

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**  
**2002 VIRTUAL MIDYEAR MEETING**  
**FEBRUARY 14, 2022**

**RESOLUTION**

RESOLVED, that the American Bar Association urges federal, state, local, territorial and tribal governments to ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated to demonstrate the absence of conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to recognize that an individual's criminal history and other criteria, as reflected in risk assessment tools or pretrial release evaluations, may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias on the part of law enforcement, prosecutor offices, judges and all other personnel utilizing risk assessment tools in connection with pretrial release;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to educate judges who make or review pretrial release decisions that an individual's criminal history and other criteria used in risk assessment tools or pretrial evaluations may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias on the part of law enforcement, prosecutor offices, judges and all other personnel utilizing risk assessment tools in connection with pretrial release;

FURTHER RESOLVED, the American Bar Association urges federal, state, local, territorial and tribal governments to require the proponent of any pretrial risk assessment tool or pretrial release evaluation in use or considered to publicly disclose the technical, procedural, and administrative steps that it has taken to eliminate from the assessment the effects of structurally biased application of laws, policies or practices, as well as conscious or unconscious racial and economic bias on the part of law enforcement, prosecutor offices, judges, and all other personnel utilizing risk assessment tools in connection with pretrial release;

FURTHER RESOLVED, the American Bar Association urges federal, state, local, territorial and tribal governments to require that pretrial risk assessment tools and

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pretrial release evaluations undergo ongoing independent and objective evaluation and monitoring to determine whether they have had an adverse racial, ethnic, or other demographic, geographic, or socioeconomic impact and, if so, to require modifications to address such impact;

## Report

In *U.S. v Salerno*<sup>1</sup>, Chief Justice Rehnquist noted that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>2</sup> And yet in courts across the country, the implementation of state and federal bail laws results in detention as the norm, with liberty as the carefully guarded exception. This resolution calls for the legal and values-based upholding of the presumption of innocence during the pretrial stage of a criminal case.<sup>3</sup> In particular, it draws attention to the modern methodology for determining pretrial liberty – the assessment of the likelihood to return to court without a new charge – as being based on policies and practices that result in structurally racist outcomes, producing data which should not be used without proof it does not contain racial or economic disparity. This resolution comports with ABA Goal III, Eliminate Bias and Enhance Diversity.

Since the 1960s, courts have worked to determine the best methodology for assessing a person’s risk of flight from prosecution. In the decades that followed, that methodology was expanded to include a person’s risk of committing a crime while awaiting trial (dubbed “safety”). Begun in NYC in the late 1960s, risk assessment instruments (RAIs) have become a wide-spread and were at one point considered an advancement over subjective decision making. It was believed that the use of a standardized tool could help eliminate variations across courts, counties, and states because they sought to add “scientific evidence” in support of a release or detention decision. It was also believed that the use of RAIs would result in a better triage of people – identifying those that posed “serious and unmanageable risk” for detention while supporting a presumption of pretrial release.

Every jurisdiction in the country makes a “pretrial release evaluation” whether they do so with the use of a RAI or not. In its 2019 scan of pretrial practices, the Pretrial Justice Institute found that 2 out of 3 used RAIs.<sup>4</sup> Another report found that over 60% of the U.S. population lives in a jurisdiction that uses RAIs.<sup>5</sup> In places that do not use a RAI, pretrial release evaluations are made using the same – and typically more - data that is used to construct RAIs. Despite the intention behind using science to aid discretion and uphold a presumption in favor of release, pretrial detention has grown over the last 30 years to encompass nearly 100% of the growth of the jail populations in the US.

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<sup>1</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>2</sup> *Id.*, at 755.

<sup>3</sup> The ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.1, summarizes the purpose of pretrial detention – to prevent flight of the accused or to protect the safety of the community.

*ABA Criminal Justice Standards on Pretrial Release (2007)* at

[https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk/#10-1.1](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/#10-1.1)

<sup>4</sup> *Scan of 2019 Pretrial Practices Survey*, Pretrial Justice Institute 2019, July 12, 2021, at

<https://university.pretrial.org/viewdocument/scan-of-pretrial-practices-pji-20>

<sup>5</sup> *How Many Jurisdictions use Each Tool?* Mapping Pretrial Injustice, July 12, 2021, at

<https://pretrialrisk.com/national-landscape/how-many-jurisdictions-use-each-tool/>

Because willful flight and actual safety risks are extremely rare events and therefore impossible to predict with accuracy, for the purpose of RAIs as well as subjective pretrial release evaluations, the definition of these measurements were expanded to capture a broader pool of people. “Willful flight” has transformed into failure to appear for any reason, including issues such as childcare, employment and transportation.<sup>6</sup> Safety went beyond credible threats to specific people and included arrests for any reason, including arrests for non-violent offenses. This has resulted not just in increased pretrial detention, but in the justification of supervision and surveillance conditions that are onerous, unnecessary, and result in increased contact with law enforcement.<sup>7</sup>

The factors used to create the algorithms or used by courts to make evaluations without a RAI are also problematic because they reflect systemic racism woven into the criminal justice system. Age at first arrest, number of prior convictions, prior incarcerated sentences, employment or education status, prior missed court appointments – each of these factors has significant racial and economic disparity. Research has also proven that at every step of the pretrial (before adjudication) process, from the deployment of police resources, the decision to arrest, to the amount of money bail set, to changes in charges, and to the use of diversion programs, the system disproportionately harms Black people and other marginalized people.<sup>8</sup> Because the most widely used RAIs as well as general subjective decision making rely on factors that directly reflect these decisions, their predictions are inevitably biased. Even when RAIs attempt to remove more obvious racial data, it persists. Two recent studies found that RAIs overpredicted the rate of high risk among Black men, meaning that a greater percentage of Black men predicted to be high risk did not actually fail to appear or become subject to arrest, than other demographic groups.<sup>9</sup> Even in New Jersey, which has significantly cut its pretrial population, the overrepresentation of Black people in jail is the same proportion (54%) as it was before the state’s pretrial reforms.<sup>10</sup>

RAIs provide justifications for not just pretrial detention, but also, when used with decision making frameworks, the imposition of onerous and costly pretrial conditions of release. Over a ten-year period, the use of electronic monitoring has risen 140%; 125,000 people were placed on electronic monitoring across all phases of the criminal legal system in 2015. In California, after a statewide realignment to reduce overcrowding in

<sup>6</sup> See, Laury P. Gouldin, *Defining Flight Risk*, 85 University of Chicago Law Review 677, 716 (2018).

<sup>7</sup> See, Andrea Woods and Portia Allen-Kyle, *A New Vision for Pretrial Justice in the United States*, ACLU (2019),

[https://www.aclu.org/sites/default/files/field\\_document/aclu\\_pretrial\\_reform\\_toplines\\_positions\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf)

<sup>8</sup> See, Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice (May 2018),

<https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>;

Dean Knox et al., *Administrative Records Mask Racially Biased Policing*, American Political Science Association (2020), <https://scholar.princeton.edu/sites/default/files/jmummolo/files/klm.pdf>

<sup>9</sup> See, Sarah Picard et al., *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, Center for Court Innovation (2019), <https://bit.ly/39hQIsK>, and Victoria A. Terranova et al., *Colorado Pretrial Assessment Tool Validation Study Final Report*, University of Northern Colorado (2020), <https://bit.ly/3saCAAdL>.

<sup>10</sup> See, New Jersey Courts Criminal Justice Reform, *2019 Report to the Governor and the Legislature* at 10, <https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf>

jails, the establishment of pretrial services agencies rose significantly.<sup>11</sup> In spite of the Constitutional right to the presumption of innocence, these conditions are imposed when there is, in fact, very little evidence to legitimize their use to reasonably assure court appearance and safety. The only condition which has been consistently shown to improve court appearance is a court date reminder.<sup>12</sup>

Our modern system for making pretrial release evaluations must be transformed to reflect a system that honors the presumption of innocence, the right to pretrial liberty and equal justice for all people. Both subjective and RAI-aided decision making is failing those arrested, people who have been victimized, as well as the integrity of our legal system because they divert time and attention from underlying issues, while encouraging pretrial supervision and other infringements upon liberty. Judges should be educated on the systemic issues that embed elements of disparity in their decision-making process.

The data used in any system of making pretrial release evaluations should be immediately assessed for its transparency (what data is being used), its public availability (in court and to the community), and economic and racial bias (proof it does not reflect racial or economic bias on the part of law enforcement or courts). If the system of pretrial release evaluation (subjective or RAI) is transparent, publicly available, and free from economically and racially biased factors, then the system should be reevaluated at 6-month intervals to ensure continued absence of bias and adverse impact.

Respectfully submitted,

Carlos Moore  
President, National Bar Association  
February 2022

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<sup>11</sup> See, Brandon Martin and Magnus Lofstrom, California's County Jails, Public Policy Institute of California (2018) at <https://www.ppic.org/publication/californias-county-jails/>

<sup>12</sup> *Id.*

## Technical Appendix: Data Bias Diagnostics

*(Please click on the link above to view technical appendix)*

## GENERAL INFORMATION FORM

Submitting Entity: National Bar Association

Submitted by: Carlos Moore, President

### 1. Summary of the Resolution

This resolution advances the need to align court decisions on pretrial release from jail with the presumption of innocence by refraining from the use of risk assessment tools and pretrial release evaluations where data demonstrates continued conscious or unconscious racial and economic bias. The resolution recognizes that an individual's criminal history as reflected in risk assessment tools or pretrial release evaluations reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious racial and economic bias on the part of law enforcement, prosecutor offices, and judges. The resolution urges that courts become aware of these criminal history deficiencies and work to develop risk assessment tools and pretrial release evaluations that are free from racial and economic bias by evaluating them at six months intervals to determine whether they have had an adverse racial or economic impact and, if so, to require modifications to address such impact.

### 2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The resolution advances Goal 3, by ensuring that pretrial release decisions are not influenced by racial and economic bias.

### 3. Approval by Submitting Entity

The National Bar Association Board of Governors approved this resolution on July 23, 2021.

### 4. Has this or a similar resolution been submitted to the House or Board previously?

We are not aware of any similar resolutions.

### 5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

We are not aware of any policies.

### 6. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable

7. Status of Legislation

Not applicable

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Implementation would occur through publication of the policy and advocacy to the courts in all states and the federal government.

9. Cost to the Association (both direct and indirect).

Indirect costs include staff time.

10. Disclosure of Interest

Not applicable

11. Referrals

Section of Civil Rights and Social Justice  
 Government and Public Sector Lawyers Division  
 Section of International Law Government and Public Sector  
 Judicial Division  
 Section of Litigation  
 Section of Science & Technology Law  
 Law Practice Division  
 Solo, Small Firm and General Practice Division  
 Commission on Hispanic Legal Rights and Responsibilities  
 Commission on Homelessness & Poverty  
 Commission on Immigration  
 Center for Human Rights  
 Coalition on Racial & Ethnic Justice  
 Standing Committee on Legal Aid and Indigent Defendants  
  
 Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution advances the need to align court decisions on pretrial release from jail with the presumption of innocence by refraining from the use of risk assessment tools and pretrial release evaluations where data demonstrates continued conscious or unconscious racial and economic bias. The resolution recognizes that an individual's criminal history as reflected in risk assessment tools or pretrial release evaluations reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious racial and economic bias on the part of law enforcement, prosecutor offices, and judges. The resolution urges that courts become aware of these criminal history deficiencies and work to develop risk assessment tools and pretrial release evaluations that are free from racial and economic bias by evaluating them at six months intervals to determine whether they have had an adverse racial or economic impact and, if so, to require modifications to address such impact.

### 2. Summary of the issue that the resolution addresses

Studies continue to show that poor people and people of color are detained prior to trial in far greater numbers than other people. Courts rely on risk assessment tools and pretrial release evaluations that reflect structurally biased applications of law, policies and practices, as well as conscious or unconscious racial and economic bias by all of the stakeholders in the criminal legal system.

### 3. Please explain how the proposed policy position will address the issue.

The proposed policy will encourage the criminal legal system to cease use of flawed risk assessment tools and pretrial release evaluations and to create tools and evaluations that are modified to diminish, and ultimately end, any adverse racial or economic impact.

### 4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

We are not aware of minority views or opposition either internal or external to the ABA.