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A Path Forward for Pretrial Justice Reform

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Abstract

Holding large numbers of bailable individuals in detention for inability to pay bail has produced a wave of reform at the local, state, and federal levels. The Constitution explicitly permits money bail, and the use of surety bonds can have significant public safety benefits in some appropriate cases. Nevertheless, the negative outcomes associated with current money bail practices cannot be ignored. Jurisdictions should concentrate on reforms that (1) restore bail to its original purpose as a tool to prevent flight from justice; (2) authorize state judges to impose a range of effective constraints, from supervised release to preventive detention, tailored to each defendant and based on an individual risk assessment; and (3) improve the bail industry through appropriate regulation.

Introduction

Across the nation, states are reforming their bail laws, and some are eliminating money bail altogether. The predominant rationale for bail reform, particularly efforts to eliminate cash bail, is that too many people are held in jails before trial simply because they cannot afford bail. This is too often true, but for many jurisdictions, the real problem is not money bail *per se*, but narrower procedural and substantive issues. Jurisdictions that rush to eliminate money bail ignore the individual liberty and public safety interests that bail protects and risk significant unintended consequences by implementing alternatives to money bail that are insufficiently tested.

Bail reform is needed, but the time is not right for its elimination. Instead, policymakers should focus on improving bail through

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Key Points

- The predominant rationale for bail reform, particularly efforts to eliminate cash bail, is that too many people are held in jails before trial simply because they cannot afford bail, but for many jurisdictions, the real problem is not money bail per se.
- Jurisdictions that rush to eliminate money bail ignore the individual liberty and public safety interests that bail protects and risk significant unintended consequences by implementing alternatives that are insufficiently tested.
- Jurisdictions should concentrate on reforms that restore bail to its original purpose as a tool to prevent flight from justice, that equip judges with validated risk-assessment tools and authorize them to impose a range of effective constraints that are tailored to each individual, and that improve the bail industry through appropriate regulation.
- In addition, state and local pretrial reforms adopted on the basis of federal grants might be fiscally unsound and could prove unsustainable without perpetual federal funding.

reforms that are local, are narrow, and strike a better balance between liberty and public safety. Advances in technology and data analytics hold great promise in assessing individual risk and providing a broader range of tools for ensuring appearance at trial. Fortunately, some states are experimenting with reform measures to allow judges to make more individualized decisions about what to do with defendants before trial, with the goal of reducing pretrial detention populations while improving public safety.

While several of these reforms are promising, future reforms would benefit from a renewed focus on three things.

- Bail should be restored to its original purpose as a tool to prevent flight from justice, not as a means to protect public safety. Using bail for public safety purposes is demonstrably ineffective, as evidenced by the many poor, low-risk defendants who are detained while higher-risk defendants with access to more money are released.

- State legislatures should ensure that state judges have at their disposal and are free to impose a range of effective constraints, from supervised release to preventive detention, tailored to each individual defendant's likelihood to commit a crime or fail to appear for court without conflating those two problems.

- The commercial bail industry itself should be improved through private or public regulation of bail agents and bounty hunters.

Ultimately, any bail reform should be evaluated based on improvements in public safety without compromising due process protections for defendants.

The Purpose of Cash Bail

The purpose of bail is to aid in resolving a tension that exists in the pretrial period between the generally accepted legal norm favoring individual liberty and the state's interests in ensuring that defendants appear at trial and do not pose a danger to public safety if they are released beforehand.[1] Bail accomplishes these goals by giving courts a tool they can use to anchor a defendant to the community by means of a bail payment: typically, a deposit that secures a defendant's release, which he forfeits if he fails to appear in court.

In theory, how large a deposit is required varies from one defendant to the next, and bail is calculated on an individual basis following a personalized assessment of the defendant's flight risk.[2] In reality, courts often rely on bail schedules that set uniform bail amounts for different categories of offenses based on their real or perceived degree of dangerousness to society. As a result, bail is often untethered from its original purpose and is neither individualized nor affordable.

Given its original purpose, it makes sense that the Eighth Amendment prohibits bail that is "excessive" but does not automatically prohibit bail that is unaffordable.[3] As the Supreme Court of the United States has observed, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more."[4] If a court believes that setting bail below a certain amount would not satisfactorily ensure a defendant's appearance, bail may be higher than what the defendant, his family, and friends can afford to pay. This can and often does result in the defendants being held before trial. Other defendants are judged to be too great a flight risk or too great a danger to public safety to be released under any conditions. In such cases, the Supreme Court has stated that the government may also detain defendants before trial who pose a serious risk of flight[5] or danger to the public.[6]

Money bail has been in common use since the Colonial Era,[7] but it is far from the only tool at a judge's disposal. Courts have a range of options available to them, from release on personal recognizance, which merely involves a promise to appear, to detaining a defendant in what is known as preventive detention if it is determined that no conditions of release can satisfactorily ensure the defendant's appearance or the protection of the community.

Although courts generally seek to determine the least restrictive conditions that will satisfy those goals, research indicates that in appropriate cases, financial incentives are more effective than unsecured release (release on recognizance) at ensuring appearance and dissuading flight.[8] The effect can be stark. One 2004 study found that felony defendants were "28 percent[] less likely to fail to appear when released on surety bond than when released on their own recognizance" and that cash bonds were similarly, though slightly less, effective.[9] The same study concluded that fugitive rates were also dramatically

lower for defendants under surety release: "53, 47, and 64 percent lower than the fugitive rates under own recognizance, deposit bond, and cash bond, respectively."[10] The authors concluded that there is "strong evidence that bounty hunters are highly effective at recapturing defendants who attempt to flee justice—considerably more so than the public police."[11]

It is doubtful that police can fulfill that mission effectively—or that they should be expected to do so. This is no slight against police officers; rather, it simply recognizes the diverse and growing responsibilities that society has imposed on our law enforcement agencies, which are often budget-strapped and stretched thin.[12] Thus, at least with regard to fugitives who skip bail, "[b]ounty hunters, not public police, appear to be the true long arms of the law."[13]

Bail agents operate differently from law enforcement officers. Because these agents are private citizens who have contractual relationships with defendants, they face fewer legal obstructions than sworn law enforcement officials face in apprehending defendants who flee.[14] They have broad discretion, informed by experience and knowledge of a defendant's circumstances, to determine who is a flight risk. Should one of their charges escape or fail to appear, the bondsman is liable for the full sum of the defendant's bail, which provides a strong incentive for bondsmen to engage with defendants to ensure their appearance and recapture them if they flee.

Of course, the effectiveness of that incentive depends on there being a credible risk of forfeiture if a defendant does indeed fail to appear. However, bail bondsmen are often largely immunized against the risk of financial loss when one of their charges fails to appear. The contracts that defendants sign often include clauses stipulating that they or their family members are liable for the full cost of the bond, thereby shielding the bondsmen from financial risk.[15] Also, many jurisdictions offer lengthy "grace periods" during which bail agents may pursue and recapture fleeing defendants without facing the prospect of paying the full cost of the bond.[16]

These factors, combined with the infrequency of bail bond forfeitures, "create a weak economic incentive for commercial sureties to ensure that defendants, for whom they are responsible, attend court" and reduce the impetus for prompt pursuit by bondsmen.[17] When jurisdictions attenuate the incentives acting on the bail industry, they risk degrading the effectiveness of commercial sureties by reducing the motivation to exercise discretion and diligence in selecting defendants and working to ensure appearance even as bondsmen continue to collect steep fees for their services.

Bail agents can perform a valuable service, but they are far from perfect. Several high-profile incidents of bail agents exercising poor judgement, sometimes with lethal consequences, have occurred in recent years. In Clarkesville, Tennessee, for example, seven bounty hunters and bondsmen engaged in a seven-mile car chase, shooting at and ramming a vehicle that they believed contained a wanted fugitive. It did not, and the shootout ended in the wounding of the driver and the death of his passenger. All seven bounty hunters were indicted on felony murder charges.[18]

Those few but sensational stories help to drive calls to eliminate commercial bondsmen altogether. While such incidents cannot be ignored, neither should the unquestionable practical benefits that bail agents provide be ignored. Consequently, policymakers should not be quick to eliminate what can be a highly effective instrument of the criminal justice system, especially if suitable, effective alternatives have not been identified and validated.

Criticisms of the Cash Bail Status Quo

Much of the current debate about bail reform has focused on the detention of purportedly low-risk, nonviolent, indigent individuals. This has led some to characterize the pretrial justice system as discriminatory, amounting to unconstitutional wealth-based detention. Some have even challenged the constitutionality of cash bail.[19]

Those arguments go too far.[20] The Constitution unarguably permits the use of cash bail, including the setting of bail that is unaffordable for the defendant. That does not, however, insulate money bail from narrower criticisms that particular bail practices may run afoul of state and federal constitutional provisions;[21] that its increasing use has led to a dramatic rise in the pretrial detention of low-risk defendants and imposed significant burdens on the public treasury; and that the combination of risk assessment tools, various conditions of release, and low-cost automated reminders of court dates may well do the job of money bail, ensuring appearance at trial without negatively affecting public safety or unnecessarily detaining individuals.

Bail and Jail. Evidence bears out that over the past three decades, courts have shifted away from

nonfinancial conditions of release and toward the use of cash bail. Between 1990 and 1994, according to the Bureau of Justice Statistics (BJS), release on recognizance accounted for 41 percent of releases, and surety bonds accounted for 24 percent. By 2004, these figures had essentially reversed, with surety bonds accounting for 42 percent of releases and personal recognizance falling to 23 percent.[22] Overall, "[b]eginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases."[23] By 2009, "the percentage of pretrial releases involving financial conditions [had risen] from 37% [in 1990] to 61%. Nearly all of this was due to a rise in the use of surety bonds."[24] By 2009, surety bonds accounted for 49 percent of all releases.[25]

The increased use of cash bail has been a direct and significant driver of the growth in jail populations.[26] In 2016, according to the BJS, U.S. jails housed a daily average of 731,300 inmates, down considerably from a high reached in 2008.[27] Nevertheless, pretrial detention has continued to grow. In 2000, 56 percent of jail prisoners were unconvicted; by 2016, that figure had grown to 65.1 percent. Over that time period, the number of individuals held before trial increased by nearly 40 percent.[28] In all, "95% of the growth in the overall jail inmate population" between 2000 and 2014 was "due to the increase in the unconvicted population."[29]

Similar trends are evident in federal pretrial detention as well.[30] In fact, excluding immigration-related offenses, more than half of all federal defendants are detained awaiting trial. Pretrial detention is fast becoming "not the exception but the rule."[31]

It would be reasonable to conclude that this increase in the pretrial population may be unavoidable if that population is composed predominantly of individuals who are denied bail because of their dangerousness or significant flight risk. The data, however, do not bear out that conclusion. Defendants denied bail and held in preventive detention appear to make up only a small portion of the pretrial population, representing only one in six pretrial detainees and only 6 percent of all felony defendants in the nation's 75 largest counties.[32] The vast majority of defendants jailed until trial are held on bail, eligible for pretrial release but unable to meet the required financial conditions.[33]

High Costs of Pretrial Detention for Inability to Pay High Bail. There are good reasons to be concerned about the status quo. Jailing an individual, for example, is an expensive proposition. According to one study, "In fiscal terms, the total annual cost of pretrial jail beds is estimated to be $14 billion, or 17% of total spending on corrections."[34] And these costs are growing at a substantial rate. Between 2000 and 2012, county correctional costs, which account for most of the nation's jails, increased by 74 percent.[35]

This represents a substantial burden on the public treasury—a burden that is not entirely justified. Certainly, some individuals will have to be held in preventive detention in order to protect public safety, prevent obstruction of justice, and ensure appearance at trial. As noted, however, the vast majority of pretrial detainees have been judged sufficiently low-risk to merit conditional release.[36] The failure to identify a satisfactory alternative to cash bail in instances where defendants cannot meet its conditions has produced a large and growing cohort of low-risk individuals who are held in detention at tremendous cost.

This includes heavy costs and burdens on defendants. Chiefly, defendants held in preventive detention can lose custody of their children and be unable to care for them and other dependents. They will be unable to show up for work and may lose their jobs, or find it harder to obtain a job later, as well as the ability to pay their rent or mortgage and provide for their families.[37] The desire to avoid these potentially ruinous social disruptions may prompt some defendants to plead guilty. Detention may also inhibit a defendant's ability to build an effective case in his own defense.[38] Moreover, those who do not plead guilty face potentially lengthy periods of detention. Kalief Browder, for example, awaited trial in Rikers Island for nearly three years, two of which he spent in solitary confinement. Browder was charged with the theft of $700 but could not afford the $900 bail bond fee. He later committed suicide.[39]

In setting conditions of release, some courts have failed to assess properly the level of risk that may be posed by individual defendants. The resulting high costs to society go beyond the merely financial. Significant numbers of defendants who are released on bail before trial are rearrested or miss their court date: in 2009, 16 percent and 17 percent, respectively.[40] That taxes victims, courts, police, bondsmen, and the communities that must suffer the presence of persons who are dangerous and desperate to escape justice. Examples abound of dangerous individuals who are released on bail and go on to commit other offenses.[41] To cite just two examples:

- In 2016, Chicagoan Michael Smith was gunned down in front of his three-year-old son after agreeing to testify against gang member and drug dealer Comfort Robinson. After Smith took the stand, Robinson—who, despite his lengthy rap sheet, had been released after a cousin posted $20,000—requested a jury trial in order to delay the proceeding. Within an hour, Robinson had orchestrated Smith's brutal murder.[42]

- In California, a jury convicted Jose Luis Nuñez Torres of murdering Leticia Arroyo, from whom Torres intended to buy methamphetamine. At the time, Torres was out on bail after being arrested for leading officers on a car chase in a stolen vehicle and then failing to appear in court.[43]

In his 2017 State of the Judiciary address, Texas Supreme Court Chief Justice Nathan Hecht colorfully described the apparent incongruity between the purpose of bail and its practical effect:

> A middle-aged woman arrested for shoplifting $105 worth of clothing for her grandchildren sat in jail almost two months because bail was set at $150,000—far more than all her worldly goods. Was she a threat to society? No. A flight risk? No. Cost to taxpayers? $3,300. Benefit: we punished grandma. Was it worth it? No. And to add to the nonsense, Texas law limits judges' power to detain high-risk defendants. High-risk defendants, a threat to society, are freed; low-risk defendants sit in jail, a burden on taxpayers. This makes no sense.[44]

Bail Schedules. As noted, defendants are entitled to an individualized inquiry to assess their dangerousness to the community, risk of flight, or likelihood of failing to appear for some other reason, but that is not always the case. Courts are routinely inundated with bail hearings that require rapid decision-making. These hearings often suffer from a dearth of relevant information such as a defendant's financial means or the particulars of his crime.[45] Courts are also typically guided by bail schedules that prescribe the amount of bail a defendant receives based not on individual determinations of risk and related factors, but rather on the charged offense.[46]

Money bail decisions can have little to do with the individual defendant. When a defendant's bail is being set according to a schedule, the principal factor in the inquiry is the severity of that offense, which courts appear prone to treat as a proxy for dangerousness and risk of flight.[47] The evidence suggests that this is a dubious proposition. Clearly, severity of the alleged defense should be treated as one of several factors to be considered in determining what conditions of pretrial supervision are appropriate for each defendant.[48] Severity of the alleged crime by itself should not, however, be determinative of a defendant's bail amount. When it is, bail permits high-risk defendants with financial means to secure release while poor, low-risk defendants are detained. When this happens, bail is not doing what it was designed to do.[49]

Bail Reform

Many states are trying to address the foregoing serious problems through bail reform. They rightfully seek to reduce the costs of pretrial detention and provide judges with more information that will help them to determine accurately whether a defendant poses a serious risk of flight or constitutes a danger to the community. States are looking increasingly to validated risk-assessment tools to accomplish that task.[50] Validated risk-assessment tools can shift the bail-setting paradigm away from reliance on bail schedules based on the severity of the alleged crime and toward a more comprehensive, individualized assessment of holistic risk.

Risk-assessment instruments are tools designed to allow for objective determinations of flight risk or dangerousness using algorithms and statistical analysis.[51] They range from relatively simple actuarial instruments—essentially checklists—to more sophisticated tools that leverage advances in machine learning and artificial intelligence to improve accuracy and reliability.[52]

Several discrete risk-assessment tools have risen to prominence in the pretrial context, each considering various factors such as the nature of the charges against a defendant; the defendant's criminal, employment, and substance abuse history; the defendant's age and sex; any prior failure to appear for a court proceeding; and other risk factors that are related to arrest and incidents of failure to appear.[53] Risk-assessment tools can assign weighted numerical values to each risk factor and generate separate flight and dangerousness scores for each defendant.[54] In theory, validated risk assessments allow courts to categorize each defendant efficiently as a low, medium, or high risk for both possibilities.[55]

Accurate risk assessment can improve outcomes for the pretrial system by enabling courts to tailor release conditions more readily to fit defendants with particular risk profiles.

- For low-risk defendants, release on recognizance is unlikely to compromise public safety, and even for those defendants in this category who may be prone to missing court, simple court-date reminders may be better than money bail as a means of assuring appearance. Research indicates that "court notifications, in particular, can greatly increase appearance rates. Phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%."[56] Some jurisdictions are experimenting with automated notification systems, with promising initial results.[57]

- Moderate-risk defendants merit additional conditions, and risk assessment can help courts to select the set of conditions most likely to produce optimal outcomes from a range of options that include supervision by pretrial services officers to GPS location monitoring, drug testing, and (for certain defendants) money bail.[58] Pretrial monitoring and supervision undoubtedly impose fiscal and personnel costs, but these costs can be substantially lower than the costs associated with pretrial detention.[59]

- Finally, risk assessment helps to narrow the range of those who face pretrial detention to the highest-risk defendants, mitigating many of the issues outlined above.

So far, most if not all states that have enacted bail reform in recent years have relied heavily on risk-assessment tools to ensure that the system is holding and releasing the right defendants, but not without some controversy. One of the most contentious issues involves accusations that the use of algorithmic risk assessment produces racially disparate results.[60] Some advocates of reform are also concerned that it will lead to more pretrial detention. Megan Stevenson, a law professor at George Mason University's Antonin Scalia Law School, studied the available data in Kentucky, an early adopter of pretrial risk-assessment tools, and concluded that they have "led to neither the dramatic efficiency gains predicted by risk assessment's champions, nor the increase in racial disparities predicted by its critics."[61] Instead, "virtually nothing is known about how the implementation of risk assessment affects key outcomes: incarceration rates, crime, misconduct, or racial disparities."[62] Stevenson also concludes that more empirical research is necessary to determine "whether outcomes are improved by incorporating algorithmic risk assessment into the decision-making framework."[63]

Nevertheless, state reforms have generated important lessons for policymakers.

Lessons Learned from State-Level Bail Reform

Kentucky. Kentucky prohibited the for-profit bail industry and incorporated risk-assessment tools into its pretrial decision-making framework in 1976. It has achieved inspiring results: 70 percent of defendants are released before trial, 92 percent of them do not reoffend, and 90 percent appear for all court dates.[64] Kentucky has learned that some factors once considered relevant to defendants' pretrial behavior—including marital status, having a telephone, and even drug use—"did not turn out to be particularly predictive" of arrests or failure to appear.[65] Those findings contribute to refinements in risk assessment and possibly better outcomes for both defendants and the public.

In 2011, Kentucky enacted bail reforms that instructed courts to release low-risk and moderate-risk defendants on their own recognizance or an unsecured bond and to impose additional constraints on moderate-risk defendants, such as GPS monitoring or increased supervision.[66] Kentucky's reforms provided that when a court does set bail, it must follow statutorily prescribed considerations, including "the financial ability of the defendant" to pay, his criminal history, whether the bail amount would be "oppressive," and "the nature of the offense charged."[67] When a court determines that a defendant presents a flight risk or is a danger to others, it must deny his release and record its reasons for doing so in a written order.[68] Typically, the reason is simply "'flight risk' or 'danger.'"[69]

Kentucky's courts are finding that risk-assessment tools, while imperfect, are valuable for making those determinations.[70] According to Circuit Court Judge William Clouse, "You're not going to find a judge in this country that would get it right every time. Hindsight is 20/20. That doesn't mean we don't want to get it right or aren't making every effort to get it right."[71]

Maryland. Maryland's 2017 bail reforms provide further evidence of the truth of Judge Clouse's

observation, but they also provide a cautionary tale against hasty overhauls of state bail rules.[72] After Maryland Attorney General Brian Frosh published misguided criticism of the state's bail system,[73] the Maryland Court of Appeals voted unanimously to adopt bail reform proposals developed by the state judiciary's Standing Committee on Rules and Practice and Procedure.[74] The purpose of the new rules is "to promote the release of defendants on their own recognizance or, when necessary, unsecured bond" or the "least onerous" release condition.[75] The rules explicitly forbid judges from imposing money bail that a defendant cannot afford to pay.[76]

These reforms have led to a dramatic average decrease of $31,000 in bail amounts, and the number of people who are assigned to bail has dropped by more than 20 percent.[77] However, both the number of defendants detained without bond and the failure-to-appear rate have risen substantially.[78] Although these results should not be judged too harshly, they do warn against eliminating the public safety and liberty benefits secured through money bail.

New Jersey. New Jersey also implemented bail reform in 2017, and the results so far have been mixed. The state incorporated a risk-assessment tool into its pretrial decision-making framework and expanded pretrial services programs. Courts were instructed to release low-risk defendants on their own recognizance, apply appropriately tailored release conditions to moderate-risk defendants, and detain high-risk defendants. Defendants who meet certain criteria may be detained in jail for up to 48 hours while a court makes its pretrial release decision based on the recommendations of Pretrial Services staff, arguments from the prosecution and defense, the nature of the offense, and the defendant's risk-assessment score.[79]

As a result of these reforms, in 2017, judges required only 44 of the 142,663 defendants who were charged with a crime to post bail.[80] Judges ordered the detention of only 8,043 defendants, although "prosecutors filed 19,366 motions for pretrial detention." Put another way, 94.2 percent of defendants were released before trial, while only 5.6 percent were detained.[81] This led to a 20 percent reduction in the state's pretrial jail population.[82]

Crime statistics for 2017—although they fail to give a complete picture of the recent reforms' effects on overall incidents of crime (including unreported crimes)—showed promising but mixed results. New Jersey State Police statistics showed neither a major increase nor a major decrease in overall crime,[83] and Newark Public Safety Director Anthony Ambrose tied an increase in minor crimes in Newark to state bail reform.[84] While the early data are promising, the cost of Pretrial Services is already exceeding revenue, and ongoing operations, at least through the current funding stream of court filing fees, are "simply not sustainable."[85]

Washington, D.C. Many jurisdictions may see the District of Columbia as a "model" for successful bail reform. The District maintains expansive pretrial services programs and boasts impressive statistics: In 2015, 91 percent of arrestees were released on personal recognizance, 89 percent of released defendants "remained arrest free," and 90 percent made all court appearances.[86] All this comes at a price tag of $62.4 million in fiscal year 2016 alone.[87] Thus, many jurisdictions will be unable or unwilling to follow the District's path for reform.

California. In August 2018, California enacted bail reform that prevents courts from imposing a financial condition on pretrial release and purports to replace bail with a risk-assessment tool and nonmonetary release conditions "so that rich and poor alike are treated fairly."[88] As in New Jersey and D.C., however, the reform is likely to demand significant expansions in pretrial services, and as in Maryland, the law allows for increased use of pretrial detention.[89] Thus, it has faced criticism from progressives and conservatives alike.[90]

These efforts are reminiscent of federal bail reform efforts in the 1960s. Convinced by the false argument that money alone determined "whether a defendant stays in jail before he comes to trial,"[91] Congress enacted the Bail Reform Act of 1966 to ensure that no one, "regardless of their financial status," would "needlessly be detained" before trial. Unfortunately, the law instructed judges to release defendants in noncapital cases on their own recognizance (unless something was required to assure reappearance) without considering each defendant's prospective dangerousness to the community.[92]

However, crimes committed by defendants on pretrial release led many states to change their bail laws, and President Ronald Reagan, Chief Justice Warren Burger, and members of the Senate Judiciary Committee were united in their opposition to the 1966 act's "failure to recognize the problem of crimes committed by those on pretrial release."[93] In 1984, Congress rectified its earlier oversight by enacting a new Bail Reform Act that enabled judges to detain the few "but

identifiable" "particularly dangerous" defendants for whom no "stringent release conditions" or likelihood of rearrest would "reasonably assure" public safety.

Focusing reform on narrow issues at a local level may mitigate some of those concerns. After all, not every problem in bail practices will require statewide legislative reform. Depending on what laws are on the books in a given jurisdiction, it may be possible to obtain meaningful reform, study the results, and amend the changes as needed at a local level—for example, by changing the bail policies at district attorneys' offices[94] and district and county courts (especially for those that have adopted rigid bail schedules).[95] Such changes might be achieved more quickly and at a lower cost than state legislative reform. These policies should be closely monitored and measured by their effect on public safety.[96]

Federal Reform Efforts

Two bills were introduced in the 115th Congress that sought to involve the federal government in the process of state bail reform. Senators Rand Paul (R–KY) and Kamala Harris (D–CA) cosponsored the Pretrial Integrity and Safety Act of 2017,[97] which would provide $10 million in annual grant funding to incentivize state and tribal governments to end and establish alternatives to "the use of payment of money bail as a condition of pretrial release in criminal cases."[98] The bill prescribes metrics for jurisdictions receiving grant funds to target, including detention and rearrest rates, and would establish and provide grant funding for a national pretrial reporting system to collect data from state and local governments.

If the Paul–Harris proposal offers a carrot to accelerate the end of cash bail, a proposal by Senator Bernie Sanders (I–VT) and Representative Ted Lieu (D–CA), the No Money Bail Act, would offer a stick.[99] The Sanders–Lieu proposal would prohibit any jurisdiction that uses money bail from receiving federal funds under the Bureau of Justice Assistance Edward Byrne Memorial Justice Assistance Grant (JAG) program.[100] These funds would be reallocated to governments that comply with the bill's edict to eliminate money bail. The proposal would also prohibit the use of cash bail in federal criminal cases.

It is uncertain whether either bill will be reintroduced in the 116th Congress, and neither proposal represents a desirable path forward for bail reform. It is far too soon to contemplate the complete elimination of money bail. It is therefore unquestionably poor policy for the federal government to attempt to coerce states into pursuing that action, especially by withholding critical criminal justice grant funding. Jurisdictions should remain free to experiment with modifications and improvements to their bail laws and continue to further the advancement of risk-assessment tools and alternative conditions of release. While that might seem to be in line with the Paul–Harris proposal, the basic process of federalism—state experimentation with policy reform—does not require federal funding.

Although eliminating money bail is premature, various states' willingness to do so demonstrates clearly that states do not need and are not waiting for federal dollars to enact bail reforms. Further, state and local pretrial reforms adopted on the basis of federal grants might be fiscally unsound and could prove unsustainable without perpetual federal funding.

What Should States Do?

There are good reasons for states and localities to prioritize bail reform, even though it is far too early to contemplate eliminating cash bail altogether. The evidence does not support such a move and, in fact, points to the use of sureties in some cases as being more effective at ensuring appearance or recapturing fugitives. Eliminating cash bail altogether would be a rash move that invites significant risk of unintended consequences—much as the 1966 Bail Reform Act's failure to permit considerations of dangerousness sparked public outcry amid a wave of violent crime.

Policymakers seeking to enact bail reform should consider three overriding needs:

1. Return bail to its original purpose.

   - Do not use bail for dangerousness. Bail's original purpose was to provide a tool to permit release of defendants while ensuring appearance at trial. Setting bail to protect public safety and using bail sums as a proxy for dangerousness are ineffective because many poor, low-risk defendants are detained while higher-risk defendants with financial means are released. Both of these circumstances carry unacceptable costs.

   - State legislatures should adopt and ensure that state judges are authorized to impose a range of constraints from supervised release to preventive detention. Procedural protections should

be afforded for each defendant including a written rationale explaining why the court tailored certain pretrial conditions to each individual defendant's likelihood to commit a crime or fail to appear in court.

- Courts should abandon rigid bail schedules that assign bail to a defendant based on the severity of the accused crime rather than a particularized risk assessment. State legislatures should ensure that state judges are able to enact this change.

2. Concentrate on objective, data-driven reforms, not ideological or political goals.

- Bail reform largely concerns local and state-level issues that require particularized solutions to address specific problems observed in each jurisdiction. The objectives of bail reform should be to improve outcomes: better differentiating between high-risk individuals who should be detained and low-risk individuals who should not, protecting public safety, improving failure-to-appear rates, and developing effective alternative conditions of release.

- The current bail reform movement provides an opportunity to equip judges with improved tools to gather and assess the most relevant information about a defendant's risks. These tools can improve the pretrial process, but they should not replace a judge's discretion. The decision regarding detention and release of defendants must remain a judgment call for the court.

- Consider sending defendants low-cost automated reminders of their court dates through text messages, telephone calls, and post cards, which have been shown to improve appearance rates for specific subsets of defendants.[101] Courts and policymakers should work with neutral third parties, such as universities or nonprofit research centers, to study the effects of these policies and evaluate outcomes.[102]

- These reforms should be considered along with speedy trial reforms, abolition of exorbitant fines and fees, and other local policy changes that may be needed.[103]

3. Promote better regulation of bail agents, recovery agents, and bounty hunters.

- Both the public and the bail industry would benefit from improved standards among bail and recovery agents. Policymakers should encourage this industry to regulate itself through private regulation and enforcement.[104]

- The bail industry should select a standard-bearer to establish best practices and certify bail agents, police its members, and enforce industry standards through a variety of methods including revocation of certification, fines, and other penalties as deemed appropriate to ensure compliance.

- Jurisdictions should tailor their incentive structures to ensure that commercial sureties are achieving the bail bond system's desired outcomes. This requires the exercise of discretion in selecting defendants to release on bond, diligent work to ensure appearance at trial, and prompt pursuit of defendants who fail to appear. Specific reforms will vary depending on current state laws, but jurisdictions may wish to consider shortening grace periods, executing more bail bond forfeitures, and barring commercial bondsmen from transferring the risk of loss to defendants.[105]

Conclusion

Money bail has a long history in the United States and has been in common usage since the Colonial Era. Originally, bail was envisioned as a tool to facilitate the release of defendants in the pretrial period while providing assurances of their appearance at trial. In recent years, however, it has had the opposite effect. Large numbers of individuals deemed to be bailable have been held in detention for inability to pay bail, imposing great costs both on defendants and on all of society.

This has produced a new wave of bail reform at the local, state, and federal levels. At present, this movement has concentrated its efforts on eliminating money bail, arguing that it is unconstitutional, is unfair to defendants, and has poor public safety outcomes. These arguments are half right: The Constitution explicitly permits money bail, and in some appropriate cases, the use of surety bonds can

have significant public safety benefits. Nevertheless, the negative outcomes associated with current money bail practices cannot be ignored, and reforms are warranted.

It is too soon, however, to eliminate money bail altogether. Jurisdictions should instead concentrate on reforms that (1) restore bail to its original purpose as a tool to prevent flight from justice; (2) ensure that state judges are authorized to impose a range of effective constraints, from supervised release to preventive detention, that are tailored to each individual; and (3) improve the bail industry through appropriate regulation. These reforms, if adopted, could improve the administration of bail without risking unintended negative consequences for public safety and constitutional rights.

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Endnotes

1. Stack v. Boyle, 342 U.S. 1, 5 (1951) (stating that "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.... Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").
2. ABA Standards for Criminal Justice: Pretrial Release § 10-5.3 (3d ed. 2007).
3. U.S. Const. amend VIII; *see also* White v. United States, 330 F.2d 811, 814 (8th Cir. 1964) (the "mere financial inability of [a] defendant to post [bail] does not automatically indicate excessiveness. The purpose for bail cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction"); United States v. Radford, 361 F.2d 777 (4th Cir. 1966); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988); U.S. ex rel. Fitzgerald v. Jordan, 747 F.2d 1120, 1134 (7th Cir. 1984); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968); State v. Pratt, 2017 VT 9, 14 (Vt. 2017); Vigil v. State, 563 P.2d 1344, 1349 (Wyo. 1977).
4. United States v. Salerno, 481 U.S. 739, 754 (1987).
5. "Under the Bail Reform Act, 18 U.S.C. § 3146, a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial." Bell v. Wolfish, 441 U.S. 520, 524 (1979).
6. "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Salerno*, 481 U.S. at 751.
7. United States v. Lawrence, 4 Cranch C.C. 518 (1835) (discussing common-law authorities on bail).
8. *See* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 108 (2004) (using propensity-score matching system to evaluate data from the 75 largest U.S. urban jurisdictions in the 1980s and 1990s); Thomas Cohen & Brian Reaves, *Pretrial Release of Felony Defendants in State Courts*, Bureau of Justice Statistics (Nov. 2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf (finding that "defendants on financial release were more likely to make all scheduled court appearances [compared to defendants released on recognizance]. Defendants released on an unsecured bond or as part of an emergency release were most likely to have a bench warrant issued because they failed to appear in court"; the second-highest failure-to-appear rate seen in the study (30 percent) was for defendants released on unsecured bond; the highest rate was seen in the "emergency release" category, in which defendants are ordered released to relieve jail crowding; surety and property bonds, meanwhile, saw the lowest failure-to-appear rates (18 percent and 14 percent, respectively); 33 percent of defendants released on unsecured bond who failed to appear were still fugitives after one year, compared to 19 percent of those released on surety bond).
9. Helland & Tabarrok, *supra* note 8, at 108. Of course, several jurisdictions have demonstrated that surety bonds are not necessary to achieve high appearance rates, as discussed below.
10. *Id.* at 110. The study distinguishes between "surety bond, that is, release on bail that is lent to the accused by a bond dealer, and nonfinancial release. Just over one-quarter of all released defendants are released on surety bond, and a very small percentage pay cash bail or put up their own property with the court (less than 5 percent combined); most of the rest are released on their own recognizance or on some form of public bail (called deposit bond) in which the defendant posts a small fraction, typically 10 percent or less, of the bail amount with the court." *Id.* at 94.
11. *Id.*
12. *Policing in America: Lessons from the Past, Opportunities for the Future*, Heritage Found. Special Rep. No. 194 (Hon. Edwin Meese III & John G. Malcolm, eds., 2017), *available at* https://herit.ag/2POpsq2; *Policing in America: Midsize Departments as Laboratories of Police Innovation*, Heritage Found. Special Rep. No. 204 (Hon. Edwin Meese III & John G. Malcolm, eds., 2018), *available at* https://herit.ag/2Et25Ao.
13. Helland & Tabarrok, *supra* note 8, at 118.
14. *See* Am. Bail Coalition, http://ambailcoalition.org/ (last accessed Dec. 13, 2018); Nat'l Assoc. of Fugitive Recovery Agents, https://www.fugitive-recovery.org/ (last accessed Dec. 13, 2018); Professional Bail Agents of the U.S., https://www.pbus.com/ (last accessed Dec. 13, 2018).
15. American Civil Liberties Union, *Selling Off Our Freedom* (May 2017), https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf.
16. In Utah, for instance, the grace period is set at six months with the potential for a 60 day extension—a duration that the Utah Legislative Auditor General found to be "unnecessarily long" given that "the majority of defendants (71 percent) who fail to appear in court, return to court or custody within a month." State of Utah, Office of the Legislative Auditor General, A Performance Audit of Utah's Monetary Bail System (2017), https://le.utah.gov/audit/17_01rpt.pdf (last accessed Jan. 8, 2019).
17. *Id.* at 38.
18. Derek Hawkins, *Bounty Hunters Fired on the Wrong Car, Killing Father of Three, Police Say*, Wash. Post (May 4, 2017), https://wapo.st/2SMuQfj. In another incident, three men—two bounty hunters and a fugitive—were killed after engaging in a gunfight at a Nissan dealership in Texas. Doug Criss, *Bounty Hunters, Fugitive Killed in Gunfight at Car Dealership*, CNN (June 2, 2017), https://cnn.it/2rLI1BS.
19. *See, e.g.*, Debra Cassens Weiss, *There Is No Constitutional Right to Cash Money Bail, 3rd Circuit Rules*, ABA J. (July 9, 2018), https://bit.ly/2KUVMcA.

20. John-Michael Seibler & Jason Snead, *The History of Cash Bail*, Heritage Found. Legal Memo. No. 213 (Aug. 25, 2017), https://www.heritage.org/courts/report/the-history-cash-bail; John-Michael Seibler, *As Bail Reform Progresses, Yes, Bail Is Constitutional*, Fed. Soc. (Nov. 22, 2017), https://bit.ly/2CcsyR7.
21. *See*, *e.g.*, Order, Pierce v. City of Velda City, 4:15-cv-570-HEA (E.D. Mo. June 3, 2015); Jones v. City of Clanton, 2:15-cv-34-MHT (M.D. Al. Sept. 14, 2015); Thompson v. Moss Point, Mississippi, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015); Walker v. City of Calhoun, Georgia, No. 4:15-cv-170-HLM (N.D. Ga. Jan. 28, 2016); Brief for the U.S. as Amicus Curiae in Support of Plaintiff-Appellee at 3, Walker v. City of Calhoun, No. 16-10521-HH (11th Cir. Aug. 18, 2016); *see also* Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc); Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986); Alabama v. Blake, 642 So. 2d 959, 968 (Ala. 1994).
22. Cohen & Reaves, *supra* note 8, at 2.
23. *Id.*
24. Brian Reaves, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, Bureau of Justice Statistics (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.
25. *Id.*
26. Bernadette Rabuy, *Pretrial Detention Costs $13.6 Billion Each Year*, Prison Pol'y Initiative (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/.
27. Zhen Zeng, *Jail Inmates in 2016*, Bureau of Justice Statistics (Feb. 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf.
28. The Annual Survey of Jails used by the BJS to compile these figures shifted from midyear (the last weekday of June) to year-end collection of jail population demographic data for 2015 and 2016. This may affect the comparison of these figures because, as the BJS notes elsewhere in the report, "jail population goes through seasonal change, typically with fewer inmates at year-end than at midyear." *Id.*
29. Todd Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Justice Statistics (Jun. 2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf.
30. Federal pretrial detention rates have also increased, climbing from 59 percent in 1995 to 76 percent in 2010 (these figures include defendants held through case disposition and those released after a time in custody). The principal driving force behind this increase in detention, according to the BJS, is the massive increase in immigration prosecutions. Thomas Cohen, *Pretrial Detention and Misconduct in Federal District Courts, 1995–2010*, Bureau of Justice Statistics (Feb. 2013), https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf. It may be that defendants in immigration cases pose a substantial flight risk that warrants pretrial detention.
31. J. C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78 Fed. Probation 1, 12–14 (2014).
32. Cohen & Reaves, *supra* note 8.
33. *Id.* at 2.
34. *See* Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, Faculty Scholarship at Penn Law No. 1745 (2017), *available at* http://scholarship.law.upenn.edu/faculty_scholarship/1745.
35. Natalie Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, National Association of Counties (2015), https://bit.ly/2Bt3mUW.
36. A nationwide survey of county jails revealed that a "majority of responding county jails that use a validated risk assessment" tool found substantial portions of their pretrial populations to be low-risk. *Id.* at 6. A 2002 BJS inmate survey found that 20.2 percent of unconvicted detainees were held on public-order offenses and 21.5 percent were held on property offenses. Doris James, *Profile of Jail Inmates, 2002*, Bureau of Justice Statistics (Jul. 2004), https://www.bjs.gov/content/pub/pdf/pji02.pdf.
37. Will Dobbie, Jacob Goldin, and Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Amer. Econ. Rev. 201, 227 (2018). It should also be noted that the consequences of losing a job in the pretrial period could extend post-conviction and impact the ability of individuals to pay court-ordered fines or restitution.
38. Oleson et al., *supra* note 31, at 12 (noting that there "is a consensus within this body of research that pretrial detention is associated with negative effects on sentencing, but the precise causal mechanisms" have yet to be determined); Marian Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 20 Crim. Just. Rev. 299, 302 (2003) (arguing that defendants detained in jail pending case disposition received longer terms of imprisonment than did those who had not been so detained).
39. The Marshall Project, *Kalief Browder*, https://www.themarshallproject.org/records/1501-kalief-browder (last accessed Dec. 14 2018).
40. Reaves, *supra* note 24, at 15.
41. Daniel Dew, *Money Bail: Making Ohio a More Dangerous Place to Live*, Buckeye Institute (Dec. 11, 2017), https://bit.ly/2rAE8PX.
42. Todd Lighty & David Heinzmann, *How a Revolving Door Bond System Puts Violent Criminals Back on Chicago's Streets*, Chicago Tribune (May 5, 2017), https://trib.in/2pNxW5l.
43. Pauline Repard & Teri Figueroa, *Jury Finds 23-Year-Old Man Guilty in Santee Slaying*, San Diego Union-Tribune (Sept. 14, 2018), https://bit.ly/2rA4kdx.
44. Address to the 85th Texas Legislature from Chief Justice Nathan Hecht on The State of the Judiciary in Texas (Feb. 1, 2017), *available at* http://www.txcourts.gov/media/1437289/soj-2017.pdf.

45. "Typically, a judge knows little about a defendant's ability to make bail, support a family, etc., and may set bail at levels that are unrealistic and impossible for many defendants to meet." Actually assessing a defendant's financial means is a challenging process, particularly in the tight timeframe of a bail hearing, and would require answering complex questions about what a defendant can truly "afford." Williams, *supra*, note 38.
46. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 Crim. Justice 1 (2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsp11_bail.pdf. ("Broadly speaking, bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime."); Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty*, 70 Stan. L. Rev. Online 167 (2018); Hon. Eric T. Washington, *State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. Rev. 5, 1087 (2016). Because of the reliance on schedules tying bail to the criminal charge, over time, courts have transferred "pretrial release decisions that had historically been committed to judicial discretion to the discretion of the charging official."
47. Hon. Curtis Karnow, *Setting Bail for Public Safety*, 13 Berkeley. J. Crim. L. 1, 16 (2008).
48. Lim Boon Tiong & Euston Quah, *Optimal Bail Setting: An Exploratory Model*, *in* Law, Social Sciences and Public Policy: Towards a Unified Framework, 107 (1998) (concluding that "it is not the severity of the criminal offence alone" that should dictate bail, but rather that bail should be set having taken into account other factors, including the probability of conviction, of re-arrest if a defendant flees, and the penalties associated with conviction, and arguing that the amount of bail needed "[t]o induce a suspect to appear for trial…must be set greater than the expected cost of punishment.")
49. See *Stack*, 342 U.S. at 5.
50. Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 Harv. J. L. & Pub. Pol'y 1, 14 (2010) ("Criminologists have long endorsed these tools because research has shown that predictions of future dangerousness or recidivism are more accurate when based on a pool of actuarial data than on clinical judgments.").
51. Certain risk-assessment tools are not quantitative in nature, but as this discussion is focusing on algorithmic risk assessment, they are beyond the scope of this paper.
52. *See* Sandra Mayson, *Dangerous Defendants*, 127 Yale L.J. 490, 508–509 (2018); Arthur Rizer and Caleb Watney, *Artificial Intelligence Can Make Our Jail System More Efficient, Equitable, and Just*, 23 Tex. Rev. of L. & Pol. 181 (2019).
53. *See generally*, Bureau of Justice Assistance, U.S. Dep't of Justice, *Pretrial Risk Assessment, Research Summary* (Oct. 18, 2010), https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf. For an example of the differing factors employed by various risk-assessment tools, see Table 3, Pretrial RAIS-Risk Factors, in Mayson, *supra* note 52 at 568.
54. *See*, *e.g.*, Laura and John Arnold Foundation, Public Safety Assessment: Risk Factors and Formula, https://bit.ly/2QDQ42n (last accessed Nov. 5, 2018).
55. See Bureau of Justice Assistance, U.S. Dep't of Justice, *Pretrial Risk Assessment, Research Summary* 1 (Oct. 18, 2010), https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.
56. Am. Civ. Liberties Union of Hawai'i, *As Much Justice as You Can Afford: Hawaii's Accused Face an Unequal Bail System*, 22, n. 63 (Jan. 2018), https://bit.ly/2S42CMZ.
57. Durham County, North Carolina, built an automated court date reminder system that launched in June 2017. Defendants could sign up on a voluntary basis to receive automatic reminders of upcoming court dates via telephone, email, or text message. According to a case study of the Durham effort, "The share of people who failed to appear for their scheduled court dates steadily dropped by 6 percentage points from September 2017 to May 2018. Specifically, 10 percent of people who signed up for the reminder system failed to appear in September 2017, compared with only 4 percent who failed to appear in May 2018. The share of people who did not sign up for the reminder system and failed to appear has remained constant, at around 7 percent, from September 2017 to May 2018." Carla Vasquez-Noriega, Marina Duane, Travis Reginal, and Jesse Jannetta, *Supporting Individual Agency in the Pretrial Release Process*, Urban Institute (Oct. 2018), https://www.urban.org/research/publication/supporting-individual-agency-pretrial-release-process.
58. District of Columbia Pretrial Services provides a "wide range of supervision programs" and is responsible for supervising "the majority of defendants" in the District, from "those posing limited risk and requiring condition monitoring, to those posing considerable risk and needing extensive release conditions." Pretrial Services Agency for the District of Columbia, *Defendant Supervision*, *available at* https://www.psa.gov/?q=programs/defendent_supervision.
59. Vasques-Noriega et al., *supra* note 57, at 2.
60. Compare, e.g., Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://bit.ly/1XMKh5R (arguing "yes"), with William Dieterich, *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity*, Northpointe Inc. (July 8, 2016), https://bit.ly/2Gr3Qkf (arguing "no").
61. Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 1, 59 (forthcoming), *available at* https://bit.ly/2k7aP3k.
62. *Id.* at 2.
63. *Id.*
64. Christine Blumauer et al., *Advancing Bail Reform in Maryland: Progress and Possibilities*, Woodrow Wilson Sch. Pub. & Int'l Affairs 28 (rev. Feb. 27, 2018), https://bit.ly/2HoN0Op (citing Pretrial Services, Administrative Office of the Courts, Kentucky Court of Justice, and Pretrial Reform in Kentucky, 16 (2013)).

65. Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. Times (June 28, 2015), https://nyti.ms/2Ck0lIm.
66. 2011 Ky. Acts ch. 2 § 48.
67. 2011 Ky. Acts ch. 2 § 47.
68. 2011 Ky. Acts ch. 2 § 48.
69. Alyso Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, The Marshall Project (Nov. 12, 2015), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail.
70. For example, the state's risk-assessment tool identified several defendants charged with escaping custody as low-risk or moderate-risk. *Id.*
71. *Id.*
72. Walter Olson, *Maryland's Bail Reform Is a Warning for Would-Be Moralizers*, Wall St. J. (Sept. 22, 2017), https://www.wsj.com/articles/marylands-bail-reform-is-a-warning-for-would-be-moralizers-1506119393.
73. Letter from Brian E. Frosh, Attorney General, to Judge Alan M. Wilner, Oct. 25, 2016, *available at* http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf.
74. Ron Snyder, Maryland's Highest Court Approves Bail Reform Rule Changes, WBALTV 11 (Feb. 8, 2017), https://www.wbaltv.com/article/marylands-highest-court-approves-bail-reform-rule-changes/8691914.
75. Md. Rule 4-216.1.
76. Md. Rule 4-216.1 § (e)(1).
77. Blumauer et al., *supra* note 64; Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer, Report Says*, Wash. Post (July 2, 2018), https://wapo.st/2AP9I1I.
78. News reports do not agree on the exact figures. According to one piece, early reports indicate that from October 2016 to March 2017, "the share of Maryland defendants held without bail had increased from 10% to 14%. The Washington Post later reported that from September 2016 to May the figure had jumped from 7% to 15%." Olson, *supra* note 72; A January news report indicated that "about 20 percent of those appearing at bail hearings" are held without bail, "up from 7.5 percent before the rule change." Scott Dance, *Since Bail Reform, Maryland Holding Fewer People Who Can't Afford Bond, Assembly Panel Told*, Baltimore Sun (Jan. 16, 2018), https://bsun.md/2CdFh6o.
79. Glenn A. Grant, New Jersey Judiciary, 2017 One Year Criminal Justice Reform: Report to the Governor and the Legislature 12–13 (2018), https://perma.cc/9LD2-8STA.
80. *Id.* at 4. *But see id.* at 1, n.1 (stating that a "defendant can be charged with a crime or offense on a complaint-summons, issued by law enforcement with a date to appear in court, or a complaint-warrant issued by a judicial officer requiring that the defendant be transported to the jail. Pursuant to the CJR statute, only defendants issued a complaint-warrant are 'eligible defendants' subject to the provisions of the law.").
81. *Id.* at 4.
82. *Id.*
83. Joe Hernandez, *It's Been One Year Since N.J. Ditched Cash Bail. Here's How It's Going*, WHYY (Dec. 26, 2017), https://whyy.org/segments/one-year-since-n-j-ditched-cash-bail-heres-going/.
84. Rebecca Everett, *Here's How N.J. Scores on Bail Reform (Hint: It's Better than Other States)*, NJ Advance Media (updated Nov 1, 2017), https://bit.ly/2LgU179.
85. Grant, *supra* note 79, at 5.
86. Hon. Eric T. Washington, *State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. Rev. 1087, 1096–97 (2016). *See The Pretrial Services Agency for the District of Columbia: Lessons from Five Decades of Innovation and Growth*, Pretrial Justice Institute Case Study (Aug. 22, 2018), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46b516e0-5ea0-a9a3-b070-ecd6bacd9ed0&forceDialog=0.
87. *See* Teresa Wiltz, *Locked Up: Is Cash Bail on the Way Out?*, Pew Stateline (Mar. 1, 2017), https://bit.ly/2UDM2p0; Stevenson & Mayson, *supra* note 34.
88. Office of Gov. Edmund Brown, *Governor Brown Signs Legislation to Revamp California's Bail System, Protect Public Safety* (Aug. 28, 2018), https://bit.ly/2N2YWvI; Samantha Young, *To Fix "Unfair" Bail System, Will California Copy Kentucky?*, L.A. Daily News (Aug. 13, 2017), https://bit.ly/2SPgVoU.
89. For defendants who present a "substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or a victim, or the appearance of the defendant in court as required." Cal. S.B. 10 (2018) (as approved by Gov. Aug. 28, 2018), *available at* https://bit.ly/2LCWZBs).
90. Laurel Eckhouse, *California Abolished Money Bail. Here's Why Bail Opponents Aren't Happy.*, Wash. Post (Aug. 31, 2018), https://wapo.st/2A1m4TL; Steven Greenhut, *California's Bail Reform Deal Is Worse Than Doing Nothing*, Reason (Aug. 29, 2018), https://bit.ly/2PPI7TR; Scott Shackford, *Will California's Proposed Bail Reforms Lead to More People Behind Bars?*, Reason (Aug. 17, 2018), https://bit.ly/2MxeVIK; Jonathan Zalewski, *California Is Changing Its Bail System. The Reforms Are Hopeful, but Unproven*, Daily Signal (Sept. 06, 2018), https://dailysign.al/2CcOFa9.

91. John-Michael Seibler & Jason Snead, *The History of Cash Bail*, Heritage Foundation Legal Memo. No. 213 (Aug. 25, 2017), https://www.heritage.org/courts/report/the-history-cash-bail (citing Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General)).
92. *Id.*; 18 U.S.C. § 1346(b) (1966).
93. *Id.* (citing S. Rep. No. 98–225, 3, 6–7 (1984)).
94. Jamiles Lartey, *New York City to End Cash Bail for Non-felony Cases in Win for Reform Advocates*, The Guardian (Jan. 10, 2018), https://bit.ly/2mtoJ1X; Alicia Victoria Lozano, *Philadelphia District Attorney Larry Krasner Ends Cash Bail for Low-Level Offenses*, NBC News (Feb. 21, 2018), https://bit.ly/2orOPCn. An early analysis of the Philadelphia reform found "no detectable evidence that the decreased use of monetary bail, unsecured bond, and release on conditions had adverse effects on appearance rates or recidivism." Aurelie Ouss and Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*, George Mason Legal Studies Research Paper No. LS 19-08 (Feb. 17, 2019), *available at* https://ssrn.com/abstract=3335138.
95. Sam Lounsberry, *Judicial Districts Across State Are Catching up to Larimer, Jackson Counties in Bail Bond Reform Practices*, Reporter-Herald (Nov. 25, 2017), https://bit.ly/2SSz6tZ.
96. Some have brought negative results. In Denver, for example, judges released 72 out of 115 defendants facing heroin distribution charges on personal recognizance bonds, and 48 of them failed to appear for court. Julie Hayden, *Denver DA Suggests Low Bonds for Heroin Dealers Put Public at Risk*, FOX31 (Nov. 16, 2016), https://bit.ly/2ECgoDK.
97. S. 1593, 115th Cong. (2017); Press Release, Sen. Kamala D. Harris, Sen Harris: Bail Reform Is a Matter of "Economic Justice" (July 24, 2018), https://bit.ly/2GXlxYF.
98. Under the proposal, $6.5 million in funding would be made available to governments and $3.5 million would be made available to groups to provide technical assistance, training, and evaluation. S. 1593, 115th Cong. § 3032(a)(1) (2018).
99. H.R. 1437, 115th Cong. (2017).
100. *Welcome to BJA's Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, https://www.bja.gov/jag/ (last accessed Dec. 18, 2018).
101. Durham County, North Carolina, built an automated court-date reminder system that launched in June 2017. Defendants could sign up on a voluntary basis to receive automatic reminders of upcoming court dates by telephone, email, or text message. Per a case study of the Durham County effort, "[e]arly results indicate that the new reminder system is effective. The share of people who failed to appear for their scheduled court dates steadily dropped by 6 percentage points from September 2017 to May 2018. Specifically, 10 percent of people who signed up for the reminder system failed to appear in September 2017, compared with only 4 percent who failed to appear in May 2018. The share of people who did not sign up for the reminder system and failed to appear has remained constant, at around 7 percent, from September 2017 to May 2018." Vasquez-Noriega et al., *supra* note 57, at 6.
102. Research indicates that "court notifications, in particular, can greatly increase appearance rates. Phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%." Am. Civ. Liberties Union of Hawai'i, *supra* note 56.
103. *See* Am. Bail Coalition, *The Future of Bail: The Fourth Generation of Bail Reform in America* (Nov. 2018), *available at* http://www.americanbailcoalition.org/wp-content/uploads/2018/11/Bail-Reform-4th-Gen-A5.pdf.
104. Mackenzie Green, *So I'm a Bounty Hunter*, Wash. Post (Sept. 21, 1997), https://wapo.st/2F4G8rQ; Jazmine Ulloa, *Efforts to Regulate Bail Companies Have Some Unlikely Allies: Bail Agents*, L.A. Times (Apr. 24, 2018), https://lat.ms/2LVTQid.
105. State of Utah, Office of the Legislative Auditor General, *supra* note 16, at 35.