The Case Against Pretrial Risk Assessment Instruments

BY CHERISE FANNO BURDEEN AND WENDY W. SHANG

Pretrial reforms have traditionally focused on improving court appearance and public safety. What is examined and addressed less frequently is why these problems exist in the first place, and concerns about racial disparities usually don’t appear until the end of the analysis. What would we see and how would we change our approach if we really understood the racial history of the legal system in the United States and placed that understanding, along with a requirement of racial equity, foremost rather than as an afterthought? Would a more expansive knowledge of the past create an avenue to disengage from harmful practices and embrace new, race- and class-conscious solutions?

Understanding the Racialized History of the Criminal Justice System
The main touchpoints of the history of African American people, as it is taught in school, typically look something like this: Black people were brought to the United States as slaves; Lincoln freed the slaves during the Civil War; Reconstruction helped the newly freed people; Jim Crow laws were written to keep Black and white people separate; Rosa Parks and Martin Luther King Jr. ignited the civil rights movement and ended racial segregation; Barack Obama became the first Black president of the United States. These touchpoints are simplified, yet they are not even common knowledge yet. A 2019 Washington Post-SRS poll showed that only 52 percent of adults identified slavery as the main cause of the Civil War, though 67 percent believed that slavery affected society a great deal or a fair amount today. An investigation conducted by the Southern Poverty Law Center’s Teaching Tolerance Project showed that 97 percent of teachers surveyed by the project agreed that learning about slavery was essential to understanding American history, but 58 percent were dissatisfied by the coverage of slavery in textbooks and nearly two in five (39 percent) said their state offered little or no support teaching this issue. On a tour of the National Museum of African American History and Culture, many members of an incoming group of Rhodes Scholars, arguably the most prestigious postgraduate scholarship program in the world, were shocked to learn about the economic scope and influence of slavery. Valerie Strauss, Just How Little U.S. Students Learn About African American History—and Five Steps to Start to Change That, Wash. Post (July 7, 2020), https://wapo.st/39bPE9S. This lack of education means that as a society, we are ill-equipped to recognize, discuss, and address the effects of racism. It’s time to look at how this ignorance is influencing our criminal justice policy.

A proper understanding of US history and how it intersects with the criminal justice system would also have to include, at minimum, the following developments.

CHERISE FANNO BURDEEN is an Executive Partner at the Pretrial Justice Institute, a national pretrial training and technical assistance provider.

WENDY W. SHANG is a writer for the Pretrial Justice Institute.
The Impact of the Thirteenth Amendment
The 13th Amendment ended slavery but included an exception: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” Allowing an exception to slavery for people who had been convicted of a crime created incentives in the labor-dependent South to pass laws that made it easy to convict Black people, usually for crimes like idleness, vagrancy, or selling one’s own agricultural products. While these laws were facially neutral, their enforcement was not. The result created a system whereby Black people were going to end up in the employ of white people, either as a means of avoiding punishment, as the punishment itself, or as a form of debt repayment (peonage). When a person could not pay an assessed court fine or fee, a local businessman would act as “surety,” vouching for the future good behavior of the person, and then post and forfeit a bond that would pay for the debt. The accused would then sign a contract agreeing to work without pay until the surety bond was paid off. Douglas Blackmon, Slavery by Another Name (2008). Convict leasing helped fill state coffers; in 1866 alone, convict leasing brought $100,000 in revenue to Alabama, or about one-tenth of the state’s combined income. Alexander C. Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the South (1996). Between 1850 and 1870, the prison population grew fivefold, with heavier growth in the South, which before the Civil War had prison populations smaller than the North’s. James Gray Pope, Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account, 94 NYU L. Rev 1465 (2019). Criminal convictions had the additional impact of disenfranchising African Americans (along with poll taxes and literacy tests), and this punishment was not limited to felonies; all but one state under Reconstruction revised its laws to include disenfranchisement for petty theft crimes. Pippa Holloway, “A Chicken-Stealer Shall Lose His Vote: Disfranchisement for Larceny in the South, 1874–1890,” 75 J. S. Hist. 931 (2009).

Notably, even states that entered the Union after the abolition of slavery adopted amendments similar to the 13th Amendment in their state constitutions. In 1888, Colorado became the first state to remove the slavery provision from its constitution, and other grassroots movements are preparing to do the same in other states. In the meantime, prison labor remains a profitable industry because of the slavery provision, with little support for actual rehabilitation. Until a bill was passed this year, people incarcerated in California were paid $1 a day to fight wildfires but had no means to become actual firefighters upon release. Prison labor is a multi-billion-dollar industry, with incarcerated people being paid pennies on the hour for labor like manufacturing, performing computer-aided design, assembling office furniture, or staffing phone calls.

The Jim Crow Period Meant More than “Separate but Equal”
The Jim Crow era often conjures up images of separate water fountains, but the lives of Black people were also marked by racially motivated violence, or the threat of violence, committed by white people. As highlighted and memorialized by the National Memorial for Peace and Justice located in Montgomery, Alabama, more than 4,000 African Americans were murdered by lynching between the Civil War and World War II. These murders were often carried out as public spectacles, to entertain whites and terrorize Blacks, for any act, however trivial, deemed offensive. The Watchmen series on HBO highlighted the Tulsa race massacre of 1921, one of many instances of large-scale violence committed against Black communities in the early 20th century, resulting in numerous deaths, loss of property, and migration to safer locations. (Rather than receiving aid, survivors of the Tulsa race massacre were rounded up into internment camps and only released if sponsored by white employers.)

In both scenarios, the separate water fountains or the lynchings, the racial hierarchy was maintained by the legal system. Although Rosa Parks, Martin Luther King Jr., and other civil rights icons are now hailed as heroes, it bears remembering that law enforcement officers and the courts maintained the legal and social order of “separate but equal.” Lynching, on the other hand, relied on inaction and the absence of consequences. Perpetrators of lynchings were rarely, if ever, punished. When lynching fell out of favor because of the bad press they brought to the state, the number of court-ordered executions began to rise, often conducted in public to mollify angry crowds. James W. Clarke, Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South, 28 Brit. J. Pol. Sci. 269 (1998).

The Jim Crow era and beyond were also marked by the unfair distribution of benefits among Blacks and whites. Two of the biggest social engineering efforts of the 20th century—federal efforts to make homeownership more affordable and the GI bill—drastically favored whites. Between 1934 and 1962, just two percent of the Federal Housing Administration loans were given to nonwhite families, undermining the ability to accumulate wealth in those communities and setting in motion an effect that persists to this day. The Brookings Institute
estimates that the net worth of a white family was nearly 10 times that of a Black family as of 2016. The GI Bill, whose benefits included money for education, loan guarantees for homes, and unemployment pay, paid out the equivalent of $137 billion in 2020 dollars, but the bill was also designed to allow states to continue discriminatory practices. While it is estimated that 28 percent of white veterans went to college on the GI Bill, only 12 percent of Black veterans did so, in part because they were limited to historically black colleges and schools whose highest degree was below a baccalaureate. Edward Humes, How the GI Bill Shunted Blacks into Vocational Training, 53 J. Blacks Higher Educ. 92 (2006). As for housing, a Black veteran might qualify for a loan through the GI Bill, but banks were not obligated to give him a loan nor were white homeowners obligated to sell him one. Discrimination was not limited to the South. Levittown, the famous post-war suburb in New York, prohibited homes from being sold to Black people. In New York and northern New Jersey, fewer than 100 of 67,000 mortgages backed by the GI Bill benefited non-white people. Erin Blakemore, How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans (updated Sept. 30, 2019), https://bit.ly/3soMM2c.

The War on Drugs Repeats the Harms of the Past
The current state of mass incarceration in the United States began with the war on drugs. In 1980, the incarceration rate in the United States was 310 per 100,000 adults; at its peak, in 2008, the incarceration rate was astonishing 1,000 per 100,000 adults. Between 1980 and 2018, the number of adults in jail on drug-related charges has increased ninefold, with Black men bearing the brunt of that increase. Sentencing Project, Trends in U.S. Corrections (2020), https://bit.ly/2JXzTMF. Although Black people are no more likely than white people to use or sell drugs, they are more than twice as likely to be arrested on drug-related charges; Black and Hispanic men make up more than half the population imprisoned for a drug offense. At the same time, African Americans are 15 to 20 percent less likely to be referred to drug courts, compared to arrestee, probation, and incarcerated populations. Timothy Ho et al., Racial and Gender Disparities in Treatment Courts: Do They Exist and Is There Anything We Can Do to Change Them?, 1 J. Advancing Just. 5 (2018).

There have been modest declines in incarceration since 2008. Imprisonment rates for Black men have declined by 34 percent from 2006 to 2018, but that still leaves a staggering rate of 1,501 Black people incarcerated for every 100,000 Black adults. The Sentencing Project estimates that at the current rate, it will take 72 years to cut the prison population in half, just three years shy of the average lifetime of a Black man in America. As a nation, we have never recognized or reckoned with these historical influences, and the result is our current criminal legal system.

Racial Disparities at the Pretrial Phase
Our nation’s criminal justice system is bloated and inundated with cases that should not be in court. In 2018, state courts handled some 17 million criminal court cases. The majority of these cases were misdemeanors. Many people who are arrested multiple times each year represent the most marginalized people in the country in terms of health needs, education, and poverty. Most cases are handled without a trial, and Black people are overrepresented in the system, making up 27 percent of people arrested, double the proportion in the general population, and 33 percent of people detained in local jails.

The decision whether or not to detain someone before trial is a vastly important one, from the standpoint of personal well-being and as a legal consequence. As a nation, we have become desensitized to the idea of how harmful “a few days” in jail can be, even though it is reasonable to assume that most people reading this article would be horrified, disgusted, and/or traumatized by the thought of themselves or a loved one being detained for any period of time in one of our nation’s jails. Incarceration destabilizes lives, especially for those who will not be excused from work, who lack a greater support network, who live on the edge between getting by and financial devastation, or who require medication or treatment to function. The tragic state of our nation’s jails has been most recently illustrated by the fact that in many states, the location of the highest number of COVID-19 cases is a jail or prison.

As a legal strategy, pretrial liberty allows people to develop their defense and make decisions without the stress of incarceration. While all people are entitled, of course, to the presumption of innocence, people who are not incarcerated before trial are more likely to avail themselves of this right and benefit from it. In Harris County, Texas, the county’s own data showed that the likelihood of a conviction differs dramatically depending on whether a person is detained before trial. In 2015 and 2016, 84 percent of those arrested for misdemeanors and detained at case disposition pleaded guilty, while 49 percent of those released before disposition pleaded guilty. Only 13 percent of those still detained at case disposition had their cases dismissed, and two percent received deferred adjudications. For those released before case disposition, 32 percent had their cases dismissed and 12 percent received deferred adjudications. O’Donnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1105 (S.D.
Our current system makes it more likely for Black people to be locked up before trial, under a multitude of pretrial models. Black men are more likely than white men to be assigned money bail as a condition of release and given amounts nearly 35 percent higher than those for white men, even when controlling for seriousness of offense. Jonah B. Gelbach & Shawn D. Bushway, Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model (August 20, 2011), https://ssrn.com/abstract=1990324. Black women are usually assigned lower bail amounts than men, though their incomes were also likely to be lower, so that the average bail amount is roughly equivalent to one’s annual average income. Black people are less likely to have their charges dropped or reduced, creating disparities when decisions are charge-based. Carlos Berdejo, Criminalizing Race: Racial Disparities in Plea-Bargaining, 59 B.C. L. Rev. 1187 (2018). Pretrial risk assessment instruments are yet another iteration of this issue, which will be discussed in the next section.

While some would prefer to look at individual actors—the “bad apple” cop or “that judge”—to explain these differences, we gain a more comprehensive view through a historical understanding. The system is not broken; it is performing according to its historical intentions and framework, regardless of the intentions, good or bad, of any individual actor. In the aftermath of protests over the deaths of George Floyd, Breonna Taylor, and so many other Black men and women, right now is as close as our nation has ever come to reckoning with our racial history and its relationship to the criminal justice system. Our most urgent task is to stop accepting solutions that seem appealing yet perpetuate racial disparities. As keepers of our nation’s legal institutions, we need to chart a different path that does not treat racial equity as a nice “extra” but as the deliberate and necessary work to move forward.

In the next section, we describe how placing a racial equity lens first on the Pretrial Justice Institute’s (PJI) theory of change forced a rethinking of our vision of pretrial reform. We do not purport to be perfect or done; those are not our goals in our work. What we hope to accomplish here is to provide one example of how an institution can cultivate and sustain racial equity.

**PJI: Rejecting Pretrial Risk Assessment Instruments**

Pretrial risk assessment instruments are algorithms built on large pools of data that categorize people according to their likelihood of returning to court with no new arrests. For much of our history, PJI supported these tools as a means of moving systems away from cash bail by offering what appeared to be an objective measurement. Risk assessment instruments had the additional appeal of providing data showing that the vast majority of people would return to court with no new arrests; even people placed in the highest risk category were at least as likely as not to return to court.

At the same time, pretrial risk assessment instruments create a greater emphasis on supervision, based on the level of risk. People who are designated as low risk might simply be asked to return to court with no new arrests with a court date reminder, and people at the highest risk level would be considered for pretrial detention in a separate hearing with full due process protections, if they fell within the category of offenses eligible for detention. Those in the middle levels of risk (or those who are categorized as high risk but not ultimately detained) are assigned a variety of requirements, typically including drug testing (whether or not the charge is drug-related) and check-ins with a pretrial officer, and perhaps electronic monitoring as well. The result is that mass incarceration is morphing into mass supervision.

From 2005 to 2015, the use of electronic monitoring rose 140 percent; in 2015 125,000 people were placed on electronic monitoring across all phases of the criminal legal system. Pew Charitable Trusts, Issue Brief: Use of Electronic Offender-Tracking Devices Expands Sharply; Number of Monitored Individuals More Than Doubled in Ten Years (Sept. 2016), https://bit.ly/3xMJJVe. In turn, supervision violations are becoming a major driver of incarceration; the Council of State Governments estimates that one-quarter of the people in prison are incarcerated due to supervision violations.

Little empirical evidence exists for imposing on the freedoms of people in pretrial status or casting people into debt for their pretrial freedom. Court date reminders are the only pretrial support that has been shown to actually help improve rates of return to court. Pretrial Just. Ctr. for Cts., Use of Court Date Reminders to Improve Court Appearance Rates (2017), https://bit.ly/3seFOQ. While most people acknowledge that cash bail wrongly depends on a person’s wealth to determine pretrial freedom, many pretrial requirements charge fees for access to supervision and drug testing. According to our 2019 Scan of Pretrial Practices, a survey of 89 counties and two independent cities representing jurisdictions of high, medium, and low densities, only one in four jurisdictions (24 percent) did not charge for any pretrial services. Again, these costs, and a growing dependence on court fines and fees in general, have an uneven effect. A 2019 survey by the Federal Reserve revealed that six percent
of Americans had unpaid legal expenses, fines, or court costs, but that number doubled for Black families.

Pretrial risk assessment instruments also cannot fulfill the promise of employing factors unrelated to race. It was not for lack of effort, but a lack of a racial equity lens. These tools removed race itself and factors that were obvious proxies for race, such as income or neighborhood, and examined whether different groups, whether sorted by race or gender, had similar outcomes. What we recognize now, though, is that the remaining factors typically used by risk assessment instruments are also influenced by systemic racism. An arrest is a highly biased event; arrests for drug-related offenses are a better indicator of where a person lives than whether an offense is taking place. Charges are more likely to be dropped or reduced for white people than Black people. Looking at previous convictions and convictions resulting in incarceration, other common factors in pretrial risk assessment instruments, is also problematic. According to a recent Harvard study, Black and Latinx people charged with drug and weapons offenses are more likely to receive sentences of incarceration and longer sentences than similarly charged white people. Elizabeth Tsai Bishop et al., Racial Disparities in the Massachusetts Criminal Justice System, Harv. L. Sch. (2020), https://bit.ly/359AdaB. The same Harvard study also found that Black and Latinx people were less likely to benefit from avenues offering less severe dispositions. With such tainted data going in, it is no surprise that the predictions are equally problematic. Black people are more likely to be erroneously categorized as “high risk.” A recent study of 175,000 people arrested in New York City found that looking at a hypothetical classification of high risk and no actual re-arrest, 23 percent of Black defendants would have been classified as high risk and flagged for detention, compared with 17 percent of Hispanic defendants and only 10 percent of white defendants. Sarah Picard et al., Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness, Ctr. for Ct. Innovation (2019), https://bit.ly/39hqlsK. A 2020 study of the Colorado Pretrial Assessment Tool similarly found that Black people and people who are homeless were more likely to be erroneously categorized as high risk. Victoria A. Terranova & Kyle C. Ward, Colorado Pretrial Assessment Tool Validation Study Final Report, Univ. N. Colo. (2020), https://bit.ly/3saCADL.

With a racial equity lens, these flaws with pretrial risk assessment instruments became clear and intolerable. In February 2020, PJI issued a statement updating our long-standing position on pretrial risk assessments by stating that they “can no longer be a part of our solution for building equitable pretrial justice systems.” Pretrial Just. Inst., Updated Position on Pretrial Risk Assessment Tools (Feb. 7, 2020), https://bit.ly/3iKfXU. In this statement, we recounted the errors we had made in previously supporting assessments, and where we saw the path forward:

[We] heard but did not fully appreciate the opposition to pretrial risk assessment tools from civil rights organizations, impacted people, and researchers. Despite these valid concerns, we were too focused on fighting the damaging status quo to really listen. We made a mistake—we did not have the right people at the table when we were designing our roadmap to decarceration, particularly individuals directly impacted by the system. As we pushed forward, some places saw significant increases in pretrial liberty, but many did not, and racial disparities persisted in both…

In the places that have undertaken reform, success hasn’t hinged on an assessment tool; it has been driven by a commitment to decarceration, values-based discussions about the purpose of detention, a willingness to acknowledge the humanity of everyone, and each system’s openness to change.

More recently, we have released a report, The Case Against Pretrial Risk Assessment Instruments, that looks more deeply at the problems with pretrial risk assessment instruments, several of which have been touched upon in this article. Pretrial Just. Inst., The Case Against Pretrial Risk Assessment Instruments (Nov. 2020), https://bit.ly/2LuwVb6. Our intention is to provide multiple venues for discussions around this issue.

The subtler lesson has been understanding that pretrial risk assessment instruments are flawed not only because of the data, but because they continue to shape problems and solutions in the framework of incarceration and supervision. When we recognized our racial and historical ties to this framework, along with the lack of data supporting these solutions, we moved to an entirely different way of thinking while examining our previous patterns of thought.

Recognizing the characteristics of white supremacy culture has helped us, as an organization, break from our past behaviors and mindsets. Understanding white supremacy culture is a necessary step to confronting racism, and the subject could be an article in itself. White supremacy culture in the workplace represents the values, practices, standards, and beliefs that provide an advantage to white people and oppress others. It manifests in a variety of ways and can be perpetuated without the intention of any particular person. One particularly powerful and common attribute is top-down, hierarchical thinking.
Hierarchical thinking is harmful because it concentrates power in the hands of the few, and traditionally, Black and other marginalized communities have been shut out of such roles and had their experiences, needs, and values overlooked or downgraded. Hierarchy implies that some people are more valuable than others, encourages the idealization of particular leaders, and motivates power hoarding because it also suggests that power is limited.

This interrogation of white supremacy culture in our organization has meant both internal and external changes. With regard to hierarchical thinking, we have created an executive team to lead our organization, rather than a single individual, and nurtured leadership opportunities for all employees. We have endeavored to make our work culture responsive to the needs of Black employees and others who come from traditionally marginalized groups.

In our work, we now seek models that not only forgo monetary bond and pretrial assessments, but empower communities to define, seek, and lead their own solutions. We value the use of data, and their transparent collection and availability, as a vital tool to create accountability and change. At present, we are working with partnerships of community groups and system actors to develop proof-of-concept models. While we still have expertise to offer, we recognize that our role is changing. The ultimate goal is to create entities that have the capacity to develop their own leaders, cultivate political power, and share knowledge while working toward the end of mass incarceration and supervision. The goal and the solution both embrace and require racial equity. Anything else is a reiteration of the past.

Suggested Reading List