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HOUSE OF REPRESENTATIVES
COMMONWEALTH *of* PENNSYLVANIA

House Democratic Policy Committee Hearing

Subcommittee on Progressive Policies for Working People

Proposals to Eliminate Cash Bail

Thursday, March 18, 2021 | 11 am

Representative Elizabeth Fiedler, Chair
House Subcommittee on Progressive Policies
Representative Summer Lee

11 a.m. **OPENING REMARKS & PANEL 1**

Larry Krasner, District Attorney
City of Philadelphia

Bethany Hallam, At-Large Member
Pittsburgh City Council

Jessica Lopez, Community Activist
Lancaster County Resident

Muhammad "MAN-E" Ali Nasir, Community Activist and Co-Founder
Jailbreak PGH

12 p.m. **PANEL 2**

Thea Sebastian, Director of Policy
Civil Rights Corps

Jessica Li, Criminal Justice Investigator
American Civil Liberties Union

Dolly Prabhu, Staff Attorney and Equal Justice Works Fellow
Abolition Law Center

Mikhail Pappas, Judge
Fifth Judicial District, Allegheny County

March 18, 2021

Testimony of Philadelphia District Attorney Larry Krasner
House Democratic Policy Committee
Proposals to Eliminate Cash Bail

Good morning and thank you Chairperson Fiedler for having me here today and thank you for your leadership on working to establish reentry mentoring programs for currently incarcerated persons. Thank you Representative Lee for inviting me to this hearing and thank you for leading the way on ending cash bail and for your leadership on improving access to social workers for incarcerated persons. I am Larry Krasner, District Attorney of Philadelphia. Thank you members of the House Democratic Policy Committee for providing this opportunity to testify about the Pennsylvania bail system's overreliance on cash bail.

Since 2018, the Philadelphia District Attorney's Office ("DAO") enacted numerous policies addressing mass incarceration and mass supervision. The purpose of these policies is not just to make us safer through evidence-based reforms, but also to create financial savings that can and must be reinvested into true crime prevention methods like public education and public health. The DAO declines charging people for statutory offenses including sex work, mere possession of cannabis, possession or distribution of substance use treatment medication and overdose prevention paraphernalia such as fentanyl test strips, and behaviors driven by poverty and homelessness such as loitering.

As the largest prosecutor's office in Pennsylvania, our reforms have not only reduced the county jail population to historic lows, we have also reduced future years of state incarceration and supervision in ways that positively impact the Commonwealth. Our resentencing of juvenile lifers alone – a population of mostly older men who were sentenced to life in prison without the possibility of parole for

serious crimes committed when they were children – will yield approximately $10 million in correctional cost savings over the first decade. These savings can and should, in my opinion, be re-invested in public education, housing, and infrastructure – public goods that support healthy children and make communities safer.

The first reform implemented was to eliminate cash bail recommendations for 25 low-level offenses. This cash bail policy not only save the taxpayers money by allowing people with low-level offenses to maintain their freedom, but it will begin to level the economic and racial playing field in our courtrooms. These offenses represent approximately half of all lead charges applied over the past five years. People released under this policy without cash bail while awaiting trial have the same appearance rate and recidivism rate as before the policy.

The Pennsylvania Constitution enshrines the right to bail for "all prisoners" except for capital offenses, offenses with a maximum penalty of life imprisonment, or "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when proof is evident or presumption great."[1] The most commonly discussed condition of bail is a secured monetary bond, also-known-as cash bail. Cash bail is a condition of bail where a person must pay 10% of the total bail amount in order to be released from pre-trial detention. If the person fails to appear or violates any other condition of the bail, then they are liable for the full bail amount and face pre-trial detention. The potential financial liability is intended to serve as a deterrent for noncompliance. In Pennsylvania, there are four other conditions of bail that can be applied. Nominal monetary bail is a condition where the bail amount is set no higher than $25, and payment is required for release from pre-trial detention.

The remaining three types of bail conditions do not require payment as a condition of release. Unsecured monetary bonds are a condition where a person is released from pre-trial detention without paying any amount, however, if they fail to appear or violate any other condition of bail then they are liable for the entire bail amount. Nonmonetary bail are conditions that require or restrict the behavior of a defendant, and empowers the court to tailor the conditions to the needs of the defendant. The last condition of bail is release on recognizance, ("ROR"), which does not impose additional conditions on pre-trial release.

[1] Pennsylvania Constitution Article I, § 14. See also, 42 Pa.C.S.A. § 5701

Despite having these five conditions, Assistant District Attorney's (ADA) were over reliant on requesting cash bail as a condition for release. This old policy resulting in many people being held in pre-trial detention not because no condition or combination of conditions other than imprisonment would reasonably assure safety, as the Constitution demands. Rather, people were being held because of an inability to pay ten-percent of cash bail. Compounding this inequitable and unsafe practice is that reliance on cash bail conditions allowed for people who despite evident proof of dangerousness to any person and the community are released. Conditions of pre-trial bail do not have to be limited to money. Conditions can include receiving treatment for substance use disorder, anger management, or mental health. Conditions can include frequent reporting and monitoring, when appropriate.

Under our policy for these 25 lead charges, nearly one in four defendants Assistant District Attorneys ("ADA") used to recommend bail between $0 and $10,000; now recommend either Released on Recognizance; Released on Special Conditions; or Unsecured monetary bonds. ADAs continue to have discretion to ask for monetary bail in exceptional circumstances.

By shifting our focus and resources toward the most serious crimes and dangerous offenders, and by insisting that truth and evidence guide our investigations and prosecutions at all times, we have fundamentally altered the jail population. Our prosecutors do not request pre-trial detention for defendants charged with a large variety of misdemeanor and felony offenses when there is no immediate threat to public safety or risk that the defendant will not cooperate with the court.

In 2019, an independent study conducted by researchers at the Antonin Scalia Law School at George Mason University found no change in defendants' failure to appear in court or recidivism following our cash bail reforms. These findings suggest that cash bail serves no public safety or justice function, while causing disruption to defendants' lives and livelihoods, families and communities, in ways the criminal justice system historically has not measured.

Eliminating cash bail is one major policy goal that my office cannot achieve alone. I am here today to request the assistance of this committee to help end the unfair, unjust, and often reckless application of cash bail to determine pre-trial detention.

Ending cash bail helps law enforcement better protect the public, and is something lawmakers on both sides of the aisle should want. When the COVID-19 pandemic shut down most court functions in March of 2020, our office accelerated cash bail reform by moving to an In/Out model within the confines of Pennsylvania's outdated system. Because courts expect and often require cash bail determinations immediately following an arrest, our office requested $1 short of $1 million for defendants arrested and charged for non-fatal shootings and other very serious crimes, and ROR or SOB for everyone else.

This policy shift complemented the Philadelphia Police Department's pandemic arrest policy, which also prioritized serious and violent crimes. As we are all aware, crimes such as sexual assault and burglary have dropped significantly during the pandemic, but gun violence has sharply increased in cities across the country – large and small, with Republican and Democratic mayors and DAs.

By summer 2020, amid an unprecedented global pandemic and alarming increases in gun violence, the jail population had changed dramatically: smaller, with a much higher ratio of people arrested for serious and violent offenses than in pre-pandemic times. The COVID policies of the DAO and Philadelphia Police Department succeeded in safely reducing the jail population and preventing deadly outbreaks seen in jurisdictions like New York and Texas.

Despite our best efforts, however, magistrates were rejecting bail recommendations from our prosecutors and still setting middling amounts of cash bail on many defendants. From March 20, 2020, through December 31, 2020, we requested defendants be held on $1 short of $1 million 47% of the time – a request that conveyed our determination that pre-trial detention was necessary for justice and public safety. Bail magistrates, who in Philadelphia are appointed by judicial leadership and need not be attorneys, granted our requests for these most serious cases just 2% of the time.

At the other end of the spectrum were people arrested for non-serious offenses and no history of failure to appear in court. In this same March through December time period, we requested defendants be released pre-trial on ROR or SOB 51% of the time. Magistrates agreed just 10% of the time.

The courts' insistence that more people be jailed ahead of trial during a pandemic that made trials and hearings impossible has inevitably caused our jail population to rise again. We are not by any stretch out of the woods when it comes to this pandemic. Our prosecutors and staff are still going to crime scenes, interviewing

witnesses, and appearing before judges in the handful of proceedings that are permitted – all while still awaiting their turn for vaccination.

Ultimately, our goal is a system that detains people pre-trial only when necessary for justice and public safety. We get there by ensuring everyone who is arrested by police gets a hearing in front of judge within days, and that both defense counsel and prosecutors are prepared to make arguments knowledgeably, having had time to review evidence and interview witnesses. A fair and effective pre-trial system offers conditions of bail as services to people whose behaviors would be better addressed with substance use treatment or stable housing, for example, rather than incarceration. Criminalization of mental illness and poverty does not make us safer; rather, it makes our communities sicker and poorer.

A system that does not waste time and resources on people who do not need to be incarcerated or supervised can better focus on those who do, ensuring people are appropriately held accountable and are rehabilitated.

Cash bail is a vestige of Jim Crow. I am grateful for the leadership of Representative Lee and others on this panel, who use their offices and platforms daily to make our systems fairer and more just. Eliminating cash bail in Pennsylvania would empower local prosecutors and judges to better protect the public, while reducing penalization and traumatization of people who are simply in need of economic stability or access to health care and treatment. The criminal legal system best serves the public by centering communities, and by being much more methodical and thoughtful when wielding its awesome power to sever people from their homes, families, work, or education.

Legislatures and governors in states including Illinois, Utah, and Virginia have made enormous strides on criminal justice reform and eliminating cash bail. I respectfully urge this committee, the Pennsylvania General Assembly, and Governor, to make our communities safer and our criminal legal system more just by ending the system of cash bail.

Thank you for the opportunity to present my testimony. I am prepared to answer any questions from members of this committee.

Allegheny County Councilperson Bethany Hallam
Testimony for Proposals to Eliminate Cash Bail Policy Hearing
March 18, 2021

Out of the dozens of times I was incarcerated, every single time was as pretrial detention. Never once was it as a sentence for a crime I was convicted of, but instead an intentional and unnecessary disruption of life without any rehabilitation plan, all while I, supposedly, was still *presumed innocent*.

My family had to bail me out at least a handful of times, varying amounts, through either a predatory bail bondsperson or a non-refundable percentage paid to the County. These costs added up to thousands of dollars over the years.

Yet, there were times when I could not be bailed out at all.

My final period of incarceration lasted for 5 months, all due to a probation detainer for a positive drug test—an alleged "technical" violation. I was in the midst of my decade long battle with substance use disorder, and instead of providing me with the treatment and support I so obviously needed, I was locked in a jail cell and treated as lesser than human, prior to even the determination that I had violated my probation. It is there I was forced to detox, 'cold turkey'—a process that is at best excruciating and at worst life-threatening or even deadly—because the jail refused to provide proper and adequate medical care. [Note: The jail still does not freely provide Medications for Opioid use Disorder (MOUD) or other related treatments.] Every experience I had at the Allegheny County Jail was disgusting, inhumane, and demoralizing.

The disruption caused by incarceration is so often a contributing factor to folks ending up back in jail or prison, and it certainly was for me. When people are incarcerated awaiting trial, so much is at stake beyond just their freedom: any period of time in pretrial detention can result in the termination of your employment, the loss of custody of your children, overdue bills, shut off utilities, and eviction, to name a few. I lost multiple jobs over many years due to even short periods of pretrial incarceration.

But pretrial detention does not only affect the people who are incarcerated, it also has a devastating impact on the loved ones of folks behind bars. While incarcerated folks, even those detained pretrial, are being held captive, working for little to no pay, the burden of the cost of their incarceration falls on the family members and friends on the outside.

Jails and prisons all across the country are profiting off of incarcerated folks and their family members who support them. My family spent thousands of dollars in phone call costs, commissary funds, and care packages, and that was because they had the means to do so. Too many families have to make the choice each day to put food on the table at home, or send money to a loved one in jail or prison.

Growing up in an upper middle class family, it wasn't until my experience in the criminal legal system that I recognized the privilege I had. At least once a day for the duration of my incarceration, I used my phone time to call the family members of the other women in my pod, simply because they could not afford to do so themselves. Jails and prisons are incentivized to detain folks pretrial because it is far too profitable to lower their populations and lose out on the enormous signing bonuses and huge profit margins that come along with phone calls, commissary, and tablet contracts.

The same is true for the Allegheny County Jail. Here, fewer than 5% of the people incarcerated at the jail are serving a sentence. The rest are held pretrial, many on probation detainers or because they can not afford the bail they were assessed. And all the while, the hefty and extortionate commissions from the use of the tablets and phones go directly into the County's General Fund (with the rest going to the shareholders of a predatory private company).

But it does not need to be this way.

Speaking at a public education event earlier this month, Allegheny County Court President Judge Clark, when discussing the reduction in the jail's population reduction from nearly 2,400 early last year to just under 1,700 today, stated plainly "We've discovered that, when we released so many people from the jail, the community wasn't any less safe than it was with those people in jail."

Judge Clark is exactly right—and I applaud their efforts and her leadership on this front. We can and we should decarcerate, and we must continue to reduce the jail's population, a process that will not only preserve the safety of the community, but will also protect those who are currently held in ACJ from the harm that is caused there on a daily basis.

Yet, I will go one step further:

Allegheny County Jail could open its doors tomorrow, releasing everyone who is constitutionally eligible for release (i.e. those not charged with homicide-related offenses), and "the community wouldn't be any less safe than it was with those people in jail."

Magisterial District Judges in Allegheny County can and should, starting tomorrow, stop setting cash bail (or denying bail altogether) and protect pretrial freedom and the presumption of innocence. Court of Common Pleas Judges, too, can and should lift all probation detainers and refrain from imposing them in the future. Both of these steps are legally permissible under the law, and arguably constitutional principles, bedrock "American" values, and basic understandings of fairness and justice would demand it.

As Judge Clark shared, respecting pretrial freedom and protecting the presumption of innocence—one of the most fundamental principles of our democracy—won't endanger the community.

If we are concerned about the safety of specific individuals, we should provide adequate resources for those specific individuals to keep them safe—for example, through better supportive shelter services, readily-available and adequate emergency housing, and generous paid safe leave for survivors of domestic violence.

But the answer is not to incarcerate our fellow residents before they have even been convicted of an alleged offense. Cash bail criminalizes poverty, but all pretrial detention violates the presumption of innocence.

It certainly doesn’t help them, and it doesn’t keep us safe either.

HEARING TESTIMONY

House Democratic Policy Committee Hearing: Proposals to Eliminate Cash Bail

Muhammad Ali Nasir, Cofounder of Jailbreak PGH

3-18-2021

My name is Muhammad Ali Nasir, or MAN-E and I'm from Homewood which is a predominantly black underserved neighborhood in Pittsburgh. I'm an Elder Meje at the Afro-American Music Institute, a 1Hood artist, a core organizer of the Bukit Bail Fund of Pittsburgh and a cofounder of Jailbreak PGH.

Before I became involved in the efforts to end cash bail in Allegheny County I was directly impacted by cash bail multiple times. My first experience was as a 16 year old who was given a ransom of 25,000 dollars. The second ransom I was given was also 25,000 dollars, the third was 50,000 dollars and the fourth was 2000 dollars. Because of mere allegations I was asked to pay over 100,000 dollars for my freedom.

Being unable to pay the full amount, the impact this had on my family and friends is immeasurable. We called in favors, borrowed from anyone willing to help and gave money to the predatory bail bondsman industry who charged a percentage of the full ransom amount. When my ransom was 50,000 dollars my mother was forced to give the deed to her house to the bail bondsmen so in case I didn't show up to court they could take possession of her home. I was acquitted in that case and absolved of charges in every other case before and afterwards. When my cases were resolved, the bail bondsman who paid my bail received the full amount from the court, but the money my family paid to him was permanently forfeited. The most important thing that I was forced to forfeit was my time, as I was made to endure punishment before the courts determined whether or not I should've even been punished. If I was convicted I would've been given time served, but upon acquittal there's no recompense for the time and money lost, or for the traumatic experience of jail overall.

People go through this everyday in Allegheny County, predominantly black people. The only thing unique about my experience with cash bail is that my family was able to scrape the money together to pay through a bail bondsman. Otherwise I would've remained incarcerated for the duration of my cases which take years for those who decide to go to trial as I did. It's because of Pretrial detention that 95 percent of accused people take plea bargains instead of going to trial which often leads to extended probation periods. If someone happens to be accused of a crime while still on probation they're punished with probation detainers and forced to stay in jail even if they'd otherwise be eligible for release on the new charge. That's why those of us involved in this work are not just focusing on cash bail but on pretrial freedom.

Cash bail is just one of the levers Judges pull to keep people incarcerated before they're given a fair trial. If only the system of cash bail is ended, we have no doubt that judges will simply pull other levers more frequently. Pretrial Risk Assessment Tools or PRATS and e-carceration or electronic monitoring are not acceptable replacements for the current cash bail system. Had the judges who set my bail instead relied on PRATS, instead of being bailable I would've been held for years because of the nature of my chargers. E-carceration places a heavy financial burden on the accused. People being held pretrial have only been accused, they haven't been found guilty of anything. It doesn't make sense to punish them in any way before establishing guilt.

I went with a close friend to his arraignment hearing last week. He's facing 3 felony charges including aggravated assault and 1 misdemeanor. I was surprised when his judge gave him a

non monetary bond with the condition of no contact. Surprised because I expected my friend to be given a high cash bail amount but also surprised that more magistrates don't exercise this power they have. Magistrates could essentially end cash bail by simply deciding not to assign a dollar amount to someone's freedom. With the presumption of innocence intact, every accused person could be given a non monetary bond or be released on their own recognizance by Magistrates.

While I understand the desire to end the state sanctioned ransom that is cash bail, I'm extremely concerned about legislation around this possibly making pretrial detention worse. I don't think it's possible to reform a system that's rooted in white supremacy and focused on race based control. I believe the only solution to cash bail and pretrial detention as a whole is not reform but complete abolition.

Thea Sebastian
Director of Policy
Civil Rights Corps

Testimony

INTRODUCTION

Representative Lee and Members of the House Democratic Legislative Caucus, thank you for allowing Civil Rights Corps the opportunity to testify today. As a nonprofit organization that works to dismantle systemic criminal-legal injustice, including through more than 17 lawsuits challenging unconstitutional wealth-based detention in the pretrial context, the issue of pretrial injustice is one that concerns us deeply. We appreciate your invitation as well as your willingness to host this critical conversation.

Over these next few minutes, my hope is to share some lessons that we have learned from our bail work nationwide. In addition, my hope is to impart one major learning: good reforms begin with having the right goals. And while the Pennsylvania bail crisis *is* urgent, hasty reforms can often times do more harm than good.

THE GOALS OF PRETRIAL REFORM

Over the last few years, state and local governments have enacted a wide range of pretrial reforms that seek to address a fundamental injustice: the fact that two people, similarly situated, might find their pretrial liberty hinging solely on how much money they have. This issue of wealth-based detention is both a constitutional and a moral injustice. And yet, eliminating money bail itself is *not* the most important aspect of pretrial reform: Pretrial reform must first and foremost be about maximizing liberty.

It is a crisis that nearly half a million people are currently detained pretrial. It is a crisis that, tonight, half a million *legally innocent people* will miss dinner with their families. It is a

crisis that, tomorrow, these individuals will miss work, miss soccer practices, miss medical appointments, and maybe lose their jobs or their housing—all because of a one-minute hearing that lacked counsel, evidence, the basic trappings of due process, or any connection to public safety. **But this crisis would be no less urgent if these people had been detained outright rather than because they could not satisfy money bond. The real problem is our willingness to cage humans unjustifiably—all before they have been convicted of any offense.**

When considering a proposed bill, my organization always asks these two questions: First, will the bill increase human liberty? Second, will the bill address the racial inequities plaguing our criminal-legal system? Not every pretrial reform passes these tests.

First, many bills, though making substantial progress toward eliminating *money* as a pretrial detention mechanism, actually increase the number of people who are jailed pretrial. To see this point, just consider the bill that many people call a "model" for pretrial reform: the federal Bail Reform Act. The federal Bail Reform Act, passed in 1984, was designed to address issues surrounding money bail. The law *did* dramatically reduce the use of cash bail – today, cash bail is not driving detention rates in the federal criminal-legal system. And yet, the Bail Reform Act (BRA) facilitated a major expansion of outright detention. Before the BRA, pretrial detention in the federal criminal-legal system was 24%.[1] Today, this number is 75%.[2] In short, this bill actually paved the way for a regime that has dramatically constricted pretrial liberty.

Closer to home, the "no cash policy" in Philadelphia is another cautionary example. After the Philadelphia District Attorney created a policy that would make bond requests binary—no bond or an amount so high that nobody could pay—the office began making liberal use of this "no bond" option. Court watchers, analyzing 450 randomized bail hearings from March to May 2020, showed that Philadelphia prosecutors requested $999,999 bail in more than 50% of bail

hearings.[1] The Defender Association of Philadelphia analysis showed similar results months later, finding that from September 1, 2020 through October 15, 2020, the District Attorney's Office requested cash bail at 1,794 of the preliminary arraignments hearings where the defender's office was present, with 1,573 of the requests for $999,999.[2] Cash bail was set in 1,757 of these hearings. In short, Philadelphia may have addressed some issues with money, but neither fully addressed due process-related concerns or caused a much-needed expansion of pretrial liberty.

Second, regarding racial disparities in pretrial detention, there are an equal number of warning flags. Race is undoubtedly an issue in pretrial detention. In Harris County, Texas, a 2011 study found that 70% of *white* misdemeanor arrestees obtain early release on bond. By contrast, only 52% of Latinx misdemeanor arrestees and 45% of African American misdemeanor arrestees could satisfy their bond and secure release."[3] Following our settlement in Harris County, which transformed the local pretrial system for misdemeanors, Black-white racial disparities in misdemeanor pretrial detention have essentially been eliminated.

However, these numbers are not proof that simply eliminating money is sufficient; in many cases, state legislators are simply replacing money with systems that replicate these existing issues. In many jurisdictions, for example, legislators are turning to algorithm-based risk assessment tools that entrench racial biases. In a *Shared Statement of Civil Rights Concerns* that my organization joined a year and a half ago, we noted that "all predictive tools and algorithms operate within the framework of institutions, structures, and a society infected by bias."[4] The results of these tools often reinforce these biases and provide a seemingly race-neutral process that replicates or exacerbates the current racial inequities in pretrial detention. We do not

[1] https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html
[2] https://phillydefenders.org/wp-content/uploads/2021/01/Pre-Trial-Policy-doc.pdf

condone approaches, such as the use of algorithm-based risk assessment, which simply create structures that we will later need to dismantle—especially when, as I will address next, we already know what our communities need.

REFORMS THAT WORK

Pretrial injustice is a crisis, but a statutory overhaul is not always the right fix. Rather, a range of other evidence-based policies can have dramatic results.

First, expanding cite-and-release is an effective way to reduce pretrial detention by reducing the population that gets arrested and booked into jail. Quick release—including cite-and-release or "citation in lieu of release"— prevents the devastating consequences of even brief detention, including job loss and stoppage of vital medications, while preserving judicial resources so that all other individuals can receive constitutionally compliant, robust hearings that fully safeguard individual liberty.

A number of jurisdictions have made policy changes that have successfully expanded cite-and-release—often by dramatic amounts. After New Orleans changed its municipal code to promote cite-and-release, the use of citations in most municipal cases increased to 68.2% from 41%.[5] In New York, sweeping pretrial reforms mandated that a ticket be issued for most misdemeanors and low-level felonies.[6] And in New Jersey, which has one of the most expansive cite-and-release programs, two-thirds of arrestees are issued a summons and released until their first appearance.[7]

Second, jurisdictions can dramatically increase pretrial success and ensure people make their court appearances simply by providing defendants voluntary supports, such as text-message reminders about their court dates, childcare during court appearances, redesigned summons

reforms, and rides to court. The truth is, most people do not miss court because they want to abscond. They miss court because their cars break down. They miss court because their childcare fell through. They miss court because they forgot or didn't know what was required. Providing voluntary supports that address these needs, rather than holding people in jail or imposing onerous release conditions release, is the *right* approach; indeed, we believe that voluntary supports should be the default for addressing non-appearance risk. We further believe, as is contained in the Uniform Law Commission bail act, that judicial officers should consider whether voluntary supports are sufficient *before* considering restrictive conditions.[8]

As the evidence bears out, these voluntary supports are extremely effective at promoting pretrial success. Text-message reminders have reduced failures to appear (FTA) by 65% while coming at an extremely low cost.[9] Transportation assistance is similarly effective. For example, a medical rideshare program in Hennepin County, Minnesota provided patients the option of taking free Lyft rides to their medical appointments. This program reduced the no-show rate at appointments by 27%[10], which prompted the county to create a court-focused rideshare program in this same model. Even redesigning the summons form to be more user-friendly can have a dramatic impact on pretrial success: A redesigned summons form in New York City reduced the FTA rate by 13%—or roughly 17,000 fewer arrest warrants per year.[11]

Third, having counsel is essential both for preventing unjust detention and for vindicating Sixth Amendment rights. Pennsylvania lawmakers should provide additional resources for indigent defense statewide, thereby ensuring that all individuals can have counsel at the very first moment when their liberty is in jeopardy. Demonstrating the success of early representation, a study of three small New York cities found that having counsel at first-appearance caused significant decreases in pretrial detention and bail amounts as well as an increase in the number

of people who spent no time in jail pretrial because of cash bail.[12] And in San Francisco, individuals being served by the Pretrial Representation Unit (PRU) at the San Francisco Public Defender's Office—who generally see a lawyer within the first day—spend less time in jail and are twice as likely to have their cases dismissed when at arraignment.[13] This intervention is projected to save approximately 11,200 jail bed-days per year; in the first five months, the PRU saved 4,689 jail beds, which translated to $806,508 in cost savings.[14]

We firmly believe that lawmakers should act to address the pretrial crisis; however, we would urge lawmakers *first* to consider how they might support on-the-ground community-based organizations already working to maximize pretrial liberty and reduce racial disparities in the pretrial system. The State could start grant programs that fund voluntary supports. It could further fund organizations that provide much-needed accountability to local systems, including organizations that do court watching—like the Abolitionist Law Center, represented here today, and the Philadelphia Bail Fund—and "court-doing" programs like the Community Release Program run by Silicon Valley De-Bug.[15] And from a statutory perspective, the State could dramatically expand cite-and-release, require counsel at first appearance, and require judicial offices to consider voluntary supports *before* considering anything further.

We would urge starting with these reforms because, as the Bail Reform Act showed, not every reform will have the decarceral results that must be the first priority of bail reform. Taking the time to get things right is essential not only from a legal perspective, but also the human perspective of Pennsylvanians statewide.

Thank you for your time. I look forward to any questions that you might have.

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[2] Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate in Context*, 82 FEDERAL PROBATION 13 (Sep. 2018). https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf
[3] Amended Brief of *Amici Curiae* NAACP Legal Defense and Educational Fund, Inc. and Harris County Commissioner Rodney Ellis in Support of Plaintiffs' Amended Motion for Preliminary Injunction D.E. 143, *ODonnell v. Harris County, Texas*, Case No. 4:16-CV-01414 (S.D.Tx. March 30, 2017) Doc. 272 at 8.
[4] Leadership Conference on Civil and Human Rights et al., *The Use of Pretrial "Risk Assessment Instruments: A Shared Statement of Civil Rights Concerns* (2019) http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf
[5] International Association of Chiefs of Police, *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States* (2016) https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf
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[10] *Hitch Health and Lyft Demonstrate Significant Reduction in Missed Medical Appointments*, Business Wire (2018). https://www.businesswire.com/news/home/20180723005141/en/Hitch-Health-Lyft-Demonstrate-Significant-Reduction-Missed
[11] Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court*, Ideas41 and The University of Chicago Crime Lab, 4 (2018). https://www.courthousenews.com/wp-content/uploads/2018/01/crim-just-report.pdf
[12] Worden, A. P. et al.,*What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUSTICE POLICY REV. 710, 710-735 (2018).
[13] Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit* (2018). https://www.capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf
[14] *Id.*
[15] *See, e.g. Participatory Defense*, Silicon Valley De-Bug. *https://www.participatorydefense.org/*

TESTIMONY SUBMITTED BY

JESSICA LI, CRIMINAL JUSTICE INVESTIGATOR

THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

TO THE

HOUSE DEMOCRATIC POLICY COMMITTEE

PUBLIC HEARING ON PROPOSALS TO ELIMINATE CASH BAIL

March 18, 2021

Good morning, representatives. My name is Jessica Li, and I am the criminal justice investigator at the ACLU of Pennsylvania. I would like to thank Representative Lee, Chairman Bizzarro, and the House Democratic Policy Committee for hosting this hearing and for inviting us to testify today. In my role as an investigator, my work has focused primarily on bail and other forms of pretrial detention, so I greatly appreciate the committee taking up this critical issue.

Bail reform has been a cornerstone of our multi-year Campaign for Smart Justice, which aims to: 1) reduce the number of people incarcerated in our prisons and jails; and 2) challenge racial disparities in the criminal legal system. Bail reform contributes to both those outcomes. Some of our recent work includes: a 2019 report on cash bail practices in Allegheny County; a lawsuit against the Philadelphia Arraignment Court Magistrates based on data we collected while observing over 2,000 bail hearings; and a decision by the Supreme Court of Pennsylvania to investigate Philadelphia's bail practices under its King's Bench authority.[1] Additionally, we will soon be releasing a statewide report on bail in Pennsylvania with an accompanying interactive website that includes granular data on cash bail practices of magisterial district judges (MDJs) throughout the commonwealth. All of our work is done in conversation and consultation with coalition partners and people directly impacted by Pennsylvania's bail practices.

On any given day, over 36,000 people sit in Pennsylvania's county jails, 62% of whom have not been convicted of a crime.[2] Too many people in our commonwealth are incarcerated not because they are guilty, but simply because they are too poor to purchase their freedom. In the face of mounting concern, policymakers are turning to the state legislature for remedy. But this prompts the question: What are the best legislative remedies to address bail practices in Pennsylvania?

The law governing bail is sound as written. Cash bail is rampant not because the law is deficient, but because magisterial district judges (MDJs) fail to follow it. As a result — and it is important to emphasize this — **we do not believe simply prohibiting or eliminating the use of cash bail through legislation is the right solution**. In fact, legislation that eliminates cash bail, may lead not only to greater pretrial detention but also to wider racial disparities. We do, however, believe there are legislative solutions that can remedy related drivers of unjust pretrial detention in Pennsylvania.

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[1] *N.B.:* The order from the court includes bail remedies the court may consider (pg. 4-6).
[2] Vera Institute of Justice, Pennsylvania Incarceration Trends Fact Sheet, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-pennsylvania.pdf.

Current Law

The Pennsylvania Constitution and Rules of Criminal Procedure

The Pennsylvania Constitution rigorously protects pretrial liberty and dictates that pretrial detention should be exceedingly rare.

The Pennsylvania Constitution guarantees a broad right to pretrial liberty, which the government may not restrict except in exceedingly rare and limited circumstances. The right to pretrial liberty is crucial: all individuals are innocent until proven guilty. The Pennsylvania Constitution prohibits "excessive bail"[3] and only permits pretrial detention, or the denial of bail, if the defendant faces life imprisonment or in the rare instance where the defendant poses such a threat that "no condition or combination of conditions other than imprisonment" can guarantee public safety.[4]

And the Pennsylvania Rules of Criminal Procedure, which govern bail, were designed to safeguard pretrial liberty and enshrine the presumption of innocence.

The Pennsylvania Rules of Criminal Procedure provide judges five options for pretrial release:

1. Release on recognizance (ROR) (a written promise to show up for their court date);
2. Release on non-monetary conditions (such as reporting requirements, restrictions on travel, or any other appropriate condition to ensure the defendant's appearance and compliance with bail);
3. Release on unsecured bail (release conditioned upon the promise to be liable for a fixed sum of money if the person fails to appear in the future);
4. Release on nominal bail (release upon a small amount of cash with the agreement that a designated person will ensure the person's return to court);
5. Release on a monetary condition (cash bail).

All types of release require the defendant to appear at future court dates, obey all orders of the bail authority, notify the court of any address change, refrain from criminal activity and neither do, nor cause, nor permit, any witness or victim intimidation.[5] If the defendant violates any of these conditions, her bail may be modified or revoked.[6]

Bail authorities: magisterial district judges (MDJs) and arraignment court magistrates (ACMs)

Within every county, except for Philadelphia,[7] residents elect magisterial district judges (MDJs).[8] MDJs serve six-year terms and are responsible for bail hearings in addition to early proceedings in nearly all criminal cases, low-level civil cases, protection from abuse orders, and traffic citations. The law does not require MDJs to have a law degree; any registered voter over 21 living within the district can become an MDJ so long as they can successfully complete 40 hours of training and pass one examination.[9] Only 35% of Pennsylvania's MDJs have law degrees. Moreover, holding office as an MDJ does not preclude people from holding other jobs, such as real estate agent, landscaper, or garden nursery owner.

[3] Pa. Const. Art. 1 § 13.
[4] Pa. Const. Art. 1 § 14.
[5] Pa. R. Crim. P. 526.
[6] *Id.* (comment).
[7] In Philadelphia, arraignment court magistrates (ACMs) assign bail. ACMs are not elected, but rather appointed by a panel of judges from the First Judicial District. Unfortunately, the problems in Philadelphia mirror the rest of the state.
[8] Pa. Const. Art. 5 § 7; 42 Pa.C.S. A § 1511.
[9] 42 Pa.C.S.A. § § 3112, 3113.

Judges must consider the least restrictive form of bail first.

Bound by the constitutional presumption of innocence, the bail authority — either arraignment court magistrates (ACMs) in Philadelphia or magisterial district judges (MDJs) in the rest of the state — must begin every bail consideration by determining whether ROR, the least restrictive form of bail, will ensure a person's appearance and compliance with pretrial conditions.[10] *The MDJ may consider other bail alternatives only if ROR is insufficient*.[11] Then, before deciding what, if any, conditions to place on an individual's release, the MDJ must consider a variety of factors relevant to whether a person will return to court for future hearings, including an individual's family relationships, community ties, and financial condition.[12]

Money bail may not be a default.

When cash bail is set, a person must pay a sum of money in order to be released. As an incentive, the idea is simple: if a person does not return to court, they will lose that sum of money. If the MDJ determines that cash bail is necessary to ensure appearance, it may only be assigned in a reasonable amount after the MDJ conducts a rigorous investigation into the defendant's financial ability to pay.[13]

Money bail can never be used solely for the purpose of incarcerating someone until trial.

A court may only detain a defendant pretrial if the accused is charged with homicide or poses such a grave danger to public safety "that no condition or combination of conditions can reasonably assure the safety of any person and the community."[14]

The law precludes MDJs from using cash bail as *de facto* detention orders— in other words, they cannot impose unaffordable bail in order to guarantee that individuals will be incarcerated pretrial. As the Supreme Court of Pennsylvania recently reaffirmed, "No condition of release, whether non-monetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial."[15] Despite these clear rules, MDJs routinely impose unaffordable cash bail that keeps people in jail.

Pennsylvania's existing law delineates a thorough and rigorous procedure for setting bail: it strenuously protects the constitutional right to pretrial liberty; it de-emphasizes the use of cash bail; and it prohibits the use of cash bail to keep a person incarcerated until trial. The law, if faithfully followed, severely limits the use of cash bail. Moreover, in the rare instances when cash bail is set, it must be reasonable and tied directly to the person's ability to pay. Pennsylvania's current state of mass pretrial incarceration is antithetical to existing law and fundamental constitutional principles.

The Practice is the Problem

Pennsylvania's current law related to bail is good — it protects pretrial liberty. However, the elected officials responsible for setting bail ignore the law, engaging in unconstitutional bail practices that result in mass pretrial incarceration.

Although cash bail has existed since the colonial era, mass incarceration — and pretrial incarceration, specifically — is a modern phenomenon.[16] It is only in recent decades that judges began to use cash bail more frequently and in higher amounts that result in pretrial detention. Unlike in other jurisdictions, the problem in Pennsylvania is not with the law, but rather with its *practice*. MDJs, the judges who determine Pennsylvanians' pretrial freedom, *simply do not follow the law*.

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[10] Pa. R. Crim. P. 524 (comment).
[11] *Id.*
[12] Pa. R. Crim. P. 523(A).
[13] Pa. R. Crim. P. 528.
[14] Pa. Const. art. 1 § 14.
[15] *Philadelphia Community Bail Fund v. Arraignment Court Magistrates*, 21 EM 2019 (Pa. 2020).
[16] See generally, Schnacke, T. R. (2018). A Brief History of Bail. *The Judges' Journal, American Bar Association, 57*(3), 4-7.

In cursory, slipshod hearings, often held behind closed doors, MDJs routinely set bail in violation of existing law. The ACLU of Pennsylvania spent months investigating bail practices across the commonwealth. Through extensive research, court-watching, and interviews with stakeholders and people incarcerated in county jails, we found that MDJs fail to conduct careful, individualized assessments; they regularly impose cash without consideration for the defendant's ability to pay; and they routinely impose money bail for the sole purpose of keeping someone incarcerated until their trial. In other words, they ignore the law.

> ***"The rise in pretrial incarceration is not so much the result of changes in positive law or policy as it is the result of changing judicial practices and attitudes."***[17]
>
> — Mitali Nagrecha, Sharon Brett, and Colin Doyle, Criminal Justice Policy Program at Harvard Law School

Legislative Recommendations

Legislation, if not tailored and targeted appropriately, risks weakening bedrock constitutional protections and exacerbating the devastating problem with pretrial detention. We also caution the legislature against the use of risk assessment tools. Experts have warned that risk assessment tools are fundamentally flawed and may lead to racially biased results.[18] Along with a growing number of organizations, including the Leadership Conference Education Fund, Pretrial Justice Institute, Algorithmic Justice League, and others, the ACLU of Pennsylvania rejects any use of risk assessment tools in its advocacy for pretrial justice.

If the Pennsylvania legislature seeks to propose reforms, a number of issues do merit legislative remedies. These can include, but are not limited to, the following:

- Increase oversight of local magisterial district court practices.
- Mandate data collection of bail-setting practices and local incarceration rates.
- Ensure bail hearings are transparent and publicly accessible.
- Implement more robust educational requirements and continuing education for magisterial district judges.
- Establish clear standards for determining ability to pay.[19]
- Fund public defense.
- Support alternatives to incarceration.[20]

The ACLU of Pennsylvania will not support:

- Any legislation that introduces the use of risk assessment tools into pretrial decision-making.
- Any legislation that expands electronic monitoring or pretrial surveillance.
- Any legislation that expands the use of preventative or pretrial detention.

We welcome the opportunity to discuss any of these proposals in greater detail with legislators and staff.

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[17] Mitali Nagrecha, Sharon Brett, and Colin Doyle (2020), Court Culture and Criminal Law Reform, *Duke Law Journal Online*, 69, https://dlj.law.duke.edu/2020/04/courtculture/.

[18] *See* Partnership on AI, Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System; New York Times, The Problems with Risk Assessment Tools; and Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns.

[19] When imposing fines, costs, or restitution, courts must determine whether a defendant is financially able to pay. However, there are no consistent or clear guidelines for how judges should make that determination. HB 248 PN 216 (Miller) provides a recent example of a bill that includes clear ability to pay criteria; or see the ACLU-PA Legal Guide to Determining Ability to Pay and the ACLU's *A New Vision for Pretrial Justice in the United States* for additional recommendations for ability to pay standards and guidelines.

[20] *See* ACLU, *A New Vision for Pretrial Justice in the United States,* March 2019, https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf.

Abolition Law Center

Testimony

House Democratic Policy Committee Hearing: Proposals to Eliminate Cash Bail

Dolly Prabhu, Staff Attorney | Equal Justice Works Fellow

3-18-2021

Abolitionist Law Center - Written Testimony
March 18, 2021

Current Pennsylvania Law

Cash Bail could end tomorrow—in Pittsburgh, in Allegheny County, and throughout the Commonwealth—if the bail-setting authorities followed the law. Article I § 13 of the Pennsylvania Constitution clearly states that "Excessive bail shall not be required," and § 14 elaborates: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great." Furthermore, the Pennsylvania Rules of Criminal Procedure require consideration of "the defendant's employment status and history, and financial condition" when setting bail.[1]

If bail-setting authorities—Magistrate Judges in Allegheny County—followed the law as it is, no one in the State would be incarcerated because they could not afford bail. When it comes to cash bail in Pennsylvania, the current state of the law is actually not the main issue. The problem is judicial noncompliance with Constitutional law. Because the law is already relatively strong, legislation may not be the best answer. Legislation is risky in every case, and potentially harmful at worst.

Pretrial Incarceration in Allegheny County

Currently, only 5% of the Allegheny County Jail (ACJ) population is serving a sentence.[2] The remaining 95% are being detained while awaiting trial or some other court proceeding. Notably, less than 100 of the almost 1800 individuals incarcerated at ACJ are being held on cash bail. While the cash bail system must absolutely be abolished, it is not the primary driver of pretrial incarceration in many regions. The primary reason for pretrial incarceration in Allegheny County—and many other counties in the state—is probation detainers. Currently, 34% of ACJ's jail population is incarcerated for this reason.[3] Prior to the pandemic and the subsequent push to decarcerate, over half of the jail population was being held on probation detainers.[4]

Probation Detainers

Probation detainers are orders issued by judges mandating a defendant's detention in jail up until their Gagnon II hearing--a proceeding that occurs many months after an individual's detention wherein the judge determines whether or not a probation violation has occurred. Probation violations include both new criminal convictions (direct violations) and any non-criminal violations of one's probation conditions (technical violations). Technical violations can

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[1] 234 Pa. Code § 523(A)(2).

[2] *Allegheny County Jail Population Management Dashboards, Holding Status Trend*, Allegheny County Dep't Human Services, https://www.alleghenycountyanalytics.us/index.php/2021/03/04/allegheny-county-jail-population-management-dashboards-2/ (last accessed Mar. 16, 2021).

[3] *Id.*

[4] *Reducing Probation and Post-Incarceration Supervision*, Just. Collaborative Init., https://static1.squarespace.com/static/5a7bd92b90bade4801f98e8c/t/5c8f9f41e4966b4eaeed7cc2/1552916289851/Allegheny+Probation+Brief.pdf (last accessed Mar. 16, 2021).

include unpaid restitution, unpaid electronic monitoring fees, unpaid court costs, failing to attend (expensive) mandated programming, failing a drug or alcohol test, not being available at your place of residence during a random check in, or a host of other non-serious and non-criminal behavior. The observed practice in Allegheny County is for the Probation Department (more specifically, the Probation Officers) to lodge detainers for nearly every alleged direct violation. Judges rarely challenge or lift these detainers.

Judges and probation officers should not make use of detainers. They serve no justifiable public safety purpose. In instances of alleged technical violations of probation, the alleged conduct does not rise to the level of a new charge, thereby undercutting any possibility of a resulting threat to public safety. In instances of alleged direct violations, a new charge has been brought, upon which an individual has been arraigned and had bail set—this bail should be controlling, and anyone determined by the bail-setting authority as safe-to-be-released should accordingly actually be free to be released.

Unacceptable Alternatives

What we have observed in other states is that legislation that seeks to end cash bail can never be pushed through unless some alternative carceral tool replaces it. These “alternatives" often may be worse than the system they replace. To this point, it is worth remembering that many criminal justice issues that are under the spotlight today for being major drivers of mass incarceration—including cash bail, probation, parole, mandatory minimums, etc.—were initially created as reforms. If the same mistakes are repeated, even well-meaning reforms run the risk of both reinforcing and expanding the prison-industrial complex. The only acceptable alternative to needless incarceration is unconditional freedom. To this end, our rhetorical demands and legislative priorities should be shifted from ending cash bail to ensuring pretrial freedom.

<u>Pretrial Risk Assessment Tools</u>

Pretrial Risk Assessment Tools are racist, counterproductive, and feed into the further erosion of the presumption of innocence. These tools are developed with data that itself is a reflection of systemic racism, including zip code, prior arrest, school suspensions, substance abuse, housing instability, etc. Essentially, the individuals most impacted by racism and poverty are deemed the most dangerous, and therefore subjected to the additional destabilizing and traumatic effects of pre-trial incarceration. It is an intentionally self-fulfilling prophecy that justifies needless punishment based partly on the effects of needless punishment.

In California, bail reform advocates had to eventually advocate against the bill proposing the end cash bail, as the risk assessment tool that would have replaced it could have resulted in even more pretrial incarceration and even more racial disparity.[5] It is not an acceptable alternative.

<u>E-Carceration</u>

The next frontier of mass incarceration is “e-carceration”; we must be careful not to build an equally—and perhaps more destructive and insidious—system of control while dismantling the old institutions. We already saw a sneak peak of this dystopian future during recent

[5] Lauren Lee White, *California Could End Cash Bail. But is This Alternative Any Better?* (Oct 21, 2021), https://theappeal.org/politicalreport/california-proposition-25-cash-bail/.

decarceration efforts in Allegheny County in response to the COVID-19 pandemic: the knee-jerk response to pretrial release was to send people home with an ankle monitor.

But electronic monitoring is not as simple as living at home. It involves hefty fees and subjects individuals to constant supervision, making it even more likely they will be incarcerated in the future due to violative behavior or financial instability. Many individuals sitting in jail on probation detainers are incarcerated due to violations stemming from electronic monitoring: they never obtained the device, they removed the device, they were somewhere they were prohibited to be, their electronic monitoring device measured BAC levels, or perhaps they just fell behind on paying electronic monitoring fees.

While electronic monitoring may be preferable to pretrial incarceration on a case-by-case basis, the potential for expansive supervision and harm is far too great for this to be relied on as a blanket alternative. In short, it is a “reform” that would increase the power and scale of the prison-industrial complex and ultimately disempower the very communities we are seeking to liberate.

HON. MIK PAPPAS, DISTRICT JUDGE
MAGISTERIAL DISTRICT COURT 05-2-31

5750 BAUM BOULEVARD
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FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
COUNTY OF ALLEGHENY

From: Mik Pappas, MDJ
To: Representative Summer Lee, Pennsylvania House Democratic Policy Committee
Re: Written Statement on the Elimination of Cash Bail in Pennsylvania
Date: March 18, 2021

Your Honor – thank you for the privilege of appearing before you and the Pennsylvania House Democratic Policy Committee, along with so many esteemed stakeholders, to address an issue tremendous public importance: the elimination of cash bail in Pennsylvania. My name is Mikhail Pappas and I serve the public as a magisterial district judge, representing eight (8) neighborhoods in the East End of the City of Pittsburgh. As part of my position, I preside as an issuing authority in bail matters arising from throughout Allegheny County.

While I am a proud member of the Special Court Judge's Association of Pennsylvania, and I am active as a leader and member of a number of community based organizations in the southwestern Pennsylvania region, today I am here on behalf of myself, and consistent with the ethical rules to which I am faithfully bound, on behalf of measures to improve the law, the legal system, and the administration of justice in Pennsylvania. I am not here to promote or endorse any one particular legislative proposal or another. I am here to share the insights that I have acquired as a practicing attorney and as a judge who has decided well over one thousand (1,000) bail matters.

My message today is simple: I believe we can safely eliminate cash bail in Pennsylvania. I believe we can best do this not by limiting judicial discretion, or binding judges to bail schedules and risk assessment algorithms. As William O. Douglas, a Justice of the United States Supreme Court for 36-years once said, "The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed." Rather, I believe we can safely eliminate cash bail by working together with the judiciary, system stakeholders, and community stakeholders to expand access more effective, restorative alternatives.

Some would say that a police encounter presents the first opportunity for diversion from the criminal justice system. Some would say that diversion begins even sooner than this with prevention through access to affordable housing, high quality public education, equal opportunities to earn a living wage, and universal healthcare. Even if we assume that both of these propositions are true, when a person has been accused of a crime, arrested and detained, temporarily deprived of their liberty while remaining cloaked in the presumption of innocence, there is something awesomely powerful, purposeful and vital to our democracy about what happens next: they are taken before a judge.

They are taken before a disinterested arbiter of justice – an independent fact finder who decides not from the clamor of the corner but from the sanctity of a calm courtroom. It is paramount to preserve the integrity of that moment by ensuring that the judge has an abundance of diversionary supports and options available. The judge is tasked with striking a delicate balance: protecting the fundamental right of the accused to pretrial release, while at the same time protecting the community and alleged victims from risk of harm. This requires that the judge make a highly fact sensitive inquiry into the individual characteristics of the accused and the circumstances surrounding their arrest. And it requires that upon completion of that inquiry, the judge have the means to craft conditions that are narrowly tailored for each individual case.

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COUNTY OF ALLEGHENY

One can imagine how a rudimentary tool like cash bail would make this an exceedingly challenging task. For instance, no matter how refined an inquiry the judge undertake, it is most likely going to be the case that conditioning a person's release on their payment of a sum of money will guarantee little more than prolonged incarceration. This is because about 80% of people who are accused of a crime are poor enough to qualify for the services of a public defender, which means that arguably, 80% of people who are accused of a crime do not have the ability to pay any amount in exchange for their release. As I am sure others will point out today, this raises serious due process, equal protection, and ultimately public safety concerns.

I ask myself, what is the message that we as a system send to the public when we rely on such undiscerning, potentially exploitive devices? Are we saying that even if we see you we cannot reach you; are we saying that even though we must protect you we are yet to figure out how? We all know that the public is ready for us to do better. From East Liberty to Ross Township, from Swissvale to South Fayette and everywhere in between, the vast majority of people agree that access to justice through our courts should not depend on what's in one's wallet, purse, or bank account.

I would like to briefly conclude with an example. It is not uncommon for a person with disability like autism spectrum disorder, or a person suffering from drug addition, or a person with a chronic mental illness, to appear in arraignment court for a bail hearing. Oftentimes when this happens, it would seem that but for some combination of the person's present circumstances and their condition, they would be eligible for pretrial release.

But here's the thing: it is not their condition, it is ours. More specifically, it is the conditions of release that we do not yet have, that we have not yet developed, but that would be narrowly tailored to fit the individual circumstances of such vulnerable persons and ensuring their immediate safe release from incarceration. That, to me, is our challenge. We need to stop blaming people for things that are beyond their control, and start taking responsibly for things that are entrusted buy the public to be within ours, as leaders, as system stakeholders, and as community stakeholders.

We can safely eliminate cash bail in Pennsylvania by ensuring that judges have an abundance of diversionary supports and options available at that critical moment when conditions of bail initially are set. Thank you.

BAIL REFORM

A GUIDE FOR STATE AND LOCAL POLICYMAKERS

February 2019

Colin Doyle | Chiraag Bains | Brook Hopkins

CRIMINAL JUSTICE POLICY PROGRAM
HARVARD LAW SCHOOL

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ABOUT THE CRIMINAL JUSTICE POLICY PROGRAM

The Criminal Justice Policy Program (CJPP) at Harvard Law School conducts research and advocacy to support criminal justice reform. It generates legal and policy analysis designed to serve advocates and policymakers throughout the country, convenes diverse stakeholders to diagnose problems and chart concrete reforms, and collaborates with government agencies to pilot and implement policy initiatives.

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INTRODUCTION

Nearly every jurisdiction in the United States relies upon money bail as a condition of pretrial release and as a covert form of pretrial detention. The practice of making the payment of a money bond a requirement for pretrial release[1] discriminates based on wealth, exacerbates racial disparities, results in over-incarceration, and imposes unnecessary costs on individuals and society at large. On any given day, American jails imprison nearly half a million people who have not been convicted of a crime — many of whom remain in jail only because they cannot afford to pay for their release. Across the country, increases in pretrial detention rates are "responsible for all of the net jail growth in last twenty years."[2] Awaiting trial from a jail cell, these individuals suffer worse case outcomes and risk losing their jobs, their homes, and custody of their children.[3] Some innocent people plead guilty just to get out of jail. The harms of our pretrial systems fall disproportionately on communities of color, as Black and Latinx people accused of crimes are more likely to be detained pretrial than similarly situated white people.[4]

As the problems of money bail and pretrial detention become more well known, pretrial reform has attracted the support of the media, politicians of both parties, professional organizations, and the public at large. The editorial boards of the Los Angeles Times, Washington Post, and New York Times have all written in support of abolishing money bail.[5] Non-profit organizations are working to eliminate money bail in at least 36 states.[6] Across the country, nearly forty community bail funds have formed to post bail for people who would otherwise be detained on unaffordable bond amounts.[7] A number of jurisdictions have already adopted reforms with the goal of reducing jail populations, protecting the community, saving money, and ensuring that people return to court.[8]

The problems with money bail are clear. But policymakers face a considerable challenge when mapping a route forward that promotes pretrial release, protects public safety, respects constitutionally required procedures, and uses practices supported by empirical research. This guide is designed to help state and local policymakers develop a plan for bail reform that relies upon expert opinions, in-depth legal analysis, social science research, and — most importantly — the practical experience of jurisdictions that have reformed their pretrial practices.[9] This guide is informed by interviews and correspondence with more than forty experts, the findings of dozens of empirical studies, and independent research into

the reforms, processes, and outcomes in thirteen jurisdiction across the United States. Included in this guide are lessons from the well-known leaders of bail reform — including New Jersey and Washington, D.C. — that have effectively eliminated money bail, achieved high rates of pretrial release, and protected public safety. But this guide also profiles jurisdictions with lesser known but impactful reforms, such as Yakima County, Oregon's success with increasing court appearance rates through automated court date reminders and Mesa County, Colorado's near-elimination of fees for pretrial services.

Experts, stakeholders, and advocates are in general agreement about some pretrial reforms, such as the value of adopting constitutionally required procedures for preventive detention. Other reforms are more contentious, with algorithmic risk assessment tools inspiring particularly heated debate within the field. Where disagreement has emerged, we have tried to generously and fairly outline the various claims and have included our own independent research and analysis. Wherever possible, empirical research has informed our recommendations for best practices.

Drawing upon this research, this guide is organized around five principles for pretrial reform that we believe are necessary to accomplish real change:

1. Limit Pretrial Detention
2. Eliminate Money Bail
3. Tread Carefully with Risk Assessment Tools
4. Optimize Pretrial Services
5. Involve Stakeholders at Every Stage of Reform

By organizing reforms around each of these principles, jurisdictions can eliminate the harms of money bail, promote equal justice under law, and maintain public safety.

Principles For Pretrial Reform

Limit Pretrial Detention

The Supreme Court affirmed over thirty years ago that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[10] In the United States, every person is presumed innocent until proven guilty and has a fundamental right to pretrial liberty. Consistent with that constitutional requirement, jurisdictions should implement strong procedural protections in favor of release pending trial. Release on recognizance should be the default rule. Defendants should have robust procedural protections against intrusions on their liberty, including the requirement that prosecutors meet a "clear and

convincing" evidentiary burden in order to detain someone or impose restrictive conditions of release. Because even short stays in jail can cause outsized harm to people, their families, and the broader community, release decisions should be made within 24 hours of arrest, and defense counsel should be appointed as early as possible to ensure that judges make informed release decisions.

Eliminate Money Bail

Jurisdictions should eliminate money bail as a condition of release. Money bail is a poor tool for achieving pretrial justice. The money bail system jails poor people because they are poor, not because they have been convicted of a crime and not because they are a danger to others. Meanwhile, that same system allows dangerous but wealthy people to post their bond and be released. The use of money bail leads to two common, often overlapping constitutional violations: 1) the detention of people solely because they cannot afford to pay a bond; and 2) *sub rosa* preventive detention, based on a judge's assessment of a defendant's danger to the community, that bypasses the constitutionally required procedures for preventive detention. Only by eliminating money bail can a jurisdiction securely prevent these injustices.

Tread Carefully with Risk Assessment Tools

The laws of many jurisdictions instruct judges to consider two risks associated with pretrial release: 1) the risk that someone accused of a crime will not reappear in court and 2) the risk that this person will endanger public safety.[11] Most of the jurisdictions studied in this guide have adopted algorithmic risk assessment tools meant to help judges better predict these risks. Risk assessment tools use historical data to assess a particular defendant's risk level based on the rate at which people with similar characteristics were arrested or missed court dates while on pretrial release. Many of these tools then offer a release recommendation based on that score.

Risk assessment instruments are not required for meaningful pretrial reform, and any jurisdiction that contemplates adopting risk assessment tools should consider two cautionary notes. First, pretrial risk assessment tools do not guarantee lower pretrial incarceration rates or more equal treatment. Ongoing research should better reveal the impact that risk assessments have, but at this time the results are largely unknown and will likely vary across jurisdictions. Second, because the criminal history data that powers risk assessments is biased, the predictions will be biased. Volumes of empirical research reveal that for the same conduct, Black and Latinx people are more likely to be arrested, prosecuted, convicted, and sentenced to harsher punishments. The disparities and biases in police

patrol activity, arrests, prosecution, and sentencing shape and distort the training data that inform the risk assessment tools.[12]

If a jurisdiction decides to use a risk assessment tool, some steps can be taken to reduce race- and wealth-based disparities, treat defendants more equitably, and keep pretrial incarceration rates low. Jurisdictions should reject tools that use proxies for race and class as predictors of risk, and they should select or build a tool with the express purpose of reducing racial and class disparities. The risk thresholds for release recommendations should be set to promote pretrial liberty, and risk assessment instruments should not be the sole basis for making detention determinations. Risk assessment tools should be tailored to conform to state law: The factors that a risk assessment tool considers should align with the factors that the law requires a judge to consider. Finally, it is critical that every policy decision about algorithmic risk assessment — whether to adopt a tool, which tool to select, how the outputs will be used — be made with the input of the community. Any risk assessment program must also include robust data collection and reevaluation processes to ensure transparency, accuracy, and fairness.

Optimize Pretrial Services

As jurisdictions strive to release more people pending trial, they should adopt pretrial interventions that work and reject interventions that overburden defendants without significant benefits to public safety or court appearance rates. Conditions of release that infringe on someone's liberty should be narrowly tailored and relate to specific, individualized concerns. Phone and text message reminders are a proven, cost-effective means of increasing court appearance rates. Electronic monitoring should be used rarely because it is a heavy restriction on liberty, carries a stigma, is costly, and has not been proven to improve public safety or court appearance rates. Requiring defendants to have in-person meetings with pretrial services officers has not been shown to improve pretrial outcomes. Pretrial services agencies should refer people to mental health and substance abuse treatment, but some empirical research indicates that making this treatment mandatory increases the risk of future arrest and missed court dates. Pretrial services should be fully funded by the government — people should not be forced to pay a "user fee" to fund pretrial services or monitoring.

Involve Stakeholders at Every Stage of Reform

A hallmark of successful reforms has been the repeated, consistent involvement of a broad range of stakeholders, including judges, prosecutors, public defenders, law enforcement, civil rights and civil liberties groups, community organizations, and people from communities that are most impacted by the criminal justice system. Across jurisdictions, a key

to success has been the consensus-building value of in-person meetings of diverse stakeholders with different viewpoints, goals, and experiences. Stakeholders and the public should also be given the opportunity to learn about the harms of the money bail system, the feasibility of reform, and the effectiveness of pretrial systems that maximize release and minimize unnecessary release conditions.

The guide proceeds as follows: Part II summarizes contemporary pretrial practices in the United States and the urgent need for reform. Part III explores the five principles for effective bail reform. Part IV concludes the guide. Appendix A is a model bill for pretrial procedures that codifies the principles from Part III. Appendix B includes in-depth case studies that examine the reform efforts from thirteen jurisdictions, divided into four categories:

Pioneers of Reform

Washington, D.C.

Kentucky

Recent Changes, Promising Outcomes

New Jersey

Cook County, IL

Santa Clara County, CA

Reform without Algorithms

New Mexico

Maryland

Snapshots of Local Innovation

Milwaukee and Dane Counties, WI

City and County of Denver and Mesa County, CO

Multnomah and Yamhill Counties, OR

THE URGENT NEED FOR BAIL REFORM

Money bail is a central part of the pretrial system of nearly every jurisdiction in the United States. The widespread practice of making the payment of a money bond central to the pretrial release decision discriminates based on wealth, exacerbates racial disparities, results in over-incarceration, and imposes unnecessary costs on individuals and society at large. Moreover, money bail does not adequately meet the twin goals of most pretrial systems: protecting public safety and ensuring a defendant's appearance at trial.[13]

Contemporary Pretrial Practices

Defendants awaiting trial in a criminal case may be released on personal recognizance, released on certain conditions, or detained in jail.[14] Most defendants are ordered to be released pending trial.[15] A person released on recognizance promises to return for future court dates. A person conditionally released must fulfill additional requirements such as posting a money bond, checking in with a pretrial services agency, maintaining employment, staying away from the victim or witnesses, or refraining from using alcohol or drugs.[16]

There are two types of bail bonds: secured and unsecured. With unsecured bonds, defendants do not provide money upfront but will owe the court money if they miss future court dates.[17] With secured bonds, defendants are free only after posting the full amount[18] or using real estate equity or a government bond as collateral.[19]

Secured bond is the predominant form of bail.[20] The United States Constitution and most state constitutions forbid the imposition of excessive bail.[21] In most jurisdictions, if a defendant cannot afford to pay the full bail amount, a bail bond agent can post bail on the defendant's behalf.[22] Bail bond agents typically charge upfront fees of up to 10% of the bail amount,[23] although some agents may charge a lower percentage or provide an installment plan.[24] These agents also charge service fees and can require collateral such as a house or car.[25] The bail bond agent retains the defendant's fee as profit and typically is not required to post the bond amount to the court unless the defendant misses a court date.[26]

When someone pays a fee to a bail bond agent, the money is never refunded, even if the person's case is dismissed or the person is acquitted.[27] If someone is unable to post bail and unable to pay a bail bond agent's fee, the person will remain in jail until the bond is posted or the case is over.[28]

Many states set bail amounts through bail schedules. Bail schedules prescribe predetermined bail amounts based on the seriousness of the criminal charges and sometimes include other factors such as age and criminal history.[29] A defendant who is able to post the scheduled bail amount before appearing in court will be released.[30] Bail schedules do not consider an individual's ability to pay the bail amount, and they do not involve an individual assessment of flight risk or danger to the community.

Most jurisdictions only permit pretrial detention in a narrow set of cases for the purpose of protecting the public. In Kentucky, judges can detain a defendant pretrial only if the defendant is charged with a capital offense and "proof is evident or the presumption is great that the defendant is guilty."[31] In jurisdictions that permit money bail, there is a risk that judges will circumvent procedural protections and limits on detention by imposing unaffordable bond amounts.[32]

The Problems with Money Bail

The money bail system imposes tremendous costs on the public, those who are detained, their families, and their communities. On an average day, the United States jails nearly half a million people who are presumed innocent and have not been convicted of a crime — many of whom are in jail only because they cannot afford to post bond.[33] With just over 4% of the world's population, the United States has almost 20% of the world's pretrial jail population.[34] Sifting through Department of Justice data from recent decades, the Prison Policy Initiative has determined that "[p]retrial detention is responsible for all of the net jail growth in last twenty years."[35] Release on recognizance rates have dropped, while money bail imposition rates have increased.[36]

Money bail exacerbates the disparities of the criminal justice system. By nature, money bail discriminates against low-income people through bond amounts that are either burdensome or unaffordable. Because wealth and race are correlated, money bail disproportionately harms Black and Latinx defendants. Implicit and explicit racial biases make this worse. Recent empirical research finds that judges overpredict the risk of Black defendants committing crimes on pretrial release and underpredict the risk of white defendants committing crimes on pretrial release.[37] Accordingly, money bail is imposed more often on Black defendants than white defendants, and Black defendants receive higher bail amounts than white defendants.[38] A nationwide study has also found that Latinx and Black defendants "are more likely to be detained [pretrial] than similarly situated white defendants."[39] Although most people in jail awaiting trial are men, the number of women detained pretrial has risen dramatically in recent decades.[40] A survey of people in prison indicates that LGBT people may face worse pretrial outcomes, but this issue is understudied and more research is needed.[41]

The consequences of pretrial detention are devastating. People who are jailed because they cannot afford to post bail may lose their jobs, their homes, and custody of their children.[42] A defendant's family also suffers, even when someone is able to post bail, "because bail agents often require collateral and/or co-signers to support a bail bond contract. In many cases, this means that a family member or friend must co-sign the bond and put up his or her own assets—such as a home or personal property—as collateral."[43]

People who cannot afford to post bail suffer worse case outcomes. As the Supreme Court has cautioned, a defendant detained pretrial "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."[44] Innocent people who are detained often accept plea offers for time served simply to get out of jail.[45] Collecting recent social science scholarship, Professors Megan Stevenson and Sandra Mayson have found that, "[n]o fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant's chance of conviction, as well as the likely sentence length."[46]

Unnecessary pretrial incarceration also has consequences for society at large. Research indicates that detaining a person pretrial increases the chances that the person will commit a crime in the future.[47] This can be true for jail stays as brief as two days.[48] American taxpayers spend approximately $38 million a day — or $14 billion a year — on pretrial detention.[49] Detention costs far exceed the costs of pretrial services or release on recognizance. Los Angeles County has determined that pretrial detention costs the county $177 per day per person,[50] but release and conditional release cost the county between $0 and $26 dollars per day per person.[51]

Jurisdictions across the country are embroiled in civil rights litigation over contemporary bail practices.[52] In 2017, a federal court granted a habeas corpus motion and found San Francisco's bail practices to be unconstitutional as applied to a particular defendant because he was detained solely because he could not afford his bond and the trial court had not assessed his ability to pay before setting the bond amount.[53] In 2018, the Fifth Circuit Court of Appeals largely affirmed a district court's preliminary injunction against Harris County, Texas, concluding that the pretrial-defendant plaintiffs are likely to succeed on a claim challenging the constitutionality of the county's bail practices.[54] And in the midst of litigation,[55] the Chief Judge of Cook County, Illinois issued an order forbidding judges from setting bail beyond what a defendant can afford to pay.[56]

The Supreme Court has held that the Constitution prohibits states from depriving individuals of their liberty on the basis of wealth. In the context of financial obligations imposed on convicted individuals, the Su-

preme Court held that judges must consider a defendant's individual circumstances — particularly the defendant's ability to pay and the availability of alternative punishments — before incarcerating the defendant on the basis of unpaid fines.[57] These principles have even stronger application in the pretrial setting, where defendants are presumed innocent and thus have a stronger liberty interest. The U.S. Department of Justice has adopted this understanding of the constitutional requirements of a pretrial system. In an amicus brief in a lawsuit challenging bail practices in Georgia, the DOJ explained: "[A] bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial."[58]

The Push for Reform

As the problems of money bail and pretrial detention have become more well known, the media, politicians, and the public have demanded reform. The editorial boards of the Los Angeles Times, Washington Post, and New York Times have all written about the need to abolish money bail.[59] Non-profit organizations are funding efforts to eliminate money bail in at least 36 states.[60] Almost forty community bail funds — non-profits that post bond for people held on unaffordable bail and that advocate to abolish the bail system — are active across the country.[61] Bail reform enjoys widespread and bipartisan support. Democratic Senator Kamala Harris and Republican Senator Rand Paul have introduced federal legislation that would encourage states to reform their bail practices.[62] And Senator Bernie Sanders recently introduced legislation to eliminate money bail at the federal level.[63] Organizations across the country officially support bail reform, including the American Bar Association,[64] the National Association of Pretrial Services Agencies,[65] the Conference of State Court Administrators,[66] the National Association of Counties,[67] the Conference of Chief Justices,[68] the American Jail Association,[69] the International Association of Chiefs of Police,[70] the Association of Prosecuting Attorneys,[71] and the National Association of Criminal Defense Lawyers.[72]

A number of jurisdictions across the country have already demonstrated that reforming money bail can reduce jail populations, protect the community, save money, and ensure that people return to court.[73] This guide provides principles that jurisdictions can use to create pretrial reforms that lower jail populations, ensure equal treatment, and protect public safety.

PRINCIPLES FOR PRETRIAL REFORM

This section collects principles and best practices that emerged from interviews and correspondence with experts, a review of empirical studies, and independent research into the pretrial reforms of thirteen jurisdictions: Washington, D.C.; Kentucky; New Jersey; Cook County, Illinois; Santa Clara County, California; New Mexico; Maryland; Milwaukee and Dane Counties, Wisconsin; City and County of Denver and Mesa County, Colorado; and Multnomah and Yamhill Counties, Oregon.[74] In light of this research, this guide offers five principles for pretrial reform that will help jurisdictions eliminate the harms of money bail, promote equal justice under law, and maintain public safety:

1. Limit Pretrial Detention
2. Eliminate Money Bail
3. Tread Carefully with Risk Assessment Tools
4. Optimize Pretrial Services
5. Involve Stakeholders at Every Stage of Reform

1. Limit Pretrial Detention

Use procedural safeguards to encourage release on recognizance

In too many places and for too long, prosecutors and judges have evaded the due process requirements for preventive detention by imposing bail amounts beyond what defendants can afford. Central to eliminating the harms of money bail is ensuring that courts provide robust due process protections for preventive detention and liberty-restricting conditions of release.

A just pretrial system requires a strong presumption in favor of unconditional release. As the Supreme Court reminds us "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[75] The laws in many jurisdictions require judges to impose the "least restrictive . . . condition or combination of conditions that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."[76] Complementary procedural protections ensure that judges follow this guidance to impose the least restrictive conditions.

The following protections should be incorporated into any procedures that restrict a defendant's liberty:

- Pretrial defendants should be afforded a presumption of unconditional release,[77] and pretrial detention should be permitted only for people charged with serious felony crimes.[78]
- For the court to consider a restriction on a defendant's pretrial liberty, the prosecution must file a motion for a separate hearing. This hearing should be held on the day of the defendant's first appearance or, if the prosecution or defense requests a continuance, soon after the first appearance (typically within three days).[79]
- Defense counsel should be present at this hearing and be given the opportunity to cross examine the prosecution's witnesses and present evidence.[80]
- To restrict a defendant's liberty, the prosecution should have the burden to prove by clear and convincing evidence that no less restrictive conditions of release will reasonably assure appearance at trial and safety of the community.[81]
- When detaining someone pretrial or otherwise restricting a defendant's liberty, the court should make a written finding on the record explaining why less restrictive conditions of release would be insufficient to protect the public or ensure that the defendant returns to court.[82]

Make release decisions within 24 hours of arrest

Because even short stays in jail can have a negative effect on a person and undermine public safety, strict timeliness requirements for release decisions are necessary to ensure that people who should be released spend as little time in jail as possible. In Kentucky, Washington, D.C., and Yamhill County, Oregon, pretrial services agencies must complete a risk assessment, conduct a pretrial interview to determine indigency for appointing a public defender, and make a recommendation to the court within 24 hours of a defendant's arrest.[83] In New Jersey, courts must make pretrial release decisions within 48 hours of a defendant's arrest, and as a matter of practice the courts try to make these decisions within 24 hours. In 2017, for cases in which prosecutors did not file motions for preventive detention, New Jersey courts made 81.3% of release decisions within 24 hours and 99.5% of release decisions within 48 hours.[84]

Some jurisdictions allow for administrative or automatic release of certain defendants prior to an appearance in court. Kentucky allows pretrial services agencies to release many lower risk defendants without a judge's involvement.[85] In Kentucky, judges can also release people before first appearance and appointment of counsel.[86] New Jersey allows police officers to run a preliminary risk assessment during the booking process.[87]

The risk assessment's recommendations encourage police officers to issue summons to lower risk people rather than arrest them. This practice reduces the number of people cycling through jail and saves many people from spending even a single night in jail. In the last year, more than two-thirds of the people charged with crimes in the state were issued summons instead of being sent to jail.[88]

Appoint defense counsel before the first hearing

Early appointment of defense counsel makes pretrial hearings more accurate and fair. Without defense counsel's advocacy, courts must make release decisions on piecemeal information about a defendant's circumstances. Judges and risk assessment tools rely on limited data that don't capture a full picture of someone's life and circumstances. A criminal record highlights only the negative parts of a person's past, and a police report contains only a fragmented description of an incident that has occurred. Defense counsel can contextualize this information and provide additional background information so that a judge can make a better-informed, individualized determination. Allowing defense attorneys to meet with their clients and read the pretrial services agency's reports before first appearance also allows defense counsel to correct any misinformation the court may otherwise receive.

2. Eliminate Money Bail

Money bail is an ineffective tool for protecting the public or ensuring that people show up to court. Money bail is a condition of release: After a judge has set a bail amount, a defendant can pay that amount or a bail agent's fee and get out of jail.[89] This means that a defendant's release depends upon an ability to pay. Wealthy defendants walk free while poor defendants languish in jail. Other conditions of release can be more effective, more efficient, and fair.

Money bail's connection to public safety is tenuous at best. Bail is not a means of preventing or deterring a defendant from committing crimes before trial. In many jurisdictions, a defendant forfeits bail upon missing a court date but does not forfeit bail upon committing a new crime.[90] To be sure, some judges use bail as a covert method of preventive detention by setting bail higher than they think a defendant can afford. But using bail in this way is not only a gamble — a defendant may still gather enough money for release — it is also unconstitutional because it circumvents due process requirements for preventive detention. Under Supreme Court precedent, courts seeking to detain a person for dangerousness must provide protections such as a full adversarial hearing at which the defendant is represented by counsel and has the right to present and challenge evidence.[91] The judge must also make a finding that no conditions of release

would be sufficient to protect the community.[92] The Constitution does not permit courts to use money bail to circumvent these requirements.

Money bail is not necessary to ensure that defendants reappear for trial. A working group in Santa Clara County found "that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice."[93] The jurisdictions studied for this guide confirm that high reappearance rates can be achieved through pretrial release and thoughtful pretrial services such as automated court reminders. In Santa Clara County, which has taken steps to rely less on money bail and release more people pretrial, more than 95% of defendants reappear in court.[94] Washington D.C. releases 94% of defendants pretrial,[95] and 90% of them make their court dates.[96]

Rather than eliminate money bail, some jurisdictions have attempted to forbid judges from imposing unaffordable bail. But so long as money bail remains a possible condition of release, some judges may continue to illegally detain people on unaffordable bonds. This exact problem has emerged in Cook County, Illinois after initially promising reforms. Last year, the county enacted a rule requiring judges to make ability-to-pay determinations before setting bail to ensure that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail."[97] To ensure compliance with the new rule, the Chief Judge reassigned all of the judges who had previously made bail decisions and assigned new judges in their place. And yet, a community court watch program found that some Cook County judges continued to detain people by setting unaffordable bail bonds.[98]

If a jurisdiction chooses to retain money bail as a condition of release, the jurisdiction should require judges to make a finding on the record that the defendant can afford the bond amount and that no other conditions of release would be sufficient to ensure the defendant's appearance in court. A review hearing should automatically be held if money bail is imposed and the defendant remains in custody for 24 hours.[99] But the only foolproof way to end illegal detention on unaffordable bail is the elimination of money bail.

3. Tread Carefully with Risk Assessment Tools

Laws in many jurisdictions instruct judges to make pretrial decisions based on two assessments of risk: the risk of a defendant committing a crime pretrial and the risk of a defendant fleeing the jurisdiction or evading prosecution.[100] To assist judges in making these predictions, many

jurisdictions have adopted algorithmic risk assessment tools as part of their pretrial reforms. Risk assessment tools use historical data to label a particular defendant as low-to-high risk based on the rate at which people with similar characteristics were arrested or missed court dates while on pretrial release. Different tools draw from different defendant characteristics, which can include criminal history, length of employment, job status, or even zip code. For example, the Laura and John Arnold Foundation's Public Safety Assessment (PSA) looks to nine risk factors that include age, a defendant's criminal history, and a defendant's history of missed court appearances.[101] Based on these factors, the PSA ranks the person on a six-point scale from low to high risk for two pretrial risks, "failure to appear" and "new criminal activity."[102]

The appeal of a risk assessment tool is straightforward: Big data could help judges make more accurate, consistent, and transparent decisions.[103] An algorithm that is driven by millions of empirical data points may more efficiently and more accurately predict future behavior than a judge applying a one-size-fits-all bail schedule or making quick judgments based on limited information. If a jurisdiction uniformly adopts these tools, then pretrial decisions could be more consistent and less influenced by the whims or prejudices of individual judges. And if the risk assessment tools contain or reflect bias along racial, class, gender, or other lines, then the tools have some potential to be analyzed and adjusted — unlike judges, whose biases remain hidden within the inaccessible "black box" of their minds.

Although risk assessment tools have been a prevailing trend in bail reform, a growing number of civil rights groups, public figures, and academics have voiced serious concerns about their use. In July 2018, more than one hundred civil rights and community groups, including the ACLU and the NAACP, signed a statement opposing the use of pretrial risk assessment tools because they "threaten to further intensify unwarranted discrepancies in the justice system and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change."[104] These groups argue that risk assessment tools fuel and perpetuate injustice because the tools are only as smart as the data that informs them, and the data informing the tools reflects the biases of a "profoundly flawed" system of justice.[105] These civil rights groups are not alone in expressing concerns over algorithmic risk assessments: former Attorney General Eric Holder has voiced similar concerns that these tools will reproduce racial disparities.[106] And in the book, *Against Prediction*, Professor Bernard Harcourt predicts that police and judicial use of algorithmic prediction tools will not only replicate but also exacerbate racial biases by providing a feedback loop that encourages greater targeting and punishment of communities of color.[107] Characterizing these risk assessment tools as "profile-based" rather than individualized, a Human Rights Watch report echoes concerns about racially

skewed data and also argues that the tools are too blunt, lumping defendants into broad categories of risk and failing to account for individual circumstances.[108]

Any jurisdiction considering the adoption or continued use of risk assessment tools should, at a minimum, consider the two main concerns with contemporary risk assessment tools:

The true impact of pretrial risk assessment tools is still unknown and using the tools does not guarantee lower pretrial incarceration rates or equal treatment.

Although some jurisdictions employing risk assessment tools have seen reductions in pretrial detention, missed court dates, and arrests of people on pretrial release, this is not universally true. In Lucas County, Ohio, pretrial detention rates increased by more than 10% after the county adopted the PSA.[109] Moreover, even within jurisdictions that have achieved positive outcomes, it's uncertain whether the risk assessment tools were responsible for that success or whether that success is due to other reforms that were adopted at the same time, changes in judicial culture, or other changes in the jurisdiction.[110]

It is also unclear if risk assessments are more accurate than judges at predicting defendants' risk of flight or risk of committing crimes while on release. In a recent study, researchers found that people anonymously recruited on the internet were as good as the COMPAS pretrial risk assessment tool at predicting whether defendants would commit pretrial offenses.[111] There has not been a similar side-by-side study comparing the accuracy of judges' assessments with the accuracy of algorithmic assessments.

Ongoing research should help to answer at least some of the lingering questions concerning the efficacy of risk assessment tools. The Access to Justice Lab at Harvard Law School is conducting randomized control trials in multiple jurisdictions that have adopted the PSA, including Dane County, Wisconsin, one of this guide's case studies.[112] Although the results won't be available for a few years, the research should indicate whether the PSA itself was responsible for changes in pretrial detention rates, missed court dates, and pretrial arrest rates in those jurisdictions.

Risk assessment tools will reproduce the inaccuracies, disparities, and biases of the criminal history data that the tools use as training data.

There is no accurate, unbiased source of data identifying who commits crimes.[113] Volumes of empirical research reveal that for the same conduct, Black and Latinx people are more likely to be arrested, prosecuted, convicted, and sentenced to harsher punishments.[114] These racial and class

disparities and biases shape and distort the criminal justice data that trains risk assessment tools.

Almost all risk assessment tools rely on arrest records as proxies for criminal activity, but arrest records are both under- and over-inclusive of the true crime rate. Arrest records are under-inclusive because they only chart law enforcement activity: Many crimes do not result in arrest.[115] According to FBI crime data for 2017, less than half of all reported violent crimes — rapes, robberies, murders, and aggravated assaults — resulted in an arrest.[116] And only 18% of reported property crimes result in an arrest. Arrest records are also over-inclusive because people are wrongly arrested and arrested for minor violations, including those that can't result in jail time. In many places, a significant number of arrests don't result in convictions — the Department of Justice's Bureau of Justice Statistics reports that, in America's 75 largest counties, one-third of *felony* arrests do not result in a conviction.[117]

Given the flaws inherent in the data, some advocates have concluded that risk assessments should not be used because they would further entrench racial and class biases within the pretrial process.[118] Others have acknowledged that bias is inherent in criminal justice data but still value risk assessments' potential as an imperfect improvement to the status quo.[119] From this perspective, criminal history data is already part of the pretrial decisionmaking process: Judges consider arrest records and prior offenses in their pretrial decisions. Keeping risk assessments out of the system doesn't keep criminal history data out. The argument is that if risk assessments can result in reductions of racial disparities and lower pretrial incarceration rates, then they're worth adopting. But it's still unknown whether risk assessments will achieve such results in practice, and it's likely that results will vary across jurisdictions.

As the case studies in this guide demonstrate, jurisdictions with high pretrial detention rates can include risk assessment tools as part of a reform package. But risk assessment tools do not by themselves guarantee reduced pretrial detention rates or a more equal pretrial system. Bail reform does not require risk assessment tools. These tools are, at their best, only one part of reform.

If a jurisdiction chooses to adopt a risk assessment tool, the following guidelines can help mitigate race- and wealth-based disparities, ensure

that defendants are assessed fairly and individually, and lower pretrial incarceration rates:

- Reject proxies for race and class as predictors of risk
- Be precise when characterizing risks
- Conform the risk assessment tool to state law
- Set risk thresholds that promote pretrial liberty
- Validate the algorithm for the local population
- Engage the community
- Retain judicial discretion and include procedural protections
- Collect data and make adjustments

Reject proxies for race and class as predictors of risk

As Professor Sonja Starr has argued, risk assessment tools that use "demographic, socioeconomic, family, and neighborhood variables" are unconstitutional, unwise, and inaccurate.[120] Whether or not there is a statistical correlation between race or wealth with re-arrest rates or missed court dates, these inputs and their proxies are impermissible — both on moral grounds and under federal and state constitutional law.[121] A person should not be incarcerated pretrial based on the actions of people with similar skin color and economic circumstances. If the state determines that someone is too dangerous to be released, it should be because of an assessment of that person's particular behavior, not because of that person's race, neighborhood, and finances.

Risk assessment algorithms that use demographic and socioeconomic data are likely to replicate the money bail system's wealth and race discrimination. Some risk assessment tools use wealth-based predictors for risk, such as renting rather than owning a home.[122] Within these jurisdictions, renting rather than owning a home can contribute as much to one's risk score as having a history of revoked bond or supervision.[123] The core injustice of money bail is that a person's freedom is dependent upon the amount of money she has. The rich experience one system of justice, while the poor experience another. Creating risk assessment tools that use wealth as a proxy for risk replicate that injustice but mask it behind the apparent neutrality of statistics and data.

These concerns have all the more force given that the predictive accuracy of risk assessment algorithms remains an open question. Including additional factors doesn't necessarily result in better predictions. A recent study found that for predicting the recidivism outcomes of a Florida pretrial population, the inclusion of more factors did not result in better predictive accuracy.[124] An algorithmic tool that looked at only two factors — age and total number of previous convictions — performed better than a tool that considered seven factors.[125]

Be precise when characterizing risks

Independent risks should have independent risk scores. Some contemporary risk assessment instruments produce one risk score, while other risk assessments generate separate scores for the risk of nonappearance and the risk of pretrial arrest.[126] There's no reason to conflate the two risks into one, because each of the risks may be mitigated by distinct conditions of release. Risk scores are meant to inform judicial decisionmaking rather than dictate an outcome. Separate scores allow a judge to more carefully consider release and conditions of release, and they allow pretrial services agencies to more efficiently address a defendant's needs and circumstances.

Risk scores should also be labeled accurately. Most risk assessments produce "new criminal activity" risk scores that purport to assess the risk that a defendant will engage in crime while on pretrial release.[127] In fact, these risk scores only assess the risk that a defendant will be arrested while on pretrial release. As noted previously, arrest records are both under- and over-inclusive of the unknown real rate of criminal activity, and are largely a measure of law enforcement activity. Risk scores should be accurately labeled the "risk of arrest" or "risk of re-arrest" — not the "risk of new criminal activity."

Conform the risk assessment tool to state law

Risk assessment tools should conform to the state law's pretrial decisionmaking requirements. This is especially important for assessments of risk of future dangerousness that lead to recommendations for preventive detention. In many jurisdictions, there are strict state constitutional law requirements surrounding the use of preventive detention. For example, the California Constitution guarantees defendants charged with non-violent felonies a right to conditional release.[128] This provision of state constitutional law places limits on which defendants a judge may preventively detain. Even if a risk assessment instrument were to determine that someone charged with a nonviolent felony represents a high risk of committing a crime pretrial, a judge could not preventively detain that person because the California Constitution guarantees that person's release. Therefore, whenever a defendant has been charged with a non-violent felony, any decisionmaking framework in use in California should conform to state law and recommend some form of release. Decisionmaking frameworks must be carefully designed so that they cannot issue recommendations that conflict with state law.

Similarly, when a judge is statutorily required to consider a specific risk, a judge should rely on a risk assessment tool only if the tool calculates risk in the way that the statute prescribes. To use another example from California, the state constitution allows for someone charged with a violent felony to be preventively detained only when there is "clear and con-

vincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others."[129] If California judges are to rely on a risk assessment tool when making preventive detention determinations for people charged with violent felonies, then that tool should measure the risk that a "person's release would result in great bodily harm to others."[130] A generalized risk that a person will be re-arrested for any crime is a different risk altogether. Risk assessment tools should not be relied upon for hearings in which the risk assessment tool calculates a different risk from the one that the judge is statutorily required to consider.

Jurisdictions may find that risk assessment tools can be useful in some pretrial contexts but not in others. State laws and constitutions tend to place more stringent procedural requirements on preventive detention than upon release and conditional release. Risk assessment tools are thus more likely to be helpful and appropriate for quickly and efficiently identifying people to be released on recognizance than for providing meaningful information when a judge must decide whether someone should be detained.

Set risk thresholds that promote pretrial liberty

Preventive detention should be the exception, not the rule. Accordingly, risk assessment tools should reflect the presumption in favor of releasing defendants. Risk assessment tools use historical data to predict a defendant's likelihood of missing court dates and committing a crime pretrial. But these predictions of risk are distinct from the tools' subsequent recommendations of what risk levels to tolerate and who to release — often referred to as a tool's "decisionmaking framework" or "decisionmaking matrix."[131] The recommendation to release or detain someone is a policy determination and is not dictated by the underlying data.

If these decisionmaking components are calibrated to recommend pretrial incarceration or onerous conditions of release for an excessive number of defendants, local jail populations will increase and more people will be involved in the criminal justice system through pretrial monitoring.

Contemporary immigration practices reveal how policy choices for these decisionmaking frameworks dictate release and detention outcomes. For years, Immigration and Customs Enforcement (ICE) has been using a risk assessment algorithm to determine whether someone arrested for an immigration violation should be detained or released on bail.[132] The tool previously recommended that some people be released and some people be detained.[133] But last year the decisionmaking framework was modified to recommend that everyone be detained. ICE now goes through the motions of using an algorithm to predict risk and inform decisionmaking, even though the release decision is predetermined. This is an extreme example of how pretrial release rates remain a policy choice distinct from

a risk assessment tool's prediction of risk. Policymakers should calibrate risk thresholds to promote pretrial liberty.

Validate the algorithm for the local population

A necessary step for adopting any risk assessment instrument is to validate it for the local population.[134] Each risk assessment tool has been trained on a certain dataset and is therefore accurate for that training data. But the tool needs to be tested to make sure that it will be accurate for new data. Rather than adopt a risk assessment tool off the shelf, a jurisdiction should test the tool to see if it would remain accurate for that jurisdiction's pretrial population. If an assessment tool has poor predictive accuracy for the jurisdiction, the jurisdiction should not adopt it. The validation process uses existing court data to test how accurately the risk assessment tool would have predicted the pretrial behavior of recent defendants. To validate a risk assessment tool, jurisdictions typically rely on technical assistance from a university or non-profit organization.[135]

Engage the community

Particularly with new and controversial elements of reform, like algorithmic risk assessment, broad community engagement and education must occur before changes are adopted. Community input should be solicited and considered before any risk assessment tools are deployed. Because these tools will judge members of the community and help determine their freedom, the public must have the opportunity for input. Before adopting these tools, public hearings should be held, and the public should have the opportunity for notice and comment. Community groups and advocacy groups should be included on government committees tasked with evaluating these tools.

Within the government, judges, attorneys, and pretrial officers should all understand the capabilities and limitations of risk assessment instruments. Assessing risk is only the first step in pretrial decisionmaking. The subsequent decisions to release, impose conditions, or detain, and the policies that guide and restrict those choices, are even more important.

Education is a necessary part of the implementation process. Before statewide reform was implemented in New Jersey, the state held training seminars for judges, attorneys, court personnel, local officials, and the public to ensure that everyone understood how the new system worked and how release and detention determinations were to be made.[136] Continuing education is also critical. Kentucky uses regularly scheduled judicial college trainings to update judges on new pretrial information and research.[137] Given the high level of bail reform activity around the country and the growing body of academic research, regular trainings are essential.

Retain judicial discretion and include procedural protections

Risk assessment instruments must not be the sole basis for making detention determinations. These tools provide information. Judges must decide what to do with that information, along with other information provided by defense counsel, prosecutors, and pretrial services agencies.

To date, every jurisdiction that employs risk assessment tools allows judges to depart from the recommendations of the tool. This is important, given judges' longstanding role and depth of experience in pretrial decisionmaking. To encourage judges to consider the information provided by risk assessment tools and by pretrial services agencies, some jurisdictions have created procedural requirements for judges who wish to depart from the risk assessment recommendations. Before departing, a judge must make a finding on the record and write an explanation for the departure.[138] This is a practice that promotes transparency, accountability of the justice system to the community's priorities, and respect for defendants' rights.

Collect data and make adjustments

Risk assessment tools cannot entirely avoid or fix the racial and class biases inherent in criminal justice data. But judges who currently make pretrial decisions are similarly influenced by implicit racial and class biases.[139] Unlike the human mind, risk assessment tools produce recommendations based on specific inputs and can be adjusted. Risk assessment tools should be regularly audited and reviewed to ensure that they produce fair and accurate outcomes. At the very least, jurisdictions should collect data about risk assessment performance, defendant outcomes, and judicial decisions. Some jurisdictions also track the cases in which prosecutors motioned for pretrial detention, along with the prosecution's success rate at these hearings.[140]

Robust data collection, especially as part of an automated system, makes tracking the success or failure of reforms easier and reveals where adjustments should be made. For example, regular data collection and review can reveal how and when certain judges deviate from the risk assessment recommendations. Consistent tracking and analysis also allow for recognition and examination of unexpected trends. This data should be made publicly available so that the public can hold the risk assessment instrument accountable to the community's values and priorities and so that researchers can study and improve upon existing systems.

4. Optimize Pretrial Services

Pretrial services agencies should provide services that are minimally intrusive and that are proven to help public safety or improve court appearance rates. Pretrial monitoring should be tailored to individual circumstances and should use the least restrictive means of reasonably assuring that the public will be safe and that a defendant will return to court.

As jurisdictions strive to release more people pending trial, they must also guard against imposing unnecessary conditions. Mandatory drug testing and treatment, mental health treatment, and electronic monitoring can be disruptive to peoples' employment and family lives, and yet research has not shown that these requirements improve pretrial outcomes.[141] In many cases, there are inexpensive and easily administrable alternatives that more effectively help people return to court and remain arrest-free.

Because the effects of many pretrial services remain largely unknown, jurisdictions should collect data and regularly reevaluate the services that they offer to ensure that the benefits outweigh the costs. Jurisdictions should explore new services that can encourage people to return to court, including subsidizing transportation to court, providing childcare in the courthouse, and attempting to contact a defendant who misses a court date before issuing a bench warrant.

Use phone and text reminders

Calling or texting people to alert them of upcoming court dates is an effective, cost-saving tool for lowering failure-to-appear rates. Multnomah County, Oregon ran a pilot program that placed automatic calls to pretrial defendants to alert them of upcoming court dates. The program increased appearance rates by 31% and saved the county over a million dollars in eight months.[142] After the success of the pilot program, the county expanded the service countywide and has been saving money for more than a decade.[143] Just this year, a study of New York City found that text message reminders increased appearance rates by 26%.[144] Yamhill County, Oregon adopted web-based software that automatically calls defendants in either English or Spanish to remind them of their upcoming court dates.[145] Milwaukee County, Wisconsin employs a variety of communication methods, sending out automated reminders by email, text, and phone.[146] The academic literature reaffirms the success of court date reminders: Two empirical studies have each found that reminders increase appearance rates.[147]

Limit in-person check-in requirements

Despite their ubiquity, mandatory in-person meetings with pretrial services officers are not supported by evidence. Across the country, a core pretrial service is the requirement to attend in-person meetings with a pretrial services officer on a weekly or monthly basis. But the few studies that have been conducted to evaluate this practice have been inconclusive, providing no reliable evidence that these meetings improve court-appearance rates or public safety.[148] Empirical studies of probation and parole supervision reveal that required meetings have no effect on future criminal activity but result in more technical violations.[149] In weighing the costs and benefits of this unproven practice, jurisdictions should keep in mind the burden that weekly in-person meetings can impose on defendants, given that people may have to travel a great distance, may have transportation issues, may have difficulty taking time off from work during business hours, and may have childcare responsibilities.

Limit the use of electronic monitoring

Electronic monitoring and home arrest are very restrictive conditions and should be reserved for rare cases in which a defendant must be kept away from a specific area or person and preventive detention is the only alternative. Empirical studies have not found any conclusive evidence that electronic monitoring prevents flight or crime.[150] Interviewees across jurisdictions cautioned against an overreliance on electronic monitoring because of the outsized impact it can have on someone's life: Electronic ankle bracelets carry a stigma that can prohibit someone from gaining or maintaining employment and can disrupt family and social life.[151] For homeless people or for people whose work or childcare responsibilities do not allow them to sit by a power outlet for extended periods of time, keeping an electronic bracelet charged or keeping up with fees for electronic monitoring can be challenging or impossible.

Refer clients to non-mandatory social services

In general, fewer mandatory conditions can lead to better case outcomes and can avoid setting defendants up to fail. Requiring substance abuse and mental health treatment can be ineffective and can make pretrial failure more likely when applied to low-risk defendants.[152] Some empirical research has shown that requiring defendants to participate in substance abuse testing and treatment does not result in better pretrial outcomes. In one study that split defendants into control and experimental groups, higher risk defendants reappeared in court and were re-arrested at the same rates, whether or not testing and treatment were required. But with lower-risk defendants, those who were required to receive testing and treatment were rearrested more often and reappeared in court less frequently.[153] In another study, required mental health treatment for defen-

dants across all risk categories did not result in any change in pretrial outcomes.[154] While referrals for needed social services may helpful, jurisdictions should avoid making them mandatory.

Consider community-sponsored services

In Santa Clara County, deep community engagement with pretrial processes has led to a new model for pretrial monitoring. With the advocacy and support of a community organization called Silicon Valley De-Bug, Santa Clara County is in the process of implementing "community-sponsored release" as an alternative to pretrial detention and specific, mandatory conditions of release.[155] Under community-sponsored release, defendants will be able to choose a community-based organization, such as a church or community group, that will support the defendant on release by providing services, such as court date reminders, transportation, and referrals to any needed social services.[156] This promising model of conditional release can help to engage the broader community in pretrial justice and can lessen some of the workload for a pretrial services agency while also tailoring pretrial support for a particular individual.

Don't impose fees for pretrial services

The criminal justice system is a public good and all aspects of the system, including pretrial services, should be collectively funded through tax dollars. But in many jurisdictions, fees are charged for pretrial services. For example, judges frequently require defendants to submit to periodic drug testing, which can include fees of between $15 and $20 per test.[157] Some jurisdictions charge defendants a fee for pretrial monitoring, including electronic monitoring, which can run as high as $900 per month.[158]

Fees associated with pretrial release conditions and services can distort sound policy decisionmaking and create perverse incentives and conflicts of interest. By externalizing the expense of pretrial services onto defendants, policymakers do not have to weigh the expense of those services against the public safety or court efficiency benefits they provide. For jurisdictions that partially fund their court system or other public institutions through pretrial services fees, there is a perverse incentive to maximize the number of defendants who receive fee-based conditions and to maximize the number of fee-based conditions a defendant receives.

If a defendant is acquitted or the charges are dropped, the defendant still has to pay any fees incurred for pretrial services.[159] This means that an innocent person can be forced to pay thousands of dollars for having been wrongfully arrested.[160] Criminal justice debt can have a profound effect on low-income defendants and can keep them ensnared in the criminal justice system for years.[161] If a payment plan is offered, the fees associated with these plans are often high and the terms are long. If someone misses a payment, additional fees can rack up. People facing criminal justice debt

may have to choose between paying down their debt and making child support payments or rent payments.

All this can be avoided by not charging fees for pretrial services and conditions of release. Mesa County, Colorado has changed its practices so that defendants are not charged fees for pretrial services.[162] One exception is that defendants pay for electronic monitoring if they can afford to pay for the cost, but no one is denied pretrial services if they cannot pay a fee, and people are not considered to be in violation of their conditions of release for not paying a fee.[163]

If a jurisdiction does charge fees for pretrial services, there should be careful inquiry into a defendant's ability to pay, and any fees should be graduated or waived accordingly.[164] Policymakers should be sure that robust ability-to-pay determination procedures are put into place and followed by judges and pretrial services personnel.

Make pretrial services an independent agency

Pretrial services should be an independent agency with dedicated pretrial officers — not a part of the probation department and not staffed by probation officers. Pretrial services agencies have unique goals and a unique relationship to people accused of crimes that are not shared by probation departments. A pretrial services agency is concerned exclusively with ensuring court appearance and public safety, whereas probation can have broader goals including rehabilitation, collecting or monitoring restitution payments, and ensuring punishment for people who violate conditions of probation.[165] Probation is part of a criminal sentence after a finding of guilt, but pretrial services agencies work for people who are presumed innocent — many of whom will not be convicted of a crime. As a result, the Constitution guarantees people who are monitored by a pretrial services agency a greater liberty interest and more rights than people who have been convicted and are being supervised by a probation office.

Separating the offices that supervise people on probation and monitor people on pretrial release helps to ensure that these distinctions are respected by staff and understood by the community at large. Even if a pretrial services agency is housed as a unit within a probation department, the National Association of Pretrial Services Agencies' Standard on Pretrial Release recommends that pretrial services function as an independent entity within that department.[166] If a pretrial services agency must exist within a probation office, the Pretrial Justice Institute and the American Probation and Parole Association have identified strategies for differentiating pretrial services agencies from probation, including separate staff, training, and mission statements.[167]

5. Involve Stakeholders at Every Stage of Reform

Successful pretrial reform must include a broad coalition of stakeholders, including every entity that participates in any step of the pretrial process. The reform process needs to include, connect, and listen to judges, prosecutors, public defenders, law enforcement, civil rights and civil liberties groups, and community organizations, especially those that include people hurt by crime and people who have been incarcerated. Judges must be included as leaders in the reform process for reforms to reflect their expertise and to ensure that judges will be invested in the reforms that they will be administering. This coalition-building process should include identifying the beliefs and needs of all stakeholders and establishing a common understanding of the mission before beginning reform efforts. Across jurisdictions, a key to success has been the consensus-building value of in-person meetings of diverse stakeholders with different viewpoints, goals, and experiences.

Pretrial reform in New Jersey shows the benefits of deep stakeholder engagement. After the publication of a study exposing problems with pretrial justice in New Jersey, the Chief Justice of the state supreme court formed a committee of diverse stakeholders to begin considering reform.[168] From an early stage, the reform process involved the governor, judges, the Attorney General's Office, and the Public Defender's Office, community organizations, and civil rights and civil liberties groups.[169]

Throughout the process of reform, the judiciary has held regularly scheduled meetings with a variety of stakeholders and created a number of committees on which different stakeholders can serve. Even though there has not been unanimous agreement with every element of pretrial reform, the entire criminal justice community feels invested in and responsible for the success of the state's pretrial reform efforts.

Education can dispel unwarranted fear about departing from the status quo. As this guide shows, a number of jurisdictions can already demonstrate how mechanisms other than money bail can lower jail populations and improve public safety. Reform can gain and hold traction when stakeholders and the broader community understand the viability of alternatives. New Jersey in particular has made it a priority to engage and educate the public. The state hosted public forums in every county in the state and held special seminars to educate the news media about the particulars of reform.[170] The court website hosts training seminars, web videos, statistical reports, news stories, and live video feeds of pretrial hearings.[171] These educational efforts may have contributed both to New Jersey's success with reforms and also to sustained public support for the new pretrial system.

CONCLUSION

Certain pretrial principles can lead to just pretrial outcomes and safe communities. Any locality attempting pretrial reforms would do well to limit pretrial detention, eliminate money bail, tread carefully with risk assessment tools, optimize pretrial services, and involve stakeholders at every stage of these reforms. The model bill for pretrial procedures and the case studies included in the appendices should further help to inform the reform process, but they are not an exhaustive set of pretrial reforms or jurisdictions worth studying.

The challenges ahead are not small. The money bail system is deeply entrenched. But money bail is not a necessary part of an effective pretrial program. By implementing smart, effective reforms, jurisdictions can lower pretrial detention rates and safeguard the right to pretrial liberty while maintaining or improving public safety.

APPENDIX A:

MODEL BILL FOR PRETRIAL PROCEDURES

This model bill codifies the pretrial procedure principles from Part III of this guide. The language has been modeled and borrowed from existing statutes but does not precisely match the laws of any particular jurisdiction.

I. First Appearance and Pretrial Release Decision

1. The court shall make a pretrial release decision for a defendant without unnecessary delay, but in no case later than 24 hours after the defendant's arrest.
2. A court may order:
   a. a defendant's release on personal recognizance, or
   b. a detention and conditional release hearing, upon a motion of the prosecutor seeking this hearing.
3. There shall be a rebuttable presumption that the defendant's release on recognizance will reasonably assure the defendant's appearance in court, the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.
4. When ordering that a defendant be released on recognizance, the court may also order that:
   a. The defendant shall not commit a crime during the period of release.
   b. The defendant shall avoid all contact with a victim of the alleged crime.
   c. The defendant shall avoid all contact with witnesses who may testify concerning the offense that are named in the document authorizing the defendant's release or in a subsequent court order.
   d. Pretrial services shall provide the defendant with reminders for all upcoming court dates via phone, text, or email.
   e. Pretrial services shall provide the defendant with a referral to non-mandatory job training or medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency.
5. A defendant released on recognizance shall not be assessed any fee or other monetary assessment related to processing the defendant's release.
6. When ordering a detention and conditional release hearing, the court may impose conditions of release or detain the defendant in jail until the hearing, unless the defendant has already been released from custody, in which case the court shall issue a notice to appear to compel the appearance of the defendant at the hearing.

If a jurisdiction chooses to allow money bail as a condition of release the following provision may be included:

Monetary Bail

1. A court may order that a defendant be released on monetary bail:
   a. for the purpose of assuring the defendant's appearance in court,
   b. not for the purpose of assuring the safety of any other person or the community.
2. There shall be a presumption that any condition(s) of release imposed shall be non-monetary in nature. Secured bond shall not be set by reference to a predetermined schedule of monetary amounts. The court shall not set a secured bond that a defendant cannot afford.
3. Prior to setting monetary bail, the court shall conduct an inquiry into the defendant's ability to pay monetary bail. This inquiry shall allow the prosecutor, defense counsel, and the defendant the opportunity to provide the court with information pertinent to the defendant's ability to pay monetary bail. This information may be provided by proffer and may include statements by the defendant's relatives or other people who are present at the hearing and have information about the defendant's ability to pay monetary bail. All information shall be admissible if it is relevant and reliable, regardless of whether it would be admissible under the rules of evidence applicable at criminal trials.
4. In an order setting monetary bail, the court must issue written findings explaining:
   a. why no non-monetary conditions of release will reasonably assure the defendant's appearance in court,
   b. how the defendant is presently able to pay the bond amount to secure his or her release, and
   c. why the bond amount is lowest amount necessary to reasonably ensure the defendant's appearance in court.
5. If, 24 hours after the imposition of money bail, a defendant continues to be detained, that defendant is entitled to a detention and conditional release hearing.

II. Detention and Conditional Release Hearing

1. Before trial, the court may order that a defendant be released on conditions or may order the detention of a defendant charged with [category of offenses within the jurisdiction that are eligible for pretrial detention], only if
   a. the court grants a prosecutor's motion for a detention and conditional release hearing, and
   b. after a hearing the court finds clear and convincing evidence that no less restrictive conditions would reasonably assure the defendant's appearance in court, the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.
2. A prosecutor may file a motion for a detention and conditional release hearing at any time, including before or after a defendant's pretrial release.
3. If the defendant is in custody, the hearing shall be held no later than the day of the defendant's first appearance in court, unless the defendant or prosecutor seek a continuance. If the prosecutor seeks a continuance, the hearing will be held in an expedited manner and no later than three days after the defendant's first appearance. If the defendant seeks a continuance, the hearing will be held no later than seven days after the defendant's first appearance.
4. At the hearing, the defendant has the right to be represented by counsel. If the defendant is financially unable to obtain adequate representation, the defendant has the right to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but shall be admissible in any future hearing to determine whether the defendant subsequently violated a condition of release or committed a crime while on release.
5. In determining conditions of release or detention, the court may take into account information concerning:
   a. the nature and circumstances of the offense charged;
   b. the weight of the evidence that could be presented against the defendant at trial, with the court allowed to consider the admissibility of any evidence sought to be excluded;
   c. the history and characteristics of the defendant, including:
      i. the defendant's character, physical and mental condition, employment, community ties, family connections and obligations, past conduct, history of drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
      ii. whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of a sentence for an offense under federal law, or the law of this or any other state;

d. the specific danger to any other person or the community that would be posed by the defendant's release, if applicable;

e. the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release, if applicable; and

f. any recommendations from the pretrial services agency.

6. In a release order imposing conditions of release, the court must:
   a. include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct;
   b. advise the person of:
      i. the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release; and
      ii. the consequences of violating a condition of release, including immediate arrest or issuance of a warrant for the person's arrest; and
   c. include written findings of fact and a written statement of the reasons for the conditions imposed, including the reason no less restrictive conditions would reasonably assure the defendant's appearance in court or the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, except for the following conditions:
      i. The defendant shall not commit a crime during the period of release.
      ii. The defendant shall avoid all contact with a victim of the alleged crime.
      iii. The defendant shall avoid all contact with witnesses who may testify concerning the offense that are named in the document authorizing the defendant's release or in a subsequent court order.
      iv. Pretrial services shall provide the defendant with a referral to non-mandatory job training
      or medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency.
7. The court may not order the defendant to pay all or a portion of the costs of any conditions of pretrial release. A defendant shall not be assessed any fee or other monetary assessment related to processing the defendant's release.
8. The court may, by subsequent order and without a hearing, permit the release of a detained defendant or remove conditions of release.
9. If, 24 hours after the imposition of conditions of release, a defendant continues to be detained, that defendant is entitled to a re-hearing.
10. A defendant may appeal an order of conditional release.
11. Regarding pretrial detention, there shall be a rebuttable presumption that release or release with conditions would reasonably assure the defendant's appearance

in court, the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

12. In a detention order, the court must include written findings of fact and a written statement of the reasons for detaining the defendant before trial, including the reason no less restrictive conditions would reasonably assure the defendant's appearance in court or the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.
13. A defendant may appeal an order of pretrial detention. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.
14. The detention and conditions of release hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds changed circumstances or finds information that was not known to the court, the prosecutor, or the defendant at the time of the hearing and that these changed circumstances or new information have a material bearing on the issue of whether there are conditions of release that will reasonably assure the defendant's appearance in court, the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process. Upon a motion of the prosecutor alleging that the defendant has committed a new crime or has violated a condition of release while on release from custody before trial, the court may reopen the hearing.

APPENDIX B:
CASE STUDIES

This appendix describes the pretrial reforms in thirteen jurisdictions, organized under four headings:

Pioneers of Reform

Washington, D.C. and **Kentucky** have been pioneers of pretrial reform for decades. Both jurisdictions have eliminated the commercial bail bond industry, have robust pretrial services agencies, and rely on risk assessment tools to inform release decisions.

Recent Changes, Promising Outcomes

New Jersey, **Cook County**, **Illinois**, and **Santa Clara County**, **California** have all dramatically overhauled their pretrial processes in recent years, increasing pretrial release, reducing or eliminating reliance on money bail, and adopting risk assessment instruments to guide judicial decisionmaking. With the support of local stakeholders and engagement with civic groups, each of these three jurisdictions has reshaped its pretrial processes from top to bottom. Although reform is still ongoing in each jurisdiction, the short-term outcomes are positive.

Reform without Algorithms

Although much of the discussion over bail reform centers on algorithmic risk assessment tools, procedural protections against unnecessary pretrial detention are integral to reform. **New Mexico** and **Maryland** have recently implemented legislation and court rules that promote pretrial release and reduce reliance on money bail.

Snapshots of Local Innovation

Much of the reporting on pretrial reform focuses on state legislation and state supreme court rulings and rules. But some localities have improved pretrial justice independent of statewide authority. This section captures how **Milwaukee and Dane Counties**, **Wisconsin**; **City and County of Denver and Mesa County**, **Colorado**; and **Multnomah and Yamhill Counties**, **Oregon** have independently reformed pretrial justice in their communities by methods that include investing in pretrial services, finding cost-effective ways to increase court appearance rates, and empirically evaluating risk assessment tools.

Each of the jurisdictions studied continues to work to improve their pretrial practices, and none should be understood as a complete and perfected model of reform.

PIONEERS OF REFORM

Washington, D.C.

Major reforms:

- **Strong Presumption of Pretrial Release**
- **Strict Timeliness Requirements and Procedural Protections**
- **Risk Assessment**
- **Pretrial Services**

Since the 1960s, Washington, D.C. has been a leader in pretrial reform by reducing reliance on money bail and providing pretrial services. The district has a strong presumption of pretrial release, strict timeliness requirements for assessing a defendant after arrest, and procedural protections for preventive detention. The district uses a risk assessment tool that it developed. Pretrial services are housed in an independent agency and services range from court date notifications to mental health treatment to halfway house placement. D.C.'s efforts have been highly successful. 94% of defendants are released pretrial — of this group, 91% make their scheduled court dates and 98% are not arrested for a violent crime while awaiting trial.[172]

The Reform Process

Bail reform in Washington, D.C. began in 1963, when the District of Columbia Junior Bar Association wrote a report about conditions in the city's jail, detailing how the majority of jail inmates were defendants who could not afford bail.[173] In response to the report, the Ford Foundation funded the D.C. Bail Project at Georgetown Law School, which provided judges with background information about a defendant's ties to the community to help judges make more informed decisions about release.[174] Through a series of congressional acts in the late 1960s and early 1970s, the D.C. Bail Project became the Pretrial Services Agency for the District of Columbia with an expanded set of pretrial services and staff.[175] By 1971, 56% of all defendants were released on non-financial conditions; by 1975, the rate was 70%.[176]

The most recent substantial reform happened in 1992, when the city council passed the D.C. Bail Reform Act.[177] According to a contemporaneous memo from that time, the council "recognized that an over-dependence on cash bonds, coupled with delays in bringing defendants to trial, resulted in lengthy pretrial detention of too many defendants, a

disproportionate number of whom were poor."[178] To address this concern, the Bail Reform Act created a set of guidelines that virtually eliminated money bail.[179]

Key Reforms

Strong Presumption of Pretrial Release

The 1992 Bail Reform Act covers pretrial release and detention.[180] Its sets out a presumption of unconditional pretrial release.[181] If a judge determines that more restrictive conditions than personal recognizance or unsecured bond are required, the judge must impose the "least restrictive . . . condition or combination of conditions that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."[182] The judge cannot impose money bail that results in someone's pretrial detention, and can impose financial conditions only to assure the defendant's appearance at court proceedings, not in order to protect public safety.[183]

Strict Timeliness Requirements and Procedural Protections

The pretrial services agency is required by law to interview "any person detained pursuant to law or charged with an offense in the District of Columbia who is to appear before a judicial officer."[184] Defendants are interviewed within 24 hours of arrest.[185]

D.C.'s statutory scheme provides for preventive detention in certain cases.[186] In the following instances, the judge must hold a hearing to determine if any condition or set of conditions short of detention will reasonably assure the appearance of the defendant and the safety of the community:

1. the defendant has been charged with a crime of violence or dangerous crime;
2. defendant has been charged with obstruction of justice;
3. there is a "serious risk" that the defendant will either obstruct or try to obstruct justice or "threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror"; or
4. there is a serious risk that the defendant will abscond.[187]

In determining whether conditions of release exist that will assure the appearance of the defendant and the safety of the community, the judge should examine the following factors:

1. "the nature and circumstances of the offense charged,"
2. "the weight of the evidence against the person,"

3. "the history and characteristics of the person," and
4. "the nature of the danger to any person or the community that would be posed by the person's release."[188]

The government has the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure appearance at trial and safety of the community.[189] The pretrial detention statute also contains a rebuttable presumption that "no condition or combination of conditions of release will reasonably assure the safety of any other person and the community" if the judicial officer finds by probable cause that the defendant committed one of an enumerated list offenses, including armed robbery, injuring a police officer, and carrying a firearm without a license.[190]

Risk Assessment

The pretrial services agency has a propriety risk assessment tool that uses information about a defendant obtained through an interview with a pretrial services officer.[191] The District of Colombia does not publically reveal all of the factors its risk assessment tool considers or the weight it gives to those factors, although some limited information about the tool has been released. For example, the risk assessment instrument considers a defendant's prior missed court appearances, "previous dangerous and violent convictions, suspected substance use disorder, current relationship to the criminal justice system, among others."[192] The risk assessment tool produces one risk score that combines the risk of missing court dates with the risk of re-arrest.[193]

After the pretrial interview, the pretrial officer prepares a report that a judge must consider when determining release and level of monitoring, although the judge is not bound by the pretrial services agency's recommendations.[194] The report includes "criminal history, lock-up drug test results, risk assessment, treatment needs and verified defendant information (residence, employment status, community ties, etc.)."[195]

Pretrial Services

Pretrial services is an independent agency that is not housed within probation.[196] Based on the defendant's risk level and specific needs, the pretrial services agency recommends release conditions, which may include notification of court dates, drug testing, substance abuse treatment, mental health treatment, stay-away orders, meetings with a pretrial services officer, halfway house placement, and electronic monitoring.[197] In addition to monitoring, the agency's Social Services and Assessment Center connects defendants to resources like employment assistance, housing, and other social services.[198] Eligible defendants may also volunteer to participate in Drug Court.[199] The pretrial services agency also supervises defendants in a diversion program in which defendants are placed in treatment centers.[200]

Pretrial services officers may recommend that defendants with substance abuse issues or mental health disorders enter a twenty-eight day residential treatment program.[201] This program assesses and treats drug and mental health problems, teaches life skills, and helps people transition into outpatient treatment programs.[202]

Outcomes

Washington D.C. has succeeded in maximizing both non-monetary release and positive pretrial outcomes. The District releases 94% of defendants pretrial.[203] Data from 2012 through 2016 show that in each year between 88% and 90% of people released while awaiting trial remained arrest-free.[204] Each year, between 98% and 99% of released defendants were not arrested for violent crimes.[205] And between 88% and 90% of released defendants made their scheduled court dates.[206]

The D.C. pretrial release system did suffer some bad publicity when, in late May 2016, a man on supervised release fatally shot someone.[207] The man had a GPS monitoring device attached to his prosthetic leg which he left at home.[208] And in 2015, a man released on a misdemeanor charge was charged in a fatal stabbing two days after release.[209] The pretrial services agency accepted responsibility for these incidents, noting that human error is always an issue but that the overwhelming majority of defendants released are not re-arrested.[210] D.C. did not retreat from any elements of its pretrial system as a result of these incidents.

One problem remaining in D.C's pretrial release process is the rebuttable presumption that no condition or combination of conditions will reasonably assure public safety or appearance when a defendant is charged with certain offenses.[211] An automatic preventive detention hearing based on the offense charged, rather than risk of reoffending, fails to take into account the individual situation of each defendant.[212] It also ties detention hearings to the choices of prosecutors, who have wide discretion in charging, and raises the risk of undue incarceration based on inappropriate charging decisions.[213]

Kentucky

Major Reforms:

- **Statewide Risk Assessment**
- **Automatic Release for Low-to-Moderate Risk Defendants Facing Low-Level Charges**
- **Timeliness Requirements**
- **Procedural Protections**
- **Pretrial Services and Court Date Reminders**

Kentucky has a number of procedural protections for people accused of crimes, including presumptions of release and requirements that judges impose the least onerous conditions necessary to reasonably ensure reappearance and public safety. The pretrial services agency supervises a small percentage of the people on pretrial release and gives all defendants phone-call reminders for upcoming court dates. With relatively high levels of pretrial release, Kentucky also has high levels of pretrial success with low failure-to-appear and re-arrest rates. At the same time, although Kentucky law only allows for preventive detention in capital cases, judges detain defendants by imposing money bail beyond what they think a defendant can afford. Kentucky uses the Laura and John Arnold Foundation's Public Safety Assessment statewide. The state has recently implemented a program that allows the pretrial services agency to automatically release low-to-moderate risk individuals facing low-level charges without requiring a hearing before a judge.

The Reform Process

Kentucky has been a leader in the pretrial field since 1976, when it banned commercial bail bonds and established pretrial services.[214] Since that time, Kentucky has continually improved its pretrial systems. Nearly a decade ago, Kentucky was an early adopter of risk assessment tools.[215] The state used its own proprietary risk assessment model before switching to the PSA in 2013. The PSA has proven to be a quicker and less interview-intensive method of identifying and releasing people who were unlikely to miss their court dates or to be rearrested.[216] Kentucky continues to explore new methods of pretrial reform: After a successful pilot program, the state recently launched a statewide administrative release program that allows for certain defendants to be released without requiring a hearing before a judge.[217]

Key Reforms

Statewide Risk Assessment

Kentucky currently uses the PSA as a statewide risk assessment tool.[218] Even though the PSA does not require an in-person interview, pretrial officers meet directly with defendants after arrest and booking to verify a defendant's identity, check a defendant's veteran status, and determine if a defendant is indigent and needs a public defender.[219] After conducting an interview, a pretrial officer calculates the defendant's risk score. Once the risk score is ready, the officer contacts the judge and presents the defendant's risk score and release recommendation.[220] In predicting the defendant's risk of committing a pretrial crime or failing to appear, the PSA looks only at the defendant's criminal history, charging documents, and age.[221]

Automatic Release for Low-Risk Defendants

In 2013, Kentucky piloted an Administrative Pretrial Release Program in 20 out of 120 counties.[222] The state expanded the program to all counties in 2017. Designed to expedite release and increase efficiency by reserving court resources for evaluating higher-risk defendants, the program automatically releases lower risk defendants.[223]

Under this program, pretrial officers can order the release on recognizance of eligible defendants immediately after running the PSA and without presenting those findings to a judge. A defendant is eligible for release if:

1. their PSA risk score is low-to-moderate, and
2. their current charge is a non-violent, non-sexual misdemeanor.[224]

Judges in each jurisdiction are permitted to expand the group of eligible defendants to include certain low-level felonies.[225] All other defendants must be presented to a judge for a release decision.[226]

Timeliness Requirements

Kentucky law, rules, and practices require pretrial services officers and judges to make timely release decisions. The pretrial services agency must conduct the risk assessment and make a release recommendation to the court within 24 hours of a defendant's arrest.[227] If a defendant is still in custody 24 hours after the judge's initial release decision — typically because the defendant has been unable to post bond — the judge must conduct a review of the conditions of release.[228] This review often takes place at an arraignment the next day in the presence of defense counsel and the prosecution.[229]

Procedural Protections

Kentucky has strong presumptions in favor of release and procedural protections for people accused of crimes. By statute, release on recognizance is the default pretrial disposition.[230] All defendants are considered bailable, except defendants in capital cases where "proof is evident or the presumption is great that the defendant is guilty."[231] Even though judges are not permitted to detain the vast majority of defendants, judges can impose conditions of release rather than release them on recognizance.[232] If a judge imposes money bail as a condition of release, the judge must consider the person's ability to pay when setting the bail amount.[233]

Judges may also impose specific release conditions, including release to custody of another, restrictions on travel, and the payment of money bond.[234] Judges must impose the "least onerous conditions" that are likely to ensure the defendant's appearance.[235] There are some mandatory release conditions for felony sex offenders, violent offenders, and people with certain substance abuse problems.[236] If a defendant has a history of drug or alcohol abuse, the court can impose drug and alcohol testing as a condition of release.[237] The court can charge a fee not exceeding the cost of the test and analysis, but the courts can also waive this fee for indigent people.[238] In practice, courts do not waive this fee because drug testing is done by private companies that charge per test and the courts do not have money allocated to pay for drug testing.[239]

At any point prior to trial, either the prosecution or defense can file a written motion requesting a change of release conditions.[240] The moving party must demonstrate either a material change in circumstances or a substantial risk of non-appearance.[241]

Pretrial Services and Court Date Reminders

Kentucky's statewide pretrial services agency interviews defendants, conducts risk assessments, makes release recommendations to the court, and monitors people on pretrial release.[242] Kentucky's pretrial services staff are assigned across the state based on need. Larger counties have multiple full-time staff members, whereas rural counties that may process as few as ten arrests per month are serviced by regional staff.[243] The pretrial services agency is part of the court system and its budget is allocated by the court. The court's overall budget is determined by the legislature.[244] The state pays for pretrial services, while the counties fund jails. Thus, the counties enjoy the jail cost savings from higher release rates while the state accepts the cost of providing pretrial services.[245]

The pretrial services agency currently notifies every released defendant of upcoming court dates through automated text messages. The agency manually calls people whose phones can't receive text messages.[246]

Outcomes

Since banning the commercial bail bonds industry and instituting pretrial services over forty years ago, Kentucky has built a long track record of high appearance and low pretrial offense rates while imposing minimal pretrial monitoring. In recent years Kentucky has released around 70% of pretrial defendants,[247] more than 90% of whom are released within three days of arrest.[248] Typically less than 10% of those released miss court dates or are re-arrested while on release.[249] Only half of one percent of people released pretrial are rearrested for a violent felony (murder, non-negligent manslaughter, forcible rape, robbery, or aggravated assault).[250] While Kentucky's 30% rate of pretrial detention is lower than the pretrial detention rate of many states, it's also much higher than jurisdictions with single-digit detention rates like Washington, D.C., and New Jersey. Moreover, judges in Kentucky are only able to detain these defendants by imposing money bond beyond what a defendant can afford, because the state constitutional law does not allow for detention outside of capital cases.

Neither adopting a risk assessment tool nor switching from a proprietary risk assessment tool to the PSA meaningfully impacted pretrial incarceration rates or judicial behavior in Kentucky. Empirical research by Professor Megan Stevenson reveals that the mandated adoption of risk assessment tools in 2011 "led to only a trivial increase in pretrial release."[251] But the method of release did change: Judges imposed money bail in fewer cases and instead released people on their own recognizance or non-monetary conditions.[252] Although judges initially adhered to release recommendations when risk assessments were first introduced, judges have drifted away from the recommendations over time.[253] Judges have also been reluctant to follow release recommendations at the first bail setting. According to the study, "[i]f judges followed the recommendations associated with the risk assessment, 90% of defendants would be granted immediate non-financial release. In practice, only 29% are released on non-monetary bond at the first bail-setting."[254]

The switch from Kentucky's proprietary risk assessment to the PSA had limited impact. According to a study conducted six months after Kentucky adopted the PSA, the change helped the state reduce crime among defendants on pretrial release by 15%, while increasing the percentage of defendants released before trial.[255] But Stevenson's more recent empirical study examines trends over a longer timeline and reveals that the switch from Kentucky's own risk assessment tool to the PSA has had "essentially no effect on releases, failures-to-appear, pretrial crime, or racial disparities in detention."[256]

The limited impact of risk assessment tools and the apparent judicial deviation from statutory and constitutional requirements for pretrial detention should not discourage other jurisdictions from adopting some of

Kentucky's pretrial practices. Both empirical studies predate Kentucky's administrative release program, which may increase pretrial release rates and should reduce the amount of time some defendants spend in jail. And Kentucky's longstanding timeliness requirements and procedural protections have a proven track record of keeping release rates relatively high even if adoption of risk assessment tools were not able to improve those numbers.

RECENT CHANGES, PROMISING OUTCOMES

New Jersey

Major Reforms:

- **Risk Assessment**
- **Technological Overhaul for Case Management**
- **Pretrial Services**
- **Procedural Protections for Preventive Detention**
- **Sustained Stakeholder Engagement and Education**

In 2017, New Jersey overhauled its pretrial justice system. Key reforms include the creation of a statewide pretrial services agency, a state constitutional amendment allowing preventive detention, a robust set of procedural protections concerning preventive detention, and statewide use of pretrial risk assessments. System actors and advocates were involved in every stage of the reform process and remain engaged through committee meetings, solicitation of public comments on potential revisions, and litigation. Initial results have been promising: New Jersey's jail population decreased by 20% in the first year of reforms.[257] This 20% decrease followed a 15% decrease in jail population during the two preceding years in which the state considered reforms and educated system actors.[258]

The Reform Process

In 2013, the Drug Policy Alliance published a study that found that pretrial detainees made up nearly three-fourths of New Jersey's jail population.[259] More than a third of these pretrial detainees remained in jail only because they could not afford bail.[260] More than 10% were detained because they were unable to post bail of $2,500 or less.[261] The system disproportionately affected poor defendants and people of color, as over two-thirds of the New Jersey jail population were Black or Latinx.[262]

In response to the study, the Chief Justice of the New Jersey Supreme Court gathered system actors — including judges, prosecutors, public defenders, private counsel, court administrators, and local government staff — to form a committee to consider pretrial reform.[263] In its 2014 report, the committee concluded that the state's existing pretrial system suffered from a "dual system error" of 1) detaining poor, low-risk defendants and 2) releasing wealthier, high-risk defendants.[264] On any given day,

the state was detaining around 9,000 pretrial defendants, at an average cost of about $100 per detainee per day.[265] The committee recommended that New Jersey transition to a "risk-based" system, in which a defendant's likelihood of missing a court date and his or her danger to the community would guide pretrial release decisions.[266] Believing that this system would require greater monitoring of released defendants, the committee also recommended that the state provide effective pretrial release services.[267] In developing these recommendations, the committee drew support from the experience of other jurisdictions — in particular the District of Columbia,[268] Kentucky,[269] and Virginia[270] — as well as New Jersey's own success using risk-based assessments in the juvenile justice system.[271]

In 2014, the state legislature passed and the governor signed the New Jersey Bail Reform Act,[272] which adopted many of the committee's recommendations, including establishing a pretrial services agency and adopting a risk assessment instrument.[273] Following the adoption of this legislation, New Jersey voters approved a state constitutional amendment allowing preventive pretrial detention.[274] Both the Bail Reform Act and the constitutional amendment went into effect on January 1, 2017.[275]

Key Reforms

Risk Assessment

Under the new statutory scheme, a defendant's risk of nonappearance and threat to public safety determine if the defendant is released and under what conditions, if any. There is a presumption in favor of "non-monetary" conditions of release, allowing the use of money bail only in situations where "no other conditions . . . will reasonably assure the . . . defendant's appearance in court."[276] If non-monetary conditions are set, those conditions must be "the least restrictive condition[s]" determined to reasonably assure the defendant's appearance at trial, the safety of any person or the community, or the integrity of the criminal justice process.[277] For example, courts will release a low-risk defendant on the condition that the defendant will be reminded of the court date by a text message or phone call from the pretrial services agency, but courts will release a high-risk defendant on more restrictive conditions, such as electronic monitoring and house arrest.

To assess a defendant's risk, New Jersey uses the Laura and John Arnold Foundation's Public Safety Assessment, which was validated using a retrospective study of New Jersey cases.[278] Under the New Jersey Bail Reform Act, a court must make a pretrial release decision within 48 hours of a defendant's arrest, during which time the pretrial services agency will prepare a risk assessment along with recommendations for conditions of release.[279] In practice, courts make these decisions within 24 hours.[280] These recommendations are determined by a decisionmaking framework that takes into account the current charge, whether the defendant is

already on pretrial release, and the risk assessment score to recommend one of four levels of pretrial monitoring or pretrial detention.[281] The court must consider this risk assessment and recommendation when making its decision, but is not bound by the pretrial services agency's recommendation.[282] If a court departs from the recommendation, the court must provide a written explanation for doing so.[283] The inputs for the PSA are drawn from the databases of statewide case management systems and state and national criminal history systems.[284] The PSA does not require an interview. The assessments are made available to defendants and their counsel, who receive both the PSA score and the information that was used as inputs for the algorithm.

Before launching the PSA statewide, New Jersey conducted pilot programs in three jurisdictions to train staff and test new technology.[285] Training seminars were subsequently held for county officials to ensure consistent implementation across the state.[286]

The New Jersey Bail Reform Act does not specifically require the courts to use the PSA, but it does require the judiciary to adopt an assessment tool that is "objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear . . . and the danger to the community while on pretrial release."[287] It also requires that the instrument gather demographic information on defendants, including on race, gender, and socio-economic status.[288] The act also established a commission that will review annual reports concerning risk assessments and pretrial services and will make recommendations for new pretrial legislation.[289]

New Jersey has also implemented a preliminary risk assessment for police officers to use.[290] When booking someone, a police officer can either send that person to jail or release the person with a summons to appear in court at a later date.[291] Under the new guidelines, low-risk defendants are expected to receive a summons and not be detained. As explained in the next section, the automated PSA tool gives police officers a preliminary risk score for the defendant during the booking process, which allows police officers to make a more informed choice between detaining and issuing a summons.

Technological Overhaul for Case Management

New Jersey has overhauled its case management software from top to bottom. The new software seamlessly integrates information databases in real time, automates the PSA's algorithmic calculations, and sends electronic alerts to the pretrial services agency, attorneys, and court staff.[292] During the booking process, a police officer digitally scans a defendant's fingerprints and begins entering information into a digital police report. This fingerprint scan and report are automatically shared with the judiciary and the pretrial services agency.[293] Upon receiving the fingerprint scan, the software identifies the defendant, runs the PSA's risk assess-

ment algorithm and decisionmaking framework, and saves the result to the case file.[294] Informed of the defendant's risk score and conditions of release recommendation, the police officer can decide to arrest the defendant or issue a summons.[295] If the police officer does detain the defendant, the software automatically alerts court staff that the defendant is in custody and automatically starts a countdown timer for the 48 hours that a defendant may remain in custody before a judge makes a pretrial release decision.[296]

Pretrial Services

New Jersey has established a statewide pretrial services agency with the dual responsibilities of 1) conducting risk assessments and making recommendations for conditions of release, and 2) monitoring defendants who have been released.[297] Monitoring can take several forms, ranging from court date reminders via text or e-mail to electronic monitoring using an ankle bracelet.[298]

The pretrial services agency is a unit within the criminal division of the state judiciary.[299] A Pretrial Services Program Review Commission — which includes the state attorney general, state legislators, court administrators, prosecutors, the public defender's office, and the heads of New Jersey civil rights groups, including the NAACP, Latino Action Network, and ACLU — has been established to periodically review the work of the pretrial services agency.[300] The commission meets at a majority of its members' request or at the request of the chair of the commission. The commission is tasked with making recommendations to the legislature and must, at minimum, make an annual report to the governor, legislature, and state supreme court.[301]

The New Jersey Bail Reform Act authorized the state supreme court to increase court filing fees to assist in the funding of the pretrial services agency.[302] The Supreme Court has increased filing fees across the board for all civil cases and applications, such as divorce filings, tenancy complaints, and gun permit requests.[303] But the court has not been able to generate sufficient revenue to fund the pretrial services agency through fees alone.[304] The legislature will need to appropriate more funding to the pretrial services agency to keep the programs running.[305] Alternative funding for the pretrial services agency is especially important because funding court services through fees can limit access to justice.[306]

Procedural Protections for Preventive Detention

New Jersey amended the state constitution to allow preventive pretrial detention.[307] The state constitution previously guaranteed a right to bail in all cases, forcing courts to set bail even when a defendant posed an unmanageable danger to the community if released.[308] Under the amended constitution, courts can deny bail, but only when "no amount

of monetary bail, non-monetary conditions of pretrial release, or combination [thereof] would reasonably assure the appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process."[309] Consistent with this amendment, the New Jersey Bail Reform Act allows for pretrial detention only if the court determines that it is necessary to ensure court appearance, protect the community, or prevent the obstruction of justice.[310] When making a detention decision, the court must consider the risk assessment and recommendations from the pretrial services agency.[311]

This preventive detention scheme contains due process protections and is limited in scope.[312] Preventive detention is allowed only upon motion of the prosecutor and after a pretrial detention hearing.[313] For these hearings, defendants have a right to counsel, right to discovery, and a right to call witnesses and present evidence.[314] At the hearing, the burden of proof is on the government to show, by clear and convincing evidence, that detention is warranted.[315] The clear and convincing evidence standard is not a light burden of proof for the prosecution to meet. Under the New Jersey rules of evidence, clear and convincing evidence is "a standard of proof falling somewhere between the ordinary civil and criminal standards" and it "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."[316]

Under the new law, some charges automatically trigger a recommendation of detention from the pretrial services agency irrespective of the defendant's PSA risk score. These charges include murder, robbery, rape, some forms of assault, and some gun crimes.[317] Except for cases in which the defendant has been charged with murder or other crimes that can result in a life sentence, the recommendation of detention is insufficient on its own to rebut the presumption of release.[318] In all cases, the government bears the burden of proof, and the judge must make the finding that detention is warranted by clear and convincing evidence. Automatic recommendations for detention based on a criminal charge can be problematic because they circumvent the risk analysis and are based on the low probable cause threshold for issuing a charge.[319]

The new pretrial system creates a more transparent process than the former money bail system.[320] Courts no longer resort to covert preventive detention by setting high amounts of money bail for dangerous defendants, because defendants who pose a real danger to the community can be detained based on that risk. In fact, courts are specifically prohibited from considering community danger as a factor when setting money bail.[321]

Sustained Stakeholder Engagement and Education

A key element of reform in New Jersey has been the extensive collaboration among stakeholders from across the criminal justice community. With strong leadership from the judiciary, regularly held meetings and well-organized committee delegation have ensured that a wide array of system actors feel responsible for the implementation and continued success of pretrial reform.

Since 2015, the judiciary committee has made it a priority to engage and educate the public. The New Jersey courts website features training seminars, web videos, statistical reports, news stories, live video feeds of pretrial hearings, and more.[322] The judiciary has hosted public forums in every county in the state.[323]

Consistent collaboration and open communication have fostered the sense that design, implementation, and calibration of risk-based pretrial decision-making in New Jersey is an on-going process. The notion of collective responsibility and the early and ongoing efforts to engage a diverse array of system actors has allowed New Jersey to nimbly adjust to issues as they emerge. Officials have been able to tweak the system without jeopardizing or stalling the progress that they have achieved.

Outcomes

- 94% release rate
- 20% reduction in jail population in the past year[324]

The initial results of New Jersey's reforms have been positive. In the last year, New Jersey has reported significant decreases in its number of pretrial detainees.[325] In 2017, 94.2% of people accused of a crime were released pretrial and only 5.6% were ordered to be detained.[326] As a result, New Jersey's jail population has also decreased by 20% since the start of the year.[327] Money bail has been almost entirely eliminated: In 2017, money bail was imposed as a condition for release on only 44 defendants.[328]

According to local actors, case processing under the new system has been smooth. The courts have successfully met the requirements of the new law, making all release decisions within 48 hours of arrest. In fact, the courts have aimed in practice to make their decisions within 24 hours. In 2017, for cases in which prosecutors did not file motions for preventive detention, courts made 81.3% of release decisions within 24 hours and 99.5% of release decisions within 48 hours.[329]

The automation of risk assessment information has had a significant impact. Because the PSA is automatically run after a defendant's fingerprint has been scanned, a police officer knows whether a court is likely to release or detain the person she is currently booking. Our interviews reveal that this has resulted in more frequent use of summons and less frequent

use of short term pretrial detention in which the police initially detain someone only for a court to release that person a day or two later.

Reactions to reform have been largely favorable, but not without some criticism. Our interviewees had mixed views on the new pretrial detention scheme, with some suggesting that prosecutors were moving for detention too often, and others suggesting the opposite. In 2017, prosecutors sought detention in 14% of cases, and succeeded 6% of the time, resulting in the pretrial incarceration of 8,043 people out of the 142,663 people charged.[330]

New Jersey's pretrial monitoring rates are hard to directly compare with other jurisdictions because New Jersey issues summons to such a high percentage of people charged with crimes, and New Jersey courts don't make release decisions for those cases. In 2017, the courts made release decisions for 44,319 defendants, but did not make release decisions for the 98,344 defendants who received summons and were not subject to detention or pretrial conditions.[331] Compared to other jurisdictions, New Jersey's rate of court-ordered release on recognizance remains low at 7.8%. But when the calculation includes defendants who were issued summons, New Jersey's rate of release on recognizance is effectively 71%.[332]

Bail reform advocates — including the ACLU, the NAACP, and the Drug Policy Alliance — have applauded the initial results of reform but contend that detention rates remain too high and racial disparities persist. [333] New Jersey's pretrial detention rate of 14 per 10,000 residents is still higher than the national average, although the rate may continue to decrease as reforms take root.[334]

A few months into the new system, the New Jersey Attorney General expressed concerns about the PSA, questioning whether it adequately accounted for the risks associated with gun offenses or repeat offenses. This criticism led to two substantial policy changes. First, in May 2017, the New Jersey Attorney General's Office revised its guidelines to prosecutors, directing them to seek pretrial detention for defendants charged with serious gun offenses or defendants who allegedly committed offenses while on parole, probation, or pretrial release.[335] Second, the New Jersey Administrative Office of the Courts decided — after consulting with the New Jersey Attorney General, the New Jersey Public Defender, the New Jersey ACLU, and other stakeholders — to recommend pretrial detention for defendants charged with serious gun offenses and a higher monitoring level for defendants charged with other gun offenses. The Attorney General's office also asked the judiciary committee to adjust the PSA algorithm to generate higher risk scores for defendants charged with gun offenses, but the judiciary committee declined to do so.[336]

Some police officials have also been critical of the reforms, arguing that the new system undermines their work and makes communities less safe.[337] The release of certain defendants with serious prior convictions

has further stoked these criticisms, although there is little basis to determine whether such cases are representative of a broader problem or how often similar defendants were released under the prior money bail system. A vocal opponent of the reforms has been the bail bond industry, whose business has been largely eliminated in the state.[338]

Cook County, Illinois

Major reforms:

- **Ability-to-Pay Determinations Before Setting Bail**
- **Risk Assessment**

In 1963, Illinois became one of the first states to eliminate the commercial bail bonds industry. In the decades following this landmark legislation, stakeholders have pushed for additional pretrial reforms, but only some parts of the state have achieved significant improvements. Illinois' patchwork of reforms is largely a result of the state's segmented criminal justice system. Illinois' pretrial programs, primarily funded by the state, are individually administered by each judicial circuit's chief judge. Though some policy is made on the state level, local judges have wide latitude in designing pretrial procedures and conditions of release. This organizational structure has made statewide reform challenging but has also encouraged local innovation.

The story of bail reform in Cook County, which encompasses Chicago and some of its suburbs, demonstrates the importance of coalition building, experimentation, and stakeholder buy-in. In 2017, after civil rights litigation and massive community support for pretrial reform, Cook County's Chief Judge announced a dramatic reorganization of the county's pretrial practices. Under an administrative order, judges in Cook County must impose non-monetary conditions of release whenever possible. Before imposing money bail, judges must determine that the defendant has the ability "to pay the amount necessary to secure his release" and that "no other conditions of release, without monetary bail, will reasonably assure the defendant's appearance in court."[339] Judges are also required to use a risk assessment instrument.[340] After these reforms were adopted, judges began releasing more people on recognizance or affordable bond, and the county jail population dropped significantly.[341] But as time has worn on, judges have returned to familiar habits and increasingly impose unaffordable money bail.[342]

Less consequentially, the state has also adopted modest pretrial reforms. A statute that took effect earlier this year requires all defendants to be represented by counsel at initial bond hearings — codifying a rule that had already been the practice in most of the state, including Cook County. The law also discourages the use of money bail and encourages localities to adopt risk assessment tools. But the new law doesn't require jurisdictions to adopt either of these reforms, nor does it provide incentives for adopting them.

The Reform Process

Over the past half century in Illinois, pretrial reforms have been implemented in a piecemeal and sporadic fashion but have at times resulted in dramatic change. In 1963, Illinois was among the first states to eliminate the role of bail bondsmen by allowing defendants to post 10% of a secured money bond directly to the court.[343] Since then, the state has undertaken other reforms, including the passage of the Pretrial Services Act in 1987, which required each judicial circuit to establish a pretrial services agency.[344] Though they represent a step in the right direction, those agencies have varied in their level of effectiveness.

Many of the recent reform efforts stem from a 2014 report from the Administrative Office of Illinois Courts criticizing Cook County's pretrial services agency.[345] Drawing upon interviews with over 147 stakeholders from key areas of the criminal justice system, including judges, prosecutors, probation officers, and public defenders, the report noted several major problems with Cook County's pretrial services agency.[346] The report found that the 1987 statute had become "largely aspirational" and that current pretrial systems were understaffed and in desperate need of restructuring and reorganizing.[347] The report also noted issues in monitoring, training, and information sharing, and it highlighted a "general lack of understanding" among key actors about how pretrial systems were supposed to work.[348] The report also found judicial discretion to be highly variable and found that electronic monitoring was used inconsistently across pretrial departments.[349] Although Cook County administered a risk-assessment tool, the report found that judges largely ignored the tool's findings.[350] Judges' mistrust was fueled by a number of factors: The tool was not statistically validated, the information used to make determinations was generally not verified by court staff, and many judges did not adequately understand how the assessment worked.[351]

After the report's release, several jurisdictions, including Cook County, took nominal steps to reform their pretrial systems. Cook, Kane, and McLean County courts adopted the Laura and John Arnold Foundation's Public Safety Assessment.[352] By mid-2015, the PSA was being administered for almost all defendants in Cook County.[353] In August 2015, the governor signed legislation allowing some defendants housed in Cook County Jail to be transferred to electronic monitoring if their cases were not resolved within thirty days.[354]

That same year, a group of advocates founded the Chicago Community Bond Fund to post bail for defendants who could not afford to post their bond amounts. Measured only by the number of clients served, the organization's impact on Chicago's pretrial system looks modest. In its first two years of operation, the fund posted bond for just over 100 people.[355] During those same two years the Cook County Jail detained more than 140,000 people.[356] But the Bond Fund and its clients have helped to raise awareness and demonstrate that money bail is unnecessary to ensure de-

fendants' appearance in court and that money bail imposes undue harm on individuals and communities. During 2016, 96% of the Bond Fund's clients — none of whom posted their own bond — made their court dates.[357] Bonds have been returned for every defendant since the fund's inception.[358]

The Bond Fund's extensive publicity and outreach efforts have also brought attention to the disadvantages that low-income people accused of crimes face and the urgent need for bail reform. Its efforts have been covered by a broad range of local and national media outlets. The organization's leadership emphasizes that its work is not a solution to the problem of money bail: In 2016, Sharlyn Grace, the group's Co-Executive Director, told the *Chicago Tribune* that the "private charity model is no substitute for the systemic reform that we need."[359] The organization has been particularly effective in highlighting the voices of individuals directly impacted by pretrial incarceration and including impacted people in advocacy and fundraising.[360] In 2016, the Bond Fund and other civil rights and community organizations formed The Coalition to End Money Bond that has arranged teach-ins, organized the community, and developed court watching programs.[361]

Litigation has also helped to prompt recent reforms. In October 2016, two men incarcerated pretrial in Cook County Jail sued Cook County's bond court judges and the sheriff, alleging unconstitutional deprivations of their liberty. The plaintiffs requested an injunction against "their continued unlawful incarceration" by the sheriff and accused the judges of unconstitutionally applying Illinois' bail statute by setting "monetary bail for pretrial arrestees without a meaningful inquiry into the person's ability to pay."[362] At the time of writing, the lawsuit is still pending.

The lawsuit generated significant publicity and was accompanied by a groundswell of support for bail reform among elected officials, including the sheriff himself. The sheriff, who publicly advocated for pretrial reform before the lawsuit, said in November 2016 that the county's "pay-for-freedom model hurts public safety and makes our criminal justice system fundamentally unfair from the start."[363] A month after the lawsuit was filed, the Cook County Board of Commissioner's Criminal Justice Committee held a hearing to discuss pretrial reform. The Commissioners heard testimony from various stakeholders in the criminal justice system. Professors, lawyers, activists, and formerly incarcerated individuals addressed the multitude of problems with money-based pretrial systems.[364] That winter, the newly-elected Cook County State's Attorney Kim Foxx announced that her office would no longer oppose the release of defendants held on less than $1,000 bond.[365] In the following spring, the office announced that it would work with the public defender's office to file motions for releasing people accused of non-violent offenses who could not afford bonds of $1,000 or less.[366]

As explained in more detail below, in July 2017, the Chief Judge of the Circuit Court of Cook County issued an administrative order that dramatically changed the county's bail system. The order encourages judges to use non-monetary conditions of release instead of money bail, requires ability-to-pay determinations before setting bond amounts, and mandates the use of a risk assessment tool for all defendants.[367]

Key Reforms

Statewide Reforms

In 2017, Illinois passed a bail reform law that added some procedural protections but was largely a symbolic show of support of county-led reform efforts.[368] The law allows low-level and non-violent defendants to have their money bonds reviewed within seven days if they can't afford to post bond.[369] The statute also mandates that counties provide public defenders at initial bond hearings.[370] Although this is a good procedural requirement, its impact is limited because larger counties had already been providing public defenders at these hearings. The bill also reiterated that judges at pretrial hearings must impose "the least restrictive possible" conditions on pretrial defendants.[371] And the bill encourages counties to adopt risk-assessment tools.[372]

The legislation is a step in the right direction, but it's not a comprehensive solution. Former Attorney General Eric Holder produced a report on bail practices in Cook County that noted that the law "merely serve[s] as another reminder that the existing provisions of Illinois' Bail Statute disfavor imposing money bail absent consideration of an individual's ability to pay—without forcing any tangible changes in the way bond courts actually function."[373] The Chicago Appleseed Fund for Justice similarly found that the bill fails to make hard limitations on the use of money bail, simply providing recommendations for a presumption against the use of money bail.[374] The Cook County Sheriff's office characterized the bill as a "modest" step in the right direction but doubted that the legislation would help reduce Cook County's jail population.[375]

Following this legislation, at the end of 2017 the Illinois Supreme Court formed a commission to study Illinois' pretrial system and develop recommendations for reform.[376]

Chicago Reforms

In July 2017, Chief Judge Timothy Evans of the Circuit Court of Cook County issued an administrative order mandating sweeping changes to the county's pretrial system.[377] The order creates a presumption of non-monetary conditions of release. If a judge does wish to impose bail, the judge must make a finding on the record that the defendant has the ability to post the bond amount and that no other conditions will ensure the defendant's return to court. The order also requires the use of a risk assessment tool for all defendants.[378] Conditions of release are to be tai-

lored to each individual defendant, and money bail is no longer the default condition of release.[379]

After Chief Judge Evans issued the order, some were concerned that other judges would not follow it. Cook County Commissioner Jesus "Chuy" Garcia hailed the order and expressed hope that bond court judges would follow it.[380] The Chicago Community Bond Fund called the order a "big win" while also announcing a court watching initiative to monitor the implementation of the order.[381]

Ability to Pay Determinations Before Setting Bail

Chief Judge Evans' order requires that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail."[382] Before the order, bond hearings were extremely short: Judges often did not investigate defendants' financial situations and rarely made findings on the record about a defendant's ability to pay.[383] One report found that, on average, judges spent less than two minutes per hearing — one judge averaged just 62 seconds per defendant.[384] Now, judges must make two findings before setting a money bond: They must find that no other conditions can ensure the defendant's appearance in court and that the defendant is able to pay the amount ordered.[385] If the judge believes that a money bond is necessary to ensure someone's appearance, the judge must set the amount based on the that person's individual financial circumstances.[386]

Before the order, many believed that judges set high bond amounts to ensure that people remained incarcerated pretrial for the sake of public safety. Potentially dangerous defendants, however, were occasionally able to post high bonds and go free. In testimony before the Cook County Board of Commissioners, Public Defender Amy Campanelli explained how someone accused of attempted murder in a gang-related shooting was able to post a $300,000 bond.[387] Following the order, judges were limited to detaining only those people who are charged with certain serious felonies and only after a hearing in which the state must prove by clear and convincing evidence that the defendant is a danger to the community and that no conditions of release will adequately protect the community.[388]

Risk Assessment

Cook County has been using the PSA, which was initially used only to evaluate people charged with felonies, countywide since March 2016. The Chief Judge has credited the tool with a decrease in the use of money bail and a decrease in the county's jail population.[389] Since the PSA was adopted, there has been some concern about how much judges actually consider the PSA's risk scores or the decisionmaking framework's release recommendations. A report by the Sherriff's office found that Cook County

judges only followed the PSA's release recommendations 15% of the time.[390] To ensure that judges follow the new order and consider the risk assessment, Chief Judge Evans reassigned all of the bond court judges to other divisions of the court system. Bond Court was renamed the Pretrial Division and is now headed by a reform-oriented judge who spearheaded the creation of diversionary courts in Cook County.[391]

Outcomes

Chicago has benefitted from the Chief Judge's new rule. Most strikingly, the population of the Cook County Jail has fallen dramatically in a short period of time. In December 2017, the jail's population fell to below 6,000 inmates, the lowest level in decades,[392] a drop of about 1,400 since Chief Judge Evans mandated sweeping changes to the bail system.[393] The jail population has stayed constant for most of 2018.[394] The jail-population drop has saved the county money. The Cook County Sheriff's office estimates savings of $3.6 million per month in overtime pay.[395] At its peak, the county spent nearly $2 million per pay period on overtime — that figure dropped to just $200,000 per pay period in January 2018.[396] The county expects to realize millions of dollars in additional savings through the demolition of unneeded jail facilities.[397]

After reforms, people released from custody have made their court dates and have rarely been rearrested pretrial. During the first two months after reform, reappearance rates were around 90% and only 7% of people released pretrial were rearrested.[398]

But judicial adherence to the Chief Judge's rule has eroded over time. Starting in July 2017, the Coalition to End Money Bond organized an extensive court watching initiative to observe and report on how the rule was implemented in its first year.[399] In reports that were released in February and September 2018, the coalition found that after the new rule first went into effect, judges released more accused people on recognizance, non-monetary conditions, and unsecured bond.[400] But as the months have passed, judges have increasingly imposed secured bonds and unaffordable secured bonds.[401] Judges have also deviated from PSA recommendations by overusing electronic monitoring and other conditions of release.[402] Nearly half of the people currently in Cook County jail are detained only because they cannot afford to pay for their release.[403] Under the order, the rate of unaffordable bonds should be 0%. "Instead unaffordable money bonds now comprise nearly 30% of all bonds set."[404] The Coalition's February report concluded that the new rule had been effective at increasing release rates but had not yet fully achieved its goal of ensuring that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail."[405] The September report found

that "adherence to [the order] in recent months has declined to the point that it is no longer effectively discouraging the use of oppressive money bonds" and called upon the state supreme court to enact a rule abolishing money bail.[406]

Santa Clara County, California

Major reforms:

- **Community-Sponsored Release**
- **Robust and Independently Housed Pretrial Services**
- **Pretrial Risk Assessment**

Santa Clara County has been a story of gradual but concrete steps to reduce the use of money bail and increase pretrial release. Since 2010, the county has periodically expanded its pretrial services agency and has adopted pretrial risk assessments to provide more information to judges at bond hearings. Today, the county is piloting a community release program through which defendants are released and connected to community-based services. At the state level, California has passed a new law that will prohibit the use of money bail starting in October 2019.[407] The numbers bear out the steady progress of these reforms. In Santa Clara county, judges now release more defendants on their own recognizance.[408] According to recent data, released defendants are making court dates 95% of the time and are avoiding re-arrest 99% of the time.[409]

The Reform Process

Over the past decade, Santa Clara County has gradually adopted a handful of reforms. In 2010, the county piloted a risk assessment tool that was adopted countywide in 2011 and validated in 2012.[410] Although the numbers of release on recognizance rose in the first part of this decade, the county still relied largely on money bail, with the secured bond amount determined by a uniform countywide bail schedule.[411] Like other counties in California, the Santa Clara bail schedule set forth bond amounts based on the seriousness of the charged offense but did not take into account individual factors such as the defendant's ability to pay, risk of missing court dates, or risk of committing a crime pretrial.[412]

Continued reliance on money bail and bail schedules produced high rates of pretrial detention. In 2014, about 40% of defendants were detained before trial either because they were ordered detained or because they could not afford bail; 35% were released on money bail; and 25% were released on their own recognizance.[413] The system was also expensive. Pretrial detention cost the county an average of $204 per day per defendant, whereas pretrial monitoring cost only $15 to $25 per day per defendant.[414] During the 2014-15 period, defendants held in pretrial detention were detained for an average of 224 days for felony offenses and 28 days for misdemeanor offenses.[415] Pretrial detainees comprised as much as 74% of the county's total jail population.[416] In addition, most defendants who obtained release on bail were only able to do so by posting a bond through a bail agent.[417] In 2015, bail agents posted 7,599 bonds in Santa Clara County

for bail amounts totaling about $200 million.[418] The county has also had to confront widespread corruption in the bail bond industry.[419]

In response to these issues, the county's Board of Supervisors convened a Bail and Release Work Group in 2014 to consider potential improvements to the pretrial process.[420] The work group included a wide range of stakeholders, including legislators, judges, the district attorney, the sheriff, the public defender, the Palo Alto chief of police, representatives from the Department of Corrections and the Office of Pretrial Services, and civil rights groups and community groups.[421] The Work Group also solicited input from the bail bond industry, providing members of the industry with the opportunity to attend and speak at its public meetings.[422] As part of its research, the work group looked to the experience of other jurisdictions, such as Kentucky, New Jersey, the District of Columbia, and the federal system.[423]

In its final report, issued in 2016, the Work Group recommended that Santa Clara County reduce its reliance on money bail and transition toward a "risk-based pretrial justice model."[424] In October 2016, the Board of Supervisors adopted most of the recommendations.[425] These recommendations included creating a community-sponsored release project, strengthening timeliness considerations in the pretrial process, updating cite-and-release standards, expanding pretrial monitoring options, collecting data on bail outcomes, and discouraging the practice of combining money bail with other conditions of release.[426] One of the work group's recommendations was to prohibit or limit the use of commercial bail bonds agents in the county, but the Board voted not to approve that recommendation.[427]

Key Reforms

Community-Sponsored Release

Community-sponsored release is a unique pretrial reform that Santa Clara County is in the process of implementing. Under this program, known as the Community Release Project, defendants will be able to elect sponsorship by a community-based organization, such as a church or ethnic association, as a condition of release.[428] That organization will then support the defendant by providing services, such as court date reminders, transportation, and referrals to any needed social services.[429] This concept is comparable to existing models for reentry services and community service sentencing, where local governments partner with private non-profit organizations to ensure the safe and effective administration of the criminal justice system.[430]

This unique program is largely the result of extensive long-term work by the community organization Silicon Valley De-Bug. For years, De-Bug has been deeply engaged with reducing reliance on money bail in Santa

Clara County. The community group first sought to minimize the use of money bail through a community organizing initiative called participatory defense, which helps the family and friends of defendants influence the outcomes in their loved ones' cases.[431] Participatory defense at the pretrial stage may entail, for example, family members collecting proof of a defendant's residency and employment and attending a defendant's arraignment to encourage a judge to make a decision in favor of pretrial release.[432] This advocacy helps to present to the courts a fuller picture of a defendant and highlights the impact that pretrial incarceration or excessive conditions of release would have on the person and the community.[433] Through this process, many people have been released without bail or with lower bail because their loved ones have been able to demonstrate that they are not a flight risk or a danger to others.[434]

Silicon Valley De-Bug was a member of the Bail and Release Work Group, and brought to bear its experience with participatory defense in its advocacy for wider implementation of community-based alternatives to bail.[435] This advocacy led the Work Group to propose formalizing community-sponsored release as an alternative to money bail and county-supervised pretrial release.[436] The Community Release Program proposal was unanimously approved by the Santa Clara County Board of Supervisors in October 2017.[437] In 2018, the County issued a Request for Information for groups interested in administering the program, which is expected to be up and running at the end of 2018.[438]

Robust and Independently Housed Pretrial Services Agency

Santa Clara County has an Office of Pretrial Services that exists as an independent county department.[439] The Office of Pretrial Services has three components: a jail unit, a court unit, and a supervision unit. The jail unit conducts pretrial risk assessments upon booking, so that low-risk people can be released quickly after review by a judge. The court unit is composed of pretrial officers staffed in courts across the county. These officers interview defendants, conduct risk assessments, provide information to judges, and make release and detention recommendations. Officers in this unit also update information about defendants' court appearances and can revise previous recommendations based on new information. The supervision unit monitors people on conditional release and coordinates any applicable services. Defendants released on their own recognizance are given court date reminders by phone or mail. Defendants released with conditions may be subject to a variety of requirements imposed by the court, including in-person meetings, drug testing, mandatory mental health or substance abuse treatment, and electronic monitoring.[440]

Pretrial Risk Assessment

As part of its transition to a risk-based bail system, Santa Clara developed and implemented its own pretrial risk assessment tool.[441] In 2010, the county worked with the Pretrial Justice Institute to develop a localized

version of the Virginia Model Risk Assessment Instrument for Santa Clara County.[442] This tool takes into account demographic and criminal history variables that include age, marital status, whether the defendant lives with family, whether the defendant has a college degree, unemployment, prior mental health treatment, prior drug treatment, other charges, prior failure to appear in the last three years, two or more prior misdemeanors, and prior probation or parole.[443] After receiving input from a group of county stakeholders — including the superior court, district attorney, public defender, and sheriff — the Office of Pretrial Services implemented the risk assessment tool in January 2011.[444] The tool was validated using local data in a study by the Pretrial Justice Institute in 2012.[445]

Using this tool, the Office Pretrial Services evaluates defendants who are booked in the county's main jail.[446] The Office of Pretrial Services has officers available 24 hours a day, 7 days a week to conduct risk assessments. The entire process — conducting an interview, reviewing a defendant's record, and submitting recommendations to the court — takes about an hour.[447] To conduct the assessment, staff members gather the required demographic and criminal-history information. Law enforcement agents provide information about the current charge, and the Office of Pretrial Services looks up the rest of a defendant's criminal history in a criminal record database. Staff members interview defendants for additional demographic information. This information is then used to calculate separate risk scores for new criminal activity, failure to appear, and technical violations of specific release conditions.[448] Based on this risk score, each defendant is categorized as low-, medium-, or high-risk. Using the tool's decisionmaking framework, pretrial services officers make recommendations to the court for release, monitoring, or detention.[449] They do not recommend specific bail amounts.[450] Pretrial officers are permitted to deviate from the decisionmaking framework's scoring matrix — for example, by recommending detention for a low-risk defendant, or recommending release for a defendant assessed as high-risk — in no more than 15% of cases each month, and only with a written justification.[451]

Outcomes

Reforms have shown promising results over time. Since the implementation of its pretrial risk assessment tool, Santa Clara County has increased the number of pretrial releases without an increase in the rate of defendants missing court appearances or being arrested for new crimes. By 2014, the number of defendants released on their own recognizance had risen to about 1,600 per month, up from 1,100 per month in 2011.[452] In 2015, pretrial services officers recommended release in 79% of cases.[453] Judges follow the recommendations about 75% of the time.[454] Meanwhile, rates of re-arrest, appearance, and technical compliance have remained the same or have improved. Between 2013 and 2016, defendants released

on their own recognizance or under monitoring appeared in court 95% of the time and avoided re-arrest 99% of the time.[455]

The increased rate of pretrial release has resulted in substantial cost savings for the county. For example, in the six-month period between July 1 and December 31, 2011 — soon after the pretrial risk assessment tool was implemented — the county saved over $30 million in jail costs as a result of the decrease in pretrial detention.[456] The county has also been able to better allocate its limited jail space. Without alternatives to detention, the county estimates that its jails would be over capacity by about 800 individuals each month.[457]

Stakeholder engagement has been crucial to the success of these reforms. It was important to involve key county stakeholders in the reform process from the very start by inviting them to the Work Group. Although all the Work Group members were generally supportive of bail reform, many — especially the elected officials — were cautious about taking any steps that might undermine or appear to undermine public safety. Acknowledging these concerns continues to be an important part of the reform process.

It was also important to ensure personal, face-to-face discussion between the various county stakeholders. Supervisor Cindy Chavez, the chair of the work group, required the attendance, at least at initial meetings, of the heads of offices and departments — the district attorney, sheriff, public defender, and Chief of Correction — rather than deputies or other representatives from the same office. This requirement helped build consensus early on in the reform process.

At the state level, California has passed a new law, effective pending a voter referendum, that will prohibit the use of money bail, expand legal avenues for preventive detention, and require counties to use risk assessment tools.[458] Civil rights groups, including De-Bug, initially supported the bill, but withdrew their support after revisions to the bill removed procedural protections and expanded the possibilities for preventive detention.[459] The new law affords counties and judges tremendous discretion to determine who can be preventively detained.[460] Time will tell if Santa Clara's local officials and judges use this discretion to proceed with reform or roll back the progress that has been made.

REFORM WITHOUT ALGORITHMS

New Mexico

Major reforms:

- **Prohibition on Pretrial Detention Because of Unaffordable Bail**
- **Procedural Protections for Preventive Detention Based on Dangerousness**

Following a state supreme court opinion that brought public attention to the harms of money bail and the inadequacies of New Mexico's pretrial system, the state legislature and New Mexico voters approved a state constitutional amendment reforming bail. The amendment made two changes: 1) it prohibited the state from detaining a defendant pretrial only because the person could not afford to post a money bond, and 2) it established procedures for preventive detention on the grounds of dangerousness. In general, public defenders, prosecutors, and judges support the reforms. Pretrial reform remains an ongoing process with new court rules or statutes needed to further clarify the procedures and evidentiary rules for preventive detention hearings.

The Reform Process

New Mexico's bail laws originally mirrored the federal Bail Reform Act of 1966, with provisions in the state constitution discouraging excessive bail[461] and statutes encouraging the "least restrictive means necessary" to ensure appearance in court.[462] Courts could preventively detain someone only in capital cases in which "the proof [wa]s evident or the presumption great" or in specific circumstances based on a current felony charge and a defendant's past felony convictions.[463]

When setting conditions of release, judges were required by statute to weigh a lengthy series of factors, including the defendant's character and community ties, the nature of the alleged offense, and the weight of the evidence.[464] Non-monetary release conditions were spelled out in statutes, while presumptive money bond amounts were found within the state's patchwork of bail schedules, which differed substantially from county to county.[465]

In late 2014, the New Mexico Supreme Court handed down a blistering opinion decrying state bail practices that had resulted in a defendant being detained for three years because he could not afford a $250,000 bond, even though less restrictive conditions of release would have been adequate to protect the community and ensure his appearance in court.[466] Following the decision, the Supreme Court created an advisory committee to review the statewide bail system and criminal procedure surrounding pretrial release.[467] In response to the state supreme court case and public outrage, the New Mexico legislature approved and referred to New Mexico voters a state constitutional amendment that would prohibit the state from detaining a defendant pretrial only because the person could not afford to post a money bond, and would establish procedures for preventive detention based on dangerousness.[468] The voters approved the amendment with 87% in favor and 13% opposed.[469]

Key Reforms

Prohibition on Pretrial Detention Because of Unaffordable Bail

The state constitution now prohibits courts from detaining defendants on a bail amount that they cannot afford.[470] New procedures dispense with the prior inconsistent bail schedules and allow money bail only as a condition to ensure that a defendant reappears in court.[471] Court rules contain a list of non-monetary conditions that can be imposed on defendants, as well as a number of factors for the court to consider when imposing these conditions.[472]

One of New Mexico's revised court rules allows courts to use risk-assessment tools approved by the state supreme court, but the New Mexico Supreme Court has yet to approve of any risk assessments.[473] With the state supreme court's approval, Bernalillo County, New Mexico's most populous, is currently piloting the Laura and John Arnold Foundation's Public Safety Assessment.[474] After evaluating the results of the pilot, the state supreme court may allow the PSA to be used in other jurisdictions.

Procedural Protections for Preventive Detention Based on Dangerousness

The state constitutional amendment established new procedures for preventive detention that have been further detailed in court rules. Under the state constitution, a court may detain a defendant pretrial only if:

1. the defendant has been charged with a felony;
2. the prosecutor moves for a preventive detention hearing; and
3. at the hearing, the prosecutor "proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."[475]

Court rules require the preventive detention hearing to occur within five days of the prosecution filing the motion and require the judge to issue a written decision within two days of the hearing's conclusion.[476] In a recent case, the New Mexico Supreme Court held that formal rules of evidence do not apply to these hearings and that judges may consider "all reliable information presented to the court in any format worthy of reasoned consideration."[477] Courts, prosecutors, and defense counsel are divided over what level of discovery should be available prior to the hearing — ongoing litigation and the development of new court rules should resolve these gaps in the law.

Outcomes

Reform in New Mexico is still too new to allow for full assessment of its impact, but some preliminary information is available regarding the reforms' effects. According to data from New Mexico's statewide public defender's office, prosecutors filed pretrial detention motions on 10% of felony arrestees statewide, and those motions were granted 33% of the time, resulting in a 3% detention rate for felony arrestees between July and October 2017.[478] In the Second Judicial District, the largest district in the state covering Albuquerque and surrounding Bernalillo County, judges estimated that about 40% of pretrial detention motions were granted as of October 2017.[479]

Anecdotally, however, it seems that New Mexico's bail reform has increased the short-term jail time for some arrestees. Under the prior system, some defendants could secure their release from jail before their first appearance in court by posting the money bond amount determined by the bail schedule. Now, many of these defendants can be released only after a hearing before a judge who makes an individualized decision for conditions of release. These hearings generally occur the day following an arrest, requiring arrestees to spend a night in jail before securing release.[480]

The reform process is still ongoing. Judges, defense lawyers, and prosecutors appear to have formed a broad consensus that the recent reforms are positive but require additional tweaks. Chief among these tweaks is the need for procedural rules for preventive detention hearings. At present, the procedures vary from court to court. Interviews with stakeholders suggest that some judges are willing to grant a motion to detain based solely on the content of a criminal complaint, while others require varying amounts of corroborating evidence. A recent state supreme court decision should help clarify some evidentiary rules. The ruling gives the defense the opportunity to cross examine any live witnesses put on by the prosecution but also allows judges to consider evidence that would be inadmissible at trial.[481] The public defender has advocated that courts be allowed to suppress evidence presented at pretrial hearing on constitu-

tional grounds and has argued that the current system does not fully clarify defendants' discovery rights.[482] Meanwhile, district attorneys contend that the five-day timeline for these hearings affords prosecutors limited time to gather evidence to establish dangerousness.[483] District attorneys characterized the hearings as often being "mini-trials that take hours to resolve.".[484]

Although the district attorneys did not intend the characterization to be a positive one, substantial hearings are a good indication that the procedural reforms are working and that long-term deprivations of liberty cannot happen without robust due process protections. These various concerns will have to be addressed over time through ongoing litigation and court rules promulgated by the state supreme court.

Reform is not yet firmly entrenched in New Mexico. New Mexico Governor Susana Martinez has advocated a full repeal of the reform measures, terming them "catch-and-release" policies.[485] Governor Martinez devoted a portion of her 2018 State of the State address to discussion of a case where a released defendant shot at a police officer.[486]

The bail bond industry also strongly opposed the bail reform initiatives from the outset. After the pre-trial detention rules took effect in July 2017, the Bail Bond Association of New Mexico filed suit in federal court, alleging that the new rules violated the Fourth, Eighth, and Fourteenth Amendments. The court dismissed the case and imposed sanctions on the plaintiffs' counsel for, among other reasons, asserting claims with an "improper purpose–namely, for political reasons to express their opposition to lawful bail reforms in the State of New Mexico rather than to advance colorable claims for judicial relief."[487]

Maryland

Major reform:

- **Ability-To-Pay Determinations Before Setting Bail**

Maryland's pretrial justice system has been a target of reform for decades. Diverse stakeholders have gathered data, drawn public attention to the harms of money bail, and lobbied the legislature. But attempts to reform the system have failed to bring about sustainable, systemic change.

In February 2017, the Court of Appeals of Maryland unanimously approved a proposal from its rules committee to amend statewide rules concerning bail and pretrial procedure.[488] The new provision, Maryland Court Rule 4-216.1, specifically instructs judicial officers not to impose bail amounts that a defendant cannot afford.[489] If the judicial officer determines that secured money bail is the least onerous condition necessary to ensure a defendant's appearance or to protect public safety, the officer must conduct an individualized inquiry into the defendant's finances.[490] The rule went into effect on July 1, 2017.[491] The impact of the new rule has been mixed. While the use of money bail has decreased, more individuals are being preventively detained.[492]

The Reform Process

In Maryland, bail reform always seems to stall out.[493] Every few years, at the urging of advocates and the courts, the Maryland legislature considers bail reform proposals but never passes meaningful legislation. Reform is often initiated by the Maryland Court of Appeals, alongside other unelected actors. These reform proposals face serious political opposition, in no small part because of the bail bond industry's significant lobbying influence with the state legislature. The resulting political fractures in Maryland's General Assembly prevent it from providing the resources necessary to carry out the court's mandate.

In 1999, the Maryland State Bar Association requested from the Maryland Court of Appeals "a study to be undertaken to evaluate the entire bail review process."[494] The judiciary both endorsed and expanded the goals of the study, concluding that substantive changes in Maryland's bail and pretrial release system would be best supported by a "comparative analysis" of Baltimore City with "other representative jurisdictions."[495] The Abell Foundation launched the Pretrial Release Project to conduct this study.[496] In its 2001 report, the project concluded that judicial officers were not following Maryland's "sound" pretrial release and bail law.[497] Among the failures cited were the lack of pretrial release and monitoring systems, the lack of counsel for the accused, and "a judicial culture" in which "bail bondsmen play too great a role."[498]

The project provided nine recommendations to bring Maryland bail practices in line with "statutory provisions and the fair administration of justice."[499] The recommendations were: 1) state-expansion of pretrial release investigations and greater investment in monitoring as an alternative to detention; 2) representation, conforming with the statutory obligations of the public defender, of indigent defendants statewide at the initial appearance and at bail review hearings; 3) the presence of assistant state attorneys at bail review hearings; 4) the creation of the option in all bail-eligible criminal or traffic cases to pay a 10% money bond to the court, which would be refunded automatically after making all court dates; 5) limited use of monetary bail, in compliance with Md. R 4-216(c); 6) use of unsecured bonds in lieu of collateral bonds; 7) further state study of the viability of eliminating the bail bondsman commercial surety, as recommended by the American Bar Association Standard Relating to Pretrial Release 10.1-3; 8) required training and education for judicial officers on pretrial release determination; 9) establishment of a community-based revolving bail fund to post 10% money bond for certain individuals.[500]

Although some of these recommendations have found their way into proposed legislation, none of these bills have become law. For example, during the 2002 legislative session, reformers proposed bills that included the project recommendation of allowing defendants to post refundable 10% money deposits with the court instead of with a commercial bondsman, allowing defendants and their families to save the money they would otherwise have to spend on non-refundable bondsman's fees.[501] Bond agents opposed these efforts, and the state House Judiciary Committee rejected the bills.[502] This trajectory is emblematic of other legislative efforts to reform the pretrial release system: The bail bond industry retains an influence over the legislature that even broad coalitions of reform proponents cannot overcome.[503]

Since the initial study, the Court of Appeals has more directly prompted revisions to pretrial practices. In a 2012 ruling, *DeWolfe v. Richmond*, the court held that all arrestees have a statutory right to appointed counsel at initial hearings under the Public Defender Act.[504] Seeking to comply with this ruling, the Public Defender asked the court and the state for emergency and long-term funding.[505] In response, the state legislature attempted to undermine the court ruling by changing the Public Defender Act to only guarantee counsel after initial hearings.[506] The court addressed the issue again the next year, holding in *DeWolfe v. Richmond* (*"Richmond II"*) that "under the Due Process component [of the Maryland constitution] an indigent defendant has a right to state-furnished counsel at an initial appearance."[507] This hard-won outcome was significant not only for the vindication of detainees' rights, but also for its reinvigoration of debates about pretrial justice more broadly.[508]

Following *Richmond II*, political leaders in Maryland, including Governor Martin O'Malley and Senate President Mike Miller, publically voiced their opposition to the court's ruling.[509] Looking to the court's changing

composition, Governor O'Malley and Senator Miller expressed hope that the court would reconsider and overrule *Richmond II*.[510] The 2014 legislative session focused intensely on *Richmond II*, with dueling proposals in the senate: one, to initiate a public referendum to overrule the constitutional right to counsel; the other, sponsored by then-Senator Brian Frosh, Chair of Judicial Proceedings, to create a statewide pretrial services agency, develop an objective risk assessment tool, and eliminate money bail.[511] Frosh explicitly sought a pretrial services agency modeled on those established in Kentucky and Washington, D.C.[512]

The referendum proposal was overwhelmingly rejected in the Senate.[513] Although Senator Frosh's risk assessment bill passed in the Senate, it did not make it past the House Judiciary Committee.[514] Committee members opposed risk assessments as well as funding the public defender's office to represent indigent defendants at their first appearances.[515] With no proposal gaining majority support in both chambers, legislators agreed on a temporary measure: ten million dollars from the judiciary budget would fund private lawyers to represent indigent defendants.[516] At the start of the 2015 legislative session, legislators filed ten bills that opposed the court's ruling in *Richmond II* and supported bail bondsmen.[517]

Key Reforms

In 2016, the Maryland House of Delegates asked the Maryland Attorney General's office (now led by Frosh as Attorney General) for advice about the state's pretrial detention practices: specifically, whether applicable federal and state law require that a judicial officer conduct an individualized inquiry regarding a defendant's financial resources prior to ordering money bail, and whether a judicial officer must avoid ordering money bail exceeding a defendant's ability to pay.[518] In a letter to the House of Delegates, the Attorney General's office answered "yes" to both questions.[519] At the same time, former United States Attorney General Eric Holder, Jr. issued a memorandum detailing the inequities and constitutional deficiencies of Maryland's "wealth-based pretrial detention scheme."[520] Addressed to Attorney General Frosh, the memorandum stressed that "any scheme that focuses primarily on the means of the accused and detains individuals solely because they cannot pay bond is antithetical to the core principles of the nation's justice system," and concluded that "reform in Maryland is sorely needed."[521]

Frosh issued a letter to the Court of Appeals on October 25, 2016 questioning the constitutionality of the existing bail proceedings.[522] In urging the Rules Committee to amend Maryland Rule 4-216 "to ensure that defendants are not held in pretrial detention solely because they lack the financial resources to post a monetary bail,"[523] Frosh asserted seven interrelated propositions: 1) "current law requires judicial officers to conduct an individualized inquiry into a defendant's financial circumstances";[524] 2)

the state's pretrial release rules are followed inconsistently and variably across jurisdictions;[525] 3) the state's pretrial system "does not effectively advance the state's compelling interests in the protection of public safety and in ensuring" that defendants appear at trial;[526] 4) increased reliance on pretrial services, rather than pretrial detention, will better serve the state, the defendants, and public safety;[527] 5) the pretrial system "disproportionately affects racial minorities";[528] 6) "pretrial detention unnecessarily harms defendants and their families";[529] and 7) the current pretrial system is "costly to taxpayers."[530] Citing the Pretrial Justice Report, the task forces, various commissions, and academics, Frosh reminded the court that "the inadequacies of Maryland's pretrial system have been thoroughly documented."[531]

The Court of Appeals approved the rule change, which specifically instructs judicial officers not to impose bail amounts that a defendant cannot afford.[532] If the judicial officer determines that bail is the least onerous condition necessary to ensure a defendant's appearance or to protect public safety, the officer must conduct an individualized inquiry into the defendant's finances.[533]

Advocates were quick to point out, however, that more work remained to be done, especially strengthening pretrial services and creating alternatives to pretrial detention.[534] The General Assembly considered dueling proposals: one, to codify the new rule and provide pretrial services in every jurisdiction;[535] the other, to codify the principle against bail as punishment, but to reject the new rule's requirement that judges impose the "least onerous" conditions as a means of ensuring court appearance.[536] Neither bill was passed into law.[537]

While bail reform remains an intractable problem for the state, in 2018 the legislature passed a law that establishes a million-dollar grant fund for pretrial services.[538]

Although statewide reform has been difficult to achieve, individual counties in Maryland have seen some success improving their pretrial justice systems. Risk assessments and pretrial services vary county to county in Maryland. Eleven of Maryland's 24 counties have pretrial service agencies, and five have a risk assessment tool.[539] Of those five, two use a tool that has been validated for the local population. One uses a tool validated in another state.[540]

St. Mary's County has adopted a risk assessment tool and has been able to release more people to pretrial monitoring.[541] This program started after the county's assistant sheriff — who was also warden of the county jail — served on the 2014 Governor's Commission to Reform Maryland's Pretrial System.[542] Although the state legislature failed to adopt the commission's recommendations, the assistant sheriff developed a plan to implement pretrial services at the county level. The assistant sheriff presented the plan to local judges and the county prosecutor, who partnered with the assistant sheriff to implement the new plan.[543] The pretrial services agency now

oversees defendants on pretrial monitoring, helps them access services such as health insurance, and reminds them of upcoming court dates.[544]

Outcomes

As a result of the Maryland Court of Appeals rule change, the use of money bail as a means of detention has declined significantly. Before the rule change, 40% of pretrial defendants were detained because they could not afford bail.[545] Now, around 20% of defendants are held on unaffordable bail. At the same time, judicial officers are currently preventively detaining 20% of defendants, up from 7.5% before the rule change.[546] Overall, this means that around 40% of pretrial defendants are now detained, compared to a detention rate of over 50% before the rule change.

Whether a defendant is released pretrial can sometimes depend upon the robustness of the pretrial services agency in the jurisdiction. Advocates continue to push for the funding of pretrial services so that judges have options other than just release on recognizance and pretrial incarceration.[547] Maryland's broader history of attempted reforms makes clear that securing adequate pretrial release services will be a challenge. As with the new rule, reform is often initiated by unelected actors, such as the Court of Appeals, leaving elected political actors to fill in the gaps. At the state level, legislators have been unable to agree on comprehensive bills to further the reforms started by the court. In no small part, this is due to the lobbying of the bail bond industry.[548]

Modest reforms have been secured at the county level, especially with the creation of pretrial service agencies. In its first year of running a pretrial services agency, St. Mary's County saved around $400,000 in expenses and monitored over 200 people who would otherwise have been detained pretrial.[549]

SNAPSHOTS OF LOCAL INNOVATION

Milwaukee and Dane Counties, Wisconsin

State Background

Wisconsin has pursued a statewide shift to evidence-based practices in the criminal justice system, including the use of risk assessment tools. The state outlawed the commercial bail bond industry in 1979.[550] On a local level, some counties have adopted substantial pretrial reforms, including prioritizing release over pretrial incarceration, using automated court date reminders, and adopting risk assessment tools. For example, Milwaukee County has implemented a pretrial risk assessment tool, a pretrial monitoring program, and early intervention programs. Dane County has partnered with Harvard Law School's Access to Justice Lab to run a pilot program to test the effectiveness of the Laura and John Arnold Foundation's Public Safety Assessment for the county.

The Wisconsin state constitution prohibits "excessive bail" and establishes a right to pretrial release "under reasonable conditions designed to assure appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses.".[551] By state constitution and state statute, money bail is allowed only for the purpose of ensuring court appearance.[552] Wisconsin law also affirms the presumption in favor of pretrial release,[553] allowing detention only if the defendant is charged with certain specific offenses and the court finds by clear and convincing evidence that available conditions of release "will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses."[554] Defendants are entitled to a pretrial detention hearing that must be commenced within ten days of their arrest.[555]

Nevertheless, commercial bail bonds are an issue of continued political debate in Wisconsin. In 2011 and again in 2013, state Republicans — supported by the American Bail Coalition and the American Legislative Exchange Council — attempted to revive the commercial bail bond industry.[556] Governor Walker vetoed these proposals both times,[557] in part due to strong opposition from the courts[558] and law enforcement officials.[559] However, industry lobbyists are expected to continue their efforts within the state.[560]

As part of a broader push toward evidence-based practices in the criminal justice system, some counties in Wisconsin have implemented actuarial risk assessment tools.[561] These reforms began in 2006, when the Wisconsin Supreme Court's Effective Justice Strategies Subcommittee — which includes judges, prosecutors, court administrators, and members of the state's Department of Corrections — launched the Assess, Inform, and Measure pilot program.[562] The goal of the program was to provide judges with "valid and reliable information" to better inform their case dispositions.[563]

Wisconsin has also been expanding its treatment and diversion programs. A state treatment and diversion program offers voluntary substance abuse treatment, evidence-based case management, and other risk reduction services — such as drug testing and monitoring — to non-violent offenders as alternatives to prosecution or incarceration.[564] The program operates in 46 of 72 counties and with two tribes in Wisconsin.[565] A 2014 empirical study found positive outcomes for the program, estimating that every dollar invested in the program yielded nearly two dollars in benefits to society.[566]

Milwaukee County

Major reforms:

- **Pretrial Risk Assessment**
- **Pretrial Monitoring and Services**

In 2007, Milwaukee County established a council of criminal justice stakeholders to evaluate the county's criminal justice system and promote collaboration across agencies.[567] The council includes the chief judge, sheriff, county executive, district attorney, public defender, Milwaukee City's mayor and police chief, the Wisconsin Department of Corrections regional chief, a representative from the Victim Witness Assistance program, and members of the community.[568] The council is still active today and its committees work on issues ranging from data analysis to mental health to juvenile justice, each of which holds public meetings every month.[569] The council has developed broad justice system goals, and it analyzes system performance, retains technical assistance, and facilitates communication between the justice system and the larger community.

Much of Milwaukee County's recent pretrial reforms were jumpstarted by a jail population analysis completed by the Pretrial Justice Institute in 2010 followed by the county's participation in the National Institute of Correction's Evidence-Based Decision Making in Local Criminal Justice Systems initiative, which provided technical support for reforms.[570] The county provides its pretrial services through contracts with outside

non-profit vendors, largely because the county determined that outsourcing the services would be less expensive than providing the services directly.[571] The county has contracts with two non-profit pretrial services providers. The county employs only two staff members to oversee its pretrial services as the outside vendors provide the staff needed to run the programs. County rules require the services to be bid out regularly. The county's annual budget for pretrial services is just under $5 million and has been growing in recent years.[572]

Pretrial Risk Assessment

In 2012, Milwaukee County established a pretrial risk assessment program, which is run by an outside non-profit vendor and screens over 17,000 arrestees annually.[573] Risk assessments are used to identify people who can be released immediately after booking, to help judges make decisions about pretrial release and conditions of release, and to help prosecutors identify candidates for diversion and deferred prosecution.[574]

Initially, Milwaukee County developed its own tool, the Milwaukee County Pretrial Risk Assessment Instrument, but replaced it in 2016 with the PSA.[575] Unlike the PSA, the Milwaukee County Pretrial Risk Assessment Instrument considered some socioeconomic factors — including residence and employment status — and did not separate out the risk of future arrest from the risk of failure to appear.[576] County officials have found the transition to the PSA to be relatively smooth. During its implementation, the county offered training on the tool to various stakeholders — including judges, prosecutors, and public defenders — and also explained the underlying research that went into developing the tool.[577] In 2018 Milwaukee began a validation process for the PSA.

Local officials have found case processing under the PSA to be highly efficient. The pretrial services agency conducts an assessment for each individual defendant booked in the jail based on information from Wisconsin's crime database and national databases. In the booking room, pretrial service officers also conduct an interview with each defendant. Although the PSA does not require an interview, Milwaukee uses other tools for diversion, deferred prosecution, and supervision conditions that rely on interview questions. Each interview takes about fifteen minutes and is fairly standardized, with staff members using a common script. Our interviewees stated that these booking-room interviews are a crucial component of their pretrial process. Although one of the purported advantages of the PSA is that it does not require individual interviews, Milwaukee never considered discontinuing them when it adopted the PSA.[578]

After the PSA and interview are completed, staff members prepare a pretrial risk assessment report with release recommendations. This report is made available to prosecutors, defense counsel, and the courts. The recommendations are merely advisory and are not binding on prosecutors

when making charging decisions or judges when making pretrial release decisions.[579]

Pretrial Monitoring and Services

Milwaukee County's pretrial services officers monitor defendants on release and remind them of upcoming court dates.[580] The program monitors about 1,300 people at any given time.[581] The pretrial services provided scale according to a defendant's risk level. Low-risk defendants receive an automated court reminder and do not meet with a case manager. Most moderate-risk defendants meet with staff members once a month. Some moderate- and high-risk defendants meet with staff members in person every other week and receive a phone call on the off weeks. High-risk defendants meet with staff members in person every week.[582] Some defendants have other conditions of release, including drug or alcohol testing or GPS monitoring. Staff members monitor these defendants for compliance and produce a compliance report for the courts.[583]

In January 2017, the pretrial services agency started to offer automated court date reminders.[584] These reminders are sent to defendants by e-mail when possible because it is the most cost-effective method. Otherwise, the reminders are sent by text message or phone call.

Dane County

Major reform:

- **Randomized Control Trial for Risk Assessments**

Recent reform efforts in Dane County, which includes the city of Madison, have culminated in a purpose-driven, data-rich pilot program that will better inform the county and the criminal justice community at large about the efficacy of the Arnold Foundation's Public Safety Assessment.

Reform began in 2014, when Dane County representatives participated in a Wisconsin summit on evidence-based decisionmaking and a national conference on pretrial justice policy.[585] Following these conferences, a pretrial services subcommittee formed and produced a report that established Dane County's future pretrial goals. These goals included releasing more low-risk defendants pretrial, collecting and analyzing data, shifting to more evidence-based practices, and reducing racial disparities.[586] Following this report, the Dane County Board of Supervisors hired a full-time data scientist and convened three working groups that developed more detailed plans for reform.[587]

Dane County also partnered with Harvard Law School's Access to Justice Lab to implement a PSA pilot program that is the first randomized control trial evaluating the PSA's effectiveness.[588] Under this trial, a "treat-

ment" group of pretrial defendants is evaluated by the pretrial services agency, using the PSA.[589] The defendants' risk scores and pretrial recommendations are given to the court, defense attorneys, and prosecutors. A "control" group of pretrial defendants will not be evaluated under the PSA. Judges will make decisions in those cases without knowing a defendant's risk score.[590] By using a randomized control trial methodology, the county hopes to learn if the PSA is causally responsible for the lower pretrial detention rates, lower failure-to-appear rates, and lower new-criminal-activity rates in many of the jurisdictions that have adopted the tool so far. While the PSA has been validated using historical data, validation can only confirm that the PSA would have made accurate predictions for previous defendants. A randomized control study allows researchers to measure the difference in outcomes between using and not using the PSA in real time, while controlling for factors that tend to complicate comparisons across different time periods or across different jurisdictions.

Denver and Mesa Counties, Colorado

State Background

In 2013, Colorado revised its bail statutes to encourage counties to create pretrial services offices, prioritize pretrial decisionmaking based on risk, and reduce reliance on money bail—with decisionmaking informed by community input.[591] The state does not have a uniform pretrial services system and does not require counties to use a risk assessment tool, but the state has developed the Colorado Pretrial Assessment Tool for use in any jurisdiction in the state.

The 2013 reform bill resulted from close study by a statewide subcommittee, drawing on national examples as well as success in various counties around the state, including Mesa, Boulder, and Denver.[592] Colorado law now requires chief judges of judicial districts to consult with county officials and support the development of pretrial services programs that advance "evidence-based decision-making in determining the type of bond and conditions of release."[593] These programs must be developed by a community advisory board, which is appointed by the chief judge of the judicial district and which must include representation from local law enforcement, the district attorney's office, the public defender's office, and the public at large.[594] The law encourages the chief judge to include a representative from the bail bond industry on the community advisory board.[595] Colorado law also states that counties "must make all reasonable efforts" to implement a risk assessment tool and pretrial decisionmaking framework, but does not prescribe a particular tool or require the use of a risk assessment tool at all.[596]

A partnership between the Colorado Association of Pretrial Services, the Pretrial Justice Institute, and pretrial agencies from ten counties developed the Colorado Pretrial Assessment Tool (CPAT), validated based on statewide data, for use in any jurisdiction in the state.[597] The assessment tool was trained on data from ten counties in Colorado, representing 81% of the state's population, and was designed with input from pretrial officers in those counties.[598] The tool's creators wanted to incorporate as much information and as many factors as possible, including items related to "demographics, residence and employment, mental health and substance use/abuse, criminal history and past criminal justice system involvement, [and] current charges and system involvement."[599] The final version of CPAT uses twelve factors that have a statistical relationship with appearance rates and rates of new charges being filed:

- Having a Home or Cell Phone

- Owning or Renting One's Residence
- Contributing to Residential Payments
- Past or Current Problems with Alcohol
- Past or Current Mental Health Treatment
- Age at First Arrest
- Past Jail Sentence
- Past Prison Sentence
- Having Active Warrants
- Having Other Pending Cases
- Currently on Monitoring
- History of Revoked Bond or Monitoring[600]

As explored in greater depth earlier in this guide, using socioeconomic information as a predictor for risk raises serious concerns and can invite litigation over wealth-based discrimination. The creators of CPAT wanted to include as many factors as possible to help improve predictions, but including more factors doesn't necessarily result in better predictions.[601] In a recent study, an algorithmic tool that looked at only two factors — age and total number of previous convictions — performed better than a tool that considered seven factors.[602]

Unlike some other risk assessment tools, the CPAT does not include a decisionmaking framework that translates risk scores into release recommendations.[603] CPAT informs pretrial officers of the reappearance and re-arrest rate of defendants within a given risk score range, but county-level pretrial service agencies are free to set their own policies about how to present that information to the court and what conditions to recommend.[604]

Denver County

Major Reforms:

- **Expanded Procedural Protections**
- **Pretrial Monitoring and Services**
- **Pretrial Risk Assessment**

In recent years, Denver County has reformed its pretrial procedures to involve defense attorneys, utilize risk assessments, and inform defendants of upcoming court dates. Counsel is appointed and defense attorneys advocate at first appearance hearings.[605] The pretrial services agency runs the CPAT risk assessment for all defendants charged with felonies and most defendants charged with misdemeanors.[606] The county no longer

uses a felony bail schedule and has increased its pretrial release rate from 54% to 64%.[607]

Denver's pretrial services agency is separate from parole and probation and is part of the Denver Department of Public Safety's Community Corrections Programs, which also provides diversion programs and alternatives to incarceration.[608] The agency has two units, an investigation unit and a supervision unit.[609]

The investigation unit interviews defendants, completes a criminal background check, and scores the risk assessment using the CPAT.[610] Pretrial services officers considers the resulting risk score when making bond and release recommendations to the court, but the CPAT tool does not offer specific recommendations of release conditions.

The pretrial supervision unit determines defendants' eligibility for supervised release by reviewing custody dockets.[611] This review occurs in court when a judge orders a defendant to be conditionally released.[612] The pretrial services agency has a handful of different monitoring methods: weekly meetings, toxicology screenings, electronic monitoring, and electronic ankle bracelets that monitor sweat for the presence of alcohol.[613]

Mesa County

Major Reforms:

- **Elimination of Fees for Pretrial Services**
- **Pretrial Monitoring and Services**
- **Pretrial Risk Assessment**

Mesa County was the first jurisdiction in Colorado to begin using the CPAT tool, which the county still uses today.[614] The county has developed its own decisionmaking framework that translates CPAT risk scores into recommendations for release, conditions of release, or detention.[615] Based on its continued assessment of pretrial outcomes, Mesa County has periodically increased the number of people who qualify for release on personal recognizance and reduced the number of conditions that are frequently imposed.[616] With the exception of electronic monitoring and positive drug tests, the county does not charge people for pretrial services.[617] People are never denied pretrial services or detained if they cannot pay a fee, and people are not considered to be in violation of their conditions of release for not paying a fee.[618]

The pretrial services agency has two functions: assessing defendants and supervising released defendants. The assessment process includes the collection of criminal history data and a short interview with the defendant.[619] There are no attorneys present for the interview.[620] To the

extent that time and resources allow, the pretrial services agency verifies information that the defendant provides in the interview such as owning a home or contributing to monthly rent payments.[621] Based on the risk score and interview, pretrial officers provide a written report to the court, prosecutors, and defense attorneys.[622] Pretrial services officers do not have discretion to deviate from the countywide decisionmaking framework.

Multnomah and Yamhill Counties, Oregon

State Background

Oregon is in the early stages of pretrial reform. The state is receiving technical assistance from the National Criminal Justice Reform Project to improve the state's mental health treatment, justice reinvestment, and data management.[623]

Oregon law allows for pretrial defendants to be released from custody on personal recognizance, on conditional release, or on secured money bail.[624] State law also allows sheriffs to release pretrial detainees on personal recognizance when a jail is over capacity.[625] The commercial bail bond industry has been banned statewide since 1973.[626] District attorneys, defense attorneys, and law enforcement have all opposed legislative attempts to revive the bail bond industry.[627] When assigned money bail, a defendant must post 10% of the bond with the court to be released.[628] Under a statewide statute, if a defendant makes his or her court dates, the court will return 85% of the 10% bond deposit to the defendant, but will keep the remaining 15% of the 10% deposit as a fee.[629] The statute affords judges the discretion to dismiss this fee. Depending on the type of court, this fee will either fund court administrative costs or be deposited into general funds for the county or state.[630] These kinds of fees are an unwise and unjust tax for being accused of a crime. Even if someone's case is dismissed or someone is acquitted, the state still retains the money. There is no statewide pretrial system in Oregon; counties have their own pretrial services agencies, which can vary considerably.

Oregon's 2013 Justice Reinvestment Act created a Task Force on Public Safety that later established a Pretrial Workgroup in 2017.[631] The Workgroup contracted with the National Institute of Corrections to train system actors in Oregon. The trainings educate participants about the history and harms of money bail and alternatives to bail that have worked in other states.[632] Oregon also plans to expand its data collection efforts, with particular emphasis on collecting data about race and the criminal justice system.[633] One working group will assess the extent to which risk-assessment tools have a disparate racial impact.[634]

Multnomah County

Major Reforms:

- **Automated Court Date Reminders**
- **Increased Pretrial Release**
- **Pretrial Risk Assessments**

Multnomah County has been using the Virginia Pretrial Risk Assessment Instrument (VPRAI) since 2009.[635]

The VPRAI checks for nine factors:

- if the current arrest is a felony
- if the defendant has pending charges
- if the defendant has an outstanding warrant
- if the defendant has prior convictions
- if the defendant has failed to appear more than once in the past
- if the defendant has more than one violent conviction
- if the defendant has resided in the same place for less than a year
- if the defendant has been employed continuously for the past two years
- if the defendant has a history of drug abuse.[636]

Positive responses to those factors are each weighted as one point, except for prior failures to appear, which is worth two points.[637] In 2010, Multnomah ran a study to measure the accuracy and fairness of the VPRAI.[638] The study found that the VPRAI was accurate and consistent.[639] But the study also acknowledged that several factors considered in the VPRAI were poor at measuring risk.[640] And the responses to six of the VPRAI's nine factors varied strongly by ethnic group.[641] For example, with the factor of "Is current offense a felony?", the answer was yes for 67% of Black defendants but only 54% of white defendants and 22% of Asian defendants.[642] The county did not make any policy changes as a result of this study.

Multnomah County defendants are monitored through a combination of phone contacts, home visits, office appointments, and limited use of electronic monitoring.[643] In 2005, the county started a pilot program that gives pretrial defendants automated calls notifying them of their upcoming court dates.[644] The pilot program dramatically reduced failure-to-appear rates and saved the county over a million dollars in eight months. Following this success, the program was expanded in 2006 to place notification calls in a larger number of cases.[645]

Yamhill County

Major Reforms:

- **Automated Court Date Reminders**
- **Pretrial Monitoring**
- **Pretrial Risk Assessments**

Over the past few years, Yamhill County has received federal funding from the Bureau of Justice Assistance and the National Institute of Corrections to reform its pretrial procedures and incorporate evidence-based practices.[646] The county has adopted a new risk assessment tool, expanded its staff, modified its pretrial procedures, and subscribed to an automated court notification system.[647]

Yamhill County previously used the VPRAI, but now uses the Oregon Public Safety Checklist, which is another risk assessment tool that uses actuarial data and has been validated for the local population.[648] The county chose to switch to the Oregon Public Safety Checklist because it was more accurate for the Yamhill County population.[649] Although the Public Safety Checklist does not require an interview, the county still conducts interviews because, when making release decisions, judges are statutorily required to consider factors that the checklist does not include.

The county has hired an additional pretrial officer and has implemented an informal "second look" step in their pretrial procedures, whereby, when the office has the time and capacity to do so, the pretrial services agency reevaluates whether people detained pretrial should be released.[650] Yamhill County Pretrial Services runs risk assessments for all detained defendants within 24 hours of initial arrest and booking at the local jail and provides a release recommendation to the court at arraignment.[651]

In 2015, Yamhill adopted web-based software that automatically calls defendants to remind them of their upcoming court dates.[652] The software can make phone calls in English or Spanish.[653]

Since implementing reforms, Yamhill has lowered the pretrial share of its local jail population by 10% and has a failure to appear rate of only 4–5%.[654] A group of stakeholders continues to meet regularly to collaborate on system improvements. Participants include the presiding judge, county commissioner, district attorney, sheriff, defense and victim representative, the director of community corrections, an IT manager, and the director of Health and Human Services.[655]

ENDNOTES

1. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 1 (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf; ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST 1 (3d. ed. 2016).
2. Peter Wagner & Wendy Sawyer, PRISON POLICY INITIATIVE, *Mass Incarceration: The Whole Pie 2018* (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html.
3. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 7 (2016).
4. Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOCIAL PROBLEMS 222, 222 (2004). We use the word "Latinx" where other researchers have used the word "Hispanic." For background on the history and use of "Latinx" as a gender-neutral label for Latino/a and Latin@, see generally Cristobal Salinas Jr & Adele Lozano, *Mapping and Recontextualizing the Evolution of the Term Latinx: An Environmental Scanning in Higher Education*, J. LAT. EDUC. (2017).
5. *How the Poor Get Locked Up and the Rich Go Free*, L.A. TIMES (Aug. 16, 2017), http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170816-story.amp.html; *Fixing the Unfair Bail System is Worth the Costs*, WASH.POST (Sept. 9, 2017) https://www.washingtonpost.com/opinions/fixing-the-unfair-bail-system-is-worth-the-costs/2017/09/09/ff3c5c4c-73eb-11e7-8f39-eeb7d3a2d304_story.html?noredirect=on&utm_term=.64bd83f31cfe; *Cash Bail's Lonely Defender*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/opinion/cash-bails-lonely-defender.html?_r=0.
6. Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017) https://www.nbcnews.com/specials/bail-reform.
7. Directory of Community Bail Funds, BROOKLYN COMMUNITY BAIL FUND, https://brooklynbailfund.org/nbfn-directory/ (last visited Oct 1, 2018).
8. *See e.g.*, CALIFORNIANS FOR SAFETY & JUSTICE, PRETRIAL PROGRESS: A SURVEY OF PRETRIAL PRACTICES AND SERVICES IN CALIFORNIA 5-7 (Aug. 2015).
9. In 2017, the Los Angeles County Board of Supervisors passed a motion to evaluate the county's current bail system and to "improve and create a more equitable and just pretrial release system that ensures efficiency and fairness." Los Angeles County Board of Supervisors, Motion No. 112060 (2017), http://file.lacounty.gov/SDSInter/bos/supdocs/112060.pdf [Hereinafter: Los Angeles County Motion]. This motion passed by unanimous vote. *See* Nik Swiatek, *Board Votes to Review Current Bail and Pretrial Release Policies*, Supervisor Kuehl (Mar. 8, 2017), https://supervisorkuehl.com/board-votes-review-current-bail-pretrial-release-policies/. Shortly thereafter, the Criminal Justice Policy Program at Harvard Law School assisted the county by studying the process of reform in other jurisdictions across the country and distilling a set of principles for the Board to consider as it reimagines pretrial justice in Los Angeles County. This guide is a result of that work. The jurisdictions were selected in consultation with Los Angeles County. CJPP did not accept compensation for this work and understood that the Office of the County Counsel planned to consult with local actors and other experts to analyze the county's current pretrial system and to implement any changes.
10. Salerno v. United States, 481 U.S. 739, 755 (1987).
11. *E.g.*, D.C. CODE ANN. § 23-1321.
12. *See generally* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018). LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 (2013); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOCIAL PROBLEMS 222 (2004); JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CENTER FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE (2015); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, J. POL. ECON. 1320 (2014); MARC MAUER, JUSTICE FOR ALL? CHALLENGING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (2010).
13. *E.g.*, CAL. CONST. art. I, § 12; CAL. CONST. art. I, § 28(a)(8)(b)(3), (f)(3). Other considerations include "the seriousness of the offense charged, [and] the previous criminal record of the defendant." CAL. CONST. art. I, § 12.

14. For a broader background on general bail practices, see generally Criminal Justice Policy Program, Harvard Law Sch., Moving Beyond Money: A Primer on Bail Reform (2016) [hereinafter Bail Reform Primer].
15. *E.g.*, Cal. Penal Code § 1270 (West 2017) ("Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail.").
16. *See generally* Bail Reform Primer, supra note 14, at 5–6.
17. Bail Reform Primer, supra note 14, at 6.
18. *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1, 3–4 (2008).
19. *E.g.*, Cal. Pen. Code § 1298 (West 2017).
20. See Human Rights Watch, "Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People 6 (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf [hereinafter Human Rights Watch].
21. U.S. Const. amend. VIII; e.g., Cal. Const. art. I, § 12.
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is expanded, this change may diminish or even reverse cuts in pretrial detention rates resulting from the elimination of money bail. The line-drawing challenge of identifying the appropriate class of defendants who should be categorically exempt from pretrial detention is beyond the scope of this guide but is worthy of more research and discussion. For a thorough treatment of this problem, see generally TIMOTHY R. SCHNACKE, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (2017).

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