JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

Request for ADA accommodations should be made at least three business days before the meeting and directed to: JCCAccessCoordinator@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

NOTICE AND AGENDA OF OPEN MEETING

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1) and (e)(1))

THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS

THIS MEETING IS BEING RECORDED

Date:	December 13, 2018
Time:	12:15-1:15 p.m.
Public Call-in Number:	877-820-7831; Passcode; passcode 4133250 (Listen Only)

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Members of the public seeking to make an audio recording of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to forum@jud.ca.gov.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Approval of Minutes

Approve minutes of the October 11, 2018, Tribal Court–State Court Forum meeting.

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting only in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Ann Gilmour. Only written comments received by 12:15 p.m. on December 12, 2018 will be provided to advisory body members prior to the start of the meeting.

III. INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

Info 1

Cochairs Report

- Approval of Minutes for October 11, 2018 Meeting
- Plan for February 28, 2019 In Person Meeting

Info 2
Federal Court – Power Act Collaboration
Hon. Edward J. Davila, United States District Judge, Northern District of California

Info 3
Missing and Murdered Indigenous Women & Girls – Report from the Urban Indian Health Institute
Ms. Annita Lucchesi (Southern Cheyenne), Ph.D.- Candidate & Program Researcher, Urban Indian Health Institute

Info 4
Bail Reform and Development of Risk Assessment Tools
Eve Hershcopf, Attorney, Judicial Council Criminal Justice Services
Hon. Hilary A. Chittick, Judge, Superior Court of California, County of Fresno

Info 5
Recent and Upcoming Conferences
Vida Castaneda, Senior Analyst, Judicial Council Center for Families, Children & the Courts

IV. ADJOURNMENT

Adjourn

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

October 11, 2018
12:15-1:15 p.m.

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair,* Hon. Erin Alexander, Hon. April Attebury, Hon. Leonard Edwards(Ret.), Hon. Patricia Guerrero, Ms. Heather Hostler, Hon. Mark Juhas, Hon. Lester Marston, Hon. Mark Radoff, Hon. David Riemenschneider, Hon. Michael Sachs, Hon. Cindy Smith, Ms. Christina Snider, Hon. John Sugiyama, Hon. Sunshine Sykes, and Hon. Juan Ulloa
Advisory Body Members Absent:	*Hon. Susanne Kingsbury, Co-chair,* Hon. Richard Blake, Hon. Hilary A. Chittick, Hon. Gail Dekreon, Hon. Kristina Kalka, Hon. Lawrence C. King, Hon. William Kockenmeister, Hon. Patricia Lenzi, Hon. Devon Lomayesva, Hon. Gilbert Ochoa, Hon. Robert Trentacosta, Hon. Claudette White, Hon. Christine Williams, and Hon. Joseph Wiseman
Others Present:	Ms. Kimberly Bushard, Ms. Vida Castaneda, Ms. Charlene Depner, Ms. Ann Gilmour, and Ms. Joy Ricardo

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:18 p.m.

Approval of Minutes
The Forum approved the August 16, 2018 meeting minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–5)

Info 1
CoChairs Report

- *Review 2018-2019 Forum Meeting Dates Schedule*
  The in-person Forum meeting will be held on February 28, 2019. Please reserve the date. Judicial Council staff will email a meeting reminder to all members.
- *Update on Advisory Committee Representative Appointments*
  The Chief Justice approved all appointments for the state court judges and liaisons for committees identified per Rule 10.60. As a result, we have several new members joining the Forum.
- *Welcome New Members*
  Judge Abinanti welcomes new and returning members. She remarks that the relationships between the tribal court and state courts systems has gotten stronger over the years and major accomplishments have been achieved.
  Judge Suzanne Kingsbury, a longstanding member of the Forum, will serve as our new Forum cochair along with Judge Abinanti. Judge Kingsbury replaces Justice Perluss as

Forum cochair. Unfortunately, Judge Kingsbury could not attend this meeting due to a scheduling conflict.

Info 2
Update on the Work of the California Department of Social Services, Office of Tribal Affairs
Presenter: Heather Hostler, Director, California Department of Social Services' Office of Tribal Affairs (OTA)
Ms. Hostler provided information about her background and vast experience working with tribes prior to joining the Office of Tribal Affairs in July 2017. Her current staffing consists of two analysts, and a consultant who serves as a subject matter expert on tribal affairs. Ms. Hostler shared OTA's mission statement and explained that the OTA serves as an advisor to leadership throughout CDSS on the best practice strategies to use when working with tribal governments. The office will also coordinate the work of all divisions of CDSS and collaborate with counties on issues that affect tribes.

She and her staff are working on developing tribal engagement strategies, engagement of core stakeholders, ways to improve data collection and use it more effectively. Ms. Hostler has been meeting with tribes to identify their priorities and the level of engagement with county governments. The OTA participated in the tribal consultation summit this Summer and consulted on tribal engagement issues. The OTA is developing a tribal advisory committee which will meet at the end of November. Members of the committee will include tribal representatives, CDSS, agency partners, state and federal partners.

The OTA has been very involved in legislation that impacts tribes:
- AB3176 -This bill incorporates 2016 BIA regulations into California's statutory framework governing the ICWA.
- OTA supported a bill that would give CDSS the authority to provide startup money to tribes who participate in the Title IV-E programs

Regarding the recent decision in Brackeen vs. Zinke a US District court case ruling the ICWA unconstitutional, CDSS has issued a statement about this decision that is posted on the CDSS website. OTA will continue to monitor the case as it makes its way through the court system.

For more information on the work of OTA, visit the website.

Info 3
Final Legislative and Rules Update
Presenters: Ann Gilmour, Attorney, Judicial Council Center for Families, Children & the Courts (CFCC)
Staff provided an update on legislation and rules and forms of interest to the Forum:

AB 3176 was one of several bills related to the Indian Child Welfare Act (ICWA) that was supported by the Judicial Council on the recommendation of both the Forum and the Family and Juvenile Law Advisory Committee. This bill conforms the California Welfare and Institutions Code to the requirements of the federal regulations and guidelines concerning the ICWA. The bill was signed by the Governor on September 27, 2018.

AB 3047 was another ICWA related bill supported by the Council on the recommendation of the Forum and Fam/Juv. This bill amends section 70617 of the Government Code to exempt out of state attorneys wishing to appear pro hac vice to represent tribes in cases governed by the ICWA from the $500.00 court filing fee. This bill was signed by the Governor on September 14, 2018.

AB 3076 was the other ICWA related bill. This bill would have required the State Bar to make grants to tribal legal services programs to represent tribes in ICWA cases. This bill did not receive the appropriation that it needed, and it died.

AB 880 was not a bill that the Forum had previously considered. This bill, The Tribal Nation Grant Fund was signed by the Governor on September 27, 2018. This bill will establish the Office of the Governor's Tribal Advisor within the office of the Governor. This bill will also establish a fund from which grants will be made to eligible federally recognized tribes in California for self-governance purposes including supporting for compliance with the ICWA and support of tribal courts.

Rules regarding *Remote Access to Electronic Records* was approved by the Judicial Council on September 20, 2018. This proposal originated from the Information Technology Advisory Committee. The Forum provided input on the treatment of tribes as governmental entities with a right of remote access.

Amendment to California Rules of Court, *Rule 9.40* was approved by the California Supreme Court on September 26, 2018. It will become effective January 1, 2019.

Info 4
Youth Reinvestment Grants
Presenter: Kimberly Bushard, Field Representative, Corrections Planning & Grants Program Division, Board of State & Community Corrections
Ms. Bushard shared information about two grants that will be available early 2019. The first is the Title II Formula grant dedicated to Tribal Youth Programs. This grant provides support to programs operated by federally recognized tribal governments that serve at-risk youth. The second grant is the Youth Reinvestment Grant program. It was established in June 2018 and will award three percent of the entire $35 million grant ($1.1 million) to Indian tribes to support the implementation of diversion programs for Indian children, using trauma informed, community-based and health-based services. An advisory committee has been created to establish criteria for allocating funds to tribes over a three-year grant period.

Info 5
Recent and Upcoming Conferences
Presenter: Vida Castaneda, Senior Analyst, Judicial Council CFCC

- Vida thanked those who attended the annual Native American Day event held at the Capitol on September 28th. It was an exciting event that had an array of exhibitors, traditional demonstrations, dancing, singing and incredible speakers.
- The16th National Indian Nations Conference will be held in Coachella Valley, California on the reservation of the Agua Caliente Band of Cahuilla Indians from December 5-7, 2018. Pre-Conference Institutes will be held on Tuesday, December 4, 2018. The theme is "**Braiding Strength, Hope, and Healing for the Path Forward."** This national conference provides opportunities for tribal, state, and federal participants to share knowledge,

experiences, and ideas for developing and improving strategies and programs that serve the unique needs of crime victims in Indian Country. For further information or if you have any questions, please visit the conference website. The website also contains information on lodging, registration, the agenda, and scholarships. Hotel rooms often run out quickly, so we urge you to reserve your rooms soon.

- For more information on upcoming webinars or out of state conferences, please refer to our most recent e-update newsletter or feel free to reach out to Vida Castaneda who would be happy to assist in locating for you.

Next Forum call is December 13, 2018.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:13 p.m.

Pending approval by the advisory body on December 13, 2018.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

September 11, 2018

MEMORANDUM

To: Chief Judges, United States District Courts

From: James C. Duff

RE: PUBLIC LAW 115-237, THE POWER ACT **(INFORMATION)**

On September 4, 2018, the President signed S. 717, the "Pro bono Work to Empower and Represent (POWER) Act of 2018" (P. L. 115-237). Under the POWER Act:

- The chief judge in each judicial district, "or his or her designee," must "lead not less than one public event, in partnership with a State, local, tribal, or territorial domestic violence service provider or coalition and a State or local volunteer lawyer project, promoting pro bono legal services as a critical way in which to empower survivors of domestic violence, dating violence, sexual assault, and stalking and engage citizens in assisting those survivors."

- "The chief judge, or his or her designee, for a judicial district that contains an Indian tribe or tribal organization" must host another such event biennially "in partnership with an Indian tribe or tribal organization."

- Notwithstanding that most domestic violence cases proceed in state court, chief judges are required to "maximize the local impact of the event and the provision of access to high-quality pro bono legal services by survivors of domestic violence, dating violence, sexual assault, and stalking." (No further explanation of the requirement for this effort is provided.)

- By October 30 of each year, each chief judge must send the AO Director an annual report "detailing each public event conducted" under the Act during the previous fiscal year.

- In turn, the Director must "submit to Congress a compilation and summary of each [chief judge's] report . . . includ[ing] an analysis of how each public event meets the goals set forth in this Act, as well as suggestions on how to improve future public events."

- "The Administrative Office of the United States Courts shall use existing funds to carry out the requirements of this Act."

- No funds are authorized for the courts to comply with the POWER Act.

We raised serious concerns about this legislation with Congress as soon as we became aware that it was altered to apply to our judges. As originally introduced and passed by the Senate in August 2017, the POWER Act placed these unfunded mandates on the Department of Justice and the U.S. attorneys. The bill was pending in the House of Representatives for almost one year. On July 17, 2018, without consulting or even notifying the Judiciary, the House passed the bill with a floor amendment by Judiciary Committee Chairman Bob Goodlatte (R-VA) transferring these burdens to the Judiciary. Despite the best efforts of individual judges and the Administrative Office's Office of Legislative Affairs, on August 15, 2018, the Senate passed the POWER Act with Chairman Goodlatte's amendment. Attached please see my letter dated July 26, 2018.

The Administrative Office will engage in a legal analysis of the implementation of this new law and will advise the courts and, as appropriate, the Judicial Conference within the next few days with further suggestions.

Attachment

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

July 26, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write as Director of the Administrative Office of the United States Courts (AO) regarding S. 717, the POWER Act, which previously was referred to your Committee. We agree with the importance of legal representation for domestic violence victims, but we are concerned that the POWER Act will not result in any appreciable increase in pro bono legal services. The overwhelming majority of domestic violence cases, and related civil actions for restraining orders, proceed in state court; there is rarely federal jurisdiction. The Federal Judiciary was not consulted about this legislation, nor given an opportunity to review any drafts. My staff was not aware of S. 717 in its current form until it came to the floor of the House of Representatives. Consequently, we may not yet have identified all of the problems that could arise from its implementation.

As it was amended on the House floor, S. 717 requires the chief judge for every judicial district – of which there are 94 – to lead annual "empowerment events" to encourage lawyers in private practice to represent pro bono "survivors of domestic violence, dating violence, sexual assault, and stalking." Chief judges whose districts include Indian tribes and tribal organizations are required to hold similar events biennially regarding Indian or Alaska Native victims.[1] Every chief judge must report annually to the AO Director "detailing each public event conducted." The AO Director then must "submit to Congress a compilation and summary of each [chief judge's] report," including "an analysis of how each public event meets the goals set forth in this Act, as well as suggestions on how to improve future public events."

Federal court civil litigators, who are the lawyers most likely to be reached by the "empowerment events" held in federal court as envisioned in the bill, often have a very specialized practice and are unlikely to have substantive experience in this specific field of state law. Given our interest in ensuring that persons are well represented in the judicial system, we

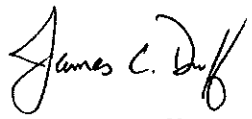
[1] As the bill is currently drafted, the annual events requirement would expire after four years; the tribal events requirement would not expire.

are concerned that S. 717 as written will not produce the results we all would like to see achieved.

Finally, the bill explicitly states that the AO "shall use existing funds to carry out the requirements of this Act." While requiring federal district courts to lead empowerment events may not yield much benefit for survivors of domestic violence, it will require the Federal Judiciary to expend resources, both to convene the required events and to meet the bill's reporting requirements. Section 5 notwithstanding, if S. 717 is enacted, then the Federal Judiciary may need to seek additional appropriations from Congress.

Thank you for considering our views on S. 717. If we may be of further assistance to you in this or any other matter, please do not hesitate to contact me or our Office of Legislative Affairs at (202) 502-1700.

Sincerely,



James C. Duff
Director

cc: Honorable Mitch McConnell

Identical letter sent to: Honorable Dianne Feinstein

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 25, 2018

MEMORANDUM

To: Chief Judges, United States District Courts

From: James C. Duff

RE: IMPLEMENTATION OF THE POWER ACT, PUBLIC LAW 115-237
(INFORMATION)

As a follow-up to my memorandum of September 11, 2018, the Administrative Office has developed suggestions on complying with the Pro bono Work to Empower and Represent (POWER) Act of 2018, P. L. 115-237.

- **Annual Requirement:** The chief judge in each judicial district, or his or her designee, must lead at least one public event, "in partnership with a State, local, tribal, or territorial domestic violence service provider or coalition and a State or local volunteer lawyer project, promoting pro bono legal services as a critical way in which to empower survivors of domestic violence, dating violence, sexual assault, and stalking, and engage citizens in assisting those survivors." The public event must be held not later than one year after the date of enactment and annually thereafter for four years. **The first such annual event must occur by September 4, 2019. This requirement expires in 2023.**

- **Requirement for Judicial Districts with an Indian Tribe or Tribal Organization:** The chief judge, or his or her designee, must lead at least one public event specifically "in partnership with an Indian tribe or tribal organization with the intent of increasing the provision of pro bono legal services for Indian or Alaska Native victims of domestic violence, dating violence, sexual assault, and stalking" **every two years. According to the legislative history of the statute, this event must be in addition to the annual event.**

- **Organization of Events:** The Administrative Office is available to assist district courts with implementing the requirements of the POWER Act in ways that minimize any disruption to court operations or the administration of justice. Chief judges may, for example, consider incorporating POWER Act events into current programs or holding the events in coordination with state/local bar programs, judicial conferences to which members of the bar are invited, or with the state courts.

- **Ethics:** To avoid any appearance of impropriety or partiality, chief judges may wish to exercise their discretion under the law to organize events that promote and encourage members of the bar to provide pro bono legal services in a wide variety of areas. By expanding these events to include other causes in addition to representing survivors of domestic violence, dating violence, sexual assault, and stalking, chief judges can avoid any ethical concerns that may result from a judge's expression of support for a specific group, while still meeting the requirements of the law.

- **Gifts to the Judiciary:** Any offers from state, local, or private entities to donate services or property to the Judiciary for the purpose of aiding or facilitating events held pursuant to the POWER Act should be sent to the General Counsel of the Administrative Office for review. The Judiciary does not have the legal authority to retain gifts of money for use in carrying out activities authorized under the POWER Act. *See Guide to Judiciary Policy*, Vol. 13, Ch. 3, § 310.50(f).

- **Reporting Requirement:** Each chief judge is required to submit an annual report to me "detailing each public event conducted" under the POWER Act during the previous fiscal year by October 30. These reports should include the number of events conducted in the prior fiscal year, the organizations that participated in the events, and the approximate number of attendees at each event. **The first report is due by October 30, 2019.** I have asked the Office of the Deputy Director to develop a process and mechanism for the submission of these reports.

- **Funding:** Congress did not specifically appropriate funding for the purpose of carrying out activities under the POWER Act. Instead, it directed the Administrative Office to use "existing funds" to carry out the law's requirements. Fiscal year 2018 appropriations, however, were not legally available for activities later authorized in the POWER Act. The Judiciary is currently operating under a continuing resolution, which also does not provide funding for POWER Act activities. The Office of the General Counsel has advised that the Judiciary will not have funding legally available to carry out the POWER Act's requirements until Congress takes other legislative steps to provide funding, such as enacting the full-year annual appropriation for fiscal year 2019. While current funding is not legally available for expenditures, the Administrative Office advises that courts should <u>not</u> use local attorney admission funds to carry out the requirements of the POWER Act because the later enactment of

a full-year appropriation may result in an augmentation of your court's fiscal year 2019 funds. *See Guide to Judiciary Policy*, Vol. 4, Ch. 6, § 670.30.10. Once final fiscal year 2019 appropriations are enacted, courts must fund POWER Act expenditures through their local court allotments. If local resources are not sufficient, the court may request supplemental funding from the Budget Division.

If you have any questions about this memorandum, please contact Michael Delman in the Office of the General Counsel at 202-502-1100 or via email at Michael_Delman@ao.uscourts.gov.

cc: District Court Executives
Clerks, United States District Courts

Suspend the Rules and Pass the Bill, S. 717, With an Amendment

(The amendment strikes all after the enacting clause and inserts a new text)

115TH CONGRESS
1ST SESSION

S. 717

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 2017
Referred to the Committee on the Judiciary

AN ACT

To promote pro bono legal services as a critical way in which to empower survivors of domestic violence.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Pro bono Work to Empower and Represent Act of 2018'' or the ''POWER Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Extremely high rates of domestic violence, dating violence, sexual assault, and stalking exist at the local, State, tribal, and national levels and such

violence or behavior harms the most vulnerable members of our society.

(2) According to a study commissioned by the Department of Justice, nearly 25 percent of women suffer from domestic violence during their lifetime.

(3) Proactive efforts should be made available in all forums to provide pro bono legal services and eliminate the violence that destroys lives and shatters families.

(4) A variety of factors cause domestic violence, dating violence, sexual assault, and stalking, and a variety of solutions at the local, State, and national levels are necessary to combat such violence or behavior.

(5) According to the National Network to End Domestic Violence, which conducted a census including almost 1,700 assistance programs, over the course of 1 day in September 2014, more than 10,000 requests for services, including legal representation, were not met.

(6) Pro bono assistance can help fill this need by providing not only legal representation, but also access to emergency shelter, transportation, and childcare.

(7) Research and studies have demonstrated that the provision of legal assistance to victims of domestic violence, dating violence, sexual assault, and stalking reduces the probability of such violence or behavior reoccurring in the future and can help survivors move forward.

(8) Legal representation increases the possibility of successfully obtaining a protective order against an attacker, which prevents further mental and physical injury to a victim and his or her family, as demonstrated by a study that found that 83 percent of victims represented by an attorney were able to obtain a protective order, whereas only 32 percent of victims without an attorney were able to do so.

(9) The American Bar Association Model Rules include commentary stating that ''every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer''.

(10) As leaders in their legal communities, judges in district courts should encourage lawyers to provide pro bono resources in an effort to help vic-

tims of such violence or behavior escape the cycle of abuse.

(11) A dedicated army of pro bono attorneys focused on this mission will inspire others to devote efforts to this cause and will raise awareness of the scourge of domestic violence, dating violence, sexual assault, and stalking throughout the country.

(12) Communities, by providing awareness of pro bono legal services and assistance to survivors of domestic violence, dating violence, sexual assault, and stalking, will empower those survivors to move forward with their lives.

SEC. 3. DISTRICT COURTS TO PROMOTE EMPOWERMENT EVENTS.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, and annually thereafter for a period of 4 years, the chief judge, or his or her designee, for each judicial district shall lead not less than 1 public event, in partnership with a State, local, tribal, or territorial domestic violence service provider or coalition and a State or local volunteer lawyer project, promoting pro bono legal services as a critical way in which to empower survivors of domestic violence, dating violence, sexual assault, and stalking and engage citizens in assisting those survivors.

(b) DISTRICTS CONTAINING INDIAN TRIBES AND TRIBAL ORGANIZATIONS.—During each 2-year period, the chief judge, or his or her designee, for a judicial district that contains an Indian tribe or tribal organization (as those terms are defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)) shall lead not less than 1 public event promoting pro bono legal services under subsection (a) of this section in partnership with an Indian tribe or tribal organization with the intent of increasing the provision of pro bono legal services for Indian or Alaska Native victims of domestic violence, dating violence, sexual assault, and stalking.

(c) REQUIREMENTS.—Each chief judge shall—

(1) have discretion as to the design, organization, and implementation of the public events required under subsection (a); and

(2) in conducting a public event under subsection (a), seek to maximize the local impact of the event and the provision of access to high-quality pro bono legal services by survivors of domestic violence, dating violence, sexual assault, and stalking.

SEC. 4. REPORTING REQUIREMENTS.

(a) REPORT TO THE ATTORNEY GENERAL.—Not later than October 30 of each year, each chief judge shall

submit to the Director of the Administrative Office of the United States Courts a report detailing each public event conducted under section 3 during the previous fiscal year.

(b) REPORT TO CONGRESS.—

(1) IN GENERAL.—Not later than January 1 of each year, the Director of the Administrative Office of the United States Courts shall submit to Congress a compilation and summary of each report received under subsection (a) for the previous fiscal year.

(2) REQUIREMENT.—Each comprehensive report submitted under paragraph (1) shall include an analysis of how each public event meets the goals set forth in this Act, as well as suggestions on how to improve future public events.

SEC. 5. FUNDING.

The Administrative Office of the United States Courts shall use existing funds to carry out the requirements of this Act.

Missing and Murdered Indigenous Women & Girls – Report from the Urban Indian Health Institute available at: http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf

H-4360.1

SUBSTITUTE HOUSE BILL 2951

State of Washington 65th Legislature 2018 Regular Session

By House Community Development, Housing & Tribal Affairs (originally sponsored by Representatives McCabe, Gregerson, Stambaugh, Stanford, Walsh, Reeves, Dye, Barkis, Frame, Haler, Jinkins, Kloba, Ormsby, Valdez, and Peterson)

READ FIRST TIME 02/02/18.

AN ACT Relating to increasing services to report and investigate missing Native American women; creating new sections; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that Native American women experience violence at much higher rates than other populations. A recent federal study reported that Native American women face murder rates over ten times the national average. However, many of these crimes often are unsolved and even unreported because there are also very high rates of disappearances among Native American women. Furthermore, there is no comprehensive data collection system for reporting or tracking missing Native American women. This gap in reporting and investigation places Native American women even more vulnerable to violence.

The legislature further finds that although violence against Native American women has been a neglected issue in society, there is a growing awareness of this crisis of violence against Native American women, and a recognition of the need for the criminal justice system to better serve and protect Native American women. The legislature intends to find ways to connect state, tribal, and

federal resources to create partnerships in finding ways to solve this crisis facing Native American women in our state.

NEW SECTION. **Sec. 2.** (1) The Washington state patrol must conduct a study to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native American women in the state. The state patrol must work with the governor's office of Indian affairs to convene meetings with tribal law enforcement partners to determine the scope of the problem, identify barriers, and find ways to create partnerships to increase reporting and investigation of missing Native American women. Collaboration with federally recognized tribes must be conducted in respect for government-to-government relations. The state patrol also must work with the federal department of justice to increase information sharing and coordinating resources that can focus on reporting and investigating missing Native American women in the state.

(2) By June 1, 2019, the state patrol must report to the legislature on the results of the study, including data and analysis of the number of missing Native American women in the state, identification of barriers in providing state resources to address the issue, and recommendations, including any proposed legislation that may be needed to address the problem.

(3) This section expires December 31, 2019.

--- END ---

H-4360.1

SUBSTITUTE HOUSE BILL 2951

State of Washington 65th Legislature 2018 Regular Session

By House Community Development, Housing & Tribal Affairs (originally sponsored by Representatives McCabe, Gregerson, Stambaugh, Stanford, Walsh, Reeves, Dye, Barkis, Frame, Haler, Jinkins, Kloba, Ormsby, Valdez, and Peterson)

READ FIRST TIME 02/02/18.

AN ACT Relating to increasing services to report and investigate missing Native American women; creating new sections; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that Native American women experience violence at much higher rates than other populations. A recent federal study reported that Native American women face murder rates over ten times the national average. However, many of these crimes often are unsolved and even unreported because there are also very high rates of disappearances among Native American women. Furthermore, there is no comprehensive data collection system for reporting or tracking missing Native American women. This gap in reporting and investigation places Native American women even more vulnerable to violence.

The legislature further finds that although violence against Native American women has been a neglected issue in society, there is a growing awareness of this crisis of violence against Native American women, and a recognition of the need for the criminal justice system to better serve and protect Native American women. The legislature intends to find ways to connect state, tribal, and

federal resources to create partnerships in finding ways to solve this crisis facing Native American women in our state.

NEW SECTION. **Sec. 2.** (1) The Washington state patrol must conduct a study to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native American women in the state. The state patrol must work with the governor's office of Indian affairs to convene meetings with tribal law enforcement partners to determine the scope of the problem, identify barriers, and find ways to create partnerships to increase reporting and investigation of missing Native American women. Collaboration with federally recognized tribes must be conducted in respect for government-to-government relations. The state patrol also must work with the federal department of justice to increase information sharing and coordinating resources that can focus on reporting and investigating missing Native American women in the state.

(2) By June 1, 2019, the state patrol must report to the legislature on the results of the study, including data and analysis of the number of missing Native American women in the state, identification of barriers in providing state resources to address the issue, and recommendations, including any proposed legislation that may be needed to address the problem.

(3) This section expires December 31, 2019.

--- END ---

Cancel Print

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

SB 10: Pretrial Release and Detention

OVERVIEW

Senate Bill 10 (Hertzberg, Stats. 2018, ch. 244) authorizes a change to California's pretrial release system from a money-based system to a risk-based release and detention system.

SB 10 assumes that a person will be released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court.

Implementation date: October 1, 2019

WHAT'S NEW

November 8, 2018 - Invitation to Comment

The Criminal Law Advisory Committee proposes adoption of two new California Rules of Court: rule 4.10, which sets forth the proper use of pretrial risk assessment information, and rule 4.40, which addresses review and release standards for Pretrial Assessment Services for persons assessed as medium risk. These proposed rules are intended to fulfill the Judicial Council's obligation under Penal Code section 1320.24(a) to adopt rules and forms, as needed, to implement specific elements of Senate Bill 10. The period for public comment on these rules ends Friday, December 14, 2018. View the Invitation to Comment - SP18-23.

WHAT DOES SB 10 DO?

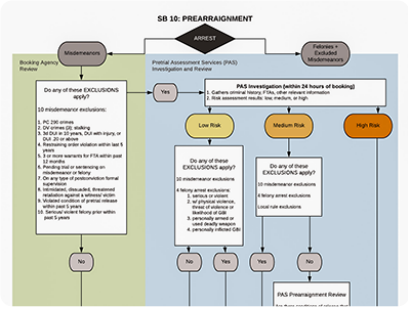
Creates series of categories of persons and offenses:

- Different levels of review
  - Misdemeanors - Most are cited and released within 12 hours
  - Greater scrutiny as seriousness of the offense increases
- Detention is based on risk, not lack of money
- Eliminates cash bail or bail bonds
- When there is very strong evidence that no conditions of release can reasonably assure public safety, a defendant can be detained pretrial, regardless of financial resources

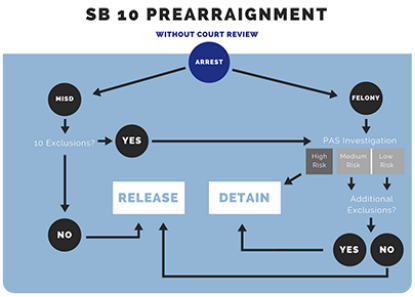
Important Information on SB 10

SB 10 Overview Updated November 8, 2018
Summary of Release and Detention Process Under SB 10

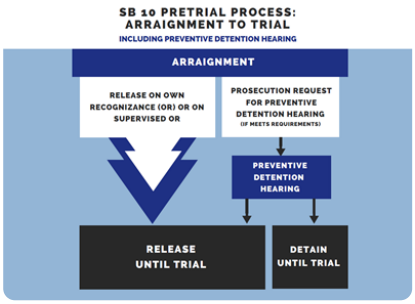
Overview of the Pretrial Process Under SB 10



Flowchart – Prearraignment Process under SB 10 – Detailed



Infographic - Prearraignment Process under SB 10 - Overview



Infographic - Pretrial Process under SB 10 - Arraignment to Trial

FREQUENTLY ASKED QUESTIONS

expand all **collapse all**

Does SB 10, the pretrial reform legislation, mean a judge has less discretion to decide who to detain or release before trial?

Under SB 10, judges will have the same discretion to release or detain individuals pretrial as they do now under the current money bail system. SB 10 establishes Pretrial Assessment Services that will gather information and provide reports to aid judges in the decision about whether a defendant is a risk to the public or likely to return to court if released before trial. In addition, Pretrial Assessment Services will recommend conditions of release. Judges will not be bound by the Pretrial Assessment Services reports and recommendations, but those will serve to inform judges' decisions. Judges remain the final authority in making pretrial release or detention decisions.

Under SB 10, will an algorithm decide who is eligible for release before trial?

No. The risk assessment tools that Pretrial Assessment Services uses contain algorithms that weigh various factors to measure the level of a person's risk to reoffend or fail to appear if released pretrial. Although Pretrial Assessment Services will have authority to release low and some medium-risk individual before arraignment, judicial officers remain the final authority in making pretrial release or detention decisions. The risk-level information obtained from the risk assessment tool, combined with the recommendation provided by Pretrial Services, will inform the judge's decision. But in every case the judicial officer can override the recommendation.

What are the benefits of a Pretrial Assessment System?

The goal of a risk assessment-based pretrial system is to release people from custody as early as possible in the process, and with the least restrictive conditions that will help to ensure their return to court and protect public safety, and to preventively detain only those for whom no set of conditions will assure public safety or return to court. While national data is limited, jurisdictions that have implemented robust risk

assessment-based pretrial systems report low rates of re-arrest for those released as well as low rates of failure to appear. For example, in Kentucky, the Pretrial Services agency recommends release on own recognizance in 89% of cases involving low-risk defendants, in 60% of moderate-risk cases, and in 50% of high-risk cases. For those high-risk defendants who are released, 71% do not have a failure to appear and 86% are not rearrested during the pretrial period. Many low and moderate-risk cases require only minimal monitoring, such as court date reminders and monthly check-ins, while higher risk cases benefit from increased supervision which can include more frequent check-ins, drug testing, and electronic monitoring.

What California counties have used pretrial assessment systems?

A 2015 survey of counties indicated that 46 of the 58 California counties have some type of pretrial program, and 70% established their programs in the past five years. However, Santa Clara, San Francisco, Humboldt, Riverside, Imperial, and Santa Cruz counties have had pretrial programs for many years. At least 49 counties use a type of pretrial risk assessment tool that provides judges with information about the risk of releasing a defendant before trial.

What percentage of the people held in California jails are unsentenced?

Currently, approximately two-thirds of California's jail population—or nearly 48,000 people—are unsentenced, according to the Board of State and Community Corrections' annual Jail Profile Survey. This includes both people who are eligible for release but have not (or cannot) post money bail and those who are not eligible for release.

What is the size of California's bail industry?

In 2016, there were approximately 3,200 licensed bail agents, 155 bail agencies, and 17 sureties conducting business in California, according to the California Department of Insurance (CDI). A CDI report from 2011-2013 found bail agents each year posted an average of 205,000 bail bonds and collected an average of $308 million in non-refundable premium fees from defendants, their friends and families.

Have other U.S. states implemented bail reform?

In recent years, New Jersey and New Mexico instituted sweeping reforms to limit or end money bail. For decades, Kentucky and Washington, D.C. have run systems that primarily rely on risk assessments with very limited use of money bail. Beyond these reforms, lawmakers in 44 states and Washington, D.C. enacted 118 new laws during 2016 addressing pretrial release and detention.

Pretrial Detention Reform

RECOMMENDATIONS TO THE CHIEF JUSTICE

PRETRIAL DETENTION REFORM WORKGROUP

OCTOBER 2017

Pretrial Detention Reform Workgroup

Hon. Brian J. Back, Cochair
Judge of the
Superior Court of California,
County of Ventura

Hon. Lisa R. Rodriguez, Cochair
Judge of the
Superior Court of California,
County of San Diego

Hon. Mark Boessenecker
Presiding Judge of the
Superior Court of California,
County of Napa

Mr. Alex Calvo
Court Executive Officer
Superior Court of California,
County of Santa Cruz

Hon. Arturo Castro
Judge of the
Superior Court of California,
County of Alameda

Hon. Hilary A. Chittick
Judge of the
Superior Court of California,
County of Fresno

Hon. George C. Eskin (Ret.)
Judge of the
Superior Court of California,
County of Santa Barbara

Hon. Scott M. Gordon
Judge of the
Superior Court of California,
County of Los Angeles

Hon. Teri L. Jackson
Presiding Judge of the
Superior Court of California,
County of San Francisco

Hon. Brian L. McCabe
Judge of the
Superior Court of California,
County of Merced

Hon. Serena R. Murillo
Judge of the
Superior Court of California,
County of Los Angeles

Hon. Risë Jones Pichon
Judge of the
Superior Court of California,
County of Santa Clara

Table of Contents

Executive Summary

The Chief Justice established the Pretrial Detention Reform Workgroup on October 28, 2016, to provide recommendations on how courts may better identify ways to make release decisions that will treat people fairly, protect the public, and ensure court appearances. In establishing the Workgroup, the Chief Justice recognized the central role of the courts.

The Chief Justice provided the following guiding principles for the Pretrial Detention Reform Workgroup:

- Pretrial custody should not occur solely because a defendant cannot afford bail.
- Public safety is a fundamental consideration in pretrial detention decisions.
- Defendants should be released from pretrial custody as early as possible based on an assessment of the risk to public safety and the risk for failing to appear in court.
- Mitigating the impacts of implicit bias on pretrial release decision-making should be considered.
- Reform recommendations should consider court and justice system partner resources.
- Nonfinancial release alternatives should be available.
- Consistent and feasible practices for making pretrial release, detention, and supervision decisions should be established.

During the course of its yearlong study, the Workgroup examined the complex issues involved in the current pretrial release and detention system. Members reviewed a wide variety of research and policy materials and heard presentations from state and national experts, justice system partner representatives, the commercial bail industry, state and local regulators, victim and civil rights advocacy organizations, California counties that have experience with pretrial services programs, and jurisdictions outside California that have undertaken pretrial reform efforts.

At the conclusion of this process, the Workgroup determined that California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.

With the Chief Justice's guiding principles as the framework, the Workgroup developed a set of 10 recommendations. These recommendations seek to achieve a just and fair pretrial release and detention system that balances the protection of public safety with the presumption of innocence and due process. The Workgroup recognizes that the release of any person before trial involves risk—as does every pretrial detention. The challenge is to minimize these risks while achieving the goals of maximizing public safety, court appearance, and release of individuals. With those goals in mind, the Workgroup submits the following recommendations to be considered and implemented as a whole:

1. Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.

Implement a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant's financial situation; and (2) provides judges with release options that are effective, varied, and fair alternatives to monetary bail.

2. Expand the use of risk-based preventive detention.

Expand the use of preventive detention to ensure that defendants will be detained pending trial in appropriate cases when public safety cannot be addressed through release conditions.

3. Establish pretrial services in every county.

Pretrial services maximize the safety of the community and minimize the risk of nonappearance at court proceedings. Pretrial services must be established in every county and must include the comprehensive use of a validated risk assessment instrument, as well as monitoring and supervision.

4. Use a validated pretrial risk assessment tool.

Use of validated risk assessment tools will provide valuable information to judges to help inform pretrial determinations regarding the defendant's likelihood of reoffending and returning to court, and assist the court in fashioning conditions or terms of pretrial release. Judicial officers must remain the final authority in making release or detention decisions and can override the assessment's recommendation when necessary to protect the public or in the interest of justice.

5. Make early release and detention decisions.

Release and detention decisions should be made early in the pretrial process. A pretrial system that gathers information about a defendant before arraignment will allow for prompt release and detention decision-making, facilitating the early release

of low-risk defendants and detaining, until arraignment, defendants who are unlikely to return to court or who pose a risk to public safety.

6. Integrate victim rights into the system.

The perspective of victims must be fully integrated into the pretrial process and the risks to their well-being addressed in pretrial decision-making. All crime victims have constitutional rights in California, including the right to be heard regarding any pretrial release decision, and their input is essential to a well-functioning system.

7. Apply pretrial procedures to violations of community supervision.

A significant portion of the jail population includes individuals accused of violating the terms and conditions of probation, mandatory supervision, postrelease community supervision, or parole. Legislation and rules of court must be adopted that consider the pretrial release and detention screening procedures for those defendants charged with a violation of supervision conditions.

8. Provide adequate funding and resources.

California's courts and local justice system partners must be fully funded to effectively implement a system of pretrial release and detention decision-making and supervision, with resources for new judges and court staff, local justice partner infrastructure, assessment tools, and training. Both significant initial investment of resources and ongoing funding are essential.

9. Deliver consistent and comprehensive education.

To achieve the goals of public safety and return to court, judges, court staff, local justice system partners, and the community must be educated on the development and implementation of a pretrial release and supervision system and provided with continuing education regarding both implicit and explicit bias to ensure that neither the pretrial system nor any type of assessment perpetuates bias. This education requires time, funding, and most importantly investment in and collaboration among all justice system partners.

10. Adopt a new framework of legislation and rules of court to implement these recommendations.

A structure will be sustainable only if it is built on a solid foundation. To undertake such comprehensive reform, this system must not be grafted onto the current complex statutory framework of monetary bail. Provisions currently in the California Constitution that presume release, permit preventive detention, and protect victims' rights will serve as the bedrock of a reformed pretrial system that balances public safety, release, and return to court. Comprehensive legislation and rules of court

should be adopted to create a system of release and detention that is efficient and does not impose excessive layers of procedural requirements.

If adopted, the reforms envisioned in these recommendations will make major and dramatic changes to California's criminal justice system and will affect the superior courts in every county and all of their justice system partners.

As with any comprehensive reform, it will be successful only if all three branches of California's government join together in its development, implementation, and maintenance. A foundation built on legislation, clear and directive court rules, and adequate and sustained resources with new funding streams is essential to the reform envisioned in these recommendations. These changes will help make California a safer place and the justice system more fair and effective.

CENTER
FOR
COURT
INNOVATION

Demystifying Risk Assessment

Key Principles and Controversies

Sarah Picard-Fritsche, Michael Rempel, Jennifer A. Tallon, Julian Adler, and Natalie Reyes

This publication was supported by Grant No. 2011-DC-BX-K002 awarded by the Bureau of Justice Assistance to the Center for Court Innovation. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the U.S. Department of Justice.

Acknowledgments

The authors are indebted to Julius Lang, Director of Training and Technical Assistance with the Center for Court Innovation, for his invaluable contributions to the conceptualization of this publication. We would also like to thank Elise Jensen, Annie Schachar, Matthew Watkins, Samiha Meah and Greg Berman, also from the Center for Court Innovation, for their comments and contributions to earlier drafts of the report. Finally, we are grateful to Alissa Huntoon and her colleagues at the Bureau of Justice Assistance for their ongoing commitment to bridging the research and practice communities in the criminal justice field.

2017

I. Introduction

As the national push to stem the tide of mass incarceration grows, state and local jurisdictions have increasingly adopted risk assessment tools in an effort to improve decision-making at key points, such as pretrial release, sentencing, or probation and parole case management.

Today, as many as 60 risk assessment tools are in use in jurisdictions across the United States. These tools are diverse in form, length, and content. The simplest tools rely exclusively on criminal records, while others add a short defendant interview, integrating the results into a single risk score. Still other tools constitute more comprehensive risk and need assessments that require a long interview. Beyond risk classification, these longer tools offer the benefit of assessing the severity of treatable needs that are often linked to criminal behavior ("criminogenic needs"). Ultimately, diversity in the current marketplace of risk assessments should be viewed positively, as different types of tools may be more appropriate depending on the "decision point" to which they are applied (e.g., pretrial release versus correctional supervision) and the specific goals of the jurisdiction adopting the tool.

A growing body of research suggests that high quality risk assessment yields more accurate estimates of risk for future crime, when compared with professional judgment alone.[1] Yet despite showing strong promise for improving decision-making and mitigating the effect of cognitive biases, risk assessment tools are controversial. Specifically, debates have emerged regarding: (1) the lack of transparency of some proprietary tools; (2) the potential for risk assessment to reproduce existing racial or ethnic biases in the justice system; and (3) the inherent challenges of applying risk classifications to individual cases based on group behavior.[2]

Several recent articles compare the accuracy of some prominent risk assessments and propose practical criteria for tool selection,[3] but to date there are few, if any, pieces that address the key "big picture" questions:

1. **What is risk assessment?** How is "risk" generally defined in the field? What is data-driven risk assessment? What kinds of risk factors are commonly found in risk assessment tools and how are risk classifications created?
2. **What are some strengths and downsides?** Can risk assessment reduce unnecessary incarceration, facilitate treatment, or otherwise improve criminal justice systems? What are the limitations of current risk assessment tools and their use?
3. **Why all the debate?** What underlies current controversies regarding the use of risk assessment in criminal justice?
4. **How can the benefits of risk assessment be maximized?** What are key principles to consider for the effective, legal, and ethical application of risk assessment tools in the criminal justice field?

This essay seeks to grapple with these questions, with an eye toward bridging the worlds of research and practice. Our goal is to provide an easy-to-read overview of the

latest social science (to the extent this is possible in a field that is rapidly evolving). Our intended audience is primarily practitioners and policymakers who want to gain a better understanding of the field and have real questions about whether and how to incorporate risk assessment into their daily practice.

School of Law
UNIVERSITY OF GEORGIA

UNIVERSITY OF GEORGIA
SCHOOL OF LAW

RESEARCH PAPER SERIES

Paper No. 2018-35 September 2018

BIAS IN, BIAS OUT

128 YALE L.J. __ (FORTHCOMING 2019).

SANDRA G. MAYSON
Assistant Professor of Law
University of Georgia School of Law
smayson@uga.edu

BIAS IN, BIAS OUT

Sandra G. Mayson[*]

ABSTRACT

Police, prosecutors, judges, and other criminal justice actors increasingly use algorithmic risk assessment to estimate the likelihood that a person will commit future crime. As many scholars have noted, these algorithms tend to have disparate racial impact. In response, critics advocate three strategies of resistance: (1) the exclusion of input factors that correlate closely with race, (2) adjustments to algorithmic design to equalize predictions across racial lines, and (3) rejection of algorithmic methods altogether.

This Article's central claim is that these strategies are at best superficial and at worst counterproductive, because the source of racial inequality in risk assessment lies neither in the input data, nor in a particular algorithm, nor in algorithmic methodology. The deep problem is the nature of prediction itself. All prediction looks to the past to make guesses about future events. In a racially stratified world, any method of prediction will project the inequalities of the past into the future. This is as true of the subjective prediction that has long pervaded criminal justice as of the algorithmic tools now replacing it. What algorithmic risk assessment has done is reveal the inequality inherent in all prediction, forcing us to confront a much larger problem than the challenges of a new technology. Algorithms shed new light on an old problem.

Ultimately, the Article contends, redressing racial disparity in prediction will require more fundamental changes in the way the criminal justice system conceives of and responds to risk. The Article argues that criminal law and policy should, first, more clearly delineate the risks that matter, and, second, acknowledge that some kinds of risk may be beyond our ability to measure without racial distortion—in which case they cannot justify state coercion. To the extent that we can reliably assess risk, on the other hand, criminal system actors should strive to respond to risk with support rather than restraint whenever possible. Counterintuitively, algorithmic risk assessment could be a valuable tool in a system that targets the risky for support.

* Assistant Professor of Law, University of Georgia School of Law. I am grateful for extremely helpful input from David Ball, Mehrsa Baradaran, Solon Barocas, Stephanie Bornstein, Kiel Brennan-Marquez, Bennett Capers, Nathan Chapman, Andrea Dennis, Sue Ferrere, Sean Hill, Mark Houldin, Gerry Leonard, Kay Levine, Anna Roberts, Hannah Sassaman, Andrew Selbst, Tim Schnacke, Megan Stevenson, and Stephanie Wykstra, as well as for thoughtful comments from fellow participants in the 2017 Southeastern Junior / Senior Faculty Workshop, CrimFest 2017 & 2018, and the 2017 and 2018 UGA / Emory Faculty Workshops.

TABLE OF CONTENTS

INTRODUCTION

"There's software across the country used to predict future crime. And it's biased against blacks."[1] So proclaimed an exposé by news outlet ProPublica in the summer of 2016. The story focused on a particular algorithmic tool, the COMPAS, but its ambition, and effect, was to stir alarm about the ascendance of algorithmic crime prediction overall.

The ProPublica story, *Machine Bias,* was emblematic of broader trends. The age of algorithms is upon us. Automated prediction programs now make decisions that affect every aspect of our lives. Soon they will drive our cars, but in the meantime they shape advertising, credit lending, hiring, policing – just about any governmental or commercial activity that has some predictive component. There is reason for this shift. Algorithmic prediction is profoundly more efficient, and often more accurate, than human judgment. It eliminates the irrational biases that contort so much of our decision-making. On the other hand, it has become abundantly clear that machines can discriminate.[2] Algorithmic prediction has the potential to perpetuate or amplify social inequality, all while maintaining the veneer of high-tech objectivity.

Nowhere is the concern with algorithmic bias more acute than in criminal justice. Over the last five years, criminal justice risk assessment has been spreading rapidly. In this context, "risk assessment" is shorthand for the actuarial measurement of some defined risk, usually the risk that the person assessed will commit future crime.[3] The concern with future crime is not new; police, judges, prosecutors, and probation and parole officers have long been tasked with making subjective determinations of dangerousness. The shift is from subjective to actuarial assessment.[4] With the rise of big data and bipartisan ambitions to be smart on crime, algorithmic risk assessment has taken the criminal justice system by storm. It is the lynchpin of the bail reform

[1] Julia Angwin *et al.*, *Machine Bias*, PROPUBLICA.COM (May 23, 2016), www.propublica.org /article/machine-bias-risk-assessments-in-criminal-sentencing.

[2] *See, e.g.*, VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018); SAFIYA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017).

[3] Most risk assessment tools, however, do not actually measure the likelihood of future crime commission, but instead the likelihood of future *arrest*, which is a poor proxy. *See infra* Part II.B.1.

[4] Parole boards have used risk assessment instruments since the 1920s, *see* BERNARD HARCOURT, AGAINST PREDICTION 7-18 (2007), but actuarial tools were hardly known in other parts of the criminal justice system until the last few years.

movement,[5] the cutting edge of policing,[6] and increasingly used in charging,[7] sentencing,[8] and to allocate supervision resources.[9] This development has sparked profound concern about the racial impact of risk assessment.[10] Given that algorithmic crime prediction tends to rely on factors heavily correlated with race, it appears poised to entrench the inexcusable racial disparity so characteristic of our justice system, and to dignify the cultural trope of black criminality with the gloss of science.

Thankfully, we have reached a moment in which the prospect of exacerbating racial disparity in criminal justice is widely understood to be unacceptable. And so, in this context as elsewhere, the prospect of algorithmic discrimination has generated calls for interventions to the predictive process to ensure racial equity. This raises the difficult question of what equality looks like. The challenge is that there are many possible metrics of racial equity in statistical prediction, and some of them are mutually exclusive.[11] The law provides no useful guidance about which to prioritize.[12] In the void it leaves, data scientists are exploring different statistical measures of equality and technical methods to achieve them.[13] Legal scholars have begun to weigh in.[14] Beyond the ivory tower, this debate is happening in courts,[15] city council chambers,[16] and community meetings.[17] The stakes are real. Criminal justice institutions must decide whether to adopt risk

[5] *See, e.g.*, Sheila Dewan, *Judges Replacing Conjecture With Formula for Bail*, N.Y. TIMES (July 26, 2015); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018); Megan T. Stevenson, *Assessing Risk Assessment in Action*, __ MINN. L. REV. (forthcoming 2018).

[6] *See, e.g.*, Selbst, *supra* note 2 at 113 ("…[P]redictive policing [is] a popular and growing method for police departments to prevent or solve crimes."); Letter from Jonathan Wroblewski, Director of the Office of Policy Legislation to Hon. Patti Saris, Chair of the U.S. Sentencing Comm'n 2 (July 29, 2014) [hereinafter DOJ Letter to U.S.S.C] (noting that "Predictive Policing—the use of algorithms that combine historical and up-to-the-minute crime information—is spreading").

[7] *See, e.g.*, Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705 (2016) (explaining "predictive prosecution" and exploring its "promise and perils").

[8] *See, e.g.*, Erin Collins, *Punishing Risk*, __ GEO. L. J. __ (forthcoming 2019); Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583 (2018).

[9] Issue Brief, Pew Ctr. on the States, Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders 2 (2011), www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2011/PewRiskAssessmentbriefpdf.pdf (describing growing use of risk assessment to allocate supervision resources).

[10] *See infra* Part I.A.

[11] *See infra* Part I.B.

[12] Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237, 237 (2015); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, __DUKE L.J.__ (forthcoming 2019).

[13] *See infra* Part I.C.

[14] Huq, *supra* note 13.

[15] *E.g.* State v. Loomis, 881 N.W.2d 749 (Wis. 2016).

[16] *E.g.* Philadelphia City Council Special Committee on Criminal Justice Reform, Interim Report Fall 2016: A Shift from Re-Entry to Pre-Entry 12, http://phlcouncil.com/wp-content/uploads/2016/11/SCFall2016InterimReport.pdf ("During prior public hearings, members of the Special Committee raised concerns that the data used in a risk assessment tool's calculations may be inherently biased, because of the decades of disparate impact and racial imbalance within the criminal justice system.").

[17] *E.g.*, Chris Palmer & Claudia Irizarry-Aponte, *Dozens of Speakers at Hearing Assail Pa. Plan to Use Algorithm in Sentencing*, PHILLY.COM (June 6, 2018), http://www.philly.com/philly/news/crime/philadelphia-pennsylvania-algorithm-sentencing-public-hearing-20180606.html.

assessment tools and if so, what measure of equality to demand that those tools fulfill. They are making these decisions as I write.[18]

Among racial justice advocates engaged in the debate, a few common themes have emerged.[19] The first is a demand that race, and factors that correlate heavily with race, be excluded as input variables for prediction. The second is a call for "algorithmic affirmative action" to equalize adverse predictions across racial lines. To the extent that scholars have grappled with the necessity of prioritizing a particular equality measure, they have mostly urged stakeholders to demand equality in the false-positive and false-negative rates for each racial group, or in the overall rate of adverse predictions across groups ("statistical parity"). Aziz Huq offers a more abstract prescription, proposing that we should design each algorithm to ensure that it imposes no net burden on communities of color, which might require some algorithms to set different thresholds for risk classes by race.[20] Lastly, critics argue that, if algorithmic risk assessment cannot be made meaningfully race-neutral, the criminal justice system must reject algorithmic methods altogether.

This Article contends that these demands are at best superficial and at worst counter-productive, because they ignore the real source of the problem: the nature of prediction itself. All prediction functions like a mirror. Its premise is that we can learn from the past because, absent intervention, the future will repeat it. Individual traits that correlated with crime commission in the past will correlate with crime commission in future. So what any predictive analysis does is hold a mirror to the past. It distills patterns in past data and interprets them as projections about the future. Algorithmic prediction produces a precise reflection of digital data. Subjective prediction produces a cloudy reflection of anecdotal data. But the nature of the analysis is the same. To predict the future under status quo conditions is simply to project history forward.

Given the nature of prediction, a racially unequal past will necessarily produce racially unequal outputs. To adapt a computer science idiom, "bias in, bias out."[21] Specifically: If the thing that we undertake to predict—say arrest—happened more frequently to black people than white in the past data, a predictive analysis will project it more frequently for black people than white in the future. The predicted event, called the target variable, is thus the key to racial disparity in prediction.

The strategies for racial equity that currently dominate the conversation amount to distorting the predictive mirror or tossing it out. Consider input data. If the thing we have undertaken to predict happens more frequently to people of color, an accurate algorithm will predict it more

[18] *Id.*; *see also* Phase 1 Reports, Pennsylvania Commission on Sentencing, Risk Assessment, http://www.hominid.psu.edu/specialty_programs/pacs/publications-and-research/risk-assessment (last visited June 30, 2018) (collecting information relating to Commission's project to develop risk assessment tool with public input).

[19] *See infra* Part III.

[20] Huq, *supra* note 13.

[21] The computer science idiom is "garbage in, garbage out," which refers to the fact that algorithmic prediction is only as good as the data on which the algorithm is trained.

frequently for people of color. Limiting input data cannot eliminate the disparity except by crippling the predictive tool. The same is true of algorithmic affirmative action to equalize outputs. Some calls for such interventions are motivated by the well-founded belief that, because of racially disparate law enforcement patterns, the standard target variable, arrest, embeds racial distortion vis-à-vis the event we actually want to avoid, presumably serious crime. But unless we know actual offending rates (which we generally do not), reconfiguring the data or algorithm to reflect a statistical scenario we prefer merely distorts the predictive mirror, so it neither reflects the data nor any demonstrable reality. Along similar lines, calls to equalize adverse predictions across racial lines require an algorithm to forsake the statistical risk assessment of individuals in favor of risk sorting within racial groups. And wholesale rejection of algorithmic methods rejects the predictive mirror directly.

The Article's normative claim is that neither distorting the predictive mirror nor tossing it out is the right path forward. If the image in the predictive mirror is jarring, the answer is not to bend it to our liking. That does not solve the problem. Nor does rejecting algorithmic methods, because there is every reason to expect that subjective prediction entails an equal degree of racial inequality. To reject algorithms in favor of judicial risk assessment is to discard the precise mirror for the cloudy one. It does not eliminate disparity. It merely turns a blind eye.

What actuarial risk assessment has done, in other words, is reveal the racial inequality inherent in *all* prediction in a racially unequal world, forcing us to confront a much deeper problem than the dangers of a new technology. In making the mechanics of prediction transparent, algorithmic methods have exposed the disparities endemic to all criminal justice risk assessment, subjective and actuarial alike. Tweaking an algorithm or its input data, or even rejecting actuarial methods, will not redress the racial disparities in crime- or arrest-risk in a racially stratified world.

The inequality exposed by algorithmic risk assessment should instead galvanize a more fundamental rethinking of the way in which the criminal justice system understands and responds to risk.[22] To start, we should be more thoughtful about what we want to learn from the past, and more honest about what we can. If the risk that really matters is the risk of serious crime but we have no access to data that fairly represent the incidence of it, there is no basis for predicting that event at all. Nor is it acceptable to resort to predicting some other event, like "any arrest," that happens to be easier to measure. This lesson has profound implications for all forms of criminal justice risk assessment, both actuarial and subjective.

If the data do fairly represent the incidence of serious crime, on the other hand, the place to redress racial disparity is not in the measurement of risk, but in the response to it. Risk assessment must reflect the past; it need not dictate the future. The default response to risk could be supportive rather than coercive. In the long term, a supportive response to risk would help to

[22] *See infra* Part IV.

redress the conditions that produce risk in the first place. In the short term, it would mitigate the disparate racial impact of prediction. Counterintuitively, algorithmic assessment could play a valuable role in a system that targets the risky for support rather than restraint.

The Article makes three core contributions. The first is explanatory. Thus far, the computer science and statistical literature on algorithmic fairness and the legal literature on criminal justice risk assessment have largely evolved on separate tracks.[23] Part I offers the most comprehensive and accessible taxonomy to date of potential measures of equality in prediction, synthesizing recent work in computer science with legal equality constructs. The Article's second contribution is the descriptive analysis of practical and conceptual problems with strategies to redress predictive inequality that are aimed at algorithmic methods *per se,* given that all prediction replicates the past. The Article's third contribution is the normative argument that meaningful change will require a more fundamental rethinking of the role of risk in criminal justice.

This Article is about criminal justice risk assessment, but it is also a window onto the broader conversation about algorithmic fairness, which is itself a microcosm of perennial debates about the nature of equality. Through a focused case study, the Article aims to contribute to the larger literatures on algorithmic fairness and on competing conceptions of equality in law. The Article's conclusion draws out some of the larger connections.

Two caveats are in order. First, the article focuses on racial disparity in prediction, severed from the messy realities of implementation. Megan Stevenson has shown that the vagaries of implementation may affect the treatment of justice-involved people more than a risk assessment algorithm itself.[24] Still, risk assessment tools are meant to guide decision-making. To the extent they do, disparities in classification will translate into disparities in outcomes. For that reason and for purposes of clarity, this Article focuses on disparities in classification alone. The second caveat is that this Article speaks of race in the crass terminology of "black" and "white." This language reduces a deeply fraught and complex social phenomenon to an artificial binary. The Article uses this language in part of necessity, to explain competing metrics of equality with as much clarity as possible, and in part in recognition that the criminal justice system itself tends to deploy this reductive schema. Whether the Article is warranted in taking this approach, the reader may judge.

The Article proceeds in four parts. Part I chronicles the recent scholarly and public debate over risk assessment and racial inequality, using the ProPublica saga and a stylized example to illustrate why race-neutral prediction is impossible. It concludes with a comprehensive taxonomy of the most important potential metrics of predictive equality. Part II lays out the

[23] A handful of seminal articles, however, have helped to bridge the gap. *See generally* Selbst & Barocas, *supra* note 2; Selbst, *supra* note 2; Huq, *supra* note 13; Kroll *et al*, *Accountable Algorithms*, 165 UNIV. PA. L. REV. 633 (2017).

[24] Stevenson, *supra* note 5.

Article's central conception of prediction as a mirror. For clarity of analysis, it draws an important distinction between two possible sources of racial disparity in prediction: racial distortions in the data vis-à-vis underlying crime rates, and a difference in underlying crime rates by race. Accounting for both, Part III explains why the prescriptions for racial equity that currently dominate the public and scholarly debate will not solve the problem. Part IV argues for a broader rethinking of the role of risk in criminal justice. The Conclusion draws out implications for other predictive arenas.

I. THE IMPOSSIBILITY OF RACE-NEUTRALITY

A. The Risk Assessment-and-Race Debate

Just a few years ago criminal justice risk assessment was an esoteric topic. Today it is fodder for The Daily Show,[25] of interest to major mainstream media,[26] and the subject of a vibrant and growing body of scholarship.[27] That literature offers an introduction to risk assessment that need not be repeated here. But it is important to define some key terms. As used in this Article, "criminal justice risk assessment" refers to the actuarial assessment of the likelihood of some future event, usually arrest for crime. The term encompasses two kinds of risk assessment tools: the more basic and more prevalent checklist instruments, and the more sophisticated machine-learned algorithms that represent the future.[28]

As the use of criminal justice risk assessment has spread, concern over its potential racial impact has exploded. The watershed year was 2014. A journalist asked whether Chicago's new predictive policing strategy was "racist,"[29] legal scholar Sonja Starr argued that the Constitution prohibits the use of race, gender, or income-correlated variables in risk assessment tools

[25] *Disrupting the Legal System with Robots*, THE DAILY SHOW (March 7, 2018), https://youtu.be/VkizYljxcD8.

[26] *E.g.* Angwin *et al*., *supra* note 1; Anna Maria Barry-Jester *et al*., *Should Prison Sentences Be Based on Crimes That Haven't Been Committed Yet?*, FIVETHIRTYEIGHT (Aug. 4, 2015), fivethirtyeight.com/features/prison-reform-risk-assessment (including simulations demonstrating risk assessment outcomes and disparate racial impact); Dewan, *supra* note 5.

[27] *See, e.g.*, Collins, *supra* note 8; Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017); Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237 (2015); Huq, *supra* note 13; John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, __ WASH. L. REV. __ (forthcoming 2018); Mayson, *supra* note 5; Anne Milgram et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENT. R. 216 (2015); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671 (2015); Slobogin, *supra* note 8; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Stevenson, *supra* note 5.

[28] For a brief explanation of the difference, *see* Mayson, *supra* note 5, at 509-11, n.97; *see also, generally*, Richard Berk and Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT. R. 222 (2015).

[29] Matt Stroud, *The Minority Report: Chicago's New Police Computer Predicts Crimes, But Is It Racist?*, THEVERGE (Feb. 19, 2014), https://www.theverge.com/2014/2/19/5419854/the-minority-report-this-computer-predicts-crime-but-is-it-racist.