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## Bail Reform and Intimate Partner Violence in Maine

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# BAIL REFORM AND INTIMATE PARTNER VIOLENCE IN MAINE

*Mac Walton*

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## BAIL REFORM AND INTIMATE PARTNER VIOLENCE IN MAINE

*Mac Walton*\*

### ABSTRACT

The bail reform movement is leading to pretrial practice changes across the country, largely aimed at reducing pretrial detention rates or uncoupling pretrial detention from money. These reforms often include expanding or formalizing the role of actuarial risk assessment tools in bail determinations. Maine has not enacted bail reforms to expressly reduce pretrial detention, but since 2015, Maine courts have been using a risk assessment tool in bail decisions in intimate partner violence cases. Analysis of risk assessment practices in Kentucky and New Jersey, in comparison with the particular considerations in IPV cases, can inform Maine's current bail system and provide models for bail reform.

### I. INTRODUCTION

Every Friday afternoon, a district court judge sits in the Capitol Judicial Center in Augusta and oversees in-custody arraignments. The courtroom itself is calm, quiet, and nearly empty, a stark contrast to the morning's in-person arraignment proceedings; only the judge, a clerk, one or two prosecutors, and a marshal are present, though every few days a defendant's family will attend. Sometimes a reporter is present as well. The defendants and their counsel (the "lawyer of the day") are video-conferenced in from the Kennebec County Jail next door.

They cycle through on the screen, few arraignments taking more than five minutes, the lawyer scrambling to read through the file she's just been handed, usually at the same time the judge obtains her own copy. The prosecutors are hardly better prepared—unless it was their case, they're just reading the file, too. An arraignment is a sequence of several events—reading of the charge, entry of the plea, appointment of counsel—and generally the most contentious is the setting of bail.<sup>1</sup> From a defendant's perspective, everything else can be dealt with down the road, but what's on their mind is going home; the bail is what's preventing that. The lawyers make their arguments, usually based on the severity of the alleged crime plus any aggravating or mitigating circumstances about the defendant, and after a minute or two, the judge sets bail.

The judge's bail determination is governed by a statute, 15 M.R.S.A. § 1026, which provides her two primary considerations: (1) there is a presumption of release

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1. Bail commissioners can set bail in Maine for most crimes, but any bail set by a bail commissioner is reviewable de novo in court upon petition. 15 M.R.S.A. § 1028(1) (1999).

on personal recognizance or unsecured bond,<sup>2</sup> unless (2) a certain cash bail or set of nonfinancial conditions is “reasonably necessary” to “ensure the appearance of the defendant [at court], . . . [or] ensure the safety of others in the community.”<sup>3</sup> To aid in her bail decision, the judge is provided a long list of statutory factors to consider. The judge also has a wide range of tools to accomplish these goals, divided along two axes. Along the financial axis, from least to most restrictive, a judge may release a defendant on their own recognizance or the execution of an unsecured bond, or require cash bail.<sup>4</sup> Along the nonfinancial axis, a judge may require a defendant to comply with a curfew; refrain from consuming alcohol or illegal drugs; have any contact with victims or witnesses of the alleged crime; or “any other condition that is reasonably necessary to ensure the appearance of the defendant [in court] . . . [or] ensure the safety of others in the community.”<sup>5</sup>

At the end of the day, the judge has broad discretion to set bail conditions and amounts. The judge’s decision may be informed by her work experience, her lived experience, the social norms of her peer group, her ideological or moral aspirations, and numerous other factors.<sup>6</sup> A judge’s assessment of a defendant’s dangerousness or flight risk is known as a “clinical” risk assessment, and traditionally it has been the default mode of assessing risk and guiding judicial decisionmaking. But there is an alternative to this unabridged judicial discretion with the potential for greater fairness: “actuarial” risk assessment,<sup>7</sup> which is based on statistically tested and verified empirical relationships between objective facts and outcome probabilities.<sup>8</sup> A number of states have incorporated actuarial risk assessment into one or several parts of their criminal justice regimes, and in 2017, New Jersey became the first state to adopt an actuarial risk assessment tool in order to eliminate money bail.

In 2012, Maine passed legislation requiring the adoption of a “validated, evidence-based domestic violence risk assessment” for use by police, prosecutors, judges, and other officers in opposite-sex intimate partner violence (IPV) cases: the Ontario Domestic Assault Risk Assessment (ODARA).<sup>9</sup> However, Maine has not

2. An unsecured bond allows the defendant to be released without paying anything, but if they fail to appear later or they violate other bail conditions, they forfeit the bond amount.

3. 15 M.R.S.A. § 1026(3)(A) (1999).

4. § 1026(1), (3)(A)(12) (1999); *see also* STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.4 (AM. BAR ASS’N 2007). The Maine Constitution provides that “[no] person shall be bailable for crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.” ME. CONST. art. 1, § 10. A probable cause standard determines when the “proof is evident or the presumption great.” *Harnish v. State*, 531 A.2d 1264, 1268 (Me. 1987).

5. § 1026(3)(A)(5), (7), (9), (18) (1999).

6. *See* William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL., PUB. POL’Y & L. 293, 294 (1996) (“the [clinical] method relies on an informal, ‘in the head,’ impressionistic, subjective conclusion”).

7. Sometimes known as “evidence-based” risk assessment; I will generally use “actuarial,” because it is more precise (clinical risk assessment is still “evidence-based,” after all).

8. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 443-44 (2016).

9. An Act to Mandate the Use of Standardized Risk Assessment in the Management of Domestic Violence Crimes, P.L. 2011, ch. 680, § 4. For two reasons, this Comment will generally use the term

joined the growing number of jurisdictions using actuarial risk assessment for broader pretrial purposes, despite repeated pushes from both the legislature and the judiciary.<sup>10</sup> In Part I of this Comment, I survey the contemporary bail reform movement and the push to adopt actuarial risk assessment in pretrial use. In Part II, I assess the implementation strategies of New Jersey and Kentucky, and describe a third approach suggested by scholarship.

In Part III, I describe Maine's IPV risk assessment tool, and compare and distinguish implementation strategies for "general" risk assessment from those for IPV risk assessment, as the different contexts implicate different constitutional, historical, and social justice concerns. I argue that Maine's criminal justice system could successfully incorporate actuarial risk assessment into bail practice, but that Maine's experience with ODARA must inform, and remain a part of, bail reform in Maine.

## II. THE CONTEMPORARY BAIL REFORM MOVEMENT

The practice of pretrial detention—of jailing a person who has not yet been convicted of the crime for which he has been arrested—has ancient roots, as does the related practice of allowing that person to be released under certain conditions.<sup>11</sup> Until the 1960s, bail procedures in the United States were a patchwork of common law and statute, with a constitutional provision tossed in for good measure. The Bail Reform Act of 1966, passed during that decade's great wave of liberalization, aimed to safeguard the pretrial rights of federal criminal defendants.<sup>12</sup> Among other changes, the 1966 Act did not permit a judge to consider a defendant's dangerousness in setting bail except in cases involving capital offenses; the primary goal of bail,

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"intimate partner violence": first, because ODARA is validated only in cases of intimate partner violence, but not in some other cases that Maine also defines as "domestic violence," such as parent-child violence, see 19-A M.R.S.A. § 4002(4) (2012); and second, because the term "domestic violence" can trivialize or minimize its seriousness. However, I will occasionally use the term "domestic violence" to facilitate discussions of statutes and historical arguments. Additionally, ODARA has not been adopted for assessment of same-sex relationships, as the developers have not had sufficient sample sizes to statistically validate it. N. ZOE HILTON ET AL., RISK ASSESSMENT FOR DOMESTICALLY VIOLENT MEN 131-32 (2010).

10. Scattered jurisdictions and police departments were using risk assessment for certain crimes; for instance, Saco Police adopted ODARA in 2009 for use in IPV cases. However, there was little broad or systematic use of actuarial risk assessments across the state. *An Act to Mandate the Use of Standardized Risk Assessment in the Management of Domestic Violence Crimes: Hearing on L.D. 1711 Before the J. Standing Comm. on Crim. Just. and Pub. Safety*, 125th Legis., (Feb. 13, 2012) (testimony of TammyJo Girard, Saco Police Department) (on file with author).

11. See generally TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INSTITUTE, THE HISTORY OF BAIL AND PRETRIAL RELEASE (updated Sept. 24, 2010), [https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI\\_2010.pdf](https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf) [<https://perma.cc/2Z6L-3SND>]. Indeed, the Supreme Court never even addressed bail until 1951's *Stack v. Boyle*. In *Stack*, the Court elucidated the rationale of bail (to ensure "the presence of the defendant" at trial) and held that bail "set at a higher figure than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." 341 U.S. 1, 5 (1951).

12. SCHNACKE ET AL., *supra* note 11, at 12.

under the 1966 Act, was to ensure the “appearance of the defendant at trial.”<sup>13</sup> This approach was quickly adopted by many states.<sup>14</sup>

The crime wave of the 1970s and 80s swung the political pendulum back in an authoritarian direction, which culminated at the federal level in the Bail Reform Act of 1984. The 1984 Act permitted federal judges to detain defendants whenever release might “endanger the safety of any other person or the community.”<sup>15</sup> In 1987, in *United States v. Salerno*, the Supreme Court upheld the 1984 Act against Due Process and Eighth Amendment challenges. On the Due Process issue, the Court held that pretrial detention for public safety reasons was regulatory, not punitive, and, therefore, that the 1984 Act’s procedural safeguards were sufficient to support pretrial detention based on a defendant’s dangerousness.<sup>16</sup> On the Excessive Bail challenge, the Court held that “[n]othing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight”;<sup>17</sup> in other words, pretrial detention could be validly based on “community safety” considerations. In the wake of the 1984 Act and *Salerno*, and in response to increasing crime rates, many states—Maine among them—added community safety provisions to their bail codes,<sup>18</sup> and public safety is now the conventional lens through which most people, both within the criminal justice system and in the world at large, view bail.<sup>19</sup>

Recent years have seen a renewed political and cultural drive to liberalize the state and federal bail systems.<sup>20</sup> In this part, I survey the reasons for this shift and describe the various strategies and goals of the contemporary bail reformers.

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13. *Id.* at 14. See also Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152 (2012).

14. See John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 8-9 (1985).

15. 18 U.S.C. § 3142(b) (2012); see also Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 905, 960 (2013). In 1984, federal prosecutors were more focused on immigration, regulatory infractions, and fraud than with drugs or violent crime. See Marie VanNostrand & Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION 3, 4 (2009) (citing Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1985* (July 1990)).

16. *United States v. Salerno*, 481 U.S. 739, 747, 752 (1987). As will be discussed below, the challenge in *Salerno* was only facial, and lower courts have found procedural Due Process violations in individual cases.

17. *Id.* at 754-55.

18. SCHNACKE ET AL., *supra* note 11, at 18 (“By 1999 . . . at least 44 states and the District of Columbia had statutes that included public safety . . . as an appropriate consideration in the pretrial release decision.”).

19. See *infra* notes 46-48 and accompanying text.

20. See, e.g., Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/M42L-B7P2>] (telling the story of Kalief Browder, a black teenager who spent three years incarcerated on Rikers Island after being accused of stealing a backpack. Browder’s family could not afford his bail; he was finally released only when the prosecutor dropped the case. Browder killed himself in 2015.).

*A. The Problem of Money Bail*

Bail systems based on money have long been thought constitutionally dubious,<sup>21</sup> but in practice have been deeply resilient. A combination of factors have inhibited reform: tradition;<sup>22</sup> the political marginalization of those classes most disproportionately affected by bail's harms;<sup>23</sup> and simple cultural inertia (i.e., the lay perception that pretrial practice simply *is* cash bail). Recently, however, the movement has been reinvigorated by increased public awareness of the normative and policy problems of money bail specifically, and the American criminal justice system generally.<sup>24</sup>

Cash bail, as currently practiced in most jurisdictions, raises several constitutional issues, even after *Salerno*. First, a money bail system will inevitably "cause[] individuals to be jailed simply because they lack the financial means to make a bail payment"; this "wealth-based distinction" violates Equal Protection and Due Process principles.<sup>25</sup> It is generally recognized that bail practices that "result in incarceration based on poverty" violate the Constitution.<sup>26</sup> A jurisdiction may not, therefore, "systematically" impose secured money bail on impoverished defendants as a de facto pretrial detention order.<sup>27</sup> Even a nominally constitutional process relies

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21. See generally Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441 (1978).

22. Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1352 (2014).

23. See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1359-61 (2012).

24. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU.ORG (Dec. 11, 2017), <https://www.aclu.org/blog/mass-incarceration/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> [<https://perma.cc/SA4H-7AU6>].

25. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, *MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 6* (2016), <http://cjpp.law.harvard.edu/publications/primer-bail-reform> [<https://perma.cc/8B8K-VSH8>] [hereinafter *MOVING BEYOND MONEY*]; see also TIMOTHY R. SCHNACKE, NATIONAL INSTITUTE OF CORRECTIONS, *FUNDAMENTALS OF BAIL 11-13* (Aug. 2014), [http://clebp.org/images/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8\\_2014.pdf](http://clebp.org/images/2014-11-05_final_bail_fundamentals_september_8_2014.pdf) [<https://perma.cc/5SZJ-VFZ8>] (listing normative reasons that money bail leads to "unnecessary" pretrial detention).

26. Vanita Gupta & Lisa Foster, U.S. Dep't of Justice, Civil Rights Division, *Dear Colleague Letter 7* (Mar. 14, 2016), [https://www.tmcce.com/files/7614/8517/9751/00\\_-\\_Regan\\_Robby\\_BINER\\_Special\\_Session.pdf](https://www.tmcce.com/files/7614/8517/9751/00_-_Regan_Robby_BINER_Special_Session.pdf) [<https://perma.cc/F8MB-D8L3>]; see also *Odonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1160 (S.D. Tex. 2017) ("The constitutional problem . . . arises from rigid adherence to imposing secured money bail when that will obviously result in, and is often intended to effect, pretrial detention of indigent defendants charged only with misdemeanors who are eligible for release under Texas law."); Memorandum from Eric H. Holder, Jr. et al. to Brian E. Frosh, Md. Att'y Gen. (Oct. 3, 2016), [http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Covington\\_MD\\_Wealth-Based\\_Pretial\\_Detention\\_White\\_Paper.pdf](http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Covington_MD_Wealth-Based_Pretial_Detention_White_Paper.pdf) [<https://perma.cc/2UQF-46Q6>].

27. *Odonnell*, 251 F. Supp. 3d at 1156 (finding that Harris County systematically imposed secured money bail on "indigent misdemeanor arrestees," and holding that such practice violated Equal Protection and Due Process Clauses), *aff'd in part, rev'd in part*, 882 F.3d 528 (5th Cir. 2018); see also *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (recognizing that at least under the

on an equation that is “complicated in theory and oversimplified in practice.” Using three abstract factors—the defendant’s perceived dangerousness, flight/FTA risk, and financial means—judges must set bail amounts and conditions.<sup>28</sup> However, the Supreme Court has not directly addressed a challenge to money bail systems on these grounds.<sup>29</sup>

Second, the arbitrary setting of money bail arguably violates procedural Due Process.<sup>30</sup> In *Salerno*, the federal 1984 Bail Reform Act was upheld against a facial Due Process challenge, in part because of the government’s “legitimate and compelling” interest in community safety, but also because of the Act’s “extensive” procedural safeguards: the right to counsel at bail hearings; the requirement that pretrial officers make “written findings of fact and . . . reasons” supporting their decision; and the requirement that a defendant’s dangerousness or flight risk be proved by clear and convincing evidence.<sup>31</sup> Most state and municipal jurisdictions do not provide these safeguards;<sup>32</sup> Maine’s only procedural protection is to require that a judge conduct an “interview with the defendant.”<sup>33</sup> The judge need not even state their rationale for imposing bail; their bail determination is presumptively reasonable.<sup>34</sup>

Despite these constitutional infirmities, “[b]ail has been stubbornly resistant to constitutional challenges.”<sup>35</sup> For the foreseeable future, the more likely path to reform is through legislation or administrative policy changes grounded on the normative problems with money bail. The recent renewal of serious political<sup>36</sup> and

federal Bail Reform Act of 1984, Congress “[proscribed] the setting of a high bail as a *de facto* automatic detention practice”).

28. Thaler, *supra* note 21, at 443.

29. In *Salerno*, the Court tipped its hat to the “modern practice of requiring a bail bond or the deposit of a sum of money” in order to ensure a defendant’s reappearance, but it did not then, and has not since, considered whether the systematic imposition of cash bail (e.g., a bail schedule) might raise Equal Protection or Due Process issues. *Salerno*, 481 U.S. at 764-65. It is also notable that the challenge in *Salerno* was facial, so it is unclear what, if any, circumstances might lead to a violation, *see id.* at 745, although the Fifth Circuit has recently held that the government’s efficiency concerns obviate a constitutional requirement that indigent detainees are entitled to anything more than a magistrate “specifically [enunciating] their individualized, case-specific reasons” for imposing *de facto* pretrial detention. Odonnell, 882 F.3d at 542.

30. Appleman, *supra* note 23, at 1304.

31. *Salerno*, 481 U.S. at 752; *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (leading case on procedural Due Process requirements).

32. *See* Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 930-31 (2017); *see also* Stack v. Boyle, 341 U.S. 1, 11 (1952) (Jackson, J., concurring) (“Fixing bail . . . is a serious exercise of judicial discretion [that is] often . . . done in haste.”). In 2017, the Supreme Judicial Court of Massachusetts held that a judge must provide “findings of fact and a statement of reasons” for their decision to set bail that the defendant is unlikely to have means to pay. Branagh v. Commonwealth, 80 N.E.3d 949, 964 (Mass. 2017).

33. 15 M.R.S.A. § 1026(4) (2012).

34. *See* State v. Felch, 2007 ME 88, ¶ 9, 928 A.2d 1252.

35. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 627 (2017). *But cf.* Branagh, 80 N.E.3d 949.

36. *See* Kamala Harris & Rand Paul, *To Shrink Jails, Let’s Reform Bail*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> [<https://perma.cc/FME4-HE55>].



public<sup>37</sup> interest in reforming money bail systems is therefore encouraging. But why now? One obvious factor is the long-term decline in violent crime, propelling the criminal justice reform movement generally; in 2015, the nationwide crime rate was “about half of what it was at its height in 1991.”<sup>38</sup> The decrease in violent crime, and the concomitant decrease in public anxiety and fear of violent crime, has altered the public discourse around criminal justice. Unnecessary pretrial detention imposes “intensely negative consequences on individuals [and] communities”<sup>39</sup>; it can have criminogenic and plea-inducing effects on defendants and impose significant financial burdens on their families.<sup>40</sup> Money bail systems have historically been prone to other abuses as well: one of the primary tactics of the 1963 civil rights demonstrators in Birmingham, Alabama, led by Martin Luther King, Jr., was to be arrested en masse and overwhelm the Birmingham jails.<sup>41</sup> The Alabama legislature hastily raised the bail limit for misdemeanors in Birmingham alone from \$300 to \$2500, which successfully confounded the demonstrators’ ability to carry out this tactic.<sup>42</sup>

Perhaps a more important reason for bail reform’s political momentum is, ironically, the current system’s budgetary impact. Money bail can “lead to significant levels of unnecessary jailing,”<sup>43</sup> funding for which must come from state and municipal budgets (budgets that have, in turn, been strained by the cost of mass incarceration generally).<sup>44</sup> Financial concerns can provide a hook with which liberal politicians can find bipartisan support for criminal justice reform.<sup>45</sup> We see this in the pretrial context as well: Senators Kamala Harris (D-CA) and Rand Paul (R-KY) have jointly advocated for national bail reform.<sup>46</sup>

Even in its more innocuous forms, money bail implicates troubling cultural norms—many of us are simply uncomfortable with what cash bail reveals about our social, legal, and economic structures.<sup>47</sup> Unjust bail practices, such as the idea that

37. See, e.g., Gonnerman, *supra* note 20.

38. Inimai Chettier, *Foreword to OLIVER ROEDER ET AL., BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE?*, at 3 (2015), [https://www.brennancenter.org/sites/default/files/analysis/What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf) [<https://perma.cc/W3SK-QE4A>].

39. MOVING BEYOND MONEY, *supra* note 25, at 6. This is not to mention, of course, the strain (to put it mildly) that overcrowding puts on detainees themselves: sanitation issues and deprivation of food and sleep, among other abuses. See Appleman, *supra* note 23, at 1315 (listing jail problems associated with overcrowding). Political bodies, sadly but perhaps inevitably, tend to emphasize the budgetary costs instead of the humanitarian ones.

40. See Wiseman, *supra* note 22, at 1354-58.

41. David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 802-03 (1993).

42. *Id.* at 805.

43. MOVING BEYOND MONEY, *supra* note 25, at 6.

44. See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 595-96 (2012).

45. See *id.* at 634.

46. Harris & Paul, *supra* note 36.

47. For example, when Sandra Bland died in a Texas jail after being arrested during a minor traffic stop, her family sued the jail officials. The officials argued, among other things, that Bland had committed suicide because she “was distraught because family and friends failed to post her [\$515

the cash bail amount should have a linear relationship to the severity of the charged crime, are deeply embedded in American culture.<sup>48</sup> Judges in popular culture—think *Law & Order* or *My Cousin Vinny*—will set cash bail amounts based solely on a defendant’s perceived flight risk or dangerousness (and assess dangerousness solely on the nature of the charged crime) without considering their financial capacity.<sup>49</sup> Judges and prosecutors may understand, intellectually, that such practices are unconstitutional; but in a bail system predicated on the exchange of money for freedom, and in a culture that normalizes and reinforces the practice, institutional inertia may be hard to overcome.

In recent years, several states have passed laws or other reforms restricting or discouraging the use of a money bail system; a movement is clearly afoot.<sup>50</sup> Yet despite the rapid erosion of money bail’s reputation in light of its many negative consequences, no jurisdiction has yet succeeded in fully eliminating money bail.<sup>51</sup>

### B. *The Promise of Actuarial Risk Assessment*

In contrast to money bail’s painfully slow abrogation, use of actuarial risk assessment tools has been expanding rapidly across the country.<sup>52</sup> Actuarial analysis is not new in the court system,<sup>53</sup> but technology has made it easier and cheaper to use in pretrial and arraignment settings,<sup>54</sup> and automated actuarial risk assessment is “enjoying its heyday in criminal justice.”<sup>55</sup> Actuarial tools are a distinct subcategory of bail reform, but they can make it politically and pragmatically easier to accomplish other reforms. For instance, they are a handy counter to arguments that without

bail].” Clifford Ward, *Failure To Be Bonded Out Led Sandra Bland to Suicide, Jail Officials Allege*, CHI. TRIB. (Nov. 12, 2015, 5:41 p.m.), <http://www.chicagotribune.com/news/ct-sandra-bland-court-motions-met-20151112-story.html> [<https://perma.cc/V65Z-58W4>].

48. See SCHNACKE, *supra* note 25, at 93.

49. See, e.g., *Law & Order: Special Victims Unit: Spring Awakening* (NBC television broadcast May 21, 2014).

50. See MOVING BEYOND MONEY, *supra* note 25, at 7 (surveying states).

51. The federal and Washington, D.C. systems are different: their bail statutes are based on “release/no release” options, and therefore “[forbid] financial conditions that result in the preventive detention of the defendant.” SCHNACKE, *supra* note 25, at 29. The new New Jersey system, likewise, does not completely foreclose the possibility of using money as security, although it does go further in that direction than any other state. See *infra* notes 136-39 and accompanying text.

52. MOVING BEYOND MONEY, *supra* note 25, at 20.

53. See, e.g. J. Scott Kohler, *Case 29: Vera Institute of Justice: Manhattan Bail Project*, in JOEL L. FLEISHMAN ET AL., CASEBOOK FOR THE FOUNDATION: A GREAT AMERICAN SECRET 81 (2007), <http://cspsc.sanford.duke.edu/learning-resources/publications/casebook-foundation-great-american-secret> [<https://perma.cc/76YZ-D9DM>] (describing the Vera Institute of Justice’s 1961 project providing “objective” risk assessment in Manhattan courts); Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73-SEP FED. PROB. 33, 34 (Sept. 2009); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 117-119 (1984) (surveying the actuarial tools in use in criminal justice systems in 1984).

54. Issie Lapowsky, *One State’s Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIRED.COM (Sept. 5, 2017, 7:00 a.m.), <https://www.wired.com/story/bail-reform-tech-justice> [<https://perma.cc/JM6H-GMZY>].

55. Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 233 (2015).

money bail, we would have no reliable system to identify dangerous or flight-risk defendants. But even within money bail systems, actuarial tools offer independent benefits as well.<sup>56</sup>

First, a definition: an actuarial decisionmaking model is one that bases decisions on empirical relationships between inputs and outcomes, after those relationships have been statistically tested and verified.<sup>57</sup> By contrast, a clinical decisionmaking model is one in which decisions are based on a professional's (e.g., a judge, psychologist, or probation officer) informal synthesis of relevant information, and is guided by professional and lived experience, theoretical and ideological perspective, knowledge of research studies, clinical observations, and other inputs that are often grouped together under the umbrella term "professional judgment."<sup>58</sup>

In the last two decades, as part of the criminal justice reform movement, a shift towards actuarial risk assessment in pretrial practice has accelerated.<sup>59</sup> Beginning in 2003, with Virginia's development and adoption of a risk assessment tool for pretrial use,<sup>60</sup> jurisdictions across the country have been reforming their pretrial justice systems to incorporate use of these tools.<sup>61</sup> Several states, including New Jersey, Kentucky, and Arizona, currently rely on actuarial risk assessment tools in setting bail, and numerous other jurisdictions "are pursuing or have recently implemented wholesale changes to their bail practices."<sup>62</sup> These reforms are being enacted through various means, such as wholesale statutory change, new court rules, law enforcement agency action, or "as the result of civil rights litigation."<sup>63</sup> Risk assessment tools have also been adopted, more controversially, for use in sentencing.<sup>64</sup>

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56. See MOVING BEYOND MONEY, *supra* note 25, at 20.

57. HILTON ET AL., *supra* note 9, at 28-29.

58. *Id.*; see also Wiseman, *supra* note 8, at 439-40.

59. PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 5 (Nov. 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0> [<https://perma.cc/25DF-QMK9>]; see also Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 Harv. C.R.-C.L. L. Rev. 477, 507-08 (2009); see generally ALEXANDER, *supra* note 24.

60. See MARIE VANNOSTRAND & KENNETH J. ROSE, PRETRIAL RISK ASSESSMENT IN VIRGINIA, 9 (May 1, 2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf>.

61. PRETRIAL JUSTICE INST., *supra* note 59, at 5.

62. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. (forthcoming 2018) (manuscript at 13), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3016088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088) [<https://perma.cc/XG35-EC6Z>]; James Brooks, *Goodbye Bail: Alaska Switches to New System of Criminal Justice*, JUNEAU EMPIRE (Dec. 20, 2017), <http://juneauempire.com/state/news/2017-12-20/goodbye-bail-alaska-switches-new-system-criminal-justice> [<https://perma.cc/HR5Z-MNKV>].

63. Stevenson, *supra* note 62 (manuscript at 12); see also PRETRIAL JUSTICE INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING (updated Oct. 2018), <https://university.pretrial.org/viewdocument/where-pretrial-improvements-are-hap-2> [<https://perma.cc/8RXW-73F4>] (collecting jurisdictional changes).

64. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014); see also Anna Maria Barry-Jester et al., *The New Science of Sentencing*, THE MARSHALL PROJECT (Aug. 4, 2015),

There is some dispute as to whether actuarial tools are preferable, in practice, to judicial decisionmaking or to other, more democratic processes such as community bail funds.<sup>65</sup> There is a broad consensus that fully validated actuarial models are more “accurate” —meaning they predict an outcome more frequently—than the informal, clinical model of traditional judicial decisionmaking.<sup>66</sup> Lacking actuarial tools, in other words, judges are already doing “risk assessment”; but the traditional tools of judicial risk assessment, such as life experience and demeanor and credibility inferences, are neither as accurate nor as unbiased as statistically-derived risk assessment tools.<sup>67</sup> This is doubly true when practical and cost constraints are factored into the equation.<sup>68</sup> Bail determinations are made very quickly—usually, a judge reviewing a bail commissioner’s decision has only a few minutes to assess and rule on a defendant’s risk<sup>69</sup>—and on fairly scant information, at least compared to sentencing decisions.<sup>70</sup> And what information a judge *does* have can be problematic: the impact of implicit racial bias on bail determinations is well documented.<sup>71</sup>

What’s more, resource constraints exacerbate some of the problems with judicial bail-setting. Erroneous clinical assessments do not only affect the low-risk defendants who are unnecessarily detained: the resources spent detaining or monitoring low-risk defendants are unavailable to supervise higher-risk defendants, who may therefore be improvidently released. Actuarial tools, by increasing accuracy, can reduce marginal errors on both sides of this equation, and thus allow more efficient resource use.<sup>72</sup>

The increased adoption of actuarial tools may also have a positive cycle effect,

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<https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing> [<https://perma.cc/R93D-39VB>].

65. See generally Simonson, *supra* note 35.

66. Wiseman, *supra* note 8, at 439-40, 441 n.140, 445; William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 19 PSYCHOL. ASSESSMENT 19, 26 (2000). But see Starr, *supra* note 64, at 852 (“[W]hile scores of studies have found that actuarial prediction methods outperform clinical judgment, this finding is not universal, the average accuracy edge is not drastic, and the vast majority of studies are from wholly different contexts (such as medical diagnosis or business failure prediction).”).

67. To be sure, actuarial analysis may simply provide “scientific” cover for structural or systemic biases, and thus impede efforts to effect more fundamental change. See Starr, *supra* note 64, at 866. Those arguments are beyond this paper’s scope, but it is worth noting that at least one study has found no expansion in racial disparities, though in somewhat unusual circumstances. See Stevenson, *supra* note 62 (manuscript at 54).

68. See Grove et al., *supra* note 66, at 26 (“On balance, the basic assumption that mechanical prediction is cheapest, and hence to be preferred when it and clinical prediction perform about equally well, seems sound . . . .”)

69. See, e.g., Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755 (2002) (observing that the presence of an attorney at a Baltimore bail review hearing increased the hearing’s duration from one minute and forty-seven seconds to two minutes and thirty-seven seconds).

70. Jones, *supra* note 32, at 943.

71. *Id.* at 944.

72. See Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1536 (2016).

by highlighting problems with the traditional money bail system and judicial risk assessment. Because the imposition of high money bail as a “de facto automatic detention practice” is unconstitutional,<sup>73</sup> money bail systems can only be constitutionally justified if there is a rational relationship not just between the defendant’s risk level and the money bail amount, but the defendant’s financial means as well.<sup>74</sup> If early indications from New Jersey’s de facto elimination of money bail are accurate—that is, that an actuarial analysis-based system can reduce pretrial detention rates without a concomitant increase in rearrest rates<sup>75</sup>—then the problems with judicial risk assessment and money bail will be even more unavoidable. Relatedly, as judges are confronted with actuarial assessments that confound their own assessments, they may become more receptive to the use of actuarial analysis, and more skeptical of judicial assessments (or, at least, of those judicial assessments made under the time and information constraints of arraignments and bail hearings).<sup>76</sup>

### *I. Concerns*

There are both constitutional and normative criticisms of actuarial tools in the criminal justice system. The prototypical constitutional argument is that the actuarial risk assessment tools discriminate based on suspect characteristics.<sup>77</sup> None of the tools currently in common use explicitly consider race, but they often use factors that function as proxies for race or other suspect classifications. Furthermore, an indispensable component of every currently available tool is the defendant’s criminal history—so a defendant who suffers the effects of, e.g., systemic racial bias will suffer those effects anew when he is scored by an actuarial tool. However, under current Equal Protection doctrine, only facially discriminatory laws must survive strict scrutiny; facially neutral laws that have a disparate impact are given rational basis review, even if those disparities are known and understood by lawmakers.<sup>78</sup> It

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73. *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988).

74. *See, e.g., Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (“Such [bail] requirement as is necessary to provide reasonable assurance of the accused’s presence at trial is constitutionally permissible. Any requirement in excess of that amount would be inherently punitive and run afoul of due process requirements.”). *Salerno* did not abrogate this necessary relationship—it merely expanded the range of legitimate government interests to include community safety.

75. *See infra* notes 155-56 and accompanying text.

76. It is pointed out, often to good effect, that the risks may run oppositely: that is, that judges will be skeptical of the actuarial score when it conflicts with their own analysis, and therefore will be more willing to override the score, *see Stevenson, supra* note 62 (manuscript at 51); or that judges will become so reliant on the actuarial analysis that they will be unwilling to override it even when it is clearly erroneous (as in the case of Edward French; *see infra* notes 112-13 and accompanying text).

77. *See, e.g., Starr, supra* note 64, at 828-29.

78. *See, e.g., Washington v. Davis*, 426 U.S. 229, 246 (1976). Disparately impactful risk assessments may be more constitutionally defensible in the pretrial setting, where they are being used to regulate, rather than punish. It is also worth noting that 2016’s *Pena-Rodriguez* decision may foreshadow a shift in Equal Protection doctrine, at least as far as racial disparate impact is concerned. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (“This Court’s decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns.”). For an exploration

should go without saying that while the disparate impact argument may not be persuasive as grounds for a constitutional challenge, we should carefully consider any negative impacts as a policy matter.<sup>79</sup>

A related argument is that actuarial tools violate criminal justice principles by considering a defendant's economic circumstances, for instance, whether or not that defendant has a job. While classifications based on wealth are not suspect in most contexts, there is a jurisprudential strain supporting heightened scrutiny for such discrimination in the criminal justice context, grounded in both equal protection and due process concerns.<sup>80</sup> Furthermore, as a normative matter it seems hypocritical to adopt a pretrial risk assessment tool expressly to try to reduce the wealth-based injustices wrought by a money bail system, only for that risk assessment tool, in turn, to consider socioeconomic status in determining pretrial detention. It may be unsatisfactory to answer that judicial risk assessment is no better, but to the extent that disparities continue to exist under actuarial risk assessment, we can at least be mildly comforted that they no longer arise from mere hunch.<sup>81</sup>

In addition to these constitutional questions, there are two policy issues that risk assessment proponents must overcome: a dignity concern, and a legitimacy concern. The dignity concern stems from the foundational criminal justice principle that “[o]ur law punishes people for what they do, not who they are.”<sup>82</sup> Essentially, the argument is that a person's situation in the criminal justice system should depend only on the choices he has actually made, rather than on his likelihood of committing future crimes, and that to allow statistical prediction to control criminal justice outcomes would be an “insult to autonomy.”<sup>83</sup> But the dignity concern has much more traction in the sentencing context than in the pretrial context. As a constitutional matter, *Salerno* already authorizes courts to consider dangerousness in setting bail, at least to the extent that pretrial detention is regulatory, not punitive. Assuming that the government has an interest in preventing crime from occurring, then the fact of a person's arrest (assuming adequate Fourth Amendment protections, probable cause, and the rest) is a sufficient predicate to an inquiry into the defendant's dangerousness. Statistical analysis simply makes that inquiry more accurate; it does not make it more likely to occur.

The legitimacy concern evades easy description, but it seems to largely stem

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of disparate impact jurisprudence in the era of Big Data, see Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017).

79. Starr, *supra* note 64, at 838. ODARA's developers took care to avoid even disparate impacts by race, though they caution that the tool's impacts may vary in different jurisdictions with different populations. See HILTON ET AL., *supra* note 9, at 129-30.

80. See, e.g., Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion) (striking down Illinois statute requiring defendants to pay transcript costs for preparation of appeal).

81. This may sound mealy-mouthed, but this paper aims to stay within the realm of relatively short-term political possibility.

82. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

83. Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OH. ST. J. CRIM. L. 583, 592 (2018). For an extended discussion of compatibilism and free will in criminal justice, see Adam J. Kolber, *Free Will as a Matter of Law*, in PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 9 (Michael Pardo & Dennis Patterson eds., 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2660457](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660457) [<https://perma.cc/R8Q9-XRGZ>].

from a broad discomfort with technological intrusion into quintessentially human spheres.<sup>84</sup> Criminal justice, even more than these other areas of law (such as driving and autonomous vehicles, addressed below) reaches morality's deepest roots, implicates questions of identity and free will,<sup>85</sup> and forces us to explicitly question what we want society to look like. It is therefore understandable that we might resist or fear technological encroachment into that domain.

While not a criminal justice concern, the spread of autonomous vehicles—and the subsequent public reaction—provides a useful illustration of this resistance. Human drivers cause nearly 40,000 motor vehicle accident fatalities every year,<sup>86</sup> over ninety percent of which are attributed to human errors—“intoxication, inattention, sleepiness, or extreme speeding”—that autonomous cars will avoid.<sup>87</sup> Autonomous cars will never be risk-free, but it is clear at this point that, properly regulated, replacing human drivers with autonomous vehicles will save many lives and billions of dollars. Yet the general public remains profoundly wary of autonomous vehicles.<sup>88</sup>

To be sure, a wild, rapid, and unregulated expansion of autonomous vehicles could do significant damage,<sup>89</sup> both in delaying the achievement of long-term benefits and in immediate human cost and suffering. Furthermore, there are legitimate reasons to be skeptical that regulation will be forthcoming, let alone sufficient.<sup>90</sup> Similarly, despite growing political and academic support for actuarial risk assessment, many media outlets remain wary of it.<sup>91</sup> But with autonomous

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84. See, e.g., Megan Stevenson, *Risk Assessment: The Devil's in the Details*, THECRIMEREPORT.ORG (Aug. 31, 2017), <https://thecrimereport.org/2017/08/31/does-risk-assessment-work-theres-no-single-answer> [https://perma.cc/Y792-6MHM].

85. See Kolber, *supra* note 83, at 14-15.

86. Neal E. Boudette, *U.S. Traffic Deaths Rise for a Second Straight Year*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/business/highway-traffic-safety.html> [https://perma.cc/37HP-GYUQ].

87. Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 CARDOZO L. REV. 121, 135 (2016).

88. See Jack Barkenbus, *People Aren't Ready for Self-Driving Cars*, CITYLAB.COM (Jan. 4, 2018), <https://www.citylab.com/transportation/2018/01/autonomous-vehicles-consumer-backlash/549650> [https://perma.cc/DL6H-GRSY]. While there are alternative explanations for certain data—for instance, that people actually just enjoy driving, or fear job losses as professional drivers are replaced—most surveys indicate substantial concerns with the very safety of autonomous vehicles, despite clear evidence to the contrary.

89. In the early twentieth century, a lack of precautionary regulation led to enormous amounts of human suffering. See, e.g., *Achievements in Public Health, 1900-1999 Motor-Vehicle Safety: A 20th Century Public Health Achievement*, CENTER FOR DISEASE CONTROL (May 14, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4818a1.htm> [https://perma.cc/G3W4-D8HA]; Bill Loomis, *1900-1930: The Years of Driving Dangerously*, DETROIT NEWS (Apr. 26, 2015), <https://www.detroitnews.com/story/news/local/michigan-history/2015/04/26/auto-traffic-history-detroit/26312107> [https://perma.cc/GGC2-8DZZ]. Those who do not learn history and all that.

90. Cecilia Kang, *Where Self-Driving Cars Go to Learn*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/technology/arizona-tech-industry-favorite-self-driving-hub.html> [https://perma.cc/EA5T-YBDF].

91. See, e.g., Eric Westervelt, *Did a Bail Reform Algorithm Contribute to This San Francisco Man's Murder?*, NPR.COM (Aug. 18, 2017, 2:00 PM), <https://www.npr.org/2017/08/18/543976003/did-a-bail-reform-algorithm-contribute-to-this-san-francisco-man-s-murder> [https://perma.cc/D597-HZFA];

vehicles, as with actuarial risk assessment, the abstraction is almost beside the point: whether we prefer an imperfect unknown (actuarial risk assessment) to an imperfect known (judicial risk assessment) will primarily depend on how “imperfect” the unknown item is, not on the abstract difference between the unknown and known. And if there is a good chance that careful regulation and implementation of the unknown will produce something better than what we have, we do a disservice in downplaying the positive outcomes that might be achieved.

One additional factor is that providing judges with actuarial analysis might further erode the distinction between flight risk and dangerousness in bail determinations. The merger of flight risk and dangerousness in judicial bail determinations has long been criticized,<sup>92</sup> but actuarial tools threaten to reinforce and anoint it—most widely-used pretrial risk assessment tools perform just the one inquiry.<sup>93</sup> Actuarial tools may increase the salience of dangerousness in judicial decisionmaking for several reasons: the public discourse around risk assessment focuses almost exclusively on dangerousness;<sup>94</sup> judicial reliance on the “availability heuristic,” that is, the “tendency to measure the probability of an event ‘by the ease with which instances or occurrences can be brought to mind’”;<sup>95</sup> and rampant doctrinal and statutory confusion as to where and how, exactly, the flight risk and dangerousness inquiries diverge.<sup>96</sup> Under *Salerno*, however, dangerousness is only a permissible criterion for setting bail under certain limited circumstances.<sup>97</sup> Furthermore, merging the dangerousness and flight risk inquiries reduces judicial accountability and legitimacy.<sup>98</sup> However, these problems arise from judicial discretion, and could be reduced by a rule-based bail system. A bail commission, for instance, with its greater resources, broader perspective, and ability to make ongoing adjustments, would be far more able to weigh the actual flight and dangerousness risks in setting its rules than judges currently can, given their time and resource constraints.<sup>99</sup>

At the end of the day, the more compelling concerns about actuarial risk

*Replacing Bail with an Algorithm*, ECONOMIST (Nov. 23, 2017), <https://www.economist.com/news/united-states/21731631-new-jersey-has-bold-experiment-reduce-number-people-jail-awaiting> [<https://perma.cc/TSY3-WRQV>]; Lapowsky, *supra* note 54.

92. See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 842 n.19 (2016) (collecting historical critiques).

93. *Id.* at 870-71. The most popular tool, the Arnold Foundation’s PSA-Court, does perform separate analyses.

94. See, e.g., Westervelt, *supra* note 91.

95. Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1363 (2012) (quoting Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974)).

96. See Gouldin, *supra* note 92, at 873, 882-83 (“[M]any statutes do a poor job of guiding judges about which risks are relevant to different pretrial decisions.”).

97. See *id.* at 876-77.

98. *Id.* at 892 (“Strangely, many risk assessment tools that have been proposed gather separate data for those defendants who commit crimes on release and for those who fail to appear, but then combine that data into a single prediction of ‘pretrial failure.’ It is difficult for that feedback to be properly incorporated by judges . . .”).

99. *Id.* at 891 & n.253.



assessment tools instruct us not to avoid them entirely, but rather to carefully consider how, and by whom, the tools are constructed and employed.

### III. EMBEDDING ACTUARIAL RISK ASSESSMENT IN LAW

Despite the growing academic and political support for evidence-based risk assessment, there is “a sore lack of research on the impacts of risk assessment in practice.”<sup>100</sup> Additionally, there has been little examination of the actual policies and practices of reform, or how particular implementation strategies and tactics might alter the effectiveness of risk assessment tools on the ground. One forthcoming paper studies bail outcomes in Kentucky and concludes that a statutory mandate that judges consider a risk assessment score did not lead to “the dramatic efficiency gains predicted by risk assessment’s champions”;<sup>101</sup> at the same time, there is evidence that New Jersey’s risk assessment implementation has moved the needle it sought to move.<sup>102</sup> It is obvious that specific implementation strategies and tactics will affect risk assessment’s efficacy: simply providing judges with actuarial risk analysis scores will not fulfill the tools’ promise, and may even backfire.

#### A. Sources of Bail Law

Within any given jurisdiction, there are numerous sources of law governing bail practices: Supreme Court precedent, state constitutions, state supreme court precedent, state statutes, local ordinances, court rules, and administrative regulations.<sup>103</sup> This thicket complicates the implementation of risk assessment tools, not only by necessitating political plate-spinning<sup>104</sup> but by raising questions of where and how decisions should be made. For instance, should non-financial conditions of release be determined through judicial operation and the adversarial process; or by a pretrial services agency; or by the legislature through the imposition of bail guidelines (discussed further below); or by some combination thereof?<sup>105</sup> Which actors should have access to risk assessment scores? Maine faces these questions both in assessing the efficacy of its ODARA implementation and in considering bail reform in the future.

Further complicating the implementation question is the fact that, while most states administer pretrial services through some sort of agency, the legal form, structure, and authority of these agencies varies widely. In some states and at the federal level, pretrial services are administered through the state administrative office of the courts;<sup>106</sup> in other states, the responsibility and authority to administer

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100. Stevenson, *supra* note 62 (manuscript at 27).

101. *Id.* (manuscript at 57).

102. PRETRIAL JUSTICE INST., *supra* note 59, at 4.

103. SCHNACKE, *supra* note 25, at 42.

104. New Jersey’s 2017 bail reforms involved statutory changes, new and modified court rules, administrative and agency directives, and a constitutional amendment.

105. See Wiseman, *supra* note 8, at 422 n.22.

106. See, e.g., 18 U.S.C. § 3152 (2014); N.J. REV. STAT. § 2A:162-25 (2014).

pretrial services is delegated to counties and cities;<sup>107</sup> in a few jurisdictions, such as Maine, there is no publicly-funded pretrial services agency.<sup>108</sup>

Despite this multiplicity of sources, however, the fundamental power to prescribe bail practices lies in the legislature. But when the legislature delegates the responsibility and discretion for the practice of bail—as they all have done, largely to the judiciary—agency problems inevitably arise.

### *B. Rules, Standards, and the Principal-Agent Problem in Bail*

The typical American bail system can be conceptualized as a principal-agent relationship.<sup>109</sup> The legislature (as the voice of the public) is the principal, and attempts to express through statute its desire for a particular balance between, say, the presumption of innocence and the community's need for protection from unconvicted but potentially dangerous individuals. Judges, in turn, are the agents tasked with effectuating the legislature's statutorily-expressed preference.<sup>110</sup> As in any agency relationship, there is an inherent tension between the parties' incentives. Judges are "wary of bearing public responsibility" for releasing a defendant who commits a new crime while on pretrial release, but at the same time, "judges do not internalize any of the costs of pretrial detention"—such as the costs of operating jails and the lost tax revenue and strains on social services resulting from unnecessary detention—"nor do they receive awards for correctly releasing defendants pretrial."<sup>111</sup> These misaligned incentives come to bear regardless of the source of the judge's risk analysis. Judges' wariness of incurring blame is likely to be affected by news stories and other publicity surrounding any high-profile "failure" of a risk assessment model, such as the July 2017 murder, in San Francisco, of Edward French. French was killed by a man who had been arrested and released only days earlier, after a judge received an erroneous risk assessment score.<sup>112</sup> The incident led to increased criticism of the risk assessment tool used in the case; NPR's headline for the story was, after all, the tendentious "Did A Bail Reform Algorithm Contribute

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107. See, e.g., VA. CODE ANN. §§ 9.1-100, 19.2-152.2 (2014) (enabling counties and cities to establish pretrial services agencies, overseen by the Department of Criminal Justice Services, an executive agency with a director appointed by the governor).

108. Maine does have an effective, private, nonprofit pretrial services agency, but its capacity is limited by its budget. See *infra* notes 184-85 and accompanying text.

109. See Wiseman, *supra* note 8, at 422 n.22 (clarifying that the public is the true principal, operating through the legislature).

110. See *id.* at 422.

111. *Id.* at 422-23; cf. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-24 (2005) (examining institutional design, performance, and dynamics of administrative agencies in criminal justice).

112. See generally Westervelt, *supra* note 91. A related version of political "blamesmanship" has an infamous example in the 1988 "Willie Horton ad," which blamed Democratic presidential candidate Michael Dukakis for the violent crimes committed by a prison inmate, William Horton, while Horton was on a temporary furlough. As governor of Massachusetts, Dukakis had supported the furlough program, for which his political opponents excoriated him. Bruce Porter, *So What? Pulitzer Prize Winning Exposés and Their Sometimes Dubious Consequences*, COLUM. JOURNALISM REV. (Apr. 1995), <https://web.archive.org/web/20080328003243/http://backissues.cjrarchives.org/year/95/2/pulitzers.asp> [<https://perma.cc/6EC8-LYVL>].

To This San Francisco Man's Murder?"<sup>113</sup> For all of these reasons, the principal-agent problem in the bail system is stark, even (perhaps especially) when judges are provided with actuarial risk assessment results.

A rule/standard analysis can be useful in addressing the principal-agent problem.<sup>114</sup> (A standard is a directive to, e.g., "protect public safety" or "minimize unnecessary detention"; a rule is a direction that a judge "unconditionally release any defendant with a PSA score below 2.") Most bail codes in the U.S., including Maine's, are standard-based: for example, the 1984 federal Bail Reform Act directs judges to release defendants unless release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."<sup>115</sup> But a rule-based system—a "classic means of reducing certain agency costs" by eliminating judicial discretion<sup>116</sup>—may be preferable in the bail context, given the more limited, and more readily quantifiable, goals of pretrial practice compared to sentencing.

### 1. *The Wiseman Proposal*

Professor Samuel Wiseman proposes a system in which state bail commissions—likely a governor-appointed panel subject to legislative oversight—would set mandatory bail guidelines to be set by bail commissions in each state.<sup>117</sup> Judges would be required to release (with or without conditions) or detain defendants based solely on the guidelines, which would be set by the commission's determination of acceptable flight and dangerousness risk levels.<sup>118</sup> Departure from the guidelines would only be permitted under very limited circumstances (Wiseman suggests that a prosecutorial showing of clear and convincing evidence might suffice).<sup>119</sup>

Going further, Crystal Yang suggests that jurisdictions incorporate the costs and benefits of pretrial detention directly into "net-benefit assessment tools" that would calculate the specific and quantifiable costs of pretrial detention (such as effects on income and housing, as well as increased jail costs) and balance them against the quantifiable benefits (decreased crime).<sup>120</sup> While Yang declines to propose a particular procedure for implementing this cost-benefit analysis—her paper merely aims to clarify what we should mean when we talk about "risk assessment"—her

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113. Westervelt, *supra* note 91.

114. Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 U.C. DAVIS L. REV. 659, 664 (1992). Professor Dau-Schmidt promotes the use of standards in sentencing regimes, largely because "the costs of administering the [Federal Sentencing Guidelines] and the serious disparities that have arisen in the application of those guidelines due to over- and under-inclusion suggest that criminal sentencing is too complex a problem for the rote application of a complex system of rules." *Id.* at 677.

115. 18 U.S.C. § 3142(b) (2012).

116. Wiseman, *supra* note 8, at 438.

117. *Id.* at 455-56; *see also* Appleman, *supra* note 23, at 1365 (proposing "bail juries" as a way to solve constitutional and procedural issues in bail determinations).

118. Wiseman, *supra* note 8, at 461-62.

119. *Id.* at 462.

120. Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1488-91 (2017).

reliance on “data-driven algorithm[s]” does suggest a rule-based, rather than standard-based, model.<sup>121</sup>

*i. Rules and Standards in Pretrial Practice*

A rule-based system would have substantial benefits. Primarily, it would better preserve and restore control of the pretrial cost-benefit balance to the legislature by subjecting the commissions to tighter legislative control compared to judges.<sup>122</sup> The commissions could also more readily admit community participation in some form, perhaps in the form of open commission proceedings or meetings, as in other local governance issues; the community, after all, is the purported beneficiary of pretrial detention.<sup>123</sup> Furthermore, although causality might flow in either direction, adoption of a rule-based system would more or less require the adoption of actuarial risk assessments—the rules would need to be based on something quantifiable or definitive, and judicial assessments would not fit that bill.

Ad hoc judicial application of actuarial tools also suggests that a rule-based system would better effectuate the tools’ proponents’ intent. A judge is most likely to override the risk assessment’s recommendation when her clinical assessment (how she views the defendant) is furthest from the risk assessment’s recommendation. In other words, if one of the main objections to pretrial risk assessment is that it doesn’t really do anything (because most of the time, judges’ clinical assessments are already fairly accurate), then it is precisely when the risk assessment runs most contrary to judicial assessments that it is most important to force judges to abide by it. Under a rule-based system, even if most risk assessment recommendations will seem to a judge like irresponsible legislative overreach à la the Federal Sentencing Guidelines, it is precisely when a judge disagrees with the recommendation that it should be most difficult to override a score.

Furthermore, research suggests that when humans receive “bad” advice from an algorithmic advisor, they abandon the algorithm at a much greater rate than they do an errant human advisor.<sup>124</sup> Thus, under a standard-based system, a judge who follows the actuarial tool’s recommendation and releases a defendant only to see them miss court dates, violate bail conditions, or otherwise “fail” to live up to the algorithm’s promise<sup>125</sup> will be much more reluctant to follow the algorithm’s recommendation in the future—and given the sheer number of cases that judges oversee, such failures will not be once-in-a-blue-moon occurrences. This danger is heightened by confirmation bias. If a judge is skeptical of actuarial tools, they will

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121. *See id.* at 1490.

122. *See* Barkow, *supra* note 111, at 732.

123. *See* Appleman, *supra* note 23, at 1357-58.

124. Andrew Prael & Lyn Van Swol, *Understanding Algorithm Aversion: When Is Advice from Automation Discounted?*, 36 J. OF FORECASTING 691, 698. Prael and Van Swol hypothesize that this effect is caused by a “perfection schema” whereby we expect automated advisors to be perfect, but humans to err. *Id.* If replicable (and sticky), the perfection schema could have major implications for attempts to import automated tools into criminal justice processes.

125. Even if the judge never sees the defendant again, they may well be provided with, or at least see, statistical data on the risk assessment’s aggregate outcomes.

be more likely to notice, and place greater narrative weight on, cases where the algorithm “fails” than where it succeeds.

There are, of course, drawbacks to the promulgation of rules rather than standards in pretrial practice. For one thing, some problems within traditional bail systems arise from half-baked legislative attempts to preclude judicial leniency through rules. For instance, in Maine as in many states, the violation of a condition of pretrial release (“VCR”)—e.g., that the defendant not use or possess alcohol—is a strict liability offense.<sup>126</sup> In a sense, this statute codifies a legislative “risk assessment.” And the presence of any VCR, no matter how innocuous or explicable, on a defendant’s record is a factor in the setting of their bail.<sup>127</sup> This rule is crude, vastly over- and under-inclusive, and exemplifies the extent to which the current system of judicial assessment is unsuited for tighter legislative control. The system needs reordering, not just jerry-rigging.

### *ii. The Federal Sentencing Guidelines’ Long Shadow*

The state bail commissions proposed by Wiseman naturally raise the specter of the Federal Sentencing Guidelines, which have been widely criticized, particularly prior to *Booker*, which made them merely advisory.<sup>128</sup> Much of this criticism is inapplicable to the pretrial context, however, and even more diminished when guidelines are applied through actuarial tools, rather than through the Guidelines’ inquisitorial, but still fundamentally clinical, administration.

First, to the extent that pretrial detention is regulatory, not punitive, a rule-based system would not implicate Sixth Amendment issues. Granting that pretrial detention has punitive characteristics (which is, after all, one of the reasons its use should be minimized), the use of actuarial tools allows the government to much more narrowly tailor detention to its interest in public safety and defendant reappearance. One of the major problems with the Sentencing Guidelines is that sentencing justifications and goals—retribution, deterrence, rehabilitation—are diverse and largely moral, which makes statistical analysis an exercise in rationalization (or worse). On the other hand, pretrial detention’s goals—ensuring the defendant’s reappearance and preventing recidivism—are quantifiable, discrete, and relatively objective.<sup>129</sup>

Besides constitutional issues, however, some problems remain. First, the Sentencing Guidelines have been criticized for replacing an adversarial sentencing process with a de facto inquisitorial system.<sup>130</sup> Under the Guidelines, “[i]t became

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126. 15 M.R.S.A. §§ 1092(3), 1094 (2012).

127. *Id.* § 1026(4)(C)(11).

128. *Booker v. United States*, 543 U.S. 220, 246 (2005).

129. Of course, “community safety” is subjective; but it is more conducive to statistical analysis than, say, “retribution.”

130. Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 4 (2010). Under the Guidelines, the judge-cum-inquisitor is authorized to make “sua sponte inquiries into the existence of aggravating or mitigating . . . factors that no one else had raised” in determining an appropriate sentence. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1437 (2008); see also Abraham S.

the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be . . . proved by more than a preponderance.”<sup>131</sup> In *Booker*, of course, that portion of the statute making adherence to the Guidelines mandatory was found to offend the Sixth Amendment.<sup>132</sup> But even under *Booker*, the Guidelines—administered through this inquisitorial process—remain available to sentencing judges as “advisory provisions.”<sup>133</sup>

Should a mandatory bail guideline survive these criticisms? In the pretrial context, the judge already carries out the administrative function of the state—judges are already called on to make non-arbitrary decisions on bail.<sup>134</sup> A judge would not be abrogating her duty to the adversarial system because the pretrial setting is a de facto inquisitorial system already.<sup>135</sup>

Second, the Sentencing Commission’s recommendations were subject to fairly strict legislative oversight. A deadlocked legislature might find it very difficult to successfully oversee a bail commission, and as Wiseman and others point out, the political pressure to limit pretrial detention for budgetary reasons will “wane in times of economic plenty.”<sup>136</sup> Even worse than the legislature’s ignoring a bail commission, though, may be its capture by groups with a strong interest in higher rates of pretrial detention. This is no new pattern. The coalitions with the strongest interest in preventing unnecessary detention—an interest based less on ideology and more on material impact—tend to be dispersed, disorganized, and politically marginalized; but political bodies, whether legislative or administrative, tend to be more responsive to better-organized (and -funded) ideological groups.<sup>137</sup> The Sentencing Commission arguably dodged that pitfall, but it fell prey to another medium for special interest groups: Congress itself. Legislative interventions in the Sentencing Commission’s work were disruptive, such as Congress’s infamous rejection of the Commission’s 1995 and 1997 proposals to reduce the famous 100:1

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Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024 (1974) (noting that American judges are ill-equipped to assume inquisitorial responsibilities, because in our adversarial system, judges tend to “rely on the parties and their counsel to define and develop issues”).

131. *Booker*, 543 U.S. at 236.

132. *Id.* at 233.

133. *Id.*

134. *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“We conclude that [pretrial detention] falls on the regulatory side of the dichotomy.”).

135. See, e.g., M.R. EVID. 101(b)(8) (the Maine Rules of Evidence do not apply to bail proceedings); *Harnish v. State*, 531 A.2d 1264, 1268 n.8 (Me. 1987) (holding, in denying murder defendant’s Due Process claim for denial of bail without clear and convincing evidence, that “[t]he pretrial bail proceeding in which the State makes the required probable cause showing is not to be a mini-trial,” based on the Supreme Court’s holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975) that “the sole issue is whether there is probable cause” for pretrial detention).

136. Wiseman, *supra* note 8, at 463.

137. *Id.*; see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1094 (1993) (“[I]t is perfectly rational for legislators to perceive that there is considerable political risk, and very little return, to taking the side of the suspect.”).

disparity between crack and powder cocaine offenses.<sup>138</sup> The lobbying danger is real, but can be mitigated by procedural requirements, including the presence of community members on bail commissions, or community bail funds.<sup>139</sup>

Third, the Sentencing Guidelines were costly and onerous to apply. The Sentencing Manual is long, complex, and—even in 2018—essentially a manual process.<sup>140</sup> By contrast, an algorithmic bail recommendation would be far easier to administer (by necessity, to meet the time limits of the pretrial process). And while the Sentencing Guidelines were not intended to reduce detention costs (they did just the opposite, by nearly all accounts), a bail guideline could be calibrated to account for detention costs<sup>141</sup>—indeed, the conventional political argument for actuarial risk assessment tools is that they allow for greater release rates without substantially increasing the risk of FTAs or rearrests.<sup>142</sup>

### C. *The New Jersey Approach*

The most prominent and comprehensive example of pretrial justice reform thus far is New Jersey's Criminal Justice Reform Law, which took effect in January 2017.<sup>143</sup> New Jersey's is the first statewide, comprehensive, de facto elimination of money bail (although it does retain the possibility of money bail in certain circumstances).<sup>144</sup> The goals of the New Jersey reforms are in line with the mainstream bail reform movement: to reduce pretrial jail populations, eliminate racial or other unfair disparities in bail decisions, and mitigate injustices of bail schedules, such as detaining poor defendants due solely to their inability to pay what would be, for many people, a nominal amount.

The New Jersey system operates essentially as follows: upon arrest, a defendant is assessed with the Arnold Public Safety Assessment (PSA), a risk assessment tool developed by the Arnold Foundation, a nonprofit institution that (among other things) provides financial and organizational support to criminal justice reform initiatives.<sup>145</sup> The defendant must be arraigned within forty-eight hours, at which point, unless the prosecutor files a motion for pretrial detention, the judge will order

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138. Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 106 (2014).

139. See Simonson, *supra* note 35, at 630-31.

140. See generally U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL (2016). An "app" is available at <https://guidelines.uscourts.gov>, but it does little to automate or speed up the process.

141. See Yang, *supra* note 120, at 1419.

142. See Wiseman, *supra* note 8, at 477-78.

143. N.J. REV. STAT. § 2A:162-15 (2018).

144. Joel Rose, *New Jersey Banking on Shift from Bail Money to Risk Assessment*, NPR (Dec. 27, 2016), <https://www.npr.org/2016/12/27/507049538/new-jersey-banking-on-shift-from-bail-money-to-risk-assessment> [<https://perma.cc/L3EJ-WK8V>]. The New Jersey reform does not completely eliminate money bail, but reserves it as a last resort, to be used only in cases of pretrial release where non-monetary conditions are deemed insufficient to ensure public safety and the defendant's appearance. See GLENN A. GRANT, N.J. JUDICIARY, CRIMINAL JUSTICE REFORM ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 1, 1 (2016), <https://www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf> [<https://perma.cc/5PEJ-PS5C>].

145. N.J. CT. R. 3:3-1(d); see also GRANT, *supra* note 144, at 3.

them released on “either personal recognizance, the execution of an unsecured appearance bond, or the least restrictive non-monetary conditions” sufficient to ensure reappearance and community safety.<sup>146</sup> If the prosecutor does file a motion for pretrial detention, a hearing must be held, and the prosecutor must overcome, by clear and convincing evidence, a presumption in favor of pretrial release (except for charges of murder and other serious crimes).<sup>147</sup> The risk assessment’s recommendation is, *prima facie*, sufficient evidence to overcome the presumption.<sup>148</sup>

The New Jersey risk assessment instrument has two components, which political and public discourse often conflate. First, a risk measurement component, the PSA, scores the defendant based on their risk factors, which are drawn automatically from state and national criminal history databases.<sup>149</sup> Second, the risk management component, the Decision Making Framework (DMF), “categorizes defendants into risk levels based upon the . . . factors considered and calculated by both the PSA and the severity of the current charge(s).”<sup>150</sup> The DMF, which is calibrated and controlled by the administrative office of the New Jersey Judiciary, is the tool that actually “produces a recommendation for a judge about conditions of release or detention.”<sup>151</sup> Because the DMF is not an actuarial assessment or measurement but rather a set of guidelines that merely incorporates an actuarial risk analysis, it can be tweaked or tailored by the judiciary to accomplish particular policy goals.<sup>152</sup> For example, in response to complaints that people arrested on certain gun violations were being released too easily, the Pretrial Services Program considered altering the DMF.<sup>153</sup>

The presumption against pretrial detention is not toothless. It carries, of course, the typical bottlenecks and procedural hurdles to limit prosecutorial or judicial discretion: prosecutors and judges have little incentive, for instance, to expend their limited time and labor resources on detaining defendants who have been classified as nondangerous. As an additional safeguard, the New Jersey Attorney General has issued a directive requiring higher-ups to approve any pretrial detention motions in many cases.<sup>154</sup>

Early indications are that New Jersey’s reforms have succeeded in reducing

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146. N.J. CT. R. 3:26-1(a)(1).

147. *Id.* at 3:4A(b)(4), (5).

148. N.J. REV. STAT. § 2A:162-18(b); N.J. CT. R. 3:4(A)(b)(5); *see also* State v. C.W., 156 A.3d 1088, 1098-1100 (N.J. Super. Ct. App. Div. 2017).

149. GRANT, *supra* note 144, at 4.

150. *Id.*

151. ACLU ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 1, 10 (2016).

152. *See* CHRISTOPHER S. PORRINO, OFFICE OF THE ATT’Y GEN. OF N.J., DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2014, C. 31, at 27-28 (Oct. 11, 2016), [http://www.nj.gov/oag/dcj/agguide/directives/2016-6\\_Law-Enforcement.pdf](http://www.nj.gov/oag/dcj/agguide/directives/2016-6_Law-Enforcement.pdf) [<https://perma.cc/QN2V-8CHM>].

153. Press Release, N.J. Office of the Att’y Gen., Attorney General Strengthens Bail Reform Directive to Better Ensure that Dangerous and Recidivist Criminals Are Kept in Jail Pending Trial (May 24, 2017), <http://nj.gov/oag/newsreleases17/pr20170524c.html> [<https://perma.cc/9D5X-FCWA>]; *see also* Lapowsky, *supra* note 54.

154. PORRINO, *supra* note 152, at 60.



pretrial jail populations. Between January 1 and November 30, 2017, the pretrial jail population in New Jersey declined by about 16% (and the January 1, 2017 snapshot may have been unrepresentative of the pre-reform baseline; between November 30, 2015 and November 30, 2017, the pretrial jail population declined by 36%).<sup>155</sup> Serious crime—homicide, rape, robbery, assault, and burglary—has also seen a very slight decline from 2016 (which does not necessarily mean that bail reform has reduced crime rates, but does contravene a common, if lazy, criticism of bail reform: that it will lead to a crime wave, as improvidently released defendants immediately reoffend).<sup>156</sup> At only one year in, it is obviously premature to say that New Jersey’s reforms have accomplished their goals. But it is clear that the coordinated efforts between New Jersey’s judiciary, legislature, executive,<sup>157</sup> and public have created an institutional structure that gives evidence-based risk assessment a foundation for success.

### *I. ODARA in the New Jersey System*

New Jersey’s bail statute specifically lists “any crime or offense involving domestic violence” as a crime for which prosecutors may seek pretrial detention without showing flight risk or dangerousness.<sup>158</sup> However, the risk assessment tool on which the New Jersey system relies, the PSA, does not account for specific IPV risk factors.<sup>159</sup> In 2016, while New Jersey was preparing to transition to the new system, the Arnold Foundation and the New Jersey Supreme Court Ad Hoc Committee on Domestic Violence both recommended that New Jersey adopt a complementary risk assessment “trailer tool” for IPV cases.<sup>160</sup> In September 2017, Christopher Porrino, the New Jersey Attorney General, formally directed law enforcement agencies and prosecutors to begin using ODARA to assess risk in IPV cases, in conjunction with the PSA.<sup>161</sup>

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155. N.J. COURTS, CRIMINAL JUSTICE REFORM STATISTICS: JAN. 01, 2017 – DEC. 31, 2017, <https://www.njcourts.gov/courts/assets/criminal/cjrreport.pdf?cacheID=gKki3A2> [<https://perma.cc/DCV9-3TL9>].

156. NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, 3RD QUARTER 2017 CRIME STATISTICS (2017), [http://www.njsp.org/ucr/pdf/current/20171218\\_3rdqtr2017.pdf](http://www.njsp.org/ucr/pdf/current/20171218_3rdqtr2017.pdf) [<https://perma.cc/4ND5-C5PQ>].

157. The New Jersey Attorney General, unlike Maine’s, is appointed by the Governor. Chris Christie was New Jersey’s governor while reform was being implemented, and was widely described as being strongly supportive of reform. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 *YALE L.J.* 2100, 2124 (2015); Matt Friedman, *Chris Christie Urges Lawmakers to Act on N.J. Bail Reform*, *NJ.COM* (July 30, 2014), [http://www.nj.com/politics/index.ssf/2014/07/chris\\_christie\\_urges\\_lawmakers\\_to\\_act\\_on\\_nj\\_bail\\_reform.html](http://www.nj.com/politics/index.ssf/2014/07/chris_christie_urges_lawmakers_to_act_on_nj_bail_reform.html) [<https://perma.cc/D5TT-Z557>].

158. N.J. REV. STAT. § 2A:162-19(a)(6) (2014).

159. Christopher S. Porrino, OFFICE OF THE ATT’Y GEN. OF N.J., ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2016-6 v3.0: MODIFICATION OF DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2015, C. 31, at 1 (Sept. 27, 2017), [http://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2016-6\\_v3-0.pdf](http://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2016-6_v3-0.pdf) [<https://perma.cc/FEX7-QCMJ>].

160. *Id.* at 44.

161. *Id.* at 2.

However, Porrino's directive is somewhat at odds with the judiciary's declaration that it is "not prepared to utilize the ODARA because it believes that legislative authorization . . . is necessary before judicial officers can consider ODARA scores."<sup>162</sup> For instance, prosecutors are directed to seek pretrial detention for cases in which the ODARA score is 5 or higher, unless a supervisory prosecutor overrides that presumption and documents their reasons for doing so.<sup>163</sup> But the prosecution cannot disseminate the ODARA score to judges, so in cases where the judiciary's DMF's presumption (which does *not* incorporate ODARA) is at odds with the prosecutor's presumption (based exclusively *on* ODARA), the prosecutor may not argue the motion using the ODARA score—but they may, and are encouraged to, argue the motion using "facts learned through administration of the ODARA."<sup>164</sup>

This procedure, and the information asymmetry on which it stands, threatens to undermine the statutory power balance between prosecutors and the judiciary. A judge may not know the ODARA score, but she can surely identify a pattern of prosecutors seeking detention in intimate partner violence cases. And there is nothing to prevent a judge familiar with ODARA's inputs from noticing that certain facts supporting the prosecutor's pretrial-detention motion are, as luck would have it, facts that might be gleaned from an ODARA administration.

That said, the New Jersey judiciary's concerns with ODARA incorporation are obscure to begin with, and could surely be mollified by a tweak of the risk assessment statute to allow, for instance, use a specialized risk assessment tool in certain specified cases.<sup>165</sup> New Jersey's ODARA implementation is in a state of flux; Maine should monitor New Jersey's experience for guidance as to incorporating ODARA into a rule-based bail system.

#### D. *The Kentucky Approach*

Kentucky has been using actuarial risk assessment in its pretrial practice for longer than most jurisdictions, dating back to 1976 and the formation of its pretrial services agency.<sup>166</sup> In 2006, Kentucky adopted a modern, actuarial risk assessment instrument, "similar in many ways to other pretrial risk tools currently in use";<sup>167</sup> since 2013, it has used the Arnold PSA.<sup>168</sup> Between 2000 and 2010, Kentucky's total prison population exploded, which led to further reform efforts consolidated in a

162. *Id.*

163. *Id.* at 67-70.

164. *Id.* at 47. Evidence rules are often relaxed or inapplicable in pretrial criminal proceedings. See N.J. R. EVID. 101(a)(2)(C) ("these rules may be relaxed . . . to admit relevant and trustworthy evidence"); M.R. EVID. 101(b)(8) ("do not apply").

165. See N.J. REV. STAT. § 2A:162-25 (2012) (referring to only a single risk assessment instrument).

166. KENTUCKY PRETRIAL SERVICES, PRETRIAL REFORM IN KENTUCKY, at 10 (January 2013), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0> [<https://perma.cc/95YD-F2MV>].

167. Stevenson, *supra* note 62 (manuscript at 30).

168. Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015), <https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail> [<https://perma.cc/9Y96-BBXG>].

2011 bill, HB 463.<sup>169</sup> HB 463 requires judges: (1) to consider a defendant's risk assessment score, along with several other factors,<sup>170</sup> in determining whether they are a flight risk or are likely to be a danger to the public;<sup>171</sup> (2) to release "low risk" defendants on their own recognizance or with an unsecured bond,<sup>172</sup> and (3), similarly, to release "moderate risk" defendants, but with extra consideration of electronic monitoring or other increased supervision.<sup>173</sup> The bill otherwise leaves judicial discretion untouched; per a Kentucky Supreme Court Order interpreting the statute, "[n]othing in these guidelines should be construed to limit the court's discretion as to whether or not to grant pretrial release to a defendant."<sup>174</sup> In short, Kentucky's is an utterly standard-based bail system; while progressive in its presumption in favor of pretrial release, its reservation of substantial judicial discretion could easily undermine the reform's goals.

One forthcoming paper by Professor Megan Stevenson examines Kentucky's use of the Arnold PSA by comparing pretrial release decisions (such as the amount of money bail and the imposition of non-financial conditions) before and after HB 463 went into effect.<sup>175</sup> Stevenson confirms some of Wiseman's worst fears. Immediately after consideration of the risk assessment was made mandatory, there was a "sizeable decrease in bail for defendants who were ranked as low risk,"<sup>176</sup> along with a commensurate increase in the percentage of defendants granted non-financial release.<sup>177</sup> So far, so good. But Stevenson's analysis also shows that HB 463 also resulted in "a sharp *drop* in the fraction of defendants receiving low cash bail,"<sup>178</sup> which "suggests that judges responded to the risk assessment changes . . . by substituting non-financial release for low-cash bail."<sup>179</sup> Furthermore, over time, "as judges returned to their previous bail setting habits," the total release rate for all defendants settled down to a 4 percent increase<sup>180</sup>—hardly the budget-saving silver bullet for which risk assessment's proponents might hope. Though Stevenson doesn't go so far, this decline over time may well stem from psychological responses to algorithmic tools' "failures," such as overcompensation for perceived

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169. Stevenson, *supra* note 62 (manuscript at 31).

170. Most notably, the "nature of the offense charged" and the "reasonably anticipated conduct of the defendant if released" remain open to consideration by the judge. KY. REV. STAT. ANN. § 431.525 (LexisNexis 2018).

171. *Id.* § 431.066(2).

172. *Id.* § 431.066(3).

173. *Id.* § 431.066(4).

174. SUPREME COURT OF KENTUCKY, ORDER APPROVING JUDICIAL GUIDELINES FOR PRETRIAL RELEASE AND MONITORED CONDITIONAL RELEASE § 11 (2011), [https://courts.ky.gov/courts/supreme/Rules\\_Procedures/201112.pdf](https://courts.ky.gov/courts/supreme/Rules_Procedures/201112.pdf) [<https://perma.cc/PR9H-PSRE>].

175. Stevenson, *supra* note 62 (manuscript at 7).

176. *Id.* (manuscript at 36). The "claim that the change in bail setting practices . . . [was] due to the information provided by the risk assessment" is further supported by the fact that "there was no change in the release rate for defendants who did not receive a risk score due to [procedural difficulties]." *Id.*

177. *Id.*

178. *Id.* (manuscript at 39) (emphasis in original).

179. *Id.*

180. *Id.* (manuscript at 50).

technological errors.<sup>181</sup>

Worse still, while Stevenson’s research basically suggests that HB 463 made judges more likely to *consider* the risk assessment score, there was also evidence of a slight increase in failure to appear (FTA) and pretrial rearrest rates.<sup>182</sup> Assuming actuarial risk assessment is a better predictor of these events than judicial assessment—a premise Stevenson neither concedes nor denies—one would expect a decrease in FTA and rearrest rates if judges were actually following the actuarial scores. Stevenson hypothesizes that this discrepancy may stem from judicial discretion being a one-way ratchet, “used not to correct the risk assessment when it erred, but to override the risk assessment when it was correct.”<sup>183</sup> In other words, judges may accord the actuarial score weight when it confirms their own assessments, but devalue it when it conflicts with their hunch—that is, they are most likely to override the score at the very time its predictive gains are most important. I will explore this problem further in Part III, as it is a particular hurdle to the successful implementation of actuarial tools in the IPV context.

In sum, Kentucky’s experiment shows that pretrial risk assessment can marginally improve overall outcomes through a standard-based system, but that a system that does not meaningfully constrain judicial discretion may not realize the tools’ full potential. Indeed, given judicial skepticism of actuarial tools, standards may even lead to worse predictive efficiency than traditional judicial risk assessment.

#### *E. Maine’s Current Bail System*

Maine’s bail code, 15 M.R.S.A. §§ 1001-1105, broadly conforms to the 1984 Act’s mold. It creates a presumption of pretrial release, either on personal recognizance or with an unsecured bond, but allows the judicial officer<sup>184</sup> to impose cash bail and release conditions if she finds them necessary in order to: “ensure the appearance of the defendant” at trial; “ensure that the defendant would refrain from any new criminal conduct”; “ensure the integrity of the judicial process”; or “ensure the safety of others in the community.”<sup>185</sup>

Pretrial services agencies play a major role in most modern bail systems, but Maine has no publicly funded pretrial agency. Instead, Maine Pretrial Services (MPS), a private nonprofit agency, largely fills this crucial gap. Founded in 1983, MPS is a nonprofit dedicated to providing the least restrictive bail alternative—typically in the form of pretrial community supervision—for those who cannot post bail or, in the judge’s eyes, require additional pretrial supervision. (MPS is also dedicated to enacting reforms to eliminate cash bail.) MPS conducts prearrestment screenings, along with a needs assessment, for any defendant who requests pretrial

181. See Pahl & Van Swol, *supra* note 124 and accompanying text.

182. Stevenson, *supra* note 62 (manuscript at 50).

183. *Id.* (manuscript at 51). Stevenson’s alternative theory—that the shift from low cash bail towards non-financial release “may have reduced the incentives for released defendants to show up in court,” thus resulting in the FTA increase—is certainly plausible, but does not comport as nicely with the judicial skepticism of risk assessment that she notes. *Id.* (manuscript at 52).

184. The definition of “judicial officer” includes bail commissioners. 15 M.R.S.A. § 1003(8) (2012).

185. *Id.* § 1026(2-A).

services. The MPS screening includes an actuarial risk assessment, but the defendant's score is not shared with the court or the parties—the risk assessment score is used internally by MPS in determining whether or not to offer pretrial supervision.<sup>186</sup>

A judge setting bail may modify a defendant's bail based on MPS's willingness to supervise them. Not infrequently, a judge will offer a defendant a choice: a lower cash bail with MPS supervision, or higher cash bail without supervision.<sup>187</sup> This indicates that Maine judges view MPS as an insurance policy rather than as a risk assessor.

Additionally, judges and bail commissioners seem to vary in their reliance on the community safety provision.<sup>188</sup> The 1980 Commission noted that “judges and bail commissioners sometimes practice preventive detention, *sub rosa* or informally, by setting unreachably high bail,” and recommended amending the Maine Constitution to “[eliminate] the need for this fiction” by allowing for detention without bail if the defendant “is an unreasonable risk of danger to the community or the judicial process.”<sup>189</sup>

While some of the problems with excess pretrial detention most frequently cited in other jurisdictions—overcrowded jails, burdens on state and local budgets, and the like—are not as severe in Maine, they are present and do have budgetary and human impacts.<sup>190</sup> In short, the issues that are driving other states to change their pretrial practices are causing harm in Maine as well.<sup>191</sup>

### 1. Prospects for Reform

The subject of bail reform has arisen intermittently in Maine. In 2015, an Intergovernmental Task Force issued a report recommending various reforms, including an in-depth study into expanding actuarial risk assessment use and eliminating (or vastly reducing) cash bail.<sup>192</sup> Despite repeated calls for reform, most prominently from Chief Justice Saufley,<sup>193</sup> no legislative action has been taken.

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186. Email from Shawn LaGrega, Dep. Dir., Maine Pretrial Services, to author (Nov. 9, 2017) (on file with author). MPS uses the Virginia tool, rather than the Arnold PSA. *Id.*

187. This use of MPS is so common that the Maine bail bond paperwork—the form filled out by a judge setting bail—includes it as a check-the-box option.

188. MARIE VANNOSTRAND ET AL., LUMINOSITY INC., PRETRIAL CASE PROCESSING IN MAINE 20 (2006), [https://digitalmaine.com/cgi/viewcontent.cgi?article=1031&context=doc\\_docs](https://digitalmaine.com/cgi/viewcontent.cgi?article=1031&context=doc_docs) [<https://perma.cc/NY3T-VD7E>].

189. JAMES E. TIERNEY ET AL., REPORT OF THE GOVERNOR'S COMMISSION TO STUDY THE LAWS RELATING TO BAIL IN CRIMINAL CASES 11-12 (Dec. 1983).

190. See Eric Russell, *Legislation Seeks to Eliminate Setting of Bail for Maine Defendants*, PORTLAND PRESS HERALD Feb. 9, 2015, <https://www.pressherald.com/2015/02/09/legislation-seeks-to-eliminate-setting-of-bail-for-maine-defendants> [<https://perma.cc/Q737-UYM9>].

191. See ROBERT E. MULLEN ET AL., REPORT OF THE INTERGOVERNMENTAL PRETRIAL JUSTICE REFORM TASK FORCE 9-11 (2015), [http://www.courts.maine.gov/reports\\_pubs/reports/pdf/PTJRTF\\_report.pdf](http://www.courts.maine.gov/reports_pubs/reports/pdf/PTJRTF_report.pdf) [<https://perma.cc/C3BX-UKL9>].

192. See *id.* at 28-30; see also Russell, *supra* note 190.

193. See Hon. Leigh I. Saufley, Me. Jud. Branch, *The State of the Judiciary: A Report to the Joint Convention of the Second Regular Session of the 127th Legislature* 6 (March 9, 2016),

While Maine has one of the lowest violent crime and incarceration rates in the nation, pretrial incarceration has been steadily increasing for years—in 2014, the pretrial population of a majority of Maine’s county jails exceeded 70% of the total inmate population.<sup>194</sup> This has led to several jails exceeding capacity, which, according to the 2015 report, “creates complex financial, personnel, programming and personal problems for the Sheriffs, the Court system . . . and the individual defendants and their families.”<sup>195</sup>

Speculation on the likelihood of political activity is beyond the scope of this article, but it is notable that over the last two decades, Maine has not shied away from enacting other criminal justice-related reforms, such as marijuana legalization.<sup>196</sup> And some barriers to bail reform that exist elsewhere, such as the bail bond industry and its all-or-nothing lobbying strategy (bail reform would likely end the industry), are minimally relevant or nonexistent in Maine.<sup>197</sup>

On the other hand, while in many other states bail reform is sold largely on budgetary grounds, the biggest hurdle to bail reform in Maine may be, ironically, the potential financial implications. While Maine’s per-inmate operating cost is large,<sup>198</sup> its total size is small enough that the economies of scale driving pretrial reforms elsewhere may not be achievable. As a purely financial matter, the costs of bail reform in Maine may outweigh the benefits: the most recent bail reform proposal in Maine is estimated to cost an additional “\$4 to 5 million a year.”<sup>199</sup> Additionally, some prosecutorial budgets rely on bail forfeiture—such as the substantial sums often forfeited by out-of-state defendants—to fund other costs, such as extradition.<sup>200</sup> Were money bail to end, these forfeitures would also dry up, with no ready replacement since the savings on pretrial detention, substantial as they may be, would be dispersed more broadly. These barriers are by no means insuperable—as impediments to bail reform go, we are lucky to have them—but they will require extra political will. The most recent legislative attempt at some sort of limited bail reform was substantially amended, and the breadth of its reforms commensurately

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[http://www.courts.maine.gov/maine\\_courts/supreme/speeches/SoJ%202016.pdf](http://www.courts.maine.gov/maine_courts/supreme/speeches/SoJ%202016.pdf) [<https://perma.cc/QF68-R7MR>].

194. MULLEN ET AL., *supra* note 191, at 3 n.1.

195. *Id.* at 9.

196. Scott Thistle, *Maine House Upholds LePage’s Veto of Recreational Marijuana Regulations*, PORTLAND PRESS HERALD (Nov. 6, 2017), <https://www.pressherald.com/2017/11/06/legislature-set-to-take-up-lepage-veto-of-recreational-marijuana> [<https://perma.cc/5SUF-U7NS>].

197. MULLEN ET AL., *supra* note 191, at 19.

198. See JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001, at 3 tbl. 2 (June 2004), <https://www.bjs.gov/content/pub/pdf/spe01.pdf> [<https://perma.cc/3SMV-ETNW>] (calculating Maine’s jail operating costs per inmate, as of FY2001, at \$44,379, compared to a national average of \$22,650).

199. Leigh I. Saufley, Me. Jud. Branch, *The State of the Judiciary: A Report to the Joint Convention of the First Regular Session of the 128th Legislature* 7 (Feb. 26, 2017), [http://www.courts.maine.gov/maine\\_courts/supreme/speeches/2017\\_soj.pdf](http://www.courts.maine.gov/maine_courts/supreme/speeches/2017_soj.pdf) [<https://perma.cc/KE77-CRN9>].

200. Interview with Maeghan Maloney, District Att’y, Kennebec Cty., in Augusta, Me. (Aug. 10, 2017) (on file with author).

reduced, in committee.<sup>201</sup> Without significant additional pressure, whether from the court system, the legislature, or the people, serious bail reform may not come to pass.

#### IV. ODARA IN MAINE

In 2004, researchers at the Mental Health Centre Penetanguishene, responding to a call by the Ontario government for intimate partner violence research, developed the Ontario Domestic Assault Risk Assessment (ODARA).<sup>202</sup> ODARA is an actuarial risk assessment tool for predicting IPV recidivism based on data available to police officers at the scene of an assault.<sup>203</sup> To develop ODARA, the researchers studied and coded 1,400 IPV arrests in Ontario, selecting predictors that significantly correlated to recidivism, and retaining “only those that made a significant independent contribution to the total sample.”<sup>204</sup>

The result of this work is a 13-point test that can be administered by police at or shortly after leaving the scene of an IPV crime. Each question is scored as either 1 or 0,<sup>205</sup> and a viable score can be reached with up to five questions unanswered; the scorer keeps track of the number of missing items and uses a table to turn the raw score into the final score. Scores within the ranges 5-6 and 7-13 are treated as the same.<sup>206</sup> A final ODARA score ranges from 0 (which indicates a 7% chance of recidivism within 5 years) to 13 (a 77% chance of recidivism), with most scores falling between 1 and 6.<sup>207</sup>

An ODARA score is based exclusively on information that should be available to officers at the scene of an assault. Five of the inputs are based on an arrestee’s criminal history, such as prior assaults and jail time. Most of the rest are based on circumstances at the scene, such as the presence of children or alcohol; the victim’s fear of the assailant (based on an interview); and barriers to victim support, such as lack of reliable transportation or communication. ODARA has been used by Canadian courts since 2004, beginning with experiments in Ontario bail courts in 2004.

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201. The most pertinent amendments removed provisions (A) requiring that “the Judicial Branch pay all bail commissioner fees” and (B) eliminating the use of unsecured appearance bonds. Comm. Amend. to L.D. 1639 (127th Legis. 2016),

[http://www.mainelegislature.org/legis/bills/display\\_ps.asp?LD=1639&snm=127](http://www.mainelegislature.org/legis/bills/display_ps.asp?LD=1639&snm=127)

[<https://perma.cc/K4SF-55K9>]. These provisions were opposed by the Aroostook County DA, among others. *An Act to Implement the Recommendations of the Intergovernmental Pretrial Justice Reform Task Force: Hearing on L.D. 1639 Before the J. Standing Comm. on Judiciary*, 127th Legis., 2nd Reg. Sess. (Mar. 14, 2016) (testimony of Todd Collins, District Att’y, Aroostook Cty).

202. HILTON ET AL., *supra* note 9, at 4.

203. Most other IPV risk assessment tools use predictors unavailable to police, such as “early childhood problems, psychopathic characteristics, [and] criminal behavior before the age of 16.” *Id.* at 10.

204. *Id.* at 51-52, 56. The researchers used police records to account for “all domestic incidents,” and thereby avoid the issue of police or prosecutors ceasing to pursue a charge. *Id.*

205. ODARA’s creators found that the predictive benefits of weighted scores were minimal, especially when compared to the ease of use of the “1 or 0” test. *Id.* at 56-57.

206. *Id.* at 60 (explaining that the small number of cases in these ranges made individual score assessments distinguishing between scores of 5 and 6 or between 9 and 11 unreliable).

207. *Id.* at app. B, tbl. B.1.

### A. ODARA Adoption

In 2011, after a string of high-profile intimate partner homicides, the Maine Commission on Domestic and Sexual Abuse formed a task force to study risk assessment practices in IPV cases.<sup>208</sup> In December 2011, while the task force worked, Representative Emily Cain of Orono introduced a bill to mandate use of evidence-based risk assessment in Maine's criminal justice system.<sup>209</sup> Following extensive research the task force recommended in its final report in February 2012 the use of ODARA in Maine's criminal justice system.<sup>210</sup>

The bill, L.D. 1711, passed the legislature with minimal amendment<sup>211</sup> and was signed into law by Governor LePage on May 21, 2012.<sup>212</sup> When the law went into effect in January 2015, Maine became the first state to require, statewide, the use of evidence-based risk assessment in IPV cases.<sup>213</sup>

L.D. 1711 implemented ODARA through several statutory requirements. First, law enforcement officers must administer an ODARA test whenever they have reason to believe that IPV has occurred.<sup>214</sup> Second, law enforcement agencies must adopt written policies and procedures that provide for ODARA's administration in IPV cases.<sup>215</sup> Third, the statute requires bail commissioners to make a "good faith effort to obtain" an ODARA score before setting bail in an IPV case.<sup>216</sup> Fourth, the law requires a judge to "consider" a defendant's ODARA score in setting bail.<sup>217</sup> The act took effect on January 1, 2015, to allow law enforcement agencies enough

208. MAINE DOMESTIC ABUSE HOMICIDE REVIEW PANEL, WORKING TOGETHER TO END DOMESTIC VIOLENCE 14 (2012), [http://www.maine.gov/ag/dynld/documents/Working\\_Together\\_to\\_End\\_Domestic\\_Violence\\_04-11-12.pdf](http://www.maine.gov/ag/dynld/documents/Working_Together_to_End_Domestic_Violence_04-11-12.pdf).

209. *An Act to Mandate the Use of Standardized Risk Assessment in the Management of Domestic Violence Crimes: Hearing on L.D. 1711 Before the J. Standing Comm. on Crim. Just. and Pub. Safety*, 125th Legis., (Feb. 13, 2012) (testimony of Rep. Emily Cain) (on file with author).

210. FAYE E. LUPPI & JULIA COLPITTS, ME. COMM'N ON DOMESTIC AND SEXUAL ABUSE, RISK ASSESSMENT COMMITTEE REPORT 3 (2012), <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWVpbnxtZWVidXNlY29tbWlzc2lvdnbnxneDo1ZmU2ODAyNDk2M2ExYzk> [<https://perma.cc/HCQ4-3722>].

211. The only significant amendment was the elimination of a provision requiring that ODARA be administered to current county and state prison inmates. Another amendment, recommended by the task force's final report, provided civil immunity for police and other officials for their ODARA administration. Comm. Amend. to L.D. 1711 (125th Legis. 2012) (on file with author).

212. L.D. 1711 (125th Legis. 2012), [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?PID=0&snum=125&paper=&paperId=l&ld=1711](http://www.mainelegislature.org/legis/bills/display_ps.asp?PID=0&snum=125&paper=&paperId=l&ld=1711) [<https://perma.cc/P6A9-4AVK>].

213. Samantha Edwards, *Maine's New Domestic Violence Protocol Goes into Effect*, NEWSCENTERMAINE.COM (Jan. 2, 2015), <http://www.newscentermaine.com/article/news/local/maines-new-domestic-violence-protocol-goes-into-effect/311637995> [<https://perma.cc/2SJT-DKTG>].

214. 19-A M.R.S.A. § 4012(6) (2012).

215. 25 M.R.S.A. § 2803-B(1)(D)(5), (2)-(3) (2012). Subsections (2) and (3) were later repealed in a stylistic revision of the entire chapter.

216. 15 M.R.S.A. §1023(4)(C)(6) (2012). Bail commissioners cannot set bail in an IPV case being charged as Class C or higher. *Id.*

217. *Id.* §1026(4)(C)(9-A).



time to implement ODARA procedures.<sup>218</sup>

A sister statute, L.D. 1867, was enacted several weeks earlier.<sup>219</sup> L.D. 1867 made two pertinent changes to Maine's bail procedure: first, it prohibits bail commissioners from setting bail in all Class A, B, and C domestic violence cases (i.e., felony domestic violence assault);<sup>220</sup> and second, when a defendant violates bail conditions on an underlying IPV offense, L.D. 1867 requires that a judge make findings on the record before releasing the defendant.<sup>221</sup>

### B. ODARA Implementation

Before L.D. 1711 passed, two agencies in Maine were systematically using ODARA: Saco Police and Maine Pretrial Services.<sup>222</sup> In the two-plus years between the bill's passing and its effective date, the Maine Criminal Justice Academy (MCJA) partnered with the Maine Coalition to End Domestic Violence (MCEDV) and the Violence Intervention Partnership of Cumberland County to develop ODARA policies and training. In 2014, the MCJA's revised training protocols for in-service officers included two hours of mandatory ODARA training.<sup>223</sup> MCEDV also collaborated with the Maine Chiefs of Police to create and facilitate online training in ODARA procedures.<sup>224</sup>

There are some valid concerns about police administration of ODARA. In at least some of the 2016 IPV-related homicides, not only had an ODARA score not been provided to the judge setting bail, but a criminal records check had not even been run.<sup>225</sup> (While responsibility for the former problem does not necessarily lie with police, if no criminal history is run, ODARA is impossible to administer.) Vesting the responsibility for ODARA administration within specific law

218. *An Act to Mandate the Use of Standardized Risk Assessment in the Management of Domestic Violence Crimes: Hearing on L.D. 1711 Before the J. Standing Comm. on Crim. Just. and Pub. Safety*, 125th Legis. (2012) (testimony of Rep. Emily Cain).

219. *An Act To Protect Victims of Domestic Violence*, L.D. 1867, 125th Maine Leg., Second Reg. Sess. (Me. 2012), [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?PID=0&snum=125&paper=&paperId=1&ld=1867](http://www.mainelegislature.org/legis/bills/display_ps.asp?PID=0&snum=125&paper=&paperId=1&ld=1867) [https://perma.cc/F9DN-ZP4E].

220. 15 M.R.S.A. § 1023(4)(B-1)(1). Typically, these are cases in which the defendant has a prior IPV-related conviction. *Id.*

221. *Id.* §§ 1095(2), 1097(2-A). This provision essentially creates a presumption of detention in certain cases. *Id.*

222. *An Act to Mandate the Use of Standardized Risk Assessment in the Management of Domestic Violence Crimes: Hearing Before the J. Standing Comm. on Criminal Justice and Pub. Safety* (2012) (Response from the Maine Commission on Domestic and Sexual Abuse Risk Assessment Committee).

223. ME. CRIMINAL JUSTICE ACAD., 2014 ANNUAL REPORT TO THE JOINT STANDING COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY 13 (April 2015), [http://digitalmaine.com/cgi/viewcontent.cgi?article=1005&context=cja\\_docs](http://digitalmaine.com/cgi/viewcontent.cgi?article=1005&context=cja_docs) [https://perma.cc/V732-6VU5].

224. *Domestic Violence Risk Assessment Implementation Date Nears: MCEDV Offers Training, Technical Assistance on ODARA*, MAINE COALITION TO END DOMESTIC VIOLENCE (June 2, 2014), <https://web.archive.org/web/20160719213450/http://www.mcedv.org/news/domestic-violence-risk-assessment-implementation-date-nears-mcedv-offers-training-technical> [https://perma.cc/L747-SW8S].

225. Saufley, *supra* note 199, at 10.

enforcement units would ease these concerns, and several jurisdictions in Maine do have specialized IPV units or investigators.<sup>226</sup> However, dedicated IPV units “are uncommon and may have insecure funding.”<sup>227</sup>

Furthermore, actuarial risk assessments are unworkable without accurate scores. Some of the ODARA inputs come from the defendant’s criminal history and are therefore easier to administer (and to double-check), but other inputs depend upon a victim interview and the police officer’s subjective assessment of, for instance, whether there were “indicators of substance abuse” or “confinement at the scene of the assault.”<sup>228</sup> While the answers to these questions will generally be clear, and ODARA scoring forms include examples and clear guidance to alleviate problems of subjectivity, there are plenty of situations in which the answer is unclear. In these cases, a score difference of only a point or two may substantially change the predicted recidivism risk. Police may be mildly incentivized to score harshly for the same reasons that police sometimes manipulate crime statistics.<sup>229</sup>

While L.D. 1711 provided standards for law enforcement training, training of prosecutors, judges, and defense counsel has been more limited. The 2015 Maine State Bar Association Annual Conference included one CLE session specifically on ODARA,<sup>230</sup> and the judiciary provided its own internal training for judges. Otherwise, though, there seems to have been little systematic training or education for lawyers in the criminal justice system.<sup>231</sup> In the defense bar, the eligibility requirements for defense attorneys to represent indigent criminal defendants require CLE credits on IPV defense but do not otherwise require any specific ODARA or risk assessment training or experience. Nor do the Standards of Practice for indigent

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226. See, e.g., *Criminal Investigations Division (Detectives)*, CITY OF BANGOR, ME. (last visited Nov. 15, 2018), <http://www.bangormaine.gov/content/318/354/1142/1188.aspx> [<https://perma.cc/H5X4-XCCD>] (“The [Bangor Domestic Violence] Investigator is assigned to the Criminal Investigation Division and, when it was created in 1997, was one of the first of its kind in Maine.”).

227. ME. DOMESTIC ABUSE HOMICIDE REVIEW PANEL, ON THE PATH TO PREVENTION: THE 11TH BIENNIAL REPORT OF THE MAINE DOMESTIC ABUSE HOMICIDE REVIEW PANEL, 18 (June 2016), <https://www.maine.gov/ag/docs/2016%20Report%20of%20the%20Domestic%20Abuse%20Homicide%20Review%20Panel.pdf> [<https://perma.cc/TVS4-CY8J>].

228. HILTON ET AL., *supra* note 9, at app. A at 159, 164.

229. See Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1214 (2014) (“The varied, overdetermined reasons for police [undercounting] in rape statistics fall into two broad categories”: political forces, and cultural norms and beliefs about the veracity of rape claims.); see also Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 331-32 (2014) (describing police resistance to various decriminalization waves). On the other hand, police have historically been prone to underestimate domestic violence prevalence, which, to the extent that tendency remains true, might cause police to score the ODARA unduly leniently. See, e.g., Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 212-16 (2008).

230. ME. STATE BAR ASS’N, 2015 MSBA ANNUAL MEETING PROGRAM (2015), <https://www.pierceatwood.com/sites/default/files/webfiles/MSBA%20annual%20meeting%20brochure.pdf> [<https://perma.cc/Q3Y9-UZJQ>].

231. Prosecutor training was each jurisdiction’s responsibility. Interview with Maeghan Maloney, District Att’y, Kennebec Cty., in Augusta, Me. (Aug. 10, 2017).

criminal defense attorneys make any mention of pretrial risk assessment.<sup>232</sup>

This is not to say that plenty of attorneys did not educate themselves; in an adversarial system that relies upon attorneys' initiative and intuition to shape the law, that is what attorneys do. But as Kentucky's and New Jersey's experiences indicate, risk assessment tools may be more effective within a rule-based system than within Maine's standard-based system.

### *I. Comparing IPV and General Risk Assessment*

Complicating analysis of ODARA's implementation in Maine are the several important differences between risk assessment tools in the general criminal context and in IPV cases. Maine is the first state to require a specialized IPV risk assessment tool in setting bail, but courts and agencies across the country have been using IPV risk assessments on a more ad hoc basis in pretrial, sentencing, probation, and other case management situations for years.<sup>233</sup> Generally, pretrial IPV risk assessment implementation mirrors that of general dangerousness and flight risk assessments: both scenarios involve a policy or rule requiring some actor—law enforcement or pretrial officers, prosecutors, or judges—to consider the assessment results “as one piece of information among many” in reaching a decision.<sup>234</sup> According to ODARA's developers, several important factors affect the success of implementation, “including (a) careful specification of the desired outcome, (b) precise and objectively stated policy, (c) cooperation and coordination among agencies implementing and enforcing the policy,” as well as sufficient training and evaluative methods.<sup>235</sup> Maine's pretrial system must account for the important differences between the two tools' uses, concerns, and effects.

First, in IPV cases, judges are balancing the defendant's right not to be unnecessarily detained—and all the concomitant injuries detention entails—against the victim's safety and freedom from harm. IPV recidivism typically, though not always, occurs against the same victim.<sup>236</sup> Essentially, the question is: how likely is the defendant to hurt the same victim and what conditions and supervision can most effectively reduce or eliminate that risk?

By contrast, general risk assessments balance the defendant's right to not be

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232. 94-649 C.M.R. ch. 3, § 3(5), 5(9), *amended by order* 2016-091 (effective June 10, 2016).

233. Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 540 (2010); *see also* HILTON ET AL., *supra* note 9, at 10-11; Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire That Predicts the Likelihood That a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 282 (2009).

234. Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 186 (2000).

235. HILTON ET AL., *supra* note 9, at 121.

236. *See* M.J. BREIDING ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010, at 51 (2010), [https://www.cdc.gov/violenceprevention/pdf/cdc\\_nisvs\\_ipv\\_report\\_2013\\_v17\\_single\\_a.pdf](https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf) [<https://perma.cc/PSA3-TH4E>].

unnecessarily detained against both “public safety” and flight risk.<sup>237</sup> The “public safety” factor is generally understood to mean the odds that a defendant “pose[s] a risk of committing any crime on release; the label is not limited to those who may commit violent or dangerous crimes.”<sup>238</sup> For most crimes, even most violent crimes, recidivism against the same victim is rare.<sup>239</sup> Consequently, the statutory factors guiding risk assessment for non-IPV defendants do not address or consider the *victim* at all, the assumption being that the defendant is no more likely to harm the victim than to harm any other person in the community.

Second, IPV risk assessment relies on a different set of factors. While general criminal risk assessment tools inquire broadly into an individual defendant’s likelihood of committing any future crime or FTA (by looking at a defendant’s economic and personal history),<sup>240</sup> ODARA’s inquiry is much more narrowly focused on the relationship between the defendant and the victim, and therefore incorporates more information about the alleged crime and the circumstances surrounding its commission. For this reason, ODARA requires administration by police, and therefore changes to police procedure;<sup>241</sup> by contrast, general risk assessments can typically be conducted by other actors, usually pretrial officers, or run automatically based on information available through state criminal histories. Maine Pretrial Services, for instance, administers a general risk assessment tool in Maine, whereas law enforcement officers must administer ODARA.<sup>242</sup> Changes to police procedure can be expensive and impractical, may have unintended consequences, and can be resisted by police themselves.<sup>243</sup> On the other hand, while scoring errors or incompleteness will be less common in PSA application than they are in ODARA application, other risks are present in automated systems: errors in the criminal history data itself, cases of mistaken identity, and the like.<sup>244</sup> These

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237. GOULDIN, *supra* note 92, at 892 (noting that many risk assessment tools combine the risks of a defendant committing crimes on release, and failing to appear, into a single “pretrial failure” rate).

238. *Id.* at 851 (discussing federal courts’ interpretations of the 1984 Bail Reform Act).

239. According to a 2017 BJS report, between 2005 and 2014, “[v]ictims of violence committed by a stranger had the lowest percentage of repeat violent crime,” while victims of IPV experienced the greatest percentage of repeat violence. BARBARA A. OUDEKERK & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, NCJ 250567, REPEAT VIOLENT VICTIMIZATION, 2005-14, at 7 (2017), <https://www.bjs.gov/content/pub/pdf/rvv0514.pdf> [<https://perma.cc/HNX8-HQJJ>].

240. The Virginia risk assessment tool, for instance, accounts for a defendant’s employment status, length at his current residence, and history of drug abuse. VANNOSTRAND & ROSE, *supra* note 60, at 18-20.

241. Indeed, one consideration in the selection of the ODARA factors was the availability of information to police. HILTON ET AL., *supra* note 9, at 139.

242. 19-A M.R.S.A. § 4012(6) (2012). Theoretically, victim or pretrial services could also administer the test, but the short timeline for bail proceedings – generally, upon an incarcerated defendant’s filing a petition for redetermination of bail, a hearing must be held within 48 hours of filing – effectively necessitates police administration, since they will have been on the scene initially. *See Me. R. Crim. P.* 46(d).

243. *See* LAWRENCE SHERMAN, POLICING DOMESTIC VIOLENCE 109, 113 (1992).

244. For instance, a data entry error likely led to the pretrial release of Lamonte Mims in July 2017, five days before he allegedly murdered Edward French. Westervelt, *supra* note 91. While risk assessment would not increase the likelihood of such errors, it may make their effects more pernicious, by making judges less prepared to identify “unusual” outcomes as errors – to the extent a judge trusts

errors are less easily overridden under a rule-based system than when police, prosecutors, and judges retain a greater degree of discretion.

Third, ODARA can help minimize the pretrial detention of “victim arrestees” – that is, people (mostly women) who are arrested for IPV but are not the primary aggressors in the relationship. There is evidence that a “substantial percentage of women [arrested for IPV], but not men, [have] been victimized by their partners and may have been acting in self-defense.”<sup>245</sup> A 2004 California study of victim arrests noted that although women arrested for IPV were less likely than men to have been the “primary perpetrators” of the violence, they were just as likely to have used “severe violence and inflicted severe injuries” against their partners.<sup>246</sup> Before ODARA’s adoption in Maine, judges, guided by the factors in Maine’s bail code, would use the severity of the alleged violence as a proxy for future dangerousness.<sup>247</sup> The severity of the charged offense is always available to the arrainging judge, which may have led to disproportionately high bail for victim arrestees; ODARA, conversely, incorporates other evidence that an assault was retaliatory or defensive and thus aids in preventing that detention.<sup>248</sup>

Finally, ODARA was adopted in Maine explicitly as a way to identify and detain dangerous defendants rather than to identify and release harmless defendants. Even the statute describes the ODARA score as “evidence that the defendant poses a danger to the safety of others in the community.”<sup>249</sup> This language primes judges to view ODARA primarily as an indicator of dangerousness; by contrast, general risk assessment tools are largely implemented to indicate nondangerousness.<sup>250</sup> Any implementation of general risk assessment in Maine must account for judges’ experiences with ODARA and its focus on heightened dangerousness.

Additionally, these distinctions become more important in rural places, where the dangerousness and lethality of intimate partner violence is greater than in urban areas.<sup>251</sup> For most other crimes, there is a much narrower gap in rates between rural and urban areas.<sup>252</sup> Therefore, in a predominately rural state like Maine,<sup>253</sup> IPV risk

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the risk assessment’s recommendation, *see* Pahl & Van Swol, *supra* note 124, he may not pay as much attention to information that would otherwise make him question or overrule it.

245. Amy L. Busch & Mindy S. Rosenberg, *Comparing Women and Men Arrested for Domestic Violence: A Preliminary Report*, 19 J. FAM. VIOLENCE 49, 56 (2004).

246. *Id.* at 49.

247. 15 M.R.S.A. § 1026(4)(A) (2012); *see also* Wiseman, *supra* note 8, at 438-39, 441 n.140.

248. General risk assessment can reduce a similar disparity: the systematic imposition of higher bail amounts and pretrial detention rates on black and other racial minority defendants. *See* Jones, *supra* note 32, at 938-39.

249. 15 M.R.S.A. § 1026(4)(C)(9-A).

250. Starr, *supra* note 64, at 816.

251. Lisa B. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WISC. J. L. GENDER, & SOC’Y 348, 349-50 (2008). It is unclear whether there is a meaningful urban-rural difference in rates of occurrence of intimate partner violence. *Id.* at 351.

252. *Id.* at 348-49 & n.5.

253. In 2010, 61.3% of Mainers lived in rural areas. Matt Wickenheiser, *Census: Maine Most Rural State in 2010 as Urban Centers Grow Nationwide*, BANGOR DAILY NEWS (Mar. 26, 2012), <https://bangordailynews.com/2012/03/26/business/census-maine-most-rural-state-in-2010-as-urban-centers-grow-nationwide> [<https://perma.cc/9797-U9DX>].

assessment does not only assist judges in making pretrial release and bail decisions, but also, perhaps even more importantly, to assist prosecutors, pretrial services, and victim services in allocating resources.<sup>254</sup> Efficient resource allocation is an important benefit of risk assessment in general, but it is even more important in rural places where time and distance make pretrial supervision more difficult.

## 2. Other Considerations

Certain normative and constitutional criticisms of actuarial risk assessment carry special weight in the IPV context. Feminist critiques of mandatory arrest laws and the theory of state intervention as inevitably violent may become particularly salient when algorithms get involved.<sup>255</sup> IPV risk assessment law must confront these issues.

Feminist writers and restorative justice advocates have criticized mandatory arrest laws on the grounds that they “revictimize” IPV victims by “[replicating] the very violence the state seeks to eradicate.”<sup>256</sup> (The original impetus for mandatory arrest, in the 80s and 90s, was to eradicate the then-common police practice of minimizing or ignoring intimate partner violence, typically because it was viewed as a “private matter,” and thus fell outside law enforcement’s purview or responsibility.)<sup>257</sup> Risk assessment’s robotic nature can increase the sense of disempowerment that many IPV victims feel in their interactions with the criminal justice system.<sup>258</sup> This problem may even be heightened when, as with ODARA, facts about the victim (over which the victim has no control) underpin the state action. That is, if general criminal risk assessment is impermissibly based on factors beyond the defendant’s control, then there is double the danger of impermissible bias in IPV cases because uncontrollable characteristics of both the defendant and the victim may affect the score.<sup>259</sup>

In Maine’s current system, IPV victims may attend their abuser’s bail hearings and argue for pretrial release.<sup>260</sup> The reasons they do so are no less valid for their variety and complexity: economic dependence or vulnerability;<sup>261</sup> the presence of

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254. HILTON ET AL., *supra* note 9, at 114.

255. *See generally* Johnson, *supra* note 233.

256. Linda Mills, *Killing Her Softly: Inmate Abuse and the Violence of State Intervention*, 118 HARV. L. REV. 550, 556, 585 (1999).

257. Kohn, *supra* note 229, at 212-15.

258. Mills, *supra* note 256, at 576-77.

259. For instance, perpetrators and victims nearly always share socioeconomic characteristics. HILTON ET AL., *supra* note 9, at 130. While ODARA does not expressly consider defendant’s demographic characteristics, ODARA does inquire into any barriers to safety the victim faces, which includes factors that implicate social and economic circumstances. An indigent victim who seeks the defendant’s release will be less likely to succeed than will a wealthy victim who seeks the same.

260. *See, e.g.*, Kimberly D. Bailey, *It’s Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1792-93 (2012).

261. *Id.* at 1794-95.

children; fear;<sup>262</sup> love;<sup>263</sup> fear of social stigma;<sup>264</sup> and as many other reasons as there are people and personalities. While these requests may be only rarely granted, the opportunity to be heard can show victims the human face behind the state action. The use of risk assessment would close this curtain and obscure state paternalism and violence in an aura of “objectivity.”<sup>265</sup>

Mandatory arrest, no-drop, and other laws and policies that subordinate “individual autonomy in domestic space to state control” may also raise Due Process issues.<sup>266</sup> The privacy and marital autonomy rights developed in *Griswold*<sup>267</sup> and its progeny<sup>268</sup> are implicated whenever the state expands its reach into the home; no-contact orders, curfews, electronic monitoring, and the like could be viewed as enforcing a “state-imposed de facto divorce.”<sup>269</sup> Professor Jeannie Suk argues that expansion in the use of these state-imposed separation tools threatens to exceed their justification. In other words, because IPV is a “manifestation of gendered power inequality” in intimate relationships, the law has developed extraordinary tools to deal with the problem, but these extraordinary tools are becoming normalized.<sup>270</sup>

However, the adoption of actuarial risk assessment in IPV cases will not increase this intrusion. If anything, by more accurately predicting incidences of violence, it will help to reduce incidences of unwarranted separation. Furthermore, the public/private distinction—as Professor Suk acknowledges—was historically used to justify non-intervention in IPV cases.<sup>271</sup> Until the 1970s, it was common for police, prosecutors, and judges to treat IPV under a “therapeutic,” not criminal, framework, often on the grounds that the criminal justice system should not reach inside the home.<sup>272</sup>

If IPV risk assessment tools are to be used, we need not limit their outcomes to the relatively binary “release/no release” decision that characterizes rule-based systems. Even if mandatory arrest and no-drop policies are inappropriate or counterproductive enactments of state violence, risk assessment should not be used mechanically in IPV cases. Linda Mills has suggested that the state should allow some couples to enter alternative forms of counseling or healing, rather than universally prosecute IPV as a criminal matter, and that in many jurisdictions,

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262. See EVAN STARK, COERCIVE CONTROL 207 (2009).

263. Bailey, *supra* note 260, at 1785.

264. *Id.* at 1800.

265. *But see* Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1894 (1996) (arguing that concerns about revictimization trivialize and obscure the “actual physical harm inflicted by battering”).

266. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 70 (2006).

267. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

268. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

269. Suk, *supra* note 266, at 64.

270. *Id.* at 69-70.

271. Hanna, *supra* note 265, at 1869.

272. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2170 (1996).

prosecution is mandated, in part, to avoid risk.<sup>273</sup> These and other therapeutic uses of IPV risk assessment should be a part of any implementation scheme.

### *C. Applying the Lessons of Risk Assessment Implementation*

If and when Maine reforms its antiquated, problematic, and arguably unconstitutional bail system, how would actuarial tools be best incorporated into those reforms? The theoretical appeal of a rule-based system is undeniable. As Wiseman persuasively argues and as Kentucky's experience indicates, merely adopting an actuarial tool will not necessarily solve the problems inherent to a standard-based bail system. Some curtailment of judicial discretion seems necessary if one's goal is to reduce pretrial detention rates and to uncouple a defendant's "risk level" (*however* it is determined: judicially or actuarially) from the amount of cash bail they must pay. Judges may not trust actuarial tools and may be hasty to find reasons and ways to override their recommendations.<sup>274</sup> This judicial skepticism, and reluctance to use actuarial tools, may compound itself. A rule-based system seems to form a good baseline concept for actuarial risk assessment implementation.

Furthermore, Maine judges' experience with ODARA may prime them to view risk assessment solely through a dangerousness lens. Maintaining a standard-based procedure and simply attaching a general risk assessment could be risky because Maine judges have experience primarily with a risk assessment tool that indicates risk, rather than one that indicates the absence of risk. This is no mere tautology: ODARA, through its history and the way it is taught, primes judges to look for risk, but the goal of the PSA and other bail reform models is to "reduce pretrial detention by limiting it to the statistically dangerous."<sup>275</sup>

Actuarial tools are means, not ends. We should not forget that a primary goal of actuarial risk assessment is the elimination of money bail or at least the mitigation of its worst harms. While a standard-based system might lead to improved outcomes at the margins, the evidence from Kentucky indicates that without restricting judicial discretion these improvements are minimal (though they are no less real for being small: 100 defendants freed pretrial, who would otherwise have been detained, is a real, non-trivial gain in human welfare). But if a rule-based system would lead to a greater increase in pretrial release—as New Jersey's experience suggests it would—then the gains from the actuarial tool would outweigh its drawbacks, most of which are present, to varying degrees, whether rules or standards are used.

Those drawbacks, of course, are the legitimacy and dignity concerns. While these problems are heightened under a rule-based system, they attach to the very roots of the actuarial tool itself and are therefore still present if the actuarial tool is governed by a standard, not a rule. For these reasons, I suggest that an actuarial tool be implemented into general pretrial risk assessment under a quantifiable rule-based system, rather than a system based on judicial discretion.

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273. LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 110, 134-37 (2003).

274. *See supra* notes 124-25 & 181-82 and accompanying text.

275. Sandra G. Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 494 (2018).



### 1. *Building a Decision-Making Framework*

Within the universe of rule-based pretrial decisionmaking systems, a crucial distinction seems to be this: where should the power to set the rules lie? That is, who should control the “decision-making framework”? New Jersey’s system locates that power in the judiciary, through the administrative office of the courts;<sup>276</sup> Wiseman’s proposal, though informally, would follow the federal sentencing guidelines’ example and create an independent bail commission, appointed by the executive but removable only for cause.<sup>277</sup> The bail commission model has intuitive appeal, but the commission should accept greater judicial input than the federal sentencing commission did.<sup>278</sup> Judicial involvement will be crucial, but isolating the decision-making power within the administrative office of the courts risks perpetuating the political and agency costs that the rule-based system is intended to avoid. An independent commission would also be more insulated from the political blowback from “bad errors” —crimes committed by defendants on pretrial release—than are single judges.

Tailoring and validation of a pretrial risk assessment to Maine’s idiosyncrasies—the vast differences (in population density, economic and administrative resources, and culture) between Inland/Northern and Coastal/Southern Maine must be taken into account in designing and implementing risk assessment. The simplest solution would be to create multiple decision-making frameworks to suit the particular needs of different counties. This tailoring would come with minor additional administrative costs, but tailoring would carry significant advantages: easing of legitimacy and dignity concerns, greater acceptance by judges in rural courts (and commensurately fewer judicial overrides and costs), as well as simple fairness.

### 2. *Incorporating IPV Risk Assessment*

The same arguments compelling a rule-based system in the general criminal context still apply to IPV cases. If we approach the problem from the same direction, that is one of aggregate fairness, then a rule-based system would ensure that a greater number of defendants were receiving fairer treatment. At the same time, however, the harms attendant to IPV prosecution (e.g., alienation, loss of control, and other forms of continued harm to victims, not to mention the heightened danger of retribution) would worsen under a rule-based bail system, primarily because IPV risk assessment deals not with a single individual but with two people and their relationship.

We must also account for the impact of different pretrial processes on police incentives. For instance, say Maine adopts a bail commission model that uses the

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276. ACLU ET AL., *supra* note 151, at 10.

277. Wiseman, *supra* note 8, at 459.

278. *See id.* at 460; *see also* Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 FED. PROB. 30, 31 (2011) (“The early data . . . suggests that the lack of judicial input has made the tool less effective in . . . achieving increased rates of defendants released in the federal system.”).

Arnold PSA in most cases and ODARA in cases where police have probable cause to believe IPV has occurred. If police want to increase the likelihood that in a borderline case, an arrestee will be detained pretrial, then allowing ODARA to supplement the PSA gives police two bites at the apple—they might be inclined to get an ODARA score on the off-chance that it is high, even if there isn't enough evidence for a prosecutor to charge any IPV crime.

A system in which judges retain greater discretion in IPV cases could risk IPV defendants crowding out other pretrial detainees. That is, under the current bail system, we might assume judges are releasing a greater percentage of IPV defendants than they might otherwise release because judges are responding (if only marginally) to crowding concerns; but if defendants in other crimes are being released at greater rates, that might open up space that judges would then fill with IPV defendants. Judges could also increase IPV pretrial detention rates to “compensate” for what they might perceive as the bail commission’s excessive leniency. In other words, if judges are anchored to a certain level of pretrial detention, they will seize an opportunity to return to that level. To the extent that intimate partner abusers are more likely than defendants in other crimes to recidivate,<sup>279</sup> this proportional readjustment may be desirable; the concern, though, is that this “compensation” would exceed the higher recidivism risk, especially if risk assessment generally “increase[s] the salience of recidivism prediction in [judicial] decisionmaking.”<sup>280</sup>

In the courtroom, however, the revictimization of IPV victims under a rule-based system may not be substantially greater than under a system in which ODARA is instead used as a factor in overcoming a PSA-based presumption of release. It is important here not to confuse revictimization concerns with legitimacy concerns. Revictimization is about the loss of agency due to state coercion, no matter what the impetus for that coercion; legitimacy concerns are about loss of agency due to the mechanical or algorithmic nature of the state’s decisionmaking. In a rule-based pretrial detention proceeding, some degree of revictimization may be unavoidable, regardless of whether ODARA or the Arnold PSA is the controlling mechanism. (A victim is unlikely to see the difference between the ODARA and a general risk assessment tool, at least as far as their own agency is concerned.)<sup>281</sup> And while there is a strong societal interest in protecting victims, it is not the only goal of criminal justice; after all, intimate partner violence “is a crime and not merely a tort.”<sup>282</sup>

The incorporation of IPV risk assessment into a reformed bail system must account for these considerations. Under a bail commission model, which sets

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279. Recidivism rates vary widely from place to place, and are difficult to calculate, but the available evidence indicates that IPV offenders’ rearrest rates are somewhat above-average. *See, e.g.*, WASH. STATE INST. FOR PUB. POLICY, RECIDIVISM TRENDS OF DOMESTIC VIOLENCE OFFENDERS IN WASHINGTON STATE 5 (August 2013), [http://www.wsipp.wa.gov/ReportFile/1541/Wsipp\\_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf) [<https://perma.cc/K9Y3-4SWH>].

280. Starr, *supra* note 64, at 865.

281. While it is true that a victim’s statements and circumstances are factors in the ODARA score, the specific score calculations need not – and should not – be mentioned in a detention hearing.

282. Bruce Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 U.M.K.C. L. REV. 33, 75 (2000).

presumptions of release and detention based on a general risk assessment tool in all cases, IPV risk assessments should serve as supplemental tools—not through a mechanical or rule-based process, but through a holistic, judicial, balancing of these important concerns.

#### D. Intermediate Steps

Even if general bail reform is not to be accomplished in the short term, a few enhancements to the ODARA system could still improve outcomes. Prosecutors play an important role in ensuring that ODARA use does not fade. Consistent prosecutorial use of ODARA will encourage police to consistently collect scores, in order to avoid blowback from angry prosecutors, and will reinforce consistent judicial consideration of scores (among other things, greater judicial experience of ODARA would show judges how ODARA might improve their own decisionmaking). At the law enforcement level, clarification of the subtleties in ODARA administration (i.e., score-taking) would lead to more consistent application; embedding ODARA in police report forms, not just in policy, seems an obvious step as well.<sup>283</sup>

The defense bar could also play a more active role in domestic violence cases. ODARA need not be used in a strict detention/no-detention decision: defense attorneys might use a higher ODARA score to advocate for rehabilitative or alternative measures as well. For instance, to the extent that an IPV defendant is “dangerous” only to the victim, some pretrial tools, such as electronic monitoring, may be more appropriate in IPV cases than in other criminal cases.<sup>284</sup> Defense counsel might also help to reinforce the consistent application and provision of ODARA by questioning a prosecutor who fails to provide a score. Finally, the traditional role of defense attorneys is to optimize the outcome in the current case (that is, to treat the defendant as a one-shotter),<sup>285</sup> but the scope of the defense

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283. Many police departments in Maine do this already. The only source I have for this is my own research.

284. Electronic monitoring is rarely used, because the defendant is required to pay its costs. There seems to be little reason not to subsidize these costs—which are perhaps 10-20% of the cost of pretrial imprisonment—and electronic monitoring has generally been effective in IPV cases. See Amanda Rhodes, *Strengthening the Guard: The Use of GPS Surveillance to Enforce Domestic Violence Protection Orders*, 2 TENN. J. RACE GENDER & SOC. JUST. 129, 142 (2013). But see Jack Karsten & Darrell M. West, *Decades Later, Electronic Monitoring of Offenders Is Still Prone to Failure*, BROOKINGS INSTITUTION (Sept. 21, 2017), <https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure> [<https://perma.cc/RFU2-DFFR>] (describing technical problems with electronic monitoring tools). At time of writing, the most recent legislation to appropriate \$1.87 million in state funds for expanded use of pretrial electronic monitoring had failed in committee. An Act To Expand Use of Electronic Monitoring in Domestic Violence, Sexual Assault and Stalking Cases, L.D. 1183, 128th Me. Leg., 2d Reg. Sess. (Jan. 25, 2018), [https://legislature.maine.gov/legis/bills/display\\_ps.asp?snum=128&paper=HP0820&PID=1456](https://legislature.maine.gov/legis/bills/display_ps.asp?snum=128&paper=HP0820&PID=1456) [<https://perma.cc/4WWZ-VHCU>].

285. See, e.g., Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 117 (1974) (“What might be good strategy for [a] . . . prosecutor—

attorney's role might be expanded in IPV cases to focus on a defendant's potential for repeat arrest. In these cases, defense counsel might use the ODARA score to identify clients whose long-term interests might be best served by some amount of rehabilitative or therapeutic measures.<sup>286</sup>

For judges, the most important short-term improvement would be to synchronize ODARA consideration with the wider range of bail conditions available.<sup>287</sup> To the extent that even in the absence of bail schedules, judges fall into patterns and habits in setting bail for certain types of cases, encouraging judicial flexibility and creativity in balancing the various rights and dangers at stake in all bail proceedings may reduce judicial reliance on cash bail amount as a proxy for dangerousness. Even minor changes, such as reformatting administrative forms, may nudge judges in this direction.<sup>288</sup> Recent legislation to strengthen the requirement that judges receive and consider ODARA scores has stalled.<sup>289</sup> While more frequent application and consideration of ODARA would likely do little harm, this type of "forced consideration" can only do so much to improve outcomes so long as pretrial decisionmaking is left almost entirely to judicial discretion.

## V. CONCLUSION

Maine's bail system needs reform. The alignment of cash bail amounts with the severity of the charged crime, with scarce consideration of the defendant's means—a bail schedule in all but name—is outdated, morally troubling, and possibly unconstitutional. While actuarial risk assessment will not solve all the system's ills, a system based on statistical analysis, rather than judicial hunches, could do much to restore the presumption of innocence. Pretrial detention decisions based on the statistical likelihood of a defendant's being rearrested or failing to appear also better comports with the conception of pretrial detention as regulatory or administrative, not punitive. But the intersection of bail reform, actuarial risk assessment, and IPV raises different and more complex problems than in other criminal contexts. Pretrial detention decisions in IPV cases are fraught with constitutional, political, emotional, and moral quandaries and will require a careful—and different—balancing of the interests at stake. Maine has taken one step towards a fairer pretrial justice system, but it has a good way left to walk.

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trading off some cases for gains on others—is branded as unethical when done by a criminal defense . . . lawyer.”).

286. See Winick, *supra* note 282, at 67.

287. The Law Court has approved of judicial flexibility in using the “catch-all” provision in Maine’s bail code, at least in the context of random drug testing. See *State v. Ullring*, 1999 ME 183, ¶¶ 20, 25, 741 A.2d 1065.

288. Maine’s current bail forms are check-the-box, which maximizes judicial efficiency but may encourage overreliance on particular provisions. For an extended discussion of the impact of document layout on legal responses, see Rashmee Singh, “Please Check the Appropriate Box”: *Documents and the Governance of Domestic Violence*, 42 LAW & SOC. INQUIRY 509 (2017).

289. See, e.g., An Act to Require an Ontario Domestic Assault Risk Assessment Prior to Setting Bail in Domestic Violence Arrests in Which the Alleged Abuser Has Been Taken into Custody, L.D. 640, 128th Me. Leg., 1st Sess. 2017 (Apr. 25, 2017), [https://legislature.maine.gov/legis/bills/display\\_ps.asp?snum=128&paper=HP0454&PID=1456](https://legislature.maine.gov/legis/bills/display_ps.asp?snum=128&paper=HP0454&PID=1456) [<https://perma.cc/2CWQ-CEYM>].

