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Children Behind Bars: A Path to Reducing Pre-Adjudicative Detention in the Juvenile Justice System

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CHILDREN BEHIND BARS: A PATH TO REDUCING PRE-ADJUDICATIVE DETENTION IN THE JUVENILE JUSTICE SYSTEM

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INTRODUCTION

In 2019, nearly 16,000 young people referred to the juvenile justice system were detained in juvenile facilities.[1] Nearly 10,000 of them had not yet been found to have committed a crime.[2] When it comes to youthful offenders, one might assume that courts would be inclined to exhibit leniency and favor pretrial release. In reality, judges detain youth pretrial in over a quarter of delinquency cases.[3]

Pretrial detention[4] does not affect all youth at an equal rate: juvenile court judges consistently detain older youths more often than younger youths, more boys than girls, and far more children of color.[5] In fact, "youth pretrial detention is marred by racial disparity."[6] For example, "less than 21% of white youth with delinquency cases are detained, compared to 32% of Hispanic youth, 30% of Black youth, 26% of American Indian youth, and 25% of Asian, Native Hawaiian, or Pacific Islander youth."[7]

1 Wendy Sawyer, *Youth Confinement: The Whole Pie 2019,* PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.

2 *Id.*

3 *Id.*

4 Though the full term in the juvenile system is "pre-adjudicatory" detention rather than "pretrial," and "adjudicatory hearing" or "adjudication" rather than "trial," the terms will be used interchangeably in this Note.

5 *See* Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, 47 CRIME & JUST. 417, 421 (Mar. 5, 2018) (discussing the necessity for increased procedural safeguards in juvenile justice and relevant judicial and legislative responses).

6 Sawyer, *supra* note 1.

7 *Id.*

Like in the adult criminal justice system, pre-adjudicative detention is an inevitable reality of the juvenile system.[8] Federal guidance provides that "the purpose of juvenile detention is to confine only those youth who are serious, violent, or chronic offenders pending legal action."[9] But in practice, this form of detention is decidedly not reserved for the most serious cases where, for example, a juvenile's alleged offense is such that he poses imminent and grave danger to the community.[10] In fact, a 2019 report found that "over 3,200 youth [were] detained [nationally] for technical violations of probation or parole, or for status offenses, which are behaviors that are not law violations for adults."[11]

Two distinct problems are present when it comes to the pretrial detention of juveniles: detention is not limited to the most serious cases, and racial disparities abound. But while the statistics might paint a grim picture, there is hope for this vulnerable population. In the wake of robust bail reform for adults and juvenile justice reform across the country, the time is ripe for change in pre-adjudicative decision-making in the juvenile justice system. This Note will explore one specific option for such reform: integrating algorithmic risk assessment tools into judicial determinations of whether a juvenile needs to be detained before his trial. This particular reform has been successful in the adult system, and it could serve to remove racist and unjust subjectivity behind today's pre-adjudicative detention of juveniles. Part I of this Note will explain the workings of the juvenile justice system and the harms that juveniles suffer when they are detained before trial. Part II will discuss the current state of reform in both the juvenile and adult criminal justice systems and will argue that the juvenile system should be further reformed by borrowing from adult system reform involving algorithmic risk assessment tools.

8 *See id.* (listing statistics demonstrating the commonality of pre-adjudicative detention in the juvenile system and highlighting that many youths cannot afford bail).

9 *Id.* (internal quotation marks omitted).

10 *See id.* (discussing that most youths placed in detention centers have committed low-level, rather than high-level, offenses).

11 *See id.* (internal quotation marks omitted); *see also* Sarah Hockenberry, U.S. Dep't of Just. Off. of Juv. Just. & Detention Prevention, *Juveniles in Residential Placement, 2013*, 1, 3 (May 2016) (discussing that examples of status offenses include running away, truancy, and incorrigibility).

I. BACKGROUND

A. The Juvenile Justice System

Since the early 20th century, "every state in the country [has] had . . . a separate system of criminal justice" for children, in recognition that "as a class, [juveniles] are less blameworthy, and they have a greater capacity for change."[12] Most states today define delinquency as "the commission of a criminal act by a child who was under the age of 18 at the time."[13] The goal of juvenile justice is supposed to be rehabilitation, and "juvenile court judges draw from a range of legal options to meet both the safety needs of the public and the treatment of the youth."[14]

Like in the adult system, juveniles facing delinquency charges may be detained by court order pending adjudicatory and/or disposition hearings.[15] Detention can take several forms in the juvenile justice system: secure detention, which "involves holding the child at a locked detention facility"; shelter homes, or non-secure detention, under which "the child may only leave the premises for school or other pre-approved appointments"; and home detention, "where the child may only leave home for school or appointments."[16] Further, "[i]n jurisdictions where there is no juvenile detention facility, children may be detained pretrial in adult facilities."[17]

To determine whether continued detention is necessary, "[m]ost jurisdictions require a detention hearing to be held" within forty-

12 *See Youth in the Justice System: An Overview*, JUV. L. CTR., https://jlc.org/youth-justice-system-overview (last visited Aug. 24, 2021). The Juvenile Law Center is a non-profit law firm for children in the United States and is primarily focused on the rights of children in the child welfare and justice systems. *About*, JUV. L. CTR., https://jlc.org/about (last visited Aug. 24, 2021).

13 *Youth in the Justice System: An Overview, supra* note 12. Further, "most states also allow youth to remain under the supervision of the juvenile court until age 21." *Id.*

14 *Id.*

15 *Juvenile Court Terminology*, NAT'L JUV. DEF. CTR., https://njdc.info/juvenile-court-terminology/ (last visited Dec. 18, 2019). An adjudicatory hearing is "[t]he fact-finding phase (*i.e.* the trial) of a juvenile case," and a disposition hearing is "[a]kin to a sentencing hearing in criminal court [and] is held after a juvenile has been adjudicated." *Id.*

16 *Id.*

17 *Id.*

eight to seventy-two hours "after the detention commences."[18] If there is "probable cause that the child committed the alleged delinquent act . . . pre-adjudicatory detention" may be permitted, though most jurisdictions also require "a showing that the child is a flight risk or that the child is a danger to hi[m] or herself or others such that continued detention is required."[19]

The Supreme Court has spoken to the constitutionality of pretrial detention of juveniles.[20] In *Schall v. Martin*, the Court considered whether a New York statute "authoriz[ing] pretrial detention of an accused juvenile delinquent based on a finding that there is a 'serious risk' that the child 'may before the return date commit an act which if committed by an adult would constitute a crime'" violated such juvenile's due process rights.[21] It concluded that "preventive detention under [the statute] serve[d] a legitimate state objective, and that the procedural protections afforded pretrial detainees by the . . . statute satisf[ied] the requirements of the Due Process Clause of the Fourteenth Amendment."[22]

Though the Court seemed to have confidence in "judges' prognostication ability," social scientists question the precision of judges' assessment of juveniles' pretrial risk.[23] Not only has research shown that statistical predictions of risk, like those of psychiatrists, are more reliable than professional judgments, but when making predictions of a juvenile's risk level, judges often have even less information than clinicians would.[24] For example, a clinician would rely on professional evaluations, social histories,

18 *Id.*

19 *Id.*

20 *See generally* Schall v. Martin, 467 U.S. 253 (1984) (considering whether the section of the New York Family Court Act authorizing pretrial detention of an accused juvenile delinquent based on a finding that there was "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime" violated the due process clause).

21 *Id.* at 255-56.

22 *See id.* at 256-57.

23 Feld, *supra* note 5, at 421.

24 *See id.* at 421-22.

and psychometric tests.[25] Judges typically do not have access to this type of information when determining whether a juvenile should be detained.[26] This lack of information "compounds the fallibility" of judges' predictions.[27]

B. Harms of Detaining Young Offenders Before Trial

As a general matter, pre-trial detention of young offenders—even when necessary—is exceedingly harmful to those young offenders.[28] The harms reach nearly every aspect of that juvenile's life and can have lasting effects.[29] Specifically, "[p]retrial detention impedes the exercise of children's due process rights, negatively impacts their physical and mental health, and leads to social [and economic] effects that last their entire lives."[30] In light of these serious concerns, pretrial confinement of young people in formal detention facilities should be the rare exception in the juvenile justice system—not the norm.

One of the most pertinent due process concerns at stake stems from the plea bargaining process of the criminal justice system.[31] Criminal defendants of all ages who are detained pretrial often "feel compelled to take whatever deal the prosecutor offers, even if they are innocent."[32] Indeed, "[b]eing detained before trial decreases an individual's bargaining power and increases the pressure to plead guilty."[33] This danger is compounded when the

25 *See id.* A psychometric test is "a standard and scientific method used to measure individuals' mental capabilities and [behavioral] style." *What are psychometric tests*, INST. OF PSYCHOMETRIC COACHING, https://www.psychometricinstitute.com.au/psychometric-guide/introduction_to_psychometric_tests.html (last visited Dec. 8, 2020).

26 *See* Feld, *supra* note 5, at 421-22.

27 *Id.* at 422.

28 *See* INT'L HUM. RTS. L. CLINIC, UNIV. MINN. HUM. RTS. CTR. & JUV. JUST. ADVOC. INT'L, CHILDREN IN PRETRIAL DETENTION: PROMOTING STRONGER INTERNATIONAL TIME LIMITS 11 (2018).

29 *See id.*

30 *Id.*

31 *See id.* at 12.

32 *See* Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 4, 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ (analyzing the consequences of plea-bargaining for juveniles, including the pressure to accept regardless of innocence).

33 INT'L HUM. RTS. L. CLINIC ET AL., *supra* note 28, at 12.

criminal defendant is a juvenile.[34] Experts have "attribute[d] juveniles' overrepresentation among false confessors to reduced cognitive ability, developmental immaturity, and increased susceptibility to manipulation."[35] In fact, research indicates that "juveniles are routinely unable to understand fully the consequences of a plea deal, not only in terms of the punishment they receive but also in relation to their waiver of rights."[36] And in terms of individual proceedings, "[j]udges convict and institutionalize detained youths more often than similar youths released pending trial."[37] Thus, the pressures of wanting to get out of detention coupled with the diminished cognitive capacities of youth, as well as the impact of detention on case dispositions, result in grave due process concerns.

Pretrial detention also impedes the physical health of young people.[38] Detained young people "have high rates of unmet physical . . . needs, as well as higher mortality rates, compared to the general adolescent population."[39] Common unmet physical needs include sexually transmitted infections and chronic conditions affecting ethnic minorities and disadvantaged communities, like asthma, type two diabetes, and sickle cell disease.[40] Further, "[e]xtended periods of time in pretrial detention increase[] children's exposure to various forms of child abuse and mistreatment."[41] This includes both physical and sexual abuse, and the risk of sexual abuse is particularly high where "pretrial detainees

34 *See* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 957 (Nov. 8, 2019) ("[T]here is good reason to suspect that [juveniles are susceptible to false guilty pleas]; certain features of adolescence, such as inability to consider long-term consequences . . . place[s] [them] at risk for false confessions to prosecutors.").

35 Feld, *supra* note 5, at 437.

36 *See* FAIR TRIALS, THE DISAPPEARING TRIAL 1, 11 (2017), https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf (advocating for a rights-based approach to trial waiver systems). *See also* Feld, *supra* note 5, at 437 (noting that juveniles "are more likely to comply with authority figures, tell police what they think police want to hear, and respond to negative feedback" and "[t]he stress and anxiety of interrogation intensify their desire to extricate themselves in the short run by waiving [their rights] and confessing.").

37 Feld, *supra* note 5, at 422.

38 INT'L HUM. RTS. L. CLINIC ET AL., *supra* note 28, at 11.

39 Elizabeth S. Barnert, Raymond Perry, & Robert E. Morris, *Juvenile Incarceration and Health*, 16 ACAD. PEDIATRICS 99, 101 (2016) (demonstrating that clinical care, research, medical education, policy, and advocacy for pediatricians can lead change and improve the health status of youth involved in the juvenile justice system).

40 *See Id.*

41 INT'L HUM. RTS. L. CLINIC ET AL., *supra* note 28, at 13-14.

are mixed with convicted youth or are detained with adults."[42] "[O]vercrowding, isolation, and the use of solitary confinement" can also contribute to a "deteriorating physical condition" in the young.[43]

The impact of pretrial detention on mental health is equally concerning.[44] Researchers believe that although "upwards of two-thirds of young people in detention centers could meet the criteria for having a mental disorder, a little more than a third need ongoing clinical care—a figure twice the rate of the general adolescent population."[45] The reason for the disproportionate rate of mental health issues among youth in detention facilities is likely the detention itself.[46] For example, "for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration."[47] A study of detained youth in Oregon found that [thirty-four percent] suffered from "a current significant clinical level of depression."[48] Detained youth are also "at greater risk of self-harm" than their un-detained counterparts.[49] In fact, some researchers have found that "incarcerated youth experience from *two to four times* the suicide rate of youth in community."[50] As to long-term mental health implications, detention can lead to institutionalization, which is "a psychological adaptation that incorporates the norms of prison life into habits of thinking, feeling, and acting . . . [and] occurs more quickly in youth than adults."[51]

Even when young offenders are detained for short periods of time, "the impacts of detention . . . on children last long after they are released and follow them as they return to their communities and become adults" and can be seen most starkly in social and

42 *Id.* at 14.

43 *Id.*

44 *See generally* BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), *available at* https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/dangers_of_detention.pdf (discussing the grievous mental health consequences for youth who are detained).

45 *Id.* at 8.

46 *See id.*

47 *Id.* at 2.

48 *Id.* at 8 (internal quotation marks and italics omitted).

49 *Id.* at 9.

50 *Id.*

51 INT'L HUM. RTS. L. CLINIC ET AL., *supra* note 28, at 15.

economic harms.[52] For example, detention "decreases the likelihood that youth will successfully reintegrate into the community upon release" and "impedes children's regular adolescent development."[53] Moreover, "detention interrupts young people's education, and once incarcerated, some youth have a hard time returning to school."[54] In the long term, juveniles "who leave detention and who do not reattach to schools face collateral risks: High school dropouts face higher unemployment, poorer health (and a shorter life), and earn substantially less than youth who do successfully return [to] and complete school."[55] Furthermore, detention in one's youth can also negatively affect future employment prospects.[56] One study found that incarcerating youth between the ages of sixteen and twenty-five "reduced work time over the next decade by [twenty-five to thirty] percent," and another found that youth aged fourteen to twenty-four "who spent some time incarcerated in a youth facility experienced three weeks less work a year . . . as compared to youth who had no history of incarceration."[57] In fact, "[d]ue to the disruptions in their education, and the natural life processes that allow young people to age-out of crime . . . the process of incarceration could actually change an individual into a less stable employee."[58]

Pre-adjudicative detention of some juveniles is perhaps an unavoidable outcome. Some may argue that an individual poses too big a danger to society or too great a risk of failing to appear for court appearances that there is simply no alternative to confinement. However, it should still be a measure of last resort—a rare

52 *See id.*

53 *Id.* at 15-16. As to the stunting of development, "due to the restrictive environment of detention, as well as denial of educational and community activities, children are unable to develop mastery (the sense of having control over the forces that affect one's life) and identity, both of which are critical stages of adolescent psychological development." *Id.*

54 HOLMAN & ZEIDENBURG, *supra* note 44, at 9. "A Department of Education study showed that [forty-three] percent of incarcerated youth receiving remedial education services in detention did not return to school after release, and another [sixteen] percent enrolled in school but dropped out after only five months." *Id.*

55 *Id.*

56 *See id.* at 10.

57 *Id.* at 10.

58 *Id.* (internal quotation marks and emphasis omitted).

exception rather than the rule. Juveniles with their whole lives ahead of them deserve the same reforms that those accused in the adult system are seeing so that detention will be ordered only in the most extreme cases.

II. DISCUSSION

A. Reform in the Adult Criminal Justice System

In recent years, jurisdictions across the country have undertaken robust efforts to reform their adult criminal justice systems, especially in the pretrial stage. One focus of this movement has been bail reform, a front-end solution to cure the harms of detention by ensuring that only those who have the highest susceptibility to pretrial failure are kept in pretrial confinement.[59] Importantly, the juvenile system and the adult system share many similar practices, such as money bail, and they share similar problems, like excessive detention and wealth and race disparities.[60]

Pretrial reform efforts have focused on money bail for a simple reason: the practice is inherently unjust.[61] As in the juvenile justice system, the Supreme Court has upheld pretrial detention of adults in the criminal justice system in the interest of public safety.[62] In fact, in the seminal case sanctioning the practice in the adult system, *United States v. Salerno*, the Court relied heavily on the reasoning it set forth in *Schall* upholding juvenile detention.[63] However, *Salerno* had one important caveat: "[i]n our society

59 *See generally* Stephanie Wykstra, *Bail reform, which could save millions of unconvicted people from jail, explained*, VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality (discussing the use of money bail as one of the most troubling features of our criminal justice system).

60 *See id.* (noting that many adults cannot afford bail and the system's reliance on it leads to the exploitation of people of color)*; see also* INT'L HUM. RTS. L. CLINIC ET AL., *supra* note 28, at 13, 38, 50.

61 *See* Wykstra, *supra* note 59.

62 *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (holding that it was not unconstitutional for a federal court to detain an arrestee pending trial if the government has demonstrated by clear and convincing evidence that no release conditions would reasonably assure the safety of any other person and the community).

63 *See id.* at 745-48.

liberty is the norm, and detention prior to trial . . . is the carefully limited exception."[64] Yet in the years following that decision, confinement prior to trial was not a "carefully limited exception."[65] In fact, between 1990—three years after the *Salerno* decision—and 2009, "releases in which courts used money bail in felony cases rose from [thirty-seven] percent to [sixty-one] percent."[66] Money bail and detention became the norm.

One problem with this increase stems from the fact that "even at low amounts, most people cannot quickly post bail."[67] This results in a system that allows one's wealth, rather than the danger he poses to public safety, to determine whether he will be detained.[68] The system inflicts racial inequity as well: for example, "[c]ompared to white men charged with the same crime and with the same criminal histories, African-American men receive bail amounts [thirty-five percent] higher; for Hispanic men, bail is [nineteen percent] higher than white men."[69]

One important focus of criminal justice reform has been a shift away from a "wealth-based pretrial system"[70] and toward objective evaluations of whether a criminal defendant should be detained before trial.[71] Specifically, jurisdictions across the United States have begun to employ statistical risk assessment tools into those pivotal pretrial determinations.[72] Such "tools employ a

64 *Id.* at 755.

65 *See* Wykstra, *supra* note 59.

66 *See id.* This statistic was taken from a U.S. Department of Justice study of felony defendants in large urban counties across the country in 2009. *See* Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009- Statistical Tables*, U.S. DEP'T OF JUST. 1, 15 (Dec. 2013).

67 Wykstra, *supra* note 61.

68 *See id.*; *see also Why We Need Pretrial Reform*, PRETRIAL JUST. INST., https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/ (last visited Sept. 3, 2021) ("Raising $400 for an emergency would be hard for nearly half of all Americans. Yet, across the United States a person's ability to pay determines who stays in jail before trial and who returns home.").

69 PRETRIAL JUST. INSTITUTE, *supra* note 68. Further, "[s]tudies have found . . . that African Americans face higher bail amounts and are less likely to be released on conditions that don't involve paying money. Another concluded that being black increases a defendant's odds of being held in jail pretrial by [twenty-five percent]." *Id.*

70 Wykstra, *supra* note 59.

71 *See* Sarah Picard, Matt Watkins, Michael Rempel, & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, CTR. FOR CT. INNOVATION (last visited Sept. 4, 2021), 3 (highlighting the usefulness of risk assessments in promoting racial fairness in sentencing).

72 *See id.*; *see also* Wykstra, *supra* note 59 ("[Pretrial] risk assessment tools have been adopted by several states, including New Jersey, Arizona, and Kentucky, as well as by dozens of local jurisdictions across the country.").

mathematical formula, or algorithm, to estimate the probability of a defendant incurring a new arrest or failing to appear in court."[73] Though automated decision-making tools are widely used in the criminal justice system, the specific tools used differ by jurisdiction."[74] In the adult system, the most commonly used tools are Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), Level of Service Inventory Revised (LSI-R), and Public Safety Assessment (PSA).[75] These tools differ both in in the stage of the criminal process in which they are designed to be used and the factors considered in their assessments.[76]

COMPAS is among the most commonly used algorithms in the United States.[77] It considers five main kinds of variables: criminal involvement, relationships and lifestyles, personality and attitudes, family, and social exclusion.[78] However, the specifics of how the formula is calculated have not been made public.[79] While Equivant, the company that sells COMPAS, does offer a pretrial product,[80] COMPAS was "designed to support ultimate treatment, programming and case management decisions for defendants."[81]

Next, like COMPAS, LSI-R "pulls information from a wide set of factors ranging from criminal history to personality patterns."[82]

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73 Picard et al., *supra* note 71 at 3.

74 *See AI and Human Rights: Criminal Justice System*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/algorithmic-transparency/crim-justice/ (last visited Sept. 4, 2021).

75 *See id*.

76 *See id.*

77 *See id.*

78 *See* Danielle Kehl, Priscilla Guo & Samuel Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, BERKMEN KLEIN CTR. FOR INTERNET & SOC., HARV. L. SCHOOL 1, 11, https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf (2017) (analyzing the use of risk assessment tools and raising questions on their fairness and transparency).

79 *See AI and Human Rights: Criminal Justice System*, *supra* note 74. Northepointe, the company that created the formula, "has stated that the basis of its future crime formula includes factors such as education levels and whether the defendant has a job." *Id.* Nevertheless, it has not disclosed the precise formula it uses, and the lack of transparency surrounding this tool has frustrated "[d]efense advocates . . . [who] are unable to challenge the validity of the [tool's] results at sentencing hearings." *Id.* Further, "because the public has no opportunity to identify problems with [such] troubled systems, it cannot present those complaints to government officials." *Id*.

80 *See Practitioner's Guide to COMPAS Core,* EQUIVANT 1, 31 (Apr. 4, 2019), *available at* http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf (describing COMPAS's pre-trial assessment tool, PRRS-II).

81 *See COMPAS Risk & Need Assessment System FAQ,* NORTHEPOINTE, http://www.northpointeinc.com/files/downloads/FAQ_Document.pdf (last visited Sept. 16, 2021).

82 *See Practitioner's Guide to COMPAS Core*, *supra* note 80, at 19 (listing the risk factors used by LSI-R and comparing it to COMPAS).

The key areas measured by this tool are criminal history, accommodation, leisure and recreation, education and employment, emotional and personal areas, companions, financial status, attitudes and orientation, family and marital status, and alcohol or drug problems.[83] LSI-R was designed for defendants sixteen and over and "help[s] predict parole outcome, success in correctional halfway houses, institutional misconducts, and recidivism."[84]

Lastly, the PSA "only considers variables that relate to a defendant's criminal history . . . as well as age and current charge."[85] This stands in contrast to COMPAS and LSI-R, as the PSA does not consider one's social background.[86] Instead, the PSA uses age at arrest, whether the offense was violent, pending charges at the time of the offense, prior felony or misdemeanor convictions, prior failure to appear, and prior sentence to incarceration.[87] Further, the PSA is "available [to jurisdictions] at no cost," and the "factors and method used to calculate PSA scores are available and accessible to the public."[88] This tool was designed specifically for use in assessing a person's likelihood of returning to court for future hearings and remaining [crime-free] while on pretrial release."[89]

All three of these tools have their own merits and drawbacks. In Parts II(C) and (D), this Note will assess which tool would be the most suitable for the pre-adjudication stage of the juvenile justice system.

83 *See LSI-R*, MHS ASSESSMENTS, https://www.mhs.com/MHS-Publicsafety?prodname=lsi-r (last visited Sept. 16, 2021).

84 *Id.*

85 *Public Safety Assessment FAQs*, ARNOLD VENTURES (Mar. 18, 2019), https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf.

86 *See Public Safety Assessment: How It Works*, ADVANCING PRETRIAL POL. & RESEARCH (May 2020), https://www.psapretrial.org/about/factors.

87 *Id.*

88 *About the Public Safety Assessment,* ADVANCING PRETRIAL POL. & RESEARCH, https://advancingpretrial.org/psa/about/ (last visited Sept. 12, 2021).

89 *See id.*

B. Reform in the Juvenile Justice System

Starting around thirty years ago, states began adopting "get-tough" policies to reduce juvenile crime that included more severe punishments and an increased number of youth prosecutions.[90] These policies gave judges "broad discretion to confine youths prior to trial."[91] As a result, judges "overuse[d] and abuse[d] detention facilities to confine youths and disproportionately detain children of color."[92]

Even money bail became an issue in the juvenile justice system.[93] A survey of United States jurisdictions showed that, as of mid-2019, nineteen U.S. states and territories have statutes or court rules that "expressly allow for children facing charges in delinquency court to be released from detention on bail," while only nine states and territories prohibit the practice.[94] "In the remaining [twenty-eight] states, statutes and court rules neither authorize nor prohibit the use of bail in juvenile court," though courts in some of those jurisdictions have held that "youth do not have a right to release on bail."[95]

In jurisdictions that allow for money bail, a "child's ability to go home depends on their ability to post bail" regardless of whether or not their arrest was wrongful.[96] According to a survey of juvenile defenders, children, like their adult counterparts, are often "detained prior to trial because courts set bail at amounts that [they] cannot afford to pay."[97] In fact, the survey found that "courts impose bail that children cannot afford to pay in at least [eleven] of the [jurisdictions] that expressly allow for bail, despite statutory language in seven of them that requires the court to consider the financial ability of the youth or their family."[98]

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90 *See* Feld, *supra* note 5, at 418. This trend was spurred largely by a sharp escalation in youth homicide rates and gun violence, which "provided political impetus to transform juvenile and criminal justice policies." *Id.*

91 *Id* at 421.

92 *Id.*

93 *See A Right to Liberty: Reforming Juvenile Money Bail,* NAT'L JUV. DEF. CTR. 3 (Mar. 2019), https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf.

94 *Id.* at 4.

95 *Id.*

96 *Id.* at 2.

97 *Id.* at 11.

98 *Id. at 10.*

One of the major juvenile pretrial reform efforts has been spearheaded by the Juvenile Detention Alternatives Initiative (JDAI).[99] JDAI was established by the Annie E. Casey Foundation[100] in the early 1990s, to "reduce reliance on local detention."[101] JDAI's model is based on eight strategies, including the use of "rigorous data collection and analysis to guide decision making" and the use of "objective admission criteria and screening instruments to replace subjective decision-making processes" to determine whether youth should be placed into secure juvenile detention facilities.[102]

JDAI's results have been largely positive.[103] Since its inception, its model operates in around 300 counties in the United States and has "dramatically reduc[ed] detention facility populations."[104] It also operates at the state level in one state, New Jersey.[105] Several of the JDAI strategies are worth mentioning. First, it emphasizes

99 *See Juvenile Detention Alternatives Initiative (JDAI)*, THE ANNIE E. CASEY FOUND., https://www.aecf.org/work/juvenile-justice/jdai/ (last visited Sept. 16, 2021).

100 The Annie E. Casey Foundation is "a private philanthropy . . . [that] makes grants that help federal agencies, states, counties, cities, and neighborhoods create more innovative, cost-effective responses to the issues that negatively affect children: poverty, unnecessary disconnection from family and communities with limited access to opportunity." *About Us*, THE ANNIE E. CASEY FOUND, https://www.aecf.org/about/ (last visited Sept. 16, 2021).

101 *See Juvenile Detention Alternatives Initiative (JDAI)*, *supra* note 99. The overreliance on detention can be traced back to an "increase in violent crime in the 1980s," which prompted states to "stress[] punitiveness, accountability, and . . . public safety, rejecting traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment. This change in emphasis . . . is exemplified by [a number of states] that redefined the purpose clause of their juvenile courts to emphasize public safety, certainty of sanctions, and offender accountability." *Juvenile Crime Juvenile Justice,* NAT'L RSCH. COUNCIL & INST. OF MED., 155 (Joan McCord et al. eds., 2001).

102 *JDAI Core Strategies*, THE ANNIE E. CASEY FOUND., https://www.aecf.org/work/juvenile-justice/jdai/jdai-core-strategies (last visited Sept. 3, 2021). The remaining strategies are: "promoting collaboration between juvenile court officials, probation agencies, prosecutors, defense attorneys, schools, community organizations and advocates; . . . "implementing new or expanded community-based alternatives to locked facilities – such as day and evening reporting centers, home confinement and shelter care; instituting case processing reforms to expedite the flow of cases through the system; "reducing the number of youth detained for probation rule violations or failing to appear in court, and the number held in detention awaiting transfer to a residential facility; improving racial and ethnic equity by examining data to identify policies and practices that may disadvantage youth of color at various stages of the process, and pursuing strategies to ensure a more level playing field for youth regardless of race or ethnicity; and monitoring and improving conditions of confinement in detention facilities." *Id.*

103 *See JDAI at 25: Juvenile Detention Alternatives Initiative Insights from the Annual Results Reports,* THE ANNIE E. CASEY FOUND. 1-4 (Apr. 17, 2017), *https://assets.aecf.org/m/resourcedoc/aecf-jdaiat25-2017.pdf* (discussing how JDAI sites have achieved reductions in both juvenile incarceration and crimes).

104 *Juvenile Detention Alternatives Initiative (JDAI), supra* note 99.

105 *See New Jersey Becomes First State to Implement JDAI Statewide*, THE ANNIE E. CASEY FOUND., https://www.aecf.org/blog/new-jersey-becomes-first-state-to-implement-jdai-statewide (Sept. 12, 2018).

creating "[a] formal structure for collaboration across agencies and among key stakeholders in planning and policymaking."[106] Next, it requires the use of "comprehensive data" to "diagnose a system's problems and proclivities [and] to assess the impact of various reforms."[107] It is also crucial that sites use "objective criteria . . . to support decision-making at all points where choices to place youth in secure custody are made."[108] And to reduce racial disparities, it urges "[i]nclusive, sustained leadership grounded in the use of data."[109]

Pretrial reform in the juvenile system has focused less on statistical risk assessment.[110] As mentioned earlier, risk assessment is only one facet of JDAI's pretrial reform model.[111] Even then, the tools used by JDAI sites are typically not algorithmic.[112] Instead, most JDAI sites use "the consensus approach to risk assessment design," which is "essentially a hybrid of prediction science and local policymaking."[113] This design model employs "risk factors [that] are borrowed from a common menu of delinquency risk factors that have been tested in other contexts and jurisdictions."[114] Each site develops its own version of a risk assessment tool, choosing risk factors "based on the experience, knowledge, and informed guesswork of local juvenile justice stakeholders."[115] Similarly, "[p]oints are assigned to risk factors based on stakeholder discussion and estimates of the effects on referrals and detention population."[116]

106 *State-Level Detention Reform: A Practice Guide for Advisory Groups*, THE ANNIE E. CASEY FOUND., 1,6 (2008), https://assets.aecf.org/m/resourcedoc/aecf-practice3stateleveldetentionreform-2008.pdf.

107 *Id.*

108 *Id.*

109 *See id.* at 7.

110 *See* David Steinhart, *Juvenile Detention Risk Assessment: A Practice Guide to Juvenile Detention Reform*, THE ANNIE E. CASEY FOUND. 1,13 (2006), https://assets.aecf.org/m/resourceimg/aecf-juveniledetentionriskassessment1-2006.pdf.

111 *See generally State-Level Detention Reform: A Practice Guide for Advisory Group*, *supra* note 106, at 14 (discussing the various tools used in JDAI's pretrial reform model; risk assessment is just one of many tools mentioned).

112 *See* Steinhart, *supra* note 110, at 13. In fact, as of 2006 when this report was published, the only JDAI site to have used a statistical design method was New York City. *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

Data analyses from the years 2008-2016 showed that "JDAI sites have achieved significant reductions in both juvenile incarceration and juvenile crime; and in most sites, those reductions have been sustained or deepened over time."[117] For example, "[a]cross the 164 JDAI sites that reported in 2016, there were more than 3,800 fewer youth in detention on an average day in 2016 than before those sites undertook JDAI—a reduction of [forty-three] percent."[118] And "[t]here were roughly 93,000 fewer admissions per year to juvenile detention facilities in JDAI sites—a decrease of 49 percent—compared with pre-JDAI levels."[119] However, the data did "also indicate that despite sites' best efforts, racial and ethnic disparities have persisted or worsened overall; and in some sites, the momentum of detention reform appears to have slowed in recent years."[120]

C. Experience with Risk Assessment in the Adult System

Recent bail reform efforts in the adult system have led to notable successes, particularly concerning the implementation of risk assessment tools. Of the most commonly used tools designed to be used in criminal cases,[121] the PSA is most effective. Not only was it designed to be used at the pretrial phase; it is also the least likely to exacerbate the problems it was designed to fix—namely, discriminatory and unequal decision-making when it comes to pretrial detention.[122]

As opposed to the PSA, neither LSI-R nor COMPAS were designed to be used at the pretrial phase of the criminal process.[123] The LSI-R advertises a focus on "parole outcome, successes in correctional halfway houses, institutional misconducts, and recidivism" and is used to predict the risk of reoffending as it is relevant

117 *See JDAI at 25, supra* note 103, at 1.
118 *Id.* at 3.
119 *Id.*
120 *Id*. at 1.
121 Kehl, Guo, Kessler, *supra* note 78, at 10 (discussing COMPAS, LSI-R, and the PSA).
122 *See About the Public Safety Assessment*, ADVANCING PRETRIAL POLICY & RESEARCH, https://www.psapretrial.org/about/background (last visited Oct. 30, 2019).
123 Kehl, Guo, Kessler, *supra* note 78, at 10.

to the treatment and "correctional intervention" for offenders.[124] COMPAS was intended to be used post adjudication, "specifically . . . to aid probation officers in determining which defendants would succeed in specific treatment types."[125]

Further, a 2016 analysis of the COMPAS algorithm demonstrated a dangerous race bias, ironically exacerbating one of the problems actuarial tools were intended to remedy.[126] The study "looked at more than 10,000 criminal defendants in Broward County, Florida, and compared their predicted recidivism rates with the rate that actually occurred over a two-year period."[127] Its findings indicated that "black defendants who did not recidivate over a two-year period were nearly twice as likely to be misclassified as higher risk compared to their white counterparts"; that "white defendants who re-offended within the next two years were mistakenly labeled low risk almost twice as often as black re-offenders"; that "even when controlling for prior crimes, future recidivism, age, and gender, black defendants were [forty-five] percent more likely to be assigned higher risk scores than white defendants"; that "[b]lack defendants were . . . twice as likely as white defendants to be misclassified as being a higher risk of violent recidivism[,] [a]nd white violent recidivists were [sixty-three] percent more likely to have been misclassified as low risk of violent recidivism, compared with black violent recidivists"; and finally, that "even when controlling for prior crimes, future recidivism, age, and gender, black defendants were [seventy-seven] percent more likely to be assigned higher risk scores than white defendants."[128] Accordingly, COMPAS is also not the appropriate choice for pretrial risk assessment.

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124 Christopher T. Lowenkamp & Kristin Bechtel, *The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System*, 71 FED. PROB. 3 (2007). https://www.uscourts.gov/sites/default/files/fed_probation_dec_2007.pdf.

125 *Algorithms in the Criminal Justice System*, *supra* note 78. The company that designed and sells COMPAS does offer a pretrial product, but the factors used are not purely objective, and the way in which the score is computed is not publicly available, posing a transparency and even a potential due process issue. *See* Equivant, *supra* note 80, at 31. The practice guide provides that the assessment "includes eight risk factors (felony top charge, pending case, failure to appear, prior arrest on bail, prior jail sentence, drug abuse history, employment status, and length of residence)." *Id*. at 31.

126 *See* Jeff Larson Et Al., *How We Analyzed the COMPAS Recidivism Algorithm,* PROPUBLICA (May 23, 2016).

127 *Id.*

128 *Id.*

Alternatively, the PSA is intended for pretrial use[129] and uses only objective factors in its calculations.[130] First, the PSA "was designed . . . to provide judicial officers with information to help them assess a person's likelihood of returning to court for future hearings and remaining crime free while on pretrial release."[131] Next, the factors the PSA considers are both objective and predictive.[132] These factors "include the person's current age, prior convictions, pending charges, and prior failures to appear in court pretrial."[133] Interestingly, "[f]actors such as drug and alcohol use, mental health, employment, and residence," though included in the other major risk assessment systems, "were excluded [here] because they did not increase the PSA's predictive accuracy."[134] Further, because of the purely objective nature of the factors, "[a]ll studies to date have shown the PSA does not exacerbate racial disparities."[135]

Moreover, jurisdictions that have implemented the PSA in their pretrial processes have experienced success with it. For example, a 2017 study of Yakima County in Washington found that after implementation, there was "[a] statistically significant and substantial increase . . . in the number of people released pretrial . . . with no statistically significant difference observed in public safety and court appearance outcomes."[136] Likewise, the use of the PSA in Lucas County, Ohio led to nearly double the pretrial releases without bail, a decrease in pretrial crime, and a decrease in pretrial defendants skipping their court appearances.[137] New Jersey

129 *See About the Public Safety Assessment*, *supra* note 122.

130 *See id.*

131 *See Frequently Asked Questions,* ADVANCING PRETRIAL POLICY & RESEARCH, https://advancingpretrial.org/faq/ (last visited Sept. 15, 2021).

132 *See About the Public Safety Assessment, supra* note 122.

133 *Id.* (listing factors used by the PSA to assess the likelihood of pretrial success).

134 *Id.*

135 *Id.*

136 Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis*, at 6 (Nov. 2017), https://justicesystempartners.org/wp-content/uploads/2018/02/2017-Yakima-Pretrial-Pre-Post-Implementation-Study.pdf.

137 *See New Data: Pretrial Risk Assessment Tool Works to Reduce Crime, Increase Court Appearances*, ARNOLD VENTURES (Aug. 8, 2016), https://www.arnoldventures.org/newsroom/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/. This study also found the PSA to be race and gender-neutral. *Id.*

also found success in implementing the PSA statewide: a report by the state's courts found a nearly thirty percent decrease in the pretrial jail population in the first two years the tool was used, with no change in crime rates or failures to appear.[138]

D. Borrowing from the Adult System

This Note proposes two simultaneous reforms for juvenile pretrial detention decision-making that are inspired by recent reforms in adult pretrial detention: the use of risk assessment tools and the elimination of money bail. The integration of actuarial risk assessment tools into juvenile pretrial detention decision-making likely has the best chance of successfully reducing the detention population if it is also coupled with the elimination of money bail in those jurisdictions that presently permit it.[139]

This two-prong reform copies the model implemented by New Jersey's bail overhaul in its adult criminal justice system.[140] Under legislation that came into effect in 2017, the "system begins with the assumption that innocent people should not be in jail."[141] Pre-trial detention in New Jersey now requires a hearing, at which prosecutors must convince judges that "no conditions could protect the public or ensure that the defendant will return to court."[142] Advocacy and decision-making at such hearings in New Jersey's adult system relies on actuarial risk assessment—namely, the PSA.[143]

The state has seen positive results. In the first year of implemented reform, the New Jersey's pretrial jail population decreased by 20.3%.[144] People continued to show up to their court dates, fewer indigent defendants were detained, and the rearrest rate

138 *See* Glenn A. Grant, J.A.D., *Jan. 1-Dec. 31 2018 Report to the Governor and Legislature* at 3 (Apr. 2019), https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf.

139 *See* Discussion, *supra* Part II(B) (discussing jurisdictions' treatment of money bail in their respective juvenile justice systems).

140 *See Pretrial Justice Reform*, ACLU OF N.J., https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last visited Feb. 22, 2020).

141 *Id.* "All defendants, other than those facing life imprisonment, are . . . entitled to a presumption of release." *Id.*

142 *Id.*

143 *See id.*

144 *Id.*

stayed the same as it was under the old money bail system.[145] Accordingly, a combination of virtually eliminating money bail and introducing statistical risk assessment into judicial decision-making is a promising proposal for juvenile systems as well.

Although JDAI presented several legitimate concerns with statistical models in its risk assessment practice guide,[146] the experience with statistical models in the adult system shows that models are not inherently a roadblock to reform or positive results.[147] Given JDAI's failure to mitigate racial disparities despite its twenty-five years of efforts, and because "the momentum of detention reform" has slowed,[148] juvenile justice reform could certainly use some re-energizing and a fresh look at statistical models. Specifically, developing a tool modeled after the adult PSA tool using new data from the juvenile system could help to reduce the juvenile pretrial detention population and ensure that only those juveniles for whom detention is the only option are detained at the pretrial stage.

One of JDAI's concerns with respect to algorithmic models was that "[t]he statistical design method is exacting, [time-consuming], and costly" because "[t]he strictest empirical protocols require testing the predictive value of each risk factor in relation to specific target outcomes."[149] Yet, in the adult system, the PSA is available at no cost—this ensures that individual jurisdictions do not have to expend their own resources developing it, nor do they have to pay to implement and use it.[150] Accordingly, a juvenile tool would likely be most appealing to jurisdictions if it were similarly available free of charge.

Next, JDAI was concerned with potential gaps in knowledge between lay practitioners and statisticians.[151] For example, it

145 *See ACLU-NJ Responds to Release of 2018 Criminal Justice Reform Full-Year Report*, ACLU OF N.J. (Apr. 2, 2019), https://www.aclu-nj.org/news/2019/04/02/aclu-nj-responds-release-2018-criminal-justice-reform-full-y.

146 *See* Steinhart, *supra* note 110, at 12.

147 *See, e.g.*, *supra* Part II(C) (discussing various jurisdictions' positive experiences with the PSA).

148 *JDAI at 25*, *supra* note 103, at 1.

149 *See* Steinhart, *supra* note 110, at 12..

150 *See About the Public Safety Assessment, supra* note 122.

151 *See* Steinhart, *supra* note 110, at 12. The guide specified that "[s]tatisticians offer a menu of mathematical techniques to verify the relationships between risk factors and outcomes—with labels like 'the Pearson product moment correlation' that may be mystifying to lay practitioners." *Id.*

worried that the "mathematical challenges [involved with] the process of weighting risk factors, combining risk factor points into composite scores, and verifying the relationship of composite scores to juvenile justice outcomes" would be too complex for realistic implementation by practitioners.[152] However, in the case of the PSA, researchers—not practitioners—were tasked with developing the system using "the largest, most diverse set of pretrial records ever assembled."[153] The "[r]esearchers analyzed [this] data to determine which factors were most predictive of failure to appear in court pretrial, new criminal arrest while on pretrial release, and new violent criminal arrest while on pretrial release."[154] Concerns regarding practitioners not understanding the process or expending valuable time and resources, as well as mathematical challenges were thus mitigated: experts developed the tool themselves.[155] Therefore, a similar method of development for a PSA-like tool in the juvenile system—i.e., tasking experts with the necessary research and data analyses—would be advisable.

Using a wide range of data might conflict with JDAI's general preference for localized development and implementation.[156] On the other hand, creating one centralized tool based on national data and providing it free of charge ensures that jurisdictions that may not otherwise be able to dedicate resources to developing their own tool will not be prohibited from moving to objective risk assessment for this reason.[157] To reconcile these concerns, a PSA-like tool for the juvenile system should also follow the PSA's guidelines for judicial discretion, which are fashioned by "local stakeholders" to "reflect local statutes, court rules, and policy preferences."[158]

Lastly, JDAI was troubled by the potential for racial bias in statistical models.[159] This is surely a valid concern, especially in light

152 *Id.*

153 *About the Public Safety Assessment*, *supra* note 122. These records were composed of "approximately 750,000 cases from roughly 300 jurisdictions nationwide." *Id.*

154 *See About the Public Safety Assessment: How the PSA Works*, ADVANCING PRETRIAL POLICY & RESEARCH, https://advancingpretrial.org/psa/factors/ (last visited Sept. 3, 2021).

155 *See id.*

156 *See* Steinhardt, *supra* note 110, at 13 (encouraging "local choice of risk factors . . . based on the experience, knowledge, and informed guesswork of local juvenile justice stakeholders").

157 *See About the Public Safety Assessment, supra* note 122.

158 See *Frequently Asked Questions*, *supra* note 131.

159 *See* Steinhardt, *supra* note 110, at 12.

of ProPublica's 2016 study of COMPAS that revealed a dangerous race bias in that particular model.[160] However, not all models are created equal—the PSA's use of objective criteria serves to ensure that each individual defendant is assessed equally without unintentional consideration of his or her race.[161] Notably, JDAI recommends "testing risk instruments for racially biased variables"[162] to avoid racially biased results; the PSA does indeed conduct such regular studies, and all of them have thus far indicated that "the PSA does not exacerbate[s] racial disparities."[163] Accordingly, similar objective criteria that is appropriately tailored for youthful offenders coupled with regular testing of the tool could serve to prevent racial biases in juvenile risk assessment and reduce racial disparities in juvenile pretrial detention.

CONCLUSION

A central tenet of both criminal and juvenile justice in this country is that one is entitled to a presumption of innocence until adjudicated otherwise. Detention prior to a finding of guilt is antithetical to this goal and should be imposed only in the narrowest of circumstances. This is especially true in the juvenile justice system, to which children as young as six could be subjected,[164] and where the harms of detention are so extreme, they can last a long lifetime.[165] Reducing the number of juveniles in pretrial detention

160 *See* Jeff Larson et al., *supra* note 126; *see also supra* Part II(C) (discussing the study that uncovered racial biases inherent in COMPAS).

161 *See Pretrial Justice: Toward Racial Equity*, ADVANCING PRETRIAL POLICY & RESEARCH https://advancingpretrial.org/pretrial-justice/racial-equity/ (last visited September 3, 2021).

162 *See* Steinhart, *supra* note 110, at 12.

163 *See About the Public Safety Assessment, supra* note 122.

164 *See Juvenile Justice System Structure & Process*, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2018&text=no&maplink=link1 (last visited Feb. 23, 2020).

165 *See supra* Part I(B).

is a critical goal of juvenile justice reform, and integrating objective, actuarial risk assessment into the pretrial process of the juvenile system is a promising means of doing so. Hopefully, the result will be a greater adherence to Justice Rehnquist's words for children in America, including children who are accused of wrongdoing: "[i]n our society[,] liberty is the norm."[166]

166 United States v. Salerno, 481 U.S. 739, 755 (1987).