QUESTIONS ABOUT
PRETRIAL ASSESSMENT

This report is an overview of evidence-based pretrial assessment—how it is developed, how it is meant to be used, and what justice professionals and the public need to know. Since all assessment tools are not created equal, it also includes a brief discussion of the kinds of tools the Pretrial Justice Institute believes improve pretrial outcomes.

In the early days of pretrial assessment, every tool was was either very simple to understand or the research behind it was publicly available and transparent. By contrast, some modern assessment tools, including ones that have drawn valid criticism*, conceal how they calculate their scores. In our view, modern tools that are not transparent—no matter how accurate—undermine public confidence and should be avoided.

Conversely, today's best objective tools provide three distinct benefits. First, they exclude factors that should not be considered, either because they are not predictive or because they result in bias. These can include demographic, socioeconomic, and even many criminal history factors. Second, they provide transparent data that can highlight practices—in policing, charging, the assignment of release conditions, etc.—that need to be reformed. Third, they make explicit to the court, the county, and the public the fact that most people have a high probability of pretrial success—that is, of making their court dates and avoiding a new arrest during release.

No assessment can predict how each individual is going to behave. But adding a transparent evidence-based tool to pretrial decision making improves the odds of getting it right. We can do better than the subjective status quo, which is ruining lives, wasting money, and leaving us all less safe. Ensuring that everyone—the public, law enforcement, judges, and policymakers—is able to understand how pretrial release decisions are made is an important step.

—Cherise Fanno Burdeen
CEO, Pretrial Justice Institute

* "Machine Bias", Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, ProPublica, May 23, 2016.

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Whenever someone is arrested, a court must decide whether he or she should remain in jail or be allowed to go home before trial. While many factors may influence this decision, in most of the nation, courts let money bail—requiring arrested people to pay money up front to "guarantee" that they will return to court—determine who, ultimately, will be detained or released while their case is still pending.

There is a growing awareness that the use of money bail is unfair, unsafe, and unnecessary. It is unfair because it causes poor and working class people—people of color, disproportionately—to be jailed while wealthier defendants can pay and go home, leading to different and unequal case outcomes.[1] It is unsafe because nearly half of the arrested people who are least likely to succeed in the community go home under the current system with little or no meaningful supervision.[2] It is unnecessary because research shows arrested people released before trial show up in court at the same high rates whether they pay money up front or not.[3]

A pretrial process using an evidence-based pretrial assessment tool is a proven, commonsense alternative to money bail that is safer, fairer, and more effective. This report provides answers to common questions about these assessments and how they are used.

What is pretrial assessment?

In most places, only two criteria may legally influence the pretrial release decision: whether the accused person, if released, is likely to appear in court as expected, and whether he or she would present an unmanageable threat to public safety during the pretrial period if released.

Except when a person is released using a bail bond schedule (see Table 2, page 5), most pretrial release decisions are preceded by some kind of assessment of the arrested person. This

A Short History of Pretrial Assessment

In the 1960s, policymakers hoping to reduce unnecessary pretrial detention developed some of the first pretrial assessment tools. These early tools were consensus-based; that is, they were created using factors a group of interested parties believed were predictive—such as how long the person had lived at his or her current residence or whether he or she had local family connections. More recently, it has become evident that some of these factors are not only *not* predictive, but they also create or exacerbate existing racial disparities in the system. Today's evidence-based pretrial assessments are actuarial, which means they are based on statistical analysis of previous cases and their outcomes. Evidence-based pretrial assessments are more reliable than previous generations of tools (and decisions made without any tool) because they exclude irrelevant and biased factors. For more information, see PJI's report, Risk Assessment Can Produce Race-Neutral Outcomes.

assessment is done differently in different places, however—but it almost always must be done very quickly. Courts that operate without an evidence-based assessment are vulnerable to inconsistent application of the law and racial and ethnic biases.

An evidence-based pretrial assessment measures the two allowable criteria for each person who comes before the court. It is conducted using a "tool" (usually a questionnaire, form, or database)

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PSA	VPRAI -Revised
Age at current arrest	On active community supervision?
Current arrest for violent offense?	Current charge felony, drug, theft, or fraud?
Current violent offense & 20 years old or younger?	Criminal history?
Pending charge at time of arrest?	Pending charge at time of arrest?
Prior misdemeanor conviction?	Two or more FTAs?
Prior felony conviction?	Two or more violent convictions?
Prior Failure to Appear (FTA) in past 2 years?	Unemployed at time of arrest?
Prior FTA older than 2 years?	History of drug abuse?
Prior sentence to incarceration?	

TABLE 1: RELEVANT FACTORS FROM TWO COMMON TOOLS—PSA AND VPRAI-REVISED [4]

that collects and uses information about the accused person to generate an objective score that suggests how the individual is likely to behave in both relevant areas during the pretrial period.

How is the score calculated?

People who develop evidence-based pretrial assessment tools analyze data from recently closed cases to determine which factors are most strongly associated with pretrial outcomes in a specific jurisdiction. Certain factors—like age at arrest or number of times a person previously failed to appear in court (see Table 1)—may be more predictive than others.

Since all relevant factors do not have the same predictive weight, some will be given a greater influence on the final score. A well-developed tool considers a number of factors that are weighted to reliably predict each newly arrested person's likelihood of having a successful pretrial release (pretrial success is typically defined as returning

to court for all appointments and not being arrested on new charges before trial).

How are the scores used?

A pretrial assessment score is meant to inform—not replace—a court's discretion to release or detain an arrested person. It can also help determine what conditions, if any, a court might impose to improve a person's chances of success if released before trial.

In most states, the law requires almost everyone who is arrested to be eligible for pretrial release. (People facing treason and capital charges are among the few exceptions.) Similarly, the U.S. Supreme Court has ruled that pretrial detention should be the "carefully limited exception"[5]—although this admonition is more aspiration than fact under the current system. Evidence-based pretrial assessments, which draw upon on statistical analysis of previous case outcomes, find that most people have a very high likelihood

Pretrial Assessment and Reduced Crime

Pretrial systems that use money bail do not adequately protect public safety. Research shows that even as they detain poor and working class people who have a high likelihood of pretrial success, they also see nearly half of those who are least likely to comply with release conditions go home with little or no meaningful supervision. In most jurisdictions, for-profit bail bondsmen face no penalty when one of their clients is arrested for a new offense during the pretrial period.

Where jurisdictions have implemented evidence-based pretrial assessment, use of the tool has coincided with a decline in pretrial crime and improved public safety. Consider, for example, Lucas County, Ohio. After one year as a participant in the MacArthur Foundation's Safety and Justice Challenge, Lucas County saw its pretrial arrest rate drop by 10.1%. At the same time, charges filed for missed court dates fell 12.3% and the number of inmates in the jail decreased 18.2%. The introduction of evidence-based pretrial assessment to guide release decisions is a key part of the reform, along with a weekly review of detained people to determine if they are eligible for release or diversion.*

http://www.toledoblade.com/local/2017/05/23/Lucas-County-notes-progress-made-on-reform-goals.html

of appearing in court and remaining arrest-free. As Figure 1 (page 7) shows the pretrial success rates of all four categories of people who were assessed by the Colorado Pretrial Assessment Tool (CPAT) after their arrest in Denver, CO. Even the small number of people in CPAT 4—those assessed as being least likely to succeed (approximately 8 percent of the total assessed population)—succeed roughly half of the time. Such distinctions are important, as they identify the comparatively small group of individuals who might benefit from pretrial release conditions designed to enhance their chances of success.

Most people will require no more than a phone call or text message reminding them of their upcoming court date. Those with scores showing a smaller probability of success may benefit from regular check-in calls or visits with a supervising agency, stay-away orders to protect victims or witnesses, and—in rare cases—GPS monitoring. Best practices advise against too many conditions, however, as they could have the perverse effect of undermining a person's chances of success. In Kentucky, for example, where nearly all arrested individuals are assessed using an evidence-based tool, only 3% of released individuals are given special conditions.[6]

In a very small number of cases, the assessment score, combined with other information, may suggest that an individual presents a potentially unmanageable likelihood of either fleeing justice or being arrested on new charges. In these cases, best practices would have the assessment score trigger a legal process with a higher burden of proof, in which both the defense and prosecution present additional evidence to guide the court's decision. Other than triggering this due process hearing, the pretrial assessment score itself should not be considered as a factor in the court's deliberation.

Don't courts already use pretrial assessment to make release decisions?

In most jurisdictions, the decision to release or detain a person begins with a bond schedule: a list of criminal charges with corresponding money bail amounts (see

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Table 2). An arrested person who can afford the amount assigned to his or her charges can pay and go home without ever seeing a judge or other court official—without being assessed.

Those who cannot afford the bond set by the schedule may see their bail amount raised or decreased based on other factors introduced at a subsequent arraignment hearing before the court. At this appearance, the court is making an assessment—sometimes guided by considerations ordered in statute or court rule. But for most of the country, these on-the-spot assessments are subjective, which means they are based upon whatever factors may seem relevant to the individual decision-maker. Only about 20% of Americans live in a jurisdiction that currently uses an evidence-based pretrial assessment tool that has been validated—tested to ensure it produces accurate results for the population to which it is applied.[7]

Why is knowing a person's pretrial assessment score important?

In the U.S. criminal justice system, arrested individuals are legally considered innocent until their case is resolved. This fundamental principle is one of the reasons the law requires courts to issue the least restrictive conditions needed to assure an arrested person will comply with conditions of release.

An evidence-based pretrial assessment can be a valuable tool for defense attorneys, as it can provide them with objective grounds to argue for release, less onerous conditions, or a

Schedule of Bonds

Felony Bonds

8-4-202	First Degree Burglary	$20,000.00
18-4-203	Second Degree Burglary of Dwelling	20,000.00
184-204	Third Degree Burglary	1,500.00
18-4-401	Theft between 500-15,000	2,500.00
	Theft over 15,000	3,500.00
18-4-402	Theft of Rental Property 500-15,000	2,500.00
	Over 15,000	3,500.00
18-4-409	Aggravated Motor Vehicle theft in the First Degree (all sections)	2,500.00
18-4-410	Theft by receiving between 500-15,000	2,500.00
	Theft by receiving over 15,000	3,500.00
18-4-502	First Degree Criminal Trespass	1,500.00
18-4-602	Theft of Sound Recordings	1,500.00
18-5-102	First Degree Forgery	2,500.00
18-5.105	Criminal Possession of a First Degree Forged Instrument	1,500.00
18-5-109	Criminal Possession of Forgery Devices	1,500.00
18-5-113	Criminal Impersonation	1,500.00
18-5-205	(3)(c)(d) Fraud by Check	2,500.00
18-5-206	(1Xe)(d) Defrauding a Secured Creditor	2,500.00
	(2Xc)(d) Defrauding a Secured Creditor	2,500.00
18-5-401	Commercial Bribery	1,500.00
18-54-03	Bribery in Sports	1,500.00

TABLE 2: BAIL/BOND SCHEDULES, LIKE THE ONE SHOWN HERE FROM COLORADO, PRESCRIBE AN ARBITRARY DOLLAR AMOUNT FOR EACH SPECIFIC CRIMINAL CHARGE.

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The Trouble with Bond Schedules

Bond schedules, which assign a pre-set bond amount to specific charges, are a common feature in jurisdictions across the United States. These schedules are problematic, however, for a number of reasons.

No research has shown that any dollar amount makes a person more or less likely to return to court and not get arrested for a new charge while released before trial. Consequently, the amounts they use are totally arbitrary.

Bond schedules vary by jurisdiction. Because they are typically created at the county level, these schedules and the amounts they prescribe can differ dramatically, even in adjacent jurisdictions.

Bond schedules are charged-based and do not factor individual circumstances. The U.S. Supreme Court ruled in Stack v. Boyle (1951) that pretrial release conditions must be individualized and, in recent legal challenges, several courts have found bond schedules to be unconstitutional.[9]

While intended to level the field by setting the same amount for every person charged with certain offenses, there is nothing equal about access to money; A $10,000 bond may be small change for some and completely unattainable for others.

reduced bond if money bail remains an option. It can also be a valuable tool for prosecutors. Combined with serious charges, it can provide them with an objective indicator to request a preventive detention hearing.

Does pretrial assessment create or exacerbate system bias?

Racial bias is a fact in the U.S. criminal justice system. Research shows, for example, that people of color who live in urban areas are more likely to come into contact with law enforcement and be drawn into the system for behaviors, such as substance use, that are equally prevalent in predominantly white communities.[8]

Pretrial assessment tools cannot erase disparate treatment within the overall justice system. They can, however, help to ensure that people at the pretrial stage are treated more fairly than is currently the case. For example, some factors that may be closely associated with race and ethnicity—like number of arrests—were once thought to be predictive of pretrial behavior and incorporated into older, consensus-based tools. However, as research reveals such factors to have little or no predictive value, they are being removed from the calculations (even as courts without tools continue to consider them). A key benefit of an evidence-based pretrial assessment, then, is that it narrows the number of variables that inform court actions to only those that are genuinely predictive. This helps to reduce the possibility of bias in the decision to release or detain, as illustrated in Figure 2 (page 7).

Can pretrial scores be used in other parts of the justice system?

Pretrial assessment tools are designed to answer only a discrete question: How likely is a person to return to court and to not get arrested for a new charge while on pretrial release? These tools should never be used to guide any decision other than those involving pretrial release. Other tools exist to address other decision points in the criminal justice system, such as treatment needs of sentenced inmates, confinement security level, and re-entry strategies.

Are all pretrial assessment tools the same?

No. Different assessment tools are created by different people using different data from different jurisdictions.

Success Rates by CPAT Category

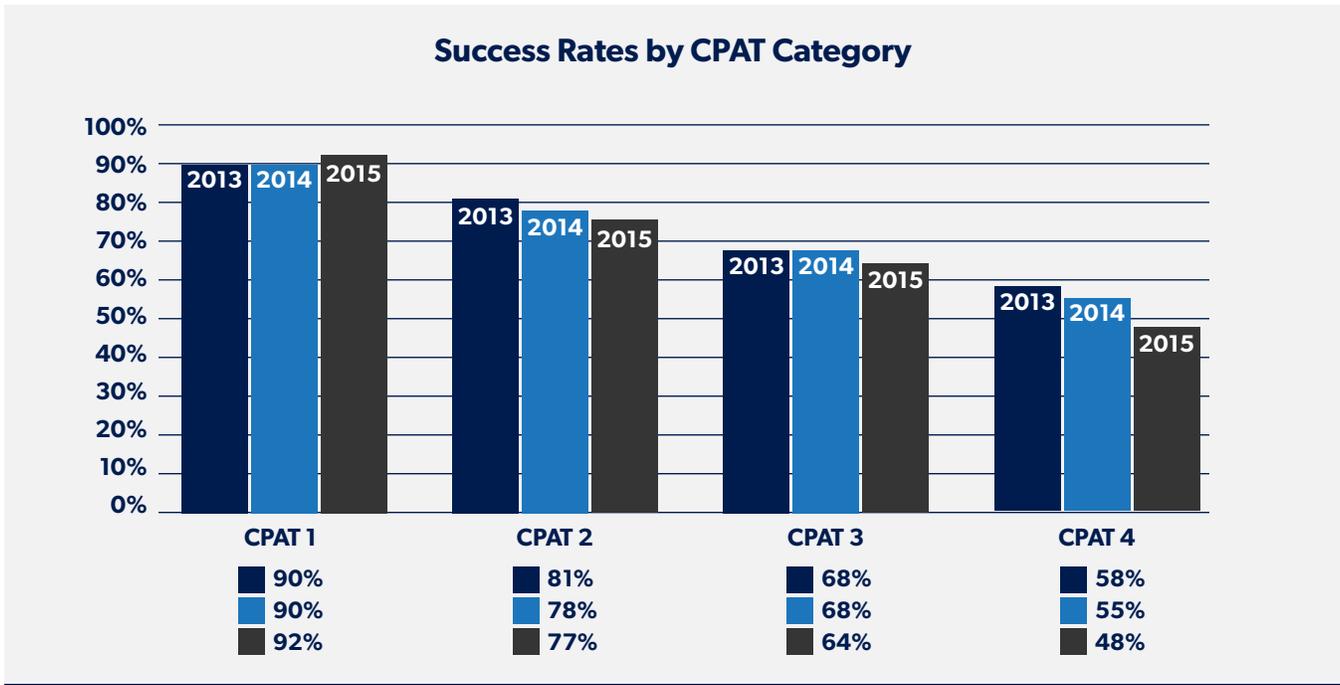|	2013	2014	2015
CPAT 1	90%	90%	92%
CPAT 2	81%	78%	77%
CPAT 3	68%	68%	64%
CPAT 4	58%	55%	48%

FIGURE 1: PEOPLE ASSESSED WITH THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT) AS CATEGORY 1 ARE LIKELY TO MEET ALL CONDITIONS OF PRETRIAL RELEASE 90% OF THE TIME OR MORE.[10]
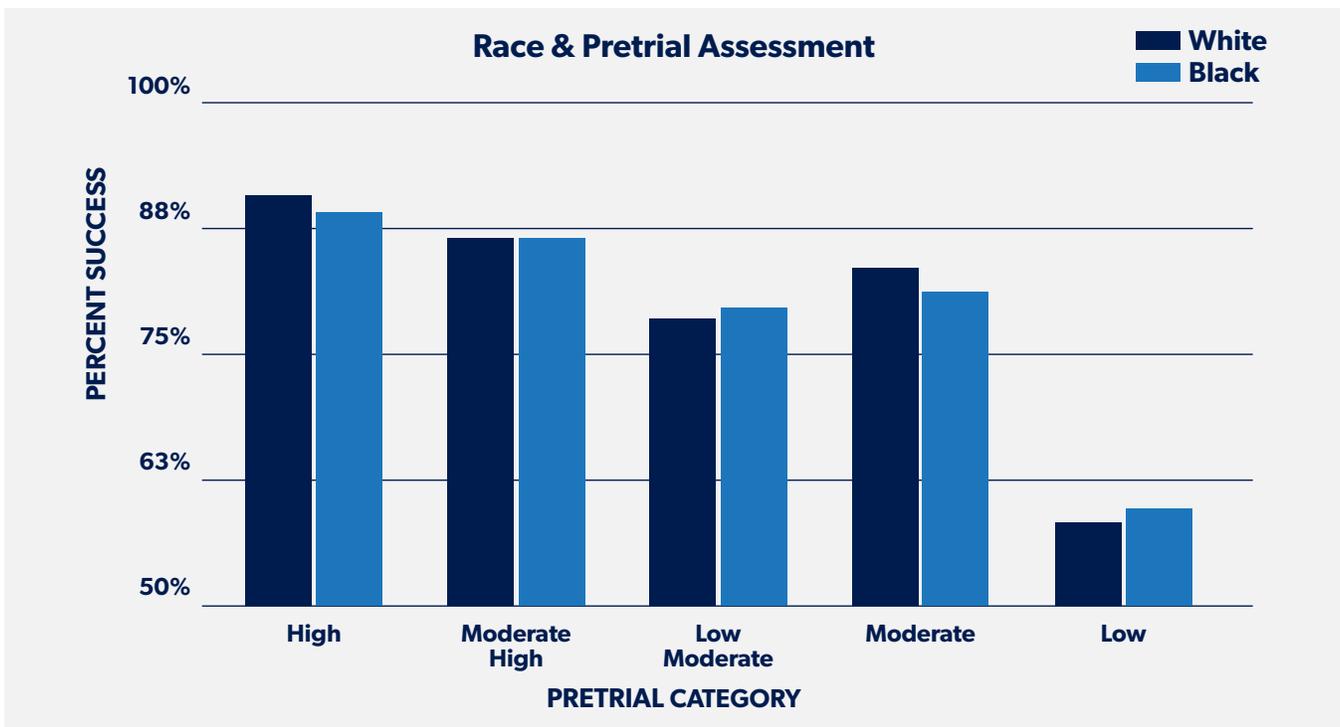
Race & Pretrial Assessment

FIGURE 2: SOME ASSESSMENT TOOLS HAVE BEEN DESIGNED TO BE RACE-NEUTRAL. AS SHOWN IN THE CHART (ADAPTED FROM THE ORIGINAL), THE PSA PRODUCES VIRTUALLY IDENTICAL RESULTS FOR WHITE AND BLACK INDIVIDUALS. [11]

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Consequently, they will be different. For this reason, if one tool is criticized for producing poor results, it does not mean that all pretrial assessment tools are flawed. Every tool, however, should be validated—or re-tested for accuracy using data from the specific jurisdiction where it is used.

The Pretrial Justice Institute supports only pretrial assessment tools and processes that help to advance fair, effective, and unbiased pretrial justice. Pretrial assessment can look different in different jurisdictions, depending on unique characteristics and needs. In general, however, a pretrial assessment tool should meet the criteria listed below.

- Pretrial assessment tools must be used only to measure the likelihood of court appearance and lawful behavior during pretrial release and to guide decisions about pretrial release and the level of release conditions to be imposed, if any.

- Pretrial assessment tools must be used to inform, not replace, judicial decision-making; they should never automatically result in someone being held or assigned a high money bond to effectuate detention.

- The factors and formula that influence pretrial scores must be publicly available and understandable—no "hidden algorithms" or proprietary calculations.

- The case-level data used to produce someone's pretrial assessment score should be easily attainable so as not to delay their prompt release or a detention hearing.

- Pretrial assessment tools must be regularly tested to ensure they are producing valid results for the population being served and producing results untainted by racial, gender, or other group bias.

Conclusion

Although pretrial assessments happen at a specific moment in the criminal justice system, they—and the companion system reforms that must be implemented with them—have long term implications, not just for the individuals who have been arrested, but also for the system and the larger community.

Any time unnecessary pretrial detention is avoided, it becomes easier for someone to keep his or her job, maintain education or medical treatment, be present for family members, etc. In short, the conditions and relationships that keep individuals, families, and communities stable and safe are preserved.

Similarly, when systems collect data about pretrial decisions and outcomes, they are also able to aggregate it, making it easier for stakeholders and the public to identify policies and decision points that are falling short. This can help facilitate improvements in how the system operates—which, in turn, can reduce the number of people who unnecessarily become involved in the criminal justice system.

Finally, every time the pretrial system is able to successfully identify the very small number of individuals who are unlikely to succeed if released before trial, and to use due process to help judges make good decisions about their detention or release conditions, it is increasing public safety and confidence in the system.

However, the most important benefit of evidence pretrial assessment is that it exposes the fact that most people, if released, have a high likelihood of returning to court and not being arrested on new charges during the pretrial period. Taking that fact to heart, and building pretrial policies and practices around it, will go a long way toward creating a pretrial justice system that is worthy of its name.

Pretrial Assessment and You

Why am I being assessed?
If you are arrested, courts will want to get a sense of whether you are likely to appear in court and stay out of trouble if released while the case is pending. An evidence-based pretrial assessment tool can give the court an objective data point to consider when making this decision. Studies have shown that judicial decisions can vary dramatically—a study of parole decisions found, for example, that judges who had recently eaten lunch were more likely to authorize releases.[12] Evidence-based pretrial assessment can help minimize such variability.

How can knowing my pretrial assessment score help me?
Knowing your pretrial assessment score allows you and your attorney to argue for pretrial release with minimal conditions—especially if the tool is transparent, as PJI recommends. If your assessment score suggests you are highly likely to succeed on pretrial release, this provides a solid foundation for seeking release without any conditions. If you have missed court dates in the past—a factor that has been shown to correlate with lower rates of pretrial success—this may have influenced your assessment score. But if ten years have passed since you missed a court date, your attorney can challenge the relevance of your record and ask the court to consider this alongside other contextual facts.

What do my pretrial assessment results mean?
Your pretrial assessment results tell the court how people with profiles similar to yours (criminal history, age, under current supervision, etc.) behaved while on pretrial release. For example, if people in your jurisdiction who had similar histories as you missed their court dates 15% of the time and were arrested for a new charge 11% of the time, the court can presume you will have similar chances of success. This should influence—but not determine—the court's decision to detain or release you, or to assign conditions designed to increase your chances of pretrial success.

Citations

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8. For examples of how people of color are disproportionately represented in criminal justice systems, see: Kahn, Andrew, and Chris Kirk. "What It's Like to Be Black in the Criminal Justice System." *Slate*, August 9, 2015. Accessed September 29, 2017. http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html.

9. See, for example, Varden v. Clanton (U.S. District Court for the Middle District of Alabama, Northern Division February 13, 2015).

10. Denver Pretrial Services Program, CY15 *Annual Report,* Denver Department of Public Safety, Community Corrections Division.

11. Figure adapted from *The Public Safety Assessment – Court Analysis of Race and Gender*. Brief. Laura and John Arnold Foundation. 2014.

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