Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement

David Reimel III

Comments

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ABSTRACT

"In the American criminal justice system, wealth—not culpability—shapes outcomes"

– The Equal Justice Initiative.

Until 2017, every state conditioned pretrial release on cash bail. Judges across the United States predicted the risk individuals posed of failing to appear and the danger to the community. As a result, indigent individuals waited in jails merely because they could not afford their bail. In 2017, New Jersey spearheaded the movement to change how the bail system operates by passing the Criminal Justice Reform Act ("CJRA"), which created an objective decision-making tool called the Public Safety Assessment.

Today, New Jersey judges are no longer required to speculate about the future decisions of individual defendants. Instead, the Public Safety

Assessment provides a tool for judges throughout the state to uniformly assess the risks based on statistical data. The CJRA uses algorithms and statistical calculations, from which judges use a Decision-Making Framework to determine whether bond is appropriate and the terms and conditions of that bond. The CJRA has virtually eliminated monetary bond entirely.

Two years later, in 2019, both New Jersey's pretrial jail population and crime rate have decreased. Furthermore, judges can rely on analytics that remove the guesswork from bail decisions. Most importantly, no one in the state of New Jersey is incarcerated prior to trial for the sole reason of indigency.

This Comment will recommend that states abandon a predominantly cash bail framework and use New Jersey's risk assessment tool. Ultimately, this Comment concludes that adopting New Jersey's framework will decrease the pretrial jail population, decrease the crime rate, and ensure that no individual is incarcerated prior to trial for the sole reason they are indigent.

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I. INTRODUCTION

Prior to 2017, the New Jersey Constitution guaranteed "[a]ll persons . . . before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or [the] presumption great."[1] Recently, following the enactment of the Criminal Justice Reform Act (CJRA), the "sufficient sureties" language was removed and replaced by a bail system that de-emphasized cash bail.[2] Presently, all individuals charged with a crime in New Jersey can be released from prison without providing the "sufficient sureties" formerly required under the cash bail system.[3]

The cash bail system directly impacted Mustafa Willis (Mr. Willis), one of many individuals who called for cash bail reform in New Jersey.[4] Mr. Willis was 24-years-old when he was arrested in 2010 for unlawful possession of a firearm.[5] The judge set Mr. Willis's bond at $50,000.[6] Given the high price, Mr. Willis's family could not afford to pay his bond outright.[7] Mr. Willis could not even afford to pay 10% ($5,000) of that amount to a bail bondsman[8] to be released.[9] Unexpectedly, Mr. Willis learned that there was a surveillance video showing a police officer planting the firearm that ultimately landed him within the criminal justice system..[10] However, Mr. Willis was unable to obtain the tape to confirm his innocence because he was incarcerated.[11] Four months later, the judge adjusted Mr. Willis's bond amount to $30,000.[12] After the adjustment, Mr. Willis's family was able to scrape together enough cash to pay the bondsman.[13] After Mr. Willis posted bail, he was able to obtain the surveillance video that confirmed his innocence.[14]

By the time Mr. Willis earned his freedom, the damage had already been done. In Mr. Willis's case, he had lost his job due to his arrest, and

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1. N.J. CONST. art. I, § 11 (amended 2014).

2. *See id.*

3. *See id.*

4. *See* Jon Schuppe, *Post Bail*, NBC.COM (Aug. 22, 2017), https://nbcnews.to/2wzB7mM.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* Crystal Ignatowski, *What is a Bail Bond & How Do They Work?*, SURETYSOLUTIONS.COM, https://bit.ly/2ZzAaWR (last visited Jan. 16, 2019) (explaining how bail bonds work in a cash bail system).

9. *See* Schuppe, *supra* note 4.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

therefore, repaying the bondsman proved nearly impossible.[15] Moreover, after Mr. Willis's arrest and release from jail, he struggled to find work, which added to the difficulty of obtaining and maintaining a source of income.[16] Mr. Willis ultimately sued the Newark Police Department and his case settled for $6,000.[17] Most of the settlement money, however, was used to repay his family, after being charged for a crime he did not commit.[18]

In 2013, the Drug Policy Alliance (DPA) conducted a study in an effort to analyze the problems that individuals like Mr. Willis faced with cash bail in New Jersey.[19] The study illustrated, on a mass scale, the number of individuals incarcerated while awaiting trial.[20] Following the study's release, Governor Chris Christie urged the legislature to enact a bail reform bill in New Jersey.[21] One year later, the New Jersey legislature passed the Criminal Justice Reform Act (CJRA) with bipartisan support.[22] Around the same time, New Jersey also elected to amend the New Jersey Constitution[23] to reflect the missions and goals of the CJRA.[24]

In passing the CJRA, the goal of the New Jersey legislature was three-fold: (1) assure the defendant appeared in court; (2) protect the citizens in the general population; and (3) prevent the "obstruction of justice by persons awaiting trial."[25] To accomplish these goals, the CJRA required the selection of a Risk Assessment Instrument,[26] which would uniformly assess all defendants and express those assessments in an easily

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15. *See id.*

16. *See Id.*

17. *See id.*

18. *See id.*

19. *See Winning Bail Reform in New Jersey*, DRUG POLICY ALLIANCE, https://bit.ly/2Mll5Tr (last visited Jan. 19, 2019).

20. *See* Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population*, LUMINOSITY 13 (Mar. 2013), https://bit.ly/2sDT0Oe.

21. *See* Michael Aron, *Christie Signs Bail Reform Bill*, NJTV NEWS (Aug. 11, 2014, 5:00 PM), https://bit.ly/2VZaqCa.

22. *Id.*

23. N.J. CONST. art. I, § 11 (amended).

24. *See generally* N.J. CONST. art. I, § 11. Prior to the amendment, N.J. CONST. art. 1 § 11 stated: "All persons . . . before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great[.]" N.J. CONST. art. I, § 11 (amended 2014). This language meant that any person charged with a non-capital crime could not be detained without bail. *See also New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, BALLOTPEDIA, https://bit.ly/2U5NcIY (last visited Nov. 20, 2018). The amendment allows pretrial detainment without cash bail.

25. Holland v. Rosen, 277 F. Supp. 3d 707, 716 (D.N.J. 2017).

26. A Risk Assessment Instrument is a tool used to "help judicial officers make informed decisions on who to release and who to detain" in the context of criminal law. John Etienne Myburgh et al., *Review of Pretrial Risk Assessment and Factors Predicting Pretrial Release Failure*, CTR. FORENSIC BEHAV. SCI. & JUST. STUD. 1, 19 (2015), https://bit.ly/2mtqqj6.

digestible format for the courts.[27] The Risk Assessment Instrument that the New Jersey Courts adopted was the Public Safety Assessment (PSA).[28]

The PSA analyzes three separate scores: (1) the Failure to Appear (FTA) score; (2) the New Criminal Activity (NCA) score; and the (3) New Violent Criminal Activity (NVCA) flag.[29] These scores are then analyzed by the courts to determine if, and on what terms, a defendant may be released during pretrial proceedings.[30]

Despite the CJRA, opponents of bail reform remain skeptical.[31] For example, June Rodgers (Ms. Rodgers) "blamed bail reform for the murder of her son."[32] Ms. Rodgers's son was shot and killed following a "verbal dispute with a man in a car."[33] Police officers arrested the man in the car, who had been arrested four days earlier and subsequently released with no cash bail.[34] Without bail reform, the man who shot Ms. Rodgers's son may not have been released from jail due to his prior arrest. Despite such terrible incidents, many have celebrated the CJRA because indigent individuals are not incarcerated merely because they cannot afford cash bail.[35]

New Jersey is the first state to effectively eliminate cash bail and create a Risk Assessment Tool to calculate a defendant's likelihood to appear, likelihood to commit a crime, and likelihood to commit a violent crime.[36] This Comment will analyze whether states should adopt similar bail reform.[37]

Part II of this Comment will discuss New Jersey's prior cash bail system,[38] the goals of the CJRA, and how the PSA accomplishes these goals.[39] Part II will also discuss the three components of the PSA-including the Failure to Appear score, the New Criminal Activity score, and the New

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27. *Id.*

28. The Public Safety Assessment is an administrative tool designed to predict the likelihood that a defendant will or will not (1) appear in subsequent court appearances and (2) be a danger to the community, if released. *See Public Safety Assessment: A Risk Tool That Promotes Safety*, *Equity, and Justice*, LAURA & JOHN ARNOLD FOUND. (Aug. 14, 2017), https://bit.ly/2zdn4ni [hereinafter *Public Safety Assessment*].

29. *See id.*

30. *See id.*

31. *See* Sarah Wallace, *'Nobody's Afraid to Commit Crimes': Cops, Victims Blast Overhaul of NJ Bail System*, NBC N.Y. (May 18, 2017, 9:38 PM), https://bit.ly/2T4yPEx.

32. *Id.*

33. *Id.*

34. *See id.*

35. *See Lessons for the Nation: New Jersey's Cash Bail Overhaul* (Brave New Films 2017), https://bit.ly/2TalevH.

36. *See Public Safety Assessment*, *supra* note 28.

37. *See infra* Part III.

38. *See infra* Section II.A. This Comment will not give an in depth analysis of cash bail generally, as states widely differ in its application.

39. *See infra* Section II.B.

Violent Criminal Activity flag. Finally, Part II will analyze how judges use the PSA within the Decision-Making Framework (DMF)[40] and the ways in which the law allows prosecutors and judges to bypass the Decision-Making Framework in certain instances.[41]

Next, Part III will analyze the impact of bail reform on New Jersey's pretrial jail population and crime rates.[42] Part III of this Comment will also emphasize the importance of re-evaluating the static risk factors of the PSA every three to five years to account for unique crimes and new empirical studies.[43] Then, Part IV will recommend that all states adopt bail reform similar to New Jersey's model.[44] Last, Part V will provide concluding remarks on the issues addressed throughout this Comment.[45]

II.   BACKGROUND

Upon arrest and commitment to a county jail, a defendant in New Jersey is required by statute to appear before a judge within 48 hours.[46] During this first appearance, the judge sets conditions for pretrial release pending trial.[47] Before the CJRA was implemented in 2017, the condition for pretrial release was "sufficient sureties," commonly known today as cash bail.[48]

Under the previous cash bail system, defendants could post bail in several ways. If defendants had the required funds available, then they could simply pay the court.[49] When defendants did not have the funds, they had to rely on family and friends or find a bail bondsman.[50] A bail bondsman would agree to pay the cash bail required, but then charge defendants a fee, which was usually a percentage of the bond.[51] If defendants could not afford to pay a bail bondsman a percentage of the fee

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40. *See infra* note 126 and accompanying text.

41. *See infra* Section II.D.

42. *See infra* Sections III.A., III.B.

43. *See infra* Section III.C.

44. *See infra* Part IV.

45. *See infra* Part V.

46. *See* N.J. STAT. ANN. § 2A:162—16(b)(1) (West 2017).

47. *See id.*

48. *See* N.J. CONST. art. I, § 11 (amended 2014).

49. *See How Do Bail Bonds Work?*, SPEEDYBAILBONDS, https://bit.ly/2TXPt8S (last visited Nov. 3, 2018).

50. *Id.*

51. *Id.* The percentage of the fee is usually 10% of the total cash bond owed to the court. *See* Ignatowski, *supra* note 8. The rest of the cash bond will be secured by the bail bondsman in the form of collateral, such as a car or jewelry. After the case concludes, so long as the defendant has arrived at all court proceedings, the bond is released, and the bail bondsman recoups the fee originally obtained from the bond release. If the defendant does not arrive at all court proceedings then the bond is forfeited and the bail bondsman will use the collateral obtained to recoup the rest of the bail amount. *Id.*

or find another means to pay the cash bond, then defendants were required to stay in jail pending trial.[52]

In 2014, however, the New Jersey legislature proposed a significant change to the cash bond process with the CJRA—a new system without a cash bail requirement and instead analyzes a defendant's criminal history to determine whether a defendant should be released.[53]

A.   New Jersey's 2014 CJRA

In 2013, the Drug Policy Alliance[54] released a study addressing the demographics of individuals incarcerated for drug use in New Jersey.[55] The study showed that on any given day in 2012, approximately 13,003 inmates were detained in county jails throughout New Jersey.[56] Of the 13,003 inmates, approximately 9,492 were detained because they were either awaiting sentencing or trial; approximately 5,006 inmates were in custody because they could not afford bail; approximately 1,560 inmates were in pretrial custody because they could not afford bail set at $2,500 or less; and approximately 800 inmates could not afford to post bail for approximately $500 or less.[57]

Given these statistics, the study concluded that the "greatest opportunities to responsibly reduce New Jersey's jail population are related to more efficiently and effectively managing the pretrial population."[58] Shortly after the study's release, the New Jersey legislature took steps to reform bail.[59]

Following the study's release, Governor Chris Christie urged lawmakers to reform New Jersey's "broken" bail system.[60] Governor Christie wanted voters to decide on a state constitutional amendment that would allow "judges to deny bail to offenders who pose a threat to safety, a flight risk, or could obstruct justice."[61] Then, in August of 2014,

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52. *See* Robert Greenwald, *What Happens if You're Too Poor to Pay Bail?*, THE NATION (Mar. 8, 2017), https://bit.ly/2FHhSx9.

53. *See* N.J. STAT. ANN. § 2A:162—16 (West 2017).

54. The Drug Policy Alliance "envisions a just society in which the use and regulation of drugs are grounded in science, compassion, health and human rights, in which the people are no longer punished for what they put into their own bodies but only for crimes committed against others." *Vision & Mission*, DRUG POLICY ALLIANCE, https://bit.ly/2Doa3de (last visited Jan. 12, 2019).

55. *See* VanNostrand, *supra* note 20, at 13.

56. *See id.* at 8.

57. *See id.*

58. *See id.*

59. *See* Holland v. Rosen, 277 F. Supp. 3d 707, 715 (D.N.J. 2017).

60. *See* Aron, *supra* note 21 (clarifying that "[t]hree quarters of the people . . . being warehoused in our jails were there awaiting trial rather than serving a sentence and their average length of stay is about [ten] months").

61. *Id.*

Governor Christie signed the CJRA into law.[62] Three months later, the people of New Jersey voted to amend the New Jersey Constitution to remove the requirement of "sufficient sureties, except for capital offenses when the proof is evident or presumption great."[63] In January of 2017, the CJRA was enacted into law.[64]

B.   The Goals of the CJRA and How it Changed Pretrial Procedure

The CJRA seeks to endorse three separate goals in consideration of a defendant's pretrial release: (1) assure the defendant appears in court; (2) protect the citizens in the general population; and (3) prevent the "obstruction of justice by persons awaiting trial."[65] To accomplish these goals, the CJRA modified New Jersey's criminal justice system to permit judges to order pretrial detention for defendants if there is "clear and convincing evidence that no condition [of release] or combination of conditions [of release] can reasonably assure" the goals of the CJRA.[66] The CJRA also moved New Jersey from a cash bail system that was "resource-based"[67]   to a bail system that "relies upon an objective evaluation of an individual defendant's level of risk."[68]

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62. *See id.*

63. N.J. CONST. art. I, § 11 (amended 2014). The amended Constitution states:
All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.
Id.

64. *See* N.J. STAT. ANN. § 2A:162—15 (West 2017).

65. Holland v. Rosen, 277 F. Supp. 3d 707, 716 (D.N.J. 2017); *see also* N.J. STAT. ANN. § 2A:162–15. The statute states:
[The CJRA] shall be liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release.
Id.

66. N.J. STAT. ANN. § 2A:162—15,—18(a)(1). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *See also Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

67. A resource-based cash bail system is one that relies on a defendant's own financial resources to post cash bail. *See Holland*, 277 F. Supp. 3d at 716.

68. *Id.*; *see also* N.J. STAT. ANN. § 2A:162—17.

Under the CJRA, an "eligible defendant,"[69] upon arrest, is detained for no more than 48 hours.[70] Within those 48 hours, a Pretrial Services[71] Program (Pretrial Services) completes a risk assessment analysis, including "recommendations on conditions of release."[72] After the risk assessment analysis is complete, Pretrial Services makes a recommendation to the judge, and the judge then determines whether the defendant will remain detained or be released from jail pending trial.[73] The judge is required to make this "pretrial release decision" within 48 hours of incarceration.[74]

The CJRA permits the presiding judge to choose between five conditions for pretrial release: (1) release on one's own recognizance[75] (ROR); (2) release by use of non-monetary conditions;[76] (3) release by cash bail;[77] (4) release by a combination of monetary bail and non-monetary conditions; and (5) detain in jail pending trial.[78]

The first option, an ROR, is the least restrictive means of enforcement.[79] ROR means a defendant is released without specific conditions to ensure the defendant returns to court.[80] On the other end of the spectrum, the fifth option, detaining a defendant in jail until trial, is the most restrictive.[81] To determine which of the five options to apply, the judge analyzes an objective Risk Assessment Instrument, which uses

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69. N.J. STAT. ANN. § 2A:162—15 ("A person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or a disorderly persons offense unless otherwise provided in [the CJRA].").

70. *See* N.J. STAT. ANN. § 2A:162—17.

71. Pretrial services is defined as "[a]n investigation of a . . . criminal defendant's background, conducted after the defendant has been arrested and charged but before trial, to help the court determine whether to release or detain the defendant pending trial." *Pretrial Services*, BLACK'S LAW DICTIONARY (10th ed. 2014).

72. *Holland*, 277 F. Supp. 3d at 717.

73. *Id.*

74. *Id*.

75. *Release on Recognizance*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The pretrial release of an arrested person who promises . . . in writing but without supplying a surety or posting bond, to appear for trial at a later date.").

76. See N.J. STAT. ANN. § 2A:162—17(b)(2) (Non-monetary conditions include "remain[ing] in the custody of a designated person," "maintain[ing] employment . . . or actively seek[ing] employment," "abiding by . . . place of abode," "report[ing] on a regular basis to a designated law enforcement agency," "comply[ing] with a specified curfew," "refrain[ing] from possessing a firearm," "refrain[ing] from excessive use of alcohol," or "return[ing] to custody for specified hours following release for employment").

77. In 2017, only forty-four defendants were required to post cash bail as a condition for release. *See Criminal Justice Reform Report to the Governor and the Legislature*, N.J. JUDICIARY 4 (2017), https://bit.ly/2PxUIdB [hereinafter *Criminal Justice Reform Report*].

78. *See* N.J. STAT. ANN. § 2A:162—16(b)(2).

79. *See id.*

80. *See supra* note 75 and accompanying text.

81. *See* N.J. STAT. ANN. § 2A:162—16. A judge can only make a determination of pretrial detention if the prosecutor has made a motion for pretrial detention.

statistics to predict the future behaviors of defendants if granted pretrial release.[82] In New Jersey, the chosen Risk Assessment Instrument is the PSA.[83]

C. New Jersey's Risk Assessment Instrument: The PSA

The PSA[84] embodies the policy goals of the CJRA.[85] The PSA assesses three factors: (1) a Failure to Appear score (FTA score); (2) a New Criminal Activity (NCA) score; and (3) a New Violent Criminal Activity (NCVA) flag.[86]

1. The FTA Score

The FTA score is calculated by measuring a variety of static risk factors[87] that determine the likelihood that a defendant will appear at court proceedings prior to trial.[88] A raw score is calculated from these static factors and then transferred to a six-point scale.[89] If the defendant has a pending charge at the time of the offense, the defendant receives one point.[90] If the defendant has a prior conviction, the defendant receives one point.[91] If the defendant has failed to appear at a pretrial hearing within the past two years, the defendant receives one point.[92] If the defendant has failed to appear two or more times within the past two years, however, the defendant receives four points.[93] Finally, if the defendant has a prior failure to appear to a pretrial hearing older than two years, the defendant receives one point.[94]

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82. *See* N.J. STAT. ANN. § 2A:162—16(a).

83. *See Public Safety Assessment*, *supra* note 28.

84. The Public Safety Assessment was approved by the Administrative Director of the New Jersey courts under the CJRA. *See* N.J. STAT. ANN. § 2A:162—25(c)(1) (West 2017).

85. *See* N.J. STAT. ANN. § 2A:162—15.

86. *See Public Safety Assessment*, *supra* note 28*.* An FTA score analyzes the likelihood that a defendant will appear in court at all pretrial proceedings. *See id.* An NCA score analyzes the likelihood a defendant will commit additional crimes while awaiting trial. *See id.* An NVCA Flag will alert the judge if the defendant is more likely to commit a violent offense while awaiting trial. *See id.*

87. "Static risk factors are features of the [defendants'] histories that predict recidivism but are not amenable to deliberate intervention, such as prior offences." Research Summary, *Giving Meaning to Risk Factors*, 15 PUB. SAFETY CAN. 1, 1 (Nov. 2010), available at https://bit.ly/2P1ArS6.

88. *See Public Safety Assessment*, *supra* note 28.

89. *See id.* Every factor calculated in the assessment is a static factor.

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

Once the static risk factors are evaluated, the points are added together to create a raw score.[95] The raw score is then converted to a six-point scale.[96] The raw scores of 0, 1, 2, 3—4, 5—6, and 7 convert to a scaled FTA score of 1, 2, 3, 4, 5, and 6, respectively.[97] A defendant with a raw score of six is considered the least likely to appear at a pretrial hearing, while a defendant with a raw score of one is considered the most likely to appear at a pretrial hearing.[98] In addition to the FTA score, the PSA also calculates the NCA score.

2.   The NCA Score

The NCA score is calculated by measuring a variety of static factors that determine the likelihood that a defendant will commit a crime while on pretrial release.[99] Similar to the FTA score, the NCA score is a raw score calculated from static risk factors and then transferred to a six-point scale.[100]

If the defendant is under the age of 23, the defendant receives two points; if the defendant is over the age of 23, the defendant receives zero points.[101] If the defendant has a pending charge at the time of the offense, the defendant receives three points.[102] If the defendant has a prior misdemeanor conviction, the defendant receives one point.[103] Furthermore, if the defendant has a prior felony conviction, the defendant receives one point.[104] If the defendant has one or two prior violent convictions,[105] the defendant receives two points.[106] However, if the defendant has three or more prior violent convictions, the defendant

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95. *See id.*

96. *See id.*

97. *See Public Safety Assessment*, *supra* note 28.

98. *Id.* There is a 16% chance a defendant will fail to appear with an FTA score of 1. N.J. PRETRIAL JUSTICE MANUAL 8 (Dec. 2016), https://bit.ly/2SqiuxQ [hereinafter *Pretrial Justice Manual*]. There is a 19% chance a defendant will fail to appear with an FTA score of 2. *Id.* There is 25% chance a defendant will fail to appear with an FTA score of 3. *Id.* There is 37% chance a defendant will fail to appear with an FTA score of 4. *Id.* There is a 53% chance a defendant will fail to appear with an FTA score of 5. *Id.* Last, there is a 65% chance a defendant will fail to appear with an FTA score of 6. *Id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. "'Violent Crime' means any crime in which the actor causes death, causes serious bodily injury [] defined by statute, or uses or threatens the immediate use of a deadly weapon. [It] also includes any aggravated sexual assault or sexual assault in which the actor uses, or threatens . . . immediate . . . physical force." State v. Parolin, 793 A.2d 638, 642 (N.J. 2002); *see also* N.J. STAT. ANN. § 2C:11—1 (West 2017).

106. *See Public Safety Assessment*, *supra* note 28.

receives two points.[107] If the defendant missed a court proceeding one time within the past two years, then one point is added to the raw score.[108] However, if the defendant failed to appear for a court proceeding more than once within the past two years, then two points are added to the raw score.[109] Last, if the defendant has a prior sentence of incarceration, the defendant receives two points.[110]

Similar to the FTA score, the raw NCA score is converted to a six-point scale with a six considered to be the most likely to commit a crime while on release and a one considered to be the least likely to commit a crime while on release.[111] The raw scores of 0, 1—2, 3—4, 5—6, 7—8, and 9—13 correlate to a scaled NCA score of 1, 2, 3, 4, 5, and 6, respectively.[112] After the NCA score is calculated, Pretrial Services must screen defendants to flag for new violent criminal activity.

3. The NVCA Flag

Unlike the FTA and NCA scores, the NVCA flag is based on many static factors, but the raw score for the NVCA flag is not converted to a six-point scale.[113] Rather, the NVCA flag becomes either a "flag" or "no flag" designation.[114] The NVCA flag cautions judges against allowing a defendant's release without strict conditions.[115] Under the CJRA, a defendant with an NVCA flag has a much lower likelihood of receiving a pretrial release given the severity of crimes that are deemed "violent."[116]

The static factors used to develop a raw score for an NVCA flag are: (1) whether the defendant has a current violent offense; (2) whether the defendant has a current violent offense and is under the age of 21; (3) whether the defendant has a pending charge at the time of the offense; (4)

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107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.* There is a 14% chance a defendant will commit a crime while on release with an NCA score of 1. *See Pretrial Justice Manual*, *supra* note 98, at 9. There is a 25% chance a defendant will commit a crime while on release with an NCA score of 2. *Id.* There is a 31% chance a defendant will commit a crime while on release with an NCA score of 3. *Id.* There is a 38% chance a defendant will commit a crime while on release with an NCA score of 4. *Id.* There is a 46% chance a defendant will commit a crime while on release with an NCA score of 5. *Id.* There is a 50% chance a defendant will commit a crime while on release with an NCA score of 6. *Id.*
113. *See Public Safety Assessment*, *supra* note 28.
114. *Id.*
115. *See* Holland v. Rosen, 277 F. Supp. 3d 707, 719 (D.N.J. 2017).
116. *See* N.J. STAT. ANN. § 2C:43—7.2 (West 2017).

whether the defendant has a prior conviction; and (5) whether the defendant has a prior violent conviction.[117]

Unlike the FTA and NCA scores, the raw NVCA score simply is converted to a "yes" or "no" designation as to whether an NVCA flag is applied.[118] If an NVCA flag is applied to a defendant, judges are less likely to grant release.[119] Raw scores of 0—3 convert to a "no," which means an NVCA flag is not applied.[120] Raw scores of 4—7 convert to a "yes," which means an NVCA flag is applied.[121] Whether a defendant receives a raw score of seven, the highest possible raw score, or four, the lowest possible raw score, is irrelevant because a judge cannot consider the score underlying the NVCA flag.[122]

Moreover, age can play a prominent factor in determining whether a defendant receives an NVCA flag. For example, a defendant under the age of 21 with a violent offense and a pending charge at the time of the offense will automatically receive an NVCA flag under the PSA.[123] By contrast, a 22-year-old defendant in the same situation will not receive an NVCA flag at all.[124] As such, two individuals one year apart in age charged with the same crime can receive vastly different pretrial release determinations because the NVCA "flags [younger] defendants as posing an elevated risk of [n]ew [v]iolent [c]riminal [a]ctivity . . . during the pretrial release period."[125] After the FTA, NCA, and NCVA have been calculated, the scores are analyzed under a decision-making framework (DMF).[126]

D.   The Decision-Making Framework

The DMF takes the three PSA scores and provides a uniform recommendation for release conditions.[127] The DMF can be broken down

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117. *See Public Safety Assessment*, *supra* note 28. If a defendant has a (1) current violent offense, then two points are added to the NVCA raw score. *Id.* If a defendant has a (2) violent offense and is under the age of 21, then one point is added to the NVCA raw score. *Id.* If a defendant has a (3) pending charge at the time of the offense, then one point is added to the raw score. *Id.* If the defendant has a (3) prior conviction, then one point is added to the raw score. *Id.* Finally, if a defendant has (4) one or two violent conviction, then one point is added, however, two points are added if a defendant has three or more violent convictions. *Id.*

118. *Id.*

119. *See Pretrial Justice* Manual, *supra* note 98, at 10.

120. *See Public Safety Assessment*, *supra* note 28.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See Pretrial Justice Manual*, *supra* note 98, at 9.

126. The Decision-Making Framework (DMF) "produces a recommendation for a judge about conditions of release or detention." *Pretrial Justice Manual*, *supra* note 98, at 10.

127. *Id.*

into four separate phases.[128] First, Pretrial Services calculates the PSA scores and recommends to the judge particular conditions the defendant should face while awaiting trial.[129] The agency can recommend that the defendant be either ROR[130] without any conditions or not ROR.[131] If Pretrial Services recommends the defendant not be ROR, then the agency can recommend release based on special conditions in a tiered format: "PML 1"; "PML 2"; "PML 3"; "PML 3+"; and "detained."[132]

PML 1 is the least restrictive tier and only requires that the defendant "report to a pretrial services officer by phone once per month."[133] PML 2 is slightly more restrictive and requires a defendant to "report to a pretrial services officer once a month in person, once a month by telephone, and be subject to monitored conditions such as a curfew."[134] PML 3 is relatively restrictive and requires that a "defendant [be] monitored in-person or by phone every week, and [be] subject to additional monitored conditions."[135] PML 3+ requires the defendant to be subject to all of the conditions described in PML 1, PML 2, and PML 3, plus it requires a GPS monitoring device and home confinement.[136] The agency can also recommend that the defendant not be released at all.[137]

Regardless of the PSA's tiered matrix, the court can determine on its own whether charges are so serious that "release [is] not recommended; if released[, the defendant should receive] maximum conditions," irrespective of the PSA and Pretrial Services recommendations.[138] A court can disregard the PSA recommendation for the most serious charges, which include "murder, aggravated manslaughter, aggravated sexual assault, and carjacking."[139] Furthermore, if the charged crime is considered "violent" and the defendant has an NVCA flag, then the court can decide to incarcerate the defendant until trial, irrespective of the PSA.[140]

Next, the court applies the FTA and NCA scores to a DMF matrix.[141] An ROR order is recommended if the FTA and NCA scores are either 1 or

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128. Holland v. Rosen, 277 F. Supp. 3d 707, 719 (D.N.J. 2017).

129. *Id.*

130. *See* N.J. STAT. ANN. § 2A:162—17(b)(2).

131. *See Holland*, 277 F. Supp. 3d at 719.

132. *See id.* "PML" stands for "Pretrial Monitoring Levels." *See Pretrial Justice Manual*, *supra* note 98, at 10.

133. *See Holland*, 277 F. Supp. 3d at 719.

134. *Id.*

135. *Id.*

136. *Id.* PML 3+ means "Electronic Monitoring" or "Home Detention."

137. *Id.*

138. *See Pretrial Justice Manual*, *supra* note 98, at 10.

139. *Holland*, 277 F. Supp. 3d at 719.

140. *Id.*

141. *See Pretrial Justice Manual*, *supra* note 98, at 10.

2.[142] A PML 1 order is recommended with an FTA score of 2 and an NCA score of 3.[143] A PML 1 order is also recommended if the FTA score is 3 or 4 and the NCA score is 2 or 3.[144] A PML 2 order is recommended if the FTA score is 5, but the NCA score is 2 or 3.[145] A PML 3 order is recommended if the FTA score is 5 and the NCA score is 4.[146] A PML 3 order is also recommended if the FTA score is either 2, 3, or 4, but the NCA score is 5.[147] A PML 3+ order is recommended if both the FTA score and NCA score are 5.[148] Last, release is not recommended if both the FTA and NCA scores are 6.[149]

Fourth, the court determines whether the defendant was charged with a No Early Release Act (NERA) crime not addressed in the above crimes that recommend no release regardless of the PSA.[150] If the defendant was charged with a NERA crime, then the recommended release conditions increase by one level.[151]

After Pretrial Risk Services applies the PSA scores to the DMF matrix, they make a recommendation for the judge to consider during the preliminary hearing.[152] The CJRA, however, has allowed room for the courts to address individualized circumstances of individual defendants irrespective of the PSA when considering pretrial release for defendants.[153]

E.   The CJRA Addresses Potential Problems with the PSA

Before a New Jersey court will order pretrial detention, a prosecutor must first apply for the detention.[154] Next, the government must prove

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142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*; *see* N.J. STAT. ANN. § 2C:43—7.2 (West 2017).
151. NERA crimes include:
[1] vehicular homicide; . . . [2] aggravated assault; . . . [3] disarming a law enforcement officer; . . . [4] kidnapping; . . . [5] robbery; . . . [6] aggravated arson; . . . [7] burglary; . . . [8] extortion; . . . [9] booby traps in manufacturing or distribution facilities; . . . [10] strict liability for drug infused deaths; . . . [11] terrorism; . . . [12] producing or possessing chemical weapons, biological agents or nuclear or radiological devices; . . . [13] racketeering, when it is a crime of the first degree; . . . [14] firearms trafficking; or . . . [15] causing or permitting a child to engage in a prohibited sexual act, knowing that the act may be reproduced in any manner, or be part of an exhibition or performance.
§ 2C:43—7.2.
152. *See* N.J. STAT. ANN. § 2A:162—16(a).
153. *See* N.J. STAT. ANN. § 2A:162—19.
154. N.J. STAT. ANN. § 2A:162—19 (West 2017) (indicating that the prosecutor may only apply for detention if the specific crime is eligible for pretrial detention).

"that the eligible defendant committed the predicate offense" at a pretrial detention hearing.[155] The defendant must be present at the hearing and must be represented by counsel.[156] If the defendant is indigent, then counsel must be appointed. [157] At the preliminary hearing the defendant has the right to "testify, present witnesses, cross-examine any of the prosecutor's witnesses, and present information by proffer."[158] After hearing the evidence presented, the court may only order pretrial detainment if it finds by "clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release[,] or [a] combination of money bail and conditions" adequately ensures public safety, prevents obstruction of justice, or the defendant's appearance in court.[159]

When a court detains a defendant after a pretrial detention hearing, the judge must "include written findings of fact and a written statement of the reasons for detention."[160] By contrast, when a court orders a defendant's release following a pretrial detention hearing, the judge must "provide an explanation in the document that authorizes the eligible defendant's release."[161] A defendant can appeal a pretrial detention ruling, which must be "heard in an expedited manner."[162]

Finally, if there has been a "material change in circumstance that justifies a change in conditions," the Superior Court of New Jersey may, on its own motion or by a motion from either party, "review the conditions of pretrial release."[163]

The CJRA has successfully transitioned to a risk-based system through implementing the PSA and the DMF. New Jersey's bail reform

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155. *See* N.J. STAT. ANN. § 2A:162—19(e)(2).
156. *See* N.J. STAT. ANN. § 2A:162–19(e)(1).
157. *Id.*
158. Holland v. Rosen, 277 F. Supp. 3d 707, 720 (D.N.J. 2017); *see also* N.J. STAT. ANN. § 2A:162–19(e)(1).
159. N.J. STAT. ANN. § 2A:162–18, –19(e)(1). The statute also states:
The court may take into account information concerning . . . a. [t]he nature and circumstances of the offense charged; b. [t]he weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded; c. [t]he history and characteristics of the eligible defendant . . . d. [t]he nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable; e. [t]he nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and f. [t]he release recommendation of the pretrial services program obtained using a risk assessment instrument.
N.J. STAT. ANN. § 2A:162—2.
160. N.J. STAT. ANN. § 2A:162–21(1).
161. N.J. STAT. ANN. § 2A:162–23.
162. N.J. STAT. ANN. § 2A:162–23(a)(2).
163. N.J. STAT. ANN. § 3:26–2(c)(2) (West 2017).

has been an effective model for other states because the CJRA adequately balances risk and contains measures for independent judicial decision-making to handle potential flaws with the PSA.[164] Additionally, two years following the enactment of the CJRA, the pretrial jail population has significantly dropped along with an unprecedented drop in crime.[165]

III. ANALYSIS

As New Jersey leads the nation in bail reform through legislation enacted in 2017, many states are following suit.[166] For example, in 2018 Alaska enacted similar bail reforms and established a quantitative algorithm to make bail decisions.[167] Additionally, the California Supreme Court declared cash bail as unconstitutional in 2018.[168] Given recent state trends, Risk Assessment Instruments such as the PSA should serve as the model for bail reform in other states.[169]

Following the first full year of bail reform, "New Jersey has become a national leader in [bail] reform."[170] Defendants no longer wait in jail pending trial solely because they cannot afford cash bail. The CJRA has successfully reduced the crime rate as the PSA ensures that defendants at risk of endangering the public stay incarcerated while allowing less dangerous defendants to return to the general population.[171]

Given the success of the CJRA in New Jersey, state legislatures should enact bail reform and use New Jersey as a model. Adopting New Jersey's PSA would (1) reduce the pretrial jail population and (2) reduce the crime rate.[172] Despite initial success, however, static factors used by states as a basis for algorithms, such as the PSA, should be periodically re-evaluated to ensure Risk Assessment Instruments continue to accomplish state goals.[173]

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164. *See infra* notes 204–06 and accompanying text.

165. *See infra* notes 171, 186 and accompanying text.

166. *See Alaska Becomes Latest State to Enact Bail Reform*, EJI (Jan. 17, 2018), https://bit.ly/2Mlp823; *see also* Vanessa Romo, *California Becomes First State to End Cash Bail After 40 Year Fight*, N.P.R. (Aug. 28, 2018, 10:49 PM), https://n.pr/2FQYDjX.

167. *See* Devin Kelly, *Alaska courts are now using a computer algorithm in bail decisions*, ANCHORAGE DAILY NEWS (Jan. 7, 2018), https://bit.ly/2FN28b2.

168. *See* Vanessa Romo, *California Becomes First State to End Cash Bail After 40 Year Fight*, NPR (Aug. 28, 2018, 10:49 PM), https://n.pr/2FQYDjX.

169. *See generally* Justin Jouvenal, *Virginia Attorney General Calls for Reforming State's Bond System*, WASH. POST, (Oct. 21, 2018), https://wapo.st/2E2laZw.

170. *Criminal Justice Reform Report*, *supra* note 77, at 3.

171. *See* Rebecca Ibarra, *Crime Rates Plunge in New Jersey, and Bail Reform Advocates Are Gloating*, WNYC NEWS (Nov. 28, 2018), https://bit.ly/2RXe0NX.

172. *See supra* note 171 and accompanying text.

173. *See infra* Section III.C.

A. Adopting New Jersey's PSA will Reduce the Pretrial Jail Population

Between January 1, 2015, and January 1, 2018, "statistics show[ed] a reduction of the pretrial jail population [in New Jersey] by . . . 35%."[174] This reduction can be attributed to the CJRA and its movement away from cash bail.[175] Meeting cash bail requirements often takes significant time and can lead to sporadic results, such as creating undue pressure for defendants to plead guilty for the sole purpose of leaving jail.[176] New Jersey's system, however, has shown that 99.5% of defendants will know whether they will be released within 48 hours of incarceration.[177] New Jersey's streamlined process holds defendants who commit violent crimes but allows less dangerous defendants to await trial at home rather than in a jail cell.[178]

1. Cash Bail Increases the Pretrial Jail Population

Under the common bail system, after being arrested, the defendant must wait for a bail hearing to learn the amount of cash bail needed to be released and then find a means to pay.[179] When defendants are unable to pay the cash bail amount many resort to desperation: such as "plead[ing] guilty in order to exit jail."[180] Indigent detainees face mounting daily pressures such as losing a job for failing to arrive at work, housing, and even custody of children when they cannot pay cash bail.[181]

Especially in misdemeanor cases, pleading guilty often means that defendants can exit jail based on time served or probation.[182] Simply put, financial pressures sometimes encourages innocent defendants to plead

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174. *See Criminal Justice Reform Report*, *supra* note 77, at 4.

175. *Id*. ("Considering the entire universe of 142,663 complaint-summons and complaint-warrants filed in 2017, and the 8,043 defendants actually detained, the rate of pretrial release is 94.2% and pretrial detention is actually 5.6% of all defendants issued complaints in 2017.").

176. *See* Scott Shackford, *Garden State Crime is Down Since New Jersey Ditched Cash Bail*, REASON (Dec. 6, 2018, 3:45 PM), https://bit.ly/2AXEm8O.

177. *See Criminal Justice Reform Report*, *supra* note 77, at 13 ("[F]or eligible defendants for whom the prosecutor did not file a detention motion, courts made release decisions for 81.3% within 24 hours and 99.5% within 48 hours."); *see also* Michael P. Jacobson & Reagan Daly, *How To Release Jail Populations in Big Ways*, GOVERNING.COM, https://bit.ly/2utxe0b (last visited Jan. 18, 2019) (Defendants "who spend even two days in pretrial detention are significantly more likely to recidivate after their cases are decided.").

178. *See supra* Section II.C.

179. *See* Schuppe, *supra* note 4.

180. *See* Shackford, *supra* note 176.

181. *See id.*

182. *See* PAUL HEATON ET AL., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

guilty when they otherwise would go to trial to prove their innocence.[183] Consequently, pretrial detention is "especially likely" to prompt wrongful guilty pleas.[184] To avoid even the possibility of an innocent defendant pleading guilty, a streamlined pretrial process to evaluate defendants quickly and adequately ensures fair treatment of all defendants irrespective of wealth. The PSA has successfully accomplished this goal.[185]

2. The PSA Decreases the Pretrial Jail Population

Presently, 99.5% of all arrested individuals received pretrial detainment hearings within 48 hours of arrest.[186] Upon arrest, Pretrial Services evaluates a defendant's FTA and NCA scores and NVCA flag.[187] Pretrial Services then makes their pretrial recommendation and a hearing occurs within 24 to 48 hours, including weekends due to virtual courts.[188] With the creation of virtual courts, a defendant charged with a non-violent crime can be arrested on a Friday evening and be back with their family by Sunday.[189]

Additionally, the PSA conforms to the United States' presumption of innocence.[190] The elimination of cash bail and a prompt pretrial release determination ensures that innocent defendants do not plead guilty for the sole purpose of returning home.[191] Eliminating cash bail and instituting a more efficient pretrial release system also ensures that the defendants who are unlikely to commit additional crimes are released with certain conditions and reduces unnecessary costs of incarceration for taxpayers.[192]

In New Jersey, indigent defendants are no longer in jail merely because they lack financial resources.[193] Moreover, wealthy defendants no longer have the option to buy their way out of prison after committing murder.[194] Currently, individuals "charged with felonies make up more

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183. *See id*. at 715.

184. *Id.* at 716.

185. *See supra* notes 176–77 and accompanying text.

186. *See Criminal Justice Reform* Report, *supra* note 77, at 4.

187. *See Public Safety Assessment*, *supra* note 28.

188. *See Criminal Justice Reform Report*, *supra* note 77, at 4, 24; *see also* Keith B. Kaplan, *Will Virtual Courts Create Courthouse Relics?*, 52 No. 2 Judges' J. 32, 32 (2013) ("A virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courthouses.").

189. *See Criminal Justice Reform Report*, *supra* note 77, at 24.

190. *See* Ariana Tanoos, *Shielding the Presumption of Innocence from Pretrial Media Coverage*, 50 IND. L. REV. 997, 999 (2017) ("The presumption of innocence is derived from the ancient maxim that the accuser must prove the guilt of the accused before the accused can be punished.").

191. *See supra* notes 180–84 and accompanying text.

192. *See* Shackford, *supra* note 176 and accompanying text.

193. *See Criminal Justice Reform Report*, *supra* note 77, at 7.

194. *See id.*

than two-thirds of the jail population nationwide."[195] Hence, approximately one-third of the prisoners are charged with misdemeanors.[196] If all states follow New Jersey and adopt the PSA, then states can release these "minimal risk" misdemeanor defendants, which would result in a significant drop in the jail population nationwide.[197]

B.   Adoption of New Jersey's PSA Will Reduce the Crime Rate

The most prominent critics of bail reform, the bail bonds industry,[198] argue that crimes would increase because the state would "unleash[] dangerous criminals back onto the streets."[199] But in the two years since the CJRA was enacted, the crime rate in New Jersey has "plummeted across the board."[200] In fact, "total violent crime [in New Jersey] is down more than 30%."[201] While this significant drop in crime may not be directly attributable to the CJRA, the static factors analyzed for the PSA keep violent, repeat offenders behind bars.[202]

The CJRA addresses two factors that contribute to the decrease in the crime rate. First, defendants that commit violent crimes, from homicide to carjacking, are uniformly ineligible for release. Second, the NCA score and NVCA flag uniformly screen individuals who have prior criminal convictions and violent offenses.[203]

The key to reducing crime is uniformity. The PSA applies the same factors to create an NCA score and NVCA flag the same way each time.[204] The judge determines on what grounds to release a defendant using the

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195. Jacobson & Daly, *supra* note 177.

196. *See id.*

197. *See Criminal Justice Reform Report*, *supra* note 77, at 7; *see also supra* notes 195–96 and accompanying text.

198. The CJRA is causing the bail bonds industry to go bankrupt due to the effective elimination of cash bail. *See* Michaelangelo Conte, *Bail Reform is Killing Our Business, Bail Bondsmen Say*, NJ.COM (Jan. 11, 2017), https://bit.ly/2sDXIvo.

199. *See NJ Bail Reform Survives on Federal Appeal*, NORTHJERSEY.COM (July 11, 2018, 4:03 P.M.), https://njersy.co/2usUtaF.

200. Star-Ledger Editorial Board, *Has Bail Reform Been A Success? Check the Crime Numbers, Then Decide*, NJ.COM (Dec. 4, 2018), https://bit.ly/2RB38WN.

201. *See id.* "State Police statistics show that compared to 2016 data (January to September), homicides are down 32% in the same period for 2018." *Id.* Furthermore, rapes are down 13% in the same period for 2018; robberies are down 37% in the same period for 2018; assaults are down 18% in the same period for 2018; and burglaries are down 30% in the same period for 2018. *See id.; see also* DEP'T OF LAW AND PUB. SAFETY DIV. OF STATE POLICE, UNIF. CRIME REPORTING UNIT (2018).

202. *See Public Safety Assessment*, *supra* note 28.

203. For example, a person who is charged with a violent offense, has a prior conviction and is under the age of 20 will receive an NVCA flag and is extremely likely to stay in jail pending trial. *See Public Safety Assessment*, *supra* note 28.

204. *See supra* Section II.C.

uniform DMF Matrix, which applies to every judge in the state.[205] If the judge decides to release a defendant, then the prosecutor has the option to appeal.[206]

Of the other states that use a predominantly cash bail system, however, no state currently applies risk factors to a decision-making framework similar to the PSA.[207] Instead, a judge typically analyzes statutory factors that are not quantifiable to reach a decision on monetary bail.[208] Pretrial Risk Services' utilization of the PSA and DMF guarantees uniformity in its application towards all defendants.[209]

Implementing the PSA will likely reduce the crime rate for all states while providing uniformity to judicial decision-making. The crime rate is down in New Jersey following the enactment of the CJRA which addresses whether a defendant will commit another crime while out on bail.[210] Judicial discretion in cash bail decision-making can be inherently much more inconsistent.[211] Further, cash bail, unlike the PSA, is not backed by empirical data.[212] Therefore, defendants awaiting pretrial release (or detention) in state courts will be assessed by their criminal history and risk level rather than the size of their wallets.

C.   States Should Evaluate Factors to Address Changes in Crime

States that adopt bail reform similar to New Jersey's system should regularly re-evaluate static risk factors in order to better evaluate individuals and crimes.[213] Risk Assessment Instruments are relatively new tools used to predict a defendant's likelihood to appear in court and risk of

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205. *See supra* Section II.D.

206. *See supra* Section II.E. Of the "19,366 motions for pretrial detention . . . the court ordered 8,043 [of those] defendants detained." *See Criminal Justice Reform Report*, *supra* note 77, at 4.

207. *See* James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & Pol'y 637, 654–56 (2017) ("[Bail] procedural schemes are now executed in starkly different manners across states, and their varying results . . . have been criticized for possibly interfering . . . in assigning accurate bail amounts.").

208. *See id.* at 655.

209. *See supra* Sections II.C., II.D.

210. *See supra* notes 200–01 and accompanying text.

211. *See* John S. Goldcamp & Michael R. Gottfredson, *Bail Decisionmaking and Pretrial Detention*, L. & HUM. BEHAV., 3, 4 (1979) ("A finding of special significance is that a large proportion of [bail decisions] could not be explained systematically (i.e., a large share of variance remain[s] unexplained).").

212. *See* Allen, *supra* note 207, at 655.

213. Factors such as "[t]he defendant's physical condition . . . [f]amily ties . . . [and] [c]ommunity ties" have not been found to have a strong relationship with empirically validated risk factors. Myburgh et al., *supra* note 26, at 57. Therefore, those factors should not be considered. *See id.*

committing crimes while on release.[214] Despite the Arnold Foundation's[215] assembly of more than "1.5 million cases from approximately 300 jurisdictions across the United States,"[216] the PSA solely uses static risk factors as opposed to dynamic risk factors.[217] While it is premature to invoke dynamic risk factors in Risk Assessment Instruments like the PSA, future studies may change the way Risk Assessment Instruments use static and dynamic factors.[218]

Static risk factors "are only moderately accurate in the prediction of future violence."[219] Dynamic risk factors, however, "are valuable predictors of recidivism . . . [and] they can serve as an important methodological function in identifying the causes of crime and reoffending."[220]

Successful implementation of dynamic risk factors can improve the PSA in several ways. First, dynamic risk factors allow for a mechanism that does not entirely focus on a defendant's criminal history.[221] Second, dynamic risk factors may address issues that the PSA does not adequately address, such as predicting behavior associated with domestic violence.[222]

The PSA focuses entirely on a defendant's criminal history, which is only one of four empirically-supportive focus groups of predictive static factors.[223] The four focus groups of static factors include: (1) individual factors, such as age, gender, ethnicity, substance abuse, and mental health status; (2) economic factors, such as education level, employment status, and financial resources; (3) social factors, such as residential stability, marital status, and availability of guarantors; and (4) criminal factors, such as criminal history, past release failures and current criminal

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214. The PSA was created in 2013. *See Public Safety Assessment*, *supra* note 28.

215. The Arnold Foundation is a philanthropy which focuses on criminal justice reform in areas such as policing, pretrial justice, community supervision, prisons, and re-integration of prisoners. *Criminal Justice*, ARNOLD VENTURES, https://bit.ly/2G60Gk6 (last visited June 23, 2019).

216. *See Public Safety Assessment*, *supra* note 28.

217. Dynamic risk factors are factors that change based on changing lifetime circumstances. *See* J.W. Coid et al., *Improving Risk Management for Violence in Mental Health Services: A Multimethods Approach*, 4 PROGRAMME GRANTS FOR APPLIED RES., Nov. 2016, at 1, 255. Examples of dynamic risk factors are homelessness and eviction. *See id.* at 256.

218. *See id.* at 255. ("Further investigation is . . . needed into the relationship between static and dynamic risk for future intervention.").

219. *See id.*

220. Tony Ward & Clare-Anne Fortune, *The Role of Dynamic Risk Factors in the Explanation of Offending*, 29 AGGRESSION & VIOLENT BEHAV., July–Aug. 2016, at 79, 79 (emphasis omitted).

221. *See infra* text accompanying notes 223–26.

222. *See infra* text accompanying notes 227–30.

223. *See* Myburgh et al., *supra* note 26, at iv; *see also Public Safety Assessment*, *supra* note 28.

involvement.[224] The PSA does not include individual factors other than age and completely ignores economic factors and social factors.[225] Unlike static factors, dynamic factors may address individual circumstances aside from character traits to predict the likelihood of appearance and the likelihood of violence.[226]

The PSA also fails to address specific issues of domestic violence.[227] Some of these issues include "show[ing] signs of escalating violence, changes in behavior, and whether they have a history of weapon use."[228] Interestingly, dynamic factors may better evaluate signs of escalating violence and changes in behavior associated with domestic violence.[229] Specifically, dynamic factors such as anxiety, homelessness, and alcoholism may be indicative of domestic violence.[230]

If studies can effectively analyze key dynamic factors as a means of predicting criminal behavior, such as domestic violence, then foundations such as the Arnold Foundation should incorporate these factors into Risk Assessment Instruments such as the PSA.[231] Therefore, re-evaluation of the PSA every three to five years is essential to address additional concerns facing the community.[232]

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224. *See id.*

225. *See supra* Section II.C.

226. For a study using dynamic risk factors in an attempt to predict likelihood of violence, robbery, drugs and acquisitive crime*, see* Coid, *supra* note 217, at 255.

227. *See Free to Kill? NJ Bail Reform Can Leave Victims Exposed*, NJ1015.COM (Feb. 9, 2018), https://bit.ly/2RCgXnQ. Nicole Morella of the New Jersey coalition to End Domestic Violence states "that the current system to determine whether a defendant is kept in custody does not consider several factors that are different from other violent criminals." *Id.*

228. *Id.* "[T]he court . . . [should] consider the victim's situation after the violence occurs, including whether they plan on trying to get out of the relationship." *Id.*

229. *See* Coid, *supra* note 217, at 255.

230. *See id.*

231. *See* Myburgh et al., *supra* note 26, at v.

232. *See id.* ("It is recommended that [Risk Assessment Instruments] be re-evaluated every three to five years . . . [as] [r]e-validation is necessary, especially to ensure the quality of the instrument and the validity of the constructs.").

IV. RECOMMENDATION

Waiting and evaluating other states' statutes before enacting bail reform is not an ideal solution. Defendants across the country are sitting in jail because they cannot afford cash bail.[233] Legislators and judiciaries across the country should promptly adopt the PSA and DMF.[234]

Two years have passed since New Jersey enacted the CJRA.[235] In that time, the pretrial jail population has decreased.[236] Defendants charged with violent crimes remain in jail and indigent defendants who have committed less serious crimes are released.[237] Further, the crime rate has dropped. While the PSA is not a perfect Risk Assessment Instrument, it can be re-analyzed and adjusted to reflect changing societal standards.[238] Moreover, the decline in prison population and decline in crime rate show that bail reform acts, such as the CJRA, are an effective solution to problems associated with cash bail.[239] States across the country should follow New Jersey's model.

V. CONCLUSION

Bail reform involving Risk Assessment Instruments is a new way of addressing the problem of defendants being incarcerated for the sole reason that they cannot afford monetary bail.[240] The solution for New Jersey was the CJRA, which incorporated a Risk Assessment Instrument called the PSA.[241] The PSA analyzes predetermined static factors which address the risks that(1) a defendant fails to appear in court; (2) a defendant is a danger to the community; and (3) that a defendant will obstruct the criminal justice process.[242] The PSA scores are then applied to a DMF, which recommends conditions of pretrial release.[243]

Critics of the CJRA have argued that the crime rate would increase because the same defendants would re-commit crimes while out on bail.[244] Yet two years after the CJRA's enactment, indigent defendants in New Jersey have proven the critics wrong.[245] The pretrial jail population has

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233. *See* Heaton, *supra* note 182, at 711.
234. *See supra* Section II.A.
235. *See Criminal Justice Reform Report*, *supra* note 77, at 4.
236. *See supra* Sections II.C., II.D.
237. *See supra* Sections III.A., III.B.
238. *See supra* Section III.C.
239. *See supra* Sections III.A., III.B.
240. *See supra* Part I; *see also supra* Sections II.A., II.B.
241. *See supra* Sections II.A., II.B., II.C.
242. *See supra* Sections II.C.1., II.C.2., II.C.3.
243. *See supra* Sections II.D.
244. *See supra* Section III.B.
245. *See supra* Section III.B.

fallen drastically along with a decrease in crime.[246] Further, the CJRA has ensured that individuals who commit the most heinous crimes, like murder, cannot pay to be released from jail.[247] Meanwhile, no one in the state of New Jersey is awaiting trial in jail for the sole reason they lack the financial means to leave.[248]

While states such as Alaska and California have made progress in bail reform, other states should follow suit and use New Jersey as a model.[249] Enacting laws like New Jersey's CJRA in states across the country would ensure that individuals are assessed by their likelihood of appearing in court and re-offending rather than the depths of their bank account.[250] In return for reforming their bail systems, states will not only see their pretrial jail population decrease substantially, but also experience a decline in crime overall.[251]

Risk Assessment Instruments like the PSA predict future behavior and therefore are imperfect.[252] There will inevitably be situations where released defendants fail to appear in court and re-commit crimes they otherwise would not have committed under a cash bail system.[253] Nevertheless, the presumption of innocence should underly criminal procedure legislation.[254] By enacting the CJRA, New Jersey demonstrated a better way to abate the risk of violent defendants while upholding our country's most critical value.[255] A defendant will be presumed innocent until proven guilty—not indigent.

246. *See supra* Sections III.A., III.B.
247. *See supra* Sections II.A., II.B.
248. *See supra* Section III.A.
249. *See supra* Part IV.
250. *See supra* Section III.A.; *see also supra* Part IV.
251. *See supra* Sections III.A., III.B.
252. *See supra* Parts I; *see also supra* Sections II.C., III.C.
253. *See supra* Part I.
254. *See supra* Section III.A.2.
255. *See supra* Parts II, III.