COMMENT

GO DIRECTLY TO JAIL, DO NOT PASS GO, DO NOT COLLECT $200: IMPROVING WISCONSIN'S PRETRIAL RELEASE STATUTE

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Over the years, the population within Wisconsin's jails has significantly increased. This population is not just those serving sentences, but rather the majority of individuals in jails are in pretrial detention, awaiting their trial. Pretrial detention has significant consequences for both the individual and the community.

However, judges receive very little guidance about what factors to consider when determining whether to release an individual or impose restrictions on that release. Because of this, many individuals are being unnecessarily detained before trial. Wisconsin's current pretrial release statute is cumbersome and confusing. It requires a judge to consider a multitude of factors without providing any guidance about how to consider those factors.

Pretrial risk assessments are tools that help judges make better decisions about who can safely be released before trial. A pretrial risk assessment considers the important factors for safe release and weighs them according to how greatly they predict a successful release. By updating Wisconsin's pretrial release statute and requiring that a pretrial risk assessment be performed, Wisconsin can safely increase the number of individuals released before trial, increase the support to judges when making release decisions, decrease the jail population, and save millions of dollars.

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GO DIRECTLY TO JAIL: WHAT HAPPENS AFTER ARREST

Kalief Browder was sixteen years old when he was arrested for robbery, which he did not commit.[1] His bail was set at $3,000, and Kalief was unable to pay it.[2] He then spent over three years on Rikers Island[3] awaiting trial, in order to prove his innocence.[4] In 2013, the charges were dropped, and he was released from incarceration.[5] Therefore, he spent over one thousand days on Rikers Island for a crime for which he was never convicted.[6] Because of his pretrial detention, he missed his sister's wedding, his nephew's birth, his prom, and his high school graduation.[7] During his pretrial incarceration, Kalief spent almost two years in solitary confinement and, as a result, he attempted to commit suicide several times.[8] In October 2014, Kalief's pretrial detention in Rikers Island was brought to national attention in *The New Yorker*.[9] In June, 2015, around two years after his release, Kalief committed suicide at age twenty-two.[10] Unfortunately,

1. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

2. Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015, 6:04 PM), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder.

3. Rikers Island is a four-hundred-acre island in between Queens and the Bronx that holds ten jails, which incarcerate over ten thousand individuals on any given day. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law. The island is known as a decrepit and violent place. *Id.*

4. Gonnerman, *supra* note 1.

5. Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, CNN (June 15, 2015, 4:49 PM), http://www.cnn.com/2015/06/07/us/kalief-browder-dead/.

6. *Id.*

7. *Id.*

8. Gonnerman, *supra* note 1.

9. Gonnerman, *supra* note 3. *See generally* Christopher Mathias, *Lawmaker Calls Use of Solitary Confinement for Teens on Rikers Island 'Torture,'* HUFFINGTON POST (Oct. 9, 2014, 2:52 PM), http://www.huffingtonpost.com/2014/10/09/rikers-island-teen-inmates_n_5959230.html; Robert Siegel, *Teen Spends Years at Rikers Island Without Being Sentenced*, NPR (Oct. 2, 2014), http://www.npr.org/2014/10/02/353312777/teen-spends-years-at-rikers-island-without-being-sentenced.

10. Gonnerman, *supra* note 1. Kalief's death brought pretrial incarceration and solitary confinement into the national media again. *See generally* Jim Dwyer, *A Life That Frayed as Justice Reform Withered*, N.Y. TIMES (June 9, 2015),

Kalief's pretrial detention plight is not singular to himself: on any given day, about 60% of individuals in U.S. jails are in pretrial detention.[11] Pretrial detention is the period between a defendant's arrest and trial.[12]

In fact, almost 50% of all arrestees are incarcerated through their pretrial detention despite the fact that only 5% of arrestees ultimately receive prison sentences.[13] Therefore, the United States is paying $9 billion per year for pretrial detention.[14] The driving factor behind the large numbers of pretrial detention is the current measure of risk: someone's financial status.[15] However, an individual's ability to pay money bail is not a reliable indicator of risk while released.[16] Despite this, most states continue to use financial status to measure this risk.[17]

Pretrial, a defendant has not been convicted. Because defendants are afforded the presumption of innocence, a defendant should only be detained if the defendant poses a threat to others or if the defendant

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http://www.nytimes.com/2015/06/10/nyregion/after-a-shocking-death-a-renewed-plea-for-bail-reform-in-new-york-state.html; Ford, *supra* note 5; Byron Pitts, Katie Yu & Lauren Effron, *Who Kalief Browder Might Have Been if He Hadn't Spent Over 1,000 Days in Jail Without a Conviction*, ABC NEWS (June 17, 2015, 6:54 PM), http://abcnews.go.com/US/kalief-browder-spent-1000-days-jail-charges/story?id=31832313; Santo, *supra* note 2.

11. JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 3 (2012) [hereinafter BAIL FAIL], http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

12. COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 931 (9th ed. 2011), http://www3.law.columbia.edu/hrlr/jlm/chapter-34.pdf.

13. PRETRIAL JUSTICE INST., IMPLEMENTING THE RECOMMENDATIONS OF THE NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: THE 2013 PROGRESS REPORT 2 (2014) [hereinafter IMPLEMENTING THE RECOMMENDATIONS], http://www.pretrial.org/download/infostop/ (type "Implementing" in the search box; then click on *Implementing the Recommendations of the National Symposium on Pretrial Justice: The 2013 Progress Report*).

14. *Id.*

15. BAIL FAIL, *supra* note 11, at 3.

16. *Id.*

17. *Id.* ("The use of bail money is generally accepted for securing release from jail after an arrest."). Forty-four states allow commercial bail and actively use it: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 4 (2007), http://www.bjs.gov/content/pub/pdf/prfdsc.pdf. Whereas, Maine, Nebraska, and the District of Columbia allow commercial bail, but rarely use it. *Id.* Only four states, Illinois, Kentucky, Oregon, and Wisconsin, disallow commercial bail. *Id.*

would flee prior to trial.[18] Judges seek to measure and limit the risk an individual could pose if released.[19] Financial conditions have not proven to accurately assess an individual's likelihood to commit a new crime or flee before trial.[20]

Although Wisconsin does not have commercial bail,[21] it still uses financial capacity as a control of an individual's pretrial release.[22] Furthermore, Wisconsin's pretrial release statute addresses the goals of pretrial release without providing any method for a judge to use in deciding whether to release an individual.[23] However, while Wisconsin's jail population has doubled,[24] this statute has remained unchanged for over two decades.[25] Wisconsin jails have limited space for current inmates and there is not enough money to afford to build

18. BAIL FAIL, *supra* note 11, at 3–4; *see also* Shima Baradaran, *Restoring the Presumption of Innocence,* 72 OHIO ST. L.J. 723, 725 (2011) (explaining that an erosion of the presumption of innocence has caused an increase in pretrial detention).

19. PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT 101: SCIENCE PROVIDES GUIDANCE ON MANAGING DEFENDANTS 2 (2012), http://www.pretrial.org/devsite/download/advocacy/PJI Risk Assessment 101 (2012).pdf.

20. BAIL FAIL, *supra* note 11, at 21–22; *see* Sasha Goldstein, *Michigan Woman Jailed as Second Surprise Baby Now Missing; Was Charged Earlier with Murdering Newborn*, N.Y. DAILY NEWS (Jan. 15, 2015, 11:10 AM), http://nydn.us/1G1XG2Q; *Man Accused of Sex Crimes with Children Out on Bond*, ABC 3 WWAY NEWS CHANNEL (Oct. 4, 2014, 2:25 PM), http://www.wwaytv3.com/2014/10/04/update-man-accused-of-sex-crimes-with-children-out-bond/.

21. BAIL FAIL, *supra* note 11, at 42. In 2013, Wisconsin's budget bill, AB 40, had included language to reintroduce commercial bail bonds in Wisconsin. *Governor Vetoes Provisions Permitting Commercial Bail in Wisconsin Budget Bill*, SURETY & FIDELITY ASS'N AM. (July 1, 2013), http://www.surety.org/news/130805/Governor-Vetoes-Provisions-Permitting-Commercial-Bail-in-Wisconsin-Budget-Bill.htm. After contentious debate about removing the provision from the budget bill, the Senate tabled it during a 17-16 vote. *Id.* The Governor then "used his veto powers to remove the bail provisions from the [budget] bill"—just as he had on a similar provision two years earlier. *Id.*

22. WIS. STAT. § 969.01(1) (2013–14).

23. *Id.* The statute provides goals of assuring the individual's court appearance, protecting the public's safety, and preventing the intimidation of witnesses. *Id.*

24. The average daily population in a Wisconsin county jail was 6,278 in 1990. WIS. DEP'T OF CORR. OFFICE OF DEP'T FACILITIES, 2013 ANNUAL REPORT 8 (2014), http://www.doc.wi.gov/Documents/WEB/ABOUT/OVERVIEW/OFFICEOFTHESECRETARY/OFFICEDETENTIONFACILITIES/2013 ODF Annual Report Rev. 5-2-14.pdf. It rapidly increased, and by 2007, the average daily population was 14,703. *Id.* Over 2012 and 2013, it has leveled off around 12,600, which is more than double the 1990 population. *Id.*

25. Section 969.01 was last amended in 1997. 1997 Wis. Laws 1665, 2135, sec. 414 (1998).

new jails to hold the increased population.[26] Wisconsin needs to update its pretrial release statute and provide judges with a pretrial release risk assessment, which will assist courts in releasing more individuals before trial without risking public safety.[27]

A pretrial risk assessment is a tool[28] that will help judges predict an individual's likelihood to be a risk while released.[29] A pretrial risk assessment better prevents flight risks or threats to the community's safety than solely a judge's personal decision.[30] A pretrial risk assessment provides a quantitative risk analysis of a defendant by assigning numerical values to different factors and assigning a risk level based on the total value.[31] The lower the risk level, the less likely the defendant is to fail to appear (FTA) or commit new criminal activity (NCA).[32] The use of a pretrial risk assessment lowers the risk of FTAs and NCAs.[33]

Although convicted offenders are required to undergo a risk analysis before release,[34] Wisconsin does not currently require defendants to undergo a risk analysis for pretrial detention

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26. Kristin Mazur, *Public Weighs In on Dane County Jail Problems*, NBC 15 WMTV (Feb. 24, 2015, 10:39 PM), http://www.nbc15.com/home/headlines/Dane-County-Board-proposes-work-groups-to-focus-on-jail-problems-292765541.html.

27. *See* BAIL FAIL, *supra* note 11, at 43.

28. A pretrial risk assessment is an actuarial science tool that considers specific factors that relate to an individual's success while released before trial. These factors are given various weights of importance, depending on their effect on success. Then, each of these factors is determined about an individual. This produces a numerical score, which relates to a likelihood of risk while released before trial. *See generally* ARTHUR PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, 2012–2013 POLICY PAPER EVIDENCE-BASED PRETRIAL RELEASE 7 (2012), http://www.pretrial.org/download/policy-statements/Evidence Based Pre-Trial Release - COSCA 2012.pdf.

29. Timothy P. Cadigan, James L. Johnson & Christopher T. Lowenkamp, *The Re-Validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 FED. PROBATION 3, 4 (2012) (arguing that a quantitative risk assessment lowers likelihood of failure to appear and commit new criminal activity compared to solely qualitative assessments or a mix of quantitative and qualitative assessments).

30. *Id.*

31. CHARLES SUMMERS & TIM WILLIS, BUREAU OF JUSTICE ASSISTANCE U.S. DEP'T OF JUSTICE, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 2 (2010), https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

32. MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, LAURA & JOHN ARNOLD FOUND., ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 16 (2013) [hereinafter ASSESSING RISK WITHOUT INTERVIEW], http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf.

33. Cadigan et al., *supra* note 29, at 4.

34. MIKE EISENBERG, JASON BRYL & TONY FABELO, THE COUNCIL OF STATE GOV'TS JUSTICE CTR., VALIDATION OF THE WISCONSIN DEPARTMENT OF CORRECTIONS RISK ASSESSMENT INSTRUMENT iii (2009).

determination.[35] As of 2014, only a few states require courts to have a pretrial risk assessment performed on individuals.[36]

This Comment argues that Wisconsin should join those states and adopt a statute that requires courts to order a pretrial risk assessment and to consider it during pretrial release determinations. Part I discusses the history and present state of pretrial release. Then, Part II explains the dangers of unnecessary pretrial detention. Part III proposes a new statute that would require a pretrial risk assessment and argues that Wisconsin should adopt this statute because it would reduce the number of individuals within the jails and the costs of pretrial detention. This Comment concludes by urging Wisconsin to adopt the statute so it can strengthen its pretrial release protections and decrease its jail populations, saving money.

I. DO NOT PASS GO: PRETRIAL RELEASE AND DETENTION

In Wisconsin, both the Wisconsin Constitution and Wisconsin Statutes govern pretrial release and detention. Wisconsin Constitution article 1, section 8 and Wisconsin Statutes sections 969.01 and 969.035 address pretrial release and detention.[37] However, pretrial release is not a new concept. Pretrial release predates the United States. Although beginning simply as bail protections, it has expanded to broader federal and state constitutional and statutory protections.

A. The History of Pretrial Release

The history of pretrial release predates the history of the United States.[38] The first concepts of pretrial release developed in medieval

35. WIS. STAT. § 969.035 (2013–14).

36. JOHN CLARK, PRETRIAL JUSTICE INST., THE FUNDAMENTALS OF PRETRIAL RISK ASSESSMENT: ACHIEVING INTER-RATER RELIABILITY 10 (2014) (including the following states: Colorado, Delaware, Hawaii, Kentucky, New Jersey, and West Virginia); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, PRETRIAL RELEASE LAWS: RECENT STATE ENACTMENTS (2014), http://www.ncsl.org/documents/cj/PretrialHandoutNCSL.pdf (explaining that Vermont recently passed legislation requiring a risk assessment to be performed for most defendants).

37. WIS. CONST. art. I, § 8; WIS. STAT. §§ 969.01, .035.

38. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M.B. BROOKER, PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 1 (2010) [hereinafter HISTORY OF BAIL], http://www.pretrial.org/download/pji-reports/PJI-History of Bail Revised.pdf. *See generally* FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898); WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA (1976); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517 (1983); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 U. PA. L. REV. 959, 1125 (1965).

England, where the Anglo-Saxon legal process required bail to be posted to ensure an individual's appearance in court.[39] The bail amount was identical to the penalty for the accused's crime.[40] Therefore, if the individual fled, the bail forfeited was the same as if the individual had been convicted.[41] The system grew and developed over the next six hundred years,[42] eventually developing into the roots of the pretrial system we recognize today.[43]

In 1679, the English Parliament established procedures to prevent long delays before a judge would hold a bail bonding hearing.[44] During 1689, an individual's right that "excessive bail ought not be required" was established.[45] English law strongly influenced the founding colonies, but the colonies' greater use of criminal penalties led to pretrial reform before even English reform.[46]

The first pretrial release protections in the United States were created in Massachusetts, which provided an "unequivocal right to bail for non-capital cases."[47] Pretrial release protections were expanded even more by language from the Pennsylvania Constitution, which became the model language for almost every state constitution adopted after 1776.[48] The Pennsylvania Constitution provided that "all prisoners shall be Bailable by Sufficient Surities."[49]

The United States Constitution does not explicitly create pretrial release protections, but rather, pretrial protections are a culmination of various federal and state protections.[50] Protections started with the Judiciary Act of 1789, which created an "absolute right to bail in non-capital federal criminal cases" and the United States' Eighth

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39. HISTORY OF BAIL, *supra* note 38, at 1–2.

40. *Id.* at 2; *see also* Carbone, *supra* note 38, at 521.

41. HISTORY OF BAIL, *supra* note 38, at 2.

42. Bail was historically used to prevent an individual from fleeing without serving a punishment. After the Norman conquest, the criminal process became a state affair implemented under the discretion of individual magistrates. Concurrently, society's perceptions of who should receive bail also changed. As a result, the bail system became subject to great abuse. *Id.* at 2–3.

43. *Id.* at 1.

44. *Id.* at 3–4 (establishing this right in the Habeas Corpus Act of 1679). *See generally* Habeas Corpus Act, 1679, 25 Car. 2, c. 2 (Eng.).

45. HISTORY OF BAIL, *supra* note 38, at 4 (establishing this right in the English Bill of Rights of 1689). *See generally* Bill of Rights, 1689, 1 W. & M. Sess. 2, c. 2 (Eng.).

46. HISTORY OF BAIL, *supra* note 38, at 4.

47. *Id.* Massachusetts's Body of Liberties created this protection. *Id.*

48. *Id.* at 4–5.

49. *Id.* at 4.

50. *Id.* at 5. The United States Constitution does not explicitly create a right to bail or list bailable offenses. *Id.*

Amendment, which established that bail should not be excessive.[51] The United States Supreme Court highlighted the lack of right to bail during the 1900s when it established that a right to bail—despite being a foundation of law—is not absolute, but rather determined by federal and possibly state legislatures.[52] The Federal Rules of Criminal Procedure, established in 1944, expanded the factors a judge was to consider when determining bail.[53] The next major reform to pretrial protections did not occur until the 1960s with the passing of the Federal Bail Reform Act[54] in 1966.[55] The 1960s and the rise of communism had decreased the likelihood of bail for those suspected of communism.[56] Therefore, Congress enacted the Federal Bail Reform Act to protect pretrial release and encourage judges to release individuals without requiring a monetary payment.[57] Following the implementation of the Federal Bail Reform Act, virtually all states enacted similar laws or established the practice through case law.[58] The Federal Bail Reform Act created a presumption of release, especially for non-capital offenses, unless the judge had reason to believe the individual may flee or put the community in danger.[59] However, despite creating this presumption, the statutes do not establish a way for judges to determine an individual's flight or community safety risk.

Despite the Federal Bail Reform Act, the following years brought a decrease in pretrial release as judges were allowed to detain individuals for more reasons. In *Bell v. Wolfish*,[60] the United States

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51. *Id. See generally* U.S. CONST. amend. VIII; Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73.

52. HISTORY OF BAIL, *supra* note 38, at 8–9 (explaining how *Stack v. Boyle*, 342 U.S. 1 (1951), and *Carlson v. Landon*, 342 U.S. 524 (1952), express the Supreme Court's opinions on bail).

53. Shima Baradaran, *The State of Pretrial Detention*, *in* THE STATE OF CRIMINAL JUSTICE 2011, at 187, 188 (Myrna S. Raeder ed., 2011).

54. The Federal Bail Reform Act contained several provisions, including: 1) creating a presumption in favor of releasing non-capital defendants on their own recognizance; 2) creating conditional releases to lower failure to appear risk; 3) restricting the use of financial conditions for release, which were only to be used if the court could not assure appearance otherwise; 4) allowing the payment of a 10% bond in lieu of the full amount; and 5) creating a review of bail for those held for twenty-four hours or more. HISTORY OF BAIL, *supra* note 38, at 12. *See generally* Bail Reform Act, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3146–3152 (2012)).

55. HISTORY OF BAIL, *supra* note 38, at 12.

56. Baradaran, *supra* note 53, at 188.

57. *Id.*

58. HISTORY OF BAIL, *supra* note 38, at 12; *see also* PRETRIAL SERVS. RES. CTR., THE SUPERVISED PRETRIAL RELEASE PRIMER 4 (1999).

59. HISTORY OF BAIL, *supra* note 38, at 12.

60. 441 U.S. 520 (1979).

Supreme Court found that judges could consider other factors in determining whether to grant bail and could detain individuals if the detention related to a legitimate government objective.[61] In the 1980s, in *Schall v. Martin*,[62] the Court expanded that exception to allow states to detain individuals to protect the public as a permissible regulatory purpose.[63] This was furthered by the Bail Reform Act of 1984, which allowed judges to make bail decisions based on the danger an individual posed to the community,[64] and which was upheld as a legitimate regulatory goal by the Court.[65] The result of this has been an increase in pretrial detainees, as judges release only 40% of individuals before trial.[66] Although a judge's ability to detain an individual to prevent the risk of danger to a community was strengthened, the judges did not receive an increase in mechanisms or support for determining when or how an individual may pose a risk to a community.

B. The Current State of Pretrial Release Law

Currently, pretrial release is governed by a combination of federal and state protections. The United States Constitution creates the foundational support for pretrial release, while also providing protections against excessive bail. The Wisconsin Constitution mirrors the United States Constitution, offering similar protections under state law, as well. Beyond the constitutions, pretrial release protections are created in Wisconsin Statutes section 969.01. Despite the protections that are created to help ensure an individual's release before trial, these sources provide very little guidance to judges about determining who should be released and how the judge should make this determination.

Although the United States Constitution does not explicitly protect the right to bail or the right to pretrial release, it does provide foundational support for pretrial release. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law,"[67] while the Fourteenth Amendment applies those protections as state protections, not just federal.[68] These, combined with the Sixth Amendment, which provides all accused with

61. Baradaran, *supra* note 53, at 188.
62. 467 U.S. 253 (1984).
63. Baradaran, *supra* note 53, at 188–89.
64. *Id.*
65. *United States v. Salerno*, 481 U.S. 739, 752 (1987).
66. Baradaran, *supra* note 18, at 725.
67. U.S. CONST. amend. V.
68. U.S. CONST. amend. XIV, § 1.

the right to a speedy and public trial by impartial jury,[69] create the constitutional basis for "innocent until proven guilty."[70] The concept of "innocent until proven guilty" is a cornerstone protection for pretrial release because pretrial detention leads to greater likelihood of conviction.[71] Additionally, the Eighth Amendment provides some pretrial release protections by prohibiting "Excessive bail."[72]

Beyond merely mirroring many of the federal protections,[73] the Wisconsin Constitution provides greater protections for pretrial release. The Wisconsin Constitution provides, "All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses."[74] In addition to the Wisconsin Constitution, Wisconsin Statutes section 969.01 also provides pretrial release protections.[75]

The language in Wisconsin Statutes section 969.01(1) mirrors the protections of the Wisconsin Constitution.[76] Again, it provides that a defendant is "eligible for release under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses."[77] The statute also states that bail should only be used "upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court"[78] and that the judge should "first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance."[79]

Beyond the protections provided, Wisconsin Statutes section 969.01 also offers factors for judges to consider in determining release. Although listed as "considerations in setting conditions of release," the

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69. U.S. CONST. amend. VI.

70. BAIL FAIL, *supra* note 11, at 5.

71. KRISTIN BECHTEL ET AL., PRETRIAL JUSTICE INST., DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH 2 (2012) [hereinafter DISPELLING THE MYTHS].

72. U.S. CONST. amend. VIII.

73. Wisconsin Constitution article I, section 6 protects against excessive bail like the Eighth Amendment. WIS. CONST. art. I, § 6. Section 7 provides a speedy, public trial by an impartial jury like the Sixth Amendment provides. WIS. CONST. art. I, § 7. Lastly, section 1 provides that all people have "certain inherent rights; among these are life, liberty and the pursuit of happiness," which is similar to the Fifth and Fourteenth Amendment protections. WIS. CONST. art. I, § 1.

74. WIS. CONST. art. I, § 8.

75. WIS. STAT. § 969.01(1) (2013–14).

76. *Compare* WIS. CONST. art. I, § 8, *with* § 969.01(1).

77. § 969.01(1).

78. *Id.*

79. *Id.*

subsection of the statute is actually stating the factors that should be considered in "determining whether to release the defendant without bail."[80] The statute lists factors such as: (1) ability to pay bail; (2) nature, number, and gravity of the charges; (3) potential penalty faced; (4) violence, either of crime or of previous convictions; (5) prior convictions; (6) character, health, residence, and reputation of defendant; (7) current probation, extended supervision, or parole periods; (8) other pending charges and if the individual is presently on bail; (9) previous release violations or failures to appear; and (10) a policy against unnecessary pretrial detention.[81] The plain text of the statute does not provide any other guidance for using the factors. It does not clarify if all of the factors must be considered or if the judge can choose which of the factors to use and which to omit. The plain text of the statute does not explain the importance or weight of the factors.[82] Nor does it provide guidance in calculating and using these considerations. Without guidance, judges tend to set restrictions, i.e., monetary restrictions, that result in unnecessary pretrial detention, further harming the individuals and the community.[83]

C. The Attention to Pretrial Release

Attention to pretrial release and bail has increased over the past year. In June, 2015, popular television host and political commentator John Oliver dedicated almost twenty minutes of his weekly news show to discussing bail and the need for pretrial release reform.[84] Oliver drew attention to the danger of being unable to afford bail by describing Miguel, who could not afford a $1,000 bail and was instead incarcerated in Rikers Island penitentiary.[85]

While John Oliver raised national attention about the consequences of setting bail too high for an individual to afford, HBO's *The Jinx* raised national attention[86] about setting bails based solely on a monetary

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80. § 969.01(4).

81. *Id.*

82. *See generally* PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 27 (2012) [hereinafter RATIONAL AND TRANSPARENT BAIL DECISION MAKING].

83. *See generally infra* Part II.

84. *Last Week Tonight with John Oliver* (HBO television broadcast June 7, 2015).

85. Rikers Island is a notorious New York jail that houses anywhere from almost ten to fifteen thousand individuals per day. Mary E. Buser & Lichi D'Amelio, *The Truth About Rikers*, JACOBIN (Dec. 20, 2015), https://www.jacobinmag.com/2015/12/kalief-browder-rikers-reform-solitary-incarceration-bail-buser/.

86. Lisa Falkenberg, *Falkenberg: Bread and Jails: A Deadline, A Promise*, HOUS. CHRON. (Jan. 2, 2016), http://www.houstonchronicle.com/news/columnists/

value without considering flight risk. Robert Durst was a millionaire accused of murder in 2001.[87] Durst received a $250,000 bail, and detectives did not realize he would be a flight risk until almost a week after the bail hearing.[88] When asked, Durst admitted that he posted bail with no intention to ever appear for trial, stating "Goodbye $250,000. Goodbye jail. I'm out."[89] Bail is supposed to prevent individuals from fleeing before trial or committing new crimes, however Durst did both after posting his $250,000 bail.[90]

Because of the national attention to bail and pretrial detention, there has been strong public support for reform.[91] The public support for change has spurred some states, like New Jersey and Colorado, to take action and reform their pretrial release system.[92] With nearly half a

falkenberg/article/Falkenberg-Bread-and-jails-A-deadline-a-promise-6733285.php; *Last Week Tonight with John Oliver*, *supra* note 84.

87. *Timeline: Inside the Robert Durst Case*, FORTY EIGHT HOURS, http://www.cbsnews.com/pictures/robert-durst-case-timeline/14/ (last viewed Jan. 5, 2016).

88. Charles V. Bagli & Kevin Flynn, *Durst Jumps Bail, and a Nationwide Dragnet Is On*, N.Y. TIMES (Oct. 17, 2001), http://www.nytimes.com/2001/10/17/nyregion/durst-jumps-bail-and-a-nationwide-dragnet-is-on.html; *see also* Catherine E. Shoichet & Eliott C. McLaughlin, *Robert Durst Denied Bail; New Details Emerge in Case*, CNN (Mar. 24, 2015, 4:26 PM), http://www.cnn.com/2015/03/23/us/robert-durst-investigation/.

89. *The Jinx: The Life and Deaths of Robert Durst, Chapter 1: A Body in the Bay* (HBO television broadcast Feb. 8, 2015).

90. Thomas Zambito & Robert Ingrassia, *Durst Collared in PA Grocery Store: Murderer Fugitive Nabbed Trying to Steal Sandwich*, N.Y. DAILY NEWS (Dec. 1, 2001, 12:00 AM), http://www.nydailynews.com/archives/news/durst-collared-pa-grocery-store-murder-fugitive-nabbed-steal-sandwich-article-1.927543.

91. *See generally Bail Reform for Indigent Suspects*, N.Y. TIMES (Oct. 2, 2015), http://www.nytimes.com/2015/10/03/opinion/bail-reform-for-indigent-suspects.html; Falkenberg, *supra* note 86; Hilary Gowins, *My 2016 Wish List: 3 Ways to Improve Illinois' Criminal Justice System*, HUFFPOST CHI. (Jan. 5, 2016), http://www.huffingtonpost.com/hilary-gowins/my-2016-wish-list-3-ways_b_8913262.html; Evan Horowitz, *The Trouble with Bail – And Some Alternatives*, BOS. GLOBE (Oct. 9, 2015), https://www.bostonglobe.com/metro/2015/10/08/the-trouble-with-bail-and-some-alternatives/APjxJiBttCOyUCHGwe5gdI/story.html; Darren Hutchinson, *There's Never Been a Better Time for Bail Reform*, POSTEVERYTHING (July 20, 2016), https://www.washingtonpost.com/posteverything/wp/2015/07/20/theres-never-been-a-better-time-for-bail-reform/; *Time for Bail Reform?*, CONN. L. TRIB. (Jan. 4, 2016), http://www.ctlawtribune.com/id=1202746227388/Time-for-Bail-Reform.

92. Brent Johnson, *State Supreme Court Chief Touts N.J.'s 'Significant' Bail Reform*, NJ.COM (May 16, 2015, 2:22 AM), http://www.nj.com/politics/index.ssf/2015/05/nj_supreme_court_chief_justice.html (explaining that some consider the reform "'the most significant criminal justice reform measure[]' in years"); *National Association of Criminal Defense Lawyers Releases Defense Attorney Guide to Adult Pretrial Release in Colorado; Additional States Forthcoming*, NAT'L ASS'N CRIM. DEF. LAW. (Sept. 21, 2015), http://www.nacdl.org/coloradobail/.

million individuals in pretrial detention at jails, now is the time to reform pretrial release systems because the consequences can be damaging for both the individual and the state.[93]

II. DO NOT COLLECT $200: THE DANGERS OF PRETRIAL DETENTION

Pretrial detention can have a significant effect on an individual through all stages of the criminal justice process. Surprisingly, pretrial detention has a negative effect on pretrial success. It also affects the type and length of punishment imposed at sentencing. Lastly, it affects an individual's success after being released (post disposition). Often even a minor period of detention can affect an individual,[94] with that effect expounding as the detention lengthens.[95]

Pretrial detention can have a significant effect on an individual before trial even begins. Pretrial detention increases an individual's likelihood of failure before trial.[96] Although many would believe that detaining an individual would decrease the individual's likelihood to miss future court appearances, pretrial detention has been shown to actually increase an individual's likelihood to fail to appear.[97] Additionally, detaining individuals increases their likelihood to be arrested for new criminal activity.[98] Increasing an individual's likelihood to commit a new crime is counterproductive to the purpose of pretrial detention, which is to "assure [a defendant's] appearance in court, [and] protect members of the community from serious bodily harm."[99] Therefore, by detaining individuals, judges increase the likelihood of the exact activities that pretrial detention seeks to prevent.

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93. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346 (2014) (citing Baradaran, *supra* note 53, at 190).

94. Low-risk individuals who are detained for two to three days are 1.22 times more likely to FTA than low-risk individuals who are detained for one day or less. CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 10 (2013) [hereinafter THE HIDDEN COSTS], http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf.

95. Low-risk defendants who are detained for fifteen to thirty days are 1.41 times more likely to FTA than low-risk individuals who are detained for one day or less. *Id.*

96. Pretrial failure occurs by committing new criminal activity or by failing to appear at another court appearance. *Id.* at 4.

97. *Id.* at 10. For low-risk individuals it increases their likelihood to FTA by 1.22 times for detentions lasting two to three days and four to seven days and 1.41 times for detentions lasting fifteen to thirty days. *Id.*

98. *Id.* For low-risk individuals, it increases their likelihood to commit new criminal activity by 1.39 times for detentions lasting two to three days and 1.74 times for detentions lasting more than thirty-one days. *Id.* at 4.

99. WIS. STAT. § 969.01 (2013–14).

Pretrial detention also affects an individual's ability to obtain good legal representation.[100] Because an individual is detained, the individual is reliant on others to find representation.[101] Likewise, if an individual is able to post bond for release, the judge may use that as an indication that the individual is not indigent and not allow the individual to receive representation by a public defender.

Additionally, pretrial detention disconnects individuals from friends and family, health care providers, and opportunities to seek gainful post-disposition employment.[102] Pretrial detention puts strains on an individual's income,[103] employment,[104] and family relationships.[105] Because of the gross effects of pretrial detention, sometimes even a short period of incarceration can lead to irreparable damage.[106]

Not only do individuals who are detained pretrial plead guilty more often and are convicted more often,[107] pretrial detention also

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100. DAVID LEVIN, PRETRIAL JUSTICE INST., EXAMINING THE EFFICACY OF PRETRIAL RELEASE CONDITIONS, SANCTIONS AND SCREENING WITH THE STATE COURT PROCESSING STATISTICS DATASERIES 2 (2007).

101. Without access to the internet and limited access to phones, individuals cannot seek representation on their own.

102. LEVIN, *supra* note 100, at 2.

103. OPEN SOC'Y JUSTICE INITIATIVE, THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION 28 (2011) [hereinafter THE SOCIOECONOMIC IMPACT] (explaining that a 2006 study estimated that Mexico lost almost $100 million in income due to pretrial detention and that a 2009 study estimated that Argentina lost over $10 million in income yearly due to pretrial detention).

104. Beyond lost income, pretrial detainees risk losing their jobs while detained. *Id.* (explaining half of men and two-thirds of women in England and Wales lost their jobs because of pretrial detention). Furthermore, the stigma of detention can limit the lifetime earning potential of the individuals. *Id*.

105. Because a pretrial detainee is not currently working, or worse, has already lost his or her job, the remaining work-eligible family members must make up for the lost income. *Id.* This loss of income is more crippling for low-income families, where income cannot be made up because all work-eligible family members are currently working. *Id.* at 29. Pretrial detention poses an even greater threat for female pretrial detainees because the stigma of certain crimes can irredeemably break family links and females are often the main caretakers of minor children. *Id.* at 24, 31. Furthermore, children of pretrial detainees are more likely to fall into poverty, end up in foster care, or be taken away from their families. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1319–20 (2012).

106. A twenty-nine-year-old truck driver was arrested in connection with a robbery. He remained in pretrial detention for almost four weeks before being released. During this time, he lost his job, his family defaulted on rent payments, and his wife had a mental breakdown due to stress. Even after release, he was unable to acquire work while awaiting his trial. Four months after arrest, a jury acquitted him of the charges. THE SOCIOECONOMIC IMPACT, *supra* note 103, at 32.

107. DISPELLING THE MYTHS, *supra* note 71.

increases an individual's punishment upon conviction. A low-risk individual who has been detained is five times more likely to receive time in jail during sentencing.[108] This means that an individual who may have received probation or community service is more likely to receive a jail sentence. This exacerbates the strains on the individual's family and work relationships that were created by the original pretrial detention.

Not only does it increase an individual's likelihood to receive a jail sentence, it also increases his or her likelihood to receive a prison sentence.[109] This means that an individual who may have received probation or a jail sentence is now three times more likely to receive a prison sentence.[110] Pretrial detention does not just increase an individual's likelihood to be jailed or imprisoned, it also can double to triple the length of an individual's jail or prison sentence.[111] Therefore, individuals who are detained pretrial also experience longer periods of detention upon sentencing, as well, thereby increasing the strain on family and work relationships.

Pretrial detention can also affect an individual's success post-disposition. Therefore, the longer an individual remains incarcerated before disposition of the charge, the more likely that individual is to fail after the resolution of his or her charge. Pretrial detention increases an individual's likelihood to recidivate upon release.[112] The longer individuals are detained, the greater the increase in their likelihood to commit a new crime.[113]

Additionally, pretrial detention disproportionately affects low-income individuals because they are more likely to be unable to meet monetary restrictions for release. A judge can impose a variety of

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108. CHRISTOPHER LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 11 (2013) [hereinafter INVESTIGATING THE IMPACT], www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf. For low-risk individuals, pretrial detention increases their likelihood of a jail sentence by 5.41 times compared to low-risk released individuals. *Id.*

109. *Id.* Pretrial detention increases a low-risk individual's likelihood of a prison sentence by 3.76 times compared to released individuals. *Id.*

110. *Id.*

111. *Id.* For low-risk individuals, being detained for the entire pretrial period will increase their jail sentences by 3.49 times. Low-risk individuals receive prison sentences that are 2.84 times longer. *Id.* at 11, 15.

112. THE HIDDEN COSTS, *supra* note 94, at 19. Individuals who were detained pretrial are 1.3 times more likely to recidivate during release than defendants who were released. *Id.*

113. *Id.* For low-risk individuals, it increases their likelihood of recidivism within twelve months of release by 1.16 times for detentions of two to three days and 1.43 times for detentions of fifteen to thirty days. Their likelihood to recidivate within twenty-four months is similar. *Id.* at 19–20.

pretrial release restrictions on an individual.[114] However, monetary restrictions, either bail or bond[115] requirements, are the most common restriction to pretrial release.[116] By 2006, 70% of all felony cases had monetary bonds.[117] Additionally, not only has the frequency in which monetary restrictions are used increased, the value of the monetary restriction has also increased. The average bail amount increased by $30,000, from $25,400 to $55,500.[118] Because of this, low income individuals, when compared to wealthier individuals, are more likely to remain detained pretrial because they cannot afford to pay these monetary restrictions.[119]

Pretrial detention also disproportionately affects minority individuals. African American individuals are five times more likely to be detained pretrial than white individuals.[120] Wisconsin arrests four

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114. Restrictions can include, but are not limited to, financial restrictions (bail or bond), travel restrictions, substance abuse treatment, weapons restrictions, and requirements of employment. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010, at 1 (2012).

115. "Bail" occurs when an individual must provide the court with a monetary deposit for release; when the individual returns to court for adjudication, they receive their money back. "Bond" is when an individual requires the assistance of a third party, usually a commercial bail bondsman, to provide enough money to meet the monetary requirement. The individual pays a percentage, usually 10%, of the total amount to the bondsman. The bondsman provides insurance to the court that satisfies the monetary condition. When the individual returns to court for adjudication, the bondsman receives his money back; however, he keeps the individual's percentage. CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 5–6 (2011) [hereinafter STATE OF THE SCIENCE].

116. *See* BAIL FAIL, *supra* note 11, at 10 (showing that nonfinancial release restrictions had decreased while financial release had increased proportionally). Monetary restrictions have become so prevalent that U.S. Attorney General Robert Kennedy articulated,

> What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?

Id. at 1 (quoting HISTORY OF BAIL, *supra* note 38, at 12).

117. DISPELLING THE MYTHS, *supra* note 71, at 1.

118. BAIL FAIL, *supra* note 11, at 10.

119. *Id.*

120. *Id.* During a seven-year survey, 36% of African American individuals and 44% of Hispanic individuals were detained for their entire pretrial period because they could not post bond. Compare this to the 27% of white individuals who were unable to post bond. PEPIN, *supra* note 28, at 5; *see also* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 193 (2013); Frank McIntyre & Shima Baradaran, *Race, Prediction, and Pretrial Detention*, 10 J. EMPIRICAL LEGAL STUD. 741, 741–42 (2013).

African American individuals to every white individual.[121] Statistically, Wisconsin leads the nation in the percentage of African American and Native American men who are incarcerated:[122] one in every eight African American men is incarcerated in Wisconsin,[123] and one in every thirteen Native American men in Wisconsin is incarcerated.[124] This presents a never-ending circle of consequences: African Americans are more likely to be arrested, then to be detained pretrial. Because they were detained, they are more likely to recidivate and be arrested again, repeating the cycle.

Despite no indication that monetary restrictions ensure that an individual will appear in court or protect the safety of the public from new criminal activity, monetary restrictions are the most common pretrial release requirement.[125] Even in Wisconsin, where commercial bail bonds are forbidden,[126] an individual's ability to pay bail is the first factor listed in the pretrial release statute.[127] Judges need to have a more reliable measure for determining when they should release someone before trial. A pretrial risk assessment is that tool. However, currently, only six states require the use of pretrial risk assessments.[128]

A pretrial risk assessment is a quantitative analysis[129] of the risk of "failure" a defendant poses while released before trial.[130] "Failure"

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121. WIS. COUNCIL ON CHILDREN & FAMILIES, RACE TO EQUITY: A BASELINE REPORT ON THE STATE OF RACIAL DISPARITIES IN DANE COUNTY 11 (2013), http://racetoequity.net/dev/wp-content/uploads/WCCF-R2E-Report.pdf.

122. JOHN PAWASARAT & LOIS M. QUINN, WISCONSIN'S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES OF 2013, at 8–9 (2013), http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf.

123. *Id.* at 8.

124. *Id.* at 9.

125. *See* BAIL FAIL, *supra* note 11, at 10.

126. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), http://www.nytimes.com/2008/01/29/us/29bail.html. Only Illinois, Kentucky, Oregon, and Wisconsin have abolished the commercial bail bonds system. *Id.*

127. WIS. STAT. § 969.01(4) (2013–14).

128. CLARK, *supra* note 36, at 10. Those states are Colorado, Delaware, Hawaii, Kentucky, New Jersey, and West Virginia. *Id.*

129. This Comment concentrates on quantitative risk assessments. Risk assessments may be quantitative, qualitative, or a combination of the two. SUMMERS & WILLIS, *supra* note 31, at 2. Quantitative assessments offer more consistency and empirical examination, and therefore, they are often preferred over qualitative assessments. *Id.* Quantitative assessments base risk determinations on assigned numeric calculations of the data. Qualitative assessments base risk determinations on non-numerical labels. Jeff Lowder, *The Difference Between Quantitative and Qualitative Risk Analysis and Why It Matters (Part 1)*, BLOGINFOSEC.COM (Sept. 4, 2008, 6:00 AM), http://www.bloginfosec.com/2008/09/04/the-difference-between-quantitative-and-qualitative-risk-analysis-and-why-it-matters-part-1/2/.

130. SUMMERS & WILLIS, *supra* note 31, at 1.

occurs when a defendant fails to appear (FTA) at a court proceeding, is arrested for another criminal violation before trial, or a combination of both.[131] A pretrial risk assessment usually quantifies an individual's risk based on a number of factors, usually between seven and twelve factors.[132] The most validated risk factors are prior FTA, prior convictions, current charge, current employment, substance abuse history, and whether the individual has another case pending.[133] These factors demonstrably relate to pretrial failure, not criminogenic factors or recidivism.[134] The assessment, then, groups defendants and classifies the risk level of the group based off of results of the sample group with the same score.[135] The risk level assigned to the group shows the likelihood of pretrial failure if the individual were released, usually low, medium, and high.[136]

III. REFORMING THE STATUTE, TRANSFORMING PRETRIAL RELEASE IN WISCONSIN

Wisconsin's pretrial release statute offers very little guidance to judges about how best to determine who should be released. I propose an amended pretrial release statute that requires a pretrial risk assessment be performed[137] and considered before a judge makes

131. *Id.* Therefore, "pretrial success" would be completing pretrial time without an FTA or an arrest for criminal activity.

132. For example, the Ohio Pretrial Risk Assessment measures seven factors: age at first arrest, number of FTA warrants in the past two years, prior jail incarcerations, employment at time of arrest, length at current residence, illegal drug use, and history of drug use. EDWARD LATESSA ET AL., UNIV. OF CINCINNATI, CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM: FINAL REPORT 49 (2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf. The Virginia Pretrial Risk Assessment Instrument measures nine factors: charge type, pending charge, outstanding warrants, criminal history, prior FTA convictions, prior violent convictions, length at current residence, employment at time of arrest and length of that employment, and history of substance abuse. VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT (VPRAI) INSTRUCTION MANUAL 5–8 (2003) [hereinafter VPRAI], https://www.dcjs.virginia.gov/corrections/documents/vpraiManual.pdf. The Federal Pretrial Risk Assessment Instrument measures thirteen factors: prior felony convictions, prior FTAs, other pending charges, current offense type, current offense class, current age, highest education, employment status, residence, current drug use, current alcohol use, citizenship status, and ties to a foreign country. FEDERAL PRETRIAL RISK ASSESSMENT INSTRUMENT (PTRA) 1–3 (2010), http://www.pretrial.org/download/risk-assessment/Federal Pretrial Risk Assessment Instrument (2010).pdf.

133. STATE OF THE SCIENCE, *supra* note 115, at 11.

134. SUMMERS & WILLIS, *supra* note 31, at 1.

135. Clark, *supra* note 36, at 2–5.

136. *Id.*

137. Who performs the risk assessment, when it is performed, and how it is performed are all questions that go beyond the scope of this Comment and are therefore

pretrial release decisions.[138] Additionally, the proposed statute combines and clarifies the current applicable subsections within the Wisconsin statute, thereby expanding its usefulness to judges. Finally, I will address some of the concerns of the proposed statute and pretrial risk assessments.

A. The Problems with Wisconsin's Current Pretrial Release Statute

As previously identified, Wisconsin Statutes section 969.01 currently governs pretrial release.[139] The statute is awkwardly ordered,[140] describing pretrial decision requirements in subsections 1 and 4, while subsection 2 discusses probation, and subsection 3 discusses bail for witnesses.[141] The proposed statute condenses and clarifies subsections 1 and 4. Additionally, it requires that judges consider a pretrial risk assessment as one of the factors used in the pretrial release decision-making process.

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not addressed. Some states have pretrial service agencies that perform the assessment. *See, e.g.*, PRETRIAL SERV., ADMIN. OFFICE OF THE COURTS KY. COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY (2013); MARIE VANNOSTRAND & KENNETH J. ROSE, PRETRIAL RISK ASSESSMENT IN VIRGINIA (2009). For examples of types of pretrial risk assessments, see CTR. FOR CRIMINAL JUSTICE RESEARCH, OHIO RISK ASSESSMENT SYSTEM – PRETRIAL ASSESSMENT TOOL (ORAS-PAT) SCORING GUIDE 3 (2010); VPRAI, *supra* note 132, at 1; Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, FED. PROBATION, Sept. 2011, at 30, http://www.pretrial.org/download/risk-assessment/Implementing Risk Assessment in the Federal Pretrial Services System - Cadigan et al 2011.pdf. For a discussion about how to perform the assessment, see ASSESSING RISK WITHOUT INTERVIEW, *supra* note 32.

138. The goal of this Comment is to explain the strengths and usefulness of implementing a pretrial risk assessment during the pretrial release decision-making process. Therefore, the proposed statute is narrowly tailored to accomplish two goals: first, to require a pretrial risk assessment be performed and second, to clarify the provisions of Wisconsin's current pretrial statute. Although it is a minimal change, it is an important first step to expanding the usefulness of the assessment. Once a pretrial risk assessment is implemented before every release decision, the assessment can be used to create statutory presumptions for release decisions, i.e., presumptive release without restrictions for all low-risk offenders. However, proposing any statutory presumptions would have expanded the conversation beyond the bounds of this Comment and therefore is not discussed. For more information about detention and appropriate release restrictions for risk levels, see INVESTIGATING THE IMPACT, *supra* note 108, at 8–9. For more information about Kentucky, a state that requires risk-level-based release and restriction decisions, see *infra* note 152.

139. WIS. STAT. § 969.01 (2013–14).

140. The awkward ordering could lead individuals to believe that subsections 1 and 4 are separate, rather than inter-related. Additionally, it makes the statute cumbersome to read and could make it more apt to misinterpretation because of the distance between the two subsections.

141. § 969.01.

Wisconsin Statutes section 969.01 currently governs an individual's eligibility for release.[142] Subsection 1 states that a defendant is eligible for release subject to conditions to prevent FTAs and new criminal activity.[143] A separate subsection, subsection 4, describes considerations in setting conditions.[144] Subsection 4 specifies what factors a judge may consider in order to prevent FTAs and new criminal activity.[145] Having the governing subsections split apart may cause a judge to only use one, not both, of the subsections. Additionally, whether the subsections are independent or dependent on each other is unclear.

The proposed statute simplifies and clarifies these issues. First, it combines all of the considerations for release into one common location. Therefore, an individual is less likely to overlook or miss all of the necessary considerations. Second, it physically lists all of the factors for a judge to consider. By listing them, it is a visual reminder for the judge of all the possible considerations and can also serve as a checklist to be used during the decision-making process.

The current statute also provides certain restrictions for a judge to consider during release for pretrial success. Specifically, in order to prevent FTAs, the court may impose a necessary bail.[146] Whereas, in order to prevent new criminal activity, the court may impose other non-monetary conditions of release.[147] However, the current statute gives very little guidance in determining what factors should be considered in choosing the types of pretrial release conditions.

The only guidance of factors is found buried in the middle of subsection 4, where the statute currently declares a list of the "[p]roper considerations in determining whether to release a defendant without bail, fixing a reasonable amount of bail or imposing other reasonable conditions of release . . . ."[148] The list of factors includes ability to pay bail, current offense, prior convictions, reputation of individual, strength of evidence, status of individual pertaining to other criminal proceedings, prior FTAs, and the "policy against unnecessary detention

142. *Id.*

143. § 969.01(1). Specifically, conditions are "designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses." *Id.*

144. § 969.01(4).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

of defendant's pending trail."[149] However, the statute does not provide any more guidance about how to consider or weigh those factors.[150]

B. An Improved Pretrial Release Statute

The proposed statute condenses and clarifies subsections 1 and 4 of Wisconsin Statutes section 969.01. Language that is maintained from the original section appears in normal font.[151] The added language is modeled on Kentucky's[152] statutory requirement that a pretrial risk assessment be performed.[153] Added language is underlined.

> Before conviction, except as provided in ss. 969.035 and 971.14 (1r), a defendant arrested for a criminal offense is eligible for release under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses. <u>Before determining pretrial release, a pretrial risk assessment shall be performed.</u>
>
> <u>In determining pretrial release, the court shall consider the factors set forth below, in addition to other factors deemed necessary:</u>
>
> - <u>A pretrial risk assessment</u>
> - Ability of an individual to pay bail
> - The circumstances of the individual and his/her situation

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149. *Id.*

150. RATIONAL AND TRANSPARENT BAIL DECISION MAKING, *supra* note 82, at 28 (explaining the difference in importance of various pretrial risk factors).

151. § 969.01(1), (4).

152. Kentucky was chosen as a basis because, in 2011, Kentucky passed House Bill 463, which overhauled the state's criminal law and penal code for the first time in over thirty years. JOHN D. MINTON, JR., LAURIE DUDGEON & CONNIE PAYNE, REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES, AND RECOMMENDATIONS 4 (2012). In the first year after the implementation of the bill, Kentucky saw FTA and NCA rates of 10% or less. *Id.* at 6. This met the goals of the legislators who wanted to release more individuals, while maintaining safety. *Id.*

153. KY. REV. STAT. ANN. § 431.066 (2012). Subsection 2 states,

> When a court considers pretrial release and bail for an arrested defendant, the court shall consider whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released. *In making this determination, the court shall consider the pretrial risk assessment for a verified and eligible defendant along with the factors set forth* in KRS 431.525.

Id. (emphasis added).

- The individual's prior convictions, including failures to appear[154]
- The current charge[155]
- The policy against unnecessary detention of defendants pending trial.

Bail may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court. If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant. In determining whether any conditions of release are appropriate, the judge shall first consider the likelihood of the defendant appearing for trial if released on his or her own recognizance.

Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses.

The proposed statute maintains much of the original language of Wisconsin Statutes section 969.01. It expands the current pretrial process by requiring that a pretrial risk assessment be performed. The proposed statute also combines many of the factors from the original Wisconsin Statutes section 969.01(4) with the consideration of the pretrial risk assessment and the individual's circumstances. It provides judges with guidance as to what factors they should consider, while maintaining their discretion by allowing them to consider any other necessary factors and the individual's circumstances.

C. The Purpose of the Pretrial Release Assessment and Statute

The proposed statute clarifies and condenses the current statute, while expanding it to ensure that a court orders a pretrial risk assessment and the judge considers the results during the pretrial release determination.[156] The statute would affect the current pretrial

154. This encompasses the original language from Wisconsin Statutes section 969.01(4): "the defendant's prior record of criminal convictions and delinquency adjudications, [and] . . . whether the defendant has in the past forfeited bail or violated a condition of release or was a fugitive from justice at the time of arrest." § 969.01(4).

155. This encompasses the original language from Wisconsin Statutes section 969.01(4): "the nature, number and gravity of the offenses and the potential penalty the defendant faces, whether the alleged acts were violent in nature." *Id*.

156. *Compare* § 969.01(4), *with* proposed statute, *supra* Part III.B.

system by requiring the performance of a pretrial risk assessment.[157] This Section analyzes some of the effects the proposed statute would have on the pretrial system and the communities it is in. The use of a pretrial risk assessment will increase the number of individuals released without affecting a community's safety.[158] Because of the increase in pretrial releases, the costs of pretrial detention, to both individuals and communities, will be reduced.[159] Lastly, the increase in pretrial release will prevent the unnecessary consequences of pretrial detention.[160]

Communities can increase access to community resources without experiencing a risk to community safety because of the pretrial risk assessment. In mid-2011, the United States jail population was over seven hundred thousand individuals, with jails operating at over 90% capacity for over a decade.[161] Approximately 60% of individuals in jail are in either the pretrial or trial process.[162] The pretrial risk assessment will help identify an individual's risk, which will allow courts to grant more releases. Each of these individuals is a burden to the finances and resources of the communities in which they are jailed.[163] Granting more releases will free up financial resources to be used elsewhere. Studies have shown that up to 25% more people could be safely released pretrial with proper procedures, including risk assessments.[164]

During the last jail census, in 2006, there were 14,553 individuals in Wisconsin jails.[165] If approximately 60% of individuals in jail are in either the pretrial or trial process, then about 8,732 individuals are in those processes. If using a pretrial risk assessment can safely release 25% more individuals, then an additional 2,183 individuals could be released from these jails.

Not only can the use of a pretrial risk assessment increase the number of individuals to be released before trial, it can do so without sacrificing the safety of the community. The implementation of a pretrial risk assessment has increased the number of individuals released without monetary restrictions in the District of Columbia, where more individuals were released while pretrial failure rates remained the same.[166] From 1965 to 2008, the percentage of individuals

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157. *Compare* § 969.01(4), *with* proposed statute, *supra* Part III.B.

158. BAIL FAIL, *supra* note 11, at 27, 29.

159. *See infra* note 177.

160. *See supra* Part III.A.

161. BAIL FAIL, *supra* note 11, at 5.

162. *Id.*

163. *Id.*

164. *Id.* at 4.

165. JAMES STEPHAN & GEORGETTE WALSH, CENSUS OF JAIL FACILITIES, 2006, at 17 (2011), http://www.bjs.gov/content/pub/pdf/cjf06.pdf.

166. PEPIN, *supra* note 28, at 7.

who were released without monetary restrictions increased from 11% to 80%.[167] During this time, the area experienced 88% pretrial release success, even with more individuals released than before.[168] Likewise, Kentucky saw similar results after implementing a pretrial risk assessment. About 70% of individuals are released, and there is about a 90% success rate amongst those released.[169] Therefore, Wisconsin has the potential to release about two thousand more individuals while maintaining the safety of its communities.

Releasing more individuals will lower costs for individuals and communities. Pretrial release lowers the financial and familial risk that individuals face pretrial.[170] During pretrial detention, they are unable to work and provide for their families. Pretrial release allows them to continue to work and to provide for their families.[171] The longer an individual is detained, the greater the cost to the individual.[172] Therefore, pretrial release can negate or lessen these costs by releasing individuals to lives, work, and families.

Beyond saving the familial costs, every pretrial release amounts to financial savings that a community can use elsewhere. In 2011, counties spent around $9 billion nationally detaining individuals in county jail until their court dates.[173] A 2002 study showed that individuals charged with felonies who were detained before trial waited fifty-one days in jail until trial.[174] Although the average jail bed for pretrial detention costs $60 per day nationally,[175] Wisconsin spends about $91 per day on each individual incarcerated.[176] As previously discussed, there are about 2,183 individuals that Wisconsin could release pretrial. If these individuals, who previously would have been detained until trial, were released, Wisconsin would have saved over $10 million per year.[177]

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167. *Id.*

168. *Id.*

169. *Id.* at 8.

170. Defendants who are detained are disconnected from their families and employment. LEVIN, *supra* note 100, at 2. Defendants who are released would not be.

171. *Id.*

172. The correlation between length of detention and cost to individuals explains why pretrial detention increases the likelihood that an individual will plead guilty. DISPELLING THE MYTHS, *supra* note 71, at 2.

173. BAIL FAIL, *supra* note 11, at 3.

174. *Id.* at 5.

175. IMPLEMENTING THE RECOMMENDATIONS, *supra* note 13, at 2.

176. PAWASARAT & QUINN, *supra* note 122, at 3.

177. Fifty-one days of pretrial detention multiplied by a cost of $91 per day multiplied by the excess 2,183 inmates who could be released pretrial equals a savings of $10,131,303. Although the figures used are from the 2006 jail census, the jail population has leveled off in recent years to numbers comparable to 2006. WIS. DEP'T OF CORR. OFFICE OF DEP'T FACILITIES, *supra* note 24, at 8. The precise amount saved

Wisconsin could increase its savings even more by avoiding the increased risk of pretrial failure and recidivism that pretrial detention creates.[178] Because these financial resources would no longer be needed for pretrial incarceration, communities would be able to use them elsewhere.

Pretrial release helps avoid the consequences of pretrial detention and supports constitutional rights. Consequences of pretrial detention include an increased likelihood the detainee will be found guilty and receive a prison sentence.[179] This challenges the idea that a presumption of innocence can be protected during detention.[180] Pretrial release protects the presumption of innocence by largely preventing these consequences. Additionally, with the movement towards financial restraints upon pretrial release, economic status has become a main factor in determining pretrial release.[181] Concerns of due process and equal protection arise when economic status is the primary reason one defendant is released and another is not.[182] By basing the pretrial release decision on a quantitative assessment rather than economic reasons, individuals' due process rights will be better protected.

D. Easing Apprehension and Doubt

The use of pretrial assessment tools may create concerns among community members, including concerns over the accuracy of the tool or the possible misinterpretation of the tool. These concerns, however, can be alleviated. Studies have proven the accuracy of pretrial risk assessments, both for the validity of the instrument and the validity of the tools.[183] Communities are able to adapt the risk assessments to

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each year would depend on the number of individuals who would have been detained previously and who are now being released.

178. *See supra* notes 94–95, 112–113 and accompanying text.

179. *See supra* Part II.

180. Ky. Dep't of Pub. Advocacy, *Kentucky Pretrial Release Manual*, ADVOCATE, June 2013, at 2, 5.

181. PEPIN, *supra* note 28, at 4.

182. Wisconsin's Sentence Credit Statute, WIS. STAT. § 973.155 (2013–14), was established to ensure that individuals who remained incarcerated before trial did not receive greater punishment than those who were able to pay bail and be released. *State v. Beets*, 369 N.W.2d 382, 385 (Wis. 1985) ("Even if not couched in constitutional terms of equal protection, confinement credit is designed to afford fairness—that a person not serve more time than that for which he is sentenced."). This principle was first established in *Klimas v. State*, where the court provided a day of credit for every day spent in confinement due to indigency. 249 N.W.2d 285, 287 (Wis. 1977). The court established the credit to protect due process and equal protection of individuals no matter the income and invited the legislature to expand the protections with a more generous rule. *Id.* at 288.

183. *See* sources cited *infra* note 185.

specific populations in order to provide results that are more accurate. Clear training and explicit language will provide transparency as to what the tool is and is not capable of measuring. Another possible concern is that the risk assessment will remove a judge's determination of release, however, the statute allows judges to maintain discretion when determining release by only requiring that the judge consider the risk assessment, not dictate that the judge follow it.

Another concern with pretrial risk assessments is the accuracy of the tools, because without an accurate interpretation of what the risk assessment explains, the assessment is worthless. First, the tool must be capable of accurately predicting pretrial success in order to help decision-makers assess an individual for pretrial release. Second, a tool must measure the right factors in order to make this assessment; not every factor may be necessary for determining risk.[184] Jurisdictions using pretrial risk assessments are frequently validating their tools through predictive validity and content validity.

A pretrial risk assessment will increase a judge's predictive validity. Predictive validity is the accuracy of the tool in predicting pretrial success.[185] During a multi-jurisdictional study, David Levin found that pretrial failure is lower in jurisdictions that use a *quantitative* risk assessment, or even *mixed* risk assessment, than in jurisdictions where pretrial release is determined by *qualitative* assessments.[186] This statute, which requires a judge to consider the pretrial risk assessment but not necessarily follow it, is a mixed risk assessment, because it combines both a quantitative assessment[187] and a qualitative assessment.[188] Therefore, the statute will increase the predictive validity even if a judge uses a mixed decision because even mixed decisions have a lower pretrial failure rate than purely qualitative decisions.[189]

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184. Unvalidated risk factors may reduce public safety and reinforce racial or ethnic biases within the system. BAIL FAIL, *supra* note 11, at 43.

185. *See* Spurgeon Kennedy, Laura House & Michael Williams, *Using Research to Improve Pretrial Justice and Public Safety: Results from PSA's Risk Assessment Validation Project*, FED. PROBATION, June 2013, at 28, 30. *See generally* PRETRIAL JUSTICE INST., THE TRANSFORMATION OF PRETRIAL SERVICES IN ALLEGHENY COUNTY, PENNSYLVANIA: DEVELOPMENT OF BEST PRACTICES AND VALIDATION OF RISK ASSESSMENT (2007); ASSESSING RISK WITHOUT INTERVIEW, *supra* note 32; MARIA VANNOSTRAND, ASSESSING RISK AMONG PRETRIAL DEFENDANTS IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT 3 (2003); Cadigan et al., *supra* note 29, at 3–9; Edward Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, FED. PROBATION, June 2010, at 16.

186. LEVIN, *supra* note 100, at 10–11. This includes both failures to appear and new criminal activity. *Id.*

187. The pretrial risk assessment.

188. The judge's discretion.

189. LEVIN, *supra* note 100, at 10–11.

A pretrial risk assessment must also have content validity in order to best assess risk levels. Content validity analyzes how accurately the risk factors identify criminogenic needs and risk.[190] Content validity has identified six significant risk factors across the various pretrial risk assessment tools used.[191] These factors are: 1) an individual's prior failures to appear, 2) an individual's prior convictions, 3) whether an individual is presently charged with a felony, 4) whether the individual is unemployed, 5) whether an individual has a history of drug abuse, and 6) whether the individual has a pending case.[192] Content validity is important because using the wrong factors can lead to demographic discrimination and decrease public safety.[193] By including these six risk factors within a pretrial risk assessment, there is assurance that the risk level is being measured by accurate, predicative factors.[194]

For a risk assessment tool to be effective, it must accurately measure an individual against his or her peers. Therefore, normalization is key for a pretrial risk assessment's success. A single mother from rural Montana should not have her risk assessed using a tool measuring New York City teenage males. The assessment would not be accurate because their risk factors would be different.[195] To provide the most accurate assessment, individuals should be compared against similar individuals. Risk assessments are tailored through normalization or use of a large sampling pool to ensure that individuals are being compared to similar individuals.[196]

Normalization is the process of tailoring a risk assessment to a specific, jurisdictional pool of individuals.[197] Because a pretrial risk assessment analyzes an individual's risk compared to his or her peers, the process of normalization tailors the pool of peers from a large, generally nation-wide pool to a smaller pool of individuals that are

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190. STATE OF THE SCIENCE, *supra* note 115, at 9.

191. *Id.*

192. *Id.*

193. PEPIN, *supra* note 28, at 6.

194. STATE OF THE SCIENCE, *supra* note 115, at 10.

195. What would be defined as "high risk" in rural Montana will likely be different than "high risk" in New York because there are "variations in local culture, local crime, or information systems." *Id.* at 35. Furthermore, differences in age, race, and gender can affect how effective the tool is. SUMMERS & WILLIS, *supra* note 31, at 4.

196. *See* STATE OF THE SCIENCE, *supra* note 115, at 34–35. *See generally id.* (providing information about the science behind pretrial risk assessments and normalization).

197. Faun Moses & Justin Helm, Challenging the Application of COMPAS to Sentencing Decisions on Appeal at the Office of the Wisconsin State Public Defender 2014 Annual Criminal Defense Conference (Nov. 20, 2014) [hereinafter Challenging the Application of COMPAS]; *see also* STATE OF THE SCIENCE, *supra* note 115, at 35.

"normal," or common, to the individual.[198] By doing this, assessment risk levels are specific to the jurisdiction. Therefore, when an individual's risk is being analyzed, his or her risk level is being compared to the risk level of his or her peers.[199] This produces more accurate results because the individuals are similar.[200] Wisconsin is large enough to supply its own pool for normalization purposes.[201] Therefore, although the pool would not be normalized immediately, within several years, Wisconsin would be able to use a pretrial risk assessment that is normalized to Wisconsin and generates more accurate risk predictions.[202]

If a jurisdiction does not have a sampling pool large enough to normalize, a jurisdiction will usually use a risk assessment with a nation-wide sampling pool, which is large enough that everyone is represented within the pool.[203] Because of the large sampling pool, the outliers within a sample are minimized and the individual can be assessed.[204] A pretrial risk assessment may be tailored to specific populations, e.g., women or juveniles charged as adults, who may have different factors of importance that are not measured in the standard assessment.[205]

Confusion over what the pretrial risk assessment tool measures will impair its usefulness. Furthermore, a misunderstanding of what

198. *See generally* Charlie Harp, *What Is Data Normalization?*, CLINICAL ARCHITECTURE (Aug. 5, 2013, 10:39 PM), http://clinicalarchitecture.com/what-is-data-normalization/.

199. COMPAS, the overall risk assessment tool used in Wisconsin, is currently being normalized to a pool of Wisconsin individuals that has been developed over the past two years. Jared Hoy et al., Using the COMPAS Electronic Pre-Sentence Investigation Reports at the Office of the Wisconsin State Public Defender 2014 Annual Criminal Defense Conference (Nov. 20, 2014) [hereinafter Using COMPAS]; *see also* EVIDENCE BASED DECISION MAKING FOR DEFENSE ATTORNEYS 5 (2014) [hereinafter EBDM FOR DEFENSE ATTORNEYS]; STATE OF THE SCIENCE, *supra* note 115, at 35.

200. Challenging the Application of COMPAS, *supra* note 197.

201. Using COMPAS, *supra* note 199 (explaining that Northpointe is currently normalizing the data pool for the COMPAS risk assessment that the Department of Corrections currently uses); EBDM FOR DEFENSE ATTORNEYS, *supra* note 199, at 5 ("Once enough COMPAS evaluations are completed in Wisconsin, the test will be normed for our specific population.").

202. Using COMPAS, *supra* note 199; *see also* STATE OF THE SCIENCE, *supra* note 115, at 35 (explaining that a normalized test is more valid).

203. COMPAS has a national representation tool that is used for initial classifications until a jurisdictional pool is created that is large enough to be compared to statistically. Using COMPAS, *supra* note 199.

204. *Id.*

205. PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 39 (2009). Some example distinct populations include substance abuse individuals, mental health individuals, individuals charged with domestic violence, women, and juveniles charged as adults. *Id.*

"risk" is could lead to abuse of the tools.[206] Proper training of judges, attorneys, social workers, and others using the pretrial risk assessment is imperative to the success of assessment. Specifically, there needs to be an understanding that the tool measures groups of individuals, not specific individuals.[207] Therefore, the tool is not infallible.[208] A pretrial risk assessment only groups individuals based on the risk analyzation.[209] It is not a "perfect predictor of future criminality."[210] It cannot predict the likelihood that a given individual will commit a specific offense.[211] Each individual is different, but judges will maintain their discretion to use this as a tool, and they should not treat it as a specific predictor of what a unique individual will do.

Additionally, the pretrial risk assessments measure two specific pretrial worries: failure of an individual to appear in court and the possibility that an individual will commit new criminal activity. The definitions of "pretrial failure" and "pretrial success" must be clear. They should explain what is considered an FTA and what is considered new criminal activity. Being explicit will help validate the accuracy of the tool. It will also create transparencies so everyone using the tool understands its capabilities and its possible shortcomings.

Another concern is that the pretrial risk assessment will eliminate a judge's discretion in determining pretrial release because the risk assessment will dictate that low-risk individuals be released and high-risk individuals be detained. There may be concern that the decision-maker will not look past the assessment level to the individual and his or her circumstances. However, pretrial risk assessment is merely a tool to help the decision-maker during the pretrial release determination.[212] While the proposed statute requires a pretrial risk assessment be performed, it does not dictate that the assessment level decide the release status of an individual.[213] The proposed statute provides guidance to judges on factors to be considered during the

206. Abuse could occur if a judge assumes that "high risk" means "high likelihood of pretrial failure" and then refuses release solely because of the pretrial risk assessment.

207. CLARK, *supra* note 36, at 4.

208. EBDM FOR DEFENSE ATTORNEYS, *supra* note 199, at 4.

209. CLARK, *supra* note 36, at 4.

210. EBDM FOR DEFENSE ATTORNEYS, *supra* note 199, at 5.

211. *Id.*; *see also* Using COMPAS, *supra* note 199.

212. Using COMPAS, *supra* note 199; *see also* EBDM FOR DEFENSE ATTORNEYS, *supra* note 199, at 1 ("The intent [of EBDM] is that persons in the position of making decisions can use this information when formulating policy decisions on arrest, charging, sentencing, and supervision.").

213. *See* proposed statute, *supra* Part III.B.

pretrial release determination.[214] It also provides a judge flexibility to make individual determinations of pretrial release by both listing individuals and their circumstances as a factor and by allowing judges to consider any other necessary factors.[215] The pretrial risk assessment is meant to be a tool to assist decision-makers in making more accurate pretrial release decisions.[216]

TIME TO TAKE ACTION

As one of only four states that prohibits commercial bail bonds,[217] Wisconsin has begun to move towards a system that cares about more than just how much money an accused person has.[218] However, Wisconsin's current pretrial release statute lacks guidance about what factors should be considered when deciding when to release an individual. Because of this, Wisconsin is wasting financial resources by keeping individuals detained whom judges could otherwise safely release. Wisconsin has an opportunity to strengthen its pretrial release system by amending the current pretrial release statute to require judges to consider a pretrial risk assessment. This would strengthen the validity of judges' risk assessments and allow them to release more individuals without compromising communities' safety. By adopting the proposed statute, Wisconsin would join Kentucky in leading pretrial release reform by releasing individuals based on individualized risk, rather than how much money the individual has.[219]

Currently, Wisconsin is facing a $280 million budget shortfall,[220] and the government is looking towards significant budget cuts throughout state, including to the University of Wisconsin System.[221] Meanwhile, Wisconsin has more than two thousand individuals sitting in pretrial detention throughout state jails.[222] These individuals could be

214. *See id.*

215. *See id.*

216. *See* LEVIN, *supra* note 100, at 10–11.

217. *See supra* note 126.

218. *See supra* note 116.

219. Kentucky is the only state that both prohibits commercial bail bonds and requires a pretrial risk assessment. *See supra* notes 126, 128.

220. Scott Bauer, *Wisconsin's 2-Year Budget Hole Forecast at up to $2 Billion*, POST CRESCENT (Jan. 24, 2015, 9:28 AM), http://www.postcrescent.com/story/news/2015/01/24/wisconsins-year-budget-hole-forecast-billion/22269873/.

221. Pat Schneider, *UW Alums Line Up on Both Sides of Scott Walker's Proposed Budget Cuts*, CAP. TIMES (Mar. 16, 2015, 9:30 AM), http://host.madison.com/news/local/writers/pat_schneider/uw-alums-line-up-on-both-sides-of-scott-walker/article_6088f76b-d3f6-53af-a6ce-a234f7cb8a38.html.

222. *See supra* Part III.C.

safely released before trial, saving Wisconsin millions of dollars.[223] Implementing this amendment is a simple way to provide judges more clarity and assistance in safely releasing individuals before trial, thereby eliminating the preventable costs of unnecessarily detaining individuals before trial.

223. *See supra* text accompanying note 177.