

BAIL REFORM

A GUIDE FOR STATE AND LOCAL POLICYMAKERS

February 2019

Colin Doyle | Chiraag Bains | Brook Hopkins

CRIMINAL JUSTICE
POLICY PROGRAM

HARVARD LAW SCHOOL

ACKNOWLEDGMENTS

Bail Reform: A Guide for State and Local Policymakers was prepared by the Criminal Justice Policy Program (CJPP) at Harvard Law School. The drafting of this guide was overseen by CJPP's faculty co-directors, Prof. Carol Steiker and Prof. Alex Whiting. As a legal fellow at CJPP, Elana Fogel provided initial research and drafting. CJPP staff, Elizabeth Bishop, Sharon Brett, Mitali Nagrecha, Chijindu Obiofuma, Ranit Patel, and Anna Weick edited this guide and offered helpful feedback. Many Harvard Law School students contributed valuable research assistance, including Veronica Saltzman, Katelyn Kang, Brianne Power, Katherine Robinson, Maia Usui, Megan Vees, Jenny Braun, Eliza McDuffie, Sarah Bayer, Kenneth Crouch, Jack Brewer, and Nicholas Raskin.

We are grateful for generous insights and feedback from Rich Adkins, Ivette Ale, Chelsea Barabas, Tarah Boh Blair, Cherise Fanno Burdeen, Ross Caldwell, Susan Callaghan, Steve Chin, Patrisse Cullors, Gina Eachus, Peter Eliasberg, Lori Eville, Stephanie Garbo, Edward Gordon, Sharlyn Grace, Garrett Griffin, Vance Hagins, Cindy Hendrickson, Elie Honig, Raj Jayadev, Michelle Jett, Aaron Johnson, Alec Karakatsanis, Laks Kattalai, Scott Levy, Maja Marjanovic, Devon Porter, John Raphling, Jessica Rivas, Hannah Sassaman, Timothy Schnacke, Thea Sebastian, Alex Shalom, Colin Starger, Margaret Strickland, Pilar Weiss, B. Scott West, and Bo Zeerip.

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ABOUT THE CRIMINAL JUSTICE POLICY PROGRAM

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

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INTRODUCTION

Nearly every jurisdiction in the United States relies upon money bail as a condition of pretrial release and as a covert form of pretrial detention. The practice of making the payment of a money bond a requirement for pretrial release¹ discriminates based on wealth, exacerbates racial disparities, results in over-incarceration, and imposes unnecessary costs on individuals and society at large. On any given day, American jails imprison nearly half a million people who have not been convicted of a crime — many of whom remain in jail only because they cannot afford to pay for their release. Across the country, increases in pretrial detention rates are “responsible for all of the net jail growth in last twenty years.”² Awaiting trial from a jail cell, these individuals suffer worse case outcomes and risk losing their jobs, their homes, and custody of their children.³ Some innocent people plead guilty just to get out of jail. The harms of our pretrial systems fall disproportionately on communities of color, as Black and Latinx people accused of crimes are more likely to be detained pretrial than similarly situated white people.⁴

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

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

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

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

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

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

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

Principles For Pretrial Reform

Limit Pretrial Detention

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

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

Eliminate Money Bail

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

Tread Carefully with Risk Assessment Tools

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

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

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

The disparities and biases in police patrol activity, arrests, prosecution, and sentencing shape and distort the training data that inform the risk assessment tools.

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

Optimize Pretrial Services

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

Involve Stakeholders at Every Stage of Reform

A hallmark of successful reforms has been the repeated, consistent involvement of a broad range of stakeholders, including judges, prosecutors, public defenders, law enforcement, civil rights and civil liberties groups, community organizations, and people from communities that are most impacted by the criminal justice system. Across jurisdictions, a key to success has been the consensus-building value of in-person meetings of diverse stakeholders with different viewpoints, goals, and experiences. Stakeholders and the public should also be given the opportunity to learn about the harms of the money bail system, the feasibility of reform, and the effectiveness of pretrial systems that maximize release and minimize unnecessary release conditions.

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

Pioneers of Reform

Washington, D.C.
Kentucky

Recent Changes, Promising Outcomes

New Jersey
Cook County, IL
Santa Clara County, CA

Reform without Algorithms

New Mexico
Maryland

Snapshots of Local Innovation

Milwaukee and Dane Counties, WI
City and County of Denver and Mesa County, CO
Multnomah and Yamhill Counties, OR

THE URGENT NEED FOR BAIL REFORM

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

Contemporary Pretrial Practices

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

There are two types of bail bonds: secured and unsecured. With unsecured bonds, defendants do not provide money upfront but will owe the court money if they miss future court dates.¹⁷ With secured bonds, defendants are free only after posting the full amount¹⁸ or using real estate equity or a government bond as collateral.¹⁹

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

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

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

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

The Problems with Money Bail

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

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

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

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

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

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

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

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

The Push for Reform

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

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

PRINCIPLES FOR PRETRIAL REFORM

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

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

1. Limit Pretrial Detention

Use procedural safeguards to encourage release on recognizance

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

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

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

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

Make release decisions within 24 hours of arrest

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

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

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

Appoint defense counsel before the first hearing

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

2. Eliminate Money Bail

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

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

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

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

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

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

3. Tread Carefully with Risk Assessment Tools

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reject proxies for race and class as predictors of risk

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

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

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

Be precise when characterizing risks

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

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

Conform the risk assessment tool to state law

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

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

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

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

Set risk thresholds that promote pretrial liberty

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

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

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

example of how pretrial release rates remain a policy choice distinct from a risk assessment tool's prediction of risk. Policymakers should calibrate risk thresholds to promote pretrial liberty.

Validate the algorithm for the local population

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

Engage the community

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

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

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

Retain judicial discretion and include procedural protections

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

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

Collect data and make adjustments

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

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

4. Optimize Pretrial Services

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

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

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

Use phone and text reminders

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

Limit in-person check-in requirements

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

Limit the use of electronic monitoring

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

Refer clients to non-mandatory social services

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

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

Consider community-sponsored services

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

Don't impose fees for pretrial services

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

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

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

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

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

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

Make pretrial services an independent agency

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

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

5. Involve Stakeholders at Every Stage of Reform

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

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

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

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

CONCLUSION

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

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

APPENDIX A:

MODEL BILL FOR PRETRIAL PROCEDURES

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

I. First Appearance and Pretrial Release Decision

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

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

Monetary Bail

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

II. Detention and Conditional Release Hearing

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

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

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

APPENDIX B:

CASE STUDIES

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

Pioneers of Reform

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

Recent Changes, Promising Outcomes

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

Reform without Algorithms

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

Snapshots of Local Innovation

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

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

PIONEERS OF REFORM

Washington, D.C.

Major reforms:

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

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

The Reform Process

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

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

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

Key Reforms

Strong Presumption of Pretrial Release

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

Strict Timeliness Requirements and Procedural Protections

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

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

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

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

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

3. “the history and characteristics of the person,” and
4. “the nature of the danger to any person or the community that would be posed by the person’s release.”¹⁸⁸

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

Risk Assessment

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

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

Pretrial Services

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

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

Outcomes

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

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

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

Kentucky

Major Reforms:

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

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

The Reform Process

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

Key Reforms

Statewide Risk Assessment

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

Automatic Release for Low-Risk Defendants

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

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

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

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

Timeliness Requirements

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

Procedural Protections

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

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

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

Pretrial Services and Court Date Reminders

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

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

Outcomes

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

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

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

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

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

RECENT CHANGES, PROMISING OUTCOMES

New Jersey

Major Reforms:

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

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

The Reform Process

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

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

the state was detaining around 9,000 pretrial defendants, at an average cost of about \$100 per detainee per day.²⁶⁵ The committee recommended that New Jersey transition to a “risk-based” system, in which a defendant’s likelihood of missing a court date and his or her danger to the community would guide pretrial release decisions.²⁶⁶ Believing that this system would require greater monitoring of released defendants, the committee also recommended that the state provide effective pretrial release services.²⁶⁷ In developing these recommendations, the committee drew support from the experience of other jurisdictions — in particular the District of Columbia,²⁶⁸ Kentucky,²⁶⁹ and Virginia²⁷⁰ — as well as New Jersey’s own success using risk-based assessments in the juvenile justice system.²⁷¹

In 2014, the state legislature passed and the governor signed the New Jersey Bail Reform Act,²⁷² which adopted many of the committee’s recommendations, including establishing a pretrial services agency and adopting a risk assessment instrument.²⁷³ Following the adoption of this legislation, New Jersey voters approved a state constitutional amendment allowing preventive pretrial detention.²⁷⁴ Both the Bail Reform Act and the constitutional amendment went into effect on January 1, 2017.²⁷⁵

Key Reforms

Risk Assessment

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

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

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

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

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

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

Technological Overhaul for Case Management

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

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

Pretrial Services

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

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

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

Procedural Protections for Preventive Detention

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

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

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

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

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

Sustained Stakeholder Engagement and Education

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

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

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

Outcomes

- 94% release rate
- 20% reduction in jail population in the past year³²⁴

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

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

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

that this has resulted in more frequent use of summons and less frequent use of short term pretrial detention in which the police initially detain someone only for a court to release that person a day or two later.

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

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

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

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

Some police officials have also been critical of the reforms, arguing that the new system undermines their work and makes communities less

safe.³³⁷ The release of certain defendants with serious prior convictions has further stoked these criticisms, although there is little basis to determine whether such cases are representative of a broader problem or how often similar defendants were released under the prior money bail system. A vocal opponent of the reforms has been the bail bond industry, whose business has been largely eliminated in the state.³³⁸

Cook County, Illinois

Major reforms:

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

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

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

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

The Reform Process

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

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

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

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

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

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

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

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

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

Key Reforms

Statewide Reforms

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

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

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

Chicago Reforms

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

assessment tool for all defendants.³⁷⁸ Conditions of release are to be tailored to each individual defendant, and money bail is no longer the default condition of release.³⁷⁹

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

Ability to Pay Determinations Before Setting Bail

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

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

Risk Assessment

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

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

Outcomes

Chicago has benefitted from the Chief Judge's new rule. Most strikingly, the population of the Cook County Jail has fallen dramatically in a short period of time. In December 2017, the jail's population fell to below 6,000 inmates, the lowest level in decades,³⁹² a drop of about 1,400 since Chief Judge Evans mandated sweeping changes to the bail system.³⁹³ The jail population has stayed constant for most of 2018.³⁹⁴ The jail-population drop has saved the county money. The Cook County Sheriff's office estimates savings of \$3.6 million per month in overtime pay.³⁹⁵ At its peak, the county spent nearly \$2 million per pay period on overtime — that figure dropped to just \$200,000 per pay period in January 2018.³⁹⁶ The county expects to realize millions of dollars in additional savings through the demolition of unneeded jail facilities.³⁹⁷

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

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

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

Santa Clara County, California

Major reforms:

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

Santa Clara County has been a story of gradual but concrete steps to reduce the use of money bail and increase pretrial release. Since 2010, the county has periodically expanded its pretrial services agency and has adopted pretrial risk assessments to provide more information to judges at bond hearings. Today, the county is piloting a community release program through which defendants are released and connected to community-based services. At the state level, California has passed a new law that will prohibit the use of money bail starting in October 2019.⁴⁰⁷ The numbers bear out the steady progress of these reforms. In Santa Clara county, judges now release more defendants on their own recognizance.⁴⁰⁸ According to recent data, released defendants are making court dates 95% of the time and are avoiding re-arrest 99% of the time.⁴⁰⁹

The Reform Process

Over the past decade, Santa Clara County has gradually adopted a handful of reforms. In 2010, the county piloted a risk assessment tool that was adopted countywide in 2011 and validated in 2012.⁴¹⁰ Although the numbers of release on recognizance rose in the first part of this decade, the county still relied largely on money bail, with the secured bond amount determined by a uniform countywide bail schedule.⁴¹¹ Like other counties in California, the Santa Clara bail schedule set forth bond amounts based on the seriousness of the charged offense but did not take into account individual factors such as the defendant's ability to pay, risk of missing court dates, or risk of committing a crime pretrial.⁴¹²

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

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

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

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

Key Reforms

Community-Sponsored Release

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

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

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

Silicon Valley De-Bug was a member of the Bail and Release Work Group, and brought to bear its experience with participatory defense in its advocacy for wider implementation of community-based alternatives to bail.⁴³⁵ This advocacy led the Work Group to propose formalizing community-sponsored release as an alternative to money bail and county-supervised pretrial release.⁴³⁶ The Community Release Program proposal was unanimously approved by the Santa Clara County Board of Supervisors in October 2017.⁴³⁷ In 2018, the County issued a Request for Information for groups interested in administering the program, which is expected to be up and running at the end of 2018.⁴³⁸

Robust and Independently Housed Pretrial Services Agency

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

Pretrial Risk Assessment

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

version of the Virginia Model Risk Assessment Instrument for Santa Clara County.⁴⁴² This tool takes into account demographic and criminal history variables that include age, marital status, whether the defendant lives with family, whether the defendant has a college degree, unemployment, prior mental health treatment, prior drug treatment, other charges, prior failure to appear in the last three years, two or more prior misdemeanors, and prior probation or parole.⁴⁴³ After receiving input from a group of county stakeholders — including the superior court, district attorney, public defender, and sheriff — the Office of Pretrial Services implemented the risk assessment tool in January 2011.⁴⁴⁴ The tool was validated using local data in a study by the Pretrial Justice Institute in 2012.⁴⁴⁵

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

Outcomes

Reforms have shown promising results over time. Since the implementation of its pretrial risk assessment tool, Santa Clara County has increased the number of pretrial releases without an increase in the rate of defendants missing court appearances or being arrested for new crimes. By 2014, the number of defendants released on their own recognizance had risen to about 1,600 per month, up from 1,100 per month in 2011.⁴⁵² In 2015, pretrial services officers recommended release in 79% of cases.⁴⁵³ Judges follow the recommendations about 75% of the time.⁴⁵⁴ Meanwhile, rates of re-arrest, appearance, and technical compliance have remained the same or have improved. Between 2013 and 2016, defendants released

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

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

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

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

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

REFORM WITHOUT ALGORITHMS

New Mexico

Major reforms:

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

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

The Reform Process

New Mexico's bail laws originally mirrored the federal Bail Reform Act of 1966, with provisions in the state constitution discouraging excessive bail⁴⁶¹ and statutes encouraging the "least restrictive means necessary" to ensure appearance in court.⁴⁶² Courts could preventively detain someone only in capital cases in which "the proof [wa]s evident or the presumption great" or in specific circumstances based on a current felony charge and a defendant's past felony convictions.⁴⁶³

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

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

Key Reforms

Prohibition on Pretrial Detention Because of Unaffordable Bail

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

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

Procedural Protections for Preventive Detention Based on Dangerousness

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

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

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

Outcomes

Reform in New Mexico is still too new to allow for full assessment of its impact, but some preliminary information is available regarding the reforms' effects. According to data from New Mexico's statewide public defender's office, prosecutors filed pretrial detention motions on 10% of felony arrestees statewide, and those motions were granted 33% of the time, resulting in a 3% detention rate for felony arrestees between July and October 2017.⁴⁷⁸ In the Second Judicial District, the largest district in the state covering Albuquerque and surrounding Bernalillo County, judges estimated that about 40% of pretrial detention motions were granted as of October 2017.⁴⁷⁹

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

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

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

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

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

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

Maryland

Major reform:

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

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

In February 2017, the Court of Appeals of Maryland unanimously approved a proposal from its rules committee to amend statewide rules concerning bail and pretrial procedure.⁴⁸⁸ The new provision, Maryland Court Rule 4-216.1, specifically instructs judicial officers not to impose bail amounts that a defendant cannot afford.⁴⁸⁹ If the judicial officer determines that secured money bail is the least onerous condition necessary to ensure a defendant's appearance or to protect public safety, the officer must conduct an individualized inquiry into the defendant's finances.⁴⁹⁰ The rule went into effect on July 1, 2017.⁴⁹¹ The impact of the new rule has been mixed. While the use of money bail has decreased, more individuals are being preventively detained.⁴⁹²

The Reform Process

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

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

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

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

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

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

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

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

Key Reforms

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

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

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

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

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

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

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

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

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

Outcomes

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

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

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

SNAPSHOTS OF LOCAL INNOVATION

Milwaukee and Dane Counties, Wisconsin

State Background

Wisconsin has pursued a statewide shift to evidence-based practices in the criminal justice system, including the use of risk assessment tools. The state outlawed the commercial bail bond industry in 1979.⁵⁵⁰ On a local level, some counties have adopted substantial pretrial reforms, including prioritizing release over pretrial incarceration, using automated court date reminders, and adopting risk assessment tools. For example, Milwaukee County has implemented a pretrial risk assessment tool, a pretrial monitoring program, and early intervention programs. Dane County has partnered with Harvard Law School’s Access to Justice Lab to run a pilot program to test the effectiveness of the Laura and John Arnold Foundation’s Public Safety Assessment for the county.

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

Nevertheless, commercial bail bonds are an issue of continued political debate in Wisconsin. In 2011 and again in 2013, state Republicans — supported by the American Bail Coalition and the American Legislative Exchange Council — attempted to revive the commercial bail bond industry.⁵⁵⁶ Governor Walker vetoed these proposals both times,⁵⁵⁷ in part due to strong opposition from the courts⁵⁵⁸ and law enforcement officials.⁵⁵⁹ However, industry lobbyists are expected to continue their efforts within the state.⁵⁶⁰

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

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

Milwaukee County

Major reforms:

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

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

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

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

Pretrial Risk Assessment

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

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

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

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

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

Pretrial Monitoring and Services

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

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

Dane County

Major reform:

- **Randomized Control Trial for Risk Assessments**

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

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

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

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

Denver and Mesa Counties, Colorado

State Background

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

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

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

- Having a Home or Cell Phone

- Owning or Renting One’s Residence
- Contributing to Residential Payments
- Past or Current Problems with Alcohol
- Past or Current Mental Health Treatment
- Age at First Arrest
- Past Jail Sentence
- Past Prison Sentence
- Having Active Warrants
- Having Other Pending Cases
- Currently on Monitoring
- History of Revoked Bond or Monitoring⁶⁰⁰

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

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

Denver County

Major Reforms:

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

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

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

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

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

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

Mesa County

Major Reforms:

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

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

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

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

Multnomah and Yamhill Counties, Oregon

State Background

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

Oregon law allows for pretrial defendants to be released from custody on personal recognizance, on conditional release, or on secured money bail.⁶²⁴ State law also allows sheriffs to release pretrial detainees on personal recognizance when a jail is over capacity.⁶²⁵ The commercial bail bond industry has been banned statewide since 1973.⁶²⁶ District attorneys, defense attorneys, and law enforcement have all opposed legislative attempts to revive the bail bond industry.⁶²⁷ When assigned money bail, a defendant must post 10% of the bond with the court to be released.⁶²⁸ Under a statewide statute, if a defendant makes his or her court dates, the court will return 85% of the 10% bond deposit to the defendant, but will keep the remaining 15% of the 10% deposit as a fee.⁶²⁹ The statute affords judges the discretion to dismiss this fee. Depending on the type of court, this fee will either fund court administrative costs or be deposited into general funds for the county or state.⁶³⁰ These kinds of fees are an unwise and unjust tax for being accused of a crime. Even if someone's case is dismissed or someone is acquitted, the state still retains the money. There is no statewide pretrial system in Oregon; counties have their own pretrial services agencies, which can vary considerably.

Oregon's 2013 Justice Reinvestment Act created a Task Force on Public Safety that later established a Pretrial Workgroup in 2017.⁶³¹ The Workgroup contracted with the National Institute of Corrections to train system actors in Oregon. The trainings educate participants about the history and harms of money bail and alternatives to bail that have worked in other states.⁶³² Oregon also plans to expand its data collection efforts, with particular emphasis on collecting data about race and the criminal justice system.⁶³³ One working group will assess the extent to which risk-assessment tools have a disparate racial impact.⁶³⁴

Multnomah County

Major Reforms:

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

Multnomah County has been using the Virginia Pretrial Risk Assessment Instrument (VPRAI) since 2009.⁶³⁵

The VPRAI checks for nine factors:

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

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

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

Yamhill County

Major Reforms:

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

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

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

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

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

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

ENDNOTES

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

14. For a broader background on general bail practices, see generally CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016) [HEREINAFTER BAIL REFORM PRIMER].
15. *E.g.*, CAL. PENAL CODE § 1270 (West 2017) (“Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail.”).
16. See generally BAIL REFORM PRIMER, *supra* note 14, at 5–6.
17. BAIL REFORM PRIMER, *supra* note 14, at 6.
18. See Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 3–4 (2008).
19. *E.g.*, CAL. PEN. CODE § 1298 (West 2017).
20. See HUMAN RIGHTS WATCH, “NOT IN IT FOR JUSTICE” HOW CALIFORNIA’S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 6 (2017), https://www.hrw.org/sites/default/files/report_pdf/us_bail0417_web_0.pdf [hereinafter HUMAN RIGHTS WATCH].
21. U.S. Const. amend. VIII; *e.g.*, CAL. CONST. art. I, § 12.
22. *E.g.*, CAL. PEN. CODE § 1276 (West 2017).
23. See HUMAN RIGHTS WATCH, *supra* note 20, at 29.
24. *Id.* at 39 (“Competition among different bond agencies means they will often make deals, including reducing their fee to 8%, sometimes lower. They frequently offer payment plans, sometimes agreeing to down payments as low as 1%, along with monthly payments.”) (citation omitted).
25. ISAAC BRYAN ET AL., MILLION DOLLAR HOODS, THE PRICE FOR FREEDOM: BAIL IN THE CITY OF L.A., 1 (2017), http://milliondollarhoods.org/wp-content/uploads/2017/10/MDH_Bail-Report_Dec-4-2017.pdf.
26. HUMAN RIGHTS WATCH, *supra* note 20, at 29.
27. BAIL REFORM PRIMER, *supra* note 14, at 12.
28. *Id.* at 6.
29. *E.g.*, FELONY BAIL SCHEDULE, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 3 (2018); see generally BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (2018).
30. *E.g.*, FELONY BAIL SCHEDULE, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 3 (2018).
31. KY R. CRIM. P. 4.06.
32. The study of Cook County, Illinois in the appendix is an example of this problem. The county has robust preventive detention procedures and requires judges to determine that a defendant has the ability “to pay the amount necessary to secure his release” before imposing bail. General Order No. 18.8A, Circuit Court of Cook County, (July 17, 2017), <http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf>. But judges in Cook County continue to impose unaffordable bond amounts that result in detention. THE COALITION TO END MONEY BAIL, SHIFTING SANDS: AN INVESTIGATION INTO THE FIRST YEAR OF BOND REFORM IN COOK COUNTY 6 (2018), <https://www.chicagobond.org/reports/Shifting-Sands.pdf> (last visited Sep 20, 2018).
33. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 1 (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf>; ROY WALMSLEY, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST 1 (3d. ed. 2016).
34. WALMSLEY, *supra* note 33, at 13; Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World’s Population and One Quarter of the World’s Prisoners*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.d10281e3c39c.
35. Peter Wagner & Wendy Sawyer, PRISON POLICY INITIATIVE, *Mass Incarceration: The Whole Pie 2018* (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.
36. RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 29 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.
37. David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, at 1889–90 (2018).
38. *Id.* 1885–86.
39. Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOCIAL PROBLEMS 222, 222 (2004).
40. Aleks Kajstura, PRISON POLICY INITIATIVE, *WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2018* (Nov. 13, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html>.
41. JASON LYDON ET AL., COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK’S NATIONAL LGBTQ PRISONER SURVEY 24 (2015).
42. BAIL REFORM PRIMER, *supra* note 14, at 7.
43. Cty. of Santa Clara Bail and Release Work Grp., *Consensus Report on Optimal Pretrial Justice 38* (2016) (draft), <https://www.sccgov.org/sites/ceo/Documents/bail-release-work-group.pdf> [hereinafter Santa Clara Bail Report].
44. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).
45. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* 69 STAN. L. REV. 711, 714–717 (2017). See also Samuel Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 419–20 (2016).
46. Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, REFORMING CRIMINAL JUSTICE 22 (2017).
47. Heaton, *supra* note 45, at 718. CHRISTOPHER T. LOWENKAMP ET AL., LJAF, *THE HIDDEN COSTS OF PRETRIAL DETENTION* 4 (2013).
48. LOWENKAMP *supra* note 47, at 4.

49. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017)
50. Los Angeles County Motion, *supra* note 9. This number may not include medical expenses, which can be substantial for defendants who receive health or mental health treatment in jail. See SARAH LIEBOWITZ, ET AL., ACLU OF SOUTHERN CALIFORNIA & THE BAZELON CENTER FOR MENTAL HEALTH LAW, A WAY FORWARD: DIVERTING PEOPLE WITH MENTAL ILLNESS FROM INHUMANE AND EXPENSIVE JAILS INTO COMMUNITY-BASED TREATMENT THAT WORKS 8 (2014).
51. Los Angeles County Motion, *supra* note 9.
52. *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited May 11, 2018).
53. *Reem v. Hennessy*, No. 17-CV-06628-CRB, 2017 WL 6539760, at *1 (N.D. Cal. Dec. 21, 2017).
54. *ODonnell v. Harris Cty., Texas*, 882 F.3d 528, 535 (5th Cir. 2018). The court remanded the case for the district court to reconsider the scope of the injunction. *Id.* The court found that the plaintiffs were likely to succeed on the merits of an equal protection claim and at least part of a due process claim challenging the county's offense-based bail schedule. *Id.*
55. Steve Schmadeke, *Lawsuit Challenges the Cash Bail System in Cook County*, CHICAGO TRIBUNE (Sept. 11, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-cook-county-hearing-cash-bail-lawsuit-20170911-story.html>.
56. Richard A. Oppel Jr., *Defendants Can't Be Jailed Solely Because of an Inability to Post Bail, Judge Says*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html>.
57. *Bearden v. Georgia*, 461 U.S. 660, 665–67 (1983).
58. Amicus Brief of Dep't of Justice, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir. Aug. 18, 2016). The Department also filed a "Statement of Interest" in an Alabama case involving the use of fixed bail schedules, in which it also outlined the constitutional principles generally applicable in the pretrial setting. Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (N.D. Ala. Feb. 3, 2015).
59. *How the Poor Get Locked Up and the Rich Go Free*, L.A. TIMES (Aug. 16, 2017), <http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170816-story.amp.html>; *Fixing the Unfair Bail System is Worth the Costs*, WASH. POST (Sept. 9, 2017) https://www.washingtonpost.com/opinions/fixing-the-unfair-bail-system-is-worth-the-costs/2017/09/09/ff3c5c4c-73eb-11e7-8f39-eeb7d3a2d304_story.html?noredirect=on&utm_term=.64bd83f31cfe; *Cash Bail's Lonely Defender*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/opinion/cash-bails-lonely-defender.html?_r=0.
60. Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017) <https://www.nbcnews.com/specials/bail-reform>.
61. Directory of Community Bail Funds, *supra* note 7.
62. Kamala D. Harris & Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let's Reform Bail*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>.
63. Aída Chávez, *Bernie Sanders Introduces Bill to End Money Bail*, THE INTERCEPT (July 25, 2018), <https://theintercept.com/2018/07/25/bernie-sanders-money-bail/>.
64. Rhonda McMillion, *Boosting Bail Reform: ABA urges Congress to limit use of cash bail*, ABA J. (Nov. 2017), http://www.abajournal.com/magazine/article/ABA_urges_Congress_to_limit_use_of_cash_bail/. See generally AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3d ed. 2007).
65. See NAT'L ASSOC. OF PRETRIAL SERVS. AGENCIES, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES STANDARDS ON PRETRIAL RELEASE 4 (3d ed. 2004).
66. See generally CONFERENCE OF STATE CT. ADM'RS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE.
67. See NAT'L ASSOC. OF CTYS, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 104 (2016–2017),
68. See CONFERENCE OF CHIEF JUSTICES, RES. 3: ENDORSING THE CONFERENCE OF STATE COURT ADMINISTRATORS POLICY PAPER ON EVIDENCE-BASED PRETRIAL RELEASE (2013).
69. See AM. JAIL ASSOC., AMERICAN JAIL ASSOCIATION RESOLUTION ON PRETRIAL JUSTICE (2010).
70. See SUSAN WEINSTEIN, INT'L ASSOC. OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS 8–10 (2011).
71. See ASSOC. OF PROSECUTING ATTORNEYS, POLICY STATEMENT ON PRETRIAL SERVICES.
72. NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, BOARD RESOLUTION CONCERNING PRETRIAL RELEASE AND LIMITED USE OF FINANCIAL BOND (2012).
73. See CALIFORNIANS FOR SAFETY & JUSTICE, PRETRIAL PROGRESS: A SURVEY OF PRETRIAL PRACTICES AND SERVICES IN CALIFORNIA 5–7 (Aug. 2015).
74. This research was conducted between June of 2017 and Oct. of 2018.
75. *United States v. Salerno*, 481 U.S. 739, 755 (1987).
76. *E.g.*, D.C. CODE ANN. § 23-1321(c)(1)(B).
77. *E.g.*, D.C. CODE ANN. § 23-1321(b).
78. "Detention eligibility nets" are an emerging and important topic of discussion in pretrial reform. State law has traditionally allowed only a small subgroup of defendants to be preventively detained pretrial. Judges have circumvented these limits by imposing unaffordable bail amounts on defendants who are not legally eligible for preventive detention, which results in those defendants remaining in jail because they cannot afford to post bail. Jurisdictions that consider eliminating money bail often also consider changing the class of defendants that can be legally detained. If the class of defendants who can be legally detained

- is expanded, this change may diminish or even reverse cuts in pretrial detention rates resulting from the elimination of money bail. The line-drawing challenge of identifying the appropriate class of defendants who should be categorically exempt from pretrial detention is beyond the scope of this guide but is worthy of more research and discussion. For a thorough treatment of this problem, see generally TIMOTHY R. SCHNACKE, “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (2017).
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 80. *E.g.*, N.M. CT. R. 5-401(A)(2).
 81. *E.g.*, N.J. STAT. ANN. § 2a:162-16, 18 (West 2017).
 82. *See e.g.*, N.M. CT. R. 5-401(A)(1)(a).
 83. *Interview Process & Release Alternatives*, KENTUCKY COURT OF JUSTICE, <https://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx> (last visited May 15, 2018); *Court Support*, Pretrial Servs. Agency for D.C., https://www.psa.gov/?q=programs/court_support (last visited May 11, 2018); *Yamhill County Pretrial Justice Program*, Oregon Knowledge Bank, <http://okb.oregon.gov/portfolio-item/yamhill-pretrial-justice/> (last visited May 25, 2018).
 84. GLENN A. GRANT, ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE FOR CALENDAR YEAR 2017 at 13.
 85. Supreme Court of Kentucky, Amended Order 2015-24: “Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program” at 4 (Dec. 2, 2015), https://courts.ky.gov/courts/supreme/Rules_Procedures/201524.pdf.
 86. KENTUCKY COURT OF JUSTICE, *Interview Process & Release Alternatives*, <https://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx> (last visited May 15, 2018).
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 90. *E.g.*, Karnow, *supra* note 18, at 20.
 91. *See* United States v. Salerno, 481 U.S. 739, 751–52 (1987).
 92. *Id.*
 93. Santa Clara Bail Report, *supra* note 43, at 2.
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 95. PRETRIAL SERVS. AGENCY FOR D.C., RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC (2017).
 96. COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA, FY 2016 AGENCY FINANCIAL REPORT 27 (Nov. 15, 2016).
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 98. THE COALITION TO END MONEY BOND, MONITORING COOK COUNTY’S CENTRAL BOND COURT: A COMMUNITY COURTWATCHING INITIATIVE 24 (2018), http://www.chicagoappleseed.org/wp-content/uploads/2018/02/Courtwatching-Report_Coalition-to-End-Money-Bond_FINAL_2-25-18.pdf.
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 100. *E.g.*, N.J. CONST. art. I, para. 11.
 101. LAURA AND JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016). The full set of factors includes age at current arrest, current violent offense, pending charges, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in past two years, prior failure to appear longer than two years ago, and prior sentence to incarceration. *Id.*
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HARVARD LAW SCHOOL

Austin Hall, 1st Floor
1515 Massachusetts Ave
Cambridge, MA 02138