RESPONSE

PRESUMPTIVE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS

CHRISTOPHER SLOBOGIN*

One proposed reform of the pretrial detention system is the adoption of risk assessment instruments to assist courts in determining who is at risk of reoffending or a flight risk. This Response to Professor Melissa Hamilton's Article, Modelling Pretrial Detention*, proposes that under most circumstances the results of well-validated instruments should not only inform pretrial outcomes but should dictate them, on the ground that such results are more likely to be accurate than judicial decision-making. The Response also provides evidence that this reform would significantly reduce pretrial detention rates and, consistent with Professor Hamilton's findings, avoid producing racially disparate results.*

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INTRODUCTION

Our pretrial detention system is a travesty. As Melissa Hamilton notes in her Article, *Modelling Pretrial Detention*,[1] each year that system detains hundreds of thousands of arrested individuals for days or months, in

* Milton Underwood Professor of Law, *Vanderbilt University*.

1. Melissa Hamilton, *Modelling Pretrial Detention*, 72 AM. U. L. REV. 519 (2023).

the absence of a conviction and often on minor charges,[2] based on the speculation that they might pose a risk to the community or fail to return for later proceedings.[3] Over 95% of arrestees in the United States are subjected to pretrial detention of at least a couple of days.[4] By comparison, only about 3% of people arrested in Germany are detained prior to trial; most are given summons to appear at an appointed time.[5]

The cash bail system that exists in most states allows detained individuals to obtain release only if they can pony up either a significant sum of money for the court or, if they cannot, a fraction of it for a bondsman, who gets to keep the money whether or not the defendant shows up for trial.[6] Alternatively, in many states the court can simply decide to detain the person preventively without bothering with a bail arrangement.[7] As a result of these various pretrial regimes, the lives of suspects and their families are disrupted,[8] arrestees are often detained in horrendous conditions,[9] and all of those detained,

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2. *See* RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN, & PEGGY MCGARRY, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA, VERA INST. OF JUSTICE 5 (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/RAK5-HF5Z] ("[N]early 75 percent of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses.").

3. Hamilton, *supra* note 1, at 532 ("[A]pproximately 550,000 individuals at any given time reside in jails around the country awaiting hearings concerning pending charges.").

4. SUBRAMANIAN ET AL., *supra* note 2, at 22.

5. CHRISTINE MORGENSTERN, *Alternatives to Pre-trial Detention*, *in* ENCYC. OF CRIMINOLOGY & CRIM. JUS. 68, 69 (Gerben Buinsma & David Weisburd eds., 2014).

6. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1100 (2019) ("[T]he vast majority of pretrial detainees in the United States are confined because they cannot afford to post a bail amount set according to a schedule or after a perfunctory hearing.").

7. *Id.* at 1104–05 (describing federal and state statutes).

8. *See* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html [https://perma.cc/T9KG-HBQK] (describing the consequences of pretrial detention on poor defendants in New York's Criminal justice system, including lost wages, homes, child custody, and opportunity to meaningfully assist in the defense).

9. WASH. LAWS.' COMM. FOR CIV. RTS. & URB. AFFS., D.C. PRISONERS: CONDITIONS OF CONFINEMENT IN THE DISTRICT OF COLUMBIA 1 (2015) (detailing "[t]he appalling conditions of confinement in D.C. prison facilities, especially in light of their disproportionate impact on African-Americans").

guilty and innocent alike, are pressured to plead guilty simply to escape jail.[10]

Relying on a variety of legal sources, including the Sixth, Eighth, and Fourteenth Amendments, scholars have argued that pretrial detention, or at least the cash bail system, should be abolished.[11] But an end to all pretrial detention is unlikely to happen. The disdain for criminals and the fear of crime is too strong in this country for the abolitionist position to gain traction.[12]

There is a compromise, however, that could both radically reduce pretrial detention and satisfy those concerned about public safety. In my book, *Just Algorithms: Using Science to Reduce Incarceration and Inform a Jurisprudence of Risk*,[13] I argue that risk assessment algorithms that identify high risk individuals, if properly validated and properly used, can drastically reduce prison and jail populations without significantly increasing crime rates.[14] As Professor Hamilton notes, a number of jurisdictions have for some time relied on these instruments to inform judicial decision-making.[15] But I argue that the full potential of the tools cannot be realized unless judges are normally *required* to endorse their results; as the first two words of my book's title suggest, I contend that the algorithmic result should be treated as presumptively

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10. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 133 ("Those who cannot make bail feel increased pressure to plead guilty because each successive day in jail means lost liberty, lost income, and separation from family."); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 831–33 (2018) (detailing statistics describing the number of innocent people who plead guilty to avoid prolonged pretrial detention).

11. *See* René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667, 675 (2021) (briefly describing the arguments).

12. *See* Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, THE MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states [https://perma.cc/BS3N-4QQF] (noting that New York state's bail reform statute, which focused simply on ending cash bail for large numbers of offenders rather than adopting a risk-based system of the type described here, was repealed shortly after implementation because of reports of increased criminal activity).

13. CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK (2021).

14. *Id.* at 25–36.

15. *See* Hamilton, *supra* note 1, at 555 ("The PSA is the most commonly used pretrial risk assessment tool in the United States, having been adopted in at least four states and many major metropolitan areas.").

dispositive so that, barring unusual circumstances, pretrial detention occurs only when a validated risk assessment instrument indicates the individual is high risk with respect to flight risk or criminal activity.[16]

I. THE VALUE OF RISK ASSESSMENT INSTRUMENTS

One such instrument that might fulfill this role is the focus of Professor Hamilton's paper, the Arnold Ventures' Public Safety Assessment ("PSA").[17] The instrument relies on nine risk factors—involving prior convictions, failures to appear, pending charges, and age—to assess three issues: (1) the pretrial risk of failing to appear in court; (2) the pretrial risk of being arrested for new criminal activity; and (3) the pretrial risk of being arrested for new violent criminal activity.[18] Not all of the risk factors are used to predict each pretrial outcome, but those factors that are used and present in a given case are assigned a certain number of points. After all relevant factors are considered, the points are totaled and converted to a one- to six-number scale, with a score of six signifying the highest degree of risk.[19]

Professor Hamilton's study of Cook County indicates that far less than 10% of those evaluated under the PSA were considered high risk in the cohort she examined.[20] So if only high risk individuals were subject to detention, vast numbers of individuals currently detained prior to trial could instead be released. At the same time, people who are released because they are designated "low" and "medium" risk are not likely to threaten the community or dodge legal proceedings.[21] Although it is not clear from her paper how either Professor Hamilton or Cook County defined these terms, the developers of the PSA apparently equate low and medium risk with scores below a five on the

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16. *See* SLOBOGIN, *supra* note 13, at 75–80 (describing research finding that "adjusting" an algorithmic score decreases accuracy).

17. *See* LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 4 (2013), https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-research-summary_PSA-Court_4_1.pdf [https://perma.cc/AK7W-ZJMB].

18. Hamilton, *supra* note 1, at 556.

19. LAURA & JOHN ARNOLD FOUND., *supra* note 17, at 4 (describing the instrument's three six-point scales).

20. The PSA evaluations reported by Hamilton indicated that 7% of the arrestees were at high risk for failing to appear, and 8% were at high risk of committing a violent crime if released. Hamilton, *supra* note 1, at 567.

21. *Id.*

PSA.[22] If so, based on the validation studies conducted by Arnold Ventures, a person designated low or medium risk shares risk factors with a group, less than 4.5% of whom were rearrested for a violent offense prior to trial; a person designated low or medium risk for any crime shares risk factors with a group, less than 30% of whom were arrested for any indictable offense prior to trial; and a person designated low or medium risk for failure to appear shares risk factors with a group, less than 30% of whom failed to appear.[23]

While those fixated on crime control might think that these risk percentages are too high, research in a number of jurisdictions that use the PSA indicates that crime and failure-to-appear rates have not increased substantially.[24] In a regime where PSA results were treated as presumptive, as I advocate, those rates admittedly might trend upward.

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22. *See* MAPPING PRETRIAL INJUSTICE, *Common Pretrial Risk Assessments*, https://pretrialrisk.com/the-basics/common-prai [https://perma.cc/3WER-6FZV] (noting that a score of 5 or 6 on the PSA "would be considered 'high risk' in many jurisdictions").

23. *See* LAURA & JOHN ARNOLD FOUND., *supra* note 17, at 4 (showing recidivism and failure to appear statistics in validation samples). Others have also found that, if "high risk" is defined to include only those who have a significant probability of committing *violent* crime, the recidivism figures are very low. *See also* Cristopher Moore, Elise Ferguson & Paul Guerin, *How Much Risk and Risk of What? A Closer Look at Pretrial Risk Assessment*, 16 (Feb. 8, 2023) (unpublished manuscript), https://ssrn.com/abstract=4352036 [https://perma.cc/UFQ2-2A95] (finding that the total violent crime rate defendants with a new criminal activity score of 5 or 6 is 4.8–5.5%, that the majority of these felony charges were for felonies in the fourth degree, and that "[t]he rate of rearrest for violent felonies of 1st, 2nd, and 3rd degree is at most 0.2%, 1.1%, and 1.5% (with standard deviations of 0.3%).").

24. *See* Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases [https://perma.cc/3C2V-3L4Q]. One study of individuals released in Cook County, the focus of Professor Hamilton's study, found that after the PSA was introduced, only 0.6% of the 24,504 individuals released during the first fifteen months were rearrested for a violent crime prior to trial, although that study did not include domestic assault, battery, and simple assault in the violent crime category. Even with those crimes included, the rearrest rate was still only 2.4%. *See* JAMES AUSTIN & WENDY NARO-WARE, WHY BAIL REFORM IS SAFE AND EFFECTIVE: THE CASE OF COOK COUNTY 3 (2020), https://www.cookcountycourt.org/Portals/0/Cook_bailReport_final3_AW%20editsJA.pdf [https://perma.cc/RQM9-CDMD]; *see also* GLENN A. GRANT, CRIMINAL JUSTICE REFORM: ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 16, 40, 51 (2021), https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/cjr2021.pdf [https://perma.cc/EH3L-4XGR] (indicating that, in 2020 in New Jersey—a state that uses the PSA—the rate of pretrial detention was 9.2%, the rate of rearrests on indictable offenses was 20%, on serious gun-related offenses 0.6%, and on failures to appear 3%).

But consider the fact that the trigger for the pretrial process—arrest—requires probable cause under the Fourth Amendment,[25] and probable cause is often quantified in the 40 to 50% certainty range;[26] if probable cause is required for arrest, something approaching that level of risk ought to be required for prolonged detention after arrest as well. Indeed, one survey found that participants believed pretrial detention should not be permitted unless there is a *60%* chance of recidivism.[27] These observations recognize that while some low and medium risk individuals will commit a crime or fail to appear (false negatives), that number pales in comparison to those who would be unnecessarily confined if the cut-off score were set lower (false positives).[28] Furthermore, false negatives can be reduced through the imposition of conditions, such as substance abuse treatment, ankle monitors, reminders about trial dates, and transportation assistance.[29]

Most importantly, if PSA results are not made presumptively dispositive, judges, virtually all of whom are elected, are likely to revert to a preference for detention, despite its debilitating effects on those detained. Megan Stevenson's study of how the PSA fared in Kentucky makes the point.[30] Although Stevenson found that overall the PSA only reduced the rate of release by about 4%, she also found that the introduction of the PSA *initially* occasioned a sharp increase in overall

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25. Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause . . . .").

26. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 VAND. L. REV. 1293, 1327 (1982) (survey of judges finding that, on average, probable cause is equated with a 45% level of certainty).

27. Nicolas Scurich & Daniel Krauss, *Public's Views of Risk Assessment Algorithms and Pretrial Decision Making*, 26 PSYCH. PUB. POL'Y & L. 1, 5 (2020); *see also* PEW CHARITABLE TRS., *Americans Favor Expanded Pretrial Release, Limited Use of Jail*, fig.8 (Nov. 21, 2018) (66% would be willing to release an individual with a 30% chance of pretrial arrest).

28. Cristopher Moore, Elise Ferguson & Paul Guerin, *How Accurate Are Rebuttable Presumptions of Pretrial Dangerousness?: A Natural Experiment from New Mexico* J. EMPIRICAL LEG. STUDIES (forthcoming 2023) (finding, based on a study of New Mexico pretrial detention practices, that even if only those with a score of 6 are detained, the false positive rate was 71%).

29. *See* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1764–65 (2018) (describing ways to minimize failures to appear); Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1404 (2014) (arguing that ankle monitors should often replace detention).

30. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018).

release rates (without, apparently, an increase in crime rates).[31] It was only over time that release rates crept back down.[32] Stevenson conjectures that this relapse occurred because judges erroneously decided they were better at assessing risk than a risk tool.[33] It was also the case that judges faced no repercussions for failing to give the PSA presumptive effect; the Kentucky Supreme Court apparently did not care how the judges treated the instrument's results.[34] Stevenson's study suggests that unless judges are required to follow the PSA (barring truly exceptional circumstances), the usefulness of algorithms in minimizing unnecessary detention will be seriously compromised; judges will discount the algorithm because they trust their own instincts,[35] disdain "voodoo" numerology,[36] or lack confidence in the instrument.[37]

Judges need to be disabused of these notions, at least if the right preconditions exist. The most important precondition is that risk assessment instruments like the PSA be well-validated. That means they should be trained on data from the local jurisdiction, be periodically

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31. *See id.* at 352, 353 fig.3 (providing a visual summary of this point over a four-month period immediately before and after introduction of the PSA).

32. *Id.*

33. *Id.* at 369–70 (conjecturing that "judicial discretion was used not to correct the risk assessment when it erred, but to override the risk assessment when it was correct").

34. *Id.* at 343–44 (stating that "nowhere in [the statute authorizing use of the PSA] was judicial discretion limited. In a Kentucky Supreme Court order that clarified how judges should respond to [the statute], this was made abundantly clear, stating, 'Nothing in these guidelines shall be construed to limit the court's discretion as to whether or not to grant pretrial release to a defendant.'").

35. *See* Steven L. Chanenson & Jordan M. Hyatt, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* 10 (Villanova Univ. Charles Widger Sch. of Law, Working Paper No. 193, 2016), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1201&context=wps [https://perma.cc/XM34-M4SH] (summarizing a survey finding "a general belief among members of the judiciary their judgment was more accurate than actuarial at-sentencing assessments").

36. *See* Anne Metz, John Monahan, Luke Siebert & Brandon Garrett, *Valid or Voodoo: A Qualitative Study of Attorney Attitudes Towards Risk Assessment in Sentencing and Plea Bargaining* 16 (Va. Pub. L. & Legal Theory Rsch. Paper, Paper No. 2020-25, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552018 [https://perma.cc/WS4C-S2DE] (stating that skepticism about the sufficiency of risk assessment outcomes was one of the commonly cited concerns of judges).

37. *See* Matthew DeMichele, Megan Comfort, Kelle Barrick, & Peter Baumgartner, *The Intuitive-Override Model: Nudging Judges Toward Pretrial Risk Assessment Instruments*, 85 FED. PROB. 22, 27 (2021) (quoting one judge as saying about risk assessment instruments, "[i]t's important to understand that it's just a tool and that judges are the definitive answer").

re-evaluated, and have both good calibration and discriminant validity.[38] Assuming these requirements are met, the PSA is likely to outperform most, if not all, judges. As Sarah Desmarais and her colleagues concluded after comparing human decision-making to a number of risk assessment tools (including some that were not particularly well-validated): "There is overwhelming evidence that risk assessments completed using structured approaches produce estimates that are more reliable and more accurate than unstructured risk assessments."[39]

II. CRITICISMS OF RISK ASSESSMENT INSTRUMENTS

Even on the assumption that risk assessment instruments outperform judges, many scholars and legal organizations have resisted the use of algorithms in the pretrial setting.[40] Three complaints stand out.

The first criticism is that risk tools are biased, racially and otherwise, because of the biased data used to develop them.[41] For instance, if racialized policing practices result in Black people being arrested more often than white people for drug possession crimes despite similar usage rates, then using possession arrests as a risk factor may give Black people inflated risk scores compared to white people.[42]

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38. *See* SLOBOGIN, *supra* note 13, at 68–74, 80–81 (explaining these types of validation and why they are important).

39. Sarah J. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCH. SERV. 206, 206 (2016).

40. *See, e.g.*, *More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONF. CIV. & HUM. RTS. (July 30, 2018), https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment [https://perma.cc/7PB6-XGXG] (explaining that over 100 civil rights, digital justice, and community-based organizations raised concerns over the adoption of algorithmic-based decision-making tools).

41. *See, e.g.*, PRETRIAL JUST. INST., THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS 1 (2020), https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df300e0218357bb223d689/1642017935113/The+Case+Against+Pretrial+Risk+Assessment+Instruments–PJI+2020.pdf [https://perma.cc/BY7X-3S6W] ("RAIs [risk assessment instruments] simply add a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future, based on information gathered from within a structurally racist and unequal system of law, policy and practice.").

42. *See* Cherise Fanno Burdeen & Wendy W. Shang, *The Case Against Pretrial Risk Assessment Instruments*, 36 CRIM. JUST. 21, 25 (2021) (stating that even criminal history

Professor Hamilton's Article is important because it tends to debunk this widely held view about the biased nature of risk tools. Through a meticulously conducted study, Hamilton demonstrates that, although Black people are over-represented in the detained population relative to their percentage in the arrested population, PSA outcomes mitigate that disparity substantially.[43] For instance, although she found that 26.1% of Black people were detained prior to their first hearing compared to 17.9% of white people,[44] her regression analysis discovered that this difference was explained primarily by scores on the PSA, not race.[45] Further, Hamilton found that the PSA seems to do a better job at eliminating this racial disparity than reliance on offense type and offense severity—the types of legal factors that usually inform unstructured pretrial decision-making. These findings suggest that if avoiding racial disparity is the goal, the PSA should be preferred over traditional methods of making pretrial decisions.[46] Of course, if the factors found on a risk assessment instrument like the PSA are themselves racially problematic (as suggested above with respect to arrests for drug crimes, for instance), then a claim of racial disparity could still be made. But unlike some risk assessment instruments,[47] the

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is "influenced by systemic racism," asserting that "arrests for drug-related offenses are a better indicator of where a person lives than whether an offense is taking place," and concluding that "[w]ith such tainted data going in . . . Black people are more likely to be erroneously categorized as 'high risk.'"); *see also* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2264 (2019) ("In statistical terms, the problem is that, as a result of disparate law enforcement practices, race might moderate the predictive value of certain variables (or the algorithm as a whole), such that the algorithm overestimates risk for [B]lack people relative to white people.").

43. *See, e.g.*, Hamilton, *supra* note 1, at 579 (concluding that when accounting for a variety of legal variables, the racial disparity in detention outcomes that affected Black defendants disappeared).

44. *Id.* at 570 fig.3.

45. *See id.* at 576 (finding that "Black and [o]ther race defendants are no more likely to be detained pretrial compared to [w]hite defendants after including the effects of a host of legal variables *plus* risk assessment predictions" and that Hispanic people are less likely than white people to be detained) (emphasis in original).

46. *See id.* at 574 (finding that, when "legal predictors" excluding risk assessment factors are taken into account, Black defendants were still more likely to be detained than whites, albeit at a less dramatic rate than when those factors were not regressed).

47. *See, e.g.*, SLOBOGIN, *supra* note 13, at 39 (describing the Violence Risk Appraisal Guide).

PSA's criminal history risk factors rely only on convictions, not arrests, which minimizes that problem.[48]

Evidence from San Francisco backs up the hypothesis that risk algorithms can reduce racial disparity.[49] There, a study involving 2,298 arrestees found that, compared to PSA results, both the probation department and judges making the pretrial decision significantly increased the number of people recommended for detention (in the case of the department) and detained (in the case of judges).[50] For instance, the PSA recommended that 9% of Hispanic arrestees be detained.[51] In contrast, the department advised that 27% of Hispanic arrestees be kept in jail (a threefold increase over the PSA), and judges upped the proportion again to 52%.[52] The analogous numbers for white arrestees were 24%, 39%, and 58%, and for Black people, 17%, 43%, and 65%![53] Clearly, not only were human decision-makers much less inclined to opt for release than the PSA score, but they were much more likely to choose detention for people of color, once again suggesting that the PSA—if made presumptive—can reduce bias. At the same time, even in San Francisco, the introduction of the PSA led to an increase in releases from 29% to 61%,[54] and only 2% of those released committed a violent crime within six months (with violent crime defined to include simple assault).[55]

These types of statistics suggest that risk assessment instruments like the PSA have some promise as relatively unbiased engines of decarceration that can, at the same time, be palatable to a punitive and fearful public. This is also the conclusion of other prominent

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48. *See* LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016) [hereinafter PUBLIC SAFETY ASSESSMENT] https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/L5MW-MCEK] (showing that the PSA's criminal history factors all involve convictions, although also showing that the PSA considers currently charged crime).

49. *See Public Safety Assessment (PSA) Implementation in San Francisco, Preliminary Data from the First Six Months*, Justice Syst. Partners, SHF000857 (2017), https://www.usbailreform.com/wp-content/uploads/2017/08/SHF000830-SHF000859.pdf [https://perma.cc/3RPH-DEH7].

50. *See id.* at SHF000851.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at SHF000858.

55. *Id.* These data also indicate that in San Francisco, as opposed to Chicago (the site of Hamilton's study), white people were more likely to get high PSA scores than any other racial group.

researchers. For instance, Sarah Desmarais, John Monahan, and James Austin have stated:

> [T]he scientific evidence behind [claims about inaccuracy and racial bias in pretrial risk assessment instruments] is lacking. Instead, the findings of rigorous research shows that the results of pretrial risk assessment instruments demonstrate good accuracy in predicting new criminal activity, including violent crime, during the pretrial period, even when there are differences between groups defined by race and ethnicity. Furthermore, the scientific evidence suggests they can be an effective strategy to help achieve pretrial system change, including reducing pretrial detention for people of color and white people, alike, when their results are actually used to inform decision-making.[56]

Nonetheless, critics have registered two other objections to these instruments. One concern is that, because the tools can only include a finite number of factors, all of which are based on data derived from groups of other people, they fail to make the individualized assessment demanded by the Constitution and general notions of fairness and procedural justice.[57] As Vincent Southerland puts it, algorithms emphasize quantitative data "over the narratives that shape the lives of the individuals to be judged by the state . . . in service of what amounts to profiling . . . ."[58] He proposes that algorithms be replaced by, or at least supplemented with, peoples' stories, with the goal of undermining racial and other stereotypes.[59]

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56. Sarah L. Desmarais, John Monahan & James Austin, *The Empirical Case for Pretrial Risk Assessment Instruments*, 49 CRIM. JUST. & BEHAV. 807, 807 (2022). A study that arrived at similar conclusions is reported in Joshua Grossman, Julian Nyarko & Sharad Goel, *Racial Bias as a Multi-Stage, Multi-Actor Problem: An Analysis of Pretrial Detention*, 20 J. EMPIRICAL LEG. STUDIES 86, 102 (2023) (stating, in a study of the impact of the PTRA, another pretrial risk assessment instrument: "We find evidence for at most modest effects of (perceptions of) race on decisions, with no statistically significant difference between Black and white defendants, and a statistically significant . . . gap between Hispanic and white defendants [with Hispanic people detained less often]").

57. *See generally*, Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System*, 15 OHIO ST. J. CRIM. L. 573, 574, 580 (2018) (noting that "even if [risk assessment instruments] can provide predictions that are more fair, efficient, and accurate than the clinical judgments made by human beings, they will never become widespread if they cannot gain public support[,]" and pointing out that the instruments often lack the transparency required by the Constitution and give the defendant little say in the process).

58. Vincent Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Justice System*, 80 MD. L. REV. 487, 552 (2021).

59. *Id.* at 554–55.

This concern about non-individualized profiling becomes particularly salient if, as I propose, the results of a tool like the PSA are considered presumptively dispositive. Yet it must be remembered that one reason to move toward risk assessment instruments and away from individualization is precisely because a person's "context" is subject to varying interpretations. Judges may end up believing that evidence that is meant to invoke leniency, such as descriptions about one's disadvantaged social situation or reasons for offending, instead *increases* risk.[60] Or, judges may simply understand and therefore prefer stories from middle-class individuals over those proffered by people from the lower classes.[61] Further, once story-telling becomes part of the analysis, the judge's rationale for any given decision becomes much less transparent. Whereas the PSA's risk factors are obvious from the face of the instrument, the judge's additional considerations, even if put in writing (which virtually never occurs in the pretrial setting[62]), are likely to be much more opaque and, accordingly, less challengeable. Thus, to my mind, the presumption in favor of the PSA result should be a strong one, rebuttable only by extremely persuasive evidence of risk ("he has threatened to kill his wife if released") or lack thereof ("he now has a job and a car, neither of which he had at the time of his two previous failures to appear").

A related, final attack on pretrial risk tools like the PSA focuses on the specific risk factors that are included in the algorithm. These factors tend either to be "static" historical facts (like prior convictions) or to describe a "status" (like age, which the PSA includes as a risk factor,[63] or gender, which is not included in the PSA but is found in some other instruments).[64] If the criminal justice system is based on moral blameworthiness, some have argued, neither static factors such

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60. *Cf.* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (noting how factors such as mental disability meant to be considered mitigating might be a "two-edged sword" and instead considered aggravating by the factfinder).

61. *See* Adam Benforado, *Can Science Save Justice?*, 101 JUDICATURE 24, 28 (2017) ("[T]he latest psychological research suggests that much of the [racially biased] skew [in sentencing] is not susceptible to conscious control. There is no magic switch to erase a life-time of exposure to damaging stereotypes that link the concepts of blackness and violence . . . .").

62. *See* Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2422 (2018) ("Judges are almost never required to explain their [pretrial detention] decisions, in written opinions or otherwise.").

63. *See* PUBLIC SAFETY ASSESSMENT, *supra* note 48, at 2, 3.

64. *See, e.g.*, SLOBOGIN, *supra* note 13, at 40 (describing the Non-Violent Risk Assessment tool used in Virginia, which includes gender as a risk factor).

as crimes for which people have served their time nor a status that does not involve conduct of any sort ought to be considered in deciding whether a person will be deprived of liberty.[65] As the Supreme Court put it in *Buck v. Davis*,[66] "our criminal law punishes people for what they do, not who they are."[67]

However, the *Buck* Court made that statement in the context of deciding that race may not be considered a risk factor, a situation it suggested was *sui generis*.[68] More importantly, *Buck* involved the post-conviction sentencing, not pretrial detention. In other cases, the Court has signaled that pretrial detention is a "regulatory" decision that does not involve a moral assessment hinging on what a person has done; nor does it trigger the presumption of innocence, which is primarily meant to emphasize the prosecution's proof burden at trial.[69] The Court has also clearly stated that pretrial detention may be based on assessments of risk.[70] Barring race, and perhaps gender, any risk factor that provides non-trivial incremental accuracy ought to be in play.[71]

The goal in the pretrial setting should be reaching the most accurate, unbiased risk assessment possible. Studies like Professor

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65. *See* Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 U. FLA. L. REV. 751, 768 (2009) (noting that "skeptics of risk assessment—many of the same voices that deem it 'preventive detention' or 'punishment for future crime'—condemn any reference to static factors whether or not related to protected classes[,]" and arguing that the argument is misguided when prevention of harm, as opposed to retributive punishment, is the goal).

66. 580 U.S. 100 (2017).

67. *Id.* at 103.

68. *Id.* at 124 (noting that basing punishment on an immutable characteristic is a violation of a "basic principle" that "was exacerbated [in this case] because it concerned race").

69. Bell v. Wolfish, 441 U.S. 520, 533, 537 (1979) (holding that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun" but rather "allocates the burden of proof in criminal trials [and] serve[s] as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody . . ."); *id.* at 537 ("This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints [like pretrial detention] that may.").

70. United States v. Salerno, 481 U.S. 739, 752 (1987) (upholding a statute allowing preventive detention on dangerousness grounds, "[g]iven the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers . . .").

71. For a fuller discussion of this issue, see SLOBOGIN, *supra* note 13, at 86–99.

Hamilton's help make the case that instruments like the PSA are the best way to pursue that goal.