THE ADMINISTRATION OF BAIL BY STATE AND FEDERAL COURTS: A CALL FOR REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
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C O N T E N T S

THURSDAY, NOVEMBER 14, 2019

Page

OPENING STATEMENTS

The Honorable Karen Bass, a Representative in Congress from the State of California, and Chair of the Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable W. Gregory Steube, a Representative in Congress from the State of Florida, and a member of the Subcommittee on Crime, Terrorism, and Homeland Security 2
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Chair of the House, Committee on the Judiciary 4

WITNESSES

Brandon Buskey, Deputy Director for Smart Justice Litigation, American Civil Liberties Union Criminal Law Reform Project
Oral Testimony 7
Prepared Statement 9
Shelton McElroy, National Director of Strategic Partnerships, The Bail Project
Oral Testimony 16
Prepared Statement 18
Alison Siegler, Director, Federal Criminal Justice Clinic, University of Chicago Law School
Oral Testimony 20
Prepared Statement 22
Mary Smith, President, Ohio Professional Bail Agents Association
Oral Testimony 40
Prepared Statement 42
Sakira Cook, Director, Justice Reform Program, The Leadership Conference on Civil and Human Rights
Oral Testimony 45
Prepared Statement 47

STATEMENTS, LETTERS, MATERIALS, ARTICLES SUBMITTED

Article by Cameron Langford submitted by Sheila Jackson Lee 72
Letter submitted by Representative Louie Gohmert, a Member of Congress of the State of Texas, and a Member of the Subcommittee on Crime, Terrorism, and Homeland Security of the House, Committee on the Judiciary from Senator Jeff Van Drew, First legislative District, New Jersey, Bob Andrezeiczak, Assemblyman, and Bruce Land, Assemblyman for the record 92

APPENDIX

Letter submitted from the American Bail Coalition by Jeffrey J. Clayton 96

THE ADMINISTRATION OF BAIL BY STATE AND FEDERAL COURTS: A CALL FOR REFORM

Thursday, November 14, 2019

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:07 a.m., in Room 2141, Rayburn Office Building, Hon. Karen Bass [chair of the subcommittee] presiding.

Present: Representatives Bass, Nadler, Demings, Jackson Lee, McBath, Richmond, Cicilline, Lieu, Dean, Mucarsel-Powell, Cohen, Gohmert, Reschenthaler, Cline, and Steube.

Staff present: Moh Sharma, Member Services and Outreach Advisor; Ben Hernandez, Counsel; Joe Graupensperger, Chief Counsel; Milagros Cisneros, Detailee; and Veronica Eligan, Professional Staff Member.

Ms. BASS. The Subcommittee will come to order.

Without objection, the chair is authorized to declare recesses of the Subcommittee at any time.

We welcome everyone to this afternoon's oversight hearing on "The Administration of Bail by State and Federal Courts: A Call for Reform."

I will now recognize myself for an opening statement. Today, the Subcommittee on Crime, Terrorism, and Homeland Security meets to discuss the important issue of bail reform.

The national dialogue on reforming bail in the pretrial system both on the State and federal level has not waited for congressional attention.

There has been a groundswell of community action that has resoundingly proclaimed that the current system is unjust, unfair, and does not work to protect communities.

Since 2000, 95 percent of the growth in the jail population has consisted of pretrial detainees. This increase has had a profound impact on communities.

That burden has been disproportionately placed on the shoulders of communities of color. Studies show that low-income and African-American communities are disproportionately impacted during the pretrial phase of the criminal justice process.

One such study found that when compared to White men charged with the same crime and with the same criminal history, African-American men have bails set in amounts that are 35 percent higher. For Latino men, bail is set at 19 percent higher than it is for White individuals.

These defendants who cannot afford bond receive harsher case outcomes and are three to four times more likely to receive a sentence to jail or prison and their sentences are two to three times longer.

The situations for defendants who are women is particularly troubling. While women are more likely to be granted release on their own recognizance, they are much less likely to be able to afford bail when it is ordered.

Eighty percent of women who are locked up pretrial are mothers. When mothers are jailed, the families, potentially, collapse. Their children are more likely to end up with relatives or be subjected to the foster care system.

Using financial considerations as a deciding factor of whether an individual is freed or imprisoned perpetuates existing inequities.

In a fixed money bail system wealthy defendants who pose a risk to public safety are, in a sense, able to buy their freedom.

The wealthy and the poor receive radically different treatment solely based upon their ability to post bail, which often is set at arbitrary levels well above the means of many people to pay despite the low risk they may actually pose to society.

I believe that is patently unfair and is un-American.

This hearing offers Congress the opportunity to reshape the dialogue on how the community interacts with the criminal justice system.

Reducing pretrial incarceration and the harm associated with unnecessary detention starts with giving law enforcement officers the discretion in deciding at the outset when a case would be better resolved by treatment or services.

Those with mental health or substance use issues need not enter the criminal justice system unless they propose a clear danger.

In the same vein, providing officers the ability to issue citations in lieu of arrest reduces time spent on low-level cases.

According to the International Association of Chiefs of Police, issuing a citation takes less than a third of the time as processing an arrest. These types of reforms put officers back on the street to address violent crime.

The Nation has reached an inflection point on bail reform. We must examine and pursue alternatives to money bail.

The states, including my home State of California, have experienced challenges in reforming their system and we learned from what has worked and what still needs to be improved.

Our discussion today can help both at the State and federal level. Our bail and pretrial systems must be reformed.

I look forward to hearing from each of the witnesses as we initiate this dialogue in the Judiciary Committee.

It is now my pleasure to recognize Mr. Steube for his opening statement.

Mr. STEUBE. Thank you, Madam Chair, and thank you to the witnesses that are here today.

The use of bail has been part of our legal system since the founding of our country. Our Founding Fathers included in the Eighth amendment to the Constitution on excessive bail. They did not include an outright prohibition on bail.

The Eighth amendment acknowledges that in some cases a particular amount set for bail may be unconstitutional. As many of us already know, bail is simply used to increase the chances that the accused would return to court if they were released prior to trial.

Of course, any deprivation of a person's liberty should be scrutinized. The presumption of innocence forms the bedrock of our criminal justice system. A person's race, gender, religion, national origin, or political belief should have no bearing on that presumption of innocence.

Our responsibility as Members of Congress and as Members of the Judiciary Committee is to explore the different approaches that have been discussed and, in good faith, identify what works and what doesn't.

In Texas, Texas has grappled with this very issue. On Thanksgiving Day 2017, Texas State Trooper Damon Allen was killed during a traffic stop. The man accused of killing Damon Allen had been released several months before on a $15,000 bail.

In response, Governor Greg Abbott proposed reforms that would require judges to set bail based on whether the accused is a threat to law enforcement.

The chief justice of the Texas Supreme Court, Martin Hike, announced his support of the governor's proposal.

California has dealt with the issue of bail in the criminal justice system. In 2018, then California Governor Jerry Brown signed into law Senate Bill 10, which would effectively end cash bail.

As states like Texas and California and others around the country examine these issues based on the feedback State lawmakers received from their constituents, Congress has also advanced efforts to reform bail practices.

In 1966, Congress enacted the Bail Reform Act, which directed judges to release all noncapital case defendants on their own recognizance unless doing so would be inadequate to assure their appearance.

This law did not allow judges to consider a defendant's potential risk to their community or to public safety.

However, in 1984, after examining concerns regarding crimes being committed by those on pretrial release, Congress updated the Bail Reform Act to allow judges to detain particularly dangerous defendants from whom no stringent release conditions would reasonably assure public safety.

Congress expressly prohibited using inordinately high financial conditions to detain defendants. In the *U.S.* v. *Salerno*, the Supreme Court upheld the constitutionality of the Bail Reform Act of 1984, holding that the law was constitutional because when the government's interest in protecting the community outweighs individual liberty, pretrial detention can be, quote, "a potential solution to a pressing societal problem."

As we move forward, we can learn from the history of bail and its use in the criminal justice system. The whole point of our criminal justice system is to protect the public while ensuring that the accused is innocent until proven guilty and that they are afforded due process.

I fear that proposals that would eliminate the use of cash bail in its entirety, however well intentioned, will fail to take into the

account the importance of public safety, will reduce flexibility and discretion for law enforcement, prosecutors, and judges, and simply ignore the voices of victims harmed in alleged crimes.

Judges use cash bail to protect victims to prevent high-risk defendants from having contact with the victim or witness before trial.

Imagine telling a survivor of domestic violence or sexual assault that cash bail is unfair or discriminatory to their alleged abuser.

We owe it to these victims and the communities that we all represent to be forthright and honest about these issues and to always ensure that we are promoting public safety.

I yield back.

Ms. BASS. I am now pleased to recognize Chair of the full committee, the gentleman from New York, Chairman Nadler, for his opening statement.

Chair NADLER. Thank you, Madam Chair. I thank the Subcommittee chair, Representative Karen Bass, for conducting this hearing on the important topic of bail reform.

On any given day, six out of 10 people in federal and State jails, accounting for nearly half a million people, are incarcerated awaiting trial.

These are Members of our community who are still innocent in the eyes of the law and may, in fact, never be found guilty of anything.

Yet, they may spend months behind bars before even having the opportunity to contest the charges against them.

The modern bail system has become unmoored from its original intent, which was only to ensure defendants return to court.

The current system detains many people based solely on their inability to afford money bail, which results in serious problems for defendants of limited means.

It also imperils the effective operation of the adversarial system of justice, and it may even endanger the community.

The nearly half a million people incarcerated pretrial are at a disadvantage from the outset. Access to counsel while incarcerated pretrial may be hampered, undermining preparation of a defense and accumulation of evidence.

These challenges, in turn, may unjustly encourage defendants to take plea bargains for crimes that they never committed.

Defendants who cannot afford bail receive harsher case outcomes on average than those who are able to pay. They are three to four times more likely to receive a jail or prison sentence and the sentences are likely to be two to three times longer.

In addition, opportunities for pretrial diversion programs, which address underlying factors that contribute to criminal behavior, may be unavailable to those who are incarcerated pretrial.

Money bail systems challenge the very legitimacy of our criminal justice system and its presumption of innocence before trial.

A number of studies on money bail show that it is not even effective at mitigating the risk of nonappearance while resulting in significant negative outcomes.

Now is the time to investigate in earnest alternatives that promote rehabilitation and safety. Unnecessary pretrial detention has real consequences for families and communities.

Being detained pretrial even for a short period can be daunting. For example, while in jail pretrial defendants risk losing their jobs and their homes, which can have a cascading effect on families.

People who have lost their jobs because of being detained lose income and their ability to maintain their families, placing them at greater risk of engaging in crime.

In fact, studies have shown that defendants detained and just three days in jail are more likely to be arrested on new charges.

Unfortunately, the current money-based system promotes release of some of the most dangerous defendants because they can afford to post bond, then will little to no meaningful supervision, and keeping presumptively innocent people in jail is expensive.

Local communities spend by some estimates $14 billion every year to detain people who have not been convicted of anything. It would be better to redirect these funds instead to crime prevention, rehabilitation of offenders, and assisting victims.

In the federal context, the reforms of the past have been proven to be insufficient in balancing a defendant's liberty interest and ensuring that the communities remain safe.

At the time of the passage of the Bail Reform Act in 1984, 81 percent of defendants were released at pretrial just before that law was enacted.

Since enactment of the 1984 act, release rates have steeply declined, falling to 66 percent by 1996, 37 percent by 2006, and 25 percent in 2018, compared, again, to 81 percent 35 years ago.

Even release rates of low-risk defendants have decreased. Surely, community safety does not justify this trend.

A number of states have implemented reforms of their bail systems in recent years including, recently, my own State of New York, and the time has come for Congress to examine how federal courts administer pretrial bail as well.

Conservatively, it costs upwards of $85 a day to incarcerate a person pretrial. Pretrial supervision, coupled with measures such as court date reminder programs, costs just a fraction of that.

Congress should investigate the effectiveness of these practices and other potential reforms. As we consider alternatives to money bail, however, we must determine whether certain alternatives such as over reliance on risk assessment tools may generate additional negative consequences such as compounding the racial bias that already exists in other aspects of our criminal justice system.

While developing effective and just alternatives to current money bail practices will undoubtedly require a financial commitment, the costs of inaction to defendants, their families, and the larger community is much higher.

The negative impact on everyone of even a few days spent in jail pretrial may greatly outweigh the perceived benefit.

I look forward to the discussion today of these very important issues and I, again, thank Subcommittee Chair Bass for conducting this hearing.

I yield back the balance of my time.

Ms. BASS. We welcome our witnesses and thank them for participating in today's hearing.

Now, if you would please rise I will begin by swearing you in. Raise your right hand.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

[A chorus of ayes.]

Ms. BASS. Thank you. Let the record show the witnesses answered in the affirmative. We will now proceed with witness introductions.

Brandon Buskey is the deputy director for Smart Justice Litigation at the ACLU Criminal Law Reform Project. His work focuses on reforming pretrial justice, expanding the right to counsel, juvenile sentencing, and residency restrictions for former sexual offenders.

Prior to the ACLU, Brandon worked at the Equal Justice Initiative and the Civil Rights Bureau of the New York State Attorney General's Office.

He is a 2006 graduate of New York University Law School. Following law school, he clerked for the Honorable Janet C. Hall of the U.S. District Court for the District of Connecticut.

Shelton McElroy is the national director of strategic partnership of the Bail Project. Before assuming his current position, he worked at Parent Advocacy and Participatory Defense in Louisville, Kentucky, assisting parents in the reunification process with their children. He is a formerly incarcerated individual who was a ward of the State and foster care for over 15 years.

Additionally, he was a Just Leadership Fellow and a 2018 BME Genius Award recipient. Mr. McElroy holds a Master's in mental health counseling and studies documentary studies at Duke University.

Alison Siegler is a clinical professor of law and the founder and director of the Federal Criminal Justice Clinic at the University of Chicago Law School.

She was previously a staff attorney with the Federal Defender Program in Chicago, a Prettyman Fellow at Georgetown University Law Center's Criminal Justice Clinic, and a law clerk for the U.S. District Judge Robert W. Gettleman. Ms. Siegler graduated magna cum laude from Yale College and earned a J.D. from Yale Law School and holds a degree from Georgetown.

Mary Smith is President of the Ohio Professional Bail Association and serves as the mid-America director for the Professional Bail Agents of the United States. For nearly 30 years she has owned and operated Smith Bonds & Surety in Ohio.

She holds a degree in paralegal studies from Ashworth College and licenses in Ohio surety, bail, property, and casualty health and life, and a nonresident bail license in Michigan.

Sakira Cook is a program director for justice reform at the Leadership Conference on Civil and Human Rights. At the Leadership Conference, Ms. Cook leads the development of a federal policy agenda on reform of the criminal justice system for the coalition.

Prior to joining the Leadership Conference, Ms. Cook served as a legal fellow at the Open Society Policy Center focusing on criminal justice, civil and racial justice reform. Ms. Cook attended Howard University where she earned a B.A. in international business and management and Wayne State University Law School.

Please note that each of your written statements will be entered into record in its entirety. So, accordingly, I ask that you summarize your testimony in five minutes.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals your five minutes have expired.

Mr. Buskey, you can begin.

STATEMENT OF BRANDON BUSKEY

Mr. BUSKEY. Thank you.

Chair Bass, Congressman Steube, thank you for the opportunity to testify today. Chair Nadler, thank you for your Committee leadership and for joining today's important hearing.

My name is Brandon Buskey and I am the deputy director of Smart Justice Litigation at the ACLU.

Here are the stakes. We cannot end mass incarceration and its legacy of racial injustice unless we radically reform our pretrial systems. Of the 2.2 million people trapped by the carceral epidemic, nearly one out of every five is a person locked in a jail cell awaiting trial.

Most of these people are in jail because they cannot afford to purchase their release with money bail. Communities of color are uniquely damaged by this system.

In response to this crisis, numerous civil rights organizations have brought dozens of lawsuits across the country to end our dependence on money bail.

The ACLU successfully brought the first of these challenges in 2014 in Mississippi on behalf of Octavious Burks and Joshua Bassett.

Respectively, they spent 10 and eight months in jail without a lawyer and without even being formally charged with an offense, all because they could not afford bail.

Since then, the ACLU has brought over a dozen bail reform lawsuits. Our clients are people like Candace Edwards, who was arrested in Alabama for forging a $75 check.

For this, her bail was set at $7,500. When we met Candace the day after her arrest, she told us the night before she had slept on the concrete floor of an overcrowded cell. Candace was seven months pregnant.

In 1987, the Supreme Court in *U.S.* v. *Salerno* declared, "In our society, liberty is the norm and detention prior to or without trial is the carefully limited exception."

Today, too many of our criminal court systems have this exactly backwards. Octavious, Josh, and Candace are the norm. Indefinite detention without counsel is the norm. Liberty, sadly, is the arbitrarily denied exception.

We must reverse course. The right to pretrial liberty is fundamental. Under Salerno, that means the government can only jail you before trial if it has an exceptional reason. Money is never an exceptional reason.

It can delay a person's release by days or even weeks as their family and friends scramble to collect money. In that time, a per-

son may experience many or all of the harms of pretrial detention such as loss of employment, housing, or custody.

This trauma makes them more likely to be rearrested or to miss court. Also, research has repeatedly shown that money is almost always unnecessary.

Providing free resources like court reminders or voluntary treatment referrals have proven better at serving the goals of the system to release people quickly, ensure a court appearance, and protect public safety.

However, ending money bail is not enough. At the ACLU, our vision is a world in which 95 percent of all people arrested are released within 48 hours.

Consider this. Pretrial violence is extremely rare and, thus, extremely hard to predict. Only 1.9 percent of people arrested for felonies are rearrested for violent offenses prior to trial.

If we truly value the presumption of innocence, how many people can we detain to avoid a risk that happens in less than 2 percent of serious cases and less than 1 percent overall, especially when our methods of prediction, either by a judge alone or with the aid of a risk assessment, reliably reproduced the racial disparities that infect our entire system of criminal enforcement?

If we stay true to our values, our vision is achievable. I want to suggest three things the Congress can do in addition to ending money bail to significantly increase pretrial release and racial equity, all while keeping communities safe.

First, increase mandatory and presumptive release. This also means eliminating existing presumptions of pretrial detention, reserving incarceration for rare and very serious offenses.

Those who are not immediately released must receive individualized hearings with counsel at which detention is prohibited unless the government proves that it is absolutely necessary.

Second, invest in evidence-based reforms that work like court date reminders. Most people do not flee. They forget. Text message reminders and improved court notices significantly increase court attendance.

Finally, set clear goals for risk assessments. Then evaluate whether they are working. To be clear, the ACLU opposes the use of risk assessments to determine pretrial liberty.

However, jurisdictions using them must ensure that the tools actually result in releasing more people and reducing racial bias.

Thank you.

[The statement of Mr. Buskey follows:]

Hearing of the Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

The Administration of Bail by State and Federal Courts: A Call for Reform

Written Statement of the American Civil Liberties Union
Thursday, November 14, 2019

Brandon Buskey
Deputy Director for Smart Justice Litigation
American Civil Liberties Union

Introduction

The American Civil Liberties Union (ACLU) would like to thank Crime Subcommittee Chairwoman Bass and Ranking Member Ratcliffe, for the opportunity to testify about the critical issues of pretrial liberty and bail during this hearing on *The Administration of Bail by State and Federal Courts: A Call for Reform*.

I am the Deputy Director of Smart Justice Litigation at the American Civil Liberties Union (ACLU). Our team is the litigation arm of the ACLU's Campaign for Smart Justice, a multi-state, multi-year effort to reduce America's prison and jail population by 50% and to challenge systemic racism in the administration of criminal justice.

Here are the stakes. We cannot end mass incarceration and its legacy of racial injustice unless we radically reform our pretrial systems. Of the 2.2 million people trapped by the carceral epidemic, nearly one out of every five is a person confined to a jail cell, awaiting trial.[1] Most of these people are in jail because they cannot afford to purchase their release. People of Color are uniquely burdened by this practice.[2]

Pretrial detention feeds mass incarceration. People held in jail before trial are more likely to be convicted, often because they plead guilty to crimes they did not commit simply to go home; they are more likely to receive a jail or prison sentence; and they are more likely to receive a longer jail or prison system.[3]

I. The ACLU's Bail Reform Litigation

This is a constitutional and moral outrage. In response to this crisis, over the past five years, numerous civil rights organizations and lawyers have brought dozens of lawsuits across the country to end our dependence on money bail. The ACLU successfully brought the first of these challenges in 2014 in Mississippi, on behalf of Octavious Burks and Joshua Bassett. Respectively,

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[1] Prison Policy Initiative, *Mass Incarceration: The Whole Pie*, available at: https://www.prisonpolicy.org/blog/2019/03/19/whole-pie/.

[2] *E.g.*, David Arnold, et al, *Racial Bias in Bail Decisions*, 11/2018, THE QUARTERLY JOURNAL OF ECONOMICS, 133, 4, 1885-1932; Cynthia E. Jones, *"Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919 (2013); Stephen Demuth, (2003). *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, CRIMINOLOGY, 41(3), 801-836 (2003).

[3] *E.g.*, Will Dobbie, et al, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 214 (2018); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 4 (2013), craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/498S-LM6P].

they spent ten and eight months in jail—without a lawyer and without even being formally charged with an offense—all because they could not afford bail.[4]

Since then, the ACLU has litigated over a dozen pretrial reform cases. Most of our clients are people jailed on unaffordable bail without counsel. They are people like Candace Edwards, who was arrested in Alabama for forging a $75 check. For this, her bail was set at $7,500. When we met Candace the day after her arrest, she told us that the night before she slept on the concrete floor of an overcrowded cell. Candace was seven months pregnant.

In 1987, the Supreme Court, in *United States v. Salerno*, declared: "In our society, liberty is the norm, and detention prior to or without trial, is the carefully limited exception."[5] Today, too many of our criminal court systems have this exactly backwards. Octavious, Josh, and Candace are the norm. Indefinite detention without counsel is the norm. Liberty, sadly, is the arbitrarily denied exception.

We bring these lawsuits to reverse course, to make real the Supreme Court's decree that the right to pretrial liberty is fundamental. To paraphrase *Salerno*, that means the government can only jail you before trial if it has an exceptional reason. We otherwise eviscerate the presumption of innocence, the bedrock of our criminal justice system.

Money is almost never an exceptional reason. The Supreme Court has long condemned imprisoning people "solely because of [their] indigency."[6] More importantly, money bail does not work. The three primary goals of the pretrial system are to release people promptly, to ensure that those people appear for trial, and to protect the public from imminent danger. Money bail fails on all three accounts.

Rigorous studies in a variety of jurisdictions—such as Colorado;[7] Cook County (Chicago), Illinois;[8] New Jersey;[9] New York City, New York;[10] Mecklenburg County (Charlotte), North

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[4] Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, New York Times, Sept. 24, 2014, available at: https://www.nytimes.com/2014/09/25/us/in-a-mississippi-jail-convictions-and-counsel-appear-optional.html

[5] 481 U.S. 739, 755 (1987).

[6] Tate v. Short, 401 U.S. 395, 398 (1971); *see also* Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*,. Washington, DC: PRETRIAL JUSTICE INSTITUTE (2013); Claire M. B. Brooker, et al, (2014), *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*. Washington, DC: PRETRIAL JUSTICE INSTITUTE.

[8] Cook County Office of the Chief Judge, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*. Chicago, IL: State of Illinois Circuit Court of Cook County (2019, May).

[9] Glenn A. Grant, *2018 Report to the Governor and the Legislature*, Trenton, NJ: Administrative Office of the Courts (April 2019).

[10] Aubrey Fox and Stephen Koppel, *Research Brief: Pretrial Release Without Money: New York City, 1987–2018*. New York, NY: New York City Criminal Justice Agency (March 2019).

Carolina;[11] Philadelphia, Pennsylvania;[12] and Yakima County, Washington[13]—demonstrate that nonfinancial conditions of release are more effective at achieving the goals of the pretrial system. Indeed, most people come back to court and stay out of trouble without any or minimal conditions on their liberty. Courts are increasingly recognizing this truth, most prominently the Fifth Circuit Court of Appeals in *O'Donnell v. Harris County*.[14]

The reasons money fails are simple. Paying money bail often delays a person's release by days or weeks, as they scramble to collect money from family and friends. In that time, a person may experience many or all of the harms of pretrial detention: loss of employment, housing, or child custody. This trauma makes them *more* likely to miss court or to be re-arrested.

Our lawsuits help bring these truths to power. Along with limiting wealth-based detention, in *Booth v. Galveston County, Texas*, we obtained the first injunction from a federal court declaring that individuals have a right to counsel at a bail determination because these proceedings are critical phases of a criminal prosecution.[15] The guiding hand ensures that judges have a complete picture of the individual before them and that they remain faithful to the Constitution's presumption of pretrial release.[16]

We have also challenged abusive conditions of release, such as profiteering by private companies that force people to pay for invasive supervision like GPS monitoring. In *Ayo v. Dunn*, for example, we sued a private pretrial supervision company in East Baton Rouge, Louisiana, that trapped people in jail unless they agreed to pay a $525 monitoring fee. We prevailed in the district court on the claim that this practice constitutes extortion under the Racketeering Influenced and Corrupt Organizations Act (RICO).[17]

We subsequently used RICO, along with consumer and tort law, to challenge the bail bond industry, the entity most responsible for the metastasis of money bail in recent decades. Our case *Mitchell v. First Call Bail and Surety, Inc.*, is on behalf of Eugene Mitchell and his wife, Shayleen

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[11] Cindy Redcross, et al,. *Pretrial Justice Reform Study: Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina*, New York, NY: MDRC Center for Criminal Justice Research (March 2019) (Report 1 of 2); Cindy Redcross, et al, *Pretrial Justice Reform Study: Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina*, New York, NY: MDRC Center for Criminal Justice Research (March 2019) (Report 2 of 2).

[12] Oren M. Gur, et al, *Prosecutor-Led Bail Reform: Year One*, Philadelphia, PA: Philadelphia District Attorney's Office (Feb. 2019,).

[13] Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis*, Rockville, MD: PRETRIAL JUSTICE INSTITUTE (2017).

[14] 892 F.3d 147, 154 (5th Cir. 2018) (finding "reams of empirical data" showing that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision").

[15] No. 3:18-cv-00104, 2019 WL 3714455, slip op. at *9-10 (S.D. Tex. Aug. 7, 2019), *adopted, as modified, by* Booth v. Galveston Co., 2019 WL 4305337 (S.D. Tex. Sept. 11, 2019).

[16] *Id.*

[17] No. 17-cv-526, 2018 WL 4355199, slip op, at *2 (M.D. La. Sept. 12, 2018).

Meuchell. In April 2017, bounty hunters conducted a nighttime raid of their Lolo, Montana home, and held them and their four-year old daughter at gunpoint. All this was to arrest Mr. Mitchell on a $1,670 bond for inadvertently missing a court date on traffic violations. The federal district court recently held that the bounty hunters and the bail bond company that hired them were both accountable for this assault.[18] Most critically, the court also held that Allegheny Casualty International Fidelity Associated Bond (AIA), the insurance company that underwrote Mr. Mitchell's bond, could face liability for perpetuating these abuses.[19] Insurance companies like AIA are the lifeblood of the bail bond industry, a multi-billion dollar enterprise that preys on the desperation of arrested individuals and their families when courts force them to buy their freedom from jail.[20]

We have litigated across the South, in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, and Texas. But we have also litigated in places as diverse as Arizona, California, Colorado, Michigan, Montana, Pennsylvania, and New York.

II. The Need and Case for Legislative Action

Pursuing these cases over the past five years has taught us a valuable lesson: while litigation can expose the irrationality of money bail and rein in severe abuses within the pretrial system, litigation alone is not enough. For one, we cannot end money bail in a courtroom. For every jurisdiction we sue, there are three more that cling to money bail. Rather, litigation plays a supporting role in a broader movement to realize the culture of release that the Constitution demands. That movement needs your leadership.

This is why the ACLU is pleased to support The No Money Bail Act[21] and the Pretrial Integrity and Safety Act,[22] legislation that has been offered in this body by Representative Ted Lieu (D-CA-33). These bills use federal resources to incentivize states to reform unjust money bail systems.

However, it is critical that you understand this: ending money bail is not enough. Look no further than the federal system, which bans detaining someone based on wealth. Instead, a court may only detain someone if it issues an explicit detention order.[23] Yet, prior to trial, the federal system warehouses 76% of people accused of federal offenses and 84% of those accused of drug offenses.[24] This hardly seems like the "carefully limited exception" mandated by *Salerno*.[25]

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[18] No. 19-cv-67, 2019 WL 5069352, at *1 (D.Mo. Oct. 9, 2019).
[19] *Id.*
[20] *See generally*, American Civil Liberties Union and Color of Change, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail Systems* (May 2017).
[21] H.R. 4474, 116th (2019), S. 3271, 115th (2018).
[22] H.R. 4019, 115th (2017), S. 1593, 115th (2017).
[23] *See* 18 U.S.C. § 3142(c) (2012).
[24] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 53.
[25] 481 U.S. at 754–55.

Our vision must be bolder. At the ACLU, we want a nation in which 95% of all people arrested are released within 48 hours.[26] Consider this. Of the presumption of innocence at trial, the English common law expert Blackstone famously wrote, "It is better that 10 guilty persons escape than one innocent suffer." That injunction should apply with equal or more force *before* trial, when we are trying, not to determine what a person has already done, but instead to predict what a person might do.

To this end, we know pretrial violence is extremely rare, and thus extremely hard to predict. Only 1.9% of people arrested for felonies are re-arrested for violent offenses.[27] Keep in mind, the rate is this low despite the fact that most jurisdictions do not provide any resources that might prevent such incidents.

Further, on the Pretrial Safety Assessment, the most popular and best-designed risk assessment instrument, a mere 9% of those flagged as most dangerous will actually be re-arrested for a crime of violence.[28] In other words, 9 of 10 will turn out to pose no threat at all. True flight, meaning people trying to avoid prosecution rather than merely forgetting a court date, is even rarer and more difficult to measure. Indeed, there is no validated risk assessment that predicts flight.

Given these facts, 95% may be too low. Regardless of whether you agree, I urge you to think of the problem this way: given the presumption of innocence and the fundamental right to pretrial release, how many people should we detain to avoid a risk that occurs in only 2% of cases over all, and in only 9% of the cases most likely to present the risk? And how many people can we detain in good conscience knowing that our methods of prediction, either by a judge alone or with the aid of a risk assessment, reproduce the racial disparities that infect our entire system of criminal enforcement? I hope your answer is now closer to 95%.

III. Recommendations

I want to suggest things the Congress can do, in addition to ending money bail, to reform the federal system and incentivize states to significantly reduce pretrial detention and increase racial equity, all while ensuring that people return to court and keeping communities safe.

1. **Increase mandatory and presumptive release**. This also requires eliminating existing presumptions of pretrial detention, thus reserving pretrial incarceration for rare, serious charges. Jurisdictions must provide those that are not released immediately with robust,

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[26] American Civil Liberties Union, *A New Vision for Pretrial Justice in the United States*, at 2 (Mar. 2019).

[27] Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 527 (2012).

[28] Matt Alsdorf, *Public Safety Assessment—Court*, NCSC 6, https://www.ncsc.org/~/media/Microsites/Files/PJCC/NCSC%20DC%20Presentation.ashx https://perma.cc/3AF2-8C64]; LAURA & JOHN ARNOLD FOUND., *RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT – COURT IN KENTUCKY* 3 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf [https://perma.cc/8QS4-CYSB] (indicating that the New Violent Criminal Activity (NVCA) category is associated with an 8.6% likelihood of arrest for a violent charge).

individualized hearings, including the assistance of counsel, that prohibit detention unless the government proves it is necessary.

2. **Invest in evidence-based reforms that work, such as court reminders.** Most people do not flee, they forget. Thus, text message reminders and improved court notices significantly increase court attendance.[29] Access to voluntary mental health and addiction treatment is also critical.

3. **Eliminate or reduce practices that set people up for failure.** This includes limiting drug testing and GPS monitoring. These measures have not proven effective and may increase pretrial failure.[30] It also includes eliminating requirements that people to pay for the costs of their pretrial conditions, which only perpetuates the cycle of debt we seek to end by abandoning money bail.

4. **Set clear goals for risk assessments, then evaluate whether they are working**. The ACLU opposes the use of risk assessments to determine pretrial liberty. However, jurisdictions using them must ensure that the tools actually result in releasing more people and reducing racial bias.

5. **Data, data, data.** Jails and local courts are among the least transparent of our criminal systems. In many places, particularly across the South, bail proceedings are not on the record. We cannot reform these systems unless we know what they are doing. That means helping to modernize local court systems to better track pretrial data—both pretrial success and failure—and making that data readily available to the public in a way that respects individual privacy.

Conclusion

The stakes are high. But Congress has an extraordinary opportunity to end the tyranny of money bail and champion a culture of release across the country. The Constitution demands more pretrial release and racial justice, and we now have the research and the experience demonstrating that we can meet these demands safely and efficiently. Thank you for your leadership.

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[29] Associated Press, *Text Message Reminders Help People Remember Their Court Dates*, LOS ANGELES TIMES, May 4, 2019, https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html.

[30] The Pretrial Blog, *Electronic Monitoring: Proceed with Caution*, Pretrial Justice Institute (Mar. 2018); John S. Goldkamp, et al, *Pretrial Drug Testing and Defendant Risk*, Journal of Criminal Law and Criminology, Fall 1990, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6669&context=jclc.

Ms. BASS. Thank you.
Mr. McElroy?

STATEMENT OF SHELTON McELROY

Mr. MCELROY. Thank you.

In thinking about waiting for criminal justice reform, I think about a story of a friend of mine that had gotten out of prison prior to me, and upon release he had gone through his belongings that he had had 10 years prior and he found a ticket to a shoe repair store that had been in his wallet over 10 years.

A day or so after being home he went and he took that ticket to that shoe store and he was a little nervous, but he handed it to the cobbler, and the cobbler went in the back and rustled around for a pretty considerable amount of time and came back out and he said, they will be ready in a week.

So that delay that we have in waiting for reform is very similar—that we have been waiting and waiting and waiting, and while we wait hundreds and thousands of people are held in pretrial incarceration this very day.

People that are not guilty, people with the presumption of innocence, sit in jail and will be there throughout the holidays.

At 18 years old, after spending 15 of my years in foster care, less than four months later I was sitting in jail during the holidays. My crime was burglary.

I had gone into a home of someone I knew and I was hungry, and I started to eat out of the refrigerator and drink, and they came home and I ran out the back door.

I was apprehended shortly thereafter and, you know, I found myself sitting in jail, my whole life right in front of me. And I had been in institutions my whole life, but nothing had prepared me for sitting in jail at this age.

My foster mother, Virginia Rogers, was still living at the time and I called her, the phone call itself costing $5.65 and on a fixed income was far greater than she could afford.

I told her the amount of my bail and she told me to hold on to God's unchanging hand, and that I did. You know, shortly thereafter I was visited by two church Members that made me aware that my foster mother, Virginia, had passed and I asked when the funeral was, and they said it had already passed as well.

The charge I was charged with held one to five years and the prosecutor proposed a deal to me to take four years. You know, I could not balance that responsibility at that age and at that time as to what I should do. I know that I wanted to be a soldier. I had spent time at Fort Knox in a foster home and had gone to sleep listening to the tanks as they fired, and that was my dream.

I had taken the ASVAB and two military reps were in the room and proposed to the judge to allow me to go and join, and the judge denied that.

Hindsight being 20/20, I regret the day I violated the homeowner's space and unlawfully entered their property. Yet, today I know that my imprisonment spurred on by my inability to pay cash bail and defend myself adequately benefitted no one and, ultimately, cost taxpayers more than $35,000 a year during the time that I should have been in college.

The collateral consequences of cash bail, especially on communities of color, can be devastating. I met a young lady named Niesha. Niesha had been accused of hitting her boyfriend. She was arrested on a Friday.

A $50,000 bail was set. Her mother came up with $1,500, paid the down payment and Niesha was released with a commitment to pay $300 a month. The following Monday, the case was dismissed. But her debtor's prison never went away. While riding with Niesha, she still owed $1,700.

The bail bondsman called, harassing her. Even offered a deal that if she paid $1,000 immediately, they would relinquish the debt. She didn't have $1,000 to pay immediately. They wanted to download apps on her phone to surveille her. They criticized her because she didn't have a voicemail set up on her phone.

Cash bail is unjust. Taking away the presumption of innocence from anyone is unjust, and when we do this and we claim that we are doing this for public safety, we forget that even I was raped.

When we talk about protecting the people that were harmed, the large majority of people that come into contact in these situations actually have trauma and they need healing, and they need reinvestment in those resources to heal.

Thank you.

[The statement of Mr. McElroy follows:]

TESTIMONY OF SHELTON MCELROY

NATIONAL DIRECTOR OF STRATEGIC PARTNERSHIPS, THE BAIL PROJECT

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

U.S. HOUSE COMMITTEE ON THE JUDICIARY

November 14, 2019

"The Administration of Bail by State and Federal Courts: A Call for Reform"

Good morning Chairwoman Bass, Ranking Member Ratcliffe, and members of the Subcommittee. I am Shelton McElroy, and I am the National Director of Strategic Partnerships at The Bail Project, which is a non-profit organization working to combat mass incarceration.

At 18 years old, after spending the last 15 years in foster care, I found myself in jail. My bail was set at $500, which was the same as a million dollars for an unemployed homeless teen.

My crime — I'm certain you are curious — burglary in the second degree. Hungry, impulsive and somewhat inebriated, I decided to break into the home of a person I knew to steal weed. In a fit of hunger, I microwaved some of her family's leftovers while helping myself to some alcoholic beverages. In walked her brother, and my caper ended in a chase outside of the home through a field and to the nearby middle school. The police had received a call about me trespassing at the high school earlier, so they were in the vicinity and soon showed up.

My whole life I had spent in and out of institutions — Home of the Innocents, group homes, 30-day housing shelters, temporary foster parents, even a juvenile detention center once for a couple of days.

However, nothing could have prepared me for this. Jail is hell on earth. The 16-man dorm I was placed into was almost two times over capacity, and I found a place under the metal tables where we ate to unroll my mattress. I endured the frigid temperatures, inedible food and the violence spawned by conditions of habitat.

My foster mother, Virginia Rogers, was still living at the time. I called — the phone call costing her $5.65, a humongous amount for a 70-year-old whose only money was Social Security insurance and $90 a month that she earned as the minister of music for First Baptist Church. Her insulin and prescription oxygen typically exceeded her income, causing her to obtain reinforcements from her adult children. Nevertheless, she answered the call and we talked. She prayed for me, and when I mentioned $500 bail, she groaned, "Boy that's a lot of money. Don't nobody have that. Now you just hold on to the Lord's unchanging hand."

And that's just what I did. I held on when Mr. Donnie, one of her fellow church members, and Rev. Mackey, a former minister at her church — the only visitors I ever had — came to tell me that Momma (Miss Virginia) had died. "When are the services?" I must have gasped. "Already passed," they informed me. And away they went, as did everything outside of jail for me.

The crime I was charged with carried a one- to five-year sentence. The prosecutor proposed a deal for me to take four years. The public defender assigned to my case carried the message. I had been inside for months by now, had become accustomed to the doors opening and shutting. I was resigned to pleading guilty, I mean I had done what I was accused of, only I hadn't taken the VCR, TV and several other items out of the house, which the homeowners had claimed. I took the deal offered, and ultimately served that sentence.

More than 20 years later — as the national deputy director of operations for The Bail Project, a charitable nonprofit organization that pays cash bail on behalf of indigent clients — I look back on this experience and wonder what a difference it would have made had I not been incarcerated pretrial. What if I would have been able to have afforded $500 bail, or what if the judge would have released me on my own recognizance? Would the outcome have been different in sentencing? Would the impact that jail and prison had on me emotionally and mentally been lessened? So many unanswerable questions.

Hindsight being 20/20, I regret the day I violated the homeowners' space and unlawfully entered their property. However, today I know that my imprisonment spurred on by my inability to pay cash bail and defend myself adequately, benefited no one and ultimately cost taxpayers more than $35,000 a year for four years.

Whenever we trounce on rights, such as the presumption of innocence, we manifest the reduction of rights such as cruel and unusual punishment, and ultimately create injustice in our criminal justice system.

STATEMENT OF ALISON SIEGLER

Ms. SIEGLER. Chair Bass, Ranking Member, Committee Members, thank you for the opportunity to speak here today.

My name is Alison Siegler and I am the director of the Federal Criminal Justice Clinic at the University of Chicago Law School.

I am here today because the federal pretrial detention system is in crisis, and I believe Congress should intervene and fix the Bail Reform Act of 1984.

Today, the federal pretrial detention system detains people at an astronomical rate. The percentage of defendants who are detained pending trial has increased from 19 percent in 1985 to fully 75 percent in 2018.

That was never what Congress intended. The Act was supposed to detain just a narrow set of people, people who were highly dangerous or posed a high risk of absconding.

But, in practice, pretrial detention is now the norm, not the exception, even though our Constitution says that every detainee is presumed innocent.

This skyrocketing federal pretrial detention rate is problematic for several reasons. Studies show that pretrial detention actually makes people—makes society less safe because it increases a detainee's risk of recidivism.

This is very salient in the federal system because most federal defendants are not violent. Violent offenders make up just 2 percent of those arrested for federal crimes.

The data also shows that the vast majority of federal defendants appear in court and don't reoffend while they are on bond.

In 2018, 98 percent of federal defendants nationwide did not commit new crimes on bond and 99 percent appeared for court as required.

What is really remarkable about this is that it is seen—this compliance rate is seen equally in districts that release a whole lot of people and districts that release almost nobody.

So, when release rates increase, crime and flight do not increase. The high federal detention rate also imposes huge fiscal and human costs. On average, a defendant spends 255 days in pretrial detention, often in deplorable conditions.

For example, in the depths of winter last January, pretrial detainees at the Metropolitan Detention Center in Brooklyn, New York, went without heat and electricity for days.

While defendants sit in jail awaiting trial, they can lose their jobs, their homes, their health, even their children, and federal pretrial detention imposes a high burden on taxpayers. It costs approximately $32,000 a year to incarcerate a defendant and only $4,000 to supervise them on release.

These problems make clear that the federal pretrial detention system is in crisis and that reform is needed. Today, I want to highlight two crucial fixes to the federal Bail Reform Act.

First, eliminating financial conditions that require people to buy their freedom, and second, modifying the blanket presumptions of detention that limit judicial discretion and unnecessarily lock up low-risk defendants.

First, a primary goal of the Act was to end practices that conditioned freedom on someone's ability to pay. Every day in federal

courtrooms around the country judges impose conditions of release that privilege the wealthy.

For example, some judges impose bail bonds. Other judges require family Members to co-sign a bond and document their net worth. At best, this unnecessarily delays release but, at worst, it results in the pretrial detention of indigent defendants.

In other districts, indigent defendants are required to pay the costs of their own court-ordered electronic monitoring.

Congress should end these injustices by modifying the Bail Reform Act to eliminate financial conditions and truly put rich and poor on equal footing.

Turning to my next proposal for reform, the statute contains a rebuttable presumption that puts a thumb on the scale in favor of detention in many, many federal cases.

This presumption of detention must be changed. It has had far-reaching consequences and very devastating ones.

First, the problem is the presumption is the presumptions sweep too broadly. They detain low-risk offenders, and they fail to accurately predict who is going to reoffend and who is going to abscond from court.

In fact, a Federal Government study found that the presumptions are actually driving the high federal detention rate. The study had a real-world impact. It led Chief Justice John Roberts and the Judicial Conference to recommend that Congress significantly limit these presumptions, certain of the presumptions.

Today's hearing gives Congress a real opportunity to Act on that recommendation.

Second, like mandatory minimum sentences, these presumptions of detention severely constrain judicial discretion. They prevent judges from making individualized determinations on release.

Federal judges lament that the presumptions are really tying their hands. Although the presumptions were created with very good intentions, they have failed us in practice.

In the words of a government study, the presumptions, and I quote, "become an almost de facto detention order for almost half of all federal cases and have contributed to a massive increase in the federal pretrial detention rate with all of the social and economic costs associated with high rates of incarceration," end quote.

I urge you to take action and to bring the federal pretrial system back in line with Congress's intent.

Thank you, and I look forward to your questions.

[The statement of Ms. Siegler follows:]

WRITTEN STATEMENT OF ALISON SIEGLER
Clinical Professor of Law and Director of the Federal Criminal Justice Clinic
University of Chicago Law School

Before the Judiciary Committee of the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on "The Administration of Bail by State and Federal Courts: A Call for Reform"

November 14, 2019

Alison Siegler, Clinical Professor of Law & Director of the FCJC
Erica K. Zunkel, Associate Clinical Professor of Law & Associate Director of the FCJC

Introduction **3**

I. Certain Provisions of § 3142(f) Should be Eliminated or Made Discretionary. **3**

II. The Standard for Detention at the Initial Appearance Should Be Clarified and Amended **5**

A. The BRA Should Be Modified to Clarify That Detention at the Initial Appearance Hearing is Limited to Cases That Raise One of the 7 Factors in § 3142(f). 6

B. The BRA Should Specify a Standard and Burden of Proof for Detention Based on Risk of Flight at the Initial Appearance. 8

III. The BRA Should Be Reorganized and Reformatted to Provide Much-Needed Clarity to Judges and Practitioners. **9**

IV. Financial Conditions of Release Should Be Eliminated. **10**

V. The Standard for Flight Risk/Appearance Should be Modified. **11**

A. Detention Based on Flight Risk Should Only Be Authorized Where There Is a Real Likelihood That a Defendant May *Voluntarily Abscond.* 11

B. Detention Based on Flight Risk Should Only Be Authorized When There is a High Risk of Imminent and Intentional Non-Appearance. 12

VI. The Presumptions of Detention Should be Clarified and Modified. **13**

A. Eliminate or Limit Certain Presumptions Of Detention. 13

B. Clarify the Presumptions to Grant Judges More Discretion and Bring the Statute In Line With Case Law. 15

C. Eliminate or Substantially Limit The Presumption Of Detention That Specifically Applies to People Charged in Federal Drug and Gun Cases. 16

VII. The Definition of Dangerousness Should Be Modified. **17**

A. Congress Intended Only a Small Minority of Defendants to Be Detained Based on Dangerousness, and Put Procedural Protections in Place to Ensure That Happened. .. 17

B. Congress Should Modify the BRA's Definition of Dangerousness. 18

Introduction

There is widespread agreement that the cash bail system is broken, and there is a robust reform movement afoot at the state level to eliminate money bail. The federal pretrial detention system is in crisis, too, but its problems have been largely overlooked, even by federal legislators. The Bail Reform Act of 1984 (BRA or "the Act") results in the pretrial detention of far too many people because it is overbroad, confusing, and targets low-risk defendants for detention. Legislative reform is needed to address this crisis.

In fall 2018, the Federal Criminal Justice Clinic (FCJC) created a Federal Bail Reform Project that is having far-reaching local and national impact. FCJC Director Alison Siegler and Associate Director Erica Zunkel conceived of this project out of a concern that pretrial release and detention practices in federal court deviated from the legal requirements of the Bail Reform Act.

To delve deeper into the source of the problems, the FCJC designed what appears to be the first courtwatching project ever undertaken in federal court anywhere in the country. Volunteers observed 170 federal bail-related hearings in Chicago over the course of 10 weeks. The clinic watched both types of federal bail hearings: Initial Appearance hearings and Detention Hearings. The clinic gathered and logged detailed information about each hearing, including whether defendants were being illegally detained and whether the government was requesting detention for reasons not authorized anywhere in the statute. The clinic's courtwatching revealed significant problems in the implementation of the Bail Reform Act in practice. In the wake of our courtwatching, we met with Federal Public Defenders around the country and learned that many of the problems we had observed in Chicago were happening elsewhere in the country. Although judges, prosecutors, and the defense bar are changing their approach to bail-related issues in response to our Federal Bail Reform Project, it is clear that changing the culture of federal bail is not enough; legislative reform is urgently needed.

I. Certain Provisions of § 3142(f) Should be Eliminated or Made Discretionary.

Under the BRA, if the prosecutor charges any offense that is listed in § 3142(f)(1) and seeks detention at the Initial Appearance, detention is mandatory. In determining what types of offenses authorize detention at the Initial Appearance, § 3142(f) sweeps too broadly and unnecessarily cabins judicial discretion.

The simplest fix would be to entirely eliminate certain categories of offenses listed in § 3142(f), including drug offenses under § 3142(f)(1)(C) and cases involving flight risk concerns under § 3142(f)(2)(A). This fix alone would bring skyrocketing detention rates under control. According to United States Sentencing Commission data, approximately 68% of federal cases in 2018 appear to qualify for detention under § 3142(f)(1) (excluding immigration cases).[1] This fix

[1] U.S. SENT. COMM., *2018 Annual Report and Sourcebook* 45 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf. This number was calculated using the total number of federal cases in 2018 (69,245) and subtracting the number of immigration cases (23,883). That results in 45,542 federal cases. Using the Sentencing Commission's "type of crime" breakdown, 30,900

would not have detrimental effects on public safety given the data showing lower federal detention rates are not accompanied by any increase in reoffending or failure to appear.[2] Moreover, the mandatory detention provisions in § 3142(f) were created when the crime rate was much higher and are no longer necessary in the current climate.[3]

Alternatively, for certain categories of offenses—including drug offenses and cases involving flight risk concerns—detention at the Initial Appearance should be discretionary rather than mandatory. This change would shift the locus of discretion from prosecutors to judges, giving judges the authority to decide whether detention at the Initial Appearance is warranted.

Regardless, mandatory detention that rests solely in the hands of the government must be reevaluated and limited. There are reasons to be concerned with a regime that makes the prosecutor's charging decision the sole determinant of detention at the Initial Appearance and removes all discretion from judges at this stage. Recent empirical research shows that prosecutors' charging decisions are the major driver of mass incarceration in the state system.[4] Further support for shifting the locus of discretion from prosecutors to judges at the Initial Appearance can be found in a growing body of research in the federal system showing that prosecutorial charging decisions create sentencing disparities—including racial disparities—and arguing for increased judicial discretion in the sentencing arena.[5]

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federal cases appear to qualify for detention under one of the § 3142(f)(1) case categories, which equals 67.8% of all non-immigration cases.

[2] Court data shows that the five federal districts with the lowest release rates (average 20.5%) have a failure to appear rate of 1.44%, while the five districts with the highest release rates (average 69.94%) have a failure to appear rate of 1.37%. *See* ADMIN. OFF. U.S. COURTS, *Judicial Business: Federal Pretrial Services Tables*, Table H-15 (Sept. 30, 2018). The five districts with the lowest release rates have an average re-arrest rate of 0.59%, while the five districts with the highest release rates have an average re-arrest rate of 1.04%. *Id.* (The districts with the lowest release rates are the S.D. California, W.D. Arkansas, E.D. Tennessee, D. Puerto Rico, and S.D. Texas; the districts with the highest release rates are D. Guam, W.D. Washington, M.D. Alabama, E.D. Wisconsin, and D. Hawaii. *Id.*)

[3] *See* John Pfaff, *Locked In* 72 (2017) ("The crime decline since 1991 has been dramatic. Between 1991 and 2008, violent crime fell by 36% and property crime by 31%. By the end of 2014, both violent and property crime declined another 14%.").

[4] *See* Pfaff, *supra* note 3, at 72. ("I had expected to find that changes at every level—arrests, prosecutions, admissions, even time served had pushed up prison populations. Yet across a wide number and variety of states, . . . the only thing that really grew over time was the rate at which prosecutors filed felony charges against arrestees."); *id.* at 72–73 ("Between 1994 and 2008, the number of felony cases in my sample rose by almost 40%, from 1.4 million to 1.9 million. . . . In short, between 1994 and 2008, the number of people admitted to prison rose by about 40%, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees.").

[5] *See* Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L.J. 2, 48 (2013) (prosecutorial "charging decisions appear to be the major driver of sentencing disparity," including racial disparities); *see also id.* at 31 ("Our research thus suggests that the post-arrest justice process—especially mandatory minimum charging—introduces sizeable racial disparities."); *id.* at 78 ("[W]e are particularly concerned about proposals to respond to sentencing disparities by restoring tighter constraints on sentencing, especially those that entail expanding mandatory minimums" and thus moving the locus of discretion from judges to prosecutors); Crystal S. Yang, *Have Inter-judge Sentencing Disparities Increased in an Advisory*

Alternative limitations could be placed on the current § 3142(f)(1) categories to shift discretion from prosecutors to judges. For example, some of the § 3142(f)(1) categories could be limited to people with more serious criminal histories, or to people who have reoffended while on pretrial release in the past. This latter limitation echoes § 3142(e)(2), which creates a presumption of detention for people who have previously reoffended while on pretrial release. Such a recidivist limitation would also support Congress's intent to target those who commit new offenses while on release. Alternatively, the § 3142(f) categories could be limited to those facing mandatory minimum penalties.

II. The Standard for Detention at the Initial Appearance Should Be Clarified and Amended.

A key reason the Supreme Court upheld the Bail Reform Act as constitutional in *United States v. Salerno* was because the statute only authorizes detention at the Initial Appearance under certain limited circumstances.[6] Specifically, § 3142(f) limits the circumstances under which a person can be detained at the Initial Appearance to "extremely serious offenses."[7]

Congress intended § 3142(f) to serve as a gatekeeper to detention, and the Supreme Court upheld the statute in reliance on the limitations in that section. The BRA only authorizes pretrial detention at the Initial Appearance hearing when one of 7 enumerated factors in § 3142(f) is met. It was these limitations, among others, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[8] The *Salerno* Court further relied on the narrow limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that "the government's interest in preventing crime by arrestees is both legitimate and compelling."[9]

Caselaw further supports § 3142(f)'s role as a gatekeeper. Since the Supreme Court decided *Salerno*, every court of appeals to address the issue agrees that it is illegal to detain someone—or even hold a Detention Hearing—unless the government affirmatively invokes one of the § 3142(f) factors.[10]

Guidelines Regime? Evidence from Booker, 89 N.Y.U. L. Rev. 1268, 1278–79, 1323–26 (2014) (finding "that the application of a mandatory minimum is a large contributor to interjudge and interdistrict [sentencing] disparities," explaining that eliminating mandatory minimums would "reduc[e] unwarranted disparities in sentencing," and arguing that "any proposal that contemplates shifting power to prosecutors will likely exacerbate unwarranted disparities").

[6] 481 U.S. 739, 747 (1987).

[7] *Id*. at 750; *see also id.* at 747 ("The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (*detention hearings available if* case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders).") (emphasis added).

[8] *Id*. at 748.

[9] *Id*. at 749.

[10] *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) ("Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a Detention Hearing exists."); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir.

In practice, however, judges and the government misunderstand and disregard the limitations § 3142(f) places on detention. At times, this issue results in people being illegally detained at the Initial Appearance when, in fact, there is no statutory basis for detention. When this happens, the Act as applied becomes unconstitutional. The disregard for § 3142(f)'s gatekeeping role also illustrates a broader problem, which is that the practice at detention proceedings has become untethered from the statute.

Our courtwatching confirmed that the fundamental disregard for the Bail Reform Act's limitations on detention at the Initial Appearance is a serious and nationwide problem. Lack of adherence to the statute results in prosecutors requesting detention without a legal basis, and at times even leads to illegal detentions. For example, the government sought detention in 80% of the cases we observed during the first 7 weeks of our courtwatching. In approximately 95% of those cases, the government did not cite a § 3142(f) factor and instead based their detention request on reasons not authorized by the statute.[11]

Conversations with Chief Federal Public Defenders and other defense attorneys around the country reveal that disregard of the statute's gatekeeping provisions is a significant problem. In one federal district, prosecutors ignore the adversarial requirements of the criminal justice system and do not even appear in court at the Initial Appearance, let alone state the statutory basis for their detention requests. Instead, only the judge, defense attorney, and defendant are present at the Initial Appearance, and judges regularly detain defendants without any discussion of the statutory basis for detention. This violates the statute and the common law rule established by every court of appeals to address the issue.

Discussions with judges and practitioners further reveal that part of the problem is one of organization: The legal standard for the *first* court appearance is buried in the middle of the statute—in subsection (f)—and is lumped together with the procedures that apply at the *second* court appearance, the Detention Hearing. Clarifying § 3142(f)'s application and requirements would reduce or eliminate these problems, put the Act on stronger constitutional footing, and bring it back in line with the drafters' intent.

A. The BRA Should Be Modified to Clarify That Detention at the Initial Appearance Hearing is Limited to Cases That Raise One of the 7 Factors in § 3142(f).

The plain language of the statute demonstrates that the BRA only authorizes pretrial detention at the Initial Appearance hearing when one of the 7 factors in § 3142(f) is met. Section 3142(f) says: "The judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors in § 3142(f)(1) and (f)(2). Section (f)(1) lists case-specific factors and authorizes pretrial detention in cases charging crimes of violence, drugs, guns, minor victim

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1992); *United States v. Twine,* 344 F.3d 987, 987 (9th Cir. 2003); *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

[11] The clinic's courtwatching spanned 10 weeks in late 2018 and early 2019. In January 2019, our clinic conducted a training for criminal defense attorneys about the BRA and best practices at bail-related hearings. After that training, bail practices improved. To provide the most accurate information about the problems we observed, we will reference data from the first 7 weeks of our courtwatching, before any intervention occurred.

offenses, and terrorism offenses, among others. Section (f)(2) authorizes detention on the grounds of "serious risk that such person will flee" or "serious risk" of obstruction of justice in the form of a threat to a witness or juror.

Despite § 3142(f)'s gatekeeping role, the government and judges often rely on impermissible factors not found in § 3142(f). There are two primary ways in which the statutory restrictions are evaded or disregarded.

First, across the country, the government often moves for detention on the ground that the person is a *danger to the community*, even though that is not a permissible statutory basis. The courts of appeals agree that generalized danger to the community is not a basis for detention at the Initial Appearance because it is not one of the enumerated § 3142(f) factors.[12] Judges nevertheless grant detention on dangerousness grounds.

Second, the government often moves for detention on the ground that the person is an ordinary "risk of flight," which is also not a permissible statutory basis for detention. Rather, the statute only authorizes detention if there is a "*serious risk* that [the defendant] will flee."[13] There is some risk of flight in every criminal case; according to a basic canon of statutory interpretation, the term "serious risk" means that the risk must be more significant.[14] Moreover, the government rarely, if ever, presents any evidence to support its allegation that the risk that a particular person will flee rises to the level of a "serious risk." In fact, the Senate's 1983 report makes clear that detention based on serious risk of flight should only occur only in *extreme and unusual cases*.[15] Congress surely intended judges to make findings on this issue. After all, § 3142(f)(2)(A) only authorizes detention at the Initial Appearance "in a case that involves" a "serious risk" that the person will flee. Yet judges regularly detain people under this provision in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a "serious risk" the person will flee.[16]

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[12] *See, e.g.*, *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) ("[W]e find ourselves in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.").

[13] § 3142(f)(2)(A) (emphasis added).

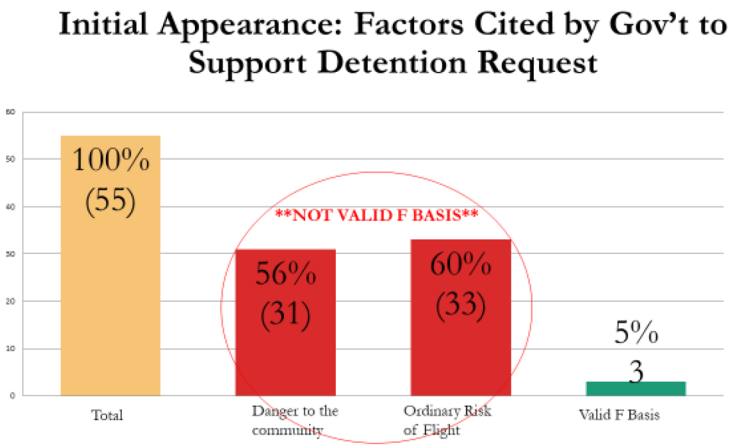
[14] *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("One of the most basic interpretative canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

[15] *See Bail Reform Act of 1983: Report of the Committee on the Judiciary*, 98th Cong. 48 (1983) ("Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases*.") (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a "*rare case of extreme and unusual circumstances* . . . justifies pretrial detention"—as representing the "current case law").

[16] For example, a federal magistrate judge in the District of Puerto Rico detained a defendant based on ordinary "risk of flight," even though no § 3142(f)(1) factor was met and there was no determination that the defendant posed a "serious risk of flight" as required by the statute, and despite clear First Circuit authority to the contrary. *United States v. Martinez-Machuca*, 18-cr-568 (D.P.R. April 30, 2019) at 5–6 (acknowledging that First Circuit law only authorizes detention when "one of the

We saw both of these problems repeatedly in our courtwatching and have heard similar anecdotes from defense attorneys in many federal districts. On the dangerousness issue, during the first 7 weeks of our courtwatching, the government cited danger to the community as the basis for detention in approximately 56% of the cases. Regarding flight, during that same period of courtwatching, the government cited ordinary risk of flight as the basis for detention in approximately 60% of the cases, and only provided evidence to support the request in one case. All told, the government cited improper bases for detention in 95% of cases. In many cases, a legitimate statutory basis for detention existed under § 3142(f)(1), but simply was not cited. However, in some cases there was no statutory basis for detention whatsoever.

The chart below illustrates the problem:



B. The BRA Should Specify a Standard and Burden of Proof for Detention Based on Risk of Flight at the Initial Appearance.

As discussed above, in practice, people are regularly detained at the Initial Appearance and held for a Detention Hearing on a mere allegation of "risk of flight," without regard to the fact that § 3142(f)(2)(A) authorizes detention only if the person poses a "serious risk that such person will flee." There is rarely any discussion by judges, the government, or the defense about the seriousness of a particular person's risk of flight.

This failure can be traced to the fact that the statute does not specify a standard or burden of proof for proving "serious risk" of flight at the Initial Appearance hearing. Courts have

§ 3142(f) conditions for holding a detention hearing exists") (citing *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)).

expressed frustration at the statute's lack of an evidentiary requirement for proof of serious risk of flight, explaining that at the Initial Appearance, "[n]either side [prosecution or defense] provides any guidance about the quantum of evidence needed to show a serious risk of flight sufficient to warrant the holding of a Detention Hearing."[17] This guidance must be provided by Congress.

Without a clear standard and burden of proof, § 3142(f)(2)(A) is not performing the gatekeeping function that Congress intended. Instead, prosecutors can detain someone on mere assertion and speculation. Relatedly, there is a risk that the government will treat the flight risk provision in § 3142(f)(2)(A) as a catch-all and will "move for detention as . . . [an] end run around subsection (f)," ignoring the narrow tailoring that led the Supreme Court to uphold the Act as constitutional.[18]

Practitioners report that this risk is a reality in certain jurisdictions, and the caselaw bears this out. In *United States v. Robinson*, for example, the judge criticized the government for not presenting evidence of "serious risk" of flight at the Initial Appearance. Though the government purported to be proceeding by proffer, the judge noted, "[n]othing about those statements amounts to a 'proffer' of anything . . . because no information was offered to support either allegation."[19]

Legislative reform is particularly important in this area, as some judges have construed the Bail Reform Act as not requiring the government to provide any evidence whatsoever of risk of flight at the Initial Appearance.[20] During our courtwatching, when the government asked for detention based on ordinary "risk of flight," they virtually never cited evidence to support their request, and the judges did not require them to do so. This cannot be right, because § 3142(f)(2)(A) authorizes detention only "in a case that involves" a "serious risk" of flight, which contemplates at least some kind of judicial finding. Clear guidance from Congress is needed to require the government to provide a sufficient evidentiary basis to support detention.

III. The BRA Should Be Reorganized and Reformatted to Provide Much-Needed Clarity to Judges and Practitioners.

Judges and practitioners alike lament that the Bail Reform Act is badly organized, difficult to follow, and does not proceed in a logical order. For example, judges and practitioners do not understand the limitations on detention at the Initial Appearance, perhaps in part because the relevant provision comes in the middle of the statute—in subsection (f)—rather than towards the beginning. The confusion may also arise because one part of § 3142(f) discusses the legal standard for the Initial Appearance hearing, while another part lists the standards and procedures for the Detention Hearing. The Act needs to be reorganized so that the text proceeds in the order in which the legal issues arise during the two bond-related court proceedings, the Initial

[17] *United States v. Lizardi-Maldonado*, 275 F. Supp. 3d 1284, 1288–89 (D. Utah 2017).

[18] *United States v. Gibson*, 384 F. Supp. 3d 955, 964 (N.D. Ind. 2019).

[19] 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010).

[20] *See, e.g.*, *United States v. Baltazar-Martinez*, No. 19-20439, 2019 WL 3068176, at *2 (E.D. Mich. July 12, 2019) (noting "the Government is not required to make an evidentiary proffer before a Detention Hearing can even be set, and such a requirement is not supported by the statute").

Appearance hearing and the Detention Hearing. Subsections and headings should also be added to further clarify the meaning of the Act.

IV. Financial Conditions of Release Should Be Eliminated.

The BRA should be modified to prohibit all financial conditions of release. Such a modification would bring the Act back in line with Congress's original intent of preventing judges from imposing financial conditions that lead poor people to be detained while wealthy people can buy their freedom.

The purpose of the Bail Reform Act of 1966 was to "revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[21] At the bill signing, President Lyndon Johnson reiterated harsh criticism against the system of money bond, arguing that "[b]ecause of the bail system, the scales of justice [were] weighted not with fact nor law nor mercy. They [were] weighted with money."[22] The Bail Reform Act of 1984 continued to work towards the elimination of detention based solely on inability to pay. To effectuate this intent, § 3142(c)(2) states, "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." The purpose of § 3142(c)(2) was to ensure that "the judicial officer may not impose excessive bail as a means of detaining the individual" was an "unauthorized" practice.[23]

However, the Act also contains and endorses a panoply of financial restrictions and conditions that privilege the wealthy over the poor.[24] These provisions enable judges to impose conditions that are dependent on, or proxies for, a person's financial means. The data make clear that, for some people, the scales of justice are still weighted with money. For example, nearly 10% of federal defendants detained pretrial are held because they cannot post a secured bond.[25]

In practice, some of the Act's financial provisions result in de facto detention. For example, in some federal districts, judges will not authorize a defendant's family member to serve as a third-party custodian and/or co-signer of a bond unless that person can demonstrate that they are a solvent surety. Federal judges elsewhere refuse to release defendants unless they pay cash bonds or post real property as security for their release, in spite of § 3142(c)'s mandate.

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[21] Pub. L. No. 89-465, 80 Stat. 214, 214 (1996).

[22] *See* Lyndon B. Johnson, President of the United States, *Remarks at the Signing of the Bail Reform Act of 1966*, (June 22, 1966), https://www.presidency.ucsb.edu/ws/?pid=27666.

[23] *Bail Reform Act Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong. 243 (1984) [hereinafter 1984 Hearings] (testimony of Ira Glasser).

[24] *See* 18 U.S.C. § 3142(c)(1)(B)(xi)–(xii) (listing "execut[ing] a bail bond with solvent sureties" and agreeing to forfeit "property of a sufficient unencumbered value, including money" as permissible conditions of release); § 3142(g)(4) (authorizing a judge to inquire into the source of property in considering the conditions of release in § 3142(c)(1)(B)(xi)–(xii)).

[25] Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* at 6–7, Special Report, U.S. Dep't of Justice Bureau of Justice Statistics (2012), https://perma.cc/4LT8-YPX8.

In addition, indigent defendants released on bond are sometimes ordered to pay costs associated with mandatory conditions of release, such as the cost of electronic monitoring.

The Act should be amended to make clear that the imposition of financial conditions is flatly impermissible. Such a bright line rule will do a far better job of effectuating the drafters' intent. It will also avoid the injustice—not to mention the constitutional minefields—of a regime that conditions liberty on a person's financial means.[26]

V. The Standard for Flight Risk/Appearance Should be Modified.

Currently, the BRA authorizes detention at the Initial Appearance under § 3142(f) if there is a "serious risk that such person will flee." The BRA authorizes continued detention at the Detention Hearing under § 3142(e) if a judge finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required."

A. Detention Based on Flight Risk Should Only Be Authorized Where There Is a Real Likelihood That a Defendant May *Voluntarily Abscond.*

The BRA should be modified to authorize detention for flight risk only where there is a serious likelihood that someone will voluntarily abscond. Legal scholars and criminologists have recently advocated for a clearer delineation between the small number of "defendants who are expected to flee a jurisdiction" and the "much larger group" of people who are simply attendance risks due to poverty, transportation barriers, and lack of resources.[27] Increasingly, scholarship recognizes that "some nonappearances are more problematic than others"[28] and

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[26] The legality of cash bail is being aggressively litigated around the country. On June 1, 2018, the Fifth Circuit struck down as unconstitutional the cash bail system in Harris County, Texas, because the "state of affairs [where a wealthy arrestee is able to post bond while an identical indigent arrestee cannot] violates the equal protection clause." *See ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018). Similarly, on June 11, 2019, a federal judge granted a preliminary injunction, enjoining the City of St. Louis, Missouri from "enforcing any monetary condition of release that results in detention solely by virtue of an arrestee's inability to pay" unless "detention is necessary because there are no less restrictive alternatives to ensure the arrestee's appearance or the public's safety." *See Dixon v. City of St. Louis,* No. 4:19-CV-0112-AGF, 2019 WL 2437026, at *16 (E.D. Mo. June 11, 2019). And on August 29, 2019, the Fifth Circuit ruled unanimously that the Louisiana bail system, where judges receive a cut of every monetary bond they set to fund their courts, was unconstitutional. *See Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019). There are other lawsuits pending that challenge the cash bail systems in Cook County, Illinois (encompassing Chicago), Davidson County, Tennessee (encompassing Nashville), and Calhoun County, Georgia, among others.

[27] Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 683 (2018); *see also* Jason Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, ABA JOURNAL (July 17, 2018) ("[T]he vast majority of criminal defendants are not flight risks—they're attendance risks.").

[28] *Id.* at 726.

"detention should be reserved for those who cannot be prevented or dissuaded from leaving the jurisdiction using less intrusive interventions."[29]

State level data further shows that most concerns about non-appearance (i.e. cases where the person is *not* fleeing to avoid prosecution) can be prevented in ways that are less costly and less restrictive than detention. One study was able to reduce rates of non-appearance from 25% to 6% by reminding people directly of their upcoming court date.[30] Another recent study found that text message reminders "reduced failures to appear by 26% relative to receiving no messages."[31] Partnering with community organizations, improving access to high-quality substance abuse treatment, and improving pretrial services support can also reduce rates of non-appearance.[32]

Where other factors may be responsible for appearance risks, such as inadequate transportation or drug addiction, a drug treatment program or vouchers for transportation may well meet the requirement that the judge impose the "least restrictive . . . conditions" that "will reasonably assure the appearance of the person as required" under § 3142(c)(1)(B).

B. Detention Based on Flight Risk Should Only Be Authorized When There is a High Risk of Imminent and Intentional Non-Appearance.

The BRA's provisions regarding flight risk and failures-to-appear must be revised, because they have become catchalls and contribute to the rising federal pretrial detention rate. The legislative history of the Bail Reform Act of 1966 indicates that Congress was primarily concerned about identifying and detaining people who might *flee to avoid prosecution*. One preliminary version of the bill, for example, specified that penalties for non-appearance applied only to a defendant who "fail[ed] to comply with the terms of his release with intent to avoid prosecution; the service of his sentence, or the giving of testimony."[33] As Deputy Attorney General of the United States Ramsey Clark testified, "the test [as to whether a penalty would apply to a defendant] is whether he failed to appear *with intent* to avoid prosecution."[34]

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[29] *Id.* at 686; *see also* John S. Goldkamp, *Fugitive Safe Surrender: An Important Beginning*, 11 Criminology & Pub. Pol. 229, 429–30 (drawing a distinction between "active flaunters" and "inadvertent absconders").

[30] Gouldin, *supra* note 27, at 731 (citing data from Coconino County, Arizona); *see also* Rachel A. Harmon, 115 Mich. L. Rev. 337–38 (noting that "[j]urisdictions can increase appearance pursuant to citations by screening out the suspects least likely to appear if cited; by reducing obstacles to appearing as required; and by optimizing consequences for failures to appear"); Marie VanNostrand et al., *State of the Science of Pretrial Release Recommendations and Supervision*, Pretrial Justice Institute (June 2011) ("All . . . studies concluded that court date notifications in some form are effective at reducing failures to appear in court.").

[31] Brice Cook et al., *Using Behavioral Science to Improve Criminal Justice Outcomes*, UChicago Crime Lab & Ideas 42 (January 2018), https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf.

[32] Gouldin, *supra* note 27, at 732.

[33] *Federal Bail Procedures Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 89th Cong. 5 (1965) [hereinafter 1965 Hearings] (text of S. 1357).

[34] *Id.* at 33 (statement of Ramsey Clark) (emphasis added).

Legislative history accompanying the Bail Reform Act of 1984 reveals a continued focus on the need to prevent high-level, wealthy drug defendants from fleeing to avoid prosecution. In his 1984 testimony, Deputy Attorney General James Knapp emphasized that "detention to assure appearance at trial" was appropriate for "habitual and violent criminals and major drug traffickers."[35] He then cited a case where "a bond of $1 million was forfeited in the Southern District of Florida after a reputed head of a major marijuana smuggling operation failed to appear for trial" as an example of a case in which pretrial detention was appropriate.[36] In fact, however, the typical federal drug defendant does not have the funds to hire his own lawyer, let alone the means or wherewithal to flee the city, state, or country.

Legislative history supports modifying the Bail Reform Act to specify that risk of flight must be "imminent" and "intentional" for a Detention Hearing to be held. Regarding the imminence of flight, the government wanted to prioritize detention for people who would flee immediately upon release. Indeed, the 1964 Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice expressed a concern about "imminent flight."[37] Notably, this point of view was adopted by Senator Fong, then a member of the Committee on the Judiciary, who urged courts to place "reasonable restrictions on association or movement" in order to "prevent[] *imminent* flight."[38] The legislative history also supports an emphasis on the intentionality of the flight. When Deputy Attorney General Ramsey Clark testified to the Senate, he made it clear that the executive branch placed great importance on a person's intent and was in favor of a statute where "the Government would have the obligation or the burden of coming forward with some evidence of willfulness on the part of the defendant in connection with his failure to appear," before imposing penalties.[39]

VI. The Presumptions of Detention Should be Clarified and Modified.

The BRA includes a statutory presumption in favor of detention in many federal cases.[40] The language of the BRA has improperly led federal judges to feel that most presumption cases should result in detention, and many judges have a near-blanket policy of detaining defendants in presumption cases. Relatedly, there is a great deal of confusion among the bench and bar alike over how the presumptions operate.

A. Eliminate or Limit Certain Presumptions Of Detention.

The presumptions of detention in the Bail Reform Act restrict judicial discretion, undermine the constitutional presumption of innocence, and are responsible for a massive increase in the pretrial detention rate. The presumptions of detention also run counter to the BRA's presumption of release. Other provisions of the BRA already account for the seriousness of the offense, rendering the presumption superfluous. The BRA specifically requires judges to consider "the nature and circumstances of the offense charged" and "the weight of the evidence"

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[35] *1984 Hearings*, *supra* note 23, at 233 (Statement of James I.K. Knapp).
[36] *Id.*
[37] *See 1965 Hearings, supra* note 33, at 211 (text of S. 1357) (emphasis added).
[38] *Id.* at 16 (emphasis added).
[39] *Id.* at 33.
[40] 18 U.S.C. § 3142(e)(3).

at the Detention Hearing.[41] And, even without the presumptions, judges will retain the authority to detain defendants in serious cases.

The Administrative Office of the U.S. Courts released an important empirical study about the § 3142(e)(3) presumption and release rates, entitled *The Presumption for Detention Statute's Relationship to Release Rates*. The study made several key findings that support eliminating certain presumptions.[42]

First, pretrial services officers recommend release less frequently in § 3142(e)(3) presumption cases than non-presumption cases, especially for low-risk people. For low-risk people in category 1 (meaning little to no criminal history and a stable personal background[43]), pretrial services recommended release in 93% of non-presumption cases, compared to only 68% of presumption cases.[44] The numbers between presumption and non-presumption cases begin to converge as risk levels increase.[45]

Second, release rates are higher for low-risk non-presumption defendants than low-risk § 3142(e)(3) presumption defendants, meaning there may be some "unnecessary detention." At the lowest risk level, people with non-presumption cases were released 94% of the time, while people with presumption cases were released only 68% of the time.[46] This suggests that the purported purpose of the presumption—to detain high-risk people who were likely to pose a danger to the community if released—was not being fulfilled.[47] "[W]ere it not for the existence of the presumption, these defendants might be released at higher rates."[48]

Third, the § 3142(e)(3) presumption failed to correctly identify those who are most likely to recidivate, fail to appear, or be revoked for technical violations. For example, other than category 1 presumption cases, presumption rearrest rates were *lower* than non-presumption rearrest rates (for category 1, presumption rearrest rates were only slightly higher than non-presumption cases).[49] Similarly, for category 1 and 2 defendants, non-presumption cases were revoked for technical violations at a lower rate than presumption cases. However as risk levels increased there was no difference in revocation rates for technical violations for category 3 defendants. Notably, for risk categories 4 and 5, non-presumption cases were actually more likely to be revoked than presumption cases—again showing that the presumptions have little predictive value in the cases where they should matter most.[50] Finally, across all risk categories,

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[41] 18 U.S.C. § 3142(g).

[42] *See* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Federal Probation Journal 52 (Sept. 2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf.

[43] In the study, the Pretrial Risk Assessment Tool was used to identify defendants' risk level. *Id.* at 54. The tool puts defendants into a one of five categories based on their response to 11 questions. *Id.* at 55. These categories are different than a defendant's Criminal History Category under the U.S. Sentencing Guidelines.

[44] *Id.* at 56.

[45] *Id.*

[46] *Id.* at 57.

[47] *Id.* at 56–57.

[48] *Id.* at 57.

[49] *Id.* at 58.

[50] *Id.* at 59–60.

there was no significant difference in rates of failure to appear between presumption and non-presumption cases.[51]

The study concluded that "the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk."[52] The study goes on to state that the presumption has become "an almost de facto detention order in almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration."[53]

B. Clarify the Presumptions to Grant Judges More Discretion and Bring the Statute In Line With Case Law.

Even if certain presumptions are not eliminated, the statutory language should be clarified to ensure that judges have the authority to make individualized, discretionary decisions in presumption cases. This will also promote judicial efficiency, ensuring that courts of appeals are not required to clarify the meaning of the statute for lower courts.

Moreover, the rules in § 3142(e)(2) and (3) should not be called "presumptions" at all, because that is not how they operate. A presumption typically shifts the burden of proof to one party; the presumption in § 3142(e) does not. Instead, the burden of proof/persuasion continues to rest with the government at all times. This presumption merely imposes on the defendant a burden of *production*, requiring the defendant to present some evidence that he/she will not flee and some evidence that he/she will not pose a danger to the community.[54]

Given the confusing language of the statute, courts have struggled with how to interpret and apply the presumption. Tellingly, a seminal case on the issue begins its extensive discussion of the presumption by saying, "We must first decide what the rebuttable presumption means," and continues, "Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors."[55]

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[51] *Id.* at 60.

[52] *Id.*

[53] *Id.* at 61.

[54] *See, e.g.*, *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985) (holding that the government bears the burden of *persuasion* at all times while a defendant just bears a burden of *production*, which entails producing "some evidence" under § 3142(g)); *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (engaging in lengthy analysis of the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing "some evidence" under § 3142(g), and concluding that after it is rebutted, "the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)"); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (holding that the defendant has a burden of production and only needs "to offer some credible evidence contrary to the statutory presumption"); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (holding that the burden of *persuasion* rests with the government, not the defendant).

[55] *Jessup*, 757 F.2d at 380, 384.

Anecdotal information gathered during our courtwatching reveals that courts rarely understand how the presumption is supposed to operate, resulting in its misapplication in practice. For example, it is rare for judges to follow the two-step process of first analyzing whether the presumption has been rebutted and then weighing the presumption against the other evidence under § 3142(g). In practice, many judges feel that the presumption is a de facto directive by Congress that ties their hands and requires detention. For these reasons, the wording of the presumption should be changed to make it easier for judges to understand how it is supposed to work in practice.

C. Eliminate or Substantially Limit The Presumption Of Detention That Specifically Applies to People Charged in Federal Drug and Gun Cases.

Section 3142(e)(3) contains a presumption of pretrial detention in drug and gun cases that applies in approximately 45% of all federal cases. The AO study found that the presumption applied in 93% of all federal drug cases.[56] The presumption has resulted in high detention rates. From 1995 to 2013, the percentage of people charged with drug crimes who were jailed while awaiting trial increased from 76% to 84%.[57]

It is important to address the drug presumption because drug crimes make up nearly 30% of the federal docket nationwide.[58] In contrast, when the BRA was enacted in 1984, drug crimes made up just 18% of the federal docket.[59] Moreover, in the ensuing years men of color have borne the brunt of our federal drug laws; data shows that they ultimately face longer prison terms than whites arrested for the same offenses with the same prior records.[60]

The drug and gun presumptions should be eliminated or substantially limited because they sweep too broadly. The BRA's drug presumption applies to any drug offense for which the maximum term of imprisonment is ten years or more—not just those that carry a mandatory minimum penalty.[61] This encompasses virtually all federal drug offenses, including all offenses involving any amount of a drug stronger than marijuana and 50 kilograms or more of marijuana.[62]

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[56] Austin, *supra* note 42, at 55.

[57] *Id.* at 53.

[58] U.S. SENT'G COMM'N, *Overview of Federal Cases—Fiscal Year 2018*, at 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

[59] John Scalia, *Federal Drug Offenders, 1999 with Trends 1984-99*, U.S. Dep't of Justice Bureau of Justice Statistics Special Report at 1 (Aug. 2001), https://www.csdp.org/research/fdo99.pdf.

[60] *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1349 (2014); *see also* Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 Judicature 6 (July–Aug. 2010) ("Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system."); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 350 (Oct. 2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf (finding that the cumulative sentencing impacts of criminal history and weapon involvement are "particularly acute for Black drug offenders").

[61] *See* 18 U.S.C. § 3142(e)(3)(A).

[62] *See* 21 U.S.C. §§ 841(b), 960(b).

Because it covers so many drug offenses, the drug presumption applies to kingpins and couriers alike, regardless of culpability. This is not what the Congress that passed the BRA intended. In fact, the drug presumption was not part of the original bill, and was only added later in the drafting stages.[63] Senator Strom Thurmond, the Chair of the Senate Judiciary Committee, remarked that a presumption of detention for "grave drug offense[s]" was needed because "[i]t is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity" and "these persons have both the resources and foreign contacts to escape to other countries with relative ease[.]"[64] But, today, the drug presumption applies equally to a poor person with no criminal history who is alleged to possess only 1 gram of cocaine as it does to a true "kingpin" like Joaquin "El Chapo" Guzman. Likewise, we have heard from judges that the gun presumption is overbroad because it applies to cases in which a person may have possessed a weapon in a way that is only tangentially related to the underlying crime.

VII. The Definition of Dangerousness Should Be Modified.

The statutory language that allows judges to detain anyone who "will endanger the safety of any other person or the community" is vague, overbroad, and results in more detention than is necessary to protect the community. The statute should be modified to comport with the original intent of Congress—that judges use this prong to detain only the "small but identifiable group of particularly dangerous defendants [for] whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[65]

A. Congress Intended Only a Small Minority of Defendants to Be Detained Based on Dangerousness, and Put Procedural Protections in Place to Ensure That Happened.

From the Founding until the passage of the Bail Reform Act in 1984, judges were only permitted to detain people in order to mitigate their risk of flight, not on dangerousness grounds. Congress justified its departure from this historic norm in two ways. First, it pointed to the "growing problem of crimes committed by persons on release."[66] Second, it found that judges were already detaining people they considered dangerous, even without statutory authorization, by setting high money bond that defendants could not pay. The hope was that formally authorizing the detention of dangerous defendants would allow Congress to deal with the problem of crimes committed by defendants released pretrial, and would ensure that detention decisions were happening in a transparent manner.

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[63] *See Senate Report of the Committee on the Judiciary on S. 1554, Subcommittee on the Constitution*, November 3, 1981 ("Senator DeConcini also offered an amendment which was approved 5-0, creating a rebuttable presumption that an individual charged with a grave drug-related offense, for which a maximum penalty of 10 years or more may be imposed, is not likely to appear for trial and is likely to pose a risk to community safety if not detained. The Subcommittee then approved S. 1554, as amended by a recorded vote of 4-0.").

[64] S. Rep. No. 98-147, at 45–47

[65] S. Rep. No. 98-225, at 6.

[66] *Id.* at 6, 7, 10.

The legislative history of the BRA reveals that Congress expected only a small minority of defendants to be detained as dangerous. The Senate Judiciary Committee Report described the defendants eligible for detention under this prong as the "small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."[67]

The design of the statute reflected this intention on the part of Congress to carefully limit the pool of people who could be detained as dangerous. For example, as noted above, to detain a person at the Initial Appearance, the government must prove that the defendant satisfies one of the factors laid out in § 3142(f). Generalized dangerousness is not one of the factors. Instead, the government must prove that the person is charged with a particular type of crime or that there is a serious risk that the person will obstruct justice.

Testimony from the Department of Justice in the lead-up to the passage of the BRA reveals a clear understanding that the government would have to carry a heavy burden to successfully detain someone based on dangerousness. Deputy Attorney General James Knapp testified that under this new regime the Department felt detention would "require clear and convincing evidence and . . . require something tangible in a particular case. It is going to have to be something very tangible demonstrated to the judge before he is going to make this finding [that a defendant is so dangerous that detention is required]."[68]

B. Congress Should Modify the BRA's Definition of Dangerousness.

To better reflect Congressional intent and ensure that defendants who pose a true danger are being detained, the definition of dangerousness could be modified to require the government to identify an individual's specific risk of physical harm to another reasonably identified person or persons in order to detain an individual as dangerous.[69]

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[67] *Id.* at 6. The House Judiciary Committee Report described them as "*the dangerous few* who will commit offenses while on bail." H.R. Rep. No. 98–1121, at 60 (emphasis added).

[68] *1984 Hearings*, *supra* note 23, at 223.

[69] *See, e.g.*, *Blackson v. United States*, 897 A.2d 187, 194 (D.C. 2006) (interpreting similar "dangerousness" language in the D.C. bail statute to mean that "[t]he trial court . . . need[s] clear and convincing evidence that appellant pose[s] an identified and articulable threat to an individual or the community and that nothing short of detention [will] reasonably suffice to disable [him] from executing that threat.").

Ms. BASS. Ms. Smith?

STATEMENT OF MARY SMITH

Ms. SMITH. Good morning, Madam Chair Bass and Committee Members.

My name is Mary Frances Smith. I am the President of the Ohio Professional Bail Association and I thank you for allowing me to testify today on this very important issue.

The bail reform movement is not about reform. It is about elimination of monetary bail because of a mistaken belief that it is somehow discriminating against the poor.

Currently, most accused persons take advantage of the taxpayer-funded pretrial release program. They walk out of jail on a signature or promise to return to court.

However, if a judge sets monetary bail as a requirement, the accused turns to friends, family, or they can employ the services of a bail agent.

Bond is set because the accused may have numerous failures to appear. Bond may not be posted because the family might demand that they be kept in jail because that is the only way to ensure sobriety or stop the defendant from reoffending.

Many people, including myself, have lost relatives who got released and overdosed within hours. We tried to have them kept in jail so that we could set up rehab for them. But the system insisted on releasing them with no monetary bail, despite repeated warnings from families and friends that they could kill themselves or others.

In the criminal justice system lives are at stake. We have to rely on what works. Commercial bail works. The failure to appear rate for commercial surety is below 2 percent.

When pretrial release programs have a defendant fail to appear and a warrant or a capias is issued, local law enforcement attempts to serve that warrant.

However, when a surety bond is placed with the court, the surety agent becomes responsible for the apprehension and returning the fugitive back before the court.

If the surety does not return the fugitive, it must pay the bond.

Without any judicial involvement—I repeat, without any judicial involvement, my nephew, Brent, was released through a county risk assessment tool that had determined that his risk for failure to appear was five out of six.

Within 48 hours of his release, he was dead, due to another overdose. The case was dismissed, and because of the way the county counts and labels its results, Brent was listed as a success because his case was dismissed.

Judges have used their experience and wisdom to make determinations on who will be released on an own recognizance bond, who should be detained until trial, and who should be offered bail.

The bail reform movement is replacing judicial discretion with risk assessments. Most risk assessments are a brief list of seven to nine questions that ask things like have you ever been arrested before. Many accused will not offer honest answers.

An algorithm can never replace the wisdom of a judge's discretion in deciding who should and should not be released awaiting trial on bail.

The issue here is there is no accountability for pretrial release programs. How much federal money is being spent on pretrial at the State level through the Byrne JAG grants?

How many accused are funded through taxpayer dollars that have failed to appear? How many of the accused released on pretrial have a history of violent crime?

No one knows because Congress doesn't require the states to report. We have these pretrial programs that are not accountable being heralded as a magic solution for bail elimination. How can we support any bill that penalizes any State that allows monetary bail as an option to the court?

Citizens have a right to know if their tax dollars are being used effectively or are being used to prop up a failed system of revolving jail house doors that have no accountability.

Let us take an honest look at pretrial programs and lay them side by side against commercial bail. Let us compare the failure to appear rates.

While bail reform sounds noble, let us look under the hood. Find the data examined—needed to examine pretrial. Allow judges to continue using their discretion and determine bail with the facts before them on a case-by-case basis.

I thank you.

[The statement of Ms. Smith follows:]

TESTIMONY OF MARY FRANCES SMITH
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
November 14th, 2019

Madam Chairwoman and Vice Chairwoman and Committee Members:

My name is Mary Frances Smith. I am the President of the Ohio Professional Bail Association. I am a Managing General Agent serving over 40 Agents in 4 States, and I work to provide continuing education for lawyers and judges. I have authored a handbook that is currently used to assist clerks and judges in courts across Ohio. I have recently marked 31 years working within the criminal justice system.

The so-called “bail reform” movement is best reflected in HR 4474, The No Money Bail Act of 2019. By making a state that uses a money bail system ineligible for federal funds under the Byrne JAG Program, this bill would eliminate the commercial bail industry in this nation. And, let’s just be honest – that is the goal of the “bail reform” movement.

The bail reform movement is not about bail reform. Any time you hear that phrase it means bail elimination. These bail reform advocates want to get rid of monetary bail because of the mistaken belief that it somehow discriminates against the poor.

Commercial bail is not discriminatory against the poor. This is a myth.

Most accused persons can take advantage of a taxpayer funded Pretrial Release program and walk out of jail on a signature or promise to return to court. If a judge sets monetary bail as a requirement the accused can turn to a friend, his family or employ the services of a bail agent. Often the accused have friends and family who have money, but the family doesn’t want the accused released from jail for very valid reasons.

First, the accused may have numerous failures to appear -- they haven’t demonstrated that they can be trusted to be free while awaiting trial without some type of bail.

Second, their family might be demanding that they be kept in jail because that's the only way that their sobriety can be assured. Many, many people, myself included, have lost a relative who got out of jail and OD’d within hours. We tried to have them kept in jail, but the system insisted on releasing them on no monetary bail, despite repeated warning from family and friends that they were going to kill themselves or others.

So, this idea that commercial bail is cruel because it denies the poor their due process is a ruse. In the criminal justice system, lives are at stake. We have to rely on what works. Commercial bail works. It works because defendants show up for trial and sureties guarantee their appearance in court. If they don't show up, the surety is responsible and obligated to return the fugitive to court or pay the bond. This is why it works. And in commercial bail, the failure to appear rate is below 2%.

Pre-trial release programs already exist to ensure that no one sits in jail solely because they can't afford the monetary component. When the defendant doesn't appear for court and a warrant or capias is issued, local law enforcement attempts to serve the warrant. However, when a surety bond is placed with the court the surety agent becomes responsible for the apprehension and return of the fugitive back before the court.

Without any judicial involvement, my nephew Brent was released through the county risk assessment tool; this tool had determined that his risk for failure to appear was 5 out of 6. Within 48 hours he was dead due to an overdose. To the county, another statistic. A case dismissed. Believe it or not, because of the way the county counts and labels its results, it listed Brent's case as a success because his case was dismissed.

In reference to the use of risk assessments: In order to eliminate commercial bail, you have to take a judge's judicial discretion out of the process. Judges have seen it all, and they use their experience and their wisdom to make determinations of who will be released on OR, who should be detained until trial, and who should be offered bail. The bail reform movement is replacing judicial discretion with "risk-assessments." Most people don't know this, but most risk assessments are a brief list of 7-9 questions that asks things like, *have you ever been arrested before?* And to these questions, many accused (I know this is shocking) will not offer honest answers. So, the next time you hear the term risk assessment, understand that this is the mechanism by which an algorithm can replace the wisdom of a judge's discretion in deciding who should and should not be released while awaiting trial on bail.

There are hundreds of thousands of fugitive warrants in state computer systems across the country.

Yet, despite these atrocious statistics, there still is no accountability for pre-trial release programs.

- How much federal money is being spent on pre-trial at the state level through the Byrne JAG grants? *No one knows because Congress doesn't require the states to report.*
- How many accused that are funded with taxpayer dollars have failed to appear on previous releases? *No one knows because Congress doesn't require the states to report.*
- How many of the accused that are currently on pre-trial release have a history of violent crime? *No one knows because Congress doesn't require the state to report.*
- What is the failure to appear rates of current pre-trial release programs? *No one knows because Congress doesn't require the states to report.*

And we have these pre-trial release programs, that are not accountable – being heralded as the magic solution to so called "bail reform."

So, if there is no accountability and no way to measure these programs, how can we support any bill that eliminates any state that uses monetary bail as an option?

In the last session, this Committee passed the Citizens Right to Know Act, which, for the first time, would have required pre-trial release programs to report their failure to appear rates.

The Citizens Right to Know Act was common sense legislation. That's not too much to ask, is it? Citizens have a right to know if their tax dollars are being used efficiently, or whether those tax dollars are being used to prop up a failed system of revolving jailhouse doors that have no accountability.

If the Committee wants to enact meaningful reforms, rather than eliminate monetary bail, it should take an honest look at pre-trial release programs, and lay them side by side against commercial bail, **comparing failure-to-appear rates.** Only then will you get an accurate picture of what works and what doesn't.

These horrific failure-to-appear rates from pre-trial must be examined and confronted head on. So, while "bail reform" sounds noble, look under the hood. Hold States accountable for the money you give them. And allow judges to continue using their discretion and determining bail in accordance with the facts before them.

Thank you.

Ms. BASS. Ms. Cook?

STATEMENT OF SAKIRA COOK

Ms. COOK. Chair Bass, Chair Nadler, and Ranking Member Gohmert, and Members of the committee, thank you for the opportunity to testify about the need for meaningful bail reform in State and federal court systems, including the need to eliminate cash bail and reduce pretrial incarceration without the use of algorithmic-based risk assessment tools.

We commend the Subcommittee for focusing on the failures of our current State and federal pretrial systems. These systems are not serving their original purpose to ensure people show up to court.

Instead, they fly in the face of a foundational constitutional principle: One is innocent until proven guilty.

They also heavily rely on money bail for determining who can and cannot go home while awaiting trial. This has created a two-tiered legal system, one where poor people are detained pretrial because they can't afford bail and wealthier people can walk free.

Pretrial detention is the norm in too many communities. Each year, 12 million people are admitted to jail and each night nearly half a million people sit in jail awaiting trial.

This pervasive system of pretrial detention has devastating effects, especially on Black and brown people. Stories like those of Sandra Bland and Kalief Browder show the shocking—sometimes shocking effects of pretrial detention.

Pretrial incarceration increases people's likelihood of conviction and their risk of recidivism. Even a short period of pretrial detention can have cascading effects. People are at risk of losing jobs, homes, medical care, custody, and relationships.

There are more effective methods than money bail to ensure court appearances. Pretrial support systems can address the structural barriers that keep people from showing up the court.

They can provide childcare, transportation services, and other nonpunitive or for-pay supports. Even simple steps like providing reminder calls or text messages dramatically reduce rates of failed appearances.

Fortunately, places like Washington, DC, Philadelphia, New York, and New Jersey are successfully moving away from money bail and safely reducing their pretrial populations.

In some instances, jurisdictions have adopted undesirable alternatives, namely, the use of pretrial assessments.

Risk assessments are actuarial tools that use historical data both from criminal legal databases and demographic factors to attempt to forecast an individual's likelihood of appearance at trial or risk of re-arrest.

Research has shown, however, that these algorithms reflect current biases within the criminal legal system because they use flawed data, such as prior failures to appear and arrest rates, and as a result are profoundly limited.

Champions of these tools argue that they are evidence based and can provide judges high-quality objective data that will help them make their jail population smaller without putting the public at risk.

Independent studies have shown that many jurisdictions using risk assessments have actually increased pretrial incarceration, and none have reduced racial disparities in pretrial decision making.

A group of data scientists recently wrote in a letter to this committee, I quote,

> "Pretrial risk assessment tools suffer from serious methodological flaws that undermine their accuracy, validity, and effectiveness. Pretrial risk assessments do not guarantee or even increase the likelihood of better pretrial outcomes.
>
> The technical problems with these tools cannot be resolved and their limitations disproportionately impact communities of color."

These concerns led the Leadership Conference to publish a statement of concern signed by more than a hundred civil rights, data science, and community-based organizations.

The statement argued that risk assessment tools were deeply flawed, skewed based on race and social economic status, and therefore should not be used while making detention decisions.

We believe that jurisdictions can safely end money bail and release most accused people pretrial without their use.

Members of Congress, we need a new pretrial framework, one that dramatically reduces detention, ends racial and other inequities, and abolishes wealth-based discrimination.

Federal legislation can help to incentivize states to end money bail, use alternatives to arrests and prosecution for minor offenses, and preserve the presumption of innocence by establishing robust pretrial adversarial processes hearings, all without the risk—use of risk assessment instruments.

We look forward to working with the Members of this Subcommittee to meet these goals.

Thank you.

[The statement of Ms. Cook follows:]

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STATEMENT OF SAKIRA COOK, DIRECTOR, JUSTICE REFORM PROGRAM
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRRORISM & HOMELAND SECURITY

HEARING ON "THE ADMINISTRATION OF BAIL BY STATE AND FEDERAL COURTS: A CALL FOR REFORM"

NOVEMBER 14, 2019

Chairman Karen Bass, Ranking Member John Ratcliffe, and members of the Committee: my name is Sakira Cook and I am the director of the Justice Reform Program at The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States.

While we were founded as the legislative arm of the civil rights movement, The Leadership Conference's mission has since expanded so that today we are meeting the new challenges of the 21st century, which include guaranteeing quality education for children, ensuring economic opportunity and justice for all workers, preserving the right to vote and other democratic institutions for marginalized communities, and transforming the criminal legal system in America. Thank you for the opportunity to submit written testimony regarding the need for bail reform at both the federal and state levels.

The American criminal legal system is a stain on our democracy. This system replicates and reinforces patterns of racial and economic oppression that can be traced from slavery — and the result is a criminal-legal bureaucracy that denies millions of people the opportunities, legal equality, and human rights they deserve. while at the same time fueling the world's highest incarceration rate. Our overreliance on incarceration and criminalization as the primary mechanism to advance public safety has had a devasting impact on our communities.

Today, the United States leads the world in imprisoning or supervising more than 6.6 million people while ripping parents and loved ones from their families every day. Research shows that nearly one in two adults in America — approximately 113 million people — has an immediate family member who is currently or formerly incarcerated. This crisis of over-criminalization and incarceration is fueled by the policy choices the nation has made since the start of the "War on Drugs" more than 40 years ago.

Since then, there has been a growing movement to reverse course. But while there has been some progress at the state and federal level to address drivers of mass incarceration and criminalization, and to decrease prison populations and address racial inequity, these reforms have largely overlooked the crisis we face within our jail systems —- a crisis that is largely fueled by our massive over-use of pretrial detention. Ultimately, we cannot end mass incarceration and criminalization without significant changes to our pretrial systems.

According to the Vera Institute, between 1970 and 2015, "the number of people being detained before trial increased by a whopping 433 percent."[i] One of the primary drivers of rising jail populations and overcrowding has been an increase in pretrial detention, despite a decrease in crime rates.[ii] This significant increase in pretrial detention can be tied directly to the fact that many jurisdictions require people arrested and accused of crimes to pay upfront money bail in order to be released until their trial, regardless of their offense. This phenomenon flies in the face of one of the bedrock principles of the American criminal legal system and the fundamental purpose of bail: that Americans are presumed innocent until proven guilty in a court of law.

Fundamentally, bail is the mechanism through which pretrial release is secured. Many people today misconceive this point, thinking of bail as a monetary sum. This misconception is tied to how the bail system has evolved, not the essential nature of pretrial release, because as originally defined, bail meant release from custody. The original conception of bail undergirds the legal principle of innocence until proven guilty. This presumption of innocence ensures that individuals who are faced with criminal charges will be treated fairly by the court and places the burden of proof on the government to prove one's guilt beyond a reasonable doubt. Yet, the current structure of the bail system belies these core tenets of our judicial system.

That is why in recent years advocates and activist throughout this country have issued a clarion call to end wealth-based detention and transform our state and federal bail systems. We can no longer afford to use the criminal legal system as the sole mechanism for advancing public safety. Instead, we must take bold action to end the structural inequalities and racism that plague the system, especially at the earliest stages — arrest and pretrial. Our nation must be willing to imagine a new paradigm for public safety, one that does not rely exclusively on criminalization and incarceration. The time has come to overhaul the bail system. We need a new pretrial framework that dramatically reduces pretrial detention, ends racial and other inequities prevalent in the current system, and abolishes wealth-based discrimination throughout the pretrial process. Congress must pass legislation that incentivizes states to end wealth-based detention (i.e. money bail), use alternatives to arrest and prosecution for minor offenses, and preserve the presumption of innocence by establishing robust due process protections.

Overview of Bail in in the Criminal Legal System

The modern concept of bail originated in England, where a person accused of a crime was required to find an individual to serve as their "surety" who would agree to pay the settled amount to the victim if the defendant fled. The English framework was brought over to the colonies, and when the framers drafted the first ten amendments to the U.S. Constitution, they enshrined a protection against the use of "excessive bail."[iii] The understanding of whether bail was excessive was originally tied to the purpose of

bail, which was interpreted to be to assure the presence of the accused person at subsequent hearings.[iv] Therefore, bail that was excessive was bail "set at a figure higher than an amount reasonably calculated [to] assure the presence of the accused."[v] The Judiciary Act of 1789 required that in the federal system, bail must be set for all crimes not punishable by death.

This system established at the founding was revolutionary, since it created an almost universal presumption of release; pretrial detention was only considered permissible for a small, confined subset of the most serious capital crimes.[vi] Over time, though, the United States turned this system on its head. While England went in a different direction, allowing judges to release people even without a surety, the United States entrenched a commercial system of cash bail. In this system, judges would release people if someone - usually a bail bonds agent who was making a profit off of the transaction (and charging individuals a 10 percent premium that they would never get back) - promised to pay a large sum if the person did not appear in court. In setting money bail amounts, judges seldom ask what the accused individual can actually pay. The result was that our jails became filled with people who could have been free if they had enough money in the bank but were left behind bars simply because they were poor. As courts used money bail more and more frequently, and set money bail at higher and higher amounts, this country saw an explosion in the private bail industry—as well as in the rate of pretrial detention—much of it simply because people were too poor to pay a sum of money.

In 1964, Congress set out to reform the federal bail system, introducing a suite of bills and holding hearings. The testimony of the then-Attorney General Robert F. Kennedy is instructive on the problems with bail our society faced at that time and are still very present today. He said in part:

> "That problem, simply stated is: the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail. Bail has only one purpose -- to insure that a person who is accused of a crime will appear in court for his trial. We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. It is not harassment. It is not to keep people in jail. It is simply to guarantee appearance in court. This is a legitimate purpose for a system of justice. In practice, however, bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom. I am talking about a very large number of Americans. In fiscal 1963, the number of federal prisoners alone held in jail pending trial exceeded 22,000. The average length of their detention was nearly 29 days. Like figures can be compiled from state and local jurisdictions. On a single day last year, for example, there were 1,300 persons being held prior to trial in the Los Angeles County jail. In St. Louis, 79 percent of all defendants are detained because they cannot raise bail. In Baltimore the figure is 75 percent. A 1962 American Bar Association survey of felony cases showed high percentages of pre-trial detention in New Orleans, Detroit, Boston, San Francisco and Miami. And similar conditions exist in smaller communities. In Montgomery County, Maryland, nearly 30 percent of jail inmates are persons awaiting grand jury action or trial. The heart of the problem is that their guilt has not been established. Yet they must wait in jail for three to six months. The main reason for these statistics is that our bail setting process is unrealistic and often arbitrary. Various studies

> demonstrate that bail is set without regard to defendants' character, family ties, community roots, or financial condition. Rather, what is often the sole consideration in fixing bail is the nature of the crime."[vii]

As a result of this outcry for reform, the first significant effort to change the federal bail system was the Bail Reform Act of 1966. The 1966 Act sought to ensure that "all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges."[viii] The Act established a presumption in favor of releasing non-capital defendants pending trial, and required that the lowest possible burden be placed as a condition of release that would ensure a charged individual's appearance. This included restrictions on money bail, which could only be imposed if a non-financial condition was not enough to ensure appearance.[ix] While the Act of 1966 went far in accomplishing its main goal to reduce the needless detention of bailable defendants, it failed to provide a solution to a growing concern surrounding pretrial release: assessing an individual's threat to public safety while on release.[x] The Act generally forbade judges from treating a defendant's dangerousness or risk to public safety as a reason for detention, except in capital cases, cases where the convicted were awaiting sentencing, and cases where those convicted filed an appeal. Put together, these exceptions represented the first time in American history that a law authorized a judge to consider dangerousness as a legitimate reason to deny bail.[xi] This narrow class of exceptions was considered by some to be too restrictive, however, and a movement to consider an individual's risk to public safety while on pretrial release began to gain traction.[xii]

During the height of the War on Drugs and the crack cocaine epidemic in the 1970s and 1980s, the appearance of rising crime rates drew public concern.[xiii] Much of this concern was directed to crimes attributed to individuals on pretrial release, despite significant evidence to the contrary.[xiv] Congress passed the Bail Reform Act of 1984 to address these concerns, removing many of the protections against detention established by the 1966 Act, and establishing the modern federal bail framework.[xv] The 1984 Act created presumptions of pretrial detention for "previous violators" and "drug and firearm offenders."[xvi] Under the "previous-violator presumption," no condition of release is presumed to be able to ensure the safety of the community where the defendant has been convicted of committing one of a series of specified crimes while out on bail, and is now accused of committing another of the specified crimes.[xvii] The "drug-and-firearm-offender presumption" assumes that no condition of release will reasonably be able to ensure the individual's appearance and the safety of the community where there is probable cause to believe the defendant has committed the same enumerated offenses considered for the "previous violator presumption."[xviii]

The act also expanded the allowable scope of the bail inquiry from a question of ensuring re-appearance, to include a consideration of the defendant's "dangerousness" to the community if released prior to trial.[xix] A 'danger to the community' included not only a physical danger of violence, but the broader, more subjective question of a person who is in danger of recidivism while on pretrial release. This is the first time that the question of the potential dangerousness of an individual's was explicitly allowed to inform the bail inquiry, and these changes led to a significant increase pretrial detention: between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent.[xx] More than three decades after the Bail Reform Act of 1984 became law, "federal and state statutes were rewritten . . . [to] permi[t]

judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness."[xxi]

The Supreme Court asserted the constitutionality of the Bail Reform Act of 1984 in its decision in *United States v. Salerno* in 1987.[xxii] The Court stated that an arrestee may additionally be detained prior to trial if the government can provide "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community."[xxiii] The Court went further, explaining that under this new standard, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designated to ensure that goal, and no more… [however] when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here [with dangerousness], the eighth amendment does not require release on bail."[xxiv] In its determination, the Court noted that the Bail Reform Act served a regulatory purpose, not a penal one, because it requires a 'prompt' detention hearing, the maximum length of pretrial detention is limited by the requirements of the Speedy Trial Act,[xxv] and pretrial detainees must be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."[xxvi] Perhaps most importantly, *Salerno* created a clear mandate for how our bail system should operate that "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Today, we have turned *Salerno* on its head. With more than 60 percent of our jail population legally innocent and awaiting trial,[xxvii] we have made pretrial detention our norm in all too many places and for all too many communities. It is time to address this crisis and restore the promises of our constitutional framework.

Pretrial Detention Significantly Impacts Individuals and Communities

Each year, there are 12 million admissions to jails[xxviii] and each night, nearly half a million people sit in jail not because they have been convicted of a crime, but because they are detained prior to trial,[xxix] often because they cannot afford money bail. Nationally, 62 percent of people in jail are there because they are awaiting trial, usually for misdemeanors or lesser offenses.[xxx] These are mostly cash-poor people arrested for very minor offenses who cannot afford to post bail and are more often than not dealing with mental health or substance use problems.[xxxi]

Research shows that this pervasive system of pretrial detention has devastating effects on individuals, their families, and the community. Stories like those of Sandra Bland[xxxii] and Kalief Browder[xxxiii] show the shocking effects of detention, whether for a couple of days or three years, on an individual not convicted of a crime, who is detained for very minor offenses.

The impact of prolonged pretrial detention, however, reaches further than the detention itself. While in jail, people are at risk of losing employment, falling behind in school, not getting needed medication, losing their housing and losing custody of their children.[xxxiv] Not only does pretrial detention significantly impact access to counsel and opportunities for dismissal, diversion, and plea bargaining,[xxxv] detention has a coercive effect that has been shown to induce individuals to plead guilty out of a desire to go home.[xxxvi] People detained prior to trial are three to four times more likely to receive a sentence to jail or prison, and their sentences are two to three times longer.[xxxvii] Just three days in jail increases the risk that some people will be arrested on new charges. Pretrial detention further bleeds resources from communities that can

least afford it, sucking away billions of dollars[xxxviii] from families and communities that will never get it back.

The Problems with Money Bail & The Need for Reform

Between 1992 and 2006, the average bail amount increased by 118 percent, and 8 in 10 people would have to pay over a full year's wages to meet the average bail amount.[xxxix] According to a report by the Federal Reserve Board, 43 percent of individuals stated that they would be unable to pay for an emergency expense of $400 out of pocket,[xl] while 12 percent of Americans have no means at all to pay for such an expense.[xli] In the federal system in 2018, 51,000 people were detained prior to trial, representing 75 percent of those charged with crimes.[xlii] The median bail nationwide for felonies is currently $10,000, roughly 8 months' income for a typical individual facing pretrial detention.

Despite constitutional requirements that bail may not be set higher than necessary to assure that the defendant will appear to stand trial,[xliii] many states determine bail costs through bail schedules, which tie the cost of release to the seriousness of criminal charges and sometimes additional factors such as criminal history or age.[xliv] Absent from those additionally considered factors is the individual's ability to pay, and an individualized assessment of the person's risk of flight or danger to the community.[xlv] This often results in higher rates of pretrial detention, because the amount required to post bail is vastly greater than an average defendant's financial capacity. Local communities often bear the burden of these higher rates of detention, as jails have become increasingly more overcrowded, and as a result, more expensive. The population in local and regional jails has tripled over the last 40 years, and a significant reason for that increase is rooted in the high rates of pretrial detention.[xlvi]

This money-based system is shown to be counterproductive to policy goals and ineffective at performing the very functions that bail is meant to perform. The primary concern driving the imposition of bail is that defendants will not appear for their court appearances, but the statistics show that failure to appear is incredibly rare: in a study done by the Bureau of Justice Statistics between 1990 and 2004 in 40 of the 75 largest U.S. counties, over 75 percent of those accused of a crime showed up for their court dates within a one-year timespan.[xlvii] Many of the people who miss court appearances do so not out of a desire or attempt to flee, but because of structural barriers to appearance.[xlviii] The inability to miss work, find child care, or find adequate transportation often contribute significantly to individuals failing to appear in court, as do simple mistakes like forgetting and getting the date wrong. Statutes criminalizing failure to appear fail to take these structural barriers into account, criminalizing missed court dates as if they were equivalent to willful fleeing of the jurisdiction.[xlix]

There are several methods that have been found to be more effective at ensuring court appearances, including a robust system of pretrial support and the imposition of non-financial conditions of release. Pretrial support systems seek to target many of the structural barriers to appearance through the provision of childcare and transportation services. Additionally, studies have shown that pretrial support systems that provide reminder calls or text messages dramatically reduce rates of failed appearances, sometimes reducing failure to appear rates by as much as 75 percent.[l] Courts can also choose to impose non-financial conditions for pretrial release, including periodic reporting to a pretrial services office, maintaining

current routines related to employment, training or education, and release to the custody of a designated person who can ensure the individual's appearance.[li]

Risk Assessment Tools Are Not the Answer

As calls for reform of money bail systems have grown and in recognition of the major emotional and financial costs of pretrial detention on individuals, families, and communities, many jurisdictions in recent years have switched to using pretrial risk assessment tools as an alternative to cash bail. Pretrial risk assessment tools are often promoted as an essential part of bail reform, one that can help judges make more informed, objective pretrial decisions. The Leadership Conference, however, believes that risk assessments should never be used to replace the judgement of a court of law, as 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.

Risk assessments are actuarial tools that use historical data, both from criminal legal databases and demographic factors, to attempt to "forecast" which people can be safely[liii] released from custody, without failing to appear at court, and without getting arrested again on a new charge. Designers of these tools purport that they are evidence-based and can provide magistrates and judges high-quality "objective" data that will help them make their jail populations smaller without putting public safety at risk by providing insights about who can be safely released following an arrest. But independent studies of whether or not risk assessment actually causes decarceration of our jails, while reducing racial disparities,[liii] have shown that many jurisdictions have not made their jails smaller, some have increased pretrial incarceration, and none have reduced racial disparities in pretrial decision-making when using these tools.[liv] Prominent independent research has shown that these algorithms, trained on a practice of criminal justice that is racist at its root, have a punitive disparate impact on Black and brown people, even when well calibrated for "accuracy."[lv]

After these tools are deployed, they are often tied to a "decision-making framework"[lvi] that interprets the scores risk assessments produce and ties those scores to pretrial outcomes based on the level of risk of flight or rearrests that an individual poses--often termed low, moderate, or high.[lvii] Recommendations of release, pretrial supervision, or pretrial detention follow those risk levels. Because the tracking of a numerical score of "low", "moderate", and "high" risk is a policy decision, the ultimate determination of whether a defendant poses a "low, "moderate,' or "high" risk is one of policy, not science, and is the result of "risk factors" that are highly malleable, subjective, and informed by the local tolerance for "risk" in the legal system.[lviii] At bottom, actuarial risk assessments have not proven effective in reducing the number of people detained pretrial or the racial disparities attendant to pretrial justice. That is not the fault of the tools, but a function of the deep and pervasive structural inequities that define America's criminal legal system. At best, the forecasts that come from technological tools will reflect those inequities, rendering them an inadequate solution to meet the challenge of infusing fairness and racial equity into the criminal legal system in general, and the pretrial justice system in particular.[lix]

Because of these concerns, The Leadership Conference released "The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns," signed by over 100 civil rights, data science, and community-based organizations. The statement argued that risk assessment tools were deeply flawed,

skewed based on race and socioeconomic status, and therefore should not be used to replace the constitutional judgement of courts of law when making detention decisions.[lx] If at all utilized, the only meaningful purpose they can serve is to identify which people can be released immediately and which people are in need of non-punitive or restrictive services. We acknowledged, however, the increasing adoption of risk assessment tools by many jurisdictions as alternatives to cash bail and therefore, developed six principles guiding their use in order to reduce the harm that these assessments can impose.[lxi]

- First, if in use, a pretrial risk assessment instrument must be designed and implemented in ways that reduce and ultimately eliminate unwarranted racial disparities across the criminal justice system.
- Second, pretrial risk assessment instruments must be developed with community input, revalidated regularly by independent data scientists with that input in mind, and subjected to regular, meaningful oversight by the community.
- Third, risk assessment instruments must never recommend detention. Instead, if they do not recommend immediate release, they should recommend a hearing where a person is protected by rigorous procedural safeguards.
- Fourth, neither pretrial detention nor conditions of supervision should ever be imposed, except through an individualized, adversarial hearing.
- Fifth, in accordance with the presumption of innocence, pretrial risk assessment instruments must communicate the individuals' likelihood of success upon release, not failure, in clear and concrete terms.
- Finally, these instruments must be transparent, independently validated, and open to challenge by an accused person's counsel.

Recommendations

A new framework for pretrial justice must maximize pretrial liberty while ending racial and wealth-based discrimination. To realize this vision, changes must be made to the release processes and presumptions of the pretrial process itself, the mechanisms of release, and the frameworks into which individuals are released prior to trial at both the federal and state levels.

Federal Reform Recommendations

Since the Bail Reform Act of 1984, the federal pretrial detention rate has risen from 24 percent to 75 percent of individuals facing trial.[lxii] Policymakers should set clear metrics for reversing this increase, in order to return at least to a rate consistent with the levels prior to 1984. An essential first step in reducing this rate is to eliminate existing "presumptions" of pretrial detention: the "previous violator presumption," and the "drug and firearm offender presumption."[lxiii] Instead, courts should work to further protect the presumption of innocence by presuming pretrial release in all but the most extreme cases, where absolutely no combination of conditions will ensure the person's appearance at court or the safety of identified members of a community.[lxiv] Where the court feels that release is not appropriate, a decision to

detain must be made only after a robust, adversarial hearing in front of a judge, where the charged person is represented by an attorney.[lxv] The government should invest the savings from bail reform in community-based, community-led services, including pretrial support services, drug and alcohol treatment centers, job training, youth programs, financial literacy, and childcare for communities adversely impacted by discriminatory bail practices. Further, Congress should examine the extent to which the Federal Pretrial Risk Assessment (PTRA) has failed to influence pretrial release in the federal system. It was hoped that the instrument, developed in 2009, "might lead to an increase in release rates." However, "the PTRA's implementation has not been associated with rising pretrial release rates. Rather, release rates have declined during the period coinciding with PTRA implementation."[lxvi]

State Reform Recommendations

Many states have already undertaken significant efforts at bail reform, and others should be incentivized by the federal government to go further. Washington, D.C. moved away from its use of cash bail in 1992, and currently releases 94 percent of those arrested.[lxvii] Between 2011 and 2016, roughly 90 percent of individuals on pretrial release were not re-arrested prior to the resolution of their case, and between 98-99 percent of released defendants were not arrested for violent crimes.[lxviii] During that same time frame, between 88 and 90 percent of released defendants made their scheduled court dates.[lxix] Of those that were, the vast majority were not re-arrested for violent crimes.[lxx]

Since New Jersey deprioritized the use of money bail in 2014, it has seen time spent behind bars while awaiting trial reduced 40 percent,[lxxi] and the state's overall population detained prior to trial has decreased 44 percent.[lxxii] A comparison of the old, money bail system used until 2014 and the new system implemented in 2017 show that both recidivism and court appearance rates have largely remained consistent.[lxxiii] New York's bail reform law, passed this year, deprioritized money bail, mandated release for 90 percent of all arrests statewide, and prohibited significant electronic monitoring in the vast majority of cases.[lxxiv] The law is expected to reduce the state's pretrial jail population by 40 percent if implemented effectively. While these jurisdictions use risk assessment tools, their successes in decreasing pretrial detention cannot be wholly attributed to their adoption. In fact, these successes are the result of a combination of changes that completely overhauled the pretrial systems in these jurisdictions and increased due process protections for accused persons.

Declines in pretrial detention rates and the jail populations in Philadelphia are additionally instructive on this point. Philadelphia has been successful in reducing its jail population by 40 percent, beginning to move away from cash bail and driving other reforms by implementing systemic changes to its pretrial system, including diversion programs and recommending release automatically for minor offenses. Partially due to advocacy from local and national communities, Philadelphia has accomplished all of this without implementing a new risk assessment for pretrial decision-making. When Philadelphia's new system is compared with the old, money bail approach, there has been no change in failure-to-appear or recidivism rates, and in fact, the court-appearance rate for Philadelphia individuals charged with a crime was the highest it had been in a decade.[lxxv]

Meaningful efforts to reform state pretrial detention policies should begin by reducing jail populations. Unless prohibited by a local statute, courts should assume release for the vast majority of accused

persons—95 percent—before trial. In order to achieve this target, The Leadership Conference recommends supporting states engaging in bail reform measures that include the following;

- Eliminating the use of money bail, pretrial fees, and any other "secured" financial conditions that require upfront payments and/or proof of collateral.
- Automatically releasing on recognizance everyone charged with a misdemeanor and/or certain felonies using a "cite and release" program that avoids the need for police processing or jail booking. The only condition should be that the person returns to court.
- Before imposing conditions or detention, requiring robust hearings that start by presuming innocence and, accordingly, release. Such a process must require, at minimum:
    - The right to appointed counsel immediately following arrest;
    - A written record justifying detention or any release conditions imposed;
    - The right to discovery;
    - The right to testify, present witnesses, cross-examine witnesses, and present evidence;
    - The right to a good cause continuance; and
    - The right to appeal and to have decisions speedily reviewed.
- Ensuring that eligibility for pretrial detention (the "detention eligibility net") is extremely limited. In addition to the "net" requirement, ensuring that, before imposing onerous conditions or detention, there is a robust adversarial hearing, where judges must find by clear and convincing evidence that individuals pose a high risk of intentional flight or of seriously physically harming another reasonably identifiable person during the adjudication period. Judges must also find that there are no combinations of conditions that will ensure the accused person will return to court and public safety. Evidence supporting these findings must be specific to individuals and not based on generalized characteristics, such as the neighborhood in which they reside.
- Requiring release conditions to be no more restrictive than necessary to mitigate — and directly tied to mitigating — the specific risk or risks identified. Ensuring that neither probation offices nor other enforcement agencies bear responsibility for providing pretrial services, including, but not limited to, engaging in monitoring, surveillance, and searches.
- Requiring robust, timely collection and reporting of pretrial detention and release data so communities can monitor whether racial and/or other disparities persist. Specifically, data must be automatically collected before trial for each individual detained and must include information about race and ethnicity, age, and gender.

- Requiring reporting of all prosecutorial decision-making (i.e. charging decisions and other discretionary decisions).

- Resisting the use of algorithm-based "risk assessment" tools, that exacerbate racial biases, in determinations of the conditions of release and detention.

Conclusion

Bringing fairness, equity, and dignity to our legal system is one of the most profound civil and human rights issues of our time. The unequal treatment of people of color and people who are low-income undermines the progress the nation has made over the past five decades toward equality under the law. The Leadership Conference appreciates the recognition by many in Congress that this country has a broken bail system; and we have been pleased to support some of the federal reform efforts on this front. The Leadership Conference endorses The No Money Bail Act and the Pretrial Integrity and Safety Act legislation that has been offered in this body by Representative Ted Lieu (D-CA-33). These bills use federal resources to assist states in reforming the injustices of money bail systems that incarcerate people who have not been convicted of a crime because of their inability to pay. These bills are significant steps forward as we work to eliminate all forms of preventative detention and unnecessary bail conditions.

In addition to federal legislation that encourages meaningful state level reforms, The Leadership Conference urges Congress to address the inadequacies of the federal bail system. The Bail Reform Act of 1984 presumes pretrial detention for certain offenders, including drug offenders, which has led to a federal pretrial detention rate of approximately 75 percent. Congress should eliminate existing presumptions of pretrial detention, reserving pretrial incarceration for rare, serious charges. With that change, we expect that, at both the state and federal levels, at least 95 percent of people in the criminal legal system will be released no later than 48 hours after arrest.

We urge the subcommittee to pursue the measures outlined above to reform the federal pretrial release system, and to assist and incentivize states to engage in their own reform initiatives.

Thank you for your leadership on this critical issue.

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[ii] Ibid.

[iii] *Eighth Amendment*

[iv] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

[v] Ibid. Pg. 1.

[vi] Schnacke, Timothy R. "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention." *Center for Legal and Evidence-Based Practices.* April 18, 2017. Pgs. 49-50. https://university.pretrial.org/viewdocument/model-bail-laws-re-drawing-the-l.

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[viii] *Bail Reform Act of 1966 (Public Law 89-465).*

[ix] Ibid. § 3146(a).

[x] Schnacke, Timothy R. "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention." *Center for Legal and Evidence-Based Practices.* April 18, 2017. Pgs. 66-67. https://university.pretrial.org/viewdocument/model-bail-laws-re-drawing-the-l.

[xi] Hegreness, Matthew J. "America's Fundamental and Vanishing Right to Bail." *Arizona Law Review, Volume 55.* 2013. Pg. 958. For a detailed history on the reform efforts from the 1960s through the 1980s, *see* Koepke, John L. & Robinson, David G. "Danger Ahead: Risk Assessment and the Future of Bail Reform." *Washington Law Review, Volume 93.* 2018. Pgs. 1731-1743.

[xii] Schnacke, Timothy R. "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention." Center for Legal and Evidence-Based Practices. April 18, 2017. Pgs. 66-67. https://university.pretrial.org/viewdocument/model-bail-laws-re-drawing-the-l.

[xiii] *See* Travis, Jeremy & Western, Bruce, & Redburn, Steven, "COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES." 2014. ("The unprecedented rise in incarceration rates can be attributed to an increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.").

[xiv] *See* Prepared Statement of Guy Willetts, Chief of the Pretrial Services Branch, Division of Probation, Administrative Offices of the United States Courts. "Bail Reform Act of 1981–82: Hearing on H.R. 3006, H.R. 4264, and H.R. 4362 Before the H. Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary." 97th Congress. 1981. (testifying that in a sample of ten jurisdictions, "new crimes committed by federal offenders released on bail occurred at a rate of 8.4 percent"); *see also,* J.W. LOCKE ET AL., U.S. DEP'T OF COMMERCE, NAT'L BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY 2 (1970), [https://perma.cc/8DEP-Z76R] (providing statistics from a four-week period in 1968 in Washington D.C. showing that of 712 defendants who entered the District of Columbia Criminal Justice System, 11% of those released charged with misdemeanors or felonies were subsequently re-arrested on a second charge during the release period).

[xv] *Bail Reform Act of 1984 (H.R. 5865) 98th Congress.*

[xvi] 18 U.S.C.A. § 3142(e) (2008).

[xvii] Adair Jr., David N. "The Bail Reform Act of 1984." *Federal Judicial Center.* 2006. https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf. This presumption applies to crimes including: crimes of violence, federal drug offenses that carry a maximum prison term of ten years or more, certain offenses related to children, and certain terrorism-related charges.18 U.S.C. § 3142(f)(1).

[xviii] *See* 18 U.S.C.§ 3142(e)(2),

[xix] Ibid. § 3142(e)(1) ("If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").*

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[xxi] Gouldin, Lauryn P. "Disentangling Flight Risk from Dangerousness" *Brigham Young University Law Review.* 2016. Pg. 863.

[xxii] *United States v. Salerno,* 481 U.S. 739 (1987).

[xxiii] Ibid. pg. 751.

[xxiv] Ibid. pg. 754.

[xxv] 18 U.S.C. § 3161 (1982).

[xxvi] 18 U.S.C. § 3142(i)(2) (2008),

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[xxxv] Digard, Léon & Swavola, Elizabeth. "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention." *Vera Institute of Justice*, April 2019. Pg. 1. https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention.

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[xxxix] "The High Price of Bail." *Justice Policy Institute.* http://www.justicepolicy.org/uploads/justicepolicy/documents/high_price_of_bail_-_final.pdf.

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[xlii] Rowland, Matthew G. "The Rising Federal Pretrial Detention Rate, In Context." *Federal Probation Journal.* September, 2018. https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf.

[xliii] *Stack v. Boyle*, 342 U.S. 1 (1951).

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[l] *See* Uptrust."What We Do." http://www.uptrust.co/what-we-do.

[li] *See* 18 U.S.C. § 3142(c) (2006).

[lii] This "safely" inquiry reflects the same questions that the bail inquiry traditionally targets: (1) whether the individual will appear in court, (2) without committing another offense while on release. *See*, Desmarais, Sarah L. & Lowder, Evan M. "Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys." *Safety and Justice Challenge.* February 2019.

[liii] *See* Albright, Alex. "If You Give A Judge a Risk Score: Evidence from Kentucky Bail Decisions." *Harvard Law School John M. Olin Center.* May 2019. http://www.law.harvard.edu/programs/olin_center/Prizes/2019-1.pdf. *See also,* Picard, Sarah et.al., "Beyond the Algorithm." *Center for Court Innovation.* https://www.courtinnovation.org/sites/default/files/media/documents/2019-06/beyond_the_algorithm.pdf.

[liv] *See* Viljoen, Jodi L. et al. "Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systematic Review and Meta-Analysis." *Law and Human Behavior, Volume 43.* August 2019. (Finding that "[a]lthough some researchers and policymakers have hypothesized that the adoption of tools might reduce rates of incarceration ... we found tenuous results. [T]he overall strength of evidence that tools reduce placements is low."). *See also,* Redcross, Cindy et al. "Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina." *MDRC.* March 2019; Stevenson, Megan. "Assessing Risk Assessment in Action." *Minnesota Law Review, Volume 103.* 2019.

[lv] *See,* Angwin, Julia, et al. "Machine Bias: There's software used across the country to predict future criminals. And it's biased against Blacks." *ProPublica.* May 23, 2016. https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. *See also,* Jon Kleinberg et al., Inherent Trade-Offs in the Fair Determination of Risk Scores, ARXIV (Nov. 17, 2016), https://arxiv.org/pdf/1609.05807.pdf; Alexandra Chouldechova, Fair prediction with disparate impact: A study of bias in recidivism prediction instruments, ARXIV (Feb. 2017), https://arxiv.org/abs/1703.00056.

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[lviii] Relevant 'risk factors' evaluated by risk assessments include: defendant's age, substance use, criminal history (including failure to appear), active community supervision, pending/current charge(s), employment stability, housing/residential stability, family/peer relationships, and community ties. *Id.* at 4.

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[lx] The Leadership Conference on Civil and Human Rights. "The Use of Pretrial 'Risk Assessment' Instruments: A Shared Statement of Civil Rights Concerns.'" http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf/. *See also* The Leadership Conference on Civil and Human Rights. "More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment." July 30, 2018. https://civilrights.org/edfund/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/.

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[lxii] Rowland, Matthew G. "The Rising Federal Pretrial Detention Rate, In Context." Federal Probation Journal. September, 2018. https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf.

[lxiii] 18 U.S.C.A. § 3142(e) (2008).

[lxiv] The Leadership Conference on Civil and Human Rights. "Vision for Justice: 2020 and Beyond." Pgs. 10-11. http://civilrightsdocs.info/pdf/reports/Vision-For-Justice-2020-SHORT.pdf.

[lxv] Ibid.

[lxvi] Austin, Amaryllis, & Cohen, Thomas H. " Examining Federal Pretrial Release Trends over the Last Decade." *Federal Probation Journal, Volume 82, Number 2.* September 2018. Pg. 10.

[lxvii] "FY 2017 Release Rates for Pretrial Defendants within Washington, DC." *Pretrial Services Agency for the District of Colombia.* March 30, 2018. https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf.

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[lxxi] "Two Years Into Bail Reform, Pretrial Detention Much Lower, AOC Report Says." *New Jersey Law Journal* (Online) April 3, 2019.

[lxxii] Francis, Reuben. "New Jersey Is Proving that Bail Reform Works." *Talk Poverty.* April 26, 2019. https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/.

[lxxiii] "Two Years Into Bail Reform, Pretrial Detention Much Lower, AOC Report Says." *New Jersey Law Journal* (Online) April 3, 2019.

[lxxiv] Rahman, Insha. "New York, New York: Highlights of the 2019 Bail Reform Law." *Vera Institute of Justice.* July 2019. https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf.

[lxxv] Melamed, Samantha. "Philly DA Larry Krasner stopped seeking bail for low-level crimes. Here's what happened next." *The Philadelphia Inquirer.* February 19, 2019. https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html.

Ms. BASS. Thank you. We will now proceed under the five-minute Rule with questions, and I will begin by recognizing myself for five minutes.

The questions I would like to ask, I want to focus on policy recommendations to understand specifically what you all would recommend because saying things like eliminating financial conditions and all, I would like to understand more about that.

I wanted to begin with Mr. Buskey.

I saw in your resume you also deal with juveniles, and so maybe you could talk about the differences in terms of juvenile detentions.

Mr. BUSKEY. In terms of pretrial release?

Well, I think that for juveniles—well, I should say as an initial matter, the goal of our pretrial system should be to ensure success and ensure that people are returning to court, ensure that they are not being rearrested, and so that primarily means identifying the proper metrics of support that will help a person succeed once they are released.

So, the question of the differences for juveniles is really one of how do we assign the proper resources for a juvenile to ensure their pretrial release, and I am assuming you mean a juvenile who is in the criminal system.

Ms. BASS. Yeah.

Mr. BUSKEY. So, one, I will start with, again, counsel who understands the unique circumstances of a juvenile in that situation and then other means of support where the juvenile is in school, needs treatment, perhaps, for other issues going on.

Just like it is for an adult, the question is what is the individualized assessment of what that juvenile needs to succeed prior to trial.

Ms. BASS. You talked about mandatory release and that the government would need to prove. Could you speak more about that in terms of what your recommendations were?

Mr. BUSKEY. Absolutely.

When I say mandatory release, I am primarily talking about citations and release or summonses. So, this would be a situation where police make an arrest but that the jurisdiction has defined certain offenses where that person does not need to be booked into the jail. They are simply given a court date and then returned some time later.

Ms. BASS. Do you think that there should be an increase in the electronic monitor?

Mr. BUSKEY. No, and in fact, that is a major concern of the ACLU. The monitors are extraordinarily intrusive. They are a search under the Fourth Amendment, and, beyond that, there is very little evidence that they actually help to ensure that people return to court or prevent re-arrest.

So, our vision is that those types of liberty-restricting conditions would be subject to very similar types of due process restraints as detention itself because they come very close to that phenomenon.

Ms. BASS. Mr. McElroy, what would be your specific policy recommendations?

Mr. MCELROY. Yes. So, I think we are both in unison around not using monitoring systems. I will give you an analogy of a young man, 17 years old, a youthful offender who our organization posted

cash money bail on behalf and the mother had the responsibility of taking him to check in every Thursday.

She worked all day, passed through Long John Silver's drive-thru. On returning the following Thursday, he was violated and held in detention because that was a deviance from the path that they were supposed to take. She didn't think it through. She was hungry.

Ms. BASS. Wait a minute. Wait a minute. Say that again.

Mr. MCELROY. Yeah. So, he is on monitoring. He has a weekly check-in on Thursdays to come to the court monitoring office. There are intrusive restrictions. You go, you come. The monitoring is a GPS system.

She pulls in the Long John Silver's drive-thru. Gets some food from a long day's work. Goes home. They go back to check in the following Thursday, and he is incarcerated.

Ms. BASS. Okay.

Mr. MCELROY. Yeah.

Ms. BASS. So as a minor, he didn't do that.

Mr. MCELROY. No. No. So, there is not a lot of built-in capacity to be flexible. There are numerous clients that are on these monitors working in factories and manufacturing and the GPS doesn't read there in the building. The next thing you know, you have got law enforcement at their job arresting them.

Ms. BASS. Wow.

Mr. MCELROY. So, and then public transportation. If the monitor is to keep somebody from somebody, the bus happens to drive through the community that they are in, you have a violation as well.

Ms. BASS. Ms. Siegler—and I just have a few seconds left. So, recommendations?

Ms. SIEGLER. Yes. The two most important reforms are the ones I mentioned.

Ms. BASS. Right.

Ms. SIEGLER. I apologize. The two most important reforms are the ones I mentioned earlier: Simply eliminating the presumptions of detention, eliminating financial conditions.

If I may address the financial conditions issue. One part of the Act tells judges not to impose a financial condition that results in the detention of the person. But there are other parts of the Act that cut against this.

So, there is parts of the Act that allow judges to detain somebody simply because the family has no property to post in the sense of a home or no money bail that they can sign for.

So, in some districts, pretrial services literally recommends that somebody pay for their own electronic monitoring conditions in every single case.

So, these are serious problems and I think we need a bright line Rule that just prohibits financial conditions.

Ms. BASS. Thank you.

Mr. Gohmert?

Mr. GOHMERT. Thank you. Appreciate all the witnesses being here today and your mental adroitness in adjusting to different Ranking Members.

I am not—and I appreciate your insights into the federal system. I am extremely familiar with Texas's State system. When I took felony bench in January of '93, I was appalled to find that our commercial bailsmen had not had a bail forfeited in years and so people didn't show up.

We started forfeiting bonds. I think they thought that perhaps by donating to my campaign that they would be able to continue. But, it would be like an insurance company except in premiums and never pay any claim.

They got really good at—and I could see they were better than the county system for making sure that people showed up when they were supposed to because now they had a very substantial interest.

There are problems with some commercial bail bondsmen who do take advantage of the situation and try to get people to sign up whether it is their homes, different things that should never be put at risk.

So, I had concerns about that, and we would try to make sure people knew who were more ethical and moral. I have been concerned too over—it seemed like '70s, early '80s in Texas there was a huge concern about rights of offenders or alleged offenders, and crime rates had gone up.

Then that pendulum swung hard the other way for a number of years. Crime rates have gone down. So, since I have been in Congress I have seen much more focus on offenders or alleged offenders' rights than a victim's rights.

It didn't seem like race was an issue. It certainly wasn't for me. In bail it was what kind of crime is alleged to have been committed, what are the risks to the public and, specifically, victims, and I am concerned that we are getting away from concern about re-offenses.

It is interesting, Mr. Buskey, to hear you concerned about electronic monitoring. All through the '90s I constantly was hearing, please let us use electronic monitoring. I understand the invasiveness and the constitutional concerns. But, you surely have got to admit it is not as intrusive as being behind bars and that is why defense attorneys were begging for electronic monitoring to make sure that they weren't gouging people.

I am a fan of using treatment, not short term but at least 30 days or so of treatment, and I think that is something that should be encouraged since the majority of people seem to have drug or alcohol problems who come before courts.

I am very concerned about pushing everybody out without any requirements of bail. Obviously, if somebody has bounced a check, for heaven's sake, they are not a violent risk. That is not something where there ought to be any kind of bail, like, had been set.

Mr. McElroy, from the things you have said, my heart goes out to you, not for the offenses you committed and different punishments so much as the fact that you didn't have a loving family home. You were a foster child. I would love to know more about your background, but my time is running out.

I have encouraged, when we were in the majority, we should have hearings on what seems to have more to do with crime in

America and that is the breakdown of the family, and every child knowing they were loved and cared about.

I would love any submission but especially from you, Mr. McElroy, from your perspective, if you could write a note and provide any insights to what would be helpful in that area.

We appreciate all your time. I wish we had more than five minutes. I wish I talked faster so I could use it more effectively. But this is a huge issue, and we appreciate everybody being here.

Any comments that any of you would have from your perspective? I just do think we need some kind of bail program, but it doesn't need to be punishing people. It needs to be protecting public more than anything and encouraging treatment for those that need it.

I welcome your insights. You have given us your testimony. Any thoughts especially based on questions you have heard today that could be submitted to the Committee would be appreciated.

Thank you very much.

Ms. BASS. Mr. Chair?

Chair NADLER. Thank you, Madam Chair.

Ms. Siegler, at the federal level defendants are released pretrial at a significantly lower rate today than they were 20 years ago. We have been through that. I think it was 25 percent compared to 80 something percent in the '80s.

Obviously, this is very concerning. What are the primary reforms that are needed in the federal bail system to address the falling release rates?

Ms. SIEGLER. So, one issue I haven't discussed yet that I think is really important is that we have to limit the crimes that make someone eligible for detention in the very first place and this is separate from the presumptions of detention.

The presumptions apply at the detention hearing, which usually happens a few days later. But the question is at the outset, at the very beginning of the case what makes somebody detention eligible, and this is one of the key drivers of these astronomical federal detention rates—the fact that in many federal cases the judge is just required to lock somebody up as soon as the prosecutor moves for detention.

If it is a certain kind of case, then the judge has no wiggle room. The judge's hands are tied, and he or she just has to lock the person up, and that is true in pretty much every single federal drug case without regard to the person's criminal history.

Chair NADLER. So, this was new since the '84 act?

Ms. SIEGLER. This is since the '84 act. Exactly.

Chair NADLER. Before '84 you had more discretion? You had discretion and it was exercised?

Ms. SIEGLER. Yes. Before '84 there was discretion that could be exercised. This is section 3142(f) of the Act and it has these seven specific conditions, most of which are specific types of crimes—drug crimes, gun cases, and things like that.

Drug cases account for nearly one-third of the federal docket. So, if you took drug cases off of the list of cases that automatically result in detention at the first appearance, we could have a huge impact on these federal detention rates.

Alternatively, you could just make detention at the initial appearance a discretionary decision by the judge. Right now, it is mandatory. If we just gave the judge discretion—

Chair NADLER. Right now, it is mandatory that the defendant be detained if a certain—

Ms. SIEGLER. In certain kinds of cases, yes. It says shall, and if we just change the wording of the Act to may, then the judge has discretion and that is what we want. We want judges to be making these decisions, as many people here have said.

So, I think—and we want judges, not prosecutors, making that decision. That is the right decision point.

Chair NADLER. Thank you very much.

Mr. McElroy, the collateral consequences of unnecessary pretrial confinement are grave. You mentioned some. What are the lasting impacts, in your experience, of being detained pretrial?

Mr. MCELROY. Yeah. So, I want to definitely say that people that are impacted by incarceration are resilient, whole, and resourceful, right. So, this isn't a story of a deficit.

This is a story, in my own personal, of overcoming a system. It wasn't a lack of family, because it was a system that deteriorated the ability for my mother to provide for me—a system, policy made in this very chamber, that decided that when a child goes into foster care you had to expedite termination of parental rights. That happened right here when you had the majority, sir.

So, I want to talk about the system that has fed, then fueled mass incarceration. Okay. That is why we are here. It is not because communities are weak. It is not because families are weak.

So, the residual consequences are that we have Black and brown communities that are decimated by mass incarceration and it is not slowing down. It is not slowing down.

The bail bonds industry makes $2 million off the backs of Black women. That is who pays the bill on behalf of their children. Women.

Chair NADLER. Thank you.

Ms. Cook, pretrial risk assessment tools present clear concerns. What alternatives do you think states could implement that protect community safety and ensure defendants return to court without some of the problems of pretrial risks assessment?

Ms. COOK. So, we believe that we can increase mandatory and presumptive release with cite and return to court summons. We can also dramatically increase pretrial supports like transportation services, childcare services, even the smallest thing like redesigning summons forms so people understand them better and understand when they have to show up to court, as well as text message reminders. All these things can increase the likelihood that someone will appear for their court date in the future.

Public safety, of course, is something that we should be concerned about. But that is the very limited exception. 90-five percent, as Brandon said, of people can be safely released on their own recognizance or with very, very limited—

Chair NADLER. On what basis do you determine the 5 percent or the 2 percent or whatever who cannot without using a risk assessment tool that is problematic?

Ms. COOK. We know that the majority of people who are detained pretrial today are there—almost two-thirds of them are there for misdemeanors, are there for very low-level offenses, and knowing that gives us some sense of who those folks are and that they can be released pretrial. Many of them are sitting there because they can't afford bail.

So, in the limited circumstances where there needs to be a determination of whether someone's condition should be applied to someone or detention should happen. That has to be done in a robust adversarial hearing process where a person has counsel, where they are able to present witnesses, where there is evidence that is able to support that decision, and then a judge should make that decision, not a risk assessment tool.

Chair NADLER. Thank you very much. My time has expired.

I yield back.

Ms. BASS. Mr. Cline?

Mr. CLINE. Thank you, Madam Chair, and I thank the witnesses for being here as well.

As a former prosecutor at the local level in Virginia, I have a perspective on bond that is a little different from the federal perspective. But, a lot of things are similar.

I am intrigued by Ms. Siegler's statement about no bail for certain offenses. You were talking about presumption cases, right? A presumption against bond in certain cases, right?

Ms. SIEGLER. So yes, there are two places where this is a problem. Yes, at the detention—

Mr. CLINE. Not a problem. I am just trying to clarify your statement.

Ms. SIEGLER. Yes.

Mr. CLINE. You said there were certain offenses for which there is no bond, and I don't think that is accurate.

Ms. SIEGLER. Oh, no. I didn't mean to say that. I apologize.

Mr. CLINE. Okay.

Ms. SIEGLER. What I meant was there are certain offenses for which when, at the very first appearance, the judge must detain the person until a detention hearing, which is usually three days later.

Mr. CLINE. Okay.

Ms. SIEGLER. That was the point I was talking to Mr. Nadler about.

Mr. CLINE. Thank you for clarifying that. Okay.

There are a number of presumption cases on the books just as there are at the State level. It seems to be growing in number for which the—it is up to the future defendant to have to prove—to overcome that presumption against bail.

I think that whether it is at the federal level or at the State level, what we are seeing is an effort to box in and tie hands and limit options, whether it is for judges, whether it is for prosecutors, because they are involved in the bail process too and a lot of times it is done up at the judge's bench, especially at the local level.

First thing in the morning you have a probation officer there. The individual is there. They are appointed an attorney. They can set a bond hearing for the attorney to represent them. But at that

point they don't have anybody right there and so, really, it is a conversation that is going on.

So, whether we are talking about presumptions on the one end or mandatory release options which is being talked about, I think you are tying the hands on both ends of the spectrum and we need to leave as much discretion as possible to the judges who are evaluating the factors at stake here—whether the individual is going to be a danger to the community if released, whether the individual is going to be a flight risk, what that criminal history shows regarding failures to appear.

If there are failures to appear on the record, a judge is going to not want to have another failure to appear on the record when they don't show up the next time for whatever reason that occurs.

Whether it is a financial reason or whether it is some reason related to the person's work situation, family situation, these things will come out in the process if the judge is given the discretion to look into it and if the probation officer and the prosecutor are given the option—opportunity to craft something that is right for that individual.

So, I don't think pretrial is a replacement for bail. I don't think it is—I think the two can work together. So, I don't think removing all financial factors from this process is possible or appropriate.

At the end of the day, I think you need a combination of things. But the long and short of it, you really do need to maintain that flexibility at the local level and I am sure that some of that will apply to the federal system.

I am a freshman, so I am just getting into the federal system. I think there can be some accommodation for both.

Ms. Smith, is there anything else that was mentioned that you might want to address?

Ms. SMITH. Yes. Thank you, sir.

I want to address Mr. McElroy. My mother was a foster mother for 21 children along with the eight of her own. So, I understand the foster care program very well.

I want to explain that you came from Kentucky. When you were arrested—when he was arrested in Kentucky there was no commercial bail allowed. There still is not.

Had there been a commercial bondsman in the area and had you called collect on that phone to the commercial bondsman, we would have worked with your family to secure your release and monitors wouldn't have been held. You wouldn't have been held in jail.

We do a very job of releasing people from the jail cell very quickly. We offer payment plans in almost every State in the United States.

Illinois is another State that doesn't allow commercial bail. Monetary bail does work. Most of the time it works well when you have a commercial bondsman who will post that bond.

To answer your question about a bondsman who threatened. 30-one years and 40 agents later we have never threatened our agent—our defendants or their families. We make sure that they show up. We call them before every court date.

I apologize, ma'am. Thank you.

Ms. BASS. No, it is okay. Thank you.

Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you so very much and thank you for holding this hearing.

Let me try to untangle and unweave, if there is that word, with quotes, this system of bail and, really, label it in the context of chattel, as if you were holding chattel in the old days and bartering and bargaining their coming and going.

So, I think in the innovative thinking of what we should be doing on the federal level it is to detangle and disengage from a bail system for this nation. I certainly respect all industries. The bail system is an industry and, certainly, income is generated from it.

The question is whether the harm is too great, and that the federal system needs to take charge of this so that it is not this disparate State complex maze that families have to work their way through, and that is the context in which I am going to ask my questions.

First, let me read into the record and ask unanimous consent to place an article by Cameron Langford and read exactly these words from Houston, Texas.

> "Texas' most populous county unconstitutionally jails poor people charged with misdemeanors only because they cannot afford a pretrial detention system that also violates State law, a federal judge rules.
>
> Lead plaintiff Maranda O'Donnell *sued* Harris County in May 2016 after she was arrested on a misdemeanor charge of driving with an invalid license and a magistrate, in an obscene decision, set her bail at $2,500.
>
> O'Donnell, 23, says her detention jeopardized a new restaurant job she was depending on to care for her young daughter. She got out of jail after a few days only by mustering support to get the $2,500."

So, I would ask unanimous consent for that to be put into the record.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

COURTHOUSE NEWS SERVICE

Federal Judge Strikes Down Houston-Area Bail System

Texas' most populous county unconstitutionally jails poor people charged with misdemeanors only because they cannot afford bail, a pretrial-detention system that also violates state law, a federal judge ruled.

CAMERON LANGFORD / May 1, 2017

HOUSTON (CN) – Texas' most populous county unconstitutionally jails poor people charged with misdemeanors only because they cannot afford bail, a pretrial-detention system that also violates state law, a federal judge ruled.

Lead plaintiff Maranda ODonnell sued Harris County in May 2016, after she was arrested on a misdemeanor charge of driving with an invalid license and a magistrate judge set her bail at $2,500.

ODonnell, 23, says her detention jeopardized a new restaurant job she was depending on to care for her young daughter. She got out of jail after a few days by paying her $2,500 bail.

She argues in her lawsuit that the county's system of using a fee schedule to set bail based on the charges violates Fifth and 14th Amendment rights to due process and equal protection.
She also named Harris County's 16 criminal court judges, its sheriff and five magistrate judges who set bond at probable cause hearings as co-defendants.

ODonnell says it makes no sense that someone charged with murder could be released if they can afford bail, while poor people charged with petty crimes languish behind bars, making them more likely to plead guilty to crimes they didn't commit to get out and tend to their jobs and family.

Harris County counters that it considers more than just a defendant's ability to pay in setting bail. It also weighs their criminal history and prior failures to appear for court hearings.

U.S. District Judge Lee Rosenthal agreed with ODonnell and granted her preliminary injunctive relief on Friday.
Rosenthal decided the county's current system of requiring pretrial services staff to verify a misdemeanor defendant's background information with a reference provided by the defendant before they can be released on an unsecured bond – with no payment up front –delays the process, impinging on the constitutional right to pretrial liberty.

She ordered Harris County pretrial services staff to make misdemeanor defendants sign an affidavit, stating what amount of bail they "could reasonably pay within 24 hours of his or her arrest" under penalty of perjury.

The affidavits must be reviewed by a magistrate judge at probable cause hearings that happen within 24 hours of an arrest.

"The purpose of this requirement is to provide a better, easier, and faster way to get the information needed to determine a misdemeanor defendant's ability to pay," Rosenthal wrote in a 193-page order.

Though Texas and federal law say judges must customize a defendant's bail amount based on their circumstances, evidence presented during an eight-day hearing in March showed that Harris County's hearing officers and criminal judges impose the scheduled bail amount 90 percent of the time, even for homeless people.

ODonnell's attorneys presented evidence showing that Harris County's bail system is so ingrained to work against poor people that of the 9,388 defendants the county's pretrial services department recommended be

released on no-fee or personal bonds, the magistrates denied a personal bond 56.3 percent of the time in 2015.

Judge Rosenthal reviewed 2,300 recordings of misdemeanor probable cause hearings and cited one she says discredits the hearing officers' claims that they carefully review defendants' ability to pay the scheduled bail on a case-by-case basis before setting bail.

A hearing officer found a defendant identified only as D.M., charged with possession of less than two ounces of marijuana, had his bail set too low due to "all his priors" and raised it to $5,000, Rosenthal wrote in her order.

"The defendant requests a personal bond because his fiancée is pregnant and he is the only income earner in the household," Rosenthal wrote, citing the hearing video. "The hearing officer responds, 'I take all that into consideration' but again points to the defendant's prior convictions. The defendant points out that he has never missed a court appearance for any of those prior arrests and convictions. The hearing officer cuts him off, stating, 'That is one factor, the other factor is everything else … Based on the nature of the offenses for which you were charged, I'm not going to consider you' for a personal bond."

The videos confirmed ODonnell's claims that hearing officers and sheriff's deputies at probable cause hearings tell defendants not to say anything out of fear they will incriminate themselves, so defendants can't argue for lower bail.

Their first opportunity to do so is at their initial appearances before county criminal judges, who deny release on unsecured bonds 90 percent of the time, according to the case record.

Harris County is implementing reforms set to launch July 1 that it argues will moot ODonnell's claims, including a risk-assessment tool that will gauge a defendant's likelihood of missing court hearings or committing new crimes while out on bond, without pretrial services staff having to interview them, and it will make bond recommendations within 30 minutes of an arrest.

But critics say the tool is not a cure-all because judges will still have discretion to ignore the recommendation of a personal bond and set a cash bond.

Throughout the March hearing, Rosenthal pressed the county's attorneys to give her stats comparing the pretrial failure-to-appear rates for those released on paid and no-fee bonds. But one judge testified that Harris County doesn't keep those records.

"The policymakers are apparently unaware of important facts about the bail-bond system in Harris County, yet they have devised and implemented bail practices and customs, having the force of policy, with no inquiry into whether the bail policy is a reasonable way to achieve the goals of assuring appearance at trial," Rosenthal wrote.

Numerous county officials have publicly stated they agree the county's bail system is unconstitutional, including two defendants in the case, Harris County Sheriff Ed Gonzalez and Judge Darrell Jordan, the only Democrat among the county's 16 criminal-court judges.

To address a booking bottleneck at the county jail that sometimes prevents Houston police from transferring arrestees there, Rosenthal ordered Gonzalez to release all misdemeanor defendants who haven't had a probable cause hearing within 24 hours of their arrest on no-fee bonds.

"A misdemeanor defendant's criminal background or risk factors may give the county a persuasive reason to detain that defendant. But an order imposing secured money bail is effectively a pretrial preventive detention order only against those who cannot afford to pay. It is not a detention order as to defendants who can pay, even if they present a similar risk of failing to appear or of committing new offenses before trial as those who cannot pay," Rosenthal wrote.

Rosenthal agreed with ODonnell's key claim that setting bail higher than defendants can afford is de facto preventive detention, which is illegal for

misdemeanor defendants in Texas unless they're charged with a violent crime and placed under a protective order.

Harris County has already spent more than $2 million on outside counsel defending against the lawsuit and its hiring of Washington D.C. lawyer Charles Cooper, an appeal specialist, last month suggested it will appeal Rosenthal's injunction.

First Assistant County Attorney Robert Soard told Courthouse News on Monday that the county is weighing its options.

"We are reviewing the orders and the memo and opinion. No decision has been made at this time concerning an appeal of the preliminary injunction," he said.

Rosenthal's order cites recent changes made by New Jersey, Maryland, New Mexico and the city of New Orleans that favor releasing poor, low-level defendants on personal bonds.

Advocates say bail reform will also ease Harris County Jail's chronic overcrowding problems. More than 75 inmates died in the jail since a U.S. Justice Department probe in 2009 found the county was providing inadequate medical and mental health care to inmates and guards were using excessive force on them.

The preliminary injunction takes effect May 15. Rosenthal also granted ODonnell's motion to certify a class action.

Ms. JACKSON LEE. The headline says that the federal judge strikes down the Houston area bail system. It is 2019 and we are still in the midst of negotiating that settlement because of the major opposition that occurred on that particular action by the federal court, who was really appalled and just recently held an open hearing for those who are for and against to come and speak about it.

So, I think it is clear that this should be handled from the federal level. Let me thank you, Commissioner Rodney Ellis, Judge Hidalgo, and Commissioner Adrian Garcia, who are the cornerstone.

Let me ask you, Ms. Siegler, on the question of your point about Congress, this whole idea of a flight risk and this whole idea of—I would probably take issue with only a small minority of defendants to be detained and I think I know your point.

How has this issue of dangerousness really biased courts heavily toward ensuring African Americans are not released or they get a very high bail because of stereotypes of our community persons being more dangerous than others?

Let me ask this other question so I can get in within the time. I have introduced legislation and intend to be engaged in sort of an omnibus approach to juvenile justice and that is the horrific bail system that Kalief, the young juvenile out of New York that was in Rikers Island that I think is a historic case and remained incarcerated for over a year without even counsel to the—and because of the family's circumstances. It is painful and, of course, ultimately, he lost his life, not incarcerated.

So those two points. If you could answer how dangerousness biases the decision in bail systems, and two, the unfair system that deals with juveniles where it is an uneven landscape across America.

Ms. SIEGLER. On the issue of dangerousness and the race connection, in the federal system I don't have the data or the stats specifically for how that works.

I do know that our federal system is—the vast majority of defendants are Black and brown, are people of color, and we are detaining so many people—huge numbers of people in drug cases where almost everybody is a person of color. So, —

Ms. JACKSON LEE. So, can I go quickly to Mr. Buskey, who has seen cases across the nation, how the element of dangerousness impacts people of color in making determinations about bail?

Mr. BUSKEY. Absolutely, and I think Chair Bass, in her comments this morning, said that bail is often set at 35 percent higher for African Americans for the same offense.

What we learn is that in many systems where they are using money bail, even though it itself cannot mitigate a flight—excuse me, a risk of danger, that judges are using bail to surreptitiously address danger and that is part of why African-American bail amounts are higher.

Ms. JACKSON LEE. Do you want to comment on the Kalief juvenile bail?

Mr. BUSKEY. Kalief Browder, yes.

That is a perfect example. An individual comes in, an offense does not signal any type of dangerousness. The judge sets bail reflexively.

This is a very young man, very subject to abuse and worse and Rikers Island, and just severely damaged him coming out, even though he was completely innocent of the charges, and we have to keep that in mind, the sort of trauma that people go through when they are put in prison, especially when they are very young and are placed in that environment.

Ms. BASS. Mr. Richmond?

Ms. JACKSON LEE. Thank you.

Mr. RICHMOND. Thank you, Madam Chair.

Look, I will try to go fast. Part of this is trying to understand and coordinate everything people at the table are saying because some of it is inconsistent.

I don't know how many of you were actually criminal defense attorneys, but I did that. So, when you talk about, for example, Ms. Cook, you talked about judicial discretion and so did you, Ms. Siegler.

I am not a big fan of judicial discretion unfettered. Every elected judge in the country is scared of a Willie Horton moment.

So, if you abolish cash bail and now we put more into judicial discretion, Tyrone and Leroy are going to be less likely for a judge to take a chance on them than William or Billy, and so when we see that in the system that is what kind of concerns me.

So, Ms. Cook, you quoted Vera, who does risk assessments in my home city. Where do you fall on the risk assessment?

Ms. COOK. So the Leadership Conference, as I stated before, issued a statement of concerns around risk assessment and primarily because we found that these tools were being cast as being very objective but, in reality, they reflect the biases within the criminal legal system along race and socio-economic status, and because of that they are extremely limited in being able to forecast or predict the likelihood that someone would be rearrested or fail to appear in the future.

It is sorely based on the data that is put in the system. So, garbage in data—

Mr. RICHMOND. Garbage out.

Ms. COOK. —garbage out.

Mr. RICHMOND. Thank you.

The system has to be reformed. But, what I don't hear us talking about at the table is if an offense is likely probateable and the person is likely going to receive probation, then they ought not be held at all because the chances are if they plead guilty the next day they would not serve a day in jail.

So, I don't hear anyone talking about more of a focus on issuing summonses as opposed to the arrest in the first place. We ought to look at what crimes we should be issuing a flat summons for to appear to court and then anything that is likely probateable it doesn't make sense to risk the incarceration, the collateral damage of just that weekend in jail.

So, I would love to talk more about that.

Mr. Buskey, ACLU California, what is the status of that? I know all of you supported ending cash bail. There is a referendum now. Where do you all stand on the complete elimination of cash bail?

Mr. BUSKEY. As far as S.B. 10, we opposed S.B. 10 as it was passed that is now before on referendum, is also before the California Supreme Court.

We do believe that we have to end cash bail. But, as I said before, we also have to go much farther, and I would echo your concerns about finding ways to automatically take certain kinds of charges out of the detention net and so an increase in diversion, an increase in citations instead of arrests, summonses, would be completely in line with our vision of how to dramatically increase release rates in the country.

Mr. RICHMOND. I think that at some point we have to convene everybody at the table and have a real honest conversation because when you start talking about judicial discretion let me go to the most unpopular thing that people in the criminal justice reform movement talk about, which is the '94 crime bill.

People talk about how it led to mass incarceration. They also say in the same breath that diversion is a great program. Diversion was in the '94 crime bill. People talk about how drug courts are a great progressive way now. But that was in the '94 crime bill.

What we saw was that judges were unlikely to sentence African-American offenders to drug courts because they were scared of their William Horton moment.

Prosecutors were scared to recommend diversion for African-American defendants because they were scared of their Willie Horton moment.

So, in a system that has so many judges who are elected, so many have to come up for reaffirmation, that they are scared to take chances on people they don't understand or know or communities they don't come from.

I think that if we don't address that part of this, we are going to have a problem, and then it shows up in the cash bail system where you set these really high ones.

Real quick, and Ms. Cook, you cite the Kalief case. That was judicial discretion. Because he had a probation hold, the judge would not even let him get a commercial bond, and so holding him on a probation hold or a parole hold on the theft of a backpack defies common sense from the beginning.

So, I just want to make sure that I don't believe judicial discretion for the most part the way judges have exercised that may be the answer also because they are scared of things they don't understand and many White judges don't understand young African-American males, the neighborhoods they come from, or the collateral consequences of one day of incarceration.

So, I really think—and I want to thank the Chair for bringing us together because I really think we have a lot more conversation to have on this—but the one thing we all agree on is the system as it is now is absolutely broken.

Ms. BASS. Thank you.

Mr. Reschenthaler?

Mr. RESCHENTHALER. I thank you, Chair, and I appreciate it.

I would yield to my friend and colleague from Texas.

Mr. GOHMERT. Thank you.

Mr. McElroy, I sensed in your comment about "when you were in the majority" some hostility towards Republicans.

I am a little taken aback. I am not sure what you are talking about. If there was a federal law that usurped the State—

Mr. MCELROY. Yeah. Yeah.

Mr. GOHMERT. —parental rights—it terminated parental rights early because here, again, some of you want us to usurp states' rights in State cases, and I know that has been going on for years.

We keep taking more and more authority and that is on both sides of the aisle. I have concerns about that.

I am curious about your background. You don't go into it in your statement. So, why were you ever taken from your mother to begin with?

Mr. MCELROY. Yeah. Thank you for—

Ms. BASS. Will the gentleman yield for just one second?

Mr. GOHMERT. Yeah. Okay.

Ms. BASS. The federal law is—it was great intention. We didn't want kids to linger in foster care and so, essentially, the law says is that if you are in foster care for 18 months that parental rights can be terminated, and you can be put up for adoption. So, it was well intended law, but it has had some bad collateral consequences.

Mr. GOHMERT. I appreciate that, Chair.

Mr. MCELROY. Yeah, and that policy was solidified here and so when I say that, and I want to make clear my deceased foster mother, Virginia, is a conservative and I say is, but she is deceased. So, it is not a—

Mr. GOHMERT. I am curious about your original background.

Mr. MCELROY. Yeah.

Mr. GOHMERT. Did you have a father at all in the home?

Mr. MCELROY. Yeah. So, the policy, specifically, what it did was instead of supporting my 14-year-old mother at the time, by resourcing her, trying to get her through therapy, that is the power that you wield, right.

You can make a decision to punish her, to expedite termination of her custody, or you can make a decision to extend the hearing, resource her, and help to support her and undergird her, and that is the same conversation we are having about incarceration.

Mr. GOHMERT. Did your father provide any help at all to your mother—your 14-year-old mother?

Mr. MCELROY. So, my father happened to be married at the time. So, there was a wedge in that area.

Mr. GOHMERT. Yeah. Definitely.

Mr. MCELROY. I want to really talk about what you can do to contribute because it is the same scenario in terms of people that are coming into incarceration.

You were a judge. You sat on that bench. The majority of clients you sat and looked at had been traumatized and that trauma had crystallized, and hurt people hurt people.

So, what we are not talking about here is how to redivert funds in incarcerating pretrial people and start to redivert them into resourcing people—substance abuse so that people can be prevented from overdosing. Jails are not safe spaces for drug and alcohol abuse, right. So, really, the pivot is to you—

Mr. GOHMERT. Right. That is why I am a big fan of diversion for treatment if people are serious about getting it, and I appreciate your comment.

You are not going far enough back. You are talking about jail, and I am wanting to get to the root of the problem, which you don't even recognize the root of the problem being—

Mr. MCELROY. So, the root of the problem, we have a vicious legacy of slavery that men were separated from Black children and Black women day in and day out in this state.

Mr. GOHMERT. —you didn't have a nurturing loving home and you won't recognize that, Mr. McElroy.

Mr. MCELROY. This building was built off the backs of enslaved Africans.

Mr. GOHMERT. You want to talk about the problem with jail—

Mr. MCELROY. That is the root. If you want to go to the root let us go to 1619.

Mr. GOHMERT. This is my time, Mr. McElroy.

Mr. MCELROY. You are asking me a question.

Mr. GOHMERT. You won't recognize the fact that you have been traumatized. You have been done wrong through jail, but you won't recognize that you—

Mr. MCELROY. Traumatized through policies that will not resource clients.

Mr. LIEU. [Presiding.] Mr. McElroy, you can answer—let the member ask the question. You can answer it afterwards.

Mr. GOHMERT. You aren't recognizing what I am pointing to. Yes, you were traumatized. We need to fix jail problems. We need to fix bail problems.

I want to get kids back to a place where they have got a loving nurturing home and they don't have to go to foster care—that they have got somebody there they can take—

Mr. MCELROY. Red lining kept homes from going to Black families, right. Let us talk about the policies that insulated and created this problem.

Mr. GOHMERT. You still aren't recognizing the breakdown. Hubert Humphrey talked about it beautifully in 1964. He predicted the problems that we have created with the breakdown of the home, and I still think we got to go back—

Mr. MCELROY. It happened well before 1964.

Mr. GOHMERT. Oh, yeah. It started before that, but he recognized it when others didn't.

And my time—

Mr. LIEU. Thank you.

Representative Cicilline?

Mr. CICILLINE. Thank you, Mr. Chairman.

I think one of the challenges is all of the kind of racism and injustice and discrimination that exists in our society plays out in the criminal justice system and we are trying to fix a bunch of stuff that has decades of origin, and I think this struggle, as Mr. Richmond said, between judicial discretion and statutory directives is a challenging one because judicial discretion only works so long as you have judges who actually are exercising discretion in an appropriate way.

I was a criminal defense lawyer my whole life and so this idea of letting judges have all this discretion, while it sounds great in theory, I think we have to really think about some guardrails and some guidance.

So, we have a huge problem here. One in five individuals who are incarcerated are incarcerated awaiting trial. That ought to shock and alarm everyone in this country.

It turns the presumption of innocence on its head, and when you look at the number of people who are incarcerated because they simply can't afford to post bail, that means they are in jail because they are poor, period.

There is no other—that is also inconsistent with our basic principles of justice and fairness in this country.

I think we have a big challenge here and not an easy problem to fix. But, I think we all recognize we have got to do something.

I guess my first question is to Ms. Siegler. Is one way to begin to think about this is maybe to reverse the presumption in 3142? You know, we have a release statute that essentially creates a presumption of detention and puts the burden on the accused.

So, as a beginning point, maybe if we just eliminated that and said that the presumption is unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any person, the person should be released.

In other words, get rid of those set of rebuttable presumptions and then create a category of offenses for which you cannot be detained.

Then finally, to the extent that you are going to use any risk assessment, have a mechanism to reveal the economic and racial biases of the assessments so that you can challenge them in a meaningful way, and the example I always use is if I broke a window as a kid my mother would likely call the neighbor and say, David's sorry—can we pay for the window and it be repaired, and a young man of color who had the same experience very likely would have the police called and get a juvenile record, and so it begins.

So, I am very worried about risk assessment tools, so I am going to come to you in a moment. But is that something—in 3142 is that a way to start to think about some reforms?

Ms. SIEGLER. Yes. I agree completely with all three of those reforms that you just laid out.

Number one, change the initial decision point and give judges discretion rather than just forcing judges to lock people up for certain crimes at the very onset and hold them until a detention hearing.

Number two, what you talked about is the presumptions of detention that kick in at the detention hearing. Those were under 3142(e). Those are a serious problem for many reasons, and I think the first problem is they sweep way too broadly.

So, when the statute was first enacted, those drug cases made up, like, 18 percent of the federal docket. Now the rise in drug prosecutions means that these presumptions are applying to a huge number of cases.

Mr. CICILLINE. Yeah. No, I agree. I just want to make sure I can get in a couple more questions, but yeah.

The other thing is I think it is an obvious point that I hope everyone who is watching this hearing understands this. Pretrial detention of people who are awaiting trial has a significant impact on your ability to prepare for trial, your ability to locate witnesses, consult easily with your attorney, the impression that the court has of you as an accused person when you come in from the prison or the jail versus come in from the community.

Your ability to develop a sentencing program if you, in fact, are convicted and your ability to do work in the community to show what you have done—I mean, there is so much research that shows how you end up being sentenced is directly impacted on whether you are released pretrial or held pretrial.

So, it has implications for our system of justice well beyond that individual defendant but just how the whole system works.

Ms. Cook, I want to ask you, are there risk assessments that you think are particularly good that take into account appropriately the kind of racial bias and economic bias that exists or are there none or some that are worse that we could at least look at as a guide?

Ms. COOK. So, what we have seen and I think what research has shown us is that risk assessment tools are very limited in their ability to account for the racial bias that is sort of baked into the data that the tools are trained on.

Mr. CICILLINE. Yeah.

Ms. COOK. Because of that, you are unable to judge Black or White defendants sort of statistically equally in those tools and so that is hardly impossible. I mean, it is patently impossible.

Mr. CICILLINE. Yeah.

Ms. COOK. You could use the risk assessment tool in the opposite, though—

Mr. CICILLINE. Right.

Ms. COOK. —to say, hey, what is going to be the impact to the person if they are detained pretrial on their life, on their family, on their housing or jobs that could be used in that regard.

Mr. CICILLINE. Can I just ask you, Mr. Buskey, one last question? Is it worth thinking about—I know you said about electronics surveillance, but what about the idea if a judge orders detention or whatever rubric we develop that the presumption is that detention occur by way of electronic monitoring absent some finding that it is insufficient to secure the return of that defendant and the safety of the community?

So, in other words, kind of put it down, I want to say electronic monitoring is presumptive if it is someone who needs to be in custody because that is a custodial intrusion and absent some evidence that is not sufficient to secure that person's attendance and the safety of the community the court has to impose electronic monitoring and not require the defendant to pay for it.

Mr. LIEU. The gentleman's time has expired but you may answer that question.

Mr. BUSKEY. Very quickly.

I think, if determined under the appropriate robust procedures and protections and the proper standard of review then we could consider that proposal.

The concern would be simply that the use of monitors would spread far beyond the original intent and that is the hard to thing to cabin.

Mr. CICILLINE. Thank you. I yield back.

Thank you, Mr. Chairman.

Mr. LIEU. Thank you. I now recognize myself for five minutes.

Let me first thank the witnesses for being here. I would like to thank Chair Bass for calling this important hearing and Chairman Nadler for all your important work on this issue.

I agree with Congressman Richmond that the pretrial detention system is broken. Right now, we have approximately 450,000 people sitting in jails and prison even though they have not been convicted of anything.

That is insane. We need to fix that. The commercial bail system exacerbates that problem. First, it is not rational.

I know they used the example that Republican Congressman Steube said in his opening statement where a defendant was able to purchase his freedom by posting a $15,000 bail bond and then he went and killed a law enforcement officer.

Yet, there were many poor defendants who cannot post that bail and they are sitting in jail. So, it is actually a more dangerous system when we allow wealthy defendants to purchase their ability to get out of jail and then commit more crimes. Money should have nothing to do with an individual's freedom, period.

That is why I was glad to have worked with Republican Senator Rand Paul, Democratic Senator Kamala Harris, and others here in the House to have introduced the bipartisan Pretrial Integrity and Safety Act last term.

We are going to reintroduce it this term. It is going to provide grants to local states and jurisdictions to help them with their pretrial detention to move away from money bail.

I have also introduced the No Money Bail Act every term I have been here in Congress, and I was also pleased to work with Chair Nadler to secure report language in the fiscal year '20 appropriations bill to ensure that the Bureau of Justice statistics provides better data on the State of our pretrial population.

So, I would like to ask Mr. Buskey and Ms. Cook about—since you all have extensive bail experience about some questions in terms of how, if we are going to provide these grants, and some of the conditions we should put on them.

So, would you, first of all, support the following pretrial practices, number one, expanding the use of citations instead of custodial arrests?

Ms. COOK. Yes.

Mr. BUSKEY. Yes.

Mr. LIEU. All right.

Second, would you support and ensure that before imposing pretrial detention or a conditioned release a hearing takes place within 48 hours?

Ms. COOK. Yes.

Mr. BUSKEY. Yes.

Mr. LIEU. Third, requiring representation by counsel for all defendants prior to any hearing of which a defense liberty may be determined?

Ms. COOK. Absolutely.

Mr. BUSKEY. Yes.

Mr. LIEU. Then finally, providing that any pretrial release conditions are nonfinancial based on evidence-based practices or only as restrictive as necessary?

Ms. COOK. Yes.

Mr. BUSKEY. Yes.

Mr. LIEU. So, I will be reintroducing a modified version of the bipartisan Pretrial Integrity and Safety Act based on what we have heard from this hearing.

I just want people to look at this issue. We, in Congress, every two years vote over a thousand times and most of those votes we don't get a single phone call, email, fax, or meeting.

Members of Congress and most of the American public aren't walking around thinking about bail. We want people to think about bail because it is a massive problem.

It is flipping the presumption of innocence on its head, it is irrational, and it is penalizing those who are poor. Studies have shown that the people who cannot afford to purchase their way out of jail are exactly people that cannot sit there for weeks and months on end. They lose their low-paying job.

They don't know how to deal with child support. They can't pay their rent. It is a cascading consequence of more and more bad factors, and it completely wrecks their life.

So, I look forward to working with all of you as we continue to work on this very difficult issue and it is also a bipartisan issue.

The State of Kentucky, largely, has moved away from money bail. Washington, DC, doesn't do money bail. California just put in a new law—we will see how that goes—and other states are looking at it and it is important that we look at what states do.

If there are problems we try and fix it, but I think we do have to get resources to various states to make sure they can implement alternative systems that don't continue to penalize the poor.

With that, I am going to yield back.

Oh, yes, I will yield to Congressman Richmond.

Mr. RICHMOND. Let me just add in a short period of time that we have a hybrid of a risk assessment system in New Orleans. The executive director of that risk assessment makes $350,000 a year because it is grants.

I am not opposed to the salary but there is better uses of money and I think that as we look at it we ought to look at maybe how—as we give out grants how local jurisdictions can do it in-house, save that money, because all of the criminal justice system is financed on the backs of defendants through fines and fees and other things, and I think we have to take a holistic approach.

So, I would love to work with you on that but I just wanted to point out that the director of my local risk assessment is in the 300s.

Mr. LIEU. Thank you. Appreciate that point.

You are back and now recognizing Representative Mucarsel-Powell for five minutes.

Ms. MUCARSEL-POWELL. Thank you, Mr. Chairman, and thank you to the witnesses for appearing here this morning. It is obvious

that we need to reform the bail system in America. Cash bail seems to be stuck in an old view of the world.

I have to tell you that in Miami-Dade County there was a study conducted that showed that the jail averages over 2,000 inmates daily and about 80 percent of those detained were pretrial inmates.

These individuals who can't afford to make bail have been jailed before they have had the opportunity to defend themselves in court and, of course, wealthier individuals don't have these issues.

So, more importantly, I think that money bail systems have a disproportionately negative impact on minorities and low-income defendants.

I represent a district where we are a minority majority district. Most of the people living in my district are Hispanic, African Americans, and I am very well aware how difficult it is when you are sentenced for a petty crime, you are detained, you don't have a trial, and you have no means to get out of jail.

Bail for Black men is, on average, 35 percent higher than White men and bail for Latinos is, on average, 19 percent higher. Money bail and pretrial detention often have devastating effects.

Even if a defendant is not convicted, pretrial detention throws disadvantaged defendants into a cycle of trauma and hardship that can last for years, which we have heard this morning.

It can mean that a defendant loses custody of his or her kids because she can't care for them while awaiting trial.

It can mean a person loses his job because he can't get to work while awaiting trial in jail and it means that these defendants often can't find adequate legal representation while awaiting trial in jail.

This approach to our criminal justice system only causes harm to our communities and the people that we are trying to represent.

We have to reform the bail system in order to uphold equal justice under the law.

So, I want to start with Mr. McElroy. You mentioned that a $500 bail set for you was the same as a million dollars for an unemployed homeless teen.

Can you explain a little bit what you mean by that and what are some of the hardships that money bail placed on you or other low-income or unemployed defendants?

Mr. MCELROY. Yes. So, this year I have contributed to bail out about 8,500 people across the Nation in 19 cities. I am reminded of Miss Priscilla, who cried when the judge said $3,500 bail on her, and she is a grandmother, 65 years old, primary custodian of her grandbaby, and she was in jail seven days before we brought her out, and she lost her job. Her granddaughter slept on people's couches.

The case was dismissed shortly thereafter and there is no recompense. Nobody said sorry, and this is perpetuated.

I am reminded of an LSU student—I am sorry that Mr. Richmond has left—who $3,200—she was accused of stealing two t-shirts from her roommate left over, in the middle of finals. In the middle of finals.

Our staff were able to talk with her professors and procure the opportunity for her to complete her finals, and she is a junior at LSU currently.

I could go on and on, right. These are human beings that were—my friend mentioned, Ms. Mary, the bail bonds industry would have helped them.

The predatory system that takes poor people's money, like Niesha, who I mentioned, who is paying $300 for a case that was dismissed.

Did that bail bondsman walk up there and say, oh, your case was dismissed—you don't owe me anymore—here is your $1,500 back?

Did the judge put himself in that situation to make sure that she was put back whole? No. So, what are we really talking about?

We are talking about human beings that the price of their wallet determines how much justice they get, whether they get to participate in their own case or not.

Ms. MUCARSEL-POWELL. Yeah, and it perpetuates the cycle of poverty in many of our communities and the cycle of injustices and the school to jail pipeline that we see in a lot of our communities.

So, I agree with you. Thank you so much for being here today and sharing with us your story.

I yield back.

Mr. LIEU. Thank you.

Before I call on Representative Cohen, I just want to thank you, Mr. McElroy, for the work that the Bail Project does in my district in Venice, California, as well as throughout the country.

Representative Cohen, you are recognized for five minutes.

Mr. COHEN. Thank you, sir. I hope that these questions have not been asked because I was in Transportation.

The federal system is different than most of our states. How does the federal system work in seeing that the percentage of people who return as distinguished from those who flee?

Ms. SIEGLER. How does it work as far as are we doing well?

Mr. COHEN. Numbers. Yeah. Exactly.

Ms. SIEGLER. Yeah. The numbers are incredible. I mean, we have 99 percent of people who are released on—this is 2018 numbers—99 percent of people released on bond appear in court and do not flee and, interestingly, that rate holds true whether you are looking at the five federal districts in this country that have really low release rates, around 20 percent, or the five that have really high release rates around 80 percent.

So, whether releasing a lot of people or they are releasing very few people, almost nobody is fleeing and the numbers for danger, meaning re-offense, are pretty much identical at 98 percent not re-offending.

Mr. COHEN. So, the federal system has no bail bondsmen, right?

Ms. SIEGLER. That is correct, technically.

Mr. COHEN. The bail—what do you mean technically?

Ms. SIEGLER. Technically, there is a part of the statute that says a financial condition is not supposed to result in the detention of a person.

However, there is the allowance for some bail bonds. There is the allowance for money bail. There is the allowance for paying—for putting up a home as collateral for your release.

Mr. COHEN. Yeah, but when I say bail bondsman there is not a professional bail bondsman. So, you put your money up with the court, do you not?

Ms. SIEGLER. In some federal districts there are professional bail bondsmen, yes.

Mr. COHEN. Are there?

Ms. SIEGLER. Mostly there are not. But, I have heard of some.

Mr. COHEN. Well, they are often lobbying against any of these reforms and I know when I was in the State legislature and the State senate, we had tried to change the system and what they ended up doing was they passed a bond origination fee.

Maybe they do that other places, too. But, it was like a basic $35. They said that the low-cost bonds they couldn't do them at 10 percent because I want to say a $250 bond that would be $25 wasn't worth it.

So, they put on a $35 bond origination fee to make the smaller bonds more workable and efficient for the bail bondsman. Of course, that makes it $60 for the bond and on a $250 bond that would make it 27 percent or something like that bond.

They put that $35 on every bond, even if it was a $10,000. So, it wasn't to make it effective and efficient and merchantable for the bondsman. It turns out it is extra money they put in their pocket, and they lobbied against everything we had, whether it was citations in lieu of arrest in the field or citations in lieu of arrest at the—issued and in jail, arrested. They lobbied against it all and they got it done.

Are there any states that are models for reform?

Ms. SIEGLER. On the money bails issue, I would defer to the people who are experts on the State money bail problem.

Mr. COHEN. Sure.

Mr. McElroy or Mr. Buskey?

Mr. MCELROY. I would say there are states that are being thoughtful. Oftentimes my state, Kentucky, is mentioned.

Kentucky is not a State that doesn't have cash bail. Kentucky is a State that is very dependent on algorithms, and as many people have mentioned, algorithms are only as good as the information that go in them, and I always think about it like this.

On any given day if Narcotics wants to do investigations, they can either go to their university or they can go to a low-income community, and we know which one is politically correct.

So, when you have absorbent policing surveillance, you are going to have out of those communities higher algorithms that lead to higher risk assessments.

Mr. BUSKEY. In terms of states, I would say that New Jersey is probably the State that is thinking the hardest then and doing the best on these issues.

As folks may know, New Jersey had very significant reforms about two years ago to its pretrial system that was largely based on money, huge bail bond industry—many of the same arguments against reform that we are hearing in the current debate.

New Jersey today, according to reports from last year, has virtually eliminated cash bail and so cash bail is only entered in I think less than one quarter of 1 percent of cases, right.

So, hundreds out of tens of thousands of cases end up in cash bail. They have seen no change in the rates of re-arrest prior to trial. Those still remain less than 1 percent.

There was a slight decrease in court appearance from a very, very high 93 percent to a still very, very high 89 to 90 percent reappearance rate.

They also found that even with that slight decrease in appearance rates that cases were still completing in the same amount of time.

So, despite all the rhetoric from the bail bond industry, even though people may have missed a court date, they were coming back.

Finally, I would say they are doing all of this with astronomical release rates at over 95 percent and much of that is since New Jersey dramatically increased noncustodial arrests.

So, many of these folks were getting out and I think upwards of about 30,000 people increased over last year are never being booked into jail prior to their first court appearance.

So, all of those things are ones that we try to replicate. The one thing that I would point out about New Jersey that does require some caution is that they do use risk assessments to make these determinations and that is the one thing I would think we would want to go back and look through and really determine what role the assessments are playing in deciding detention and release in New Jersey.

Mr. COHEN. Thank you.

Mr. LIEU. Thank you. The gentleman's time has expired.

This concludes today's hearing. I want to thank our—yes, Mr. Gohmert?

Mr. GOHMERT. Could I ask unanimous consent to submit a letter from Senator Jeff Andrew—from Bob Andrzejczak regarding the vote they had on their bail system?

Mr. LIEU. Without objection.

[The information follows:]

MR. GOHMERT FOR THE RECORD

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July 3, 2017

Dear Speaker Rendon,

I am a democratic member of the New Jersey Assembly representing Legislative District 1. Prior to joining the Assembly, I served in the Iraq War as a sergeant in the Army's 25th Infantry Division until my discharge following an injury which led to the amputation of my left leg from a grenade explosion in 2009. As a result, I was awarded the Purple Heart and Bronze Star; my recovery was featured on a 2009 episode of The Oprah Winfrey Show.

As you may know, New Jersey passed and has implemented a bail reform policy similar to California's SB10 which you are considering. I supported the legislation when presented to our Assembly and advocated for its passage. The law went into effect this past January and it has been an absolute disaster. The public safety needs of citizens in New Jersey has suffered far greater than could have been imagined. The costs to the state have increased exponentially and, even worse, the constitutional rights of many of the accused are being infringed.

We were told that there would be no danger to citizens because the dangerous criminals would not be released and on "low level" criminals would be eligible. The reality is that dangerous and career criminals are released daily within hours of arrest. We should never have considered free bail to those who commit crimes where a citizen has been victimized. We may only catch a criminal once out of a multitude of crimes in which they commit. They are simply not afraid of committing crimes against citizens and as a result our crime rate has increased at least 13% since January. This law is victimizing law abiding citizens every day.

We were also misled as to the cost of implementation and continuation of this policy. It has become apparent to us now that the cost of incarcerating those held awaiting trial were greatly exaggerated. Additionally, we have transferred the cost of "free" bail to the taxpayer rather than the offender. The bail system supported many functions of the court and the cost of re-arresting multiple offenders and bail jumpers was borne by the offenders themselves rather than the taxpayers. Now we are making taxpayers pay to release criminals back into their neighborhoods and with no accountability. The state does not have the resources to properly monitor these people out on bail so we don't. This is a powder keg and our citizens are suffering because of it.

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Not only are our citizens suffering but now even the accused are being denied their constitutional right to pre-trial release as a result of the new laws. The eighth amendment to the Constitution of the United States guarantees an accused the right to "reasonable bail". However, in New Jersey, many are being denied that right. This is not just happening to dangerous criminals it is happening to low level offenders as well. The risk assessment system is simply not working. In January, a convicted child predator was arrested for attempting to lure a 12 year old girl to his house for "sexual things". The risk assessment determined he was not a threat and was released. The police chief of Little Egg Harbor was so distressed by this that he appealed the release all the way to our supreme court and was denied. The man was released back into the same neighborhood where the "would be" victim resides. The only recourse for law enforcement was to post on Facebook a warning to the community.

I am not "in the bag" of any industry or special interest. I fully thought this was the right thing to do because of the arguments we heard. I am writing to you because I have experienced this first hand and it has been a disaster. I am trying to rectify a problem in New Jersey that we caused and hopefully encourage you not to make the same mistake. Please listen to the experts on this issue and look at the examples before you because the safety and financial interests of your citizens are at stake. Thank you for your time.

Sincerely,

Bob Andrzejczak
Assemblyman, First Legislative District

Mr. GOHMERT. Thank you.

Mr. LIEU. So, thank you to our visitors for attending. Thank you all in the audience for being here.

All Members will have legislative days to submit additional written questions for the witness or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 11:52 a.m., the Subcommittee was adjourned.]

APPENDIX

AMERICAN BAIL COALITION

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WRITTEN TESTIMONY
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Prepared by Jeffrey J. Clayton[1]
November 14, 2019

Dear Chairwoman Bass and Members of the House Subcommittee on Crime, Terrorism, and Homeland Security:

I would like to submit the following written remarks on behalf of the American Bail Coalition[2] and request that they be made part of the record of the hearing of November 14, 2019 entitled, "The Administration of Bail by State and Federal Courts: A Call for Reform." We agree that significant reforms are needed, particularly at the federal level which has made preventative detention the norm and eviscerated entirely the traditional right to bail, and, at the state level where bail systems are used extensively as a collections mechanism. In addition, we propose a Fourth Generation of Bail Reform[3] that offers states and the federal government a framework for future reforms.

I. Summary of Current Bail Reform Issues

We are currently in a period termed the third-generation of bail reform that has been a movement for last 8-10 years. It premises itself on "ending cash bail," and relies on a system of risk-based preventative detention, similar to the federal system. The third-generation of bail reform offers an alternative system based on three key pillars: (1) expanding the eligibility of preventative detention and the ability of the government to simply deny bail altogether by changing state statutes and state constitutions; (2) using pretrial risk assessment tools to recommend pretrial release decisions and largely decide who will be labeled as risky and then what specific recommendations will be made based thereon (preventative detention, supervisory conditions, etc); and, (3) the expansion of pretrial (pre-conviction) supervision by state agencies, local agencies, probation departments, etc. along with the concomitant and expanded use of electronic monitoring, drug screening, house arrest, and other technologies.

This movement is giving way largely due to serious concerns with each of the three pillars now learned based on real life experiences and from data. Instead, bail is a fundamental

[1] M.S. (Public Policy), University of Rochester, N.Y., J.D., University of Denver.
[2] The American Bail Coalition is a national trade association of insurance corporations that underwrite approximatey 12,000 bail agents throughout the United States.
[3] https://ambailcoalition.org/the-future-of-bail/

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constitutional right, which allows the defendants and third-parties to challenge the incarceration of the defendant by the government. Bail is indeed an exception to preventative detention by the crown—in fact, that is why it exists. Instead, we believe getting at the heart of the problem requires different solutions, what we call the Fourth Generation of Bail Reform.[4] Indeed, some of the reforms we have suggested in this document have already become law in several states.

II. The Movement Against Pretrial Risk Assessment Tools is Gaining Momentum Due to Concerns of Ineffectiveness, Inefficient Use of Dollars, Racial and Other Protected-Class Bias, Transparency Issues, and Validity Concerns

Pretrial risk assessments are sold as an easy way to get everything we want: make the communities safer, reduce jail populations, increase appearance rates, solve racism, and fix many other issues in the system. The problem is that in practice that has simply not occurred. Civil rights groups, academics, legislators, policy-makers and others are now asking not should we simply fix the issues with these pretrial risk assessment tools but should we use them at all?

The following is a list of recent criticisms of such pretrial risk assessment tools:

- In August, 2019, **twenty-seven prominent academics from prominent universities issued a statement that jurisdictions must stop using pretrial risk assessment tools because they do not accurately predict, they are racially biased, and they cannot be fixed.**[5] The same researchers then sent letter to three jurisdictions demanding that they cease using the tools.[6]
- In 2018, 100 national civil rights groups, including the NAACP and ACLU, issued a statement cautioning jurisdictions to not use the tools due to concerns of racial bias and validity, and then demanding transparency if the tools are to be used.[7]
- Academic research indicates that proprietors of these tools pursuant the common law are able to shield the underlying mathematics and data of these tools not only from the public but from criminal defendants who seek to expose the ineffectiveness of these tools at the margins when it means jail or freedom.[8]

[4] http://www.americanbailcoalition.org/wp-content/uploads/2018/11/Bail-Reform-4th-Gen-A5.pdf
[5] https://ambailcoalition.org/download/24/risk-assessments/4956/technical-flaws-of-pretrial-risk-assessments.pdf
[6] https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4976/california-researchers-rat-warning.pdf
[7] https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/863/110-civil-rights-groups-pretrial-risk-assessment-full.pdf
[8] https://www.stanfordlawreview.org/print/article/life-liberty-and-trade-secrets/

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- Over 100 civil rights groups in New York State opposed the expansion or use of pretrial risk assessment tools.[9]
- The ACLU of Kansas issued a powerful rebuke of risk assessment tools to a judiciary led task force looking at bail reform.[10]
- Eighty digital groups, including Google, Facebook, IBM, Samsung, etc. issued a statement saying that they believe the assessments potentially bake-in existing bias into the system and prevent real change.[11]
- One scholar's research shows that risk assessment algorithms have contributed to generational mass incarceration, rather than the suggestion that these algorithms actually reduce it.[12]
- The legislature of the State of Iowa passed legislation that ended a pilot project of the Arnold Foundation PSA in Iowa, which was endorsed by the Governor, due to concerns which we have seen coast-to-coast that the tool is too soft on gun cases, is not transparent and may be potentially biased.[13]
- The ACLU of Colorado at a recent legislative hearing in the House Judiciary Committee considering the statewide expansion of risk assessments in H.B. 19-1226, testified that the Colorado CPAT tool violated the Americans With Disabilities Act because it scored those with current or previous mental health or substance abuse disorders as higher risk, increasing the chances they would stay in jail or face greater supervision by county agencies. Many of the existing tools suffer from the same issues.
- In a landmark peer-reviewed study, Professor Megan Stevenson of George Mason University School of Law, after reviewing significant data from various jurisdictions, concluded that in practice the tools had a negligible if any effect on jail populations and increased slightly the risk of failing to appear in court as required and the risk of committing new crimes while on bail.[14]

[9] https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/864/new-york-100-community-leaders-bail-reform-letter.pdf
[10] https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu_presentation-kansas.pdf
[11] https://ambailcoalition.org/download/24/risk-assessments/4766/report-on-algorithmic-risk-assessment-tools.pdf
[12] https://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf
[13] http://www.americanbailcoalition.org/in-the-news/breaking-iowa-governor-shuts-arnold-foundation-pretrial-risk-assessment-effective-december-31/
[14] https://ambailcoalition.org/download/24/risk-assessments/828/assessing-risk-assessment-in-action.pdf

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- New Jersey claims the success of the Arnold Foundation Public Safety Assessment algorithm, but even if the jail population drop could be attributed to bail reform, there is no indication that the use of the algorithm is the reason there is an impact versus forcing prosecutors to have to prove detention has driven more releases.
- No one has been able to demonstrate that the investment of government resources into the risk assessment process has resulted in any savings, much less savings significant enough to offset the cost of doing the risk assessment in the first place.
- The Idaho Legislature passed legislation, Idaho House Bill 118,[15] that Governor Little signed into law, to require the pretrial risk assessments to be fully transparent and to eliminate the ability for the algorithms to be proprietary and enjoy the ability to quash discovery requests in a criminal case. John Arnold, of the Arnold Foundation, in fact supported that legislation, and yet states and jurisdictions like Michigan, New Jersey, Toledo, Ohio, etc. all have contracts that still maintain and allow the proprietary protections. No other legislature in the nation has yet to act on this.
- 50 Civil Rights groups, including the ACLU and San Francisco public defender, opposed the passage of California's Senate Bill 10, largely on grounds of opposition to the risk assessment and expansion of preventative detention.
- A recent article on Wired.com noted that the Kentucky experiment with the use of the Arnold Foundation algorithm based on empirical research has failed.[16]

In short, there is no reason at this point to believe that pretrial risk assessments will reduce jail populations, save money, make the system more fair (largely due to bias issues), reduce crimes while on bail, or reduce failures to appear in court as required. In practice, the risk assessment era has failed over the last decade to deliver on its promises, and we believe it is time for it to come to an end.

III. Preventative Detention Policies Have Proven to Increase Mass Incarceration Over Time and Have Not Shown Any Benefits In Terms of Safety and In Some Cases Reduce Public Safety

Prior to 1984, it was not believed that preventative detention, detention without bail, was allowable under the Eighth Amendment. The Federal Government passed the Bail Reform Act of 1984, which allowed the government to detain persons in serious cases if the government could prove a danger or flight risk by clear and convincing evidence. This is a "regulatory" exception, according to the U.S. Supreme Court in *Salerno*.

[15] https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118.pdf
[16] https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/

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Most state statutes and constitutions provide that all persons, except for capital or other serious crimes, are bailable by sufficient sureties, meaning a bail must be set even if the defendant is unable to post it. The U.S. Supreme Court's decision in *Stack v. Boyle* guides that decision, requiring judges to set bail at an amount reasonably calculated to ensure appearance and the safety of the community but no greater.

The current third-generation of bail reform is premised on eliminating bail through amending State Constitutions and state statutes and rules to replace it with a system where the regulatory exception in *Salerno* plus other non-monetary holds allowable under law (probation violation, parole violation, out of county charges, etc.) are the only basis for which a person is held in jail. Everyone else is then released to the supervision of the State or local governments. In fact, the New Jersey system supervises 90.9% of defendants that are released. As noted, the risk assessment tool is the primary driver into sorting defendants into the categories to detain or release on conditions, and then what conditions to impose.

The federal government has increased mass incarceration as a result of the Federal Bail Reform Act, going from a rate of 24% detained pretrial in 1983 to 72.9% today.[17] This represents a 300% increase, and has had a dramatic effect on increasing mass incarceration, primarily in drug cases. Washington, D.C. has not reduced mass incarceration as a result of its system. New Jersey claims the system has decreased the jail population, however, a report by the Brennan Center indicates that the jail population decrease in New Jersey has been steady since 1999 due to many factors and has appeared to continue unabated before and after bail reform.

In New Mexico, prosecutors were not given funding to conduct detention hearings, and the result was predictable—they cannot detain even the most serious of offenders, murderers, child traffickers, terrorists, etc. typically due to lack of resources or inability to overcome the results of the Arnold Foundation PSA, which as noted will count many firearms offenses as low risk. As a result, District Attorneys are simply sending the cases to the federal system, where defendants get preventative detention. The issue in New Mexico was highlighted by U.S. Attorney General Barr in a statement made November 12, 2019:[18]

> Barr said he sees problems with New Mexico's bail reform law, which voters passed.
>
> "That has the effect of not only allowing the offender back on the street where they can commit more crimes, but it also intimidates the neighborhood and prevents people from coming forward because they feel these people will be right back out on the

[17] https://escholarship.org/uc/item/6p31t6hv
[18] https://www.kob.com/new-mexico-news/ag-barr-critical-of-new-mexicos-judicial-system/5551167/

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> streets," Barr said. "I think part of the problem there is the judiciary in New Mexico, not using the laws that they have to keep dangerous offenders in pretrial detention.

Further, preventative detention policies are expensive to the system. A judge, prosecutor and public defender will have to conduct a full evidentiary mini-trial days after arrest. Yet, there is no indication that this system makes the public safer, and instead academics since before and after the bail reform act have concluded that the system does not make the public any safer than the traditional bail system.[19]

Finally, it is worth noting that Justice Thurgood Marshall wrote the dissent in *United States v. Salerno*, and held that preventative detention is antithetical to our constitutional tradition.[20] It certainly worth a read. The better opinion to read, however, is Judge Kearse's opinion in the Second Circuit holding the Bail Reform Act of 1984 unconstitutional.[21] The opinion reminds us of the fundamental purpose of the criminal law, which is that the system is to specify the acts that are illegal and punish those who violate such acts. To premise the system on the predictions of what one may do in the future, and restrict someone's liberty or deny it altogether as a result, is antithetical to the system of bail we have had on this continent for 400 years. So even though jurisdictions may go in this direction, they have a choice, and the words Judge Kearse are worth considering when it comes time to start cracking open the preventative detention door:

> It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause*. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.*[22]

[19] For example, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6520&context=jclc
[20] https://supreme.justia.com/cases/federal/us/481/739/#tab-opinion-1957133
[21] https://casetext.com/case/united-states-v-salerno-6
[22] *Id.*

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In short, just because the Supreme Court allowed the federal government this exception by over-ruling Judge Kearse, that does not mean that it is good public policy or that states should go down this road. They indeed have a choice not to for the reasons she stated in the opinion.

IV. The Federal Government Should Repeal the Federal Bail Reform Act of 1984 and Restore the Use of Monetary Bail

As mentioned, when monetary bail was part of the federal bail system prior to 1984, the rate of pretrial incarceration was 24%. Today, without the right to bail as part of the system, the rate of pretrial incarceration is 72.8%. Eliminating the right to bail as we then knew it and replacing it with a system of preventative detention has absolutely caused this expansion. The congress needs to take a serious look at the federal bai system and the fact that it is the most coercive tool the government has and uses in neary three out of every four cases.

V. Supervision Policies and Electronic Monitoring Have Not Proven to Be More Effective Than A Simple System of Release on Recognizance or Bail, and Jurisdictions are Now Facing Legal Scrutiny Due to the Outrageous Charges Defendants Are Required to Pay

The magic bullet of bail reform for the last ten perhaps twenty years is to hire people that will basically act as pre-conviction probation officers. So concerned are we with the presumption of innocence that we will eliminate someone's settled constitutional right to bail that we will, ironically, instead subject them to the evaluation and supervision of a state or local agency. I firmly believe that these policies increase mass incarceration not reduce it, because wide swaths of defendants, who cannot be ordered to treatment or have a criminal intervention, will simply fail and end up pleading guilty to the original charge.

Articles for years have detailed the issues with pretrial services, particularly when it is funded by defendants. The first of these was an article called *Chain Gang 2.0*,[23] which detailed the story of Antonio Green who, because of pretrial charges that were auto-withdrawn from his bank account got so far in the red, demanded that he instead be returned to jail rather than be subjected to pretrial supervision and the costs associated with it. Yet, proprietors of these technologies tell government officials, according to the article, don't worry about it, it is all free because defendants pay for it. Well, if they cannot afford to post bail and pretrial is an alternative, they probably cannot afford the charges of pretrial services either. The fees associated with pretrial services are often more than the posting of bond in the long run. They then cannot be jailed if indigent, and thus the burden and costs of all of this will be borne by

[23] https://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283

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local governments. There is litigation already going by big civil rights groups challenging the imposition of pretrial fees, in addition to many articles on the topic.

Our position is that we should all follow the law and put all bail and conditions of release into the bail setting calculus. " Least onerous" or "least restrictive" conditions of release, the constitutional standard in this country for some time, should include potential bail and all conditions of release. For example, it was recently noted that defendants had to pay $14 a day to be on pretrial services in Marion County, Indiana.[24] If a case lasted six months, the defendant would be required to pay $2,520, not including set-up fees. That could also represent the premium on a $25,200 bond. Judges should then make the following calculus—if I were to set bond at a figure below $25,200 which I believe would guarantee appearance, would that be least restrictive than restricting a defendant's other liberties and making the defendant pay for that. Not to mention that bail is typically a third-party provided benefit, which means in most cases it will be the least restrictive form of release since someone else will be paying the premium and providing the financial guarantee and appearance of the defendant.

Finally, when judges do not have the ability to impose bail, they will then have two options—jail or onerous supervision and conditions. Which is what we are seeing in New Jersey with 90.0% of all defendants getting supervision. Said Micol Seigel, a professor at Indiana University, Bloomington: "**If you no longer have bail as a way to tie people to what you see as the necessity of forcing them to reappear, then judges are going to be very tempted to put people on electronic monitors**."[25]

VI. Surety Bail is Effective at Returning the Defendant and Guaranteeing Appearances

First, often it is argued that bail does not decrease crimes while on bail. But the reality is that there is generally no difference typically in crimes while on bail, and if anything a risk-based system of preventative detention has been shown to marginally increase crimes while on bail. In addition, bail agents have been called the "true long arms of the law," which then reduce long-term fugitive rates.[26] Our position is that fugitives from the law do not rehabilitate themselves while they are fugitives—they are committing more crimes in other jurisdictions. To reduce fugitive rates is to reduce that negative crime committing behavior. New crime statistics generally are not available since the new crime happened in other jurisdictions.

Second, the most comprehensive study of bail studying the largest 75 jurisdictions over a 15 year period found that monetary bails are the most effective at guaranteeing

[24] https://theappeal.org/pushed-to-curb-use-of-cash-bail-by-january-indiana-relies-on-knee-jerk-alternative/
[25] https://theappeal.org/pushed-to-curb-use-of-cash-bail-by-january-indiana-relies-on-knee-jerk-alternative/
[26] https://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf

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appearance.[27] In addition, in a recent study of the San Francisco bail system submitted under oath by an expert witness, it was discovered that surety bail far outperformed any other form of release in terms of the rates of failing to appear in court. [28]

Data Source: Release Reason (SHP001179; 01JAN2014 - 28FEB2018)

Type of Release	# Bookings	% Bookings	FTA Rate (Raw %)
Supervised Pretrial Release	612	0.8	62.9
Court OR	9,862	12.4	61.9
Assertive Case Management	1,232	1.6	58.7
Project O.R.	1,622	2.1	27.3
Release on Bail	10,553	13.3	20.6

Note: Release on bail is overwhelmingly represented by Surety bail releases.

Figure 1 - Data from Robert Morris, footnote 25

Third, surety bonds are indemnity contracts for bail, which nearly always involve a third-party who is co-signing the agreement. The U.S. Supreme Court held in 1912 that indemnity contracts were allowed and really had become the evolved meaning of bail, from that of a third-party guarantor directly to the court to an indemnity contract signed with a third-party (bail agent) who guarantees appearance or payment of a forfeiture.[29] Associate Justice Oliver Wendell Holmes, Jr. called the distinction between the constitutional right to bail by a personal surety and by an indemnity contract *mundium*, meaning that the right to bail means the right to have a monetary bail set and meet that bail by use of an indemnity contract, which of course is then heavily regulated by State departments of insurance.

Fourth, licensed bail agents have arrest powers and may return defendants from across state lines and internationally. The burden would otherwise fall on law enforcement, and traditionally law enforcement does not chase misdemeanor defendants and many felony defendants across state lines and certainly not in other nations. Bail agents do, or they have to pay. This is why judges need to seriously ask themselves, if this guy is going to flee, what type of incentive do I need to make sure the bail agent will seek him out and return him to court. Setting meaningless bonds causes the economic incentives to break down.

[27] *Id.*
[28] https://ambailcoalition.org/download/57/buffin-v-san-francisco/5075/morris_expert_report_buffin_july062018.pdf
[29] https://supreme.justia.com/cases/federal/us/224/567/

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Fifth, if too many people are truly in jail, getting rid of monetary bail is not going to fix it, nor is getting rid of bail schedules. For example, San Francisco County is going to eliminate its bail schedule. The problem is the median time to release for those posting bail will go from a 9 hour median to likely 30 hours and release on own recognizance cases could increase from the current 23 hour median up to 30 hours. Instead, the thrust in the bail litigation and in policy discussions should not be to increase the amount of time for anyone, and instead focus should be put on those who are eligible for bail modification or recognizance release to be heard quickly—in other words, reduce the median time for own recognizance release from 23 hours to 9 hours.

VII. California's Senate Bill 10 Was Opposed by Over 50 Civil Rights Groups, Will Cost Billions, and Has Been Put on Hold Until 2020 by a Referendum Effort

I was involved in the California bail reform debate prior to their being a Senate Bill 10 or an A.B. 42. At the time, I asked a simple question to those seeking to end cash bail: what is the position on preventative detention and is there a legislative desire to amend the California constitution as New Jersey did in order to do so. And for several years, the answer was that preventative detention was not to be expanded. Instead, Senate Bill 10 was ultimately amended and became law less than a week later and *created a risk-based system of preventative detention*, which will use the pretrial risk assessment tool to label people as low risk (recognizance bond), medium risk (pretrial supervision and electronic monitoring), and high risk (preventative detention).

In fact, over 50 civil rights groups opposed the passage of the legislation, which included the Civil Rights Corps, ACLU of California, ACLU of Northern California, and the late San Francisco Public Defender Jeff Adachi.[30]

In California, the push for the legislation that ultimately became law came instead from the Service Employees International Union, who, we believe, made the calculation that a regime of statewide pretrial supervision would increase their union rolls by as many as 10,000 additional employees in the form of pretrial services officers and their staffs. None of the original supporters of bail reform, except the Chief Justice, ended up supporting the final language as contained in S.B. 10. A referendum signature drive then occurred, which resulted in Senate Bill 10 having been placed on the November, 2020 ballot.

[30] https://www.sacbee.com/news/politics-government/capitol-alert/article217031860.html

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Twenty-seven prominent academics also issued a specific letter to the California Courts and Los Angeles County, demanding that they not use the risk assessment tools any longer.[31] Both continue to steam forward anyway.

Finally, Senate Bill 10's price tag will be in the billions of dollars, not millions. The House estimate was hundreds and hundreds of millions of dollars in various counties. In addition, the California Supreme Court is going to spend $68 million just to test risk assessments in 10 counties. There are 58 counties, and that would not include the dramatic costs of supervising all of the defendants by the 10,000 new county workers and private providers of drug screening and electronic monitoring. In addition, Senate Bill 10 does not allow the state or local governments to pass along the costs of supervision even if defendants could pay. No defendants will pay for supervision, which means judges, when they cannot choose jail, will hammer defendants with all of the "free" to the system conditions that are available. We can assume, like New Jersey, that 9 out of 10 defendants will get supervised by a county government – the very government prosecuting them.

VIII. New Jersey's System of Risk-Based Preventative Detention—Didn't Save Money, Hasn't Been Proven to Be the Cause of Reducing Jail Populations, Hasn't Made the System More Fair, Didn't Reduce Racial Disparities and Has Cost Millions to the State and Local Governments Since Implementation in 2017

Other than a continued (and now slowing) decline in jail population, the results in New Jersey are not good. The New Jersey Courts recent report,[32] while inadequate in many respects, does show that the system is not some magic bullet and there is no indication whatsoever that it was worth the huge price tag, estimated to be around $250 million so far.

First, it is important to understand that the State increased the use of a summons instead of an arrest to 71% of all cases in 2018, up from 54% in 2014. In other words, in 17% of total criminal cases there was not an arrest in 2018, where there would have been an arrest in 2014. That represents 22,951 people that were not arrested in 2018 that would have been in 2014. If any gains have been made, then this is most certainly the only reason that it could possibly have had an impact. Yet, this has nothing to do with "cash bail." This is a change in arrest procedures. More importantly, this could have been done for free, and no constitutional amendment was required.

Second, by all measures, the new system performs worse than the old money bail system being run in the State in 2014. The rate of failing to appear in Court increased by

[31] https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4976/california-researchers-rat-warning.pdf
[32] https://www.njcourts.gov/courts/criminal/reform.html

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45.21%. The rate of disorderly conduct offenses being committed while on bail increased by 14.78%. New indictable offenses while on pretrial release: a 7.87% increase.

NJ Bail Reform Success Measure	2014 (Secured Bail System)	2018 (NJ Bail Reform)	% Change
New Indictable (Felony) Offense While On Pretrial Release	12.7%	13.7%	7.87%
New Disorderly Persons Offenses While On Release	11.5%	13.2%	14.78%
FAILURE TO APPEAR RATE	7.3%	10.6%	45.21%
Complaint-Summons Issued	54%	71%	31.48%
Speedy Trial--Cases Resolved In Less Than 22 months	80.4%	78.2%	-2.74% *Decrease*
Black Defendants As % Of Pretrial Population	54%	54%	No Change

Third, let us not forget that the bail reform act was called the "New Jersey Bail Reform and Speedy Trial Reform Act." Except, according to the Courts, the cases are now less speedy than before according to what they perceive to be an important measure. The number of cases resolved in less than 22 months dropped to 78.2% in 2018 from 80.4% in 2014. In other words, the new system was slower than the old system.

Fourth, the jail population decrease is pointed to as another success of bail reform. Except the pretrial jail population had been dropping by greater percentages than it did in 2018. There are many causes for this general drop in New Jersey's jail population as we have previously noted. For example, the pretrial jail population dropped by 20.7% in 2016 as compared to 2015. 2016 was the last calendar year prior to the enactment of bail reform on January 1, 2017. The pretrial jail population in 2018 declined by only 13% as compared to 2017.

Fifth, the package was supposed to reduce racial disparities in the system. The pretrial jail population was comprised of 54% black defendants in 2014. It is still comprised of 54% black defendants in 2018. While the report does note that the times in jail have fallen in some categories, the reality is still that black defendants face anywhere between 172% and 182% greater time in jail than their white counterparts in terms of getting released after arrest or

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until their cases resolve. The report recommends only one solution to this unfortunate quagmire: "The overrepresentation of black males in the pretrial jail population remains an area in need of further examination by New Jersey's criminal justice system as a whole." Sounds like business as usual to us.

Despite being able to break out many of the statistics to investigate racial disparities, no effort was made to provide any descriptive statistics as to the racial break-out of those for whom preventative detention is sought or achieved. In addition, there is no outcome data on what happens in the 22% of cases where detention is sought then the motion is dismissed at the request of a prosecutor or judge. We believe a large percentage of those are persons who are pleading guilty at a higher rate due to the threat of preventative detention.

Sixth, no effort was made to test the Arnold Foundation PSA risk assessment algorithm for racial bias, despite having ready and voluminous electronic data in order to do so. Clearly it did not reduce the overall racial disparities in the system. The question, however, did the recommendations of the PSA label more black defendants as dangerous than their white or Hispanic counterparts? No answer.

Seventh, the ACLU of New Jersey kept banging the drum at the time of the reform efforts that "liberty is the norm" in order to get these reforms passed. Liberty is no longer the norm: of those defendants released, 90.9% of them will be supervised by a pretrial services agency – stripping defendants of their basic civil liberties with a dragnet of state funded electronic monitoring devices, drug testing, and other onerous probational type requirements. Of course, the results show that the supervision doesn't work—failure to appears are up as are new crimes while on release.

Lastly, the report notes most importantly one key fact and omits one other key fact. Noted is the fact that the program is out of money. Not noted is what the total cost has been to New Jersey—at the State and local level.

The funding stream for CJR was suspect from the beginning and on a collision course with fiscal reality. Raising and banking court filing fees, according to the Courts, covered $171.2 million of the unknown, unexplained total state costs of the system and in addition to some unknown amount of local costs. The jail savings would be so great, according to reformers, that we could save our way out of the costs. These savings have not materialized, and according to John Donnadio, executive director of the New Jersey Association of Counties in a February, 2018 interview, while the pretrial jail population has dropped, "that hasn't translated to cost savings as of yet."

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So, is the system more fair? It is posited that there are fewer poor people in jail? How would we prove that? Is it that more rich people are getting summons to court rather than poor people? The report notes that the improvements sort of speak for themselves and because money bail was taken out of the system, then therefore we pronounce the new system automatically more just and fair than the old one. We have to ask, based on what?

IX. Federal "No Money Bail" Legislation Currently Being Proposed Is Contrary to Principles of Federalism, Would Require A Majority of States to Change Their State Constitutions, and Is Likely to Be Entirely Ignorned

States collect hundreds of millions of dollars from forfeited cash bails that occur when a defendant either fails to show up in court or when a defendant pleads guilty. When persons fail to appear both surety and cash bonds are forfeited. When a defendant, or in many case a third party, posts their own cash, they will lose it when they plead or are found guilty with such funds being directed to fines, fees, restitution and various surcharges. Threatening to pull Byrne JAG grants unless states stop these practices will leave a tremendous budgetary hole. For that reason, forecast only New Jersey will comply (because they nearly already have). Other states will simply decline to take the grants and keep the bail revenue flowing.

Further, implementing the no-money bail system will force states to implement expanded preventative detention policies to mimick the federal system, which will require the vast majority of states to change their state constitutions to eliminate the right to bail, which for centuries has meant money or something worth a certain amount of money. These are called "sufficient sureties" clauses, all of which would have to be repealed.

Finally, the federal government shoud not get into the business of telling states how to run their criminal justice policies, including trying to coerce them to adopt the failed federal no money bail system. States should be free to define for themselves, within the bounds of state and federal constitutional law, what their bail systems are going to look like.

X. The No-Money Bail Movement Relies on False Talking Points

You are going to hear that some huge percentage of people are in jail simply because they cannot afford bail. These talking points are false. First, the police have arrested those persons for criminal acts, which is why they are there. Second, the vast majority of persons in jail pending trial are being held on non-monetary holds. Third, judges are looking at the criminal history and history of failing to appear in court of such persons, which is why they are setting bail at particular amounts in order to require security in instances when a person is a fight risk or danger. When the criminal history of those who remain in jail is presented, the

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persons are not the innocent first time low level defendant that the other side wants to portray.

XI. Conclusion

The third-generation of bail reform is going to fail for the precise same reason the second generation of bail reform failed: because people don't want to base restrictions of liberty on what you might do in the future based on a computer and they don't want to give the government expanded powers to detain people. Neither will reduce generational mass incarceration or do anything to make the system work better or be fairer. Instead, it's time to embrace the Fourth Generation of Bail Reform.[33]

Respectfully submitted,

DocuSigned by:
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[33] https://ambailcoalition.org/the-future-of-bail/

DETENTION, RELEASE FROM JAIL, AND COMPUTERIZED BAIL JUSTICE IN CALIFORNIA:

Is it 1984 All Over Again? What Can California Learn From the Last 30 Years of Bail Reform?

Jeffrey J. Clayton, Esq.*

TABLE OF CONTENTS

INTRODUCTION 28
I. REFORMED JURISDICTIONS (FEDERAL, KENTUCKY, AND NEW JERSEY), AND THE CALIFORNIA REFORM PLANS THAT USE THEM AS A MODEL ... 28
II. CHANGING CALIFORNIA'S CONSTITUTION TO EXPAND PREVENTATIVE DETENTION—FROM UNCONSTITUTIONAL AND INEFFECTIVE POLICY TO A NOW DESIRABLE GENERAL CRIME CONTROL POLICY 33
III. REFORMING THE BAIL AND CRIMINAL JUSTICE SYSTEM BY USING COMPUTERS TO PREDICT RISK AND RECOMMEND OUTCOMES—CRITICISMS AND SAFEGUARDS 39
A. *Legal Issues—Pretrial Risk Assessments* 40
B. *Questions Regarding Proprietary and Black-Box Algorithms* 42
C. *Potential for Discrimination* 46
D. *Separation of Powers* 48
IV. DO RISK-BASED SYSTEMS WORK BETTER THAN FINANCIAL BAIL? ASSESSING THE COSTS AND GOALS OF BAIL REFORM 52
A. *New Jersey* 52
B. *Washington, D.C.* 54
C. *Kentucky* 55
D. *New Mexico* 56
E. *California* 57
CONCLUSION 58

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Introduction

As California and other states consider reforming the process of detention and release from jail, it is worth looking back on the last thirty years of bail reform, including what one commentator has called "the third generation of bail reform."[1] The third generation of bail reform is not beginning, however. We are squarely in it. And, as this Article hopes to make clear, the arguments upon which the third generation of bail reform are premised, suffer from the same infirmities as previous generations of bail reform. The goal of reform is to reduce jail populations while simultaneously reducing failures to appear in court and arrests for new crimes while on bail. Proposed reforms seem unlikely to achieve those goals without significant costs.

The current bail reform movement principally relies on computerized risk algorithms that purport to predict human behavior. Those algorithms, however, raise serious questions about the efficacy of the systems that rely upon them and ultimately how they affect the rights of defendants, including questions of protected-class discrimination. Civil libertarians ought to be concerned that bail reform will use computers to sort persons into rights-trammeling categories, with the higher the computer risk score, the more the trammeling. Bail is the right of a presumptively innocent person to be free from jail pending trial, not the right to be labeled as risky and therefore subjected to intrusive conditions assigned by what purports to be an evidence-based, scientific computer algorithm, but in the end is merely based on value-based judgments often hidden and insulated from public view.

I. Reformed Jurisdictions (Federal, Kentucky, and New Jersey), and the California Reform Plans That Use Them as a Model

Proponents of bail reform tend to advocate for a no-money bail system where an accused is detained based on risk and released based on the absence of risk. Thus, a risk assessment is used to determine whether the accused, if released, is likely to commit a new crime (including witness intimidation) and is likely to appear in court. Preventative detention (along with other holds as permitted by law, *e.g.*, probation holds, parole holds, etc.) would serve as the only mechanism to keep an accused in jail pretrial. Today, if a defendant cannot secure release from jail by posting the applicable bail bond, the defendant remains in jail awaiting trial.[2] Assessing whether an accused is or is not "risky" is obviously not

1. Timothy R. Schnacke et al., *The Third Generation of Bail Reform*, DLR Online (Mar. 14, 2011), http://www.denverlawreview.org/dlr-onlinearticle/2011/3/14/the-third-generation-of-bail-reform.html [https://perma.cc/35A8-U9VG].

2. This is a key legal question in the bail reform debate and is the subject of a series of lawsuits. Advocates for bail reform argue that a defendant who does not post bail ought to be presumed to be unable to "afford" bail. Therefore, imposing financial conditions of bail impermissibly discriminates against indigent defendants in violation of the equal protection clause. Four judges have applied three levels of review under the Equal Protection Clause analysis—rational basis,

a question of science, although that is precisely what is being proposed: using big data to predict human behavior. One official in New Jersey even described such a system as being no different than an application on a smart phone.

In federal court, financial conditions of release are rarely used and bail bond agents seldom post bonds for defendants.[3] Although financial conditions were widely used in the federal bail system prior to the Bail Reform Act of 1984, the act expanded the power of preventative detention and applied a rebuttable presumption of detention for certain offenses (primarily violent crimes and felony drug offenses).[4] The government must therefore prove, by clear-and-convincing evidence, that the defendant poses a risk of flight or is a danger to the community and that no conditions of bail are sufficient to protect the community from such risk.[5] In order to meet this standard, the federal system utilizes local

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intermediate scrutiny, and strict scrutiny. Two such cases are currently pending before the United States Court of Appeals for the Fifth and Eleventh Circuits (*O'Donnell v. Harris County, Texas* and *Walker v. Calhoun, Georgia*), and two more are working their way up to the United States Court of Appeals for the Ninth Circuit. The counterargument is that the excessive bail prohibition of the Eighth Amendment governs the constitutionality of bail when a defendant does not post bond. Thus, the mere fact that a bail is not posted, does not automatically render it excessive. In California, the simple inability to procure a bail bond has never been the dispositive factor. As the California Supreme Court noted in 1879:

> The able counsel for the prisoner, who has exhausted every means that ingenuity and learning could suggest for the relief of his client, argues that the mere fact that the prisoner is unable to procure the bail demanded of him shows that it is excessive in amount, and should therefore be reduced. But I am unable to assent to that proposition. Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance.

Ex Parte Duncan, 54 Cal. 75, 77–78 (Cal. 1879).

3. The federal system does not generally require a secured bond, meaning when financial conditions of bail are imposed they are typically an unsecured promise to forfeit a certain amount of money (which, incidentally, does not serve to detain since defendants simply sign it). *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE U.S. ATT'YS, RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS (18 U.S.C. 3141 ET SEQ.), https://www.justice.gov/usam/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et [https://perma.cc/JTT4-VEH5] (last visited Apr. 18, 2018). In state courts, a release without a requirement to post financial security is often known as a "recognizance bond" or a "signature bond."]
4. 18 U.S.C. § 3142 (2008).
5. According to the U.S. Attorneys' Manual, "[i]n a pretrial detention hearing, the government's burden is to establish by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community . . . . The

pretrial services programs, which are part of the federal court system and rely on pretrial service officers to investigate the criminal histories of defendants awaiting trial, interview such defendants, gather and verify information concerning the defendants, and ultimately issue a report and recommendation to the judicial officer setting bail.[6] Pretrial service officers will also supervise defendants if they are released pretrial to ensure compliance with any conditions imposed, including house arrest, GPS monitoring, maintaining employment, and regular drug testing.

Although Kentucky is not a no-money bail state, the state has made numerous efforts to take money out of the bail and the system it now uses is widely viewed as evidence that a no-money bail system can work.[7] As such, it has served as model for California Senate Bill 10,[8] which is currently pending before the California legislature. Kentucky has come to serve as an example for the bail reform movement in part because there are no private bail agents in Kentucky.[9] Rather, bail is posted in cash and there are no surety bail agents who bring defendants to court either within Kentucky or from foreign jurisdictions.[10] Kentucky utilizes a statewide pretrial services program that administers a risk assessment tool and supervises defendants. Specifically, Kentucky uses the Public Safety Assessment risk assessment tool created by the Laura and John Arnold Foundation[11] to assess the risk of defendants for purposes of bail.

In 2014, voters in New Jersey amended the state's constitution to change its bail system to model the federal system. This change makes all persons eligible for pretrial release "with or without posting bail, depending upon the decision of the court."[12] While it is not clear that the

issue in such a hearing is whether releasing a defendant would pose a danger to the community that would not exist were [the defendant] detained." U.S. DEP'T OF JUSTICE, OFFICE OF THE U.S. ATT'YS, *supra* note 3 (citation omitted).

6. *Id.*
7. *See* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, MARSHALL PROJECT (Nov. 12, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail [https://perma.cc/7XY2-YZY4].
8. *To Fix "Unfair" Bail System, Will California Copy Kentucky?*, L.A. DAILY NEWS (Aug. 13, 2017, 4:00 PM, updated Aug. 28, 2017, 5:37 AM), https://www.dailynews.com/2017/08/13/to-fix-unfair-bail-system-will-california-copy-kentucky [https://perma.cc/MVC6-JHJK].
9. *Frequently Asked Questions*, KY. CT. JUSTICE, https://courts.ky.gov/courtprograms/pretrialservices/Pages/FAQs.aspx [https://perma.cc/7FRA-KAC3] (last visited Feb. 12, 2018).
10. *Pretrial Services*, KY. CT. JUSTICE, https://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx [perma.cc/W5PE-JH3L] (last visited Mar. 10, 2018).
11. *Public Safety Assessment: Risk Factors and Formula*, LAURA AND JOHN ARNOLD FOUNDATION, http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/7VGA-JW36] (last visited Apr. 18, 2018).
12. *New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, BALLOTPEDIA, https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014) [https://perma.cc/CZ2U-6ZGK] (last

legislative proposal intended to eliminate all financial conditions of bail[13] that was the result.[14] New Jersey has now implemented a version of the federal system, where preventative detention functions as the only barrier to release from jail. Accordingly, bail has essentially been put behind the emergency glass like a fire alarm that is only to be used as a last resort.[15] New Jersey is also using the Public Safety Assessment tool to assess risk and to recommend detention or release.[16]

Building on these reforms, in October 2017, the California Pretrial Detention Reform Workgroup of the California Judicial Council issued

visited Feb. 12, 2018).

13. The constitutional amendment allows a court to deny pretrial release "if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's 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." *Id.* That language contemplates that judges would have the option to impose financial conditions of release when making bail decisions. The decision to implement the federal system in favor of general elimination of financial conditions of bail and bail agents was based on a combination of the Public Safety Assessment tool, court rules, and Attorney General directives, all of which have restricted judicial discretion. There is pending legislation, however, that would restore discretion to set bail. That bill authorizes judges to preventatively detain defendants in accordance with the constitutional amendment, but authorizes judges to impose "any combination of monetary bail and non-monetary conditions" that would achieve the purpose of bail when preventative detention is not imposed. Restoring Judicial Discretion in Bail Setting Act, A. 2806, 218th Leg. (N.J. 2018). The New Jersey Association of Counties opposed the constitutional amendment because it anticipated that counties would bear a large increase in the cost of supervising all of the defendants blanketed with conditions by judges who were obliged to release defendants if they did not impose preventative detention. The Chris Christie Administration dodged the objection by persuading a political court called the Council on Unfunded Mandates to reject the Association's claim that bail reform constituted an unfunded mandate, concluding that there was no proof that bail reform would cause significant financial hardship to counties. *See* Maddie Hanna, *N.J. Rethinks Bail—Who Gets Out, Who Stays Jailed*, THE INQUIRER (Jan. 1, 2017, 11:59 PM), http://www.philly.com/philly/news/local/20170101_N_J__rethinks_bail_-_who_gets_out__who_stays_jailed.html [https://perma.cc/2L5H-NANF]. Accordingly, local governments must bear the costs of supervision, which as of this writing are still unfunded but somehow constitutionally required.

14. *See* Joe Hernandez, *It's Been One Year since New Jersey Ditched Cash Bail. Here's How It's Going*, WHYY (Dec. 26, 2017), https://whyy.org/segments/one-year-since-n-j-ditched-cash-bail-heres-going [https://perma.cc/6HD3-NG76].

15. *See* Reply Brief in Support of Motion for Preliminary Injunction at 11, Holland v. Rosen, No. 1:17-cv-04317-JBS-KMW (D.N.J. Aug. 7, 2017) ("The New Jersey system alone puts bail behind the break-only-in-an-emergency glass and categorically denies bail whenever other options—including serious pretrial deprivations like ankle bracelets—are feasible.").

16. Ephrat Livni, *In the US, Some Criminal Court Judges Now Use Algorithms to Guide Decisions on Bail*, QUARTZ (Feb. 28, 2017), https://qz.com/920196/criminal-court-judges-in-new-jersey-now-use-algorithms-to-guide-decisions-on-bail [https://perma.cc/N6VG-LN6D].

recommendations to the Chief Justice.[17] The Workgroup did not hide the fact that it was recommending a move toward the federal and New Jersey systems. In fact, the report recommended that California "implement a robust risk-based pretrial assessment and supervision system to *replace the current monetary bail system*."[18] Of course, that recommendation anticipated an expansion of preventative detention, which the report notes in the second recommendation.[19]

The report does stop short of calling for a change to the California Constitution. It attempts to skirt the issue by arguing that California allows for consideration of public safety in the setting of bail[20] and therefore the California Constitution would not need to be changed in order to implement a no-money bail system. That analysis is difficult to square with the language of the California Constitution, which provides that persons "shall be released on bail by sufficient sureties," subject to certain exceptions including:

- capital offenses;
- violent felonies and felony sexual assaults if "the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others"; and
- other felonies when "the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released."[21]

Even when an exception potentially applies, release may be denied only when "the facts are evident or the presumption great."[22] In contrast to the requirement that defendants "shall be released on bail by sufficient sureties" unless an exception applies, the California Constitution also provides that a defendant "may be released on his or her own recognizance in the court's discretion."[23]

It is difficult to see how a no-money bail system that makes release contingent on risk rather than the severity of the charged crime would be consistent with the state's constitutional directive that, except in limited instances, defendants "shall be released on bail by sufficient sureties." When comparing California's constitution to New Jersey's, it seems apparent that to truly implement the no-money bail system recommended

17. Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (2017), http://www.courts.ca.gov/documents/PDRReport-20171023.pdf [https://perma.cc/L7TM-VGV8].
18. *Id.* at 2 (emphasis added).
19. *Id.*
20. *Id.* at 20.
21. Cal. Const. art. I, § 12.
22. *Id.*
23. *Id.* Excessive bail is also prohibited. Bail decisions must take into account the seriousness of the charged crime, the defendant's criminal record, and the risk of the defendant's nonappearance for future proceedings. *Id.*

by the Workgroup, California would need to amend its constitution by adopting language similar to New Jersey's constitutional amendment.[24]

California Senate Bill 10, sponsored by Senator Robert Hertzberg and Assemblyman Rob Bonta, is another proposal to reform California's bail system. Senate Bill 10, unlike the Workgroup report, does not call for expanded preventative detention although it does include many features of a risk-based system, such as imposing a risk assessment for all but violent felonies, creating a pretrial services program in each of California's fifty-eight counties, and generally allowing release without financial bail conditions for all felonies and misdemeanors except for specified crimes.[25] Importantly, judges would be given wide latitude to impose nonmonetary conditions of bail, which could include supervision, rides to court, drug screening, GPS monitoring, and house arrest, all of which would be paid either by the defendant or a county program in the event that a defendant could not afford them.

II. Changing California's Constitution to Expand Preventative Detention—From Unconstitutional and Ineffective Policy to a Now Desirable General Crime Control Policy

Bail reformers, who are advocating for a shift to the federal bail system, often quote *United States v. Salerno* for the proposition that in our country "liberty is the norm" and detention the carefully limited exception.[26] Every time I hear a call for states to go the federal bail system

24. New Jersey originally allowed detention without bail only in capital cases if the proof was evident or the presumption great. That language was deleted from the constitution and replaced with language stating that the pretrial release of a person may be denied where "no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's 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." A. Con. Res. 2806, 218th Leg. (N.J. 2018).

25. The specified crimes include serious felonies, violent felonies, felony witness intimidation, spousal rape, domestic violence, stalking, violation of protective orders, or any felony allegedly committed while the person was on pretrial release for a separate offense. *See Assembly Comm. on Public Safety*, S.B. 10, 2017–2018 Leg., (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB10# [https://perma.cc/KCF9-XASF].

26. United States v. Salerno, 481 U.S. 739, 755 (1987). The majority in *Salerno* rather dismissively determined that the Eighth Amendment prohibition against excessive bail does not prohibit preventative detention because the Amendment "says nothing about whether bail shall be available at all." *Id.* at 752. Justice Marshall's dissenting opinion castigated the majority's reasoning:

> If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether . . . . It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk

and have this quote spewed at me yet again, I cringe knowing how wrong Justice Rehnquist turned out to be.

Preventative detention—the detention of a defendant who is considered a flight risk or danger to the community—was not generally thought to be constitutional in this country prior to 1970,[27] when the District of Columbia first began implementing a no-money bail system.[28] In fact, various civil liberties groups opposed the 1984 federal Bail Reform Act provisions regarding preventative detention and claimed in *Salerno* that preventative detention was inconsistent with the federal constitution.[29] Chief Justice Rehnquist, writing for the majority, held that the government could detain a criminal defendant without setting bail—in this case, the under-boss and speculated "front boss" Anthony "Fat Tony" Salerno of the Genovese crime family[30]—if the government proved by clear and convincing evidence that the defendant posed a danger or flight risk,[31] subject to the other procedural and substantive protections contained in the act.[32]

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of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."

Id. at 760–61 (Marshall, J., dissenting).

27. *See generally*, Timothy Schnacke et al., The History of Bail and Pretrial Release (Sept. 24, 2010), https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf [https://perma.cc/LD37-XYSD] (discussing history of bail and preventative detention).

28. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 473 (1970).

29. *Amici* briefs were in fact filed by the ACLU, American Bar Association, and National Association of Criminal Defense Lawyers, among others, in support of Salerno. *See* United States v. Salerno, ProCon.org (Dec. 30, 2009, 8:33 AM), https://aclu.procon.org/view.resource.php?resourceID=002489 [https://perma.cc/H7TT-24E8] (listing amici).

30. *Anthony Salerno*, Wikipedia, *https://en.wikipedia.org/wiki/Anthony_Salerno* [https://perma.cc/X3FX-BBXQ] (last visited Feb. 13, 2018).

31. United States v. Salerno, 481 U.S. 739 (1987). Interestingly, in a paper published for the Federal Judicial Center on the Bail Reform Act of 1984, David N. Adair, Jr. suggests that the standard for preventative detention for dangerousness is clear and convincing evidence, but that since the U.S. Code is silent on the standard for risk of flight cases, the burden of proof is only a preponderance of the evidence in-flight only cases, and cites a number of cases for that proposition. David N. Adair, Jr., The Bail Reform Act of 1984 8 (3d ed. 2006), https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf [https://perma.cc/4FS4-9FY3].

32. United States v. Salerno, 481 U.S. 739, 755 (1987). The safeguards include the following: (1) detention is limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing with stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) a "fullblown adversary hearing," which required the government to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a right to counsel and could testify or present information and cross-examine witnesses at the hearing; (6) judges were guided by statutorily

The arguments for preventative detention are quite simple. It begins with the assumption that we can scientifically sort people into two categories—risky and not as risky—and then detain the risky while releasing the not as risky on conditions of bail. Many a reformer has said that the goal is to keep the right people in jail.[33] Rich gangsters, like "Fat Tony" Salerno, will always be able to post bail, so financial conditions of bail inherently discriminate on the basis of wealth. By basing detention decisions on risk however, the judicial system can reduce crime because judges will detain the dangerous offenders, who might otherwise be released due to their ability to pail bail. Other commentators argue that it is intellectually dishonest to impose de facto preventative detention by setting higher bail than an offender can reasonably be expected to post. Preventative detention is also seen as more fair to the indigent because their inability to post financial bonds will not serve as grounds for detention (although typically bail is a third-party provided benefit, and the indigent, like their rich counterparts, will still face aggressive preventative detention policies based on risk assessments). Well-intentioned challengers of state overreaches, like charitable bail funds or other community groups, would be powerless to take responsibility as the jailer of choice for the defendant.[34] Of course, proponents of bail reform also argue that ending money bail is necessary to end mass incarceration in the United States,[35] generally without acknowledging that pretrial detention of federal defendants increased after Congress passed the Bail Reform Act.[36]

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enumerated factors; (7) judges were to include written findings of fact and a statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review. *See* TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACITITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 29 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf [https://perma.cc/5K7H-MCSL].

33. *Editorial: Keeping the Right People in Jail*, BULLETIN (June 6, 2014, 12:01 AM), http://www.bendbulletin.com/home/2136314-151/editorial-keeping-the-right-people-in-jail [https://perma.cc/2PW7-FY3W].

34. The U.S. Supreme Court defines release on a bail bond as being released to the custody of the surety, which in the modern day can be a third-party or a private bail agent. Of course, this has to be a choice by both the defendant and the surety, and in that way it has been said to be the right to select the jailer of one's choice. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment." Taylor v. Taintor, 83 U.S. 366, 371 (1872).

35. *See e.g.*, Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/mass-incarceration/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail [https://perma.cc/BP6J-7PBN].

36. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984 1 (1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf [https://perma.cc/2AQ5-MHVK] ("The percent of Federal defendants held for the entire time prior to trial, either on pretrial detention or for failure to make bail, increased from 24% before the Act to 29% after the Act."). Rates of detention escalated dramatically in the years that followed.

The arguments against preventative detention are well articulated in a pre–*Salerno* article, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*.[37] The article notes that even with the most vigorous due process and risk assessment instruments available, the rate of false positives range from forty to fifty percent in one study to as high as 88 percent in another.[38] A false positive occurs when a prediction of dangerousness results in detention, when in fact, the person would not have committed a new crime if released. In addition, from a resources perspective, preventative detention hearings are expensive because they require proof by clear and convincing evidence and trigger a litany of safeguards. Finally, those who oppose the expansion of preventative detention typically argue that we cannot predict risk with sufficient certainty to be sure that we are detaining the right people. In his dissent in *Salerno*, Justice Blackmun argued that even our most highly trained professionals cannot predict risk. This squared with the position of the American Psychiatric Association that even psychiatrists are unable to make accurate predictions of long-term future criminality.[39]

Justice Thurgood Marshall's dissent in *Salerno* makes the argument that preventative detention erodes civil rights and is inconsistent with American constitutional tradition:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.[40]

Justice Marshall predicted the future as he concluded his dissent:

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day,

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See note 45 *infra* and accompanying text.

37. Scott D. Himsell, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986).

38. *Id.* at 455 n.127.

39. *See* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) ("The American Psychiatric Association (APA), participating in this case as *amicus curiae,* informs us that '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.' . . . The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong.").

40. United States v. Salerno, 481 U.S. 739, 755–756 (1986) (Marshall, J., dissenting).

> the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.
>
> Throughout the world today, there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. *Theirs is truly a decision which will go forth without authority, and come back without respect.*[41]

Justice Marshall's forecast has come true. Governments have abused and misapplied the power of preventative detention since they obtained it.[42] Denying individuals a right to bail is now a central cause of mass incarceration in the federal system.

In 1983, prior to the passage of the Bail Reform Act, the federal government detained 24 percent of persons prior to trial, primarily because they were unable to post bail.[43] Only about two percent of defendants were held without bail.[44] Justice Marshall's prediction came true. A 2015 study determined that 72.7 percent of all defendants in the federal system were detained prior to trial.[45] This represents a 303 percent increase in the rate of preventative detention since the Bail Reform Act went into effect.

It should be pointed out, however that the rate of preventative detention is extremely variable, depending upon the jurisdiction. Federal Public Defender Jeffrey A. Aaron, who published an article in the *San Francisco Daily*, which is not available online and cannot be

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41. *Id.* at 767 (emphasis added).
42. Pretrial incarceration is not the only example of preventative detention based on predictions of future misconduct. Many states have enacted laws that detain sex offenders for indefinite periods after they complete their sentences based on predictions that the offenders will be unable to control their criminal impulses and will thus commit new sex crimes if released. The Supreme Court has rejected constitutional challenges to such laws. *See e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding Kansas' Sexually Violent Predator Act); Kansas v. Crane, 534 U.S. 407 (2002) (indefinite detention permitted even if lack of self-control results from personality or emotional disorder rather than volitional impairment).
43. U.S. DEP'T OF JUSTICE, *supra* note 36, at 1.
44. *Id.*
45. *Table H-14: U.S. District Courts—Pretrial Services Release and Detention for the 12-Month Period Ending September 30, 2015*, U.S. COURTS 1 (2015), http://www.uscourts.gov/sites/default/files/data_tables/H14Sep15.pdf [https://perma.cc/HGE8-GEPA]. The percentage of defendants detained varies significantly by Circuit. The Ninth Circuit had the highest rate of detention, at 85.5 percent, while the Third Circuit had the lowest rate of detention, at 46.7 percent. *Id.*

redistributed,[46] has noted that the preventative detention statistics are available on the U.S. Courts' webpage. He notes that the disparities in detention rates are highly variable and not easily explainable. He gives the District of New Jersey as one example, with 36 percent detained, and compares that detention rate to Maine (63.2 percent), Delaware (65 percent) and Arizona (95.1 percent).

New Jersey's experiment with preventative detention appears to be trending in a similar direction as the federal experiment. While statistics prior to the law's passage are not readily available, the latest statistics on preventative detention indicate that prosecutors are filing detention motions in 43.67 percent of cases, and are succeeding a little less than half of the time with approximately 18 percent of all defendants detained.[47] Of course, if no resources are provided for preventative detention, then judges will be less likely to order it. This has been the case in New Mexico's Bernalillo County, where detention motions are filed in less than fifteen percent of eligible felony cases and detention is obtained in less than five percent of cases.[48] The New Jersey data also shows that the trend in jail population reductions has slowed slightly under bail reform. In 2016, the year before bail reform was implemented, the non-sentenced pretrial jail population declined by 20.68 percent, while in 2017, the first full year of bail reform, the non-sentenced pretrial population declined by 19.5 percent.[49]

Upon further review, in the no-money bail system, *detention becomes the norm*, or at least may threaten to become the norm. The collective distaste for the constitutional right to bail by sufficient financial sureties, combined with collective fear that presumptively innocent defendants will commit crimes if released, has convinced the public that the problem of mass incarceration can be solved by giving the government the power to detain with no bail. The decision to implement a risk-based preventative detention system in the federal system is one that, in the words of Justice Marshall, came forth "without authority" and will go back "without respect."[50] It is not clear that the results would be any different in California, although success would certainly depend on funding, which has proven to be quite expensive.

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46. Jeffrey Aaron, *Do As DOJ Says, Not As It Does*, San Francisco Daily J. (2017) (on-file with the author).
47. *Criminal Justice Reform Data*, N.J. Courts 1 (2018), https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf [https://perma.cc/2G8K-GXX6].
48. Susan Montoya Bryan, *New Mexico District Attorneys Push for Changes to Bail Rules*, Las Cruces Sun News (Sept. 28, 2017, 4:42 PM, updated Sept. 29, 2017, 10:29 AM), http://www.lcsun-news.com/story/news/local/new-mexico/2017/09/28/new-mexico-district-attorneys-push-changes-bail-rules/714831001 [https://perma.cc/3NNS-RYDF].
49. *Criminal Justice Reform Data*, *supra* note 47, at 5.
50. United States v. Salerno, 481 U.S. 739, 767 (1986) (Marshall, J., dissenting).

III. Reforming the Bail and Criminal Justice System by Using Computers to Predict Risk and Recommend Outcomes—Criticisms and Safeguards

The central component underlying the proposed reforms discussed above is utilizing computer science to perform risk assessment. For more than a generation, courts, practitioners, and others have rejected the accuracy of these dangerously unreliable predictions. For example, research has shown that, "[t]he accuracy with which clinical judgment predicts future events is often little better than random chance. The accumulated research literature indicates that errors in predicting dangerousness range from 54% to 94%, averaging about 80%."[51] The U.S. Supreme Court has also appeared to endorse the view of the American Psychiatric Association that, "predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts."[52]

Risk assessment legislation is currently underway in several states.[53] Senate Bill 10 in California is one example of such legislation. This follows proposed legislation and court rules newly implemented in as many as fifteen states over the last twelve months. The most popular risk assessment—the Public Safety Assessment (PSA)—developed by the Laura and John Arnold Foundation, is now used in as many as thirty-eight jurisdictions, including three states (New Jersey, Kentucky, and Arizona).[54] And most bail reform legislation at both the state and local level either requires the use of risk assessments prior to setting bail, or at a minimum encourages and permits the use of such assessments by adding it to the existing statutory factors for setting bail.

This Part examines several key issues that have been raised regarding the use of risk assessments including: (a) legal issues, (b) questions of

51. Terence W. Campbell, *Challenging Psychologists and Psychiatrists as Expert Witnesses*, 73 MICH. B.J. 68, 68 (1994).

52. Estelle v. Smith, 451 U.S. 454, 472 (1981).

53. *See, e.g.*, S.B. 1490, 2018 Reg. Session (Fla. 2018) (the amended version from February 6, 2018 https://www.flsenate.gov/Session/Bill/2018/1490/Amendment/648186/HTML, that legislation created a presumption against secured bail and implemented a risk assessment regime. From the legislative declaration. "The Legislature finds that the use of actuarial instruments that evaluate criminogenic based needs and classify defendants according to levels of risk provides a more consistent and accurate assessment of a defendant's risk of noncompliance while on pretrial release pending trial."); H.B. 439, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (Ohio H.B. 439 would have required the Ohio Sentencing Commission to approve and issue a list of validated risk instruments for use in the pretrial context within 90 days of the legislation becoming law).

54. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 137 (2018); *See also Pretrial Justice*, LAURA AND JOHN ARNOLD FOUNDATION, http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice [https://perma.cc/HEJ8-Z949] (last visited Apr. 19, 2018) (noting that [o]ver 40 jurisdictions have either adopted the PSA or are engaged in implementation).

transparency and black-box algorithms, (c) potential for discrimination, (d) separation of powers issues, and (e) ethical and moral questions.

A. *Legal Issues—Pretrial Risk Assessments*

One of the motivations underlying bail reform is that a criminal defendant's presumption of innocence, which has no direct application at the pretrial phase of a criminal case,[55] is lost when a criminal defendant is required to post money bail. Yet, risk assessments in practice must be more antithetical to the presumption of innocence than bail.[56] Risk assessments classify people based on what they have done in the past and are not based on what they are accused of doing in a present action. In fact, many risk assessments do not consider the current charge in making the assessment. Although critics claim that a bail schedule based on the charge is fundamentally unfair, in reality, judges typically assign higher bail, more liberty-restricting conditions, and—in the case of the federal government and Washington, D.C.—preventative detention on the basis of two unrelated factors: the defendant's age and how many prior convictions or breaches of bail conditions they have in their past.[57]

The National Legal Aid and Defender Association (NLADA) has noted several key legal issues with the use of risk assessments.[58] First, are safeguards against self-incrimination.[59] Because many risk assessments

55. Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.") (citation omitted). This is a relatively recent understanding of the presumption of innocence. "At common law, the presumption of innocence had a wider meaning. It also protected defendants during the time between charge and conviction, ensuring that most individuals would remain at liberty prior to trial . . . ." RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 48 n.4 (2015).

56. "Moreover, the threat of an unwarranted restraint on an individual's liberty is at its greatest where the decision being made is predictive in nature. To deprive an individual of his freedom on the basis of speculation about his future conduct is contrary to the presumption of innocence that 'lies at the foundation' of our judicial system. Such decision making is also peculiarly subject to abuse and threatens to undermine the respect and confidence of the community in the uniform application of the criminal law. Van Atta v. Scott, 613 P.2d 210, 218 (1980) (citation omitted).

57. *See supra* note 11 (While there are nine factors, eight are prior convictions (including whether or not served in prison) and then age. The other risk assessments are not so heavily reliant on these two factors. However, these two categories, age and prior criminality and failures as an umbrella category, are the two general reasons why scores go up. In Colorado, roughly 62 percent of the total score is based on these two umbrella categories.); *infra* note 98.

58. *See generally* NAT'L LEGAL AID & DEFENDER ASS'N, RISK & NEEDS ASSESSMENTS: WHAT DEFENDERS AND CHIEF DEFENDERS NEED TO KNOW (2015), http://www.nlada.org/sites/default/files/pictures/NLADA_Risk_and_Needs_Assessments-What_Public_Defenders_Need_to_Know.pdf [https://perma.cc/4G2S-MYJ3].

59. *Id.* at 4–5.

require an interview, individual's Fifth Amendment rights against self-incrimination are implicated This is almost impossible to avoid because many legislative proposals assume that *all* defendants will be required to submit to a risk assessment. An assessment report cannot be completed without an interview because the data required to complete the assessment is generally not available to government agencies, such as an individual's, history of mental health issues.

Second, the NLADA report notes that, "[u]se of an assessment instrument which has not been validated to make decisions impacting a defendant's liberty may violate due process or, if used at sentencing, the 8th amendment."[60] An assessment instrument, according to the report, should be "validated by testing it with the population in question before adoption for general use."[61] The report also calls for periodic revalidation. Validation is a question of limitation—an instrument should not be used for purposes for which it was not validated. The Colorado legislature amended the state's pretrial services law by permitting pretrial assessment tools to be used "solely for the purpose of assessing pretrial risk" in response to this problem.[62] Some prosecutors and defense lawyers were using the risk assessment for purposes of plea negotiations, a purpose for which it was not validated.

There have also been serious due process concerns with risk assessments, leading one group of researchers to call for core public agencies to stop using certain types of risk assessments.[63] Although there has been little litigation in the pretrial context, *State v. Loomis*,[64] a recent case decided by the Wisconsin Supreme Court, would not permit the use of the risk assessment unless it met particular safeguards designed to protect due process rights. While *Loomis* was decided in the sentencing context, the due process concerns in the pretrial context are similar. The decision permitted the use of COMPAS, a proprietary algorithm operated by a private company, but "circumscribed" its use.[65]

The Court noted one important limitation on the use of COMPAS' algorithm, which is that its "risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated."[66] Of course, in the pretrial context, the Arnold Foundation's PSA tool and many other tools, combined with the judgment of a pretrial services worker, will recommend preventative detention or liberty-restricting

60. *Id.* at 5.
61. *Id.*
62. *See* S.B. 14-212, Gen. Assemb., Reg. Sess. (Col. 2014).
63. ALEX COMPOLO ET AL., AI NOW, AI NOW 2017 REPORT 1 (2017), https://ainowinstitute.org/AI_Now_2017_Report.pdf [https://perma.cc/7TJF-XMEY] (noting that the "unreviewed or unvalidated use of pre-trained models, AI systems licensed from third party vendors, and algorithmic processes created in-house . . . raise[] serious due process concerns).
64. State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
65. *Id.* at 757.
66. *Id.* at 755.

conditions while an individual is released from jail pending trial. In New Jersey, for example, the PSA will recommend, via a grid, various categories of supervision based on the risk scores. For the highest risk cases, the tool recommends detention. The Wisconsin Supreme Court went a step further by saying that to pass due process, a tool "may not be considered as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community."[67]

In the name of protecting due process, the court developed a series of required instructions designed to temper the blind application of the risk assessment as scientific. The court required that presentence investigation reports using the risk assessment tool include a series of warning, which include the following:

> (1) The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined.
> (2) A COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed.
> (3) Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.[68]

The Wisconsin Supreme Court then issued one final warning to circuit courts, based on evidence in the record that risk assessments serve to group offenders but cannot identify whether a particular defendant falls within any statistical grouping:

> However the due process implications compel us to caution circuit courts that because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual. Accordingly, a circuit court is expected to consider this caution as it weighs all of the factors that are relevant to sentencing an individual defendant.[69]

The Court also noted that Loomis had not challenged the use of the risk assessments under an equal protection theory.[70]

B. *Questions Regarding Proprietary and Black-Box Algorithms*

As the push toward algorithm-based justice has gained steam, those designing algorithms range from college professors, to government employees and staffs, nonprofits, and for-profit corporations. As noted, the purpose of risk-prediction algorithms is to sort individuals into categories by identifying specific factors that may correlate with a greater likelihood of committing a new crime while on release and/or failing to appear in

67. *Id.* at 760.
68. *Id.* at 769.
69. *Id.* at 765.
70. *Id.* at 766.

court as required. The process of building an algorithm is an onerous one: it starts with collecting raw data, verifying the accuracy of such data, making certain data assumptions, conducting a mathematical analysis, correlating a particular set of factors into categories, assigning point values based on the magnitude of each factor, making specific decisions about the categories, and then designing a system to assign recommendations as to the non-monetary conditions that may be appropriate for defendants who fall within each risk category.[71]

Through the process of building and calibrating such algorithms, questions have arisen. Many researchers see the value of requiring proprietors of algorithms to be completely transparent as to the process by which they arrived at the algorithm. Proponents of algorithms often maintain that the factors used to score an algorithm are completely transparent, but in reality the data and process used to build them is beyond public view. In a report on regulating algorithms in criminal justice, AI Now Institute at New York University explained why black box algorithms, like the Arnold Foundation Public Safety Assessment, should not be permitted:

> Core public agencies, such as those responsible for criminal justice, healthcare, welfare, and education (e.g. "high stakes" domains) should no longer use "black box" AI and algorithmic systems. This includes the unreviewed or unvalidated use of pre-trained models, AI systems licensed from third-party vendors, and algorithmic processes created in-house. The use of such systems by public agencies raises serious due process concerns, and at a minimum they should be available for public auditing, testing, and review, and subject to accountability standards.[72]

The need for complete algorithmic transparency is necessary not only to protect due process rights, as the court recognized in *Loomis*, but also to prevent the danger of bias: "The danger of bias increases when these systems are applied, often in non-transparent ways, to critical institutions like criminal justice and healthcare."[73]

Rebecca Wexler of Yale Law School, recently wrote an article on the increasing use of trade secrets in criminal justice that are used to shield algorithms from transparency in policing, bail, and sentencing.[74] Many provisions protecting intellectual property are also contained in the contracts between nonprofit or for-profit corporations with various state and local entities. Wexler noted that, aside from the pros and cons of implementing a risk assessment regime (which remains an open debate),

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71. *See, e.g.*, MESA COUNTY PRETRIAL STAKEHOLDER GROUP, MESA COUNTY PRETRIAL SMART PRAXIS VERSION 3 (2013), https://www.pretrial.org/download/risk-assessment/Mesa%20County%20SMART%20Praxis.pdf [https://perma.cc/9X-GF-ATLP].
72. COMPOLO ET AL., *supra* note 63, at 1.
73. *Id.* at 14.
74. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. (forthcoming 2018).

one fundamental piece of the analysis is missing: ownership.[75] She noted that privatization of the justice system is a growing concern as a result of the acceleration of the deployment of these systems:

> Automation is intensifying the privatization of the justice system. Similar to private prisons that have been found to under-maintain safety and security, or private police who operate with minimal training and oversight, new criminal justice technologies are primarily privately owned. Developers often assert that details about how their tools function are trade secrets. As a result, they claim entitlements to withhold that information from criminal defendants and their attorneys, refusing to comply even with those subpoenas that seek information under a protective order or under seal.[76]

Wexler is concerned that secrecy is a continuing and growing trend:

> To date, scholars and practitioners have largely overlooked the fact that new technologies entering criminal proceedings are bringing intellectual property claims with them. But conflicts surrounding this doctrinal trend are likely to multiply. The Defend Trade Secrets Act of 2016 established the first federal civil cause of action for trade secret misappropriation, while the Supreme Court's 2014 decision in *Alice Corporation v. CLS Bank International* made it harder to patent software. Future developers of data-driven systems are therefore likely to depend ever more heavily on trade secret protections.[77]

As a general rule, trade secret protections for software in the criminal justice system are simply presumed at this point. As Wexler notes, "[t]he dearth of scholarly attention has been accompanied by uncritical acceptance of trade secret evidence in criminal cases."[78]

The question then becomes, what changes are needed to force transparency? Wexler's research is primarily focused on an individual criminal proceeding rather than the broader legal and policy questions of transparency raised by the AI Now Institute report. She calls on the courts to change rules of evidence and on legislatures to enact laws that essentially allow for the discovery of the underlying information used to construct the algorithm:

> But trade secret holders should wield no special power to block criminal defendants' access to evidence altogether. Courts should refuse to extend the privilege wholesale from civil to criminal cases, and legislatures should pass new laws that limit safeguards for trade secret evidence in criminal proceedings to protective orders and nothing more.[79]

In the broader debate on bail reform, this issue is often lost in favor of debating the merits of risk algorithms as a determinant of pretrial liberty without considering the fairness of basing decisions about liberty on

75. *Id.* at 6.
76. *Id.* at 6–7 (footnotes omitted).
77. *Id.* at 7 (footnotes omitted).
78. *Id.* at 9.
79. *Id.* at 10 (footnotes omitted).

"secret evidence" that neither the defendant nor the decisionmaker is entitled to view.

Yet, these issues are real. Researchers in one study made sixteen public information requests to find out how the Arnold Foundation tool was built.[80] While noting that the Arnold Foundation tool does disclose the factors that are scored, which many others do not, the researchers discovered that the Foundation still cloaks its algorithm in secrecy:

> However, the Arnold Foundation has not revealed how it generated the algorithms, or whether it performed pre- or post-implementation validation tests, and if so, what the outcomes were. Nor has it disclosed, in quantitative or percentage terms, what "low risk" and "high risk" mean: is the chance that a "low risk" defendant will fail to appear one in ten or one in five hundred? Is the chance that a "high risk" defendant will fail to appear twice that of a low risk defendant or fifty times?[81]

Ultimately, the researchers succeeded in obtaining information from only one of the sixteen counties from which the information was requested. Some did not respond at all. About a fourth informed the researchers that, "they could not provide information about PSA because that information was owned and controlled by the Arnold Foundation."[82] Thus, after all of these efforts, the researchers aptly noted that we still know nothing about how the tool was developed:

> From the Foundation's website, the documents provided by the Seventh Judicial Circuit, and the statement the Foundation produced for us, we know that the Foundation created the PSA algorithms by analyzing data in about 750,000 cases. We know nothing about how it analyzed that data, what alternatives it tried, or how those alternatives compared to the PSA algorithms it ultimately adopted.[83]

The Arnold Foundation has said that this practice was only limited to "early adopting jurisdictions" and that the Foundation will now be transparent. Yet, according to the researchers, "[a]s far as we can tell, however, the confidentiality provisions are not limited to 'early adopting

80. *See* Brauneis & Goodman, *supra* note 54, at 138.

81. *Id.* While the Arnold Foundation has disclosed the based risk percentages, each individual jurisdiction may have different percentages as noted in example of the Seventh Judicial Circuit of Florida. While the base percentages have been disclosed, the percentages in the risk matrix that are constructed in each jurisdiction are not disclosed nor is the process, records, or deliberations related thereto. In other words, under the purview of typically the judicial branch, a stakeholder group will go into a room and assign the percentages and decide other issues like which crimes qualify as violent under the definition of the tool. LAURA & JOHN ARNOLD FOUNDATION, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT, http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf [https://perma.cc/CG5X-N9MM] (last visited Oct. 2. 2018).

82. *See* Brauneis & Goodman, *supra* note 54, at 138.

83. *Id.* at 141.

jurisdictions,' and the provisions all say that they require confidentiality in perpetuity."[84]

The issues of secret algorithms and a lack of transparency among such algorithms are real. As discussed above, the largest proprietor of a bail algorithm—The Arnold Foundation—has failed to meet basic transparency requirements recommended by the AI Institute and as recommended by Wexler. Yet, state legislators and local governments, with one notable exception,[85] continue to promote the use of algorithms without concrete evidence of success, assuming that the science is good enough that we need not worry about an algorithm's accuracy. While Senate Bill 10 in California does provide some safeguards regarding the deployment of such risk assessments, such as requiring validation and encouraging them to be racially fair, fundamental issues, including those associated with the use of proprietary and black-box algorithms, and not requiring full transparency, remain of utmost concern. Of course, these issues are not limited to algorithms used in the setting of bail, but they are of heightened concern when algorithms play a key role in potentially depriving presumptively innocent defendants of their freedom.

C. *Potential for Discrimination*

As previously noted, transparency is a critical safeguard that allows the public and the parties to a criminal case to assess the potential for bias or unlawful discrimination in the operation of a risk assessment regime. It is difficult to reach a generalized conclusion regarding any bias that might be inherent in algorithms and whether they contribute to unlawfully discriminatory detention decisions. Assessments of bias will vary with the particular jurisdiction's reliance on algorithms, the particular algorithm, or even the particular case. At this point, it is probably fair to conclude with a cliché: the jury is out on whether the algorithms can be bias-free or are actually able, as some claim, to reduce bias. Uncertainties aside, bias is a worthy topic of consideration and California Senate Bill 10 imposes significant requirements that represent a reasonable attempt to address this issue.

It may be pointless to ask whether the use of risk assessments in the criminal justice system imposes more bias than a system that does not employ such algorithms. As one scholar recently noted:

> Determining whether or not a risk tool is racially biased is probably redundant . . . . " Machines are trained on human data. And humans are biased." The important question is whether the use of actuarial risk assessment tools results in more disparate outcomes than the status quo, or other viable alternatives. Outside of the

84. *Id.*

85. Zoë Bernard, *The First Bill to Examine 'Algorithmic Bias' in Government Agencies Has Just Passed in New York City*, Bus. Insider (Dec. 19, 2017, 1:03 PM), http://www.businessinsider.com/algorithmic-bias-accountability-bill-passes-in-new-york-city-2017-12 [https://perma.cc/TAZ8-EJQG].

research presented in this study, the empirical research on this is next to nonexistent.[86]

Unsurprisingly, the results of empirical research in several studies confirm that risk assessments are discriminatory. In one study, researchers found that "software used across the country to predict future criminals [is] biased against blacks."[87] In another, researchers concluded that, "[a]s algorithms increasingly make decisions based on historical and societal data, existing biases and historically discriminatory human decisions risk being 'baked in' to automated decisions."[88]

As legislators recognize the problem of bias in predictive algorithms, they may be inclined to study or restrict their use rather than adopting them wholesale. This has already happened in New York. New York City recently adopted a bill to address algorithmic discrimination in city government[89] and one hundred community groups across New York authored a letter to Governor Cuomo, demanding that the state not rely on risk assessments in criminal justice because "the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state."[90]

The Arnold Foundation boldly asserts that its Public Safety Assessment is both race and gender neutral[91] but this has not been evaluated by independent researchers.[92] It is one thing to assert that there is no impermissible bias; it is another to prove the existence of absolute neutrality.

While the Arnold Foundation's Public Safety Assessment was previously discussed, the reality is that many courts and policymakers regard

86. Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV 29 (forthcoming 2018) (footnote omitted).

87. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/9PUZ-4CA9].

88. Nicholas Diakopoulos & Sorelle Friedler, *How to Hold Algorithms Accountable*, MIT TECH. REV. (Nov. 17, 2016), https://www.technologyreview.com/s/602933/how-to-hold-algorithms-accountable [https://perma.cc/2JNZ-W62G].

89. Lauren Kirchner, *New York City Moves to Create Accountability for Algorithms*, PROPUBLICA (Dec. 18, 2017, 12:08 PM), https://www.propublica.org/article/new-york-city-moves-to-create-accountability-for-algorithms [https://perma.cc/3HRS-D7HQ].

90. Letter from Over 100 Community & Advocacy Groups across New York State to Andrew Cuomo, Governor, N.Y. (Nov. 2017), https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/1242/attachments/original/1511364954/FINAL_Bail_Letter_to_Governor_Cuomo_-_11.22.2017_-_10.30am.pdf?1511364954 [https://perma.cc/TU7G-NFQ9].

91. LAURA & JOHN ARNOLD FOUNDATION, RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT—COURT IN KENTUCKY 4 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf [https://perma.cc/CW7A-D84F].

92. For example, the Arnold Foundation states the PSA "accurately classifies defendants' risk levels *regardless* of their race or gender, meaning it does not have a discriminatory impact." *Id.* Yet, this assertion comes from a report authored by the Foundation, not an independent researcher.

it as transparent and as a sort of gold-standard. When it comes to other risk assessments, some designed even at the local level, the issues raised in this Part become even more important.

D. *Separation of Powers*

As I have sat in the halls of legislatures and local policy forums listening to calls from judiciaries to contract with third-party vendors and approve their own algorithms for purposes that affect the rights of litigants in a criminal case, I have wondered whether it was appropriate for the judiciary to engage in this exercise. These calls have been fueled by proclamations from national court associations, such as the Conference of Chief Justices or the Conference of State Court Administrators.[93]

The power to make court rules in the federal system, upon which many state systems are modeled, is defined as "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."[94] Of course, this power is subject to an important limitation: "Such rules shall not abridge, enlarge or modify any substantive right."[95]

Although a full analysis of these questions is beyond the scope of this Part, instead, I pose a simple question: Does the use of an algorithm to determine pretrial release decisions abridge, enlarge, or modify any substantive right of criminal defendants? While not every use of an algorithm will significantly affect the substantive rights of a criminal defendant, algorithms that inform and make recommendations regarding direct questions of substantive rights are concerning. Such recommendations have nothing to do with procedure or practice. Instead they are designed to categorize defendants and intentionally impose a more or less harsh restraint on their liberty (whether it be incarceration or a mixed-bag of electronic monitoring and supervision) based on that categorization. My reasons for concern are set forth below.

First, it is important to note that the decision to employ an algorithm is a policy choice. As one commentator has noted:

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93. The adopted resolution by the Conference of Chief Justices states that the Conference stands resolved to "accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of nonfinancial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes." *Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, CONFERENCE OF CHIEF JUSTICES (Jan. 30, 2013), http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf [https://perma.cc/G56K-UNGJ]; CONFERENCE OF STATE COURT ADMINISTRATORS, 2012–2013 POLICY PAPER EVIDENCE-BASED PRETRIAL RELEASE (2012–2013), http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf [https://perma.cc/G56K-UNGJ].

94. 28 U.S.C. § 2072(a) (2012).

95. 28 U.S.C. § 2072(b) (2012).

> When an entity chooses to create and proliferate an algorithm in furtherance of its own objectives, it also necessarily makes a value judgment about what matters and what does not. Choices about whether and how to employ algorithms are a business decision like any other. Values and choices are embedded in the design of the algorithm, just as they are reflected in a company's policy manual, board room, and standard operating practices. And like any decision, the choice to employ an algorithm—whether in pursuit of profits or efficiency or any other goal—entails the possibility of unknown consequences, both risks and rewards.[96]

Thus, for courts to decide to either obtain an algorithm or to go into the business of approving one for statewide use is to make a value judgment and accept the embedded value choices of such an algorithm.

Second, because the choices that drive algorithms are based on value judgments, they are not scientific. The supervision matrix of the Arnold Foundation's tool can serve as an example of why this is problematic because the framework is typical of those used in the pretrial services context.[97] The Arnold Foundation decisionmaking framework, as used in Florida, creates six categories based on "the percentages of defendants by risk score who were released and failed to appear." The results, based on risk score, were: "1 (12%), 2 (16%), 3 (18%), 4 (23%), 5 (27%), 6 (30%)."[98] There has been no publicly disclosed scientific basis for making these the cut-off points.[99] Rather, these categories represent two value judgments: (1) how flexible a jurisdiction is willing to be in risking that defendants will miss court appearances, thereby wasting resources and delaying justice; and (2) how tolerant a jurisdiction will be in assessing the rates of new crimes committed by defendants who have been released from jail while awaiting trial. Of course, this is part of the Arnold Foundation's argument—that the decisionmaking framework localizes these decisions.

Thus, the question becomes whether it is appropriate for the courts to make these policy decisions about public risk rather than elected officials. Typically, courts will form a committee, in some cases open to the public and in some cases not, comprised of members selected and appointed by the courts to make such substantive decisions. But risk tolerance might just as easily be considered a legislative and not a judicial decision.

Imagine a scenario under the Arnold Tool where a defendant is classified as risk six instead of five. In New Mexico and New Jersey, this defendant would be detained without bail, and yet defense lawyers are

96. Rebecca J. Krystosek, Note, *The Algorithm Made Me Do It and Other Bad Excuses*, 101 MINN. L. REV. (May 17, 2017), http://www.minnesotalawreview.org/2017/05/the-algorithm-made-me-do-it-and-other-bad-excuses/?platform=hootsuite [https://perma.cc/K7VS-6X75].

97. *See, e.g.*, MESA COUNTY PRETRIAL STAKEHOLDER GROUP, *supra* note 71. The Mesa County, Colorado "Smart Praxis" risk category scores range from one to four.

98. Brauneis & Goodman, *supra* note 54, at 29.

99. See *id.*

not yet challenging these cut-off points. In other states, this could be the difference between house arrest or not. In the Mesa County, Colorado example, discussed above, the differences between a two, three, and four are significant in terms of increasing restrictions on liberty.[100] Moreover, high-risk scores have another significant impact on individuals—higher bail, which can lead to additional pretrial incarceration. Yet, a court using the Arnold Foundation tool may impose preventative detention because a particular defendant is classified among a cadre of defendants who will commit new crimes or fail to appear in 30 out of 100 cases (a risk 6) versus a defendant classified in a different less-risky group of defendants who will fail to appear in 27 out of 100 cases (a risk 5).

When it comes to time for defendants to challenge these results, which they should, it will be difficult to establish that a three percent difference merits detention or a more stringent conditions of release, especially when courts have absolutely no way to determine which thirty of the 100 are the bad guys and which are the good guys. Basing decisions about liberty on such small differences is a far cry from scientific.

The Colorado Pretrial Assessment Tool, upon which the Mesa County tool is based, is even more forgiving to defendants, although the scoring weights do show how one factor can move a defendant from one risk category to another.[101] The four risk tolerances that the Colorado tool utilizes bear on either the risk of failing to appear or the risk of committing a new crime. It is not clear whether the overlap has been removed, so looking just at the risk of committing a new crime, the subcategories are as follows (with percentages representing a "public safety rate"): 1 (91 percent); 2 (80 percent); 3 (69 percent); 4 (58 percent).[102] The points for each category from the scoring sheet are: 1 (17 or less); 2 (18–37); 3 (38–50); 4 (51–82).[103]

If a defendant is under thirty-four years-old at the time of his or her first arrest, that factor alone will increase the score by ten to fifteen

100. *See* Mesa County Pretrial Stakeholder Group, *supra* note 71 (The differences between a two, three and four could range from supervision as low as getting a phone call reminding you to come to court all the way up to a combination of electronic home monitoring, GPS monitoring, substance abuse screening, and other correctional technologies in addition to differing rates of supervision charges passed on to defendants that increase based on supervision level and risk score.).

101. Colo. Ass'n Pretrial Servs., The Colorado Pretrial Assessment Tool (CPAT): Administration, Scoring, and Reporting Manual Version 2, at 9 (2015), https://www.pretrial.org/download/risk-assessment/CPAT%20Manual%20-%20CAPS%202015-06.pdf [https://perma.cc/Y65Y-BYP9] (last visited Oct. 2, 2018) (The age at first arrest below age 19 is a score of 15 and having another pending case is a score of 13, each of which are nearly enough to cause someone to be in risk category 2. Thus, if someone was already at a risk score of 37 in risk category two, either factor being present would leapfrog category 3 and make that person a category 4 risk.).

102. *Id.* at 9.

103. *Id.*

points, which could move the defendant from risk category two to risk category four.[104] Similarly, nine points will be assessed if the defendant is not "contributing to residential payments."[105] This can quickly bring someone into a higher risk category simply because they are poor or living in a domestic partner's home. Colorado further strives to protect the presumption of innocence by adding thirteen points if the defendant has another *pending* case, which is almost enough to move a defendant from category two to category four.[106]

The decision to contract with proprietors of algorithms to build these tolerances into a decisionmaking framework is plainly a policy question more than a question of court procedure. It also directly affects the substantive rights of the litigants to a criminal case, as both the People and the defendant must live with the categorizations, recommendations based thereon, and subsequent decisions to either under-restrain or over-restrain liberty. Without these categorizations, judges would not sort people into such rigid categories. Instead, judges would make decisions based on information that is not weighted by a machine and forces no categories. The bail reform movement today does not soften these rigid categories. Instead, it perpetuates them. Thus, the question becomes, are there legal or other considerations that must be addressed when deciding whether algorithms should be used at all or at least regulated in some basic respects?

When it comes time for a defendant to challenge an algorithm approved by a State Supreme Court rule or other state judicial body, the defendant will face some difficult challenges. First, as we have seen, the proprietors of the algorithms will try to keep the underlying information used to construct the model secret. Second, a defendant will be asking a trial judge to find that the state's highest court adopted an invalid algorithm or adopted one that is impermissibly discriminatory. This is a difficult position to put a trial judge in; indeed, trial court judges should not be placed in such a difficult position that requires them to consider whether higher courts have either signed a contract to conceal information from defendants in a criminal case or whether higher courts adopted an algorithm that is either invalid or impermissibly discriminatory.

As a new algorithm society, we are defining with particularity how much risk of crime and how many failures to appear we will tolerate. That is not a scientific decision. What is alleged to be scientific is that we can use the categories to approach the results that policymakers want. Courts then determine the rights of the defendants based on groupings within these "scientific" systems, while we have no present ability to distinguish whether any particular defendant will fall within or outside the dominant group. These are not decisions that should be made either in secret or by agencies or departments of state or local courts, even if

104. *Id.* at 3.
105. *Id.*
106. *Id.*

they are open to the public and have a transparent process. Whether it is legally permissible or ethical for the courts to recommend adoption of these systems, including a presumption against one form of bail or another, is a separate issue, but as a question of appropriate legal policy, there is no doubt that the courts are playing a legislative role.

IV. Do Risk-Based Systems Work Better than Financial Bail? Assessing the Costs and Goals of Bail Reform

Many, who are against the current bail reform movement claim that it is impossible to move to a no-money bail system. While perhaps not desirable, it certainly is possible. One can assess desirability through a cost-benefit analysis by analyzing the specific goals that previous reforms attempted to achieve, whether the goals were actually achieved, and then comparing what was achieved to the costs of implementing the reforms in order to determine in the end if reform was worth it.

Those who advocate for bail reform are primarily seeking to achieve three goals: (1) the reduction of mass incarceration; (2) similar or better appearance rates in court; and (3) a similar or reduced rate of new crimes while on bail. To achieve these goals, the reforms rely on one or both prongs of a two-pronged approach: (1) expanding preventative detention in order to reduce the use of financial conditions of bail; and (2) using risk assessments to release those who are determined to be low risk. In New Jersey and New Mexico, as in Washington, D.C. and the federal system, both prongs are used. In states like Colorado and Kentucky, only the first prong is used because these states still permit courts to set financial conditions of bail.

This Part looks at both the costs of implementing the no-money bail system or other systems designed to replace the financial conditions of bail and the benefits such systems have achieved.

A. *New Jersey*

In 2016, the New Jersey Association of Counties sued the state, alleging that forcing the counties to create a pretrial program was an unfunded mandate.[107] They alleged that the cost of implementation just for the portion paid by the counties would be between one and two million dollars on average per county,[108] with the Executive Director forecasting a fifty million dollar total expenditure annually just for county shares of the costs of bail reform.[109] The decision rendered in the case, however,

107. Complaint, In re Complaint Filed by the New Jersey Association of Counties Challenging Provisions of the Criminal Justice Reform Act as an Unfunded Mandate, No. COLM-0004-15 (N.J. Council on Local Mandates Dec. 6, 2016).

108. Caren Chesler, *New Jersey Counties Seeing Sticker Shock ahead of Bail Reform*, WHYY (Nov. 30, 2016), https://whyy.org/articles/is-criminal-justice-in-nj-about-to-become-an-unfunded-mandate [https://perma.cc/C2NW-NT8L].

109. Andrew Schmertz, *Bail Reform to Begin Despite Cost Concerns*, N.J. Ass'n Counties (Dec. 29, 2016), http://njac.org/bail-reform-to-begin-despite-cost-concerns [https://perma.cc/M7RA-Q4FT].

was that the constitutional amendment required the counties to implement the new system and was not a legislative unfunded mandate.[110]

Unfortunately, there is no state or local cost estimate as to what the total cost has been to implement the no-money bail system in New Jersey. In fact, the New Jersey Attorney General was tasked with creating a cost estimate in 2017, and concluded that "we have no idea how much massive bail overhaul will cost NJ."[111] There has, however, been at least one academic cost estimate, projecting the costs of the system to be approximately $379 million annually, the savings to be $164 million, resulting in a net annual cost of $215 million.[112] Acting Administrative Judge Grant made the following statement regarding the funding of bail reform:

> Sufficient funding, of course, remains a concern. Right now, the Criminal Justice Reform funding stream relies entirely on the increases in filing fees that the Legislature authorized. Last year, though, filings were down and therefore, as might be expected, revenue from those fees dropped as well.
>
> If these filing trends continue, we project that starting with FY 2019, the Pretrial Services Program will begin to experience an actual deficit, not just the structural deficit that we already are facing. In other words, we project that we will have exhausted all of the program's carryover balances from prior fiscal years and that the fee revenue will fall short, thereby leaving an unfunded negative balance.[113]

While one academic study estimated there would be savings to offset some of the costs, there has been, as noted, a drop in the jail population during the first year of bail reform. However, because this reduction came about prior to the bail reform, there is no proof that it was caused by bail reform. Indeed, in the calendar year before bail reform was implemented—2016—the non-sentenced pretrial population declined by 20.68 percent, and in the first full calendar year of bail reform—2017—the non-sentenced pretrial population declined by 20.3 percent.[114] As one expert has noted, "one shift" in policy cannot be said to have driven such numbers, instead it is more accurate to "attribute[e] much of it to

110. In re Complaint Filed by the New Jersey Association of Counties, No. COLM-0004-15 (N.J. Council on Local Mandates Apr. 26, 2017).

111. S.P. Sullivan, *Attorney General: We Have No Idea How Much Massive Bail Overhaul Will Cost N.J.*, NJ.COM (Dec. 8, 2016, 8:30 AM), http://www.nj.com/politics/index.ssf/2016/12/ag_we_have_no_idea_how_much_massive_nj_bail_overha.html [https://perma.cc/U53K-3VM5].

112. DARAIUS IRANI & ZACHARY JONES, REGIONAL ECONOMIC STUDIES INSTITUTE, ESTIMATING THE COST OF THE PROPOSED NEW JERSEY PRETRIAL SERVICE UNIT AND THE ACCOMPANYING LEGISLATION 5 (2014), http://www.americanbailcoalition.org/wp-content/uploads/2016/06/new-jersey-pretrial-final-report.pdf [https://perma.cc/L5GW-3EQD].

113. Remarks before the Assembly Budget Committee by Judge Glenn A. Grant, Acting Admin. Dir. of Courts (Apr. 24, 2017), http://www.njleg.state.nj.us/legislativepub/budget_2018/JUD_Grant_testimony.pdf [https://perma.cc/SRK8-B4C5].

114. *Criminal Justice Reform Data*, *supra* note 47, at 5.

the creation of the state's drug courts that focus on diverting people from prison, as well as changes in the parole system that make it less likely someone will be put back behind bars for minor technical violations of their parole."[115]

Finally, while it would be nice to know what the New Jersey numbers look like in terms of new crimes while on bail, failures to appear while on bail, and new crimes while on a summons or failure to appear while on a summons, New Jersey, despite being thirteen months in on the reforms, has not released any data regarding outcomes that would allow anyone to conclude that the anticipated benefits were realized or that they outweigh the massive cost of paying for the new system.

Is the new system is fairer? Only 7.5 percent of defendants in New Jersey will be released on their own recognizance,[116] while 70.1 percent of defendants will face some form of supervision as a condition of their release.[117] Is it fairer to supervise those defendants and make them pay for their own blood chemistry monitoring or let them post a bail bond? In other words, are financial conditions proving to be more or less restrictive of liberty than the old system? It really is impossible to say without any understanding of the current jail population versus the jail population prior to the reforms.

B. *Washington, D.C.*

Washington, D.C. spends around $63.48 million annually on its pretrial supervision program.[118] This represents an increase in spending of roughly 28 percent over the last ten years in a city of less than one million residents.[119] The program's goal in 2018 was to release 85 percent of all defendants.[120] Among those released, the goal was to have 87 percent make all court appearances and 88 percent remain crime-free.[121] Of course, using the 87 percent figure for court appearances masks the true failure-to-appear rate because of those not making *all* court appearances many will fail to appear more than once. In addition, in FY 2016, 28

115. Ted Sherman, *Why is the N.J. Prison Population Shrinking? (It's Not Just about Less Crime . . .)*, NJ.COM (Sept. 27, 2017, 4:33 PM), http://www.nj.com/news/index.ssf/2017/09/why_is_the_nj_prison_population_shrinking_its_not.html [https://perma.cc/63QL-GYFQ].

116. *Criminal Justice Reform Data*, *supra* note 47, at 2.

117. *Id.*

118. PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST FISCAL YEAR 2018 4 (2017), https://www.csosa.gov/about/financial/budget/2018/FY18-PSA-CBJ-Performance-Budget-05232017.pdf [https://perma.cc/NX2Z-T5MA].

119. *See* DISTRICT OF COLUMBIA PRETRIAL SERVS. AGENCY, CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION: FISCAL YEAR 2008 9 (2007), https://www.psa.gov/sites/default/files/FY2008%20PSA%20Congressional%20Budget%20Justification.pdf [https://perma.cc/9HNM-DVC3].

120. PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 118, at 16.

121. *Id.*

percent of defendants were out of compliance with their terms of pretrial supervision at the conclusion of their cases.[122]

Because the current system in D.C. dates back to 1963,[123] it is almost impossible to compare it to the previous system. But it is clear from looking at this system that it is both expensive and labor intensive. States that implement a system modeled on the D.C. system should therefore expect to make a substantial investment of public funds. While the D.C. data can be compared to other programs, it is hard to say that the expense is worth the results.

C. *Kentucky*

In a forthcoming article that studied risk assessments in practice, the author concluded the following:

> [T]here is a sore lack of research on the impacts of risk assessment in practice. There is no evidence on how the use of risk assessment affects racial disparities. There is no evidence that the adoption of risk assessment has led to dramatic improvements in either incarceration rates or crime without adversely affecting the other margin.[124]

Stevenson reached this conclusion after reviewing data and studies from as many as eight jurisdictions. The article's main focus, however, was Kentucky.

The Kentucky model, which proponents of bail reform point to as a success, was clearly debunked. Using six years' worth of data, Stevenson came to a variety of conclusions. Importantly, she found that the use of the Arnold Foundation Pretrial Safety Assessment in Kentucky actually increased failures to appear in court. As she noted:

> Figure 7 shows a sharp jump up in the failure-to-appear rate (defined as the fraction of all defendants who fail to appear for at least one court date) from before the legislation was introduced to after the new law was implemented. The size of the increase—about 3 p.p.—was not large in and of itself, but it is large relative to the base level: about a 40 percent increase over the mean. The introduction of the PSA did not lead to a decline in failures-to-appear. If anything, the FTA rate is slightly higher after the PSA was adopted than before.[125]

Regarding the rearrest rates for new crimes, which proponents expect to go down, Stevenson also found that the opposite was true:

> Inferring that HB 463 led to an increase in rearrests requires inferring that the drop in rearrests right before the introduction of the legislation was indicative of a meaningful change in trend that would have continued in the absence of the law. One could also argue

122. *Id.* at 22.
123. The system is now in its fifty-fifth year of operation. *See PSA's History*, Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=about/history [https://perma.cc/Y86Q-72R6].
124. Stevenson, *supra* note 86, at 27.
125. *Id.* at 41.

> that the drop down in rearrests towards the end of 2010 was just an idiosyncratic fluctuation in the rearrest rate, and the rise after the legislation was introduced was simply more idiosyncratic fluctuation. Alternative analysis, shown in the appendix, suggests that the former interpretation is more likely. *Regardless, it is clear that the increased use of risk assessments as a result of the 2011 law did not result in a decline in the pretrial rearrest rate.*[126]

Despite all of the promises that expanding risk assessments would deliver fantastic results, in fact "the large gains that many had assumed would accompany the adoption of the risk assessment tool were not realized in Kentucky."[127] In assessing what lessons other jurisdictions can learn from Kentucky, Stevenson explained that, "Kentucky's experience with risk assessment should temper hopes that the adoption of risk assessment will lead to a dramatic decrease in incarceration with no concomitant costs in terms of crime or failures to appear."[128]

D. *New Mexico*

New Mexico has released no data indicating that its no-money bail system is a success. Rather, the state has simply asserted that the new court rules necessary to implement the no-money bail system did not increase crime.[129] Unfortunately, no funding was provided to implement the new system at the state or local level. With no such funding, it is proving difficult to implement the old bail system by implementing widespread preventative detention and supervision.

In addition, there are clear signs that the program is not working. One district attorney in New Mexico has said that in the six months prior to bail reform, 150 failure-to-appear warrants were issued, for an average of twenty-five warrants per month.[130] But in the three months after bail reform was implemented, 230 warrants were issued, for an average of seventy-six warrants per month.[131] These numbers represent a 324 percent spike in failure-to-appear warrants.

As to its reductions in jail populations, New Mexico has provided no data. In February 2017, the average daily jail population in Bernalillo County (Albuquerque) was 1,200.[132] New Mexico's bail reform went into

126. *Id.* at 41–42 (emphasis added) (footnote omitted).
127. *Id.* at 51.
128. *Id.* at 53.
129. Admin. Office of the Courts of N.M., Key Facts and Law Regarding Pretrial Release and Detention 7 (2017), https://www.nmcourts.gov/uploads/files/REVISED-Pretrial%20Release%20and%20Detention%20Key%20Facts%209_28.pdf [https://perma.cc/2FVS-WMBE].
130. Bryan, *supra* note 48.
131. *Id.*
132. Soyoung Kim, *Albuquerque's Jail Population Drops to Lowest Levels Since it Was Built*, KRQE (Feb. 24, 2017, 5:28 PM), http://krqe.com/2017/02/24/albuquerques-jail-population-drops-to-lowest-levels-since-it-was-built [perma.cc/473S-KZMA].

effect on July 1, 2017.[133] As of February 10, 2018, the Bernalillo jail population was 1,376.[134] Although this change is probably not significant since the jail population has previously ranged from 1,100 to 1,400, this nonetheless represents a 14.6 percent increase in the jail population in one year, suggesting that no dramatic decrease in jail populations followed implementation of the new system.

In addition, there is no data indicating the number of crimes committed while on bail. But, Governor Martinez has said that the system had "devastating effects,"[135] citing some high-profile cases for that proposition.[136] Some state legislators have also found that something is wrong with the system. As one state senator noted, "[t]he public is expecting something to be done."[137] It is probably a fair conclusion to say that the public is generally not concerned with failures to appear and is more concerned with new crimes committed while on bail.

Absent any numbers, New Mexicans continue to be exposed to a system created by the courts, not funded by the legislature, and not endorsed by the Governor for which there is no statistical data indicating that it has met any of the tripartite goals that it was designed to achieve.

E. *California*

On May 15, 2017, the California State Senate's appropriations committee staff issued a fiscal analysis of California Senate Bill 10, which as noted above, would implement a risk-based supervision system without expanding preventative detention. In its fiscal analysis, the staff noted the first significant cost: "Major likely-reimbursable costs in the hundreds of millions of dollars annually (local funds/General Fund) to counties to establish and operate pretrial services agencies with all the entailing responsibilities imposed by this measure."[138] There were also several other significant categories of costs in the hundreds of

133. *Rule Set 6—Rules of Criminal Procedure for Magistrate Courts*, N.M. COMPILATION COMMISSION (Rule 6-409), http://www.nmcompcomm.us/nmrules/NMRules/6-409_6-5-2017.pdf [https://perma.cc/FL6V-4VWW].

134. There is no indication there has been a drop and the population has been within the range of 1100 to 1400 and thus any changes are insignificant. However, refer to this link, https://app.bernco.gov/custodylist/CustodyListInter.aspx, then click submit. It shows 1518 persons in custody as of 6/9/18, thus indicating that there has been an increase.

135. Fernanda Lopez & Chris McKee, *Lawmakers Talk Solutions to "Bail Reform" Constitutional Amendment Problem*, KQRE NEWS 13 (Oct. 27, 2017, 12:56 PM, updated 10:15 PM), http://krqe.com/2017/10/27/legislative-criminal-justice-sub-committee-discusses-bail-reform-friday [https://perma.cc/N6KP-GW4C].

136. Colleen Heild, *Governor Invokes High-Profile Cases in Bail Reform Attack*, ALBUQUERQUE JOURNAL (Oct. 22, 2017, 10:22 PM), https://www.abqjournal.com/1081592/gov-invokes-high-profile-cases-in-bail-reform-attack.html [https://perma.cc/H9CD-UZJU].

137. Lopez & McKee, *supra* note 135.

138. Cal. S. Comm. on Appropriations, Report, S.B. 10, 2017–2018 Reg. Sess., at 1 (May 15, 2017).

thousands and millions of dollars.[139] Although the report did note the possibility of cost savings, the analysis concluded that the amount of costs that might be saved was "unknown."[140]

Clearly, California will devote significant resources to implementing this program, and the results of other states give scant reason to suspect that the results, either in terms of reduction in jail populations, maintaining levels of new crimes on bail or appearance in court, or making the system fairer for defendants, will be sufficient to offset those costs.

Conclusion

Based on the available literature, it remains unknown whether moving to the federal or New Jersey no-money bail systems can produce sufficient benefits to offset the overwhelming costs. The most comprehensive and recent research produced by independent third parties suggests that the risk-assessment process has not been proven to achieve any of the tripartite goals that bail reform intends to achieve. Despite all of the advances in computing technology, it is fair to say when it comes to bail reform it is 1984 all over again.

139. *See id.* (These costs include creating pretrial agencies, training, supervision services (drug screening, electronic home monitoring, etc.), additional attorneys to represent defendants at bail hearings, data reporting and compliance monitoring.).

140. *Id.*