pretrial assessment was being developed, it was important for the state that there was a utilization of only local data because "pretrial risk factors depend on the population the risk assessment is being utilized in."<sup>30</sup> Likewise, an important goal noted by the creators in creation of the risk assessment tool was to develop an instrument that uniquely predicted likelihoods of committing another offense or failure to appear of Alaskan defendants specifically.<sup>31</sup> The creators explained that it was a top priority to not have a "cookie-cutter risk assessment . . . but one that . . . was representative of defendants across the state of Alaska."<sup>32</sup> The data that was analyzed to create the system was pulled from Alaska Court system case files (including failure to appear warrants and prior failure to appear warrants), Department of Correction Information, and Department of Public Safety data.<sup>33</sup> Importantly, this data was not pulled from only certain areas of Alaska, but from all over the entire state.<sup>34</sup> This was done in order "to ensure that the tool was representative" of all defendants in Alaska, and not just certain parts.<sup>35</sup> Finally, a risk assessment test was utilized to ensure that the performance of the tool was successful. Contrary to the PSA created by LJAF, the results found that in Alaska, the current age of the defendant had weak correlations for a defendant's likelihood that they commit a new criminal activity or failure to appear,

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27. *Id.*

28. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 91 (2017).

29. PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT 101: SCIENCE PROVIDES GUIDANCE ON MANAGING DEFENDANTS 5 (2013), [https://www.bja.gov/Publications/PJI\\_PretrialRiskAssessment101.pdf](https://www.bja.gov/Publications/PJI_PretrialRiskAssessment101.pdf).

30. Justice Reinvestment Initiative, *Alaska Pretrial Risk Assessment*, GOTOWEBINAR, 12:05 (Aug. 2017), <https://attendee.gotowebinar.com/recording/1467307448127263490>.

31. *Id.* at 19:20.

32. *Id.* at 19:45.

33. *Id.* at 21:00.

34. *Id.* at 26:30.

35. *Id.*

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and was thus removed from the algorithm.<sup>36</sup> This illustrates how a customized tool can improve a state's assessment tool and how a standardized tool like the PSA may not necessarily be a good fit for Alaska.

Ohio's system adds an additional step, as compared with Alaska's. In the creation of Ohio's system, "offenders across the Ohio criminal justice system were extensively interviewed for potential risk factors and were . . . followed for one year to gather official measures of recidivism."<sup>37</sup> Additional data included "information [] gathered by the counties from public records searches and searches of the cases file," and then verified through the Ohio Law Enforcement Gateway.<sup>38</sup> Ultimately, five assessment tools were created and "then validated . . . by 'examining the predictive power of the assessment instruments' and their ability to 'significantly distinguish between risk levels.'"<sup>39</sup> In doing this, the importance of using an individualized assessment was noted because although "using preexisting risk assessments is less costly, it assumes that the instrument is a valid predictor of recidivism for each agency's specific population."<sup>40</sup>

Nevada's Committee to Study Evidence-Based Pretrial Release also decided that "it would be preferable to develop a customized pretrial risk instrument that incorporated all of the positive attributes of [] risk instruments" while also having the "advantage of being tested and normed on defendants being released in Nevada."<sup>41</sup> In total, approximately 1,000 cases were used and statistical tests were run to determine predictive accuracy with the result proving that the assessment is statistically valid in Nevada and that it "meets industry standards in terms of factors being used and [] overall predictive accuracy."<sup>42</sup> In sum, it is clear that other states recognize the benefits and necessity of creating an individualized system that is as accurate as possible for the benefit of not only the defendants, but a society as a whole.

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36. *Id.* at 52:00.

37. Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROB. 16, 17 (2010).

38. *Id.* at 18.

39. Wiseman, *supra* note 9, at 453 (citing Latessa et al., *supra* note 37, at 19).

40. Latessa et al., *supra* note 37, at 17.

41. JAMES AUSTIN & ROBIN ALLEN, DEVELOPMENT OF THE NEVADA PRETRIAL RISK ASSESSMENT SYSTEM FINAL REPORT 1 (June 2016).

42. *Id.* at 3, 6.

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*RUTGERS UNIVERSITY LAW REVIEW*V. THE PUBLIC SAFETY ASSESSMENT DATA IS NOT AS ACCURATE AS  
POSSIBLEA. *Geographical Locations*

The geographical location that data is pulled from is very important when creating a risk assessment system that is accurate. This is because “no predictive tool is better than the data set from which it originates.”<sup>43</sup> The current PSA system derived its data from over 300 jurisdictions and used about 750,000 cases.<sup>44</sup> The LJAF stated that it specifically created this system so that its PSA can be implemented nationwide, yet, when describing why they created this PSA to begin with, they stated that “most existing pretrial risk assessments were developed using data from a single jurisdiction, and other states and counties did not believe they could adopt a tool that was based on case records from somewhere else.”<sup>45</sup> However, by using the PSA, states may *still* be adopting a tool based on records from somewhere else, exactly what the LJAF states could not and should not be done. Some states may even adopt the PSA without having *any* of their defendants’ data included in the research.

Additionally, data sets are “intricately linked to physical place and human culture.”<sup>46</sup> While it may be easier to compare big city crime rates like Chicago to Detroit, the line may begin to blur when comparing jurisdictions like New Jersey to Kentucky or Arizona. Yet all three of these states have implemented the same PSA algorithm statewide.<sup>47</sup> The LJAF began its research to create the PSA by studying about 190,000 Kentucky defendants<sup>48</sup> but a state like Kentucky that has “one of the fastest growing prison populations in the nation, . . . rising by 45

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43. Eaglin, *supra* note 28, at 72.

44. PUBLIC SAFETY ASSESSMENT, *What is the PSA?*, <https://www.psapretrial.org/about/what-is-psa>.

45. LAURA AND JOHN ARNOLD FOUND., *DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT* 3 (2013), [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF-research-summary_PSA-Court_4_1.pdf) [hereinafter *DEVELOPING A NATIONAL MODEL*].

46. Kate Crawford, *The Hidden Biases in Big Data*, HARV. BUS. REV. (Apr. 1, 2013), <https://hbr.org/2013/04/the-hidden-biases-in-big-data> [hereinafter Crawford, *Hidden Biases*].

47. *DEVELOPING A NATIONAL MODEL*, *supra* note 45, at 5.

48. *Id.* at 3.



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percent, compared to 13 percent growth for all states” is not necessarily reflective of a state like New Jersey.<sup>49</sup>

Additionally, as a risk assessment tool like this is being developed, the developer’s judgment may not be consistent with the community where the tool is being applied.<sup>50</sup> This is important because “correctional landscape varies dramatically in scale, policy[,] and practice from state to state.”<sup>51</sup> While “[c]ommercial tools tend to derive their data from selected offenders in narrowly defined regions,”<sup>52</sup> geographical diversity within the state itself is also important to the creation of an assessment tool. Just as states differ from one another, different counties within the state itself differ as well. Collecting data from the different jurisdictions within the state would help incorporate each county’s pre-trial statistics into its assessment while still keeping the policies of one state in line.<sup>53</sup>

The type of area in which a jurisdiction is located can also influence the data that is drawn from that area. A study done for those who fail to appear in rural areas compared with urban areas, for example, is indicative of the specificity that should go along with creating a risk-based tool. A study in Nebraska indicated that the failure to appear rate was almost double for those who resided in urban areas as compared with those in rural ones.<sup>54</sup> There was a 12.4% failure to appear rate for urban locations compared with a 6.8% rate in rural locations.<sup>55</sup> This could also be due to the fact that “[d]efendants with low trust in the courts were less likely to appear than those with higher trust” and different states—and even different counties within states—may have varying levels of trust in the court system.<sup>56</sup> Take a defendant’s failure to appear statistic, for example. In general, a 25

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49. PEW CTR. ON THE STATES, 2011 KENTUCKY REFORMS CUT RECIDIVISM, COSTS (2011), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2011/2011kentuckyreformscutrecidivism.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/2011kentuckyreformscutrecidivism.pdf).

50. Eaglin, *supra* note 28, at 108.

51. PEW CTR. ON THE STATES, STATE OF RECIDIVISM THE REVOLVING DOOR OF AMERICA’S PRISONS 12 (2011), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2011/pewstateofrecidivism.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/pewstateofrecidivism.pdf) [hereinafter STATE OF RECIDIVISM].

52. Eaglin, *supra* note 28, at 74.

53. See MARIE VANNOSTRAND & KENNETH J. ROSE, LUMINOSITY, INC., PRETRIAL RISK ASSESSMENT IN VIRGINIA 7 (2009), <https://university.pretrial.org/viewdocument/pretrial-risk-assess-2> (for example, in order to develop the Virginia Pretrial Risk Assessment Instrument, data was collected from seven different counties within Virginia that “varied substantially in community characteristics including: community type (urban, rural, and suburban)”).

54. BRIAN H. BORNSTEIN ET AL., REDUCING COURTS’ FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH 15 (2015).

55. *Id.*

56. *Id.* at abstract 2.

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percent failure to appear rate has been found in the United States.<sup>57</sup> However, this percentage “more likely varies considerably between local jurisdictions, the local process, and [the] nature of . . . defendants.”<sup>58</sup> This is important in assessing a defendant’s failure to appear rate and likewise should be taken into account in creating or adopting risk-assessments. Yet, the PSA, according to the LJAF, is usable by all states.<sup>59</sup>

Another example within the risk-based analysis is the defendant’s likelihood of committing new criminal or violent activity while on pretrial release. As explained above, the PSA’s categories include receiving points for previous offenses, previous incarcerations, and criminal convictions previously received.<sup>60</sup> Thus, recidivism of a particular defendant matters when determining the likelihood of release. However, the recidivism rates amongst the different states differ drastically. Between 2004 and 2007, New Jersey released approximately 14,000 people.<sup>61</sup> Of the people released, there was a 42.7% general recidivism rate from 2004 until 2007, prior to the 2014 enactment of New Jersey’s bail reform.<sup>62</sup> New Jersey was neither at the low nor high end of the recidivism rates: Wyoming had the lowest recidivism rate with 24.8% while Minnesota had a high of 61.2%.<sup>63</sup> Likewise, if data was used in the PSA from the states with a higher recidivism rate to calculate new criminal activity possibilities, it would be higher than that of a state with lower recidivism rates.

In Alaska, for example, the “likelihood that [a defendant] would be re-arrested on another offense while out on bail was 37 percent.”<sup>64</sup> Compared with the estimated 12% of New Jersey defendants that “were charged with a new offense while awaiting trial,<sup>65</sup> it would be inaccurate that a risk-assessment should score defendants in Alaska and New Jersey in the same way, since Alaska’s rate of a new criminal

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57. JUSTICE INITIATIVE INSTITUTE, CONSIDERING A RETURN TO COMMERCIAL BAIL IN WISCONSIN 1,

[http://d3n8a8spro7vhmx.cloudfront.net/jiinstitute/pages/14/attachments/original/1371664935/Point\\_Counterpoint\\_06122013.pdf?1371664935](http://d3n8a8spro7vhmx.cloudfront.net/jiinstitute/pages/14/attachments/original/1371664935/Point_Counterpoint_06122013.pdf?1371664935) (last visited Mar. 20, 2019).

58. *Id.*

59. *Public Safety Assessment*, *supra* note 17, at 5.

60. ACLU OF N.J. ET AL., *supra* note 4, at 11.

61. STATE OF RECIDIVISM, *supra* note 51, at 11 exhibit 1.

62. *Id.*

63. *Id.*

64. Pamela Cravez, *Pretrial Risk Assessment Tool Developed for Alaska* 1, ALASKA JUSTICE F. (Winter 2018), <https://scholarworks.alaska.edu/bitstream/handle/11122/8088/ajf.343a.pretrial-risk-assessment.pdf>.

65. S.P. Sullivan, *N.J. Bail System Just Went Through Massive Change on Who Stays Locked Up. Is It Working?*, NJ ADVANCE MEDIA (Feb. 19, 2017), [https://www.nj.com/politics/2017/02/how\\_njs\\_massive\\_bail\\_overhaul\\_working\\_out.html](https://www.nj.com/politics/2017/02/how_njs_massive_bail_overhaul_working_out.html).

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conviction is over three times as high as New Jersey's.<sup>66</sup> Likewise, it seems unlikely that one risk assessment tool would be as accurate as possible in both New Jersey and Alaska.

To further understand this large data collection flaw in different terms from criminal data collection, “consider the Twitter data generated by Hurricane Sandy[. M]ore than 20 million tweets between October 27 and November 1” were generated.”<sup>67</sup> The most tweets during this period came from Manhattan which “makes sense given the city’s high level of smartphone ownership and Twitter use, but it creates the illusion that Manhattan was the hub of the disaster” while “[v]ery few messages originated from more severely affected locations . . . [a]s extended power blackouts drained batteries and limited cellular access.”<sup>68</sup> Likewise, this data collected was not reflective of the storm as a whole, although a large amount of data was drawn. In the criminal context, the LJAF data could have been drawn from courts that, for example, keep very accurate records due to their high failure to appear rates. Put simply, data could have been drawn that does not exactly, and thus does not accurately, reflect New Jersey defendant behavior.

Among the states, there is major variance in defendant conduct based on several factors and this could ultimately influence pretrial behavior. If the data that is collected “draws inferences from a biased sample of the population, any decision that rests on these inferences may systematically disadvantage those who are under- or overrepresented in the dataset.”<sup>69</sup> With New Jersey using the PSA, it may very well be that New Jersey defendants, as a whole are underrepresented in the LJAF dataset. Therefore, defendants that are detained when they should be released are disadvantaged, while the community as a whole is disadvantaged when New Jersey defendants that should be detained, are not.

*B. Developer’s Discretion*

When an assessment is being created, the developers have discretion in many different aspects of design. “Numbers can’t speak for themselves, and datasets—no matter their scale—are still objects of human design.”<sup>70</sup> This is because “[d]evelopers make judgment calls

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66. See STATE OF RECIDIVISM, *supra* note 51, at 10 exhibit 1.

67. Crawford, *Hidden Biases*, *supra* note 46.

68. *Id.*

69. Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 681 (2016).

70. Crawford, *Hidden Biases*, *supra* note 46.

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about what factors to study in a data set.”<sup>71</sup> Ezekiel Edwards, director of the ACLU’s Criminal Law Reform Project stated that “algorithms and predictive tools are only as good as the data that’s fed into them . . . . Much of that data is created by man, and that data is infused with bias”<sup>72</sup> and “[t]he efficacy of” using large amounts of data “is fundamentally dependent on the quality of the data” from which the data is drawn.<sup>73</sup>

Thus another factor of inaccuracy is that “[d]evelopers shape the basics of the tool at the outset of the design process based upon available data. Whether data is already available, or how much time and money it may cost to obtain data, will shape tool-construction decisions.”<sup>74</sup> Likewise, “[b]ecause not all data is created or even collected evenly, there are ‘signal problems’ in big-data sets—dark zones or shadows where some citizens and communities are overlooked or underrepresented.”<sup>75</sup> For example, states that may not have the requisite funds and technology to compile data can be completely excluded from the data collected<sup>76</sup> or may not want for organizations to intrude for data collection purposes and potentially expose negative aspects of their criminal justice system which may “increase[] exposure to criticism and litigation.”<sup>77</sup>

However, it is unclear what data is actually used by the LJAF and from where it is drawn as “[o]bscurity in tool construction is a pressing problem. Many tool developers refuse to disclose some or all of the key information critical to understanding the value of the risk estimates produced by predictive risk tools.”<sup>78</sup> The PSA simply gives a number from an algorithm without an “explanation for their results other than the numerical outcomes translated into risk scores.”<sup>79</sup> The LJAF does not go into depth about the 300 jurisdictions that the data was pulled from, though the LJAF says the data was “from diverse jurisdictions

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71. Eaglin, *supra* note 28, at 79.

72. See Issie Lapowsky, *One State’s Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIRED (Sept. 5, 2017, 7:00 AM), <https://www.wired.com/story/bail-reform-tech-justice/>.

73. Barocas & Selbst, *supra* note 69, at 687.

74. Eaglin, *supra* note 28, at 101.

75. Crawford, *Hidden Biases*, *supra* note 46.

76. Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L.J. 349, 389 (2017).

77. *Id.*

78. Eaglin, *supra* note 28, at 105.

79. *Id.* at 106.

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from across the country.”<sup>80</sup> Additionally, there have been confidentiality agreements by the LJAF which would “bar[] the court from disclosing any ‘information about the [PSA], including any information about the development, operation[,] and presentation of the [PSA]”<sup>81</sup>

Another problem is that with the data that is drawn, developers may “‘clean’ the data . . . often introducing their assumptions into the data collection process . . . [and b]ecause data sets originate from a variety of sources, information provided may be incorrect.”<sup>82</sup> For example, if the developer receives data on one defendant that does not make sense, they could alter it to reflect what they believe it should mean, or in the alternative, scrap that piece of data altogether.<sup>83</sup> That ultimately skews the data because “one cannot be certain how many such judgment calls are made without detailed disclosure from the developers.”<sup>84</sup> But this could also explain why the LJAF began with over 1.5 million cases and ultimately only used 746,525 cases in their creation of the PSA.<sup>85</sup> All of these factors are detrimental to a comprehensive collection of nationwide data.

The discretion of the LJAF created a system that was based on what it believed to be the best system using data that they believed was representative. New Jersey, in creating its own system, will be able to appropriately and accurately create a data set that reflects New Jersey’s best interests.

## VI. CONCLUSION

Now is an ideal time to reform New Jersey’s pretrial system. Judge Glenn A. Grant, acting Administrative Director of the Courts, stated that “[t]he PSA . . . is not a static instrument, and we have always

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80. *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices* 16 n.49, UTAH ST. CTS. (Nov. 23, 2015) (citing *Public Safety Assessment*, *supra* note 17, at 5).

81. Tom Simonite, *When Government Rules by Software, Citizens are Left in the Dark*, WIRED, (Aug. 17, 2017, 7:00 AM), <https://www.wired.com/story/when-government-rules-by-software-citizens-are-left-in-the-dark/> (internal citations omitted).

82. Eaglin, *supra* note 28, at 80.

83. *See id.* (“[A] . . . report may state that a defendant is twenty-seven and recently completed a 100-year sentence for armed robbery. Researchers seeking to use that information will either ‘fix’ the information or throw the defendant out of the data set. ‘Fixing’ the information requires subjective judgments about what the information likely means . . . [A] researcher may assume that a defendant either served ten years . . . [a]nother may assume . . . one year . . . . Faced with the choice to exclude or fix the data, different developers may choose alternative responses.”).

84. *Id.*

85. DEVELOPING A NATIONAL MODEL, *supra* note 45, at 3.

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envisioned that we would rely upon our actual experiences in New Jersey to make further refinements or adjustments to these tools.”<sup>86</sup> Likewise, “[b]ail reform needs time to operate and evolve. Adjustments should be considered and some may be adopted.”<sup>87</sup> As the New Jersey Pretrial Manual states, “[a]voiding unnecessary pretrial confinement should be of paramount importance to every court system.”<sup>88</sup> Thus, New Jersey must ensure that the data and system used to decide the release and detainment of defendants is as specific and thus as accurate as possible. Yet the New Jersey Pretrial Justice Manual explains that the PSA “was validated using more than 750,000 cases in *other* jurisdictions . . .”<sup>89</sup> So it is actually possible that not a single New Jersey case was drawn for the LJAF data analysis and New Jersey is impacted by this.

Take gun charges for example. After the PSA was implemented in New Jersey, it had to be quickly altered and adjusted so that when a defendant had a gun charge, he or she would receive a “no release” recommendation.<sup>90</sup> This alteration had to occur because the “PSA [took] . . . a ‘neutral view’ of gun possession. Because [the PSA] was trained on data from across the country, and because some states have far more lax gun regulations than New Jersey does, the PSA [did not] consider mere gun possession as an outsized risk.”<sup>91</sup> However, it is clear that New Jersey should take gun possession to be an extreme risk. But this realization was at the expense of innocent members of society that were harmed in the process of releasing dangerous defendants due to these inaccuracies of the PSA when used on New Jersey defendants.<sup>92</sup>

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86. Press Release, New Jersey Courts, Supreme Court Approves Changes to Pretrial Release Recommendations for Gun Crimes, Repeat Offenders (May 25, 2017).

87. Editorial Bd., *Editorial: Don't Bail on Bail Reforms*, ASBURY PARK PRESS (Apr. 24, 2017, 4:44 PM), <https://www.app.com/story/opinion/editorials/2017/04/24/bail-reform-new-jersey-fulop/100856820>.

88. ACLU OF N.J. ET AL., *supra* note 4, at 4.

89. *Id.* (emphasis added).

90. Press Release, New Jersey Courts, *supra* note 86 (“[D]efendants charged with any one of 13 weapons offenses . . . including[ing] . . . possession of a weapon by a convicted felon or possession of an assault firearm –and . . . charges that involve weapons other than guns, such as explosives.”).

91. Lapowsky, *supra* note 72.

92. See Colleen O’Dea, *Mother of Murder Victim Sues to End N.J.’s Criminal Justice Reform*, N.J. SPOTLIGHT, (Aug. 1, 2017), <https://www.njspotlight.com/stories/17/08/01/mother-of-murder-victim-sues-to-end-nj-s-criminal-justice-reform/> (discussing a case when a mother sued former Governor Chris Christie and the LJAF after her son was shot 22 times while walking down the street. His murderer was arrested just four days earlier, charged with unlawful possession of a handgun, and released. The suit contends that the murderer “would have been locked up had it not been for bail reform’s use of a public safety assessment created by the Laura and John Arnold Foundation.”); Jessica Remo, *You Won’t Believe How Many Times This Accused Burglar Has Been Released*, NJ ADVANCE MEDIA (Mar. 3, 2017), <http://www.nj.com/union/index.ssf/2017/03/>

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But now imagine that an altered system that *does* take gun violence into account was transferred over to states like Louisiana and Massachusetts. This system would have differing results on the defendants in these two states. For example, for every 100,000 residents, Louisiana has 9.1 murders by firearms, compared with Massachusetts which only has 1 murder per 100,000 residents.<sup>93</sup> Similarly, Massachusetts is the third most strict state in its gun laws, while Louisiana is the 46<sup>th</sup> most strict state.<sup>94</sup> It is difficult to see how one algorithm would be able to take these vast differences into account while still accurately predicting what each defendant may or may not do if released pretrial. Instead, each state could take into account its own statistics, laws, and defendant conduct when creating a suitable algorithm.

A proactive approach to changing the PSA should be taken instead of waiting for more issues and irregularities to occur and consequently having to take remedial action. In the words stated on LJAF's website, "failing to appropriately determine the level of risk that a defendant poses impacts future crime and violence and carries enormous costs—both human and financial."<sup>95</sup> Under a reformed system, the developers could draw data from different counties throughout New Jersey and be as inclusive and diverse as possible. Additionally, unlike the PSA, a new system can be geared solely and exclusively to New Jersey's policies, criminal objectives, and state-specific laws. A reformed system would allow the discretion of the developers to be geared towards New Jersey itself and if there is data that is unclear, it could be replaced or edited under a consistent standard or replaced with other similar local data to ensure that a comprehensive, complete data set that is representative of the entire state is used.

Using New Jersey defendant data to analyze a defendant's pretrial risk is the most accurate and efficient way to ensure that the correct defendants are released and the correct defendants are detained. This will ultimately ensure that New Jersey's defendants are protected from incorrect detainments, but it will also go towards the overall safety of the community to ensure those who pose a danger to society or the effectiveness of the criminal justice system are properly detained. There is no better time to begin this change than now.

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dawud\_ward\_arrested\_again\_for\_burglary\_bail\_reform.html (discussing a case when a defendant was arrested 12 times and continuously released under the PSA).

93. *Gun Laws vs. Gun Deaths*, SAFEHOME.ORG, <https://www.safehome.org/resources/gun-laws-and-deaths/>.

94. *Id.*

95. DEVELOPING A NATIONAL MODEL, *supra* note 45, at 2.