

## ***ISSUES AT A GLANCE***

### ***Bail Reform***

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*Fair and Just Prosecution (FJP) brings together elected district attorneys<sup>1</sup> as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP’s “Issues at a Glance” series provides district attorneys with timely information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. These papers are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has on hand additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

## **1. SUMMARY**

This FJP “Issues at a Glance” brief discusses the prosecutor’s role in reforming the money bail system. The brief seeks to provide guidance to DAs considering new approaches to this topic.

Many scholars, commentators, and justice system leaders have expressed concerns in regard to the money bail system.<sup>2</sup> They have noted that millions of individuals are jailed annually pre-trial, at great cost to taxpayers and families, even though many are neither a flight risk nor a danger to the community. It is wealth – not public safety – that often determines eligibility for release.

As criminal justice system leaders, local prosecutors can help make communities safer, save taxpayers money, and produce fair and transparent pretrial outcomes by advocating for and implementing straightforward reforms in this area. As set forth below, there are specific steps prosecutors can take to make bail systems equitable and effective.

## **2. BACKGROUND AND DISCUSSION**

### **a. Concerns with a Money Bail System**

Local jails admit millions of people annually, most of whom have not been convicted of a crime.<sup>3</sup> More than 60 percent of jail inmates are incarcerated while awaiting trial and at least 30

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<sup>1</sup> The term “district attorney” or “DA” is used generally to refer to any chief local prosecutor, including State’s Attorneys, prosecuting attorneys, etc.

<sup>2</sup> See, e.g., Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015, available at [https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=0](https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0).

<sup>3</sup> RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (2015), <http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

percent are there solely because they cannot afford to post bail.<sup>4</sup> Seventy-five percent of pretrial detainees have been charged with drug or property crimes<sup>5</sup> – criminal behavior that in many instances is the manifestation of drug addiction or poverty.

Staying in jail pending trial often has deleterious effects; people lose their jobs, cannot care for their children, and lose contact with loved ones.<sup>6</sup> Pretrial incarceration may also pressure individuals into accepting a plea when they otherwise might go to trial: one study found that pretrial detention increases the likelihood of a plea by 18 percent.<sup>7</sup> Detained defendants may plead guilty for a range of reasons having nothing to do with their underlying guilt, including to expedite release from jail or avoid disruptions in housing or employment. Incarcerating individuals who are awaiting trial also costs taxpayers billions of dollars each year.<sup>8</sup> And due to the documented correlation between race and wealth, the use of money bail reinforces racial disparities in incarceration rates.<sup>9</sup>

While the money bail system can have devastating effects, it often offers no societal benefit. To the contrary, research suggests that pretrial incarceration is correlated with higher rates of criminal activity, both before and years after case disposition.<sup>10</sup> A study in Kentucky found that individuals at low- and moderate-risk of recidivism held for only two or three days were 40 percent more likely to commit new crimes before trial than equivalent defendants released in 24 hours or less.<sup>11</sup> As the length of pretrial detention increased, recidivism rates also rose significantly among low-risk defendants when compared to their released counterparts.<sup>12</sup> Furthermore, financial conditions of release are less effective at securing trial appearance than lower-cost alternatives,<sup>13</sup> including a text message or phone call reminder. As such, money bail can be replaced with other mechanisms that ensure more effective, fair, and transparent pretrial decisions.

In contrast to this local landscape, the federal bail statute requires a *presumption* of release for most defendants absent a showing of flight risk or danger to the community, and a federal judge

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<sup>4</sup> CRIM JUST. POL'Y PROG. AT HARV. L. SCH., MOVING BEYOND MONEY -- A PRIMER ON BAIL REFORM 6 (2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [hereinafter Moving Beyond Money]; Bail Reform Overview, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/topic/bail-reform> (last visited Apr. 4, 2017) (“On any given day, an estimated half million people are detained across the U.S. because of an inability to post bail.”).

<sup>5</sup> MOVING BEYOND MONEY, *supra* note 4, at 6.

<sup>6</sup> HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010), available at <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york>.

<sup>7</sup> See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 17-18 (U. of Penn. L. Sch., Working Paper Jan. 8, 2017), available at [http://www.econ.pitt.edu/sites/default/files/Stevenson\\_jmp2016.pdf](http://www.econ.pitt.edu/sites/default/files/Stevenson_jmp2016.pdf).

<sup>8</sup> PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST 2 (2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd> (noting that the cost to taxpayers is approximately \$38 million per day and \$14 billion annually).

<sup>9</sup> See MOVING BEYOND MONEY, *supra* note 4, at 7.

<sup>10</sup> See CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, THE LAURA & JOHN ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) (last visited Apr. 4, 2017).

<sup>11</sup> *Id.*

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

<sup>13</sup> PRETRIAL JUSTICE: HOW MUCH DOES IT COST, *supra* note 8, at 5.

may not impose a financial condition that results in a defendant's pretrial detention.<sup>14</sup> Many states now have similar statutes, and nearly half of all states presume release on recognizance or unsecured appearance bond.<sup>15</sup>

A number of jurisdictions have begun serious reform efforts to ensure release for defendants who pose no danger to the community. Washington, D.C. and New Jersey have nearly eliminated money as a condition of release. Other important reforms underway throughout the nation include diminishing the role of the commercial bail industry,<sup>16</sup> using validated actuarial models to assess risk in pretrial decisions, releasing low- and moderate-risk offenders on nonmonetary conditions (often through pretrial service agencies), diverting defendants away from criminal court through community or treatment programs, and creating administrative procedures like notification systems to increase court appearances.

### **b. The DA's Role in Bail Reform**

Prosecuting attorneys are able to implement and encourage major changes in the use of bail in their counties and cities. Recently, elected prosecutive leaders including Cook County State's Attorney Kim Foxx, Winnebago County DA Christian Gossett, and Pinal County Attorney Kent Volkmer have spoken out in favor of bail reform or have instituted office policies to reduce the pretrial population. District Attorney Kim Ogg filed a statement in support of a recent lawsuit challenging her county's bail system, and a federal judge ruled that the Harris County money bail system was unconstitutional.<sup>17</sup> Others, like San Francisco City Attorney Dennis Herrera, have not opposed lawsuits challenging the bail system's constitutionality. Many more have served on commissions that recommended and enacted reforms of the money-bail system, a detention model that former Attorney General Robert Kennedy long ago described as "cruel" and "completely illogical."<sup>18</sup>

Numerous laws and analyses embrace the view that prosecutors should make individualized pretrial decisions that are no more onerous on the defendant than necessary. Many states require a presumption of release on recognizance or unsecured appearance bond absent a showing of danger to the community or flight risk.<sup>19</sup> The National District Attorneys Association (NDAA) Standards require prosecutors to seek bail or other release conditions at the minimum level necessary to ensure community safety and court appearance, and to request release over detention whenever possible.<sup>20</sup> The American Bar Association (ABA) explains in its Criminal

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<sup>14</sup> 18 U.S.C. §§ 3141-3156; § 3142(c)(2).

<sup>15</sup> TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 12 (2010), available at <http://pretrialnola.org/wp-content/uploads/2015/09/09-24-2010-PJI-History-of-Bail.pdf>.

<sup>16</sup> Four states -- Kentucky, Illinois, Oregon, and Wisconsin -- have eliminated for-profit bail altogether. Others, like Massachusetts, effectively eradicated the industry by allowing defendants to pay a refundable deposit to the court rather than to a private agent. Some reformers have established charitable bail organizations, like the Bronx Freedom Fund or the Chicago Community Bond Fund, to replace the private sureties. See NAT'L ASSOC. OF PRETRIAL SERV. AGENCIES, THE TRUTH ABOUT COMMERCIAL BONDING IN AMERICA 4 (2009), <https://www.pretrial.org/download/pji-reports/Facts%20and%20Positions%201.pdf>; MOVING BEYOND MONEY, *supra* note 4, at 13; BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org> (last visited Apr. 12, 2017); CHICAGO COMMUNITY BOND FUND, <https://www.chicagobond.org> (last visited Apr. 12, 2017).

<sup>17</sup> See Gabrielle Banks, *Harris County Bail System Unconstitutional, Federal Judge Rules*, HOUSTON CHRON. (Apr. 28, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-bail-system-unconstitutional-11108210.php>.

<sup>18</sup> SCHNACKE ET AL., *supra* note 17, at 11-12. Recognizing the cruelty of the money-bail system, Attorney General Kennedy instructed U.S. Attorneys to presume release for defendants "in every practicable case." *Id.* at 11.

<sup>19</sup> SCHNACKE ET AL., *supra* note 17, at 12.

<sup>20</sup> NAT'L DIST. ATT'YS ASSOC., NATIONAL PROSECUTION STANDARDS 4-4.2, 4-4.4 (3rd ed.), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

Justice Standards for Pretrial Release that “the law favors the release of defendants pending the adjudication of charges.”<sup>21</sup> The ABA further recommends that each jurisdiction “adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond.”<sup>22</sup>

For prosecutors, the starting point for bail reform should be to promote a process similar to the federal statute – a presumption of release for most defendants absent a showing of flight risk or danger to the community.

### 3. RECOMMENDATIONS

- 1. Publicly support the elimination of money bail.** DAs should use their bully pulpit to communicate the harms of the money bail system and the need for reform.
- 2. Presume and affirmatively recommend release on recognizance absent a showing of danger or flight risk.** In accordance with ABA and NDAA standards, DAs should implement a presumption of release for defendants, absent a showing of flight risk or danger to the community. Detention should be reserved for the rare circumstances where a person presents a substantial and identifiable danger to the community, and the prosecutor should be required to document those circumstances.<sup>23</sup>
- 3. Screen cases early.** DAs should require early screening of all criminal cases by an experienced prosecutor who can determine whether all elements of the offense are met, sufficient evidence to prove the case exists, and pretrial detention is appropriate and necessary to protect the public and address risk of flight.
- 4. Encourage an adversarial bail process.** Encourage bail-review hearings whereby pretrial detention decisions are part of an adversarial process with defense counsel and the prosecutor present. Support a “second look” at bail determinations enabling new considerations to be presented to, and considered by, the court without procedural hurdles.
- 5. Adopt a risk assessment tool that is validated, evidence-based, and transparent.** Promote the use of risk assessment tools based on reliable models, continually reviewed and updated, shown to not reinforce racial disparity and used as part of an adversarial bail-review hearing with defense counsel and the prosecutor present. DAs should balance objective data from these tools with professional discretion to make informed recommendations about pretrial detention and encourage judges and pre-trial services officers to adopt similar validated tools.
- 6. Facilitate speedy pretrial decisions.** Inform the court that release is the default recommendation for all defendants, absent a documented and identifiable danger or flight risk. Some DA’s offices have waived the prosecutor’s appearance at bail hearings to facilitate an expedited release determination.
- 7. Support data collection and sharing.** Encourage regulations and institute policies to collect data about pretrial decisions and outcomes and share that data with the public to ensure transparency in pretrial practices.

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<sup>21</sup> ABA, *Pretrial Release*, CRIMINAL JUSTICE SECTION STANDARDS 10-1.1, available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html).

<sup>22</sup> *Id.* at 10-1.4(a).

<sup>23</sup> Bail can also serve as an additional assurance that the defendant will appear in court, but prosecutors should exercise caution in endorsing this approach depending on the facts of the case, and be mindful of constitutional concerns – as the Supreme Court has found, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eight Amendment.” *Stack v. Boyle*, 342 U.S. 1 (1951).

8. **Establish and promulgate internal office policy and train prosecutors on the importance of presumptive release.** Establish, and train prosecutors on, internal policies requiring alternatives to money bail, taking seriously ability-to-pay assessments and recognizing the trauma and harm pretrial detention can cause.
9. **Track outcomes.** As new procedures are implemented and programs piloted, collect information to share about the outcomes and value of pretrial release. Consider using communications to spotlight cost savings and the impact of release on individuals and families.
10. **Ensure new bail policies are followed by line prosecutors.** As policies are implemented at the top levels of the office, it is sometimes difficult for these new policies to take hold at the line staff level. Consider procedures to ensure that line prosecutors follow these policies, such as including adherence to these policies as part of performance evaluations.

#### 4. RESOURCES

- Ram Subramanian et al., Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails In America* (2015), available at <http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.
- Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, Wash. Post (July 6, 2016), [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.2256a1fc9cbb](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.2256a1fc9cbb);
- Pretrial Justice Institute, *Pretrial Justice: How Much Does It Cost?* (2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66faded>
- Pretrial Justice Institute, *Have You Asked Them? Talking to Defendants About Money Bond and Pretrial Release* (2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0e56ae8a-533f-0aef-6720-35d92a6539a3&forceDialog=0>.
- Timothy R. Schnacke et al., Pretrial Justice Institute, *The History of Bail and Pretrial Release* (2010), available at <http://pretrialnola.org/wp-content/uploads/2015/09/09-24-2010-PJI-History-of-Bail.pdf>.

#### 5. SAMPLE LEGISLATION

- New Jersey Bail Reform and Speedy Trial Act (2014), available at [http://www.njleg.state.nj.us/2014/Bills/PL14/31\\_.HTM](http://www.njleg.state.nj.us/2014/Bills/PL14/31_.HTM)
- No More Money Bail Act of 2016 (2016) (Washington, DC), available at <https://www.congress.gov/bill/114th-congress/house-bill/4611/text>
- New Mexico Constitutional Amendment (2016), available at [https://www.nmlegis.gov/Publications/New\\_Mexico\\_State\\_Government/Constitutional\\_Amendment/Constitutional\\_Amendments\\_2016.pdf](https://www.nmlegis.gov/Publications/New_Mexico_State_Government/Constitutional_Amendment/Constitutional_Amendments_2016.pdf)
- 18 U.S.C. § 3142, available at <https://www.law.cornell.edu/uscode/text/18/3142>