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To Bail or Not to Bail: Protecting the Presumption of Innocence in Nevada

Ebeth Palafox
Nevada Law Journal

Brendan McLeod
Nevada Law Journal

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TO BAIL OR NOT TO BAIL: PROTECTING THE PRESUMPTION OF INNOCENCE IN NEVADA

*Nevada Law Journal Staff**

EXECUTIVE SUMMARY

On August 2, 2018, then Governor Brian Sandoval announced a comprehensive review of Nevada's criminal justice system.¹ As part of this review, the Governor tasked the Advisory Committee on the Administration of Justice (ACAJ) with conducting a thorough evaluation of the state's criminal justice system and the development of policy recommendations to be considered during the 80th Session of the Nevada Legislature. In January, the ACAJ released their final report which revealed that the growth of the Nevada's carceral state was driven by the increase in the number of people incarcerated for probation and parole violations.² The AJAC report also stated that at least two-thirds of the incarcerated population entered the system with a sentence for a nonviolent offense.³ Moreover, the Committee included twenty-five strategic policy recommendations to "improve public safety by holding offenders accountable, reducing recidivism, and increasing the resources available to combat the state's behavioral health crisis" and control the growth of the incarcerated population and corrections costs.⁴ Noticeably absent from the ACAJ's recommendations

* This White Paper was written by Brendan McLeod, Forum Editor, and Ebeth R. Palafox, Nevada Law Editor, with contributions in drafting, editing, and researching by Rebecca Crooker, Jeffrey Chronister, Joshua Garry, Shaneka Malloyd, Sara Schreiber, and Shannon Zahm. The Nevada Law Journal would also like to thank Justice James W. Hardesty, Professors Anne Traum and Eve Hanan, and Assemblymen Steve Yeager and Ozzie Fumo for their support and contributions in topic selection and research.

¹ Mary-Sarah Kinner, *Governor Sandoval Announces Initiative to Improve Outcomes in State's Criminal Justice System* (Aug. 2, 2018), http://gov.nv.gov/layouts/Page_Style_1.aspx?id=254900 [<https://perma.cc/E8BP-QHNK>].

² Steve Yeager, *Criminal Justice Reform Can Move Nevada Forward*, RENO GAZETTE J. (Dec. 3, 2018, 2:36 PM), <https://www.rgj.com/story/opinion/voices/2018/12/03/criminal-justice-reform-can-move-nevada-forward-yeager/2197000002/> [<https://perma.cc/JC7D-WDJZ>].

³ *Id.*

⁴ NEV. ADVISORY COMM'N ON THE ADMIN. OF JUSTICE, JUSTICE REINVESTMENT INITIATIVE, FINAL REPORT 1, 5 (Jan. 2019),

are policies regarding pretrial practices—specifically preventative detention and bail setting practices—despite these issues being at the center of criminal justice reform conversations in Nevada in the last five years.⁵

In-state conversations surrounding preventative detention and bail setting practices mirror those occurring in other states across the country. The growing consensus across both sides of the aisle⁶ is that the cash bail system is broken because it has a disparate effect on indigent individuals and people of color and their access to justice.⁷ Most recently, California became the first state to “eliminate” its cash bail system. However, this move drew concerns from criminal justice reform advocates that it would do more harm than good.⁸ In particular, critics expressed concerns that the abolishment of the cash bail system would authorize expansive power for the courts and increase prosecutorial discretion, while continuing to have a disparate impact on the poor and people of color.⁹

Our white paper aims to discuss the issues associated with bail reform, provide an analysis of bail reform efforts across the country, and propose possible solutions for obstacles to bail reform in Nevada. The white paper’s proposed recommendations for practical bail reform is a three phase plan to eliminate the injustices that arises from Nevada’s current cash bail model.

Phase One: Eliminate Bail Schedules in Nevada

“Money bail may serve only one legitimate role: to incentivize someone to return to court as required.”¹⁰ Our current bail schedules do not allow for the consideration of an individual defendant’s circumstances.¹¹ Bail schedules fail to consider what amount of money would actually incentivize the defendant to

<https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13671>

[<https://perma.cc/B9H7-XWXC>] [hereinafter JRI FINAL REPORT]; Kinner, *supra* note 1.

⁵ JAMES AUSTIN & ROBIN ALLEN, DEVELOPMENT OF THE NEVADA PRETRIAL RISK ASSESSMENT SYSTEM FINAL REPORT 1 (2016) *available at* <https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312> [<https://perma.cc/HRG6-PY4B>]. See Assemb. B. 136, 2017 Leg., 79th Legis. Sess. (Nev. 2017); Assemb. B. 17, 2019 Leg., 80th Legis. Sess. (Nev. 2019).

⁶ Jessica Brand & Jessica Pishko, *Bail Reform: Explained*, APPEAL (June 14, 2018), <https://theappeal.org/bail-reform-explained-4abb73dd2e8a/> [<https://perma.cc/PZ52-7B23>].

⁷ *Id.*

⁸ See e.g., Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, POLITICO (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/R39N-KLLE>] (“The ACLU, NAACP and Human Rights Watch all abandoned their support for a move they initially hailed as a breakthrough for justice and fairness.”).

⁹ *Id.*

¹⁰ CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 12 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/V87P-M64R>] [hereinafter MOVING BEYOND MONEY].

¹¹ *Id.*

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return to court.¹² An indigent individual may not be able to afford bail and is therefore constructively forced into pretrial detention.¹³ However, a wealthy individual may find that losing any money posted to bail is “inconsequential” and thus not an incentive to return to court.¹⁴

Phase One would focus on the immediate elimination of bail schedules in Nevada. By eliminating bail schedules across the state, Nevada can bring to halt some of the systematic injustices prevalent in pretrial practices. The elimination of bail schedules will allow judges to focus on individuals before them, while still protecting the community and ensuring the defendant’s appearance in court.

Phase Two: Implementation of an Algorithmic and Interview Risk assessment program

Switching from a system based solely on instinct and experience (often referred to as “gut instinct”) to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system’s central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.¹⁵ These factors should include those similar to the Laura and John Arnold Foundation’s Public Safety Assessment (PSA).¹⁶

The PSA is designed to predict risk in three areas: risk of failure to appear (FTA), risk of new criminal activity (NCA), and risk of new violent criminal activity (NVCA).¹⁷ This risk prediction can be based on an automatic system that draws on the following from court records: 1) age at current arrest; 2) current violent offense; 3) pending charge at the time of the offense; 4) prior disorderly persons conviction; 5) prior indictable convictions; 6) prior violent convictions; 7) prior failure to appear at a pre-disposition court date in the last two years; 8) prior failure to appear at a pre-disposition court date more than two years ago; and 9) prior sentence to incarceration.¹⁸ These factors correlate to each of the three areas with different weight to provide FTA, NCA, and NVCA scores.¹⁹ By using these scores, the PSA provides judges with a recommendation about the conditions of release or detention according to the Deci-

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ AM. CIVIL LIBERTIES UNION OF N.J. ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 5–6 (2016), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b7202610-3480-b5bc-2e6e-7d211059fec4&forceDialog=0> [https://perma.cc/7JCH-SC4K] [hereinafter NEW JERSEY PRETRIAL JUSTICE MANUAL].

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 8–9.

sion Making Framework (DMF).²⁰ The combination of these scores and the DMF provides judges with recommendations for the least restrictive means of pretrial release to ensure court appearance and public safety.²¹

Phase Two would look to the implement an algorithmic based risk assessment tool similar to that suggested by the Supreme Court of Nevada's Committee to Study Evidence-Based Pretrial Release. However, Phase Two seeks to establish a more objective based pretrial practice by implementing the use of an evidence based pretrial risk assessment in conjunction with a pretrial options matrix. Further, this algorithmic risk assessment tool should be coupled with a personal interview process. By merging a scientifically-backed algorithmic system with an interview-based model, pretrial services can create individualized pretrial plans that will account for a defendant's risk to the community, ensure their appearance in court, and consider the burden pretrial conditions would place on a presumptively innocent defendant.

Phase Three: Creation of a Pretrial Agency in Clark County to Coincide with the Elimination of Cash Bail

Washington D.C. has established a dedicated agency within the Court Services and Offender Supervision Agency called the Pretrial Services Agency (D.C.'s PSA).²² D.C.'s PSA assists the D.C. Superior Court by "formulating release recommendations and providing supervision and treatment services to defendants which reasonably assure that those on conditional release return to court and do not engage in criminal activity pending their trial and/or sentencing."²³ D.C.'s PSA operates under the assumption that reliance on money bail discriminates against the indigent and does not effectively address public concerns with pretrial release.²⁴

Phase Three create pretrial agencies in counties with populations of over 100,000 people to coincide with the elimination of cash bail. These agencies would be an alternative to the current system by implementing the risk factor assessment and interview steps from Phase Two, combined with emerging technologies to ensure adequate pretrial supervision.

We believe that by following the examples of successful bail reform across the country and analyzing the failures in other jurisdictions, we can help our State's dialogue on the most important issues in the bail reform forum. Our hope is that this paper will allow Nevada policy makers to understand the many facets of the bail reform issue, and to make better informed decisions.

²⁰ *Id.* at 10.

²¹ *Id.*

²² *PSA's History*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=about/history> [<https://perma.cc/25UV-MX2Z>] (last visited May 3, 2019) [hereinafter *PSA's History*].

²³ *Id.*

²⁴ *Id.*

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INTRODUCTION

In 2016, Leslie Turner was arrested in North Las Vegas, Nevada because she failed to pay for a traffic ticket.²⁵ In the months prior, Ms. Turner struggled to keep her head above water. Her son was born two months premature, which resulted in after-birth complications, and was also diagnosed with Clonus, “a condition that results in involuntary muscle spasms sometimes caused by an underdeveloped nervous system.”²⁶ Ms. Turner relied on the help of her mother and Clark County Social Services after the birth of her son so that she could continue to care for her son and maintain her monthly housing expenses.²⁷ However, her unpaid traffic tickets remained a problem during this difficult time.²⁸ Nevada is one of thirteen states that treat traffic violations as criminal infractions.²⁹ When she missed a payment, Ms. Turner called the court to explain her extenuating circumstances, but she was “told she would either have to attend court or turn herself in.”³⁰

Unfortunately for Ms. Turner, and other similarly situated Nevadans, state law “does not provide a grace period for individuals on payment plans, and people who miss a payment can be arrested,” despite an on-time payment history.³¹ For example, the Las Vegas Township Justice Court website warns that it

²⁵ Jenniffer Solis, *Fines & Fees Sent Nursing Mother to Jail for Traffic Tickets*, NEV. CURRENT (June 5, 2018), <https://www.nevadacurrent.com/2018/06/05/system-of-fines-and-fees-sent-nursing-mother-to-jail-for-traffic-tickets/> [https://perma.cc/ZCE2-9XX2].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

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“will issue arrest warrants for all unpaid traffic tickets. An additional warrant fee of \$150 and a late fee of \$100 will be added to all tickets that proceed into warrant status.”³² As a result of this policy, a missed payment for a traffic ticket is recorded as a “failure to appear in court, rendering the person who got the ticket subject to a bench warrant and arrest.”³³ Following her missed payment, Ms. Turner returned to work to make some money and get back on track with her payment plan.³⁴ Soon after, Ms. Turner was pulled over, arrested, and incarcerated.³⁵ Her bail was set at \$1,500—an amount higher than what she made in a month.³⁶

Ms. Turner’s story highlights the collateral costs associated with Nevada’s cash bail system, the role of judicial discretion in bail setting practices, and exposes how a given state’s bail system disproportionately affects marginalized communities such as the poor and people of color. The general purpose of bail “is to prevent people from evading their obligation to go to court and to protect potentially dangerous people from causing harm before their cases are decided.”³⁷ However, “minor offenses like the failure to pay parking tickets” often results in incarceration at taxpayer expense.³⁸ Under Nevada law, “[b]ail should not be more than the accused can reasonably be expected to pay under their circumstances . . . , but many judges still impose high bail on those who cannot afford it.”³⁹ Arguably, an “unreasonably high bail is ‘tantamount to no bail at all.’”⁴⁰ The inability to pay bail and the resulting lengthy time in jail perpetuates the country’s mass incarceration problem, a political hot button topic in recent years, though it started decades ago.⁴¹ Particular concerns are tied to the country’s growing jail population which has tripled over the last three decades.⁴² Interestingly, the United States incarcerates more people before trial

³² *Avoid a Warrant for Your Arrest Being Issued, Pay the Fine Or ...*, LAS VEGAS JUST. CT., http://www.lasvegasjusticecourt.us/divisions/traffic_-_citation/pay_the_fine_or.php [<https://perma.cc/M5XT-RCXD>] (last visited Mar. 3, 2019).

³³ Solis, *supra* note 25.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (quoting Nevada Assemblyman Osvaldo Fumo).

⁴¹ “The term ‘mass incarceration’ refers to the unique way the [United States] lock[s] up a vast population in federal and state prisons, as well as local jails.” *What is Mass Incarceration?*, DANNOTT.COM (May 25, 2016), <https://dannott.com/2016/05/25/what-is-mass-incarceration/> [<https://perma.cc/N3VN-4EGV>]; see discussion *infra* Section I.

⁴² Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL’Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailovertime.html> [<https://perma.cc/KR5J-8MV8>].

than most countries have in its prisons and jails combined.⁴³ Additionally, more than half a million *unconvicted and presumably innocent* individuals behind bars remain in jail during the pretrial detention process because they cannot afford to pay bail.⁴⁴ Reforms to cash bail systems in states across the country, Nevada included, would begin to undo mass incarceration by targeting a major cause of overpopulated jails in cities, towns, and municipalities across the country, and reverse the disparities created by the system.

To this end, this White Paper seeks to address the aforementioned concerns. Part I details mass incarceration in the United States. It begins with its origin, the expansion, and links the role of pretrial detention in mass incarceration. Part II provides an overview of the cash bail system and reform attempts. Part III is an analysis and critique of county and municipal tools used to set bail, such as bail schedules and pretrial risk assessments. Part IV outlines Nevada's cash bail system and examines current bail reform endeavors in the state. Part V of this White Paper concludes with recommendations to address issues with bail, pretrial detention, and mass incarceration in Nevada. This proposal provides the opportunity for reform in three phases: Phase One eliminates bail schedules and encourages inter-judiciary cooperation; Phase Two works to eliminate bias in pretrial risk assessments; and Phase Three proposes creating a pretrial agency in counties with higher populations as cash bail is eliminated in those areas.

I. MASS INCARCERATION IN THE UNITED STATES

*"The United States is home to 5 percent of the world's population, but 25 percent of the world's prisoners. Think about that. Our incarceration rate is four times higher than China's. We keep more people behind bars than the top 35 European countries combined."*⁴⁵

In his remarks at the 2015 NAACP Conference, former President Barack Obama stressed a devastating truth.⁴⁶ Nearly half a decade later, the United States continues to lead the world in rates of incarceration, though our history reveals that was not always the case.⁴⁷ In 1972, the United States' incarcerated

⁴³ Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/5ZYG-ZPEP>].

⁴⁴ Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX.COM (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/S6GS-HCEJ>].

⁴⁵ President Barack Obama, Address at the NAACP Conference (July 14, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/4S97-T6MS>].

⁴⁶ *Id.*

⁴⁷ See JUSTICE POLICY INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM* (May 2000),

population was 300,000⁴⁸; approximately fifty years later, the population has risen to 2.3 million people behind bars.⁴⁹ The sudden rise of the country's incarcerated population has pushed the criminal justice system to a "tipping point," particularly in light of the effect such an immense carceral state has on civil rights.⁵⁰ For example, criminal justice reform advocates argue that the "runaway use of incarceration dehumanizes poor people and people of color, damages already marginalized communities, does not advance public safety, and siphons public resources with no social benefit."⁵¹ So, what is to blame for the sevenfold increase of the country's incarcerated population?

Our country's history plays a crucial role in understanding mass incarceration. At its core, this crisis is a product of decades of choices from various levels of political power.⁵² Starting in the mid-1960s, the punitive transformation of urban policy implemented by Republicans and Democrats alike, led to the significant expansion of the carceral state over various administrations.⁵³ In March 1965, President Lyndon B. Johnson declared the federal government's War on Crime by signing the Law Enforcement Assistance Act—the first national investment in local control efforts, essentially authorizing the federal government a direct role in the militarization of local police.⁵⁴ Later, President Richard Nixon enacted his own punitive policy by declaring a war on drugs, which pushed welfare programs to the wayside to invest in policing and punishment.⁵⁵ Due to the 126% increase in violent crime rates between 1960 and 1970, and anticipating a continued rise in crime, policymakers urged states to

http://www.justicepolicy.org/uploads/justicepolicy/documents/punishing_decade.pdf [<https://perma.cc/9VGY-6E8E>].

⁴⁸ 13TH (Kandoo Films, Forward Movement 2016).

⁴⁹ Wagner & Sawyer, *supra* note 43.

From the mid-1970s to the mid-'80s, America's incarceration rate doubled, from about 150 people per 100,000 to about 300 per 100,000. From the mid-'80s to the mid-'90s, it doubled again. By 2007, it had reached a historic high of 767 people per 100,000, before registering a modest decline to 707 people per 100,000 in 2012.

Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/NUE3-3RZC>].

⁵⁰ *Ending Mass Incarceration*, VERA INST. JUST., <https://www.vera.org/ending-mass-incarceration> [<https://perma.cc/B999-XFHP>] (last visited Mar. 3, 2019).

⁵¹ *Id.*

⁵² See generally NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis et al. eds., 2014), https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf [<https://perma.cc/9SJJ-2XNQ>] [hereinafter GROWTH OF INCARCERATION].

⁵³ See *id.* at 70–130.

⁵⁴ *Id.* at 110–11.

⁵⁵ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (Jul. 20, 2018), <https://www.brennancenter.org/blog/history-mass-incarceration> [<https://perma.cc/E3M5-83EK>].

build new correctional facilities.⁵⁶ In the late 1970s, President Jimmy Carter, “who campaigned on a promise of equality and opportunity . . . crafted an urban policy that was essentially punitive and discriminatory.”⁵⁷ Under his administration, housing projects transformed into zones with increased and constant surveillance, as well as increased police presence.⁵⁸ By the 1980s, crime control and incarceration dominated the nation’s response to poverty and inequality, a response driven by bad data collection and bad social science.⁵⁹ From 1984 to 1998, the country experienced a decline in crime, but with continuously higher incarceration rates.⁶⁰ Specifically,

states with the largest increases in incarceration experienced, on average, smaller declines in crime than other states. The “above average” states increased their rate of incarceration by an average of 72% and experienced a 13% decline in crime, while the rate of incarceration in “below average” states rose by 30% and crime rates declined by 17%.⁶¹

According to the Sentencing Project, the increase in the use of incarceration during this time, and in the decades after, is a result of policies like harsher drug laws and sentencing policies, rather than an increase in crime rates.⁶²

Decades of punitive and discriminatory policies have resulted in a system that criminalizes the poor and disproportionately affects communities of color.

⁵⁶ See Lauren-Brooke “L.B.” Eisen & Oliver Roeder, *America’s Faulty Perception of Crime Rates*, BRENNAN CTR. JUST. (Mar. 16, 2015), <https://www.brennancenter.org/blog/americas-faulty-perception-crime-rates> [https://perma.cc/R4UD-WR3H].

⁵⁷ Imani Perry, *From the War on Poverty to the War on Crime*, by Elizabeth Hinton, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/29/books/review/from-the-war-on-poverty-to-the-war-on-crime-by-elizabeth-hinton.html> [https://perma.cc/2SBC-EVYW].

⁵⁸ *Id.*

⁵⁹ *Id.* Data reveals that the “relationship between crime and incarceration is more discordant than it appears.” Coates, *supra* note 49. For example, despite the increase in violent crime rates between 1960 and 1970, incarceration actually rates fell. *Id.*; see also Eisen & Roeder, *supra* note 56. Moreover, in the following decade, both the incarceration rate and violent crime increased. See JUSTICE POLICY INST., *supra* note 47. The National Research Council found that when jurisdictions across the United States enacted these highly punitive policies and laws, they simultaneously turned away from rehabilitation and reintegration, and failed to reduce crime. GROWTH OF INCARCERATION, *supra* note 52, at 128–29. However, even once crime rates began to drop below the 1970s high, incarceration rates remained high. See Oliver Yates Libaw, *Incarceration Rate, Crime Drop Link Disputed*, ABCNEWS, <https://abcnews.go.com/US/story?id=95580&page=1> [https://perma.cc/SQ6W-7TQG] (last visited Mar. 3, 2019). One study found that despite a 13 percent reduction in crime between 1991 and 1998, the prison population increased by 72 percent. *Id.* “The lack of correlation bolstered the claim that there is no strong relationship between imprisonment and crime.” *Id.* These strong measure policies of harsher punishments on crime show that increased incarceration rates are an inefficient method of crime prevention. See GROWTH OF INCARCERATION, *supra* note 52, at 155–56.

⁶⁰ JENNI GAINSBOROUGH & MARC MAUER, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S 4 (Sept. 2000), <https://static.prisonpolicy.org/scans/sp/DimRet.pdf> [https://perma.cc/Z4BE-9UZR].

⁶¹ *Id.*

⁶² See *id.* at 17.

According to the Prison Policy Initiative, communities of color, specifically the Black community, are overrepresented in the country's incarcerated population.⁶³ Moreover, the majority of those in prison are poor, the poorest populations being women and people of color.⁶⁴

A. *The Role of Women in Mass Incarceration*

Communities of color are not the only major group in the United States adversely affected by incarceration policies. The criminal justice system has had a profound and unique effect on women; yet, women are noticeably absent from the larger conversation.⁶⁵ Although women make up the minority of the incarcerated population, the rate of incarceration for women has grown at an “alarming speed.”⁶⁶ In the last few decades, the number of women imprisoned overall increased at twice the rate of growth for men.⁶⁷ Additionally, states have experienced concerning growth in the rate of incarceration for women.⁶⁸ Nevada, for example, where despite women comprising less than ten percent of the inmate population, the state's female prison population “has grown at four times the pace of the overall prison population.”⁶⁹ This growth is evidence of a 39% increase in the last decade—an imprisonment rate 43% higher than the national average, per capita.⁷⁰ Further, the rate of imprisonment for women of color is striking when compared to white women.⁷¹ In 2018, more than 200,000 women were incarcerated, with nearly 25% of them sitting in jails without a conviction, awaiting trial, or because they could not afford to pay bail.⁷²

⁶³ Wagner & Sawyer, *supra* note 43; THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 5 (2018), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [https://perma.cc/D39D-F6ZB] [hereinafter TRENDS IN U.S. CORRECTIONS].

⁶⁴ Wagner & Sawyer, *supra* note 43.

⁶⁵ Kelsey Antle, *Women and Mass Incarceration*, BRENNAN CTR. JUST. (Apr. 29, 2016), <https://www.brennancenter.org/blog/women-and-mass-incarceration> [https://perma.cc/3PTZ-8FX5].

⁶⁶ *Id.*

⁶⁷ TRENDS IN U.S. CORRECTIONS, *supra* note 63, at 4.

⁶⁸ See generally Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/4PJT-KJLQ].

⁶⁹ JRI FINAL REPORT, *supra* note 4, at 4; KNPR News Staff, *Report: Nevada Prison Population Above Average and Growing*, NEV. PUB. RADIO (Sept. 13, 2018), <https://knpr.org/headline/2018-09/report-nevada-prison-population-above-average-and-growing> [https://perma.cc/M54T-HWGF].

⁷⁰ KNPR News Staff, *supra* note 69.

⁷¹ Compare 49 per every 100,000 white women with ninety-six and sixty-seven per every 100,000 black and Latina women, respectively. TRENDS IN U.S. CORRECTIONS, *supra* note 63, at 5. Note that the lifetime likelihood of imprisonment of U.S. residents born in 2001 is 1 in 18 and 1 in 45 for black and Latina women, respectively (as compared to the 1 in 111 for white women). *Id.*

⁷² Jessicah Pierre, *Mass Incarceration is a Women's Issue, Too*, INST. POL'Y STUDIES (Nov. 1, 2017), <https://ips-dc.org/mass-incarceration-womens-issue/> [https://perma.cc/N2DQ-]

The issue is not simply the shocking increase in incarceration rates of women; the impact of incarceration reaches far beyond the inmate to their families. Currently, more than 120,000 mothers are confined in institutions across the country.⁷³ Over almost two decades, from 1991 to 2007, “the number of children under age 18 with a mother in prison more than doubled . . . up 131 percent” whereas “the number of children with a father in prison has only grown by 77 percent in this time period.”⁷⁴ Like the overall rates of incarceration, the impacts are particularly apparent for communities of color such that “[1] in 9 African American children (11.4 percent), 1 in 28 Hispanic children (3.5 percent) and 1 in 57 white children (1.8 percent) have an incarcerated parent.”⁷⁵ Thus, “children are particularly susceptible to the domino effect of burdens placed on incarcerated women.”⁷⁶

B. The Role of Pretrial Detention in Mass Incarceration

By the same token, local jails found in mostly every city and town in the United States—the “front door” of incarceration—receive only a fraction of the larger discussion about criminal justice despite the significant role jails play in mass incarceration.⁷⁷ According to the Prison Policy Initiative, “99% of the growth in jails over the last 15 years has been a result of increases in the pre-trial population.”⁷⁸ As of early 2019, more than 462,000, 76% of the country’s total jail population, are behind bars but have not been convicted of a crime.⁷⁹ The increase is not a result of heavy criminalization or increased violence, but

ZC4P]; *New Report, Women’s Mass Incarceration: The Whole Pie 2018, Reveals How Many Women Are Locked up in the U.S., Where, and Why*, PRISON POL’Y INITIATIVE (Nov. 13, 2018), <https://www.prisonpolicy.org/blog/2018/11/13/mass-incarceration-women-2018/> [https://perma.cc/V73L-D9Z9] [hereinafter *Women’s Mass Incarceration*].

⁷³ Antle, *supra* note 65. “80% of women in jail are mothers, and most are the primary caretakers of their children.” *Women’s Mass Incarceration*, *supra* note 72.

⁷⁴ Antle, *supra* note 65.

⁷⁵ THE PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/8WVW-QJ37].

⁷⁶ Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Nov. 13, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html> [https://perma.cc/84NR-CTLU].

⁷⁷ Wagner & Sawyer, *supra* note 43.

⁷⁸ Peter Wagner, *Jails Matter. But Who is Listening*, PRISON POL’Y INITIATIVE (Aug. 14, 2015), <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/> [https://perma.cc/C3HB-HWVF]; Wagner & Sawyer, *supra* note 43.

⁷⁹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INSTITUTE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [https://perma.cc/R6HT-L8YL] [hereinafter *Whole Pie 2019*].

rather from “discretionary criminal justice policies that increasingly condition[] release from jail on whether they could pay for bail.”⁸⁰

Most recently, the mass incarceration epidemic is more and more a result of pretrial detention practices, which are “fueled by cash bail.”⁸¹ Only two countries in the world—the United States and the Philippines—have cash bail systems controlled by commercial bail bondsmen that require a defendant to pay money to be released during the pendency of their case.⁸² Our country’s cash bail system exists at the state level, thus many processes and guidelines for pretrial detention and release exist.⁸³ While preventative detention and bail are critical parts of the criminal justice system, they adversely impact an accused person’s life, particularly communities of color and indigent defendants.⁸⁴ For example, in some jurisdictions, “less than 10 percent of defendants can pay bail of less than \$1,000.”⁸⁵ Currently, the median bail is \$10,000; median annual pre-incarceration incomes for people ages 23 to 39 reveal why, for some, release is not a possibility.⁸⁶

Moreover, the impact on minorities is such that “41.6 percent of black defendants are detained pretrial while only 34.3 percent of white defendants are.”⁸⁷ Additionally, “even when charged for the same crimes, black and Hispanic defendants often pay higher bail amounts than white defendants.”⁸⁸ However, these issues are not newly discovered; decades of research and writing

⁸⁰ Marc Levin & Ed Chung, *Criminal Justice Reform Starts Before the Trial and Sentence*, THE HILL (July 7, 2017, 12:00 PM), <https://thehill.com/blogs/congress-blog/judicial/340931-criminal-justice-reform-starts-before-the-trial-and-sentence> [<https://perma.cc/Q98N-ATP9>].

⁸¹ Emmeline Clein, *Here’s How to Help End Cash Bail*, THE NATION (Oct. 25, 2018), <https://www.thenation.com/article/heres-how-to-help-end-cash-bail/> [<https://perma.cc/XN3U-KRTB>].

⁸² See Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT CAL. (Oct. 9, 2018, 4:26 PM), <https://www.politifact.com/california/statements/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/> [<https://perma.cc/TU6M-QQK2>]. A system controlled by commercial bail bondsmen is outlawed in all other countries. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/289K-VZPX>].

⁸³ National consistency regarding bail does not exist. See generally SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* (2018).

⁸⁴ See Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1125 (2018); Liana M. Goff, Note, *Pricing Justice: The Wasteful Enterprise of America’s Bail System*, 82 BROOK. L. REV. 881, 881–84 (2017).

⁸⁵ BAUGHMAN, *supra* note 83, at 2.

⁸⁶ *Whole Pie 2019*, *supra* note 79.

⁸⁷ BAUGHMAN, *supra* note 83, at 9.

⁸⁸ *Id.*

have highlighted them.⁸⁹ Yet, legislatures have made minimal strides in introducing meaningful legislation and reform.⁹⁰

Attached to this aspect of the criminal justice system are significant collateral costs. For example, a defendant detained awaiting trial is more likely to be convicted if they go to trial.⁹¹ Similarly, a defendant is more likely to take a plea deal if they are denied bail or unable to make bail, and is also three times more likely to receive prison time than a similarly situated individual who was released.⁹² While a defendant is detained, they often lack access to their attorney because of the constraints on the attorney to discuss the various issues in their case.⁹³ Additionally, a defendant who remains detained will likely lose his or her job and housing.⁹⁴ Societal effects include an economic loss because a person can no longer contribute, in addition to the accrued tax expense to keep people behind bars during the pendency of their case.⁹⁵

Among the many factors contributing to mass incarceration, the issue of pretrial detention and release has been a focus among those seeking criminal justice reform.⁹⁶ Jails were intended to house those who are a danger to society or are a flight risk, but have instead “become massive warehouses primarily for those too poor to post even low bail [and] too sick.”⁹⁷ In the United States, approximately three-quarters of a million people are sitting in a municipal or county jail waiting for their case to progress.⁹⁸ Roughly 60% of the nationwide jail population consists of individuals who have yet to be convicted of a crime, thus are *presumed innocent*.⁹⁹ As discussed above, the burden of incarceration does not affect everyone the same as evidenced by the disparate impact on low-income communities and communities of color.¹⁰⁰ Advocates and legis-

⁸⁹ Goff, *supra* note 84, at 883.

⁹⁰ Currently, four states outlaw a cash bail system: Illinois, Kentucky, Oregon, and Wisconsin. Moreover, New Jersey and Alaska very rarely permit money bail. Liptak, *supra* note 82.

⁹¹ BAUGHMAN, *supra* note 83, at 5.

⁹² *Id.* at 5–6.

⁹³ *Id.* at 7.

⁹⁴ See Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 420 (2016); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/UN4S-XBXN>].

⁹⁵ Wiseman, *supra* note 94.

⁹⁶ See PRETRIAL JUSTICE INST., WHAT’S HAPPENING IN PRETRIAL JUSTICE 1 (Apr. 2019), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8f6f4242-48c6-def6-5e86-720d6c788efe&forceDialog=0> [<https://perma.cc/U5QW-YATJ>] [hereinafter WHAT’S HAPPENING IN PRETRIAL JUSTICE].

⁹⁷ VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (Feb. 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 [<https://perma.cc/BA7L-NQXT>].

⁹⁸ See Pinto, *supra* note 94.

⁹⁹ Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401 (2017).

¹⁰⁰ *Id.* at 1401–02.

lators across the country and the aisle¹⁰¹ are pushing to eliminate or reduce the reliance on money bail in their states and local jurisdictions in response to reports and research on the shortcomings of pretrial detention systems.¹⁰²

II. A BRIEF HISTORY OF CASH BAIL AND REFORM EFFORTS ACROSS THE COUNTRY

With its roots in medieval England, the bail system used in the United States has become an integral part of the criminal justice system.¹⁰³ “Bail is the temporary release of a person awaiting trial for a crime.”¹⁰⁴ During the creation of the bail system, the main concern was whether a person released would return for future court dates.¹⁰⁵ Accordingly, the purpose of bail was to strike the balance of a defendant’s interest in pretrial liberty and the society’s interest in ensuring the defendant shows up to future court appearances,¹⁰⁶ in addition to the preservation of the presumption of innocence.¹⁰⁷ During this time, all but the most serious offenders, were likely granted some type of bail.¹⁰⁸ Like the Eighth Amendment, the English Bill of Rights prohibited excessive bail.¹⁰⁹ The United States incorporated the English approach in its own bail system. In the summer of 1789, the first U.S. Congress passed the Judiciary Act, which granted bail to defendants in non-capital federal criminal cases.¹¹⁰ States, such as Pennsylvania and Massachusetts, followed the federal government’s lead and established their own bail systems for criminal defendants.¹¹¹ As a result, monetary bail became the primary means of assuring the presence of the defendant at trial.¹¹²

¹⁰¹ Brand & Pishko, *supra* note 6.

¹⁰² Gloria Gong, *Could Pay for Success Help Make Bail Reform a Reality?*, GOVERNING.COM (June 12, 2018, 3:00 AM), <http://www.governing.com/blogs/bfc/col-bail-pretrial-detention-reform-pay-for-success.html> [<https://perma.cc/LL8G-AL9B>].

¹⁰³ R. Lamont Kaiser, *The Bail System: Is It Acceptable?*, 29 OHIO ST. L.J. 1005, 1006 (1968); Pinto, *supra* note 94 (noting that “[b]y encouraging poor defendants to plead guilty, bail keeps the system afloat”).

¹⁰⁴ BAUGHMAN, *supra* note 83, at 1.

¹⁰⁵ Kaiser, *supra* note 103, at 1008.

¹⁰⁶ Donald B. Verrilli Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329–30 (1982).

¹⁰⁷ *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”); Yang, *supra* note 99, at 1411.

¹⁰⁸ TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 1–2 (2010).

¹⁰⁹ Kaiser, *supra* note 103, at 1007.

¹¹⁰ SCHNACKE ET AL., *supra* note 108, at 5.

¹¹¹ *Id.* at 4–5.

¹¹² Kaiser, *supra* note 103, at 1007.

In the 1960s, critics of the bail system began to share their concerns about the country's bail system.¹¹³ These concerns included "whether the discretionary application of bail was equitable and whether pre-trial detention adversely affected criminal defendants, particularly those who were too poor to pay."¹¹⁴ In 1966, the Federal Bail Reform Act—the first major reform to the Judiciary Act of 1789—was passed.¹¹⁵ Generally, this Act stated that non-capital defendants should be released on their own recognizance or on "personal bonds" unless the judge decided those measures would not assure the defendant's presence for trial.¹¹⁶ Moreover, the Act permitted judges to consider other factors to determine a defendant's flight risk, such as public safety and the defendant's criminal record.¹¹⁷ Soon after, various states passed similar legislation.¹¹⁸

In 1970, Congress passed the District of Columbia Crime Bill, which permitted the detention of defendants if they were assessed as a risk to the community.¹¹⁹ Nearly fifteen years later, Congress adopted the 1984 Bail Reform Act, which adopted similar provisions as the District of Columbia Crime Bill.¹²⁰ This Act's constitutionality was challenged in *United States v. Salerno*.¹²¹ In *Salerno*, the Court found that pre-trial detention based on a defendant's risk to the community was constitutional and did not violate his or her Due Process rights.¹²² The Court balanced the "government's interest in preventing crime by arrestees" and a defendant's right to liberty in making its decision.¹²³ The Court concluded that the government's interest was legitimate and compelling, while the defendant's right to liberty "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."¹²⁴ As a result of the *Salerno* decision, the risk to the community became a prominent factor in determining whether to release a defendant in the federal and state bail system. By 1999, almost every state enacted a statute or established case law regarding pretrial supervised release.¹²⁵

The Eighth Amendment of the United States Constitution is another important part of the country's history of cash bail, which states: "*Excessive bail shall not be required*, nor excessive fines imposed, nor cruel and unusual pun-

¹¹³ Yang, *supra* note 99, at 1411.

¹¹⁴ *Id.*

¹¹⁵ SCHNACKE ET AL., *supra* note 108, at 12.

¹¹⁶ *Id.*

¹¹⁷ Yang, *supra* note 99, at 1413.

¹¹⁸ SCHNACKE ET AL., *supra* note 108, at 12.

¹¹⁹ See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 23-1322(a)(1), 84 Stat. 473, 644 (1970).

¹²⁰ See Yang, *supra* note 99, at 1415.

¹²¹ See *United States v. Salerno*, 481 U.S. 739 (1987).

¹²² *Id.* at 748.

¹²³ *Id.* at 749.

¹²⁴ *Id.* at 750–51.

¹²⁵ SCHNACKE ET AL., *supra* note 108, at 12.

ishments inflicted.”¹²⁶ Despite the system’s long history, what constitutes “excessive” bail has yet to be determined, specifically because the Supreme Court addressed the issue only a handful of times.¹²⁷ For example, in *Stack v. Boyle*, the Court stated: “Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”¹²⁸ However, the Court never stated whether the defendant’s financial ability should be considered when setting monetary bail. The financial ability of defendants has been a particularly important part of the conversation surrounding bail reform. Furthermore, whether a defendant has a *right* to bail is another issue surrounding the Eighth Amendment. Only months after it decided *Stack*, the Supreme Court held that a right to bail is a fundamental, not absolute.¹²⁹ Because bail can be denied to a class of defendants, such as those convicted of capital murder, bail is not an affirmative right.¹³⁰ Whether the Eighth Amendment permits preventive detention is still up for debate. There is such little case law regarding the application of the Eighth Amendment in the realm of bail, and in most cases, the Fourteenth Amendment becomes the best tool to challenge a bail system.

While the implementation of bail varies from jurisdiction to jurisdiction, most states follow what is known as the classic bail system.¹³¹ In the classic bail system, the primary goals are to keep the public safe, ensure individuals appear in court, and respect a defendant’s presumption of innocence.¹³² Generally, the process starts following an arrest, when the individual goes before a judge. The judge then determines whether the defendant will be released before the resolution of the case, released subject to a condition or conditions, or held in for the pretrial process.¹³³ Any determination to hold the defendant must be based on significant flight risk or the danger of the defendant being a danger to the community.¹³⁴ If the judge determines that the defendant is not a flight risk or danger to the community, the judge has several options for how to release the defendant.¹³⁵ For example, the judge can release the defendant on their own recognizance (a personal promise that the defendant will return for their court appearance), conditional release, or release on a bond.¹³⁶ A defendant released on conditional release may be required to fulfill certain requirements to maintain

¹²⁶ U.S. CONST. amend. VIII (emphasis added).

¹²⁷ See e.g., *Stack v. Boyle*, 342 U.S. 1, 4–5 (1951).

¹²⁸ *Id.* at 5.

¹²⁹ *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

¹³⁰ *Verrilli*, *supra* note 106, at 331.

¹³¹ See *id.* at 330–31.

¹³² *Id.* at 335. Charles Doyle, *Bail: An Overview of Federal Criminal Law*, CONG. RES. SERV. 11 (July 31, 2017), <https://fas.org/sgp/crs/misc/R40221.pdf> [<https://perma.cc/XEW5-YT83>].

¹³³ *MOVING BEYOND MONEY*, *supra* note 10, at 5.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

their freedom.¹³⁷ These requirements may include checking in with pretrial supervision, drug testing, electronic monitoring, or other conditions established by the court.¹³⁸

A defendant may receive one of two types of bonds: secured or unsecured. A secured bond is an amount of money a defendant can pay to secure their release.¹³⁹ Whereas, an unsecured bond is the amount of money a defendant will have to pay if they fail to appear in court.¹⁴⁰ Cash bail therefore is the amount of money a defendant pays as a condition of their release.¹⁴¹ Various methods are used to set bail regardless of the defendant's ability to pay, such as a bail schedule, pretrial algorithms, or judicial discretion.¹⁴² When a defendant cannot afford to pay their bail, they may secure the money from a bail bondsmen for a non-refundable fee and often some kind of collateral.¹⁴³

A significant factor affecting an indigent defendant and their potential freedom is the current bail bonds industry. The percentage of defendants released on a bail bond increased from 24% to 42% between 1994 and 2004.¹⁴⁴ While bail bonds can create a "safety valve" on pretrial detention for those who cannot afford a full bond amount, it can also take pretrial decisions out of the hands of the court and put them into the hands of private companies.¹⁴⁵ Current bond practices create a paradoxical effect for defendants the court might deem low risk for failure to appear. Many bail bond companies will not take low money bail bonds because it is less lucrative than high value ones.¹⁴⁶ Accordingly, defendants the court deems less likely to miss court are more likely to be in pretrial detention.¹⁴⁷

The variations in types of bond and within bail setting practices allow for institutional inequities to create unequal and unjust disparities between defendants based on their race and socioeconomic background. With many jurisdictions realizing the institutional inequities in their current bail systems, policy makers at the federal, state, and local level have focused on various methods of reform to ensure that the constitutional right of reasonable bail is available to all, regardless of wealth or race.¹⁴⁸ These efforts to change inadequate pretrial practices are as varied as the jurisdictions themselves, which can range from

¹³⁷ *Id.* at 5–6.

¹³⁸ *Id.* at 17–18.

¹³⁹ *Id.* at 6.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 11–14.

¹⁴³ *Id.* at 12.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 12–13.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.* at 4.

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the most extreme, such as amending State Constitutions and localized efforts to change practices within existing legal structures.¹⁴⁹

A. A Brief History of National Attempts at Bail Reform

“Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. The factor is simply money. How much money does the defendant have?”¹⁵⁰

This sentiment stated by Robert F. Kennedy in 1964 was a concern echoed by many and became the center for three comprehensive waves of bail reform at the federal level: (1) the Federal Bail Reform Act of 1966; (2) the Bail Reform Act of 1984; and (3) the wave of reform in the new millennium.¹⁵¹ The first two waves established tighter standards and barriers to bail by creating denial of bail based on potential flight risk and reasonably assuring public safety, while the third wave has sought to balance what many perceive to be an over emphasis on pretrial detention.

Arguments for bail reform in the 1960s were similar to arguments presently being made for reform. The Federal Bail Reform Act of 1966 was based on two premises: (1) a person’s ability to pay should not determine if they are jailed; and (2) the danger of non-appearance should be the only consideration when bail is assessed.¹⁵² However, implementation of this Act coincided with rising crime rates in America.¹⁵³ This trend prompted advocates to call for the creation of barriers to pretrial release for those who were a potential flight risk.¹⁵⁴ The Federal Bail Reform Act of 1966 thus created a climate where the courts could hold a suspected criminal without bail based on whether they were a flight risk.¹⁵⁵

The rising crime rates of the late 1960’s lead to the “tough on crime” political culture shift of the 1970’s, which led to the normalization of pretrial detention, whether the defendant’s charged crime was a capital offense or not.¹⁵⁶ Using the basis of defendants who might be a “danger to the community,” almost

¹⁴⁹ WHAT’S HAPPENING IN PRETRIAL JUSTICE, *supra* note 96, at 1.

¹⁵⁰ JOHN-MICHAEL SEIBLER & JASON SNEAD, THE HISTORY OF CASH BAIL 5 (Aug. 25, 2017), <https://www.heritage.org/sites/default/files/2017-08/LM-213.pdf> [https://perma.cc/5LDP-AJTU].

¹⁵¹ *Id.* at 5–8.

¹⁵² Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 24 (1970).

¹⁵³ *Id.* at 37, n.90.

¹⁵⁴ *Id.* at 48–49.

¹⁵⁵ AMANDA ZANIEWSKI, MASS. DEPT. OF CORRECTIONS, BAIL IN THE UNITED STATES: A BRIEF REVIEW OF THE LITERATURE, 2 (Nov. 2014), <https://www.mass.gov/files/documents/2016/09/qx/bail-in-united-states-literature-review.pdf> [https://perma.cc/XK6Q-VT3T].

¹⁵⁶ *Id.*

all states tightened their pretrial release standards by 1980.¹⁵⁷ With individual states leading the charge in creating a “danger to the community” standard, the federal government soon followed suit. In 1984, Congress passed the Federal Bail Reform Act of 1984 which enabled judges to detain defendants to “reasonably assure” public safety.¹⁵⁸ The United States Supreme Court found the Act to be constitutionally sound because it afforded defendants a full hearing and the Act was regulatory in nature.¹⁵⁹ With standards for pretrial detention based around a defendant’s flight risk and risk to the community, some felt that bail became a burden on the presumptively innocent, poor defendant.¹⁶⁰

The United States is now experiencing a third wave of bail reform focused on facilitating more conducive conditions for pretrial release in hopes of fighting mass incarceration.¹⁶¹ While the growing carceral state has driven policy change, some calls for change come as a result of public consciousness about the plight of indigent defendants.¹⁶² Despite the Bail Reform Act of 1966’s purpose in ensuring that a defendant’s inability to pay does not mean he or she remains in jail, statistics show that those most negatively affected by pretrial proceedings are the poor.¹⁶³ This third wave of bail reform is epitomized by the Pretrial Justice Institute 3DaysCount campaign.¹⁶⁴ 3DaysCount seeks to facilitate reform at state level by modifying existing bail structures to enable local bail reform.¹⁶⁵ The campaign draws its name from a statement made by Ferguson municipal court representatives who replied: “It’s only three days,” when asked why they did not track the amount of time defendants spent in jail before a hearing.¹⁶⁶ Advocates for bail reform have found many ways to improve pretrial opportunities so that they are more equitable for all, particularly through statewide efforts.

¹⁵⁷ John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15–16 (1985).

¹⁵⁸ SEIBLER & SNEAD, *supra* note 150, at 6.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 5.

¹⁶¹ See Udi Ofur, *We Can’t End Mass Incarceration Without Ending Money Bail*, ACLU NEV. (Dec. 11, 2017, 4:30 PM), <https://www.aclunv.org/es/news/we-cant-end-mass-incarceration-without-ending-money-bail> [<https://perma.cc/5BSP-QFAD>].

¹⁶² *Id.*; Dave Rini, *End Cash Bail to Stop the Cycle of Incarceration*, MEDIUM (Aug. 29, 2018), <https://medium.com/the-new-leader/end-cash-bail-to-stop-the-cycle-of-incarceration-ee84e1c4162> [<https://perma.cc/JWY3-NVZE>]; Wykstra, *supra* note 44.

¹⁶³ Wykstra, *supra* note 44; Bernadette Rabuy & Daniel Kapf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL’Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/SR8Y-2C7H>].

¹⁶⁴ *3DaysCount for State-Level Change*, PRETRIAL JUST. INST., <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> [<https://perma.cc/E37W-T5JK>] (last visited Apr. 5, 2019).

¹⁶⁵ *Id.*

¹⁶⁶ U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 60 (Mar. 4, 2015).

B. State Bail Reform

In recent years, many states enacted legislation relating to pretrial reform, some specifically focusing on reducing or eliminating the use of cash bail in their pretrial processes, implementing the use of pretrial risk assessment tools, and limiting the number of defendants held in jail prior to trial.¹⁶⁷ The federal government seemingly supports state measures for bail reform. For example, United States Senator Bernie Sanders of Vermont introduced a bill to provide grants to states that seek to implement alternative pretrial systems and lower pretrial detention populations.¹⁶⁸ The bill stated that grants would be withheld from states continuing to use money bail systems and require studies to show that pretrial processes are not resulting in disparate effects on those detained within the process.¹⁶⁹ Similar bills were subsequently introduced to the U.S. House of Representatives.¹⁷⁰

In 2018, California passed Senate Bill 10 (SB 10)—the California Money Bail Reform Act (“the Act”)—which made national news as a significant legislative example of criminal pretrial justice reform and declared California as the “first” to abolish its state’s cash bail system.¹⁷¹ However, while California’s efforts are bigger in size and thus more notable, other state efforts to overhaul or reform cash bail systems have taken place in recent years.

1. California: Move Toward Eliminating Cash Bail

California’s correctional facilities have long-struggled with overcrowding, not only because the state has the largest prison system in the United States,¹⁷² but because it “has one of the highest pretrial detention rates in the country.”¹⁷³ At the core of the California’s pretrial rate is one the “cruellest aspects of the

¹⁶⁷ *Id.* at 10–13.

¹⁶⁸ See Lauren Gambino & Ben Jacobs, *Bernie Sanders’ Cash Bail Bill Seeks to End ‘Modern Day Debtors’ Prisons*, GUARDIAN (July 25, 2018, 4:59 PM), <https://www.theguardian.com/us-news/2018/jul/25/bernie-sanders-cash-bail-bill-seeks-to-end-modern-day-debtors-prisons> [https://perma.cc/M24F-M4ME].

¹⁶⁹ *Id.*

¹⁷⁰ See e.g., No Money Bail Act of 2107, H.R. 1437, 115th Cong. § 3 (2017); Bail Fairness Act of 2018, H.R. 4833, 115th Cong. § 2(b) (2018).

¹⁷¹ Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> [https://perma.cc/5YYN-F9BJ].

¹⁷² Sam Levin, *Wealthy Murder Suspect Freed on Bail as Man Accused of Welfare Fraud Stuck in Jail*, GUARDIAN (Apr. 25, 2017, 5:00 AM), <https://www.theguardian.com/us-news/2017/apr/25/california-bail-system-tiffany-li-joseph-warren> [https://perma.cc/HZ2R-PZDF].

¹⁷³ Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California’s Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 167 (2018) [hereinafter Scott-Hayward & Ottone, *Punishing Poverty*]; see also SONYA TAFOYA, PUB. POLICY INST. OF CAL., PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA 4 fig.3 (July 2015), https://www.ppic.org/content/pubs/report/R_715STR.pdf [https://perma.cc/E2U9-AEME].

American criminal justice system”: the detention of a person simply accused for a crime because of their inability to pay bail.¹⁷⁴ Most importantly, the state’s cash bail system reveals notable and widespread disparities.¹⁷⁵ To illustrate, Joseph Warren—a sixty-year old, African American man—was charged with welfare fraud and his bail was set at \$75,000, an amount he could not afford to pay.¹⁷⁶ As a result, he was left with two options: (1) remain incarcerated for the pendency of his case, or (2) plead guilty.¹⁷⁷ Meanwhile, Tiffany Li—a wealthy real estate heir—was charged with murder and her bail was set at \$35 million.¹⁷⁸ She posted \$4 million in cash and pledged her \$62 million property for her bail.¹⁷⁹ Her ability to pay resulted in house arrest for the pendency of her case.¹⁸⁰ The unfortunate common occurrence of stories like Mr. Warren’s made bail reform a legislative priority in California.

Under the current system, the eligibility for pretrial release and the factors considered in making a pretrial release decision are specifically outlined in provisions of the California constitution, penal code, and the rules of court.¹⁸¹ For example, the state constitution provides that “a person shall be released on bail by sufficient sureties,” except if charged for any of the enumerated offenses.¹⁸² This provision additionally provides that a court cannot require excessive bail and authorizes the exercise of judicial discretion in granting release on own recognizance.¹⁸³ Moreover, each county in the state is required to prepare a uniform bail schedule, which superior court judges are required to review annually for misdemeanor offenses.¹⁸⁴ Pretrial release decisions may also be guided by evidence based risk assessments.¹⁸⁵ However, bail amounts prescribed in bail schedules and the risk assessment tools vary from county to county.¹⁸⁶

After an arrest, a judge assesses the severity of the crime and bail is set in accordance with the county bail schedule.¹⁸⁷ To be released, an individual must

¹⁷⁴ Levin, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ CAL. CONST. art. 1, §§ 12, 28; CAL. PENAL CODE §§ 1270, 1268 (West 2019); CAL. R. CT. 4.105 (2018).

¹⁸² CAL. CONST. art. 1, § 12.

¹⁸³ *Id.*

¹⁸⁴ CAL. PENAL CODE §§ 1269b, 1269b(c) (West 2019).

¹⁸⁵ Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST. L. & SOC’Y 24, 28 (2018).

¹⁸⁶ *See id.*

¹⁸⁷ CAL. PENAL CODE § 1269b (West 2019); *see also* Jazmine Ulloa, *Some Say California’s Bail System is Broken. Here’s How Two Legislators Plan to Help Fix It*, L.A. TIMES (Jun. 13, 2017, 12:05 AM), <https://www.latimes.com/politics/la-pol-sac-bail-reform-analysis-20170609-htmlstory.html> [<https://perma.cc/S55T-2XTU>].

either pay their bail in full or pay 10 percent to a bonding company.¹⁸⁸ In the case that a person cannot afford to pay their bail, they must appear before the judge within forty-eight hours, where the judge will decide what bail the person should be afforded; at this point, the judge has absolute discretion over the pre-trial release.¹⁸⁹ Ultimately, a judge has three choices: (1) keep the person detained; (2) release the person on his or her own recognizances; or (3) set bail.¹⁹⁰ In deciding the best option, the judge considers the potential danger to people in the community, other evidence offered by the defendant regarding their ties to the community, and their ability to post bond.¹⁹¹ After a review of all the relevant factors, the judge makes an individualized decision.¹⁹² At this stage, the judge must set bail in an amount that is “reasonable and sufficient” to ensure the individual will appear in court.¹⁹³ In setting bail, the judge may analyze additional factors such as public safety (regarded as the primary or most important factor), the nature of the offense, the individual’s criminal record, and the probability of the individual appearing at future court appearances.¹⁹⁴

The variation of pretrial processes and notable disparities resulting from these processes at the state and local level revealed the need for serious pretrial reform in California especially because the state has one of the highest pretrial rates in the country.¹⁹⁵ Moreover, the reform was particularly timely in consideration of the Court of Appeal of California for the First Appellate Division’s decision concluding that California’s use of bail schedules is unconstitutional and holding that a judge must consider a defendant’s ability to pay when setting bail.¹⁹⁶ After many failed attempts, bail reform finally made its way to Governor Jerry Brown’s desk in 2018.¹⁹⁷ State Senator Robert Herzberg, along with several co-authors, successfully introduced SB 10.¹⁹⁸

At face value, the Act was set to resolve California’s correctional institution overcrowding issue by scraping away at its pretrial detention and implementing a process through which presumptively innocent people would no longer remain detained simply because they cannot afford bail.¹⁹⁹ However, in the last minutes before its passage, many notable institutions and organizations

¹⁸⁸ Ulloa, *supra* note 187.

¹⁸⁹ CAL. PENAL CODE § 825 (West 2019).

¹⁹⁰ CAL. PENAL CODE §§ 1269b, 1270 (West 2019).

¹⁹¹ *In re Humphrey*, 228 Cal Rptr. 3d 513 524 (Cal Ct. App. 2018).

¹⁹² Scott-Hayward & Ottone, *Punishing Poverty*, *supra* note 173, at 171.

¹⁹³ CAL. PENAL CODE § 815a (West 2019).

¹⁹⁴ See CAL. PENAL CODE §§ 1270, 1275(a)(1) (West 2019); see also Gray v. Superior Court, 23 Cal. Rptr. 3d 50, 58 (Cal. Ct. App. 2005).

¹⁹⁵ Scott-Hayward & Ottone, *Punishing Poverty*, *supra* note 173, at 167.

¹⁹⁶ See *In re Humphrey*, 228 Cal. Rptr. 3d at 517, 538.

¹⁹⁷ See Kyle Harrison, Note, *SB 10: Punishment Before Conviction: Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 542 (2018).

¹⁹⁸ *Id.* at 537.

¹⁹⁹ SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF S.B. 10., S. 2017-2018, Reg. Sess., at 12 (Apr. 4, 2017).

that first supported the Act drew back support.²⁰⁰ Proponents of the Act argued that the legislation would create a just system that no longer unfairly impacts people of color and those in poverty, and would decrease jail populations and enhance public safety.²⁰¹ It was expected that long-time advocates from criminal justice would similarly support the Act, but that was not the case.²⁰²

Aside from the obvious impact the Act would have on the bail bonds industry,²⁰³ prominent advocates and organizations claimed this bail reform would do more harm than good. Prominent progressive organizations, such as the American Civil Liberties Union of Southern California (“ACLU”), argued that the new law authorized expansive power to the courts and increased prosecutorial discretion.²⁰⁴ The ACLU withdrew its support for the law after it was amended,²⁰⁵ and expressed disappointment when SB 10 was signed into law by Governor Brown on August 28, 2018:

[The California Money Bail Reform Act] is not the model for pretrial justice and racial equity that California should strive for. It cannot guarantee a substantial reduction in the number of Californians detained while awaiting trial, nor does it sufficiently address racial bias in pretrial decision making. Indeed, key provisions of the new law create significant new risks and problems.²⁰⁶

Moreover, the ACLU believed the new law would lead to more people being detained before trial than in the previous system because of the process put into place by the law which required the California Judicial Council—run by California judges—to approve the tool each county proposes to use.²⁰⁷ Additionally, the Act contained a provision that widened prosecutorial power by al-

²⁰⁰ Jenna Lane, *Liberal Groups Withdraw Support For Ending Cash Bail In California*, RADIO.COM (Aug. 24, 2018, 11:26 AM), <https://kcbsradio.radio.com/blogs/jenna-lane/liberal-groups-withdraw-support-bill-end-cash-bail-california> [<https://perma.cc/HKP3-LPT4>].

²⁰¹ Harrison, *supra* note 197, at 545–46.

²⁰² Ulloa, *supra* note 187.

²⁰³ *Id.*

²⁰⁴ See e.g., Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, POLITICO (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/Q9RL-8ULQ>] (“The ACLU, NAACP and Human Rights Watch all abandoned their support for a move they initially hailed as a breakthrough for justice and fairness.”).

²⁰⁵ *ACLU of California Changes Position to Oppose Bail Reform Legislation*, ACLU S. CAL. (Aug. 20, 2018), <https://www.aclusocal.org/en/press-releases/aclu-california-changes-position-oppose-bail-reform-legislation> [<https://perma.cc/QW2N-27VD>] [hereinafter ACLU S. CAL.].

²⁰⁶ See *ACLU of California Statement: Governor Brown Signs Bail Reform Legislation Opposed by ACLU*, ACLU N. CAL. (Aug. 28, 2018), <https://www.aclunc.org/news/aclu-california-statement-governor-brown-signs-bail-reform-legislation-opposed-aclu> [<https://perma.cc/KG6P-HMBY>]; Harrison, *supra* note 197, at 542.

²⁰⁷ See S.B. 10, 2017–2018 Leg., Reg. Sess. § 36 (Cal. 2017) (as amended on Sept. 6, 2017); Eric Westervelt, *California's Bail Overhaul May Do More Harm Than Good, Reformers Say*, NPR (Oct. 2, 2018, 5:01 AM), <https://www.npr.org/2018/10/02/651959950/californias-bail-overhaul-may-do-more-harm-than-good-reformers-say> [<https://perma.cc/9PD3-97K9>].

lowing the State to file motions for preventative detention.²⁰⁸ Opponents feared that authority will continue to disproportionately affect people of color and those living in poverty; thus, the Act would not systemically change the biases that underlie and perpetuate mass incarceration in California.²⁰⁹

Furthermore, opponents were concerned the computerized system, the pretrial risk assessment tool, would detract from the individualized aspect of deciding bail and result in decisions that reflect social biases.²¹⁰ This concern is mainly rooted in the fact that the law is silent on the design of the algorithm.²¹¹ On the other hand, supporters of the law argue the pretrial risk assessment tool would allow judges to make more informed decisions and ensure those classified as a high risk will not be released, though the previous system might have allowed for that opportunity.²¹² Under the new system, each county would have the discretion to set its own pretrial assessment tools which critics fear will allow biased assessment tools to negatively impact those who are most vulnerable.²¹³

The enactment of the Act would overhaul California's cash bail system entirely. As passed, the Act repeals "existing laws regarding bail and require that any remaining references to bail refer to the procedures specified in the bill,"²¹⁴ The Act attempts to safely reduce the number of defendants incarcerated only because they cannot afford to post bail.²¹⁵ Most notably, the Act eliminates the monetary aspect of California's current bail statutes and replaces it with "'risk assessments' and other nonmonetary conditions."²¹⁶ To do this, the law requires each Superior Court to have an entity, division, or program that provides pretrial risk assessment services that would "assess the risk level of persons charged with the commission of a crime, report the results of the risk determination to

²⁰⁸ S.B. 10, 2017-2018 Leg., Reg. Sess. § 36 (Cal. 2017) (as amended on Sept. 6, 2017).

²⁰⁹ ACLU S. CAL., *supra* note 205; Westervelt, *supra* note 207 ("The new SB 10 doesn't actually change the racist system of mass incarceration. It just expands it.").

²¹⁰ Westervelt, *supra* note 207.

²¹¹ *Id.*

²¹² *Id.*; Laurel Eckhouse, *California Abolished Money Bail. Here's Why Bail Opponents Aren't Happy.*, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/31/california-abolished-money-bail-heres-why-bail-opponents-arent-happy/?utm_term=.ad87d3393d4d [https://perma.cc/PDK4-7TXA].

²¹³ Westervelt, *supra* note 207.

²¹⁴ S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (as amended on Aug. 20, 2018). Assembly Member Rob Bonta introduced Assembly Bill 42—which was "identical" to SB 10—but it "failed to make it out of the assembly." See Harrison, *supra* note 197, at 542.

²¹⁵ S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (as amended on Sept. 6, 2017);

²¹⁵ SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF S.B. 10., S. 2017-2018, Reg. Sess., at 2 (Apr. 4, 2017).

²¹⁶ Colin Kalmbacher, *California Just Eliminated Cash Bail—Here's What That Means*, LAW & CRIME (Aug. 28, 2018, 5:05 PM), <https://lawandcrime.com/high-profile/california-just-eliminated-cash-bail-heres-what-that-means/> [https://perma.cc/NV9W-SGM4].

the court, and make recommendations for conditions of release of individuals pending adjudication of their criminal case.”²¹⁷

Under the Pretrial Assessment Services program, arrested individuals are categorized into low, medium, or high risk:²¹⁸

(b) “High risk” means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, is categorized as having a significant level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

(c) “Low risk” means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, is categorized as having a minimal level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

(d) “Medium Risk” means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, is categorized as having a moderate level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

The Act specifies that a person arrested for a misdemeanor is booked and released within twelve hours without having a pretrial risk assessment, except as otherwise specified.²¹⁹ A person classified as a low risk is to be released on his or her own recognizance.²²⁰ When defendants are categorized as a medium risk, the Superior Court is required to create a rule for Pretrial Assessment Services to follow permitting the release of the medium risk individual on their own recognizance or supervised own recognizance.²²¹ In the case where an individual is categorized as a high risk, the defendant is not to be released and must wait for their arraignment where a judge determines the defendant’s release.²²²

However, it could often be the case that an individual is not released through the methods explained above. For those instances, the Act authorizes the court to hold a pre-arraignment review to determine whether certain conditions would allow a safe release of the defendant to assure public safety and the defendant’s return to court.²²³ Moreover, at any time during the arraignment or the pendency of the case, the prosecution may file a motion for preventative de-

²¹⁷ S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (as amended on Aug. 20, 2018).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2017) (as amended on Aug. 20, 2018).

tention.²²⁴ Once filed, a preventative detention hearing will take place.²²⁵ At the hearing, the court must find by clear and convincing evidence that no conditions or combination of conditions will reasonably assure public safety and the defendant will appear to future court dates.²²⁶ That finding must be made on the record.²²⁷

This Golden State “victory,” however, for the proponents of the Act was short lived. After the passage of the Act, the bail industry worked quickly to require the question of whether to implement SB 10 to be put forth to California voters as a referendum in 2020.²²⁸ This roadblock has not stopped other judicial and legislative reforms related to bail throughout the state. For example, Governor Gavin Newsom allocated \$75 million to support courts’ experiments with alternatives to bail under the direction of a Judicial Council specifically created to “advise counties on how to implement alternatives to bail.”²²⁹ Additionally, the State Supreme Court will soon rule on a case said to provide immediate changes to the state’s pretrial process.²³⁰

As briefly discussed above, the Court of Appeal of California for the First Appellate Division decision concluded that California’s use of bail schedules is unconstitutional and held that a judge must consider a defendant’s ability to pay when setting bail.²³¹ This case involves Kenneth Humphrey whose bail was originally set at \$600,000 after being charged “with burglary and robbery based on allegations that he followed a fellow resident of his senior living facility into his apartment and stole \$5 and a bottle of cologne.”²³² Mr. Humphrey’s bail was later reduced to \$350,000, an amount he could still not afford to pay.²³³ The California State Supreme Court has an opportunity to uphold the Court of Appeal’s decision to effectuate an immediate change in the state’s pretrial processes.²³⁴ That change would require “prosecutors to prove that a person is too dangerous to be released—and if they[] [are] not, to set reasonable conditions for their freedom before trial.”²³⁵

²²⁴ *Id.*

²²⁵ *Id.* If the defendant is detained when the motion is filed, the court must hold a preventive detention hearing no later than 3 days after the motion is filed, and should give notice to the victim. *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Marisa Lagos, *Ending Cash Bail Is on Hold Until 2020, But Critics Aren’t Waiting to Push Reforms*, KQED (Feb. 25, 2018), <https://www.kqed.org/news/11728806/ending-cash-bail-is-on-hold-until-2020-but-critics-arent-waiting-to-push-reforms> [<https://perma.cc/MZ34-PFC7>].

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Cal. Ct. App. 2018).

²³² Lagos, *supra* note 228.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

Additionally, while the fate of SB 10 is unknown, the bill's author, State Sen. Robert Hertzberg, proposed new "legislation that would require any counties experimenting with alternatives to bail to collect data on who is being released and under what conditions" with the goal of using the information to "ensure that the same economic and racial inequities that exist under the existing bail system do[] [not] continue [to] persist under alternatives to bail."²³⁶

Moreover, with the uncertainty surrounding the future of the state's cash bail system, the University of California Los Angeles School of Law wasted no time implementing change. UCLA School of Law's criminal justice program partnered with the Bail Project, the Bronx Defenders, and the Los Angeles County Public Defender's office to launch a pilot program in Compton, California.²³⁷ The intended goal is to reduce or eliminate bail "for people who have been charged with felonies and who might face lengthy pretrial stays behind bars only because they cannot afford bail."²³⁸ The program called for UCLA law students to work alongside public defenders at the Los Angeles Superior Court in Compton.²³⁹ Compton served as the perfect "petri dish" because seven out of every ten clients in the Los Angeles County Public Defender's Compton branch cannot afford bail and wait in jail while their attorney argues their case.²⁴⁰ Though the program is still new, of the fourteen people the pilot program has represented, eleven secured a bail reduction and pretrial release.²⁴¹ Other documented successes include:

- The court allowed for the release of six clients on their own recognizance after incarceration periods of between five and sixteen weeks and where bail was set between \$30,000 and \$70,000.
- Three of the six clients "were ordered into drug-treatment facilities where they maintained contact with their families and jobs while awaiting trial."
- Another client had their bail reduced from \$30,000 to \$3,000. The client's bail was paid by the Bail Project to allow for the client's release during the pendency of his case., which was later dismissed.²⁴²

In re Humphrey has also made asking for bail reductions easier because the state appellate court ruled that when setting bail, a judge should consider a de-

²³⁶ *Id.*; see S.B. 36, 2019–2020 Leg., Reg. Sess. (Cal. 2018) (as amended on Mar. 13, 2019).

²³⁷ *Change in Compton: UCLA Law Program Brings Bail Reform to Los Angeles County*, UCLA LAW (Feb. 28, 2019), <https://www.law.ucla.edu/news-and-events/in-the-news/2019/02/change-in-compton-ucla-law-program-brings-bail-reform-to-los-angeles-county/> [<https://perma.cc/C9TD-XLN3>] [hereinafter *Change in Compton*]; see also Marisa Gerber, *With California's Cash Bail System in Limbo, Compton Pilot Program Serves as a 'Petri Dish'*, L.A. TIMES, (Dec. 30, 2018, 7:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-bail-project-compton-20181230-story.html> [<https://perma.cc/ZWW7-JZAX>].

²³⁸ *Change in Compton*, *supra* note 237.

²³⁹ *Id.*

²⁴⁰ Gerber, *supra* note 237.

²⁴¹ *Id.*

²⁴² *Change in Compton*, *supra* note 237.

fendant's ability to pay.²⁴³ Program leaders hope their efforts "shift the culture" by proving to judges that releasing people on low or no bail has no correlation to whether someone will make their court appearance or increases rates of crime.²⁴⁴ In its short time, the pilot program has demonstrated success and leaders are motivated to expand to other counties with significant amounts of *presumably innocent* people in jail because they cannot afford bail.²⁴⁵

2. D.C. Bail Reform: Creation of a Dedicated Pretrial Service Agency

The policy push to eliminate cash bail in California is not a new concept.²⁴⁶ In 1992, Washington, D.C. eliminated cash bail and established a dedicated agency within the Court Services and Offender Supervision Agency called the Pretrial Services Agency ("D.C.'s PSA").²⁴⁷ This program is statutorily precluded from supervising surety bail releases from the D.C. Superior Court.²⁴⁸ Moreover, the program assists both the D.C. Superior Court and the U.S. District Court by "formulating release recommendations and providing supervision and treatment services to defendants which reasonably assure that those on conditional release return to court and do not engage in criminal activity pending their trial and/or sentencing."²⁴⁹ The program has several goals including maintaining a defendant's presumption of innocence while using pro-social interventions, effective use of technology, and human capital to secure the non-financial conditional release of defendants.²⁵⁰ Additionally, the D.C. PSA operates under the assumption that reliance on money bail discriminates against the indigent and does not effectively address public concerns with pretrial release.²⁵¹

Currently, the program fulfills its mission by both gathering information on defendants and then supervising defendants released from custody, as well as providing the judiciary with "objective, verified" data to allow for the best decision.²⁵² Information is collected through a "client," rather than defendant, interview conducted by the D.C. PSA program officer with the purpose of gather-

²⁴³ Gerber, *supra* note 237.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Melissa Block, *What Changed After D.C. Ended Cash Bail*, NPR (Sept. 2, 2018, 7:43 AM), <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail> [<https://perma.cc/535W-GJZT>].

²⁴⁷ *PSA's History*, *supra* note 22.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Mission and Vision*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=about/mission_vision [<https://perma.cc/S2NZ-ULHC>] (last visited May 4, 2019).

²⁵¹ *Id.*

²⁵² *PSA's Role in the Criminal Justice System*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/about/role> [<https://perma.cc/H9DL-VEZU>] (last visited May 4, 2019) [hereinafter *PSA's Role in Criminal Justice*].

ing information on seventy factors later recorded in a database that calculates the client's risk of flight or potential for committing another crime.²⁵³ Officers then present this information to judicial officers to recommend the least restrictive conditions for release, while maintaining public safety and ensuring a return to court.²⁵⁴ Ultimately, the decision of a defendant's release or stay in custody rests with a judicial officer.²⁵⁵ The combination of the interview, use of a risk assessment algorithm, and recommendation by D.C.'s PSA allows a judge to gauge a person's "likelihood of succeeding."²⁵⁶

Following the judiciary's decision, the agency continues to supervise defendants released from custody to ensure they are complying with conditions of release.²⁵⁷ The agency gives defendants the opportunity to participate in pro-social interventions and reminders to help assure they appear for their scheduled court hearing.²⁵⁸ Moreover, the program offers an established line of communication with all parties by notifying the prosecution, defense, and court of the client's compliance or non-compliance to allow parties to promptly respond to any violations.²⁵⁹ Establishing these lines of communication has proven to be an important way to keep the program working toward its goal. A recent study by the University of Chicago found that receiving any pre-court message reduced failure to appear rates by 21%.²⁶⁰ Further, the study revealed that making use of consequence-based messages (those stating what would happen should a defendant fail to appear in court) combined with plan-making messages (reminders to help defendants think ahead) were more effective than consequence or reminders alone.²⁶¹ The hope is that this continued monitoring and reporting

²⁵³ Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.6ae599fbd72e [https://perma.cc/XD8R-XWRW].

²⁵⁴ *PSA's Role in Criminal Justice*, *supra* note 252.

²⁵⁵ *Id.*

²⁵⁶ Block, *supra* note 246.

²⁵⁷ *PSA's Role in Criminal Justice*, *supra* note 252.

²⁵⁸ *Id.* These interventions include: assessing defendants for drug and/or mental health issues; connections to treatment and/or re-entry services; and connection to employment, housing, and/or other social services. See *Treatment and Related Services*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=programs/treatment_services [https://perma.cc/6BA9-4N87] (last visited Apr. 27, 2019).

²⁵⁹ *PSA's Role in Criminal Justice*, *supra* note 252.

²⁶⁰ BRICE COOK ET AL., UNIV. OF CHICAGO CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 10–15 (Jan. 2018), https://urbanlabs.uchicago.edu/attachments/3b31252760b28d3b44ad1a8d964d0f1e9128af34/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/I42-954_NYCSummonsPaper_Final_Mar2018.pdf [https://perma.cc/5L6M-VY52] [hereinafter USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES].

²⁶¹ *Id.*

will minimize pretrial detention, reduce jail crowding, and ensure that pretrial services are administered fairly while promoting public safety.²⁶²

D.C. has had quantifiable success with their system. In fiscal year 2017, D.C. released 94% of arrestees at their arraignment.²⁶³ Moreover, the D.C. Judiciary agreed with 76% of D.C.'s PSA recommendations.²⁶⁴ Of those released for any crime, 88% remained arrest-free, with 99% of those on release for a violent crime remaining arrest-free.²⁶⁵ Further, 88% of clients made all their scheduled court appearances and 87% remained on continued pretrial release without a request for removal or revocation for non-compliance.²⁶⁶

However, D.C.'s program is not without its criticisms. In May of 2016, a defendant out on pretrial release bypassed a court-ordered monitoring device by detaching his prosthetic leg and then fatally shot a woman.²⁶⁷ Additionally, on July 4, 2015, a man released on a misdemeanor charge of assaulting a police officer fatally stabbed a passenger on D.C.'s metro.²⁶⁸ Further, D.C.'s statistics relating to re-arrest numbers of defendants on pretrial release are not conclusive of a lack of crime, just indicative of simply not being caught.

D.C.'s PSA has effectively built a system that all but eliminates cash bail. Thus, jurisdictions wanting to develop or reform their own pretrial services should look to D.C.'s PSA as a model of certain successes. By implementing an agency that focuses on combining technology and human capital, pretrial service agencies can create individualized plans that more readily meet the needs of defendants and constructively eliminate cash bail.

3. *New Jersey's Approach: Algorithmic Pretrial Assessment*

One attempt to curb the injustice of current bail systems is to implement the use of risk assessment tools developed by universities, governments, and nonprofit agencies.²⁶⁹ A prime example of this is New Jersey's move from

²⁶² *PSA's Role in Criminal Justice*, *supra* note 252.

²⁶³ PRETRIAL SERVS. AGENCY FOR D.C., FY 2017 RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON D.C. (Mar. 30, 2018), <https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf> [<https://perma.cc/W3HT-4E2E>] [hereinafter FY 2017 RELEASE RATES].

²⁶⁴ PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST FISCAL YEAR 2019 27 (Feb. 12, 2018), <https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2018/07/FY2019-PSA-CBJ-Performance-Budget-02122018-1.pdf> [<https://perma.cc/NNB4-UALS>] [hereinafter CONGRESSIONAL BUDGET JUSTIFICATION 2019].

²⁶⁵ *Id.*; FY 2017 RELEASE RATES, *supra* note 263.

²⁶⁶ CONGRESSIONAL BUDGET JUSTIFICATION 2019, *supra* note 264.

²⁶⁷ Marimow, *supra* note 253.

²⁶⁸ *Id.*

²⁶⁹ Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform> [<https://perma.cc/6V23-RCMT>].

money bail to a risk assessment system in 2017.²⁷⁰ Following a report showing that on a single day 5,000 people in New Jersey were able to be released on bail but could not afford it, the New Jersey Supreme Court established a committee in 2013 to examine issues related to bail and pretrial reform.²⁷¹ The committee recommended significant changes to New Jersey's pretrial practices and criminal justice system.²⁷² The committee suggested that the state move from a cash-based system of pretrial release to a risk-based system, create and implement a pretrial supervision process, and make preventative detention the rarity.²⁷³ These recommendations became law in New Jersey and took effect in January 2017.²⁷⁴ Switching from a system based solely on instinct and experience (often referred to as "gut instinct") to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.²⁷⁵

New Jersey turned to the Laura and John Arnold Foundation (LJAF) for the implementation of a "scientific, objective" risk assessment tool.²⁷⁶ LJAF's risk assessment tool, known as the Public Safety Assessment (PSA), is designed to predict risk in three areas: risk of failure to appear (FTA), risk of new criminal activity (NCA), and risk of new violent criminal activity (NVCA).²⁷⁷ The PSA is designed to make this assessment without a defendant interview based on nine factors drawn from court records, which include:²⁷⁸

1. age at current arrest
2. current violent offense
3. pending charge at the time of the offense
4. prior disorderly persons conviction
5. prior indictable convictions
6. prior violent conviction
7. prior failure to appear at a pre-disposition court date in the last two years
8. prior failure to appear at a pre-disposition court date more than two years ago
9. prior sentence to incarceration²⁷⁹

²⁷⁰ S.P. Sullivan, *N.J. Bail System Just Went through Massive Change on Who Stays Locked Up. Is it Working?*, NJ.COM (Feb. 19, 2017), https://www.nj.com/politics/index.ssf/2017/02/how_njs_massive_bail_overhaul_working_out.html [<https://perma.cc/RT9Q-R7E3>].

²⁷¹ NEW JERSEY PRETRIAL JUSTICE MANUAL, *supra* note 15, at 5.

²⁷² *Id.* at 6.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 6–7.

²⁷⁷ *Id.* at 7.

²⁷⁸ *Id.* at 8.

²⁷⁹ *Id.*

These nine factors are used to determine scores from one to six in the three areas that the PSA seeks to predict.²⁸⁰ By using these scores, the PSA provides judges with a recommendation about the conditions of release or detention according to the Decision Making Framework (DMF).²⁸¹ The PSA would recommend a defendant with a new criminal activity (NCA) score of one and a failure to appear (FTA) score of two be released on their own recognizance.²⁸² Whereas, a defendant with a new criminal activity (NCA) score of five and an FTA score of three would receive release on a Pretrial Monitoring Level (PML) of three. A defendant receives a “risk of new violent criminal activity” (NVCA) flag based on the nature of their current charge and prior criminal convictions, meaning that it is less likely for a defendant flagged for violent crimes to be recommended for release.²⁸³ For example, if a defendant’s PSA scores result in a NVCA flag, and their current offense is violent, then the DMF will not recommend release or will recommend release on the most restrictive conditions.²⁸⁴ Judges may depart from the recommendations created by the PSA and DMF, but must explain their reasons for doing so.²⁸⁵

New Jersey hopes that this model will curb the system’s bias towards detention, develop a better understanding of which defendants pose a greater risk of flight or danger, and help to eliminate all biases in the system.²⁸⁶ However, the system is not above critique. Many factors that the PSA is built on can be “profoundly affected by race, class, neighborhood and the ability to afford a lawyer.”²⁸⁷ Indeed, Marie VanNostrand, the “architect” of the PSA, stated herself that “[w]e can[not] eliminate bias, but we can disrupt the cycle of bias and that[] [is] what this tool is intended to do.”²⁸⁸

Following the first year of using the PSA in New Jersey, pretrial jail populations fell by 20%, from 7,173 on January 2017, to 5,743 on December 2017.²⁸⁹ Soon after the adoption and implementation of the PSA and DMF, the Pretrial Justice Institute released a state by state report on the status of pretrial Justice in America and gave New Jersey the only “A grade” in its state by state survey.²⁹⁰ However, in its own report, the New Jersey Judiciary addressed chal-

²⁸⁰ *Id.* at 8–9.

²⁸¹ *Id.* at 10. For an example of PSA scores in a DMF see Appendix, tbl.A.7.

²⁸² *Id.* at 9.

²⁸³ *Id.* at 7, 9.

²⁸⁴ *Id.* at 10.

²⁸⁵ *Id.* at 11.

²⁸⁶ Schuppe, *supra* note 269.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ N.J. JUDICIARY, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 4 (2018), <https://www.njcourts.gov/courts/assets/criminal/2017cjannual.pdf> [<https://perma.cc/UC6Y-GFTZ>].

²⁹⁰ PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 12 (Nov. 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?Document>

lenges related to the new criminal justice reforms.²⁹¹ The main three challenges the judiciary highlighted were: the ongoing funding of the Pretrial Services Program via court fees is “simply not sustainable”; the inability of staff to assist defendants with mental health, housing, or substance abuse; and issues related to electronic monitoring of defendants on pretrial release.²⁹²

Despite these potential challenges, algorithmic pretrial assessments are gaining traction across America. The PSA is used in Arizona, Kentucky, Rhode Island, and Utah.²⁹³ The major metropolitan areas of Chicago, Houston, and New Orleans have also adopted the PSA’s risk assessment model used by New Jersey.²⁹⁴ In New Orleans, the bail bonds industry argued that this “financial collateral is the only effective way to ensure defendants return to court for their trial.”²⁹⁵ To test this argument, the Orleans Parish Criminal District Court instituted a risk assessment tool to test if the defendant released without cash bail would be likely to return.²⁹⁶ Orleans Parish Criminal District Court used a risk assessment tool developed by the Vera Institute that uses data on prior missed court appearances, criminal history, age, and residency to predict a defendant’s likelihood to fail to appear in court or be re-arrested during pretrial release.²⁹⁷ Before the institution of this system, the average jail stay for a low risk defendant was twelve days.²⁹⁸ After a few months, the average jail stay fell to two days.²⁹⁹ Further, defendants returned to court at “roughly” the same rate as defendants in other jurisdictions.³⁰⁰

By using a risk assessment tool designed to separately evaluate both the potential for failure to appear at subsequent court dates and new criminal arrests, judges are given more options when making pretrial decisions. The use of a decision-making matrix like the DMF in conjunction with designated risk scores allows judges to further know what pretrial conditions might be the least restrictive outside of bail. Jurisdictions looking to implement risk assessment tools can look to New Jersey’s use and roll out of the PSA with DMF for an example of successful implementation. While New Jersey’s pretrial reforms are

FileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0 [https://perma.cc/5Y3V-FKQD].

²⁹¹ N.J. JUDICIARY, *supra* note 289 at 5.

²⁹² *Id.*

²⁹³ *About the PSA*, PUB. SAFETY ASSESSMENT, <https://www.psapretrial.org/about#jurisdictions-united-states> [https://perma.cc/V24R-WSBG] (last visited Apr. 24, 2019).

²⁹⁴ *Id.*

²⁹⁵ Avia Shen, *New Orleans’ Great Bail Reform Experiment*, CITY LAB (Oct. 19, 2017), <https://www.citylab.com/equity/2017/10/new-orleans-great-bail-reform-experiment/543396/> [https://perma.cc/7TT4-49KC].

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

not without issue, the tool was a demonstrable step in the right direction towards integrating objective risk assessment factors with the judicial discretion needed to make individualized decisions.

4. *Bail Reform Where Commercial Bonds are Outlawed: The Illinois Example*

Even states without commercial bail bonds are looking to reform their pretrial practices to ensure justice for defendants.³⁰¹ Illinois, Kentucky, Oregon, and Wisconsin abolished commercial bail bonds and created a system of percentage bonds.³⁰² So, rather than direct bail deposits to private business, these states require bail deposits directly to the court.³⁰³ For example, in Illinois, depending on a defendant's condition of release, state law requires defendants pay 10 percent or the full amount.³⁰⁴ The amount paid is set by a bail schedule for most misdemeanor charges including traffic, ordinance, conservation, and petty offenses.³⁰⁵ For a felony offense, judicial discretion dictates the amount of bail.³⁰⁶ When making the bail-setting decision the judge considers: the nature and circumstances of the offense charged, whether evidence shows use or threat of violence, and thirty-five other statutorily defined factors.³⁰⁷ The majority of Illinois courts use these factors combined with the Virginia Pretrial Risk Assessment Instrument (VPRAI) to determine whether pretrial custody is necessary and the amount of bail that should be set.³⁰⁸

In 2003, the Virginia Department of Criminal Services developed the VPRAI, a risk assessment tool, to assist judges in making pretrial release decisions.³⁰⁹ VPRAI is an automated computer program that uses nine factors, such as the type of charge, any other pending charges, length at current residence, and employment status, to determine a defendant's risk level and then suggest conditions for release.³¹⁰ California and Virginia currently use the VPRAI

³⁰¹ Bail Reform Act of 2017, S.B. 2034, 100th Gen. Assemb. (Ill. 2017).

³⁰² Liptak, *supra* note 82.

³⁰³ *Id.*

³⁰⁴ JESSICA REICHERT & ALYSSON GATENS, ILL. CRIMINAL JUSTICE INFO. AUTH., AN EXAMINATION OF ILLINOIS AND NATIONAL PRETRIAL PRACTICES, DETENTION, AND REFORM EFFORTS 8 (June 7, 2018), available at <http://www.icjia.state.il.us/articles/an-examination-of-illinois-and-national-pretrial-practices-detention-and-reform-efforts> [https://perma.cc/4F9N-UAP5].

³⁰⁵ *Id.*; see ILL. SUP. CT. R., art. 5.

³⁰⁶ REICHERT & GATENS, *supra* note 304.

³⁰⁷ *Id.*; see 725 ILL. COMP. STAT. 5/110-5 (2019).

³⁰⁸ REICHERT & GATENS, *supra* note 304, at 7.

³⁰⁹ VA. DEP'T OF CRIMINAL JUSTICE SERV., VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT (VPRAI) INSTRUCTION MANUAL 1 (2003), http://www.pacenterofexcellence.pitt.edu/documents/VPRAI_Manual.pdf [https://perma.cc/CY55-X7Z7].

³¹⁰ *Id.* at 5–12.

tool.³¹¹ Under VPRAI, if a defendant receives a recommendation for bail and they are unable to pay, they are given a second hearing within seven days to determine an adjusted or waiver of bail.³¹² If a defendant makes all of their court appearances, the full bail amount, or their adjusted bail amount, is returned minus the cost of administrative fees.³¹³ Moreover, “[i]f the defendant fails to make all court appearances, a bond forfeiture hearing may be conducted.”³¹⁴

Additionally, in 2016, Illinois collected data on pretrial services from a quarter of its counties.³¹⁵ In those counties, there were 15,390 new pretrial cases.³¹⁶ Of those defendants released on bond, 1,248 had their bond revoked for committing a new offense (33%), a rule violation (29%), or a failure to make a court appearance (39%).³¹⁷ After that data was collected, the Illinois legislature passed the Illinois Bail Reform Act of 2017 (“the Act”).³¹⁸ The Act sought to push Illinois’s courts further away from the use of monetary bail.³¹⁹ This Act created a presumption that any condition of pretrial release would be the least restrictive condition to assure the defendant’s appearance in court and non-monetary in nature.³²⁰ These conditions of release “may include” but are not limited to: electronic monitoring; curfews; drug counseling; stay-away orders; and in person reporting.³²¹

The Act also specifically addresses the amount of bail.³²² A defendant’s bail must assure compliance with conditions set in the bail bond, must not be oppressive, and must be made in consideration of the defendant’s ability to pay.³²³ The Act creates two categories of offenses: A and B.³²⁴ Category A offenses are class 1 and 2 felonies, as well as additional statutorily defined felonies.³²⁵ Category B offenses are qualified as petty offenses, business offenses, class A, B, and C misdemeanors, and any class 3 or 4 felony not defined as a

³¹¹ *Risk Assessment, PRETRIAL JUST. CTR. FOR CTS.*, <https://www.ncsc.org/Microsites/PJCC/Home/Topics/Risk-Assessment.aspx> [https://perma.cc/2EAF-B4FS]. (last visited Apr. 27, 2019).

³¹² REICHERT & GATENS, *supra* note 304, at 8.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 10.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Bill Status of SB2034, ILL. GEN. ASSEMBLY*, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2034&GAID=14&DocTypeID=SB&LegID=&SessionID=91&SpecSess=&Session=&GA=100> [https://perma.cc/5YWW-BBN6] (last visited Apr. 27, 2019).

³¹⁹ Bail Reform Act of 2017, S.B. 2034, 100th Gen. Assemb. § 110-5 (Ill. 2017).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ REICHERT & GATENS, *supra* note 304, at 8.

³²⁵ Bail Reform Act of 2017, S.B. 2034, 100th Gen. Assemb. § 1-3 (Ill. 2017).

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category A offense.³²⁶ Any defendant who is charged with a Category B offense and remains in custody because they are unable to financially secure their release must be brought back before the court for a rehearing on the conditions of their release.³²⁷ Accordingly, the amount of the bail is reduced by \$30.00 for every day incarcerated while awaiting a hearing.³²⁸ While more collected data and research is required, in the wake of Illinois' steps toward pretrial reform, PJI did give them a "C" grade in their 2017 review of the state, which was above the national average of "D."³²⁹

As states across the country seek to eliminate the flaws of the classic bail system, the major goals are equity and a just outcome for presumably innocent defendants. As California seeks to completely eliminate cash bail through legislative efforts, other jurisdictions like New Jersey, Illinois, and Washington D.C. have demonstrated that by generating more pretrial alternatives, cash bail can cease to be the default and become the last resort option. Ultimately, California's attempt at reform shows that the "quick fix," statewide option does not work. Instead, states should seek to involve stakeholders, research, and phase into bail setting alternatives supported by data for judges to make their determinations.

C. Executive Driven Pretrial Reform

State executive branches across the country have also acted to reform pretrial practices and allocate funding to better service pretrial defendants.³³⁰ For example, in 2015, Governor Tom Wolf of Pennsylvania requested support from the U.S. Department of Justice's Bureau of Justice Assistance (BJA) and the Pew Charitable Trust (Pew) to provide technical assistance with the state's efforts of criminal justice reform.³³¹ The initiative found that the state had inadequate pretrial and sentencing guidance.³³² Further, the initiative showed the state's counties seldom used pretrial risk assessments and that black defendants were far more likely than white defendants to receive a monetary bail decision.³³³ Following the findings of the initiative, a group of stakeholders, including bipartisan law makers, agency heads, and members of the judiciary, voted to implement policy changes to correct these disparities.³³⁴ In 2019, the Gover-

³²⁶ *Id.* at § 1-10.

³²⁷ REICHERT & GATENS, *supra* note 304, at 8.

³²⁸ *Id.*

³²⁹ *Id.* at 13.

³³⁰ PRETRIAL JUSTICE INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING 14–16 (Jan 2019) [hereinafter WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING].

³³¹ THE COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN PENNSYLVANIA: POLICY FRAMEWORK 1 (June 2017), https://csgjusticecenter.org/wp-content/uploads/2017/06/6.26.17_JR-in-Pennsylvania.pdf [<https://perma.cc/52LB-ASWU>].

³³² *Id.* at 3.

³³³ *Id.* at 4.

³³⁴ *Id.*

nor announced that following this focus on criminal justice reform, Pennsylvania prison populations experienced the largest decrease in 40 years.³³⁵ Most recently, New York Governor Andrew Cuomo proposed regulatory revisions to New York's Bail bond industry.³³⁶ This regulatory review is intended to eliminate predatory practices in the industry by standardizing bail bond contracts, fees, and documents involved in bail transactions.³³⁷ These measures are meant to provide consumer protection and to "raise the standards of integrity in the bail business."³³⁸

D. Judiciary Driven Pretrial Reform

Another driving force behind pretrial reform are judiciaries across the country.³³⁹ Some state judiciaries have written explicit recommendations,³⁴⁰ established blue ribbon commissions,³⁴¹ and formed specific committees³⁴² to look into pretrial release practices. To illustrate, legal stakeholders in Illinois petitioned the State Supreme Court to adopt a statewide rule to protect indigent defendants from pretrial detention when they have an inability to pay.³⁴³ This group included eighty-seven attorneys, prosecutors, judges, and law professors.³⁴⁴ The group highlighted how cash bail had strong evidence of wealth and race-based discrimination: "Seventy-three percent of people detained in the Cook County jail are African-American, and Black defendants on average receive higher bail amounts"³⁴⁵ These stakeholders urged their Supreme Court to act "as soon as possible."³⁴⁶ Moreover, in Orange and Osceola counties in Florida, prosecutors are limiting the offenses they seek bail for, calling

³³⁵ *Pennsylvania State Prison Population Records Largest Decrease in 40 Years*, COMMONWEALTH OF PA. (Jan. 19, 2016), <https://www.governor.pa.gov/pennsylvania-state-prison-population-records-largest-decrease-in-40-years/> [<https://perma.cc/29HL-BNKG>].

³³⁶ WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING, *supra* note 330, at 15.

³³⁷ *Id.*

³³⁸ *Governor Cuomo Announces Reforms to Improve Standards and Increase Transparency in the Bail Bond Industry*, N.Y. STATE (Aug. 21, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-reforms-improve-standards-and-increase-transparency-bail-bond-industry> [<https://perma.cc/83Q7-47LU>].

³³⁹ WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING, *supra* note 330, at 3.

³⁴⁰ *Id.* In 2016, Chief Justice Tani Cantil-Sakauye highlighted ten recommendations made by a commission in California that eventually lead to provisions in SB 10.

³⁴¹ *Id.* The Colorado Supreme Court established a blue ribbon commission that looked into maintaining the presumption of innocence while preserving a victims right to be safe and informed in the pretrial process.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ Kwame Raoul, *Imprisoned for Poverty: Why Cash Bail Needs Reform*, MEDIUM (Aug. 8, 2018), <https://medium.com/@kwameraoul/imprisoned-for-poverty-why-cash-bail-needs-reform-e9f8c7710e05> [<https://perma.cc/58B3-QS4Q>].

³⁴⁶ WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING, *supra* note 330, at 1.

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bail a “poverty penalty.”³⁴⁷ Charges that prosecutors will no longer seek bail for include: driving without a license or vehicle registration; disorderly intoxication; panhandling; loitering; and low-level drug crimes, like possession of drug paraphernalia.³⁴⁸ This stakeholder led change can be very effective and involve minimal disruption to current court programs.

Jurisdictions looking to reform their pretrial practices should follow the successful examples arising from executive and judicial driven reform. By creating a dialogue about the issues associated with pretrial proceedings and bail, stakeholders are finding ways to improve their jurisdiction’s systems. Executive driven reform seemingly works best when trying to develop data and regulate the commercial bond industry. Judicial efforts help to create a dialogue and allow both prosecutors and defense attorneys to present their recommendations without disrupting current practices.

III. CONCERNS REGARDING COUNTY AND MUNICIPAL COURT TOOLS USED TO SET BAIL AND REFORM PRETRIAL SYSTEMS

With jails being the front door to incarceration, one of the earliest and most important opportunities for the exercise of judicial discretion presents itself during the bail assessment process.³⁴⁹ As states make strides in pretrial reform and create alternatives to their current bail setting practices, it is important to note major concerns surrounding popular tools used to guide—or possibly disrupt—judicial discretion, including bail schedules and pretrial risk assessments.

A. *Constitutionality of Bail Schedules*

On September 3, 2015, the Calhoun Police Department of Georgia arrested Maurice Walker, a 54-year old African American man, on the charge of “pedestrian under the influence” for allegedly drunkenly walking down a stretch of highway.³⁵⁰ At the time of his arrest, police informed Mr. Walker that he would remain incarcerated unless he paid the \$160 fixed cash bond set by the City of

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion*, PRETRIAL JUST. INST. (Dec. 6, 2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b646a57f-6399-2fe4-5683-021480c3634a> [https://perma.cc/J4TN-ZNWE].

³⁵⁰ Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein at 8, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 16-10521-HH); see also Rhonda Cook, *Calhoun Case: Should a Poor Person Who Can’t Make Bail Be Held in Jail?*, ATLANTA J. CONSTITUTION (Sept. 26, 2016), <https://www.ajc.com/news/local/calhoun-case-should-poor-person-who-can-make-bail-held-in-jail/HKd1Rb8ki1U9nV8bCPUGsM/> [https://perma.cc/H5DV-K9MS]; Brandi Owczarz, *Judge Grants Injunction in Walker Case*, CALHOUN TIMES (Feb. 3, 2016), http://www.northwestgeorgianews.com/calhoun_times/judge-grants-injunction-in-walker-case/article_63b26648-c9ee-11e5-9f69-8b1c8c3b5116.html [https://perma.cc/SGG7-MH89].

Calhoun's bail schedule for the misdemeanor charge he incurred.³⁵¹ Due to his inability to pay, Mr. Walker remained confined to the Gordon County Jail for six days.³⁵² Mr. Walker's release was triggered by a lawsuit filed by the Southern Center for Human Rights (SCHR).³⁵³ The central issue in the case was "whether a city can detain indigent people accused of misdemeanors for up to seven days without any inquiry into their ability to pay bail" creating a bail system that violated the Fourteenth Amendment.³⁵⁴ Importantly, Mr. Walker's case highlights an important aspect of the cash bail debate—the court's use of and reliance on bail schedules in its bail determinations.³⁵⁵

³⁵¹ Brief for the United States, *supra* note 350, at 9; Owczarz, *supra* note 350.

³⁵² Owczarz, *supra* note 350.

³⁵³ Carrie Teegardin, *Walking While Intoxicated Case Could Force Changes in Georgia Courts*, ATLANTA J. CONSTITUTION (Jan. 30, 2016), <https://www.ajc.com/blog/investigations/walking-while-intoxicated-case-could-force-changes-georgia-courts/Eekuie6PsbCJOIvF8vg5sO/> [<https://perma.cc/Y4LH-KTDG>].

³⁵⁴ Cook, *supra* note 350.

³⁵⁵ Within a few months of Walker's release, the City of Calhoun enacted a "48-hour rule" guaranteeing an appearance before a judge within 48 hours with representation and an opportunity to "object to a bail amount on claims of indigency." Bill Rankin, *Court Upholds Jail for Some Too Poor to Post Bail*, ATLANTA J. CONSTITUTION (Aug. 23, 2018), <https://www.ajc.com/news/local/court-upholds-calhoun-practices-for-poor-people-who-can-post-bail/a1RQZis8RgKZyviuClJfCI/> [<https://perma.cc/BY2Q-Y3TL>]. However, a U.S. District Judge Harold Murphy wrote that despite the newly enacted rule, the rule was insufficient to invalidate Walker's suit because it "simply shorten[ed] the amount of time that indigent arrestees are held in jail Any detention based solely on financial status or ability to pay is impermissible." Cook, *supra* note 350. Judge Murphy issued a preliminary injunction prohibiting the city from holding anyone charged with a misdemeanor until its "post-arrest procedures" complied with the U.S. Constitution. *Id.* The City of Calhoun appealed to the 11th U.S. Circuit Court of Appeals. *Walker v. City of Calhoun*, CONST. ACCOUNTABILITY CTR., <https://www.theusconstitution.org/litigation/walker-v-city-of-calhoun/> [<https://perma.cc/WHF8-7UWH>] (last visited Mar. 4, 2019). In a 2-1 decision, the 11th U.S. Circuit Court of Appeals upheld Calhoun's revised bail system stating that:

Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pre-trial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security.

Walker v. City of Calhoun, 901 F.3d 1245, 1262–63 (11th Cir. 2018). Moreover, the court concluded that under Supreme Court precedent "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest." *Id.* at 1266. Despite the 11th Circuit's ruling, Walker's case fell right into a hot debate about the criminal justice system: should people with money be able to buy their freedom when people without money must wait behind bars? Moreover, the Walker case illustrates how dependence on cash bail has created a two-tiered criminal justice system in the majority of states across the country. Wykstra, *supra* note 44. The disparities created by the cash bail system are particularly recognizable amongst low-income people of color. Rabuy & Kapf, *supra* note 163; see also JESSICA EAGLIN AND DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 20 (2015), <http://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf> [<https://perma.cc/RC5P-VGPP>]. Notably, in its decision, the 11th Circuit

“[B]ail 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.”³⁵⁶ The tool’s use and a court’s reliance on the tool varies; a poll by the Pretrial Justice Institute revealed that approximately 64 percent of poll participants stated that their jurisdiction used a bail schedule to determine bail or supplement its bail setting practices.³⁵⁷ Proponents argue that “pre-set bonds are constitutional and provide a guarantee that the accused will come to court appointments.”³⁵⁸ Moreover, they assert that the tool’s use ensures public safety by creating categories of serious offenses that allow the court to hold defendants without bail.³⁵⁹

On the other hand, criminal justice reform advocates argue the tool is unconstitutional because there is no mechanism within it that determines whether a defendant is indigent.³⁶⁰ Specifically, opponents assert that “fee structures place an undue burden on indigent defendants, who may have more difficulty paying bail, including relatively low bail fees associated with misdemeanor offenses, than non-indigents defendants accused of similar offenses.”³⁶¹ As a result, an unintentional result of a court’s use of a bail schedules is “the unnecessary detention of misdemeanants, indigents, and non-dangerous defendants” because they cannot afford to pay a predetermined bail amount.³⁶² As discussed earlier, the unintentional and unnecessary detention of a defendant has serious collateral costs, including family separation, unemployment, and loss of ties to their community.³⁶³

Judicial discretion is an important facet of a fair and equitable criminal justice system.³⁶⁴ The concern with the use of bail schedules at this stage is that the tool can “represent an improper and ill-advised, if not illegal, substitute for judicial discretion at bail” and “encourage[s] an automated approach to pretrial release decision-making by compelling reliance upon a single fixed bail condition—money—found in a predetermined schedule based solely on the defendant’s highest charge.”³⁶⁵ Thus, the use of a bail schedule—particularly in juris-

states that individuals behind bars simply charged for misdemeanors “must merely wait some appropriate amount of time to receive the same benefit as the more affluent.” *Walker*, 901 F.3d at 1262. What is an *appropriate* amount of time? Across the country, people simply charged for a crime wait months, even years. Wykstra, *supra* note 44.

³⁵⁶ Carlson, *supra* note 349.

³⁵⁷ *Id.*

³⁵⁸ Cook, *supra* note 350.

³⁵⁹ Alison M. Smith, *State Money-Bail Systems: Differing Approaches*, CONGR. RES. SERV. 1, 2 (Nov. 27, 2018), <https://fas.org/sgp/crs/misc/LSB10220.pdf> [<https://perma.cc/48NV-JTFW>].

³⁶⁰ Cook, *supra* note 350.

³⁶¹ Smith, *supra* note 359.

³⁶² Carlson, *supra* note 349.

³⁶³ *Id.*; see discussion *supra* Part I.

³⁶⁴ Carlson, *supra* note 349.

³⁶⁵ *Id.*

dictions that only use a bail schedule to determine bail—may reduce a judge’s consideration of statutorily enumerated factors to provide for a balance of a person’s “liberty interest against public safety and court integrity concerns.”³⁶⁶ As a result of these concerns, various jurisdictions have considered or are currently considering the constitutionality of bail schedules.³⁶⁷

B. The Problem with Pretrial Risk Assessments

Jurisdictions are increasingly turning to risk assessment instruments to address issues associated with the money bail systems during the pretrial release and bail setting process.³⁶⁸ These tools are said to provide judges with a scientific model for predicting the risk of whether a defendant will fail to appear for trial or commit crime during the pretrial period.³⁶⁹ Though advocates of risk assessments acknowledge such a tool may not account for the totality of a given defendant’s situation, they argue that when used in conjunction with professional judgment, the tool is an improvement over professional judgment alone.³⁷⁰

A court may use a risk assessment instrument in a variety of circumstances, including in the pretrial context to gauge the risk an individual has of failing to appear for court proceedings or being arrested while awaiting trial.³⁷¹ These risk assessments tools are developed by analyzing large numbers of cases to identify factors that strongly correlate with the action that a court’s risk assessment tool is intended to predict.³⁷² Once a risk assessment tool is developed, it is then used to measure and score risk factors to produce a defendant’s risk score.³⁷³ Factors measured in a risk assessment tools may include marital history, residence history, and employment status.³⁷⁴ However, critics argue that such factors may serve as “proxies” for minority status and poverty.³⁷⁵ Since these factors are not related to an individual’s blameworthiness and may be outside of the individual’s control, they are particularly objectionable.³⁷⁶ Though these factors may correlate with increased risk, they also have a disparate impact on minority and impoverished populations.

³⁶⁶ *Id.*

³⁶⁷ *Id.*; see, e.g., *Pelekai v. White*, 861 P.2d 1205 (Haw. 1993); *Clark v. Hall*, 53 P.3d 416 (Okla. Crim. App. 2002); see also discussion *supra* Section II.B.i.

³⁶⁸ MOVING BEYOND MONEY, *supra* note 10, at 19.

³⁶⁹ *Id.* at 5.

³⁷⁰ Erin Harbinson, *Understanding Risk Assessment Tools*, 75 BENCH & B. MINN. 14, 16–17 (2018).

³⁷¹ MOVING BEYOND MONEY, *supra* note 10, at 18.

³⁷² Harbinson, *supra* note 370, at 15.

³⁷³ Jennifer L. Skeem & Christopher Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 682 (2016).

³⁷⁴ *Id.* at 681.

³⁷⁵ MOVING BEYOND MONEY, *supra* note 10, at 22.

³⁷⁶ *Id.* at 9.

While risk assessment tools are created using scientific methods, a growing concern is that the tool is using faulty data to produce skewed outcomes because criminal justice data is known to be unreliable.³⁷⁷ Accordingly, critics of risk assessment instruments assert that the current use of such tools perpetuates the very biases and disparities that the cash bail system already has in place.³⁷⁸ By relying on biased data to create the tools, taking into consideration factors that serve as proxies for minority status and poverty, and then applying such tools in a biased manner, the cycle of discrimination continues.³⁷⁹ Thus, those marginalized by the cash bail system are still marginalized under the nonmonetary pretrial release and bail setting process in jurisdictions that employ risk assessment tools.³⁸⁰

Moreover, even if the data used to create risk assessment tools and its factors are objective, there is still a possibility of bias in the application of the tools. There is a possibility that those who carry out the assessments may, at worst, manipulate the results, and, at best, have varied perspectives that negatively impact certain vulnerable populations.³⁸¹ Furthermore, judges and other decision makers in the criminal justice system may vary in when and how they choose to use a risk assessment and its' results in their judgments.³⁸² Consequently, even if the tools are found to be objective, when they are not used in an objective manner, marginalized communities remain stuck in the margins.

Although risk assessment tools may replace arbitrary or discriminatory decision-making in the pretrial release and bail setting process with a more systematic method grounded in evidence, they also have the power to disparately impact communities of color.³⁸³ In the context of actuarial risk assessment in the sentencing context, former Attorney General Eric Holder stated that, “[b]y

³⁷⁷ *Id.* at 22.

³⁷⁸ See Julia Angwin and Jeff Larson, *Bias in Criminal Risk Scores is Mathematically Inevitable*, *Researchers Say*, PROPUBLICA (Dec. 30, 2016, 4:44 PM), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say> [https://perma.cc/8CR2-2UXF]; Jennifer L. Doleac & Megan Stevenson, *Are Criminal Risk Assessment Scores Racist?*, BROOKINGS (Aug. 22, 2016), <https://www.brookings.edu/blog/up-front/2016/08/22/are-criminal-risk-assessment-scores-racist/> [https://perma.cc/AWU4-TBMG]; George Joseph, *Justice by Algorithm*, CITYLAB (Dec. 8, 2016), <https://www.citylab.com/equity/2016/12/justice-by-algorithm/505514/> [https://perma.cc/BJ8C-UX4W]; discussion *supra* Section II.B.i.

³⁷⁹ See Matt Watkins, *The Most Hot-Button Issue in Criminal Justice Reform?*, CTR. FOR CT. INNOVATION (Oct. 2018), <https://www.courtinnovation.org/publications/risk-assessment-podcast> [https://perma.cc/AY55-H6LU]; see, e.g., Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167, 173 (2014) (concluding that reliance on criminal histories intertwined with socioeconomic factors, such as age at time of first arrest, custody status at time of first arrest, and total number of convictions, inherently disadvantage minority defendants).

³⁸⁰ See *id.*; discussion *supra* Section II.B.i.

³⁸¹ Sonja B. Starr, *Risk Assessment Era: An Overdue Debate*, 27 FED. SENT’G REP. 205, 206 (2015).

³⁸² *Id.*

³⁸³ MOVING BEYOND MONEY, *supra* note 10, at 22.

basing sentencing decisions on static factors and immutable characteristics—like the defendant’s education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”³⁸⁴ Accordingly, risk assessment tools may not fix the biases and disparities inherent in the cash bail system, but rather they may make existing racial and socioeconomic disparities even worse by giving scientific credibility to unequal outcomes.³⁸⁵

In her article “Assessing Risk Assessment in Action,” Professor Megan Stevenson identified problems with using a risk assessment tool to accomplish goals in pretrial decisions.³⁸⁶ The problems included: the imperfect methods of measuring human predictions, the “implausible assumption that the human’s objective” is the same as the algorithm’s, and an inability to measure accuracy because of the many variables within individual outcomes.³⁸⁷ The problems highlight how data based on algorithmic versus judges’ results can be skewed and depend on subjective goals.³⁸⁸ For example, if a judge sets bail, a defendant who cannot pay merely goes to jail and is then lost as a data point in determining if the algorithm would have accurately predicted the result.³⁸⁹ Professor Stevenson highlighted that testing algorithmic assessments is not like a race, with a clear winner.³⁹⁰ Ideally, the best alternative to algorithmic risk assessments would be to test the predictions of a human versus the prediction made by the algorithm.³⁹¹ This failure to account for the “human” element of a desired outcome can cause statistical issues.

Many jurisdictions today are looking to fix the racial biases and disparities in the cash bail system, though the tools being used to fix such problems may not only continue the problems, but make them worse.³⁹² Turning from arbitrary decision-making that marginalizes minority and impoverished communities to tools supported by flawed science is not the way to fix disparities in the pretrial release and bail setting process.³⁹³ Ultimately, more research is necessary to determine the tool’s effectiveness and whether its use further perpetuates the biases and disparities at the center of our country’s broken criminal justice system.

³⁸⁴ Atty. Gen. Eric Holder, Address at National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> [https://perma.cc/8H27-4HK9].

³⁸⁵ MOVING BEYOND MONEY, *supra* note 10, at 22.

³⁸⁶ Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINNESOTA L. REV. 303, 324 (2018).

³⁸⁷ *Id.* at 324–25.

³⁸⁸ *Id.* at 323.

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 322.

³⁹¹ *Id.*

³⁹² MOVING BEYOND MONEY, *supra* note 10, at 22.

³⁹³ Watkins, *supra* note 379.

IV. NEVADA

*“In Nevada, the criminal justice system has too often not been a system of corrections so much as a system of incarceration, without doing much . . . to correct the drivers of criminal behavior. Instead of trying to solve the problem, the approach has more often been to warehouse an offender—out of sight, out of mind.”*³⁹⁴

Notwithstanding a strong bipartisan movement at all levels to undo mass incarceration, the United States continues to have the highest incarceration rate and overall *number* of people incarcerated in the world.³⁹⁵ Nonetheless, by the end of 2016, the United States reached the lowest incarceration rate in the last two decades.³⁹⁶ This decrease, however, is not reflected in state incarceration rates, as demonstrated by the expansion of Nevada’s carceral state.³⁹⁷ Despite the 7 percent decrease in the national rate of incarceration, Nevada’s incarceration rate suffered from a 7 percent increase.³⁹⁸ Moreover, Nevada incarcerates more people on average than other states,³⁹⁹ resulting in an “imprisonment rate that is 15 percent higher than the national average.”⁴⁰⁰ The incarceration rate forces the state to house nearly 200 inmates in an Arizona prison.⁴⁰¹ In the past decade, the state female imprisonment rate generated specific concerns because

³⁹⁴ *Hearing on Assemb. B. 236 Before the Assemb. Comm. on Judiciary*, 2019 Leg., 80th Sess. (Nev. 2019) (Statement of Steve Yeager, Chair, Assemb. Comm. on Judiciary), http://nvleg.granicus.com/MediaPlayer.php?clip_id=11041 [<https://perma.cc/J4PL-MNDZ>].

³⁹⁵ The US “incarcerates a larger share of its population than any other country.” John Gramlich, *America’s Incarceration Rate is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> [<https://perma.cc/L4XN-YRZ4>]; see discussion Section I.

³⁹⁶ *Id.* “At the end of 2016, there were about 2.2 million people behind bars in the U.S., including 1.5 million under the jurisdiction of federal and state prisons and roughly 741,000 in the custody of locally run jails.” *Id.* The sharp decrease in the incarceration rate, which accounts for the population change, is accompanied by the decrease in the *number* of inmates in recent years. *Id.*

³⁹⁷ Lucas Thomas, *Nevada’s Incarceration Rate Among Highest In The Country*, PATCH.COM (Jan. 18, 2018, 5:44 PM), <https://patch.com/nevada/lasvegas/nevadas-incarceration-rate-among-highest-country> [<https://perma.cc/QE67-MBFD>]. Importantly, of the over 1.5 million people behind bars, the states incarcerated 1,316,205 people (87.4% of the number of incarcerated people in the US), whereas the federal system only incarcerated 189,192 people (12.6% of the number of incarcerated people in the US). *Id.*

³⁹⁸ Michael Lyle, *Criminal Justice Reform Long Overdue in Nevada, Ford Says*, NEV. CURRENT (Nov. 12, 2018), <https://www.nevadacurrent.com/2018/11/12/criminal-justice-reform-long-overdue-in-nevada-ford-says/> [<https://perma.cc/N974-9ZE2>].

³⁹⁹ Michelle Rindels, *Can Better Data Help Keep Prison Population Down? Nevada’s Going to Try*, NEV. INDEPENDENT (Aug. 12, 2018, 2:05 AM), <https://thenevadaindependent.com/article/can-better-data-help-keep-prison-population-down-nevadas-going-to-try> [<https://perma.cc/C4XU-8K9M>].

⁴⁰⁰ *Id.*; see also JRI FINAL REPORT, *supra* note 4, at 4.

⁴⁰¹ Rindels, *supra* note 399.

it has grown at “four times the pace of the overall prison population.”⁴⁰² Overall, these notable areas of growth will contribute to 15 percent of the overall growth of the incarcerated population over the next decade.⁴⁰³ Over the next ten years, Nevada’s incarcerated population is expected to grow by 1,197 beds.⁴⁰⁴ That growth is “estimated to cost the state an additional \$770 million in capital expenditures to build or lease new prisons and added operating costs.”⁴⁰⁵ Thus, while many states have seen significant decreases in incarcerated populations, crimes rates, and costs, Nevada has not—and will not—follow suit without significant criminal justice reform.

In 2018, the substantial costs attached to the growing incarcerated population in Nevada raised concerns because of the 20 percent increase in yearly spending since 2012, and the sharp increase in correctional officer overtime costs, “prompting the state to dip into reserves and eating up money that’s meant to be available to a variety of agencies.”⁴⁰⁶ In response, former Governor Brian Sandoval announced a comprehensive review of Nevada’s criminal justice system in partnership with the Crime and Justice Institute (CJI).⁴⁰⁷ In January 2019, the Advisory Commission on the Administrative of Justice (ACAJ) released its final report which connected the bulk of the growth in Nevada’s correctional facilities to the rise in the number of individuals incarcerated for probation and parole violations, and the at least two-thirds of the population that entered the system for a nonviolent offense.⁴⁰⁸ Overall, the alarming growth of Nevada’s incarcerated population increased the annual corrections budget “14 percent in the last decade, reaching \$347 million in the current fiscal year.”⁴⁰⁹ As a result of their key findings, the ACAJ included twenty-five policy recommendations “specifically designed to improve public safety by holding offenders accountable, reducing recidivism, and increasing the resources available to combat the state’s behavioral health crisis” and control population growth and corrections costs for consideration by the Nevada Legislature.⁴¹⁰ Noticeably absent from the ACAJ’s recommendations and proposed

⁴⁰² JRI FINAL REPORT, *supra* note 4, at 4. KNPR News Staff, *Report: Nevada Prison Population Above Average and Growing*, NEV. PUBLIC RADIO (Sept. 13, 2018), <https://knpr.org/headline/2018-09/report-nevada-prison-population-above-average-and-growing> [<https://perma.cc/SKR4-N6FH>].

⁴⁰³ JRI FINAL REPORT, *supra* note 4, at 4.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Rindels, *supra* note 399.

⁴⁰⁷ *Id.*; see also Kinner, *supra* note 1.

⁴⁰⁸ Yeager, *supra* note 2.

⁴⁰⁹ *Id.*

⁴¹⁰ The 25 policy recommendations provided by the ACAJ are:

1. Establish [crisis intervention training] requirements for law enforcement officers
2. Establish pre-prosecution diversion for first-time nonviolent felony offenders
3. Remove existing barriers to presumptive probations
4. Establish a presumption of sentence deferral for certain nonviolent offenders admitted to Specialty Court

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legislation are any changes specifically relating to bail and preventative detention, despite these issues being at the center of criminal justice reform conversations in Nevada in recent years.⁴¹¹

A. Nevada's Cash Bail System

Nevada's cash bail system is defined by some of the most detailed and comprehensive statutes in the country, which are primarily based on the basic principles of the commercial bail industry.⁴¹² Similar to the Eighth Amendment of the U.S. Constitution,⁴¹³ the Nevada Constitution prohibits excessive bail.⁴¹⁴ Specifically, the state's constitution provides that "[a]ll persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the

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5. Ensure Drug and Mental Health Court programs align with best practices
 6. Amend the burglary statute to correspond to different levels of conduct and create proportional penalties
 7. Increase the felony theft threshold, establish different sentencing tiers for high-level larcenies, and ensure theft threshold amounts are consistent across all related offenses
 8. Reclassify simple possession of a controlled substance
 9. Increase judicial discretion in sentencing for commercial drug offenses
 10. Amend trafficking weights to distinguish drug sellers from drug traffickers, and require evidence of intent to sell or manufacture
 11. Establish a lookback period for the habitual criminal statute
 12. Remove the sentencing recommendation from the Pre-Sentence Investigation Report
 13. Reclassify certain nonviolent Category B offenses to tailor criminal conduct more appropriately to the corresponding penalty
 14. Establish and codify a streamlined parole process
 15. Implement a specialty parole option for long-term, geriatric inmates
 16. Reduce the maximum probation period that can be ordered
 17. Expand the use of swift, certain, and proportional sanctions
 18. Limit the period of incarceration resulting from a revocation for technical violations
 19. Strengthen supervision decision-making
 20. Expanding and systemizing reentry
 21. Establish policies and practices to guide decision-making that address gender specific needs
 22. Ensure sustainability of policy changes and adherence to best practices
 23. Require a certain percentage of funds be dedicated to expanding the options available to law enforcement when responding to individuals with behavioral health needs
 24. Reinvest in community supervision, treatment, and transitional housing and
 25. Reinvest in victims' services

JRI FINAL REPORT, *supra* note 4, at 5, 21–36; Kinner, *supra* note 1.

⁴¹¹ See discussion *infra* Part IV.

⁴¹² Hayley E. Miller, Note, *Taming the Wild West: Using Unsecured Bail Bonds in Nevada's Pretrial-Release Program*, 16 NEV. L.J. 1239, 1245–46 (2016).

⁴¹³ U.S. Const. amend. VIII; see also *Kaczmarek v. State*, 91 P.3d 16, 33–34 (Nev. 2004).

⁴¹⁴ NEV. CONST. art. 1, § 6.

presumption great.”⁴¹⁵ Thus, a defendant has the right to reasonable bail, except when charged with capital murder or murders punishable by life in prison.⁴¹⁶

In addition to constitutional provisions, Nevada statutes give the courts the authority, in certain circumstances, to release an accused person pending trial or sentencing.⁴¹⁷ Statutory limitations exist under Nevada law regarding the right to bail before conviction.⁴¹⁸ Before the release of “a person arrested for any crime, the court may impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court.”⁴¹⁹ Moreover, NRS § 178.4853 requires the court to consider a number of factors in determining whether pretrial release without bail may be warranted, which include:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person’s spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity or responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person’s release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person’s ties to the community or bearing on the risk that the person may willfully fail to appear.⁴²⁰

Moreover, Nevada statutes provide a non-comprehensive list of the conditions a judge may impose on the defendant, such as requiring the defendant to remain in Nevada or within a particular county, prohibiting the defendant from contact with specific people, prohibiting the defendant from entering a particular area (e.g., the Las Vegas strip) and from engaging in conduct that “may be harmful to the person’s own health, safety or welfare, or the health, safety or welfare of another person.”⁴²¹ Ultimately, the decision to increase or lower bail and impose conditions on pretrial release lies within the discretion of the court, whose primary concerns are to protect the public health, safety and welfare, and

⁴¹⁵ NEV. CONST. art. 1, § 7.

⁴¹⁶ *Id.*

⁴¹⁷ NEV. REV. STAT. §§ 178.4851, 178.4853 (2019).

⁴¹⁸ NEV. REV. STAT. § 178.484 (2019).

⁴¹⁹ NEV. REV. STAT. § 178.484(11) (2019).

⁴²⁰ NEV. REV. STAT. § 178.4853.

⁴²¹ NEV. REV. STAT. § 178.484(11)(d).

ensure a person's return to court as mandated by a judge.⁴²² For example, Nevada's Second Judicial District Court, which serves Washoe County, supplements the statutory provision with fourteen conditions on release a judge can impose.⁴²³ Whereas, the state's Eighth Judicial District Court, which serves Clark County and is home to Nevada's largest metropolitan city, Las Vegas, does not provide additional guidance to judges in this area.⁴²⁴ Despite statutory guidance for setting bail and conditions on release, counties across the state have adopted other tools including bail schedules and pretrial risk assessments to allow for, at the very least, uniform bail setting practices at the county level.

1. *Bail Schedules*

Some of Nevada's counties join the nearly 64 percent of counties across the United States that use bail schedules.⁴²⁵ However, the use of these schedules causes bail regimes to vastly differ throughout the state. For example, in Clark County, the Las Vegas Justice Court has implemented a bail schedule which provides standardized bail amounts for various categories of felony offenses, gross misdemeanors, misdemeanors, and violations of protective orders.⁴²⁶ Nevada statutes also impose additional bail for crime enhancements, which include:⁴²⁷

1. "Felony committed on property of school, at activity sponsored by school or on school bus;"⁴²⁸
2. "Felony committed by adult with assistance of child;"⁴²⁹
3. "Use of handgun with metal-penetrating bullet in [the] commission of crime;"⁴³⁰
4. "Use of deadly weapon or tear gas in commission of crime;"⁴³¹
5. "Felony committed in violation of order for protection or order to restrict conduct;"⁴³²

⁴²² NEV. REV. STAT. § 178.484(11).

⁴²³ CRIM. R. PRAC. SECOND JUD. CT. ST. NEV. 5.

⁴²⁴ See R. PRAC. EIGHTH JUD. CT. ST. NEV.

⁴²⁵ Carlson, *supra* note 349.

⁴²⁶ JUSTICE COURT, LAS VEGAS TWP., STANDARD BAIL SCHEDULE, (2015), <https://www.clarkcountybar.org/wp-content/uploads/lvjcsbs15.pdf> [<https://perma.cc/C7ZL-LXT4>] [hereinafter STANDARD BAIL SCHEDULE]. For an Example of Clark County's Bail Schedule see Appendix, tbl.A.8.

⁴²⁷ *Id.*; see also NEV. REV. STAT. §§ 193.161 (school property), 193.162 (assistance of child), 193.163 (handgun containing metal-penetrating bullets), 193.165 (use of deadly weapon), 193.166 (felony in violation of protection order), 193.167 (60 or older/vulnerable person), 193.1675 (characteristics of victim), 193.168 (gang), 193.1685 (terrorism), 453.3335, 453.3345, 453.3351, or 453.3353 (certain violations involving controlled substances under certain circumstances).

⁴²⁸ NEV. REV. STAT. § 193.161.

⁴²⁹ NEV. REV. STAT. § 193.162.

⁴³⁰ NEV. REV. STAT. § 193.163.

⁴³¹ NEV. REV. STAT. § 193.165.

⁴³² NEV. REV. STAT. § 193.166.

6. “Certain crimes committed against person 60 years of age or older or against vulnerable person;”⁴³³
7. “Commission of a crime because of certain actual or perceived characteristics of victim;”⁴³⁴
8. “Felony committed to promote activities of criminal gang;”⁴³⁵
9. “Felony committed with intent to commit, cause, aid, further or conceal act of terrorism”;⁴³⁶
10. Certain violations involving “controlled substances under certain circumstances”⁴³⁷

While any person in Nevada charged with the aforementioned is subject to additional penalties pursuant to Nevada law, the Las Vegas Township Justice Court standard bail schedule provides that when the listed enhancements are added to a charged offense, the standard bail amount doubles.⁴³⁸

Clark County’s bail schedule differs significantly from the bail schedule implemented in Churchill County, which is one of the state’s fifteen rural counties. The Churchill County bail schedule provides standardized bail amounts for over one hundred violations, including traffic violations, with bail ranging from \$25.00 for “position of driver’s hands” to \$250,000 for “sexual assault—(Forcible/Substantial Bodily Harm).”⁴³⁹ Previously, the Second Judicial District Court used a bail schedule to set bail for those arrested in Washoe County, Nevada.⁴⁴⁰ However, when the County became part of the Pretrial Risk Assessment Tool Pilot Program, its use was suspended.⁴⁴¹

As demonstrated, the possible bail amount a defendant will pay is contingent on where in the state the charged offense is committed. Without a bail schedule to rely on, judges may use their discretion, as authorized under Nevada law, to determine the appropriate amount to assign to a defendant. Because of the concern that the lack of uniformity in setting bail resulted in various outcomes and notable disparities, Nevada implemented an evidence-based release system using a pretrial risk assessment tool to create an avenue for more consistent bail setting practices throughout the state.

⁴³³ NEV. REV. STAT. § 193.167.

⁴³⁴ NEV. REV. STAT. § 193.1675.

⁴³⁵ NEV. REV. STAT. § 193.168.

⁴³⁶ NEV. REV. STAT. § 193.1685.

⁴³⁷ NEV. REV. STAT. §§ 453.3335, 453.3345, 453.3351, 453.3353.

⁴³⁸ STANDARD BAIL SCHEDULE, *supra* note 426.

⁴³⁹ CHURCHILL CTY., BAIL SCHEDULE, (2013), <http://www.churchillcounty.org/documentcenter/view/3022> [https://perma.cc/HEU2-LCMT].

⁴⁴⁰ *Pretrial Services —Assessment Program*, SECOND JUD. DIST. CT. (June 18, 2018), <https://www.washoecourts.com/OtherDocs/PretrialServices/SJDC%20One-Page%20Program%20Overview%20-%20Pretrial%20Services%20Assessment%20-%20June%202018.pdf> [https://perma.cc/8FLR-NQBY].

⁴⁴¹ See Admin. Order 2016-15, *In re* Admin. Matter of Rescinding Washoe Cty. Unif. Bail Schedule (Jan. 20, 2016), <https://www.washoecourts.com/AdminOrders/PDF/2016/2016-15%20ADMINISTRATIVE%20MATTER%20OF%20RESCINDING%20WASHOE%20COUNTY%20UNIFORM%20BAIL%20SCHEDULE.pdf> [https://perma.cc/6BDY-LC77].

2. Nevada's Pretrial Risk Assessment Tool

In 2015, in response to the concern surrounding the inconsistency in the state's bail setting practices, Justice James W. Hardesty of the Supreme Court of Nevada convened a committee to study and explore alternatives and improvements to Nevada's pretrial release system.⁴⁴² Over several meetings, the Committee to Study Evidence Based Pretrial Release was informed about various pretrial assessment tools used in jurisdictions across the country including the Ohio Risk Assessment System (ORAS).⁴⁴³ After review of the tools presented and its own research, the Committee decided it would customize a pretrial risk tool incorporating "all of the positive attributes" of the instruments reviewed.⁴⁴⁴ In February 2016, the Committee presented a prototype tool called the Nevada Pretrial Risk (NPR) instrument.⁴⁴⁵ After taking constructive recommendations from Committee members, the NPR tool's initial set of risk factors included the following:

1. Existing pending criminal case at time of current offense;
2. Age at first arrest (adult or juvenile);
3. Prior misdemeanor arrests;
4. Prior felony or gross misdemeanor arrests;
5. Prior arrest for violent crimes;
6. Prior FTA's past two years;
7. Current employment status;
8. Current residency; and,
9. Indications of substance abuse.⁴⁴⁶

"The weights for each of the nine scoring items and the overall risk scale were based on prior studies of other similar risk instruments," specifically ORAS, with the expectation that modifications to the weight and scale for factors would happen after data collection and analysis.⁴⁴⁷ By the end of the month, the tool was ready to be tested on a random sample of defendants released in 2014 from the Washoe County Detention Facility, all defendants released in White Pine County, and two random samples of defendants from the Clark County Detention Center or the Las Vegas City Jail.⁴⁴⁸

The Committee assigned five primary goals for the NPR's pilot test:

1. Description of the types of people currently being released in pretrial status in terms of their demographics, offense, and criminal history;
2. The methods of release and time in custody prior to release;
3. Re-arrest and Failure to Appear (FTA) rates;
4. Testing of the prototype instrument in terms of its validity; and,

⁴⁴² AUSTIN & ALLEN, *supra* note 5, at 1.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 1–2.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

5. Methods for improving the NPR predictive qualities.⁴⁴⁹

Two key dependent variables were recorded on a total of 1,057 collected from the four jurisdictions: (1) “whether the released defendant was rearrested for a new crime” and (2) “whether there was a bench warrant issued for failing to appear . . . for any scheduled court hearing.”⁴⁵⁰ These two variables determined “if the scoring items that were contained on the proto-type NPR instrument were statistically associated with either the rate of re-arrest or [failure to appear].”⁴⁵¹ Throughout testing, the prototype tool was adjusted as follows:

1. Added the factor of possession of valid cell phone number . . . ;
2. Consolidated the substance abuse factor by only using prior drug/alcohol related arrests . . . ;
3. Modified the residence factor by adding whether the person was a resident of Nevada . . . ;
4. Consolidated prior misdemeanor arrest score so that 3 or more receive 2 points . . . ;
5. Consolidated prior felony/gross misdemeanor arrests score so that 2 or more are scored as 2 points . . . ; and,
6. Re-calibrated the overall scale so that it matches the new scoring process.⁴⁵²

Based on the results of the pilot test, it was determined that the prototype was “proven to be a statistically valid pretrial risk instrument that meets industry standards in terms of the factors being used and their overall predictive accuracy” and ready to be fully implemented in the sampled jurisdictions.⁴⁵³ Subsequently, the Committee produced two additional versions of the tool where it changed several items from the 2016 version, one tested in Washoe County and White Pine, and the other in Clark County.⁴⁵⁴ These changes included rescaling risk factors, adjusting point assignments for certain factors, and adding mitigating verified stability factors.⁴⁵⁵

Approximately a year following the implementation of the NPR in four jurisdictions in Nevada, the Pretrial Justice Institute published, “The State of Pretrial Justice in America” in November 2017.⁴⁵⁶ The report was a comprehensive study of pretrial systems across the country, including a review of whether the

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 3.

⁴⁵¹ *Id.* at 4.

⁴⁵² *Id.* at 5–6.

⁴⁵³ *Id.* at 6.

⁴⁵⁴ See *Committee to Study Evidence-Based Pretrial Release Meeting Recordings*, SUP. CT. NEV. (July 19, 2017), available at [https://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Meeting_Recordings/\[https://perma.cc/A7EB-GDBZ\]](https://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Meeting_Recordings/[https://perma.cc/A7EB-GDBZ]) [hereinafter *Committee to Study Evidence-Based Pretrial Release*].

⁴⁵⁵ See *id.*

⁴⁵⁶ See PRETRIAL JUSTICE INST., *supra* note 290.

NPR was producing positive results.⁴⁵⁷ To arrive at the grade, the report's analysis focused on three measures:⁴⁵⁸

1. Rate of unconvicted people in local jails;
2. Percentage of people living in a jurisdiction that uses evidence-based pretrial assessment to inform pretrial decisions, and
3. Percent of a state's population living in a jurisdiction that has functionally eliminated secured money bail.

The report indicates that Nevada has a pretrial detention rate (rate of unconvicted people in local jails) of 17.9 per 10,000 residents.⁴⁵⁹ Moreover, 89.1% percent of people live in a county that uses the NPR.⁴⁶⁰ An analysis of the three measures resulted in Nevada being one of nine states to receive a "B" grade.⁴⁶¹ This result suggests that, at least in the jurisdictions using the NPR, Nevada seemingly took a step in the right direction to improve its pretrial system. Since its implementation in 2016, the four selected jurisdictions continue to use and collect data from the use of the modified NPR to provide a follow-up report at the end of 2019.⁴⁶²

In the end, regardless of the process or tool used to set bail, a defendant who can afford bail pays cash or credit to the court, an amount that is later returned to the defendant provided they appear in court.⁴⁶³ In the case that a defendant cannot pay, a bail-bond company may post bail and assure the court that the defendant will appear.⁴⁶⁴ Pursuant to NRS 697.300, bail bondsmen must charge either "15 percent of the amount of the of bond or \$50, whichever is greater," plus administrative fees.⁴⁶⁵ Typically, the defendant provides co-signers and collateral to cover the liability of a failure to appear.⁴⁶⁶ Release from preventative detention occurs once the bond posts and is later returned to the company provided the defendant appears in court as assured by the bond.⁴⁶⁷

B. *An Examination of Recent Bail Reform Efforts in Nevada*

In comparison to the majority of states, Nevada has been slow to join the criminal justice reform movement. The first significant step occurred in 2015, when Justice Hardesty led the "Committee to Study Evidence Based Pretrial

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 6.

⁴⁵⁹ *Id.* at app.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 12–13. Notably, California received a "D." *Id.*

⁴⁶² See generally *Committee to Study Evidence-Based Pretrial Release*, *supra* note 454.

⁴⁶³ NEV. REV. STAT. § 178.502(2)(b) (2019).

⁴⁶⁴ See F. Andre Taylor, *Bail Bondsmen Sometimes Get Bad Rap*, LAS VEGAS REV. J. (July 15, 2014, 3:00 AM), <http://www.reviewjournal.com/life/public-safety/bail-bondsmen-sometimes-get-bad-rap> [https://perma.cc/QR2F-EG8J].

⁴⁶⁵ NEV. REV. STAT. § 697.300(1)(a) (2019).

⁴⁶⁶ MOVING BEYOND MONEY, *supra* note 10, at 12.

⁴⁶⁷ Taylor, *supra* note 464.

Release,” as discussed above, to examine alternatives to the state’s varying bail setting practices.⁴⁶⁸ In the years following, the state has seen other efforts to reform pretrial services as it pertains to preventative detention and cash bail.

1. 2017 Legislative Efforts: Nevada’s “Elimination of Cash Bail” Bill

During the 2017 Legislative Session, state legislators introduced bills to address the deficiencies of the state’s criminal justice system.⁴⁶⁹ Among those was Assembly Bill 136 (AB 136), introduced by Assemblywoman Dina Neal, which would have mandated a court to consider the imposition of “non-financial conditions . . . on a person to mitigate the risk of failure to appear or the risk to public safety.”⁴⁷⁰ Additionally, the bill “authorized the court to use an evidence-based risk assessment tool in deciding whether there is good cause to release a person without bail.”⁴⁷¹ However, Gov. Sandoval vetoed Assemblywoman Neal’s bill stating it would “incorporate a new and unproven method for determining whether a criminal defendant should be released from custody without posting bail.”⁴⁷² Assemblywoman Neal’s bill was a significant step in Nevada’s efforts to fight the money bail system, despite its demise on the Governor’s desk.

2. 2019 Legislative and Judicial Bail Reform Efforts

In November 2018, Nevadan’s voted for former Clark County Commissioner Steve Sisolak to become the state’s thirtieth Governor; the first Democratic governor in Nevada in two decades.⁴⁷³ On the campaign trail, Sisolak signaled support for legislative efforts to reform the cash bail system⁴⁷⁴ by out-

⁴⁶⁸ See Discussion Section IV.A.2.

⁴⁶⁹ See Assemb. B. 38, 136, 250, 2017 Leg., 79th Legis. Sess. (Nev. 2017); S.B. 18 & 82, 2019 Leg., 79th Legis. Sess. (Nev. 2017). Texts of bills proposed during the 79th Legislative Session are available at <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bills/List> [<https://perma.cc/C72S-FLYF>].

⁴⁷⁰ Megan Messerly et al., *On Deadline Day, Lawmakers Pass Bills on Cyber Security, Health Care and Campaign Finance*, NEV. INDEP. (May 17, 2017, 2:15 AM), <https://thenevadaindependent.com/article/on-deadline-day-lawmakers-pass-bills-on-cyber-security-health-care-and-campaign-finance/> [<https://perma.cc/W3QS-DRL9>].

⁴⁷¹ *Id.*

⁴⁷² Letter from Brian Sandoval, Governor of Nevada, to Jason Frierson, Speaker of Nevada State Assembly (May 26, 2017), available at http://gov.nv.gov/uploadedFiles/govnvgov/Content/News_and_Media/Press/2017/Images_and_Files/2017-05-28_AB136VetoMay26.pdf [<https://perma.cc/JL6T-HRT4>].

⁴⁷³ Michelle Rindels et al., *IndyTalks: Full Transcript of Steve Sisolak’s Interview with the Nevada Independent*, NEV. INDEP. (Jan. 29, 2019, 2:05 AM), <https://thenevadaindependent.com/article/indytalks-full-transcript-of-steve-sisolaks-interview-with-the-nevada-independent> [<https://perma.cc/T79M-T3MJ>].

⁴⁷⁴ Michael Lyle, *Sisolak and Holder Discuss Justice Reform with Activists*, NEV. CURRENT (Sept. 7, 2018), <https://www.nevadacurrent.com/2018/09/07/sisolak-and-holder-discuss-justice-reform-with-activists/> [<https://perma.cc/VK5X-BZCG>].

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wardly supporting ending cash bail shortly after taking office in January 2019.⁴⁷⁵

a. Legislative Bail Reform Proposals

After months of research and assessment of the state's criminal justice system, on March 8, 2019, Assemblyman Steve Yeager and Justice Hardesty presented a 136-page bill to the Judiciary Committee of the 80th Session of the Nevada Legislature, Assembly Bill No. 236 (AB 236), which encompasses all recommendations made by the ACAJ.⁴⁷⁶ In a presentation submitted to the Committee, Assemblyman Yeager asserted that the enactment of all recommendations included in the bill would result in the state saving nearly "\$640 million dollars by averting nearly 90 percent of the state's prison population growth." As proposed, the bill has essentially "pitted prosecutors against public defenders."⁴⁷⁷ Proponents assert the bill provides necessary changes to an antiquated criminal justice system by investing in transition services for offenders re-entering society, and has the goal of curbing a growing carceral population and lower the recidivism rates.⁴⁷⁸ Opponents argue the bill compromises public safety and are concerned about lesser punishment for certain crimes, particularly for habitual criminals, and "allow[ing] offenders who violate certain parts of their probation to avoid having their probation revoked."⁴⁷⁹ There is additionally a concern that the proposed legislation is ambitious, attempting to go too far, too fast.⁴⁸⁰ AB 236 is being described as the "single most important and transformative" criminal justice legislation in the state's history, and thus likely to require significant effort by the legislative body to arrive at a proposal for criminal justice reform that gets all parties on board.⁴⁸¹

Even in its formal presentation to the legislative body, AB 236 was not inclusive of significant reform to preventative detention or bail setting practices in the state as a result of the omission of such recommendations on behalf of the ACAJ. However, legislators in the Nevada Assembly have proposed various measure that focus on significant bail reform, one with the particular goal of eliminating the cash bail system entirely. Unless otherwise specified by the

⁴⁷⁵ Rindels et al., *supra* note 473.

⁴⁷⁶ A.B. 236—*Makes Various Changes Related to Criminal Law and Procedure*, *supra* note 394; Ryan Tarinelli, *Nevada Criminal Justice Reform Bill Heard by Lawmakers*, LAS VEGAS SUN (Mar. 8, 2019, 2:17 PM), <https://lasvegassun.com/news/2019/mar/08/nevada-lawmakers-spar-on-criminal-justice-reform-b/> [<https://perma.cc/ZD5X-KAKD>].

⁴⁷⁷ Tarinelli, *supra* note 476.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

language of the bill, if passed and signed by the Governor, the legislation specified below will take effect on October 1, 2019.⁴⁸²

i. Assembly Bill 17

Hoping to continue the fight from the previous legislative session, the Committee on Judiciary, on behalf of the Nevada Supreme Court, introduced Assembly Bill No. 17 (AB 17) in the 2019 State of Nevada Legislature on February 4, 2019.⁴⁸³ This bill proposes changes to how posted bail is considered in criminal and civil court proceedings by eliminating portions of the law that allow courts to avoid exonerating bail within thirty days of bail being posted.⁴⁸⁴ Instead, the bill requires a court to exonerate bail “if the charges against a defendant are dismissed or if no normal action is taken against a defendant.”⁴⁸⁵ Moreover, it amends a “section of law allowing the court to keep the bail and apply it again if a defendant is charged with another offense ‘arising out of the same act.’”⁴⁸⁶ On April 15, 2019, the bill adopted Amendment 35, which gives the court discretion to “delay exoneration of the bail for a period not to exceed 30 days under certain circumstances.”⁴⁸⁷ On April 16, 2019, the Assembly Committee on Judiciary passed AB 17, as amended, and sent the bill to the Senate.⁴⁸⁸

ii. Assembly Bill 125

On February 11, 2019, Assemblywoman Dina Neal and Assemblymen Edgar Flores and William McCurdy introduced Assembly Bill No. 125 (AB 125).⁴⁸⁹ This bill revises “provisions governing factors to be considered by the court in deciding whether to release a person without bail; prohibiting a court

⁴⁸² Lorne Malkiewich & Allison Combs, How a Bill Becomes a Law —Process, Presentation at Pre-session Academy for New Legislators 2011 (Jan. 19, 2011), available at <https://www.leg.state.nv.us/Division/Research/LegInfo/Orientation/2010-11/Handouts/Jan19-24/1-19/08NVLegislativeProcess.pdf> [<https://perma.cc/5EKD-DTXN>].

⁴⁸³ Assemb. B. 17: Overview, 2019 Leg., 80th Legis. Sess. (Nev. 2019), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/5903/Overview> [<https://perma.cc/6YHN-5WGB>].

⁴⁸⁴ Michelle Rindels, et al., 2-Minute Preview: Legislature Still Dealing with Gun Background Checks, But Voting Rights and Antlers, Too, NEV. INDEP. (Feb. 13, 2019, 2:13 AM), <https://thenevadaindependent.com/article/2-minute-preview-legislature-still-dealing-with-gun-background-checks-but-voting-rights-and-antlers-too> [<https://perma.cc/RH74-LDUJ>].

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ 2019 LEG., 80TH LEGIS. SESS., ASSEMBLY AMENDMENT TO ASSEMBLY BILL NO. 17, (Nev. Apr. 15, 2019), https://www.leg.state.nv.us/Session/80th2019/Bills/Amendments/A_AB17_35.pdf [<https://perma.cc/9F28-S738>].

⁴⁸⁸ Assemb. B. 17: Overview, 2019 Leg., 80th Legis. Sess. (Nev. 2019), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/5903/Overview> [<https://perma.cc/6YHN-5WGB>].

⁴⁸⁹ Assemb. B. 125, 2019 Leg., 80th Legis. Sess. (Nev. 2019).

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from relying solely on a bail schedule in setting the amount of bail after a personal appearance by a defendant.”⁴⁹⁰ Specifically, when a court decides whether to release a person with bail, it “may use an evidence-based risk assessment tool, if available, but at a minimum shall consider” factors enumerated under NRS § 178.4853.⁴⁹¹ The bill adds the following to the existing law’s non-comprehensive list:

Whether one or more conditions can be imposed on the person to mitigate the risk of failure to appear or the risk to public safety, including, without limitation:

- (a) Restrictions on residence or travel;
- (b) Restrictions on associations, including, without limitation, requiring the person to avoid contact with alleged victims or potential witnesses;
- (c) Requiring the person to maintain or actively seek employment;
- (d) Requiring the person to regularly report to a designated law enforcement agency or the court;
- (e) Imposing a curfew;
- (f) Prohibiting the possession of a firearm;
- (g) Prohibiting the use of alcohol and controlled substances;
- (h) Requiring the person to receive medical, psychiatric or psychological treatment, including, without limitation, treatment for alcohol or drug abuse or a mental illness;
- (i) Intensive supervision of the person; or
- (j) Any other condition reasonably necessary to ensure the appearance of the person or the safety of any person in the community.

Moreover, the bill seeks to amend NRS § 178.498 by providing that after a person “has personally appeared before the magistrate, the magistrate *may not rely solely* on a standardized bail schedule to set the amount of bail.”⁴⁹² On April 12, 2019, Senate Majority Leader Nicole J. Cannizzaro and Speaker of the Assembly Jason Frierson granted the waiver requested by the Assembly Committee on Judiciary.⁴⁹³

iii. Assembly Bill 203

On March 4, 2019, the Assembly Judiciary introduced Assembly Bill No. 203 (AB 203), which seeks to amend NRS Chapter 178 to provide that:

If . . . a defendant can be admitted to bail without appearing personally before a magistrate, the defendant must be admitted to bail on an unsecured bond if the defendant:

Was arrested for:

- (1) A misdemeanor; or
- (2) A gross misdemeanor which does not involve an act of violence;

⁴⁹⁰ *Id.*

⁴⁹¹ See discussion *supra* Section IV.A.

⁴⁹² Assemb. B. 203, 2019 Leg. 80th Legis. Sess. (Nev. 2019) (emphasis added).

⁴⁹³ ASSEMB. DAILY JOURNAL 2019 LEG., 80TH LEGIS. SESS. 3 (Nev. Apr. 15, 2019), <https://www.leg.state.nv.us/Session/80th2019/Journal/Assembly/Final/aj071.pdf> [<https://perma.cc/A2BW-5DBW>].

- (b) Was not arrested while on bail; and
- (c) Does not have a record of failing to appear after release on bail or without bail.⁴⁹⁴

Concerns about the comprehensiveness of this proposed legislation arose shortly after its introduction. Supporters of cash bail reform worry that the bill will “leave too many loopholes for the district attorney, the police department, or . . . law enforcement in general . . . to overcharge people.”⁴⁹⁵ For example, some worry that if the law is implemented, those held on a misdemeanor might be released on their own recognizance—but if the desire is to hold someone behind bars, “they could easily up it to a felony,” thus drawing concern about a possible increase in the number of felony charges.⁴⁹⁶ On April 13, 2019, pursuant to Joint Standing Rule No. 14.3.1, no further action was allowed on this bill.⁴⁹⁷

iv. AB 325

*“Bail means jail, if you’re poor. [But for the rich], clout means you’re out!”*⁴⁹⁸

On March 21, 2018, the Assembly Judiciary Committee heard Assembly Bill 325 (AB 325).⁴⁹⁹ Before the start of the session there was speculation that legislators sought to introduce a bill to *eliminate* cash bail in Nevada once and for all.⁵⁰⁰ AB 325 instead overhauls the state’s cash bail system to ensure that the assignment of bail, especially a high bail amount, is the last resort to “ensure reasonably the appearance of the [defendant] and the safety of the community.”⁵⁰¹ The twenty-eight-page bill, as presented, is modeled after New Jersey’s set of bail reforms implemented in 2016.⁵⁰² Notably, the bill “throws out” the majority of the state’s laws regarding bail and “require[s] courts to release nearly all individuals awaiting trial eligible for bail under the ‘least restrictive conditions’ necessary for the person to show back up to court and ensure the

⁴⁹⁴ Assemb. B. 203, 2019 Leg., 80th Legis. Sess. (Nev. 2019).

⁴⁹⁵ Brian Bahouth, *Nevada Could Largely Scrap Money Bail System, Activists Hopeful*, NEV. CAP. NEWS (Mar. 18, 2019), <https://nevadacapitalnews.org/2019/03/18/nevada-could-scrap-money-bail-system-activists-hopeful/> [<https://perma.cc/UU28-8BLE>].

⁴⁹⁶ *Id.*

⁴⁹⁷ Assemb. B. 325: Overview, 2019 Leg., 80th Legis. Sess. (Nev. 2019), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6318/Overview> [<https://perma.cc/LVD9-E3TC>].

⁴⁹⁸ *Hearing on Assemb. B. 325 Before the Assemb. Comm. on Judiciary*, 2019 Leg., 80th Legis. Sess. (Nev. Mar. 21, 2019) (Testimony of Osvaldo E. Fumo, Assemb.), http://nvleg.granicus.com/MediaPlayer.php?clip_id=11281 [<https://perma.cc/R8ZH-V2N2>].

⁴⁹⁹ Colton Lochhead, *Cash Bail Debate Roils Carson City Hearing Thursday*, LAS VEGAS REV. J. (Mar. 21, 2019, 5:22 PM), <https://www.reviewjournal.com/news/politics-and-government/2019-legislature/cash-bail-debate-roils-carson-city-hearing-thursday-1623589/> [<https://perma.cc/5M4K-XQ3J>].

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*; Assemb. B. 325, 2019 Leg., 80th Legis. Sess. (Nev. 2019).

⁵⁰² Lochhead, *supra* note 499; *see also* Discussion *supra* II.B.iii.

safety of the community.”⁵⁰³ Moreover, the bill mandates the “release prior to trial or before an initial court appearance” of a defendant arrested and charged for a misdemeanor or lower offense, unless the defendant’s underlying charge is for domestic violence or a restraining order violation.⁵⁰⁴

The bill has drawn support from county “public defenders, the Americans Civil Liberties Union of Nevada, the Culinary Union, the Mass Liberation Project as well as Americans for Prosperity.”⁵⁰⁵ Opposition to the bill comes primarily from law enforcement, county district attorneys, and bail bondsmen.⁵⁰⁶ For Carson City District Attorney Jason Woodbury, the opposition is not about the idea of reform, rather it is directed at the “requirement that a pretrial release hearing be held within 48 hours of a defendant’s initial appearance in court and . . . [the] worry that victims’ rights are not addressed in the language” of the bill.⁵⁰⁷

Critics of the proposed legislation, including the Nevada District Attorney’s Association, voiced several concerns including the debilitating effect its enactment, if passed as presented, would have on a judge’s discretionary power: “A judge is going to be in the position to have the most information about the specific case and about the individual accused at the earliest possible time. But in order to do the best job he or she can the judge needs discretion.”⁵⁰⁸ Moreover, several district attorneys from across the state went on to highlight areas of the bill that would limit judicial discretion such as: the mandatory release of anyone charged with a misdemeanor without bail; inability of judges to create individualized conditions for a defendant’s release; and conflicts between AB 325’s release timeline and the recently passed Marsy’s law.⁵⁰⁹ District attorneys emphasized their willingness to work on bail reform in Nevada, but stressed the need for judges to be able to act.⁵¹⁰ When questioned on how district attorney’s would be willing to help, Carson City’s District Attorney Jason Woodbury spoke on developing objective, data driven risk assessments to give judges a tool to determine whether a defendant is likely to flee or be a danger to the community.⁵¹¹ On April 12, 2019, Senate Majority Leader Nicole

⁵⁰³ Riley Snyder et al., *2-Minute Preview: 14-Year-Old Drivers, Major Bail Changes on Deck at Legislature*, NEV. INDEP. (Mar. 21, 2019, 2:10 AM), <https://thenevadaindependent.com/article/2-minute-preview-14-year-old-drivers-major-bail-changes-on-deck-at-legislature> [<https://perma.cc/4TC6-MRDA>].

⁵⁰⁴ *Id.*

⁵⁰⁵ Lochhead, *supra* note 499.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Hearing on Assemb. B. 325, supra* note 498 (Testimony of Jason Woodbury, District Attorney, Carson City.).

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

Cannizzaro and Speaker of the Assembly Jason Frierson granted the waiver requested by the Assembly Committee on Judiciary.⁵¹²

At the time of this article's publication, the Nevada Legislature continued to deliberate and work on these bills, which propose notable changes to improve the state's pretrial process and seek to help maintain the presumption of innocence. However, the opposition remained focused on whether these changes would make situations worse for the defendant or harder on the judiciary to do its job. However, the legislative branch has not been the only branch of government seeking to improve Nevada's pretrial decision-making process.

b. Judicial Bail Reform Proposal

On December 28, 2018, Associate Justice James Hardesty filed a petition, based on the recommendation of the Committee to Study Evidence-Based Pretrial Release to adopt a "statewide requirement that all judges in Nevada utilize a validated risk assessment tool for use in pretrial decision-making."⁵¹³ On February 5, 2019, the Nevada Supreme Court heard public comment on the proposal which, like AB 17, 125, and 206, looks to overhaul the bail system in the state.⁵¹⁴ Proponents of the risk assessment "tool argued that the 'scoring items' it uses to determine whether or not a defendant is a flight risk are based on science and that an overhaul of Nevada's current system [is] long overdue."⁵¹⁵ On the other hand, opponents "argued that some of the scoring items [stand] to disproportionately affect people of color and the poor."⁵¹⁶

Notable opposition came from the American Bail Coalition (ABC), an organization whose proffered mission is "protecting the Constitutional right to bail and the promotion, protection and advancement of the surety bail profession in the United States."⁵¹⁷ The organization presented various points of opposition, including that:

⁵¹² ASSEMB. DAILY JOURNAL 2019 LEG., 80TH LEGIS. SESS. 3 (Nev. Apr. 15, 2019), <https://www.leg.state.nv.us/Session/80th2019/Journal/Assembly/Final/aj071.pdf> [https://perma.cc/A2BW-5DBW].

⁵¹³ *In re* The Committee to Study Evidence-Based Pretrial Release (Nev. Dec. 28, 2018) (No. 18-910736); Abcadmin, *Nevada Supreme Court Proposes Statewide Use of Pretrial Risk Assessment Tools Despite Ban Recommendation by Leadership Conference of Civil Rights Organizations*, AM. BAIL COAL. (Feb. 1, 2019), <http://ambailcoalition.org/nevada-supreme-court-recommends-statewide-use-of-pretrial-risk-tools-abc-opposes-recommendation/> [https://perma.cc/P2AN-TGHZ].

⁵¹⁴ Rachel Crosby, *Nevada Supreme Court Hears Proposal to Overhaul Bail System*, LAS VEGAS REV. J. (Feb. 6, 2019, 3:34 PM), <https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-supreme-court-hears-proposal-to-overhaul-bail-system-1590810/> [https://perma.cc/TB4P-GRLX].

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*; see discussion *supra* Section IV.A.2.

⁵¹⁷ *About Us*, AM. BAIL COAL., <http://ambailcoalition.org/about/> [https://perma.cc/Q77P-9GNJ] (last visited Apr. 6, 2019).

[1] [T]he Nevada Judiciary should not be in the business of approving a particular risk assessment algorithm or tool or requiring that judges use a particular tool . . . [because it] creates an impermissible appearance of impropriety, calling into question the objectivity of the Court.

...

[2] [O]ne-hundred ten national civil rights groups have called for an end to the use of pretrial risk assessments in the United States of American primarily due to concerns of racial bias and lack of transparency.

...

[3] [The] risk assessment under consideration relies heavily on demographic factors, such as employment, residential stability and age[,] . . . factors [that] could have the exact opposite impact as intended.

...

[4] [The] risk assessment relies more heavily on un-convicted conduct than [others].

...

[5] [T]hese tools don't work and have been shown to increase failures to appear in court as required, increase crimes while on bail, and have virtually no impact on the reduction of the pretrial population (and in some cases dramatically increasing the pretrial population).

...

[6] [A]t least one scholar blames the generational increases in mass incarceration on the use of risk assessment tools and labeling people as dangerous which has occurred and exploded in America's penal system since 1970.

...

[7] [T]he tool . . . violate[s] the due process clause.⁵¹⁸

Essentially, ABC's assertion is that in implementing the risk assessment as proposed, one that relies on demographic factors and unconvicted conduct and has not been tested for "protected-class" bias, the Court is ignoring evidence that the tool may disparately affect similarly situated people.⁵¹⁹

On March 21, 2019, the Supreme Court of Nevada issued an Order Adopting Statewide Use of the Nevada Pretrial Assessment.⁵²⁰ In its Order, the Court declared that it considered the concerns expressed by opponents of pretrial risk assessments about the "potential racial bias implicit in the risk assessment tool."⁵²¹ The Court sought a response from Dr. James Austin with the JFA Institute, who acknowledged "that there is no current evidence that the tool, which is based on non-racial factors, increases racial disparities in pretrial release decisions."⁵²² Accordingly, the Court determined that implementation of the NPR across Nevada's counties is necessary.⁵²³

⁵¹⁸ Abcadmin, *supra* note 513.

⁵¹⁹ *Id.*

⁵²⁰ Order Adopting Statewide Use of the Nevada Pretrial Risk Assessment, *In re The Committee to Study Evidence-Based Pretrial Release*, (Nev. 2019) (No. ADKT 0539).

⁵²¹ *Id.* at 3.

⁵²² *Id.*

⁵²³ *Id.*

V. RECOMMENDATIONS

As discussed, Nevada has slowly taken steps toward the implementation of significant pretrial reform. Though past legislative efforts have fallen short of effectuating change and there remains a significant amount of opposition targeted toward judicial reform efforts, Nevada has set itself up for a great opportunity to improve bail setting practices in its various jurisdictions and across the state. It can do so by taking actionable steps through focusing and breaking down reform efforts into actions for immediate and future implementation. Further, Nevada can address the different needs of its varying jurisdictions by allowing for flexibility based on a county's population or specific needs.

Currently, Nevada's pretrial justice system significantly limits a defendant's access to justice by requiring a defendant to pay non-refundable fees or post bail, forcing them to decide between freedom or hiring an attorney.⁵²⁴ Moreover, the system invites overcrowding of the jails and adversely impacts the resolution of the defendant's criminal case because those that are detained prior to trial are more likely to be convicted.⁵²⁵ Pretrial detention also increases the likelihood that the accused will plead guilty, negatively affects the accused's personal life, and directly correlates to the likelihood that the accused will commit another crime.⁵²⁶ Further, there are concerns regarding the practices of the commercial bail bond industry including there being no obligation to provide bond to the presumably innocent, resulting in the denial of services to an indigent defendant and the high likelihood for bondsmen and bounty hunters to abuse the system through illegal behavior.⁵²⁷ Additionally, bondsmen's practices are subjective because they can choose to not post bail for a defendant for any reason.⁵²⁸ Lastly, the bail system implicates constitutional issues such as due process and equal protection clause.⁵²⁹

While national incarceration rates fall, Nevada instead finds itself in a disappointing position as its carceral state continues its' steady and alarming growth. Now, more than ever, the Silver State needs to enact real and practical solutions to curb detention and facilitate alternative pretrial options. Nevada can overcome "bail means jail" issues by protecting a defendant's liberty interest and ensuring public safety, while also allowing for the equitable and fair administration of justice and lower incarceration rates. The following recommendations are practical steps broken down into three phases that Nevada can take to curb deficiencies in its current bail practices, establish best practice pro-

⁵²⁴ Miller, *supra* note 412, at 1248–49.

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 1250.

⁵²⁷ *Id.* at 1251–52.

⁵²⁸ SCHNACKE ET AL., *supra* note 108, at 15.

⁵²⁹ Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 811 (2018).

cedures to create a fairer system, and generate options for future creation and implementation of an exemplary pretrial system.

Phase One refines Nevada's current bail practices by eliminating bail schedules, creating an inter-judiciary dialogue about the purpose and perils of bail, and creating alternative bond opportunities for indigent defendants. This phase is ready for immediate implementation with minimal disruption to current practices used in throughout the state. This first phase provides immediate, equitable opportunities to defendants, regardless of their economic situation or race.

Phase Two establishes a more objective based pretrial practice by implementing the use of an evidence based pretrial risk assessment in conjunction with a pretrial options matrix. The goal of this hybrid tool is to reduce the number of incarcerated people, while eliminating factors that break down solely on socioeconomic status. Effectuating this standard across Nevada's counties and municipalities creates a means by which to fight systematic injustices and allow a defendant to prepare for trial with the least restrictive pretrial measures in place.

Phase Three creates an option whereby Nevada counties with larger populations may move entirely away from a cash bail system and into a more integrated model of pretrial release and supervision. To accomplish this, counties with a population of more than 100,000 would implement a dedicated pretrial agency to provide important bail setting services to defendants during the pretrial period. These agencies would allow a defendant access to a third party dedicated to helping them navigate their pretrial options while providing recommendations for the court to consider in any pretrial court appearances. These agencies would primarily focus on developing the least restrictive means to ensure the defendant's subsequent court appearances and public safety. Moreover, agencies would administer an objective, evidence-based pretrial screening, and conduct one-on-one interviews to determine a defendant's risk for failure to appear or potential to commit new criminal acts. Additionally, agencies would provide the tools necessary to implement the decision matrix by monitoring defendants before trial, ensuring defendants make court appearances, and providing tools for defendants to get help prior to trial.

A. Phase One: Immediate Refinement of Current Bail Practices in Nevada

An immediate step for reform does not require an elimination of Nevada's current bail setting practices; rather, the first step requires that the state's cash bail system does what it is intended to do—ensure the appearance of defendants while protecting public safety. By requiring the current bail system to ensure defendants can prepare for trial with the presumption of innocence intact in the least restrictive means necessary, the state's bail system can promptly produce fair and more equitable outcomes for defendants.

An analysis of those most grossly affected by the negative aspects of bail—those who are in pretrial detention simply because of an inability to pay—reveal several possible improvements which will move current bail practices from a simple “price for freedom” system to individualized measures that seek to ensure a defendant’s court appearance and promote public safety. These measures include determining a defendant’s ability to pay for a bond, providing individualized bail determinations, and creating an option for defendants who cannot obtain a commercial bond.⁵³⁰ The court’s consideration of such measures should include mandating the least restrictive means for pretrial release.

1. *Elimination: Bail Schedules*

The purpose of cash bail is to incentivize a defendant to return to court as required.⁵³¹ However, tools such as blanket bail schedules used in some Nevada jurisdictions do not allow the current system to routinely impose the least restrictive means imposed on a defendant. As discussed, bail schedules disproportionately affect indigent defendants because judges are free to set arbitrary bail amounts, while failing to consider how much money incentivizes a defendant to return to court, or even if the defendant can afford to pay.⁵³² By limiting a presumed innocent defendant’s options based on their monetary circumstances, bail schedules go beyond an incentive to return to court and are instead a restriction on a defendant’s constitutionally protected liberty interest. The authors therefore recommend that jurisdictions in Nevada eliminate their use of bail schedules and instead use individual bail determinations based on a defendant’s ability to pay.

By eliminating bail schedules entirely, the courts would focus on the true purpose of bail—a security that the defendant will return to make their court appearance. Harvard Law School Criminal Justice Policy Program (CJPP) identified several factors that safeguard a defendant when determining their ability to pay bail:

- (1) [N]otice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.⁵³³

These safeguards ensure a defendant is not held in jail because of their inability to pay.⁵³⁴ The first safeguard allows the defendant to understand that their

⁵³⁰ MOVING BEYOND MONEY, *supra* note 10, at 10.

⁵³¹ *Id.* at 8.

⁵³² See discussion *supra* Section III.A.

⁵³³ MOVING BEYOND MONEY, *supra* note 10, at 10.

⁵³⁴ *Id.*

ability to pay may be a factor in determining the amount of bail.⁵³⁵ The use of a standardized form allows the court to assess the defendant's income, financial obligations, or other financial information to assist the court in a fair determination of the defendant's bail.⁵³⁶ By giving defendants an opportunity to answer questions about their responses in a hearing, the court can ensure that the responses in the form are fully explained.⁵³⁷ Further, by making express findings on a defendant's ability to pay, the court can ensure that the responses are well-reasoned, thus giving the defendant's bail price a fully individualized consideration.⁵³⁸

The CJPP identified some suggestions for determining an individual's ability to pay when setting bail. The financial factors a court could use to determine whether a defendant can pay bail may also be collected during the court's determining indigency as it relates to the assignment of government counsel.⁵³⁹ A presumption of the inability to pay may be necessarily triggered if the defendant falls within a certain threshold already determined by the court for the purpose of representation.⁵⁴⁰ The court's assurance that a defendant can pay their bail fulfills the purpose of ensuring a defendant is actually incentivized to appear in court.⁵⁴¹ Nevada courts can look to the CJPP's identified factors to determine what level of bail would be the least restrictive, not only for indigent defendants, but for all.⁵⁴² The American Bar Association provided a similar standard:

Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.⁵⁴³

The CJPP factors included the use of a standardized form to find relevant financial information.⁵⁴⁴ By developing better forms to acquire relevant financial information, Nevada may also improve pretrial outcomes in other ways. For example, one study conducted in New York found that by redesigning criminal summons forms to feature a clear title, the date and location at the top of a form where it is more likely to be read, as well as a clear description of the

⁵³⁵ *Id.* at 11.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 12.

⁵⁴³ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-5.3(e) (3d ed. 2007).

⁵⁴⁴ MOVING BEYOND MONEY, *supra* note 10, at 11.

consequences of a failure to appear, court appearance rates improved by 13 percent over the use of older forms cluttered with information at the bottom.⁵⁴⁵

By replacing bail schedules with individualized determinations of bail, the court can ensure that Nevadans are not held in jail merely because of an inability to pay. Individualized bail determinations allow the court to determine what amount of bail, if any, is needed to incentivize a defendant to return for their court appearance. Further, by making individualized decisions, the court can continue to use bail in situations where it would function as the least restrictive means necessary to ensure a court appearance. Individualized bail determinations would also allow for stakeholders in the judicial system to engage in a meaningful dialogue about the purpose of bail and the potential pitfalls of its misapplication.

2. *Inter-judiciary Cooperation*

With the elimination of bail schedules, pretrial decisions would be based on judicial discretion and statutory guidance. However, as illustrated above, this “gut instinct” can lead to discrimination and injustice through implicit bias and institutional barriers that affect poor and minority defendants. As such, stakeholders in our justice system should engage in a meaningful dialogue that focuses on the purpose of bail setting practices and the potential pitfalls of misapplied and inappropriate bail. This dialogue would be in the best interest of those involved in the pretrial process who seek to make a concerted effort of establishing fair and just pretrial practices. By creating a dialogue between prosecutors, public defenders, and judges about the purpose and nature of bail decisions, all parties can better understand that they are seeking to preserve the presumption of innocence, ensure court appearances, and protect the public. By taking these steps Nevada can begin to move towards using bail in only the most necessary of circumstances and develop other options to allow indigent defendants the same opportunity as defendants with greater financial resources.

To do this, Nevada should look to the example of inter-judiciary cooperation currently displayed in jurisdictions like Illinois, Pennsylvania, and Washington D.C. By refocusing on the purpose of bail, judicial stakeholders can advocate for more just decisions, account for public safety, and ensure that defendants make their court appearances through the least restrictive means. By starting from the position that pretrial decisions can lead to a defendant’s loss of livelihood or housing because of their inability to pay bail, opposing sides in pretrial decisions may be more likely to reach a cooperative solution that best serves the demands of justice and provides greater social value.⁵⁴⁶

⁵⁴⁵ See USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES, *supra* note 260, at 10–15.

⁵⁴⁶ Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 781 (2014).

One concrete example of how inter-judiciary cooperation can have a tremendous effect on bail practices and the lives of defendants is demonstrated in UCLA Law's work in Compton, California.⁵⁴⁷ The work being done by students there illustrates how developing the full picture of a client's situation can have a drastic effect on a judge's bail decision.⁵⁴⁸ By openly dialoguing about the perils of inappropriate bail, students were able to advocate for concrete results.⁵⁴⁹ By working with the client's families and community supporters, they were able to show judges the whole picture and obtain their clients' release on their own recognizance.⁵⁵⁰ These clients were then able to return to their families, keep their jobs, and some were even able to enter drug-treatment facilities.⁵⁵¹

By shifting the focus away from a set price for freedom to one of purposeful pretrial decision making, defendants will have equal access to public defenders, prosecutors, and judges—who can then make people-driven decisions. Stakeholders should engage in meaningful discussion about pretrial decisions and the potential repercussions they might have on a defendant's life. An open dialogue about bail decisions would also allow stakeholders to address those who have bail amounts too low for a commercial bond, yet still too expensive for a defendant to afford.

The current commercial bail bond industry creates a gap between defendants who can afford to pay for the commercial fee and those whose bail is so low that commercial bonds are not viable. A solution to this problem is to create the opportunity for unsecured or percentage-based bonds for indigent defendants. The authors therefore recommend that Nevada courts look into implementing the use of percentage-based or unsecured bonds for indigent defendants who would not be able to secure a commercial bail bond and accordingly be detained.

As previously mentioned, an unsecured bond is an amount a defendant would have to pay only if they fail to appear in court. A percentage bond, on the other hand, requires a defendant to pay a percentage of the total bond directly to the court, instead of a commercial bondsman. By looking to states like Illinois's and Kentucky's use of percentage-based or unsecured bonds, the court could create a bridge between those who are too poor to afford a bail bond and the more affluent defendants who can afford bail. In Illinois, only 8.2 percent of defendants released on percentage and unsecured bonds had their bonds revoked.⁵⁵²

⁵⁴⁷ *Change in Compton*, *supra* note 237; *see also* discussion *supra* Section III.B.i.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *See* discussion *supra* Section III.B.iv. It is also important to consider that while 33 percent of those revocations were for committing a new crime and 39 percent were for a failure

Moreover, by creating a space for the indigent to obtain either an unsecured or percentage bond, Nevada would avoid pressure from commercial bail bond industries. California faced significant pushback from the commercial bonds industry when it passed SB 10.⁵⁵³ The American Bail Coalition sponsored a committee called “Californians Against the Reckless Bail Scheme.”⁵⁵⁴ This committee opposed the bill stating that it would cost tax payers millions by endangering public safety, eliminating the service provided by bondsmen, and further discriminating against the “poor and people of color.”⁵⁵⁵ By creating an adjacent space to the current bail industry, Nevada could avoid facing opposition from the bond industry while creating the opportunity for those left out by the bail industry to secure pretrial release.

If individual bail determinations are made and stakeholders can advocate for the least restrictive means, an unsecured bond for indigent defendants might be viable. This policy change should be driven by inter-judiciary cooperation. Those involved in the pretrial process should communicate what percentage or unsecured amount would be necessary to provide the proper incentive for court appearance by a defendant.⁵⁵⁶ Further, by using a percentage bond, defendants would pay an affordable price directly to the court and thus be more likely to return for a court appearance so that they can retrieve their money. This system would work better than AB 203’s proposal to release defendants arrested for a misdemeanor or gross misdemeanor on an unsecured bond without going before a magistrate, because the bill as proposed would require a set bail schedule to continue and fail to consider an individual’s ability to pay.

The diverse make up of Nevada’s counties may not mean that a statewide percentage or unsecured bond system would work best in every county. Individual jurisdictions should have the freedom to implement whichever system, unsecured or percentage based, works best, or even both if they determine that is necessary.

to appear, the remaining 29 percent were revoked for violating a rule in relation to their court bond. *Id.*

⁵⁵³ *BREAKING: Nearly 600,000 Signatures Submitted by Coalition to Overturn California Bail Legislation, SB-10*, AM. BAIL COALITION (Nov. 20, 2018), <http://www.americanbailcoalition.org/in-the-news/breaking-nearly-600000-signatures-submitted-by-coalition-to-overturn-california-bail-legislation-sb-10/> [https://perma.cc/ZA8E-67ZU].

⁵⁵⁴ NO ON SB 10, <https://www.stopsb10.org/> [https://perma.cc/4LEP-67BM] (last visited Apr. 6, 2019).

⁵⁵⁵ *We Have the Power to Stop SB 10*, CALIFORNIANS AGAINST THE RECKLESS BAIL SCHEME, https://uploads-ssl.webflow.com/5b918d6ef662377edb905c86/5b9e84ea0899a46c8b808fc8_Fact%20Sheet.pdf [https://perma.cc/2T4Y-ZJ3L] (last visited May 5, 2019).

⁵⁵⁶ Illinois, Kentucky, Wisconsin, and Oregon all prohibit the use of bail bond agents, and have 10 percent of the bond payable to the court, and fully refundable on appearance. Will Kenton, *Bail Bond*, INVESTOPEDIA (last updated Apr. 16, 2019), <https://www.investopedia.com/terms/b/bail-bond.asp> [https://perma.cc/95S5-9P9V].

With the above-mentioned actions, Phase One can focus Nevada's current bail practices on the least restrictive means necessary to ensure a defendant's court appearance. By shifting the focus to what can a defendant pay instead of a set price on freedom, fewer defendants will find themselves in jail merely because they are unable to post bail. Further, if a judge does feel a financial constraint is necessary, the court can create a system that would not require an indigent defendant to go to a commercial third party.

B. Phase Two: Implementation of Statewide Reforms to Current Pretrial Practices

The current use of judicial discretion and "gut instinct" increases the possibility for significant civil liberties violations of indigent defendants and people of color.⁵⁵⁷ Inherent bias against minorities and the poor allow subjective opinions to become the basis of pretrial decisions.⁵⁵⁸ Nevada is best served by investing time and money into developing longer term solutions for pretrial practices that develop objective standards by which pretrial decisions can be made. These solutions should include the development of a pretrial risk assessment that accounts for the specific factors pretrial conditions are meant to prevent, like failure to appear or commission of a new criminal act, and a correlated matrix that provides for the least restrictive means of pretrial release. To reinforce the use of a risk assessment tool in conjunction with a decision-making matrix, implementing jurisdictions should require training for stakeholders. This training would help account for the "human element" and inherent bias.

This reform phase additionally calls for an algorithmic based risk assessment tool like the one suggested and being tested in four jurisdictions by the Supreme Court of Nevada's Committee to Study Evidence-Based Pretrial Release. The proposed algorithmic tool could build on the foundation established by the implementation of the Supreme Court of Nevada Committee's risk assessment tool. Further, this algorithmic risk assessment tool should be coupled with a personal interview process. By merging a scientifically-based algorithmic system with an interview-based model, pretrial services can create individualized pretrial plans that accounts for a defendant's risk to the community, ensures his appearance in court, and considers the burden that pretrial conditions would place on a presumptively innocent person.

The most recent version of the NPR contained adjustments to the original nine factors.⁵⁵⁹ These adjustments included changing accounting for arrests to accounting only for actual convictions, lowering the value of the unemployment score, lowering of the value of cellphone/landline value, and an overall

⁵⁵⁷ See discussion *supra* Sections II.B.iii, V.A.ii.

⁵⁵⁸ See generally Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332 (2016).

⁵⁵⁹ AUSTIN & ALLEN, *supra* note 5, at 5–6.

rescaling of the risk level.⁵⁶⁰ Importantly, these adjustments illustrated the judiciary's willingness to test the correlation of different NPR factors and their predictive accuracy with whether a defendant was rearrested for a new crime or whether a bench warrant was issued for a failure to appear.⁵⁶¹ These adjustments also revealed that the NPR was a "statistically valid pretrial risk instrument that meets industry standards in terms of the factors being used and their overall predictive accuracy."⁵⁶²

Jurisdictions in Nevada should adopt a scaling system of pretrial measures like that created by the PSA. Because the PSA is designed to predict risk in three areas, risk of failure to appear (FTA), risk of new criminal activity (NCA), and risk of new violent criminal activity (NVCA), it has a developed scale of restrictions to match the risk in each category.⁵⁶³ In a recent Administrative Order, the Nevada Justice Court implemented a new methodology for pretrial services to use in determining pretrial release for defendants.⁵⁶⁴ The Order states that defendants brought in on an arrest of probable cause for a nonviolent misdemeanor without prior arrest should be released.⁵⁶⁵ It further states that where the charges are non-violent felonies and/or gross misdemeanors, pretrial services should administer the NPR and release the defendants if they are rated low on the NPR scale, or release those arrested for felony and/or gross misdemeanor possession if their NPR is low or moderate.⁵⁶⁶ The Order goes on to establish a list of conditions that indicate a defendant shall not be permitted release that include failure to appear, risk of new violent criminal activity (NVCA), and new criminal activity (NCA) factors.⁵⁶⁷

While the court's order is a step in the right direction to establish a method of least restrictive pretrial release, it may be an overcorrection. Under the Order, the options for pretrial decision break down to "release" or "shall not release," without providing other options or conditions for release. Simplifying the complex problems that developed within bail reform to release or shall not release, actually creates a higher potential for defendants to slip through on either side. This system additionally affects those who would be better served by some method of conditional pretrial release and those who should have been placed in pretrial detention. By developing a scale with more than two levels, pretrial services in Nevada would be able to develop more pretrial options that serve both the rights of individuals charged and the demands of justice. This

⁵⁶⁰ *Committee to Study Evidence-Based Pretrial Release*, *supra* note 454.

⁵⁶¹ AUSTIN & ALLEN, *supra* note 5, at 6.

⁵⁶² *Id.*

⁵⁶³ NEW JERSEY PRETRIAL JUSTICE MANUAL, *supra* note 15, at 7.

⁵⁶⁴ Third Amended Administrative Order, *In re* Guidelines for Administrative Own Recognition Releases for the Las Vegas Justice Court, at 2 (Las Vegas Just. Ct. 2019) (No. 18-04).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.* These reasons include a person arrested for a category A felony, crimes relating to fleeing or escape, violent actions against others, and sex-offender violations or sex crimes.

scale could be used in conjunction with other data driven tools to allow judges to make informed decisions about what pretrial conditions would be the least restrictive means of ensuring a defendant returns for their court appearance.

1. Develop an Options Matrix to be Used in Conjunction with Pretrial Risk Assessment

As illustrated, New Jersey's use of the PSA combined with the Decision Making Framework (DMF) allows for a more individualized plan that allows the defendant to be released on the least restrictive means, while using modern resources to provide the most likely incentive for the defendant to appear and ensure public safety.⁵⁶⁸ As jurisdictions across Nevada seek to implement evidence-based risk assessment tools, these tools should be used within the context of the purpose of bail and jurisdictions should understand the valuations of the assessment. If a defendant is low in terms of failure to appear (FTA), but moderate in terms of a risk for new criminal activity (NCA) level, it would likely be appropriate to devise some method of supervision during release to ensure no criminal activity occurs. Further, if a defendant is ranked high solely in the FTA category, electronic supervision may be enough to ensure appearance in court while not disrupting the defendant's life before trial.

The more options pretrial services have beyond a simple "release" or "detain" will allow them to customize circumstances for the best of the individual and the community. Use of a correlated decision-making matrix, like implementing personalized bail decisions, would allow for a more equitable outcome before the court. When individuals are treated in this manner, they are no longer held back by inherent bias against their race or systematic injustice because of their socioeconomic status. A tailored pretrial plan would allow the system to better protect the presumption of innocence by allowing defendants the best opportunity to prepare for trial while maintaining order in their lives.

However, AB 325 likely goes too far in creating a statewide reform so quickly. As seen by the example of New Jersey's reforms, the implementation of the PSA can be a costly affair that may not be cost efficient for all jurisdictions. While AB 325 emphasizes cash bail as a last resort for least restrictive means, it seeks to establish more equitable pretrial solutions. The bill also creates potential danger of forcing the practice on jurisdictions that may not be prepared. Moreover, the implementation of the bill may result in longer pretrial detention times in jurisdictions that have already made positive strides in pretrial reform, the taking away of judicial discretion, and conflicting with existing laws, such as the recently enacted Marsy's law.⁵⁶⁹ A better solution would be a potential roll out plan, with state support for the new systems.

To account for these pitfalls between human objectives and algorithmic assessment, the algorithmic system can be merged with an interview system like

⁵⁶⁸ See discussion *supra* Section II.B.iii.

⁵⁶⁹ Testimony of Jason Woodbury, *supra* note 508.

that used in Washington D.C. By conducting an in-person interview of the defendant, the subjective goals of a person can be merged with the objective goals of an algorithm. A trained pretrial service representative could develop the information within the factors of the risk assessment algorithm, allowing the defendant to have the best of both worlds. A system combining both objective risk assessments with interviews would allow judges to make discretionary decisions for defendants who may have extenuating circumstances or who are being charged with a crime that the judge feels does not warrant the restrictions suggested by the algorithm.

As stated above, critics of risk assessments state that the tools themselves are drawn from unreliable data that may have bias already baked into the numbers. An important counter to this inherent bias is diligent training on what the risk assessment is meant to predict and what the numbers really mean. By training users of risk assessments on what the tools' outcomes mean, judges will be better able to understand that the test is accurately aligning with their own experience. Further, by using the results of risk assessments to refine what test factors are indicative of a defendant's failure to appear and new criminal activity, administrators of the tool can evaluate what bias may still be in the system. This type of evaluation can be used to help further eliminate biased factors and refine the results of the tool.

It is additionally important that jurisdiction across Nevada consider bias training for those who are involved in the pretrial decision-making process. Bias training can also allow for discretionary decision makers to understand their own inherent bias and help them better evaluate their own decisions and counteract whatever biases they may have. These bias trainings could include self-tests of social cognition, like Project Implicit, which allows people to see what hidden biases they may have.⁵⁷⁰ By creating an atmosphere of understanding and education, advocates and judges involved in pretrial decisions will create a system that provides for public safety without creating a taxing social cost.

Nevada should remain cautious in the amount of discretion given to judges in determining pretrial release and bail options. While organizations like the ACLU and Human Rights Watch initially supported California's SB 10 in its elimination of cash bail, the groups eventually opposed the law because they feared it gave judges too much power and would lead to more people behind bars.⁵⁷¹ Critics feared that by giving judges "absolute power" in a state where judges are elected officials, judges might be tempted to "pander to law-and-

⁵⁷⁰ See generally PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> [<https://perma.cc/36CA-HJZ5>] (last visited Apr. 22, 2019). Project Implicit is a non-profit organization that administers a free Implicit Association Test that measures attitudes people may be unwilling or unable to self-report. *Id.*

⁵⁷¹ Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019, 7:25 PM), <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html> [<https://perma.cc/FFH8-QKGW>].

order voters” by favoring detention to release.⁵⁷² A counter to this critique would be an emphasis that judges consider public safety first, but do so in balance with the needs of defendants and their individual circumstances.⁵⁷³ Further, in using their discretion to override a pretrial risk assessment and its proposed conditions regarding pretrial release or detention, judges should be sure to focus on specific risks associated with individual defendants, and not “statistical probabilities or vague generalities.”⁵⁷⁴ The requirement for a specific explanation in writing of why a judge diverted from the recommendation could also be used to counter potential critics of judicial discretion.⁵⁷⁵ This would ultimately allow the judge to have the discretion necessary to make individualized decisions, while maintain a “check” on this discretion.

2. System Accountability

While these implementations will likely help separate the gap in justice between the affluent and the indigent, the only way jurisdictions will know what effect these changes are having on the system is to monitor and reevaluate. With periodic audits and evaluations of pretrial decision-making processes, stakeholders will better understand what is having a positive impact on the system and what causes deficiencies. The authors therefore recommend that with the implementation of Phase Two, a set period of trial, audit, and evaluation should be put into place to give changes the opportunity to produce quantifiable results.

Evaluation will allow pretrial risk algorithms to improve and eliminate bias. Following the standstill of California’s SB 10, law makers introduced a proposal to help prevent improper use and biased conclusions by requiring counties to report on their use of risk assessment tools.⁵⁷⁶ This supplementary legislation falls in line with recommendations given by Human Rights Watch.⁵⁷⁷ In their recommendations following their condemnation of SB 10’s potential pitfalls, Human Rights Watch recommended that state and local governments develop uniform, systematic collection of data based on detention and release decisions and court outcomes to account for fairness in court decisions and evaluate biases like race and economic status.⁵⁷⁸ In regards to algorithmic

⁵⁷² Abbie Vansickle, *So Much for The Great California Bail Celebration*, MARSHALL PROJECT (Aug. 30, 2018, 7:20 AM), <https://www.themarshallproject.org/2018/08/30/so-much-for-the-great-california-bail-celebration> [<https://perma.cc/RXG9-2S3G>].

⁵⁷³ “Not in it for Justice”: *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUM. RTS. WATCH (Apr. 11, 2017), <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly#> [<https://perma.cc/P9VM-ZCM3>] (last visited Apr. 6, 2019) [hereinafter *Not in it for Justice*].

⁵⁷⁴ *Id.*

⁵⁷⁵ NEW JERSEY PRETRIAL JUSTICE MANUAL, *supra* note 15, at 11.

⁵⁷⁶ Ulloa, *supra* note 571.

⁵⁷⁷ *Not in it for Justice*, *supra* note 573

⁵⁷⁸ *Id.*

pretrial assessment tools, Human Rights Watch further recommends complete transparency with any formula or algorithm used and the underlying data used in risk assessments.⁵⁷⁹ Data transparency should be accompanied with some sort of “mechanism for public oversight” and the ability to audit the pretrial assessment tool for calibration and adjustment.⁵⁸⁰ These safeguards would allow jurisdictions to create an evolving tool. By auditing the assessment on a yearly basis and re-calibrating it, a commission on public oversight can eliminate or add factors that move the tool away from biased decisions and can find factors that contribute to understanding defendants’ frequency for failure to appear, and the risk for new criminal activity (NCA) and new violent criminal activity (NVCA).

These evaluations can be used to refine steps made to bail reform or even further develop algorithmic risk assessments. Evaluations could further help to reconcile Professor Stevenson’s stated problem of measuring an algorithm’s results with actual human objectives. By comparing algorithmic results with actual results for failure to appear (FTA) scores, risk for new criminal activity (NCA), and risk of new violent criminal activity (NVCA), pretrial decision-makers will better understand the value of the factors incorporated into in risk assessment tool.⁵⁸¹ In assessing the data, the evaluation could look to the quantitative results of implementation (number of defendants released on bail, reduction in jail population, etc.) and qualitative results (impressions of attorneys and judges, experiences of defendants, etc.). This process could lead to the development of other factors or the elimination of factors that propagate systematic biases. Also, these tools could establish more capable Pretrial Agencies, should jurisdictions wish to implement Phase Three.

C. Phase Three: Creation of Pretrial Agencies in Counties with Populations over 100,000 to Coincide with the Elimination of Cash Bail

One problem with statewide reform in Nevada is its unique geographical makeup. Issues prevalent in Washoe and Clark County can be trivial in comparison to issues faced in more rural counties. Further, rural counties may lack the financial and human capital that might make widespread implementation of any major state reform to bail insurmountable. As such, the authors recommend a specific step for Phase Three based solely on population.

Phase Three creates pretrial agencies in counties with populations of over 100,000 people to coincide with the elimination of cash bail. These agencies would be an alternative to the current system by implementing the risk factor assessment and interview steps from Phase Two, combined with emerging technologies to ensure adequate pretrial supervision. These agencies could model themselves after D.C.’s PSA. In their self-evaluation of pretrial reform

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

and the elimination of cash bail, the state of New Jersey stated that the current operation of their Pretrial Services Program was facing problems with funding, defendant social problems, and issues with technology.⁵⁸² While New Jersey planned to operate their pretrial service agencies solely via court fees, this turned out to be ultimately be unsustainable. Court staff were unable to assist defendants with mental health issues, housing, and/or cases of substance abuse. Further, the state struggled to implement reliable electronic monitoring across all jurisdictions in the state. Essentially, New Jersey found that a state-wide, one-size-fits-all solution was not feasible.

Phase Three intends that should more population dense counties want to fully move away from a cash bail system, they should follow the example set by D.C.'s PSA. While the efforts of D.C.'s PSA are worth emulating, it is important to remember that D.C. is a metropolitan area, with relatively easy access to defendants in an interconnected geographical area as compared to other large cities. D.C.'s PSA also receives funding of almost \$65 million dollars a year.⁵⁸³ While the services and tools D.C.'s PSA use may be scalable to smaller jurisdictions, there is likely a better cost-benefit to using a dedicated pretrial service in jurisdictions with more available funds.

1. *A Full Service Pretrial Agency*

If counties in Nevada wish to fully eliminate cash bail, they will need to take the appropriate steps to ensure that a system is in place to facilitate incentives for defendants to appear, monitor defendants out on release for further crimes, and protect the community at large from potentially violent actions. These agencies, like current pretrial divisions, could be dedicated to the presumption of innocence and release.⁵⁸⁴ While both Clark and Washoe County's pretrial services divisions are currently focused on facilitating tighter turn arounds between arresting agencies and judges, these agencies might need to take on more if a county wishes to eliminate money bail.

A dedicated pretrial agency could do all initial intake for arresting agencies. After a person is arrested, they could be brought directly to a pretrial service case manager who would gather information about the defendant for use in the pretrial risk assessment tool. The case manager could further conduct interviews designed to help discuss subjective topics needed during pretrial decisions. Personal interview information could further be used in determining if the defendant is likely to need a public defender or substance abuse assistance.

Case managers could then facilitate the use of the pretrial decision matrix implemented in Phase Two to create a proper recommendation for the deciding

⁵⁸² N.J. JUDICIARY, *supra* note 289, at 5.

⁵⁸³ CONGRESSIONAL BUDGET JUSTIFICATION 2019, *supra* note 264, at 6.

⁵⁸⁴ *Las Vegas Justice Court Pretrial Services. Division*, LAS VEGAS JUST. CT., http://www.lasvegasjusticecourt.us/divisions/pretrial_services/index.php [<https://perma.cc/T34U-NQSU>] (last visited Apr. 7, 2019).

judge. By taking in the factors of the defendant's algorithmic results and personal interview, these pretrial recommendations would more fully compliment the defendant's individual circumstances. For example, if a defendant lacks a mobile phone, that would likely count against them within an evidence-based risk assessment tool. However, during a personal interview, a case manager determines how to best contact the defendant. A greater understanding of the defendant's circumstances would allow the case manager to make a more particularized recommendation, allowing the defendant to still be released and contacted.

A dedicated, full service pretrial agency is likely to help facilitate defendant appearances in court. By creating a dedicated pretrial service agency like D.C.'s PSA, Nevada counties could facilitate a relationship between case managers and defendants, like the D.C. model. Dedicated pretrial service agencies would allow those working through the pretrial process to have a support system to help them appear in court at the appropriate time. D.C.'s PSA saw appearance rates of 88 percent by creating a system that uses case managers, reminders, and potential pretrial supervision.⁵⁸⁵ Further, with a system of managing and monitoring, a full-service pretrial agency would be equipped with the appropriate information when defendants failed to make court appearances.

Under current Nevada law, if a commercial bond agency receives notification of a defendant's failure to appear, they have 180 eighty days to produce the client or give an adequate reason for a failure to appear.⁵⁸⁶ If counties were to eliminate commercial bonds altogether, the county would need to facilitate the recovery of defendants. By creating an integrated agency, case managers would be able to monitor a defendant's compliance with the conditions and/or rules of supervision. This would allow case managers to be more aware that a defendant is likely to fail to make a court appearance, and act preventatively rather than reactionarily to a failure to appear. Further, by being involved in supervision and maintaining direct contact with defendants, a pretrial agency would have the information about a defendant's likely location, contacts, and/or aliases. A dedicated pretrial agency could monitor defendants for new criminal acts and facilitate tools to help defendants avoid new criminal acts. By monitoring defendants and giving them the opportunity and tools to properly prepare for trial, a pretrial agency could help mitigate the risk that defendants out on pretrial release will commit new criminal acts. The agency can monitor via over the phone check-in's, in person check-in's, or even electronic monitoring.

With a dedicated agency, tools could be put in place to automatically send text reminders to defendants informing them of their court dates and potential

⁵⁸⁵ CONGRESSIONAL BUDGET JUSTIFICATION 2019, *supra* note 264, at 27.

⁵⁸⁶ *Pretrial Release: Nevada*, NAT'L CONF. ST. LEGISLATURES (Mar. 13, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-nevada.aspx> [https://perma.cc/2DWD-CT2U]; NEV. REV. STAT. § 178.508 (2019); NEV. REV. STAT. § 178.509 (2019); NEV. REV. STAT. § 178.516 (2019).

consequences for failure to appear. These and other messages from a dedicated agency would help to reduce failure to appear rates and therefore also reduce the number of bench warrants issued.⁵⁸⁷ For example, the Las Vegas Justice Court's Pretrial Service Division has implemented an automated system to send reminder texts for required supervision check-ins.⁵⁸⁸ A reduction in the number of bench warrants issued would create a reduction in the risk new criminal activity (NCA) committed by defendants.

It is documented that drug users are more likely than nonusers to commit crimes,⁵⁸⁹ which can be partially attributed to the fact that it is a crime to possess, manufacture, or use many drugs.⁵⁹⁰ One Bureau of Justice Statistics study in 2006 found that 17 percent of state prisoners and 18 percent of federal inmates committed offenses to get money for drugs.⁵⁹¹ In 2012, the White House's Arrestee Drug Abuse Monitoring report (ADAM II) findings showed that 60 percent of arrestees tested positive for some drug at the time of their arrest.⁵⁹² Fewer than a third of those arrested had ever been in outpatient or inpatient drug or alcohol treatment.⁵⁹³

As mentioned above, one of the problems faced by New Jersey's statewide bail reformation was the ability for pretrial service agencies to assist with substance abuse. A dedicated pretrial service agency could partner with or even develop programs to help defendants with substance abuse or drug related issues. By offering access to social services, a pretrial service agency would be a positive step towards not only developing a more equitable court system, but towards defendants' rehabilitation. By giving defendants access to tools that might help them overcome issues with substance abuse the agencies can help move the defendants away from the criminal lifestyle that may have influence on their habits.

A dedicated pretrial agency could develop and facilitate the use of more modern uses of electronic monitoring. By properly using and maintaining electronic monitoring systems, and then communicating with judges and other judicial stakeholders about the benefits of electronic monitoring, case managers could help overcome any unfamiliarity with or doubt about electronic monitor-

⁵⁸⁷ USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES, *supra* note 260, at 18.

⁵⁸⁸ LAS VEGAS JUST. CT., *supra* note 584.

⁵⁸⁹ *Fact Sheet: Drug-Related Crime*, U.S. DEP'T JUST. 1 (Sept. 1994), <https://www.bjs.gov/content/pub/pdf/DRRC.PDF> [<https://perma.cc/CLR5-GV6A>].

⁵⁹⁰ *Id.*

⁵⁹¹ CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FED. PRISONERS, 2004 6 (Oct. 2006), <https://www.bjs.gov/content/pub/pdf/dudsf04.pdf> [<https://perma.cc/VN5G-M4UM>].

⁵⁹² OFFICE OF NAT'L DRUG CONTROL POLICY, ADAM II: 2012 ANNUAL REPORT 34 (May 2013), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/adam_ii_2012_annual_rpt_final_final.pdf [<https://perma.cc/S55W-HNYA>].

⁵⁹³ *Id.*

ing systems.⁵⁹⁴ One study found that many judges were unfamiliar with or only somewhat familiar with electronic monitoring programs.⁵⁹⁵ This study further stipulated that funding was a concern for electronic monitoring but that by using portions of jail budgets, overall impact on budgetary concerns would be alleviated and would ultimately cost less than detaining a defendant.⁵⁹⁶

A full service agency would need to find its place in the criminal justice system. Human Rights Watch recommended to governments looking at bail reform that pretrial service departments and probation departments should be separate.⁵⁹⁷ This separation is to ensure that a pretrial agency is focused solely on helping get people to court and providing access to other services like mental health counseling or voluntary drug treatment.⁵⁹⁸ But if the agency, from its inception, is focused on not only aiding defendants pretrial, but also monitoring those under conditional supervised release, jurisdictions could eliminate inter-agency communication break downs and have a greater opportunity to ensure court appearance and public safety.

While pretrial supervision is likely to help with court a defendant's failure to appear and give defendants a greater opportunity for equitable treatment in court, there may not be a statistical link between pretrial supervision and "no criminal arrest." A study in 2013 by the LJAF found defendants who were deemed moderate to high risk by a risk assessment tool and given supervised release for more than 180 days were 12 to 36 percent less likely to have an NCA, risk of new criminal activity, score.⁵⁹⁹ However, because some models showed a statistically significant relationship while others only approached statistical significance, the LJAF found these findings to be tentative.⁶⁰⁰ Supervised release is an important consideration when thinking of eliminating cash bail, given that this model was run on defendants who scored moderate to high risk for a new criminal activity (NCA). A dedicated pretrial service agency could be used to help limit the danger of new criminal acts being committed in the community at large.

⁵⁹⁴ See PAMELA S. DeVULT, INSTITUTE FOR COURT MANAGEMENT, FEASIBILITY OF ELECTRONIC MONITORING FOR PRETRIAL RELEASE IN THE LEE'S SUMMIT MUNICIPAL COURT 3 (May 2011), <https://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2011/Electronic%20Monitoring%20for%20Pretrial%20Releases.ashx> [https://perma.cc/BY65-9MTK].

⁵⁹⁵ *Id.* at 25.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Not in it for Justice*, *supra* note 573.

⁵⁹⁸ *Id.*

⁵⁹⁹ CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, LAURA & JOHN ARNOLD FOUND., EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 3–4 (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_Supervision_FNL.pdf [https://perma.cc/QV82-A6ZK].

⁶⁰⁰ *Id.*

2. *The Problem with Statewide Reform*

While the PJI gave New Jersey's efforts an "A", the state acknowledged that it was floundering under its new policy implementation. Should Nevada wish to move away from cash bail and towards more equitable release standards, it must remember the issues highlighted by New Jersey and the missteps made by California. New Jersey took two years to implement their move away from bail and still came up short on funds. California's move away from cash bail created a fear that more defendants will end up in pretrial detention than before. New Jersey and California both seemingly failed to tailor their reforms to the needs of individual jurisdictions.

By using the resources and infrastructure of more urban counties, Nevada can use these pretrial agencies as examples of effective methods for pretrial release. A dedicated agency in higher population counties in Nevada can be used as a proving ground. By monitoring the results and analyzing what parts of the pretrial agency have the greatest effect on creating equitable outcomes, rural counties in Nevada can then scale down these types of services and fit them to their needs. For example, in counties with larger geographic areas it might be harder to facilitate in person check-ins. But if a larger, more populated county found that in person check-ins had a smaller effect on failure to appear and new criminal activity than automated messaging, a rural county might invest resources into an automated messaging system.

The implementation of these phases may take the form of a statute or administrative action in individual jurisdictions. After analyzing both success and failures of jurisdictions outside Nevada, the authors recommend the phases of reform be implemented by administrative bodies in individual jurisdictions overseen by a central statewide body to provide guidance and resources, similar to pretrial reform in Illinois and Pennsylvania.⁶⁰¹ This would allow administrative bodies to rollout reform in a manner that does not inhibit or counteract current efforts to improve the pretrial detention system, rather than forcing jurisdictions to accommodate a one-size-fits-all approach.

Further, a state-sponsored body will provide a ground for judges and others involved in pretrial services to be confident in the tools used to set bail in a more equitable and just manner, as well as provide a body that has the capability and resources to evaluate, update, and improve these tools with real and tested data. Moreover, the State Legislature may use these to develop a plan for gradual implementation, to allow jurisdictions to effectively and efficiently implement changes to ensure the least restrictive means are imposed in all pretrial decisions. Overall, the purpose of these recommendations is to develop methods to ensure the only reasons a person is detained during the pretrial process is if they are either a danger to the community or likely to flee. No person should have to spend time detained before they are convicted of a crime merely because they do not have the means to pay for their freedom. By implementing

⁶⁰¹ See Discussion *supra* Section II.C and D.

these phases, jurisdictions in Nevada can move away from the problems that have arisen in modern bail systems, while avoiding the growing pains many other jurisdictions are experiencing.

CONCLUSION

In an everchanging social climate, archaic legal traditions must evolve to meet the social challenges of today. In an age of mass incarceration where the poor are often trapped in pretrial detention due to the inability to afford bail, state legislatures and judiciaries need to adapt bail proceedings to protect the constitutional rights of the citizenry and avoid the harms of cash bail bonds. Such harms can be legal and social in nature, ranging from the data-supported fact that pretrial detainees are more likely to plead guilty independent of their own culpability to the impoverished losing employment because they cannot financially post bail. To remedy the detriments resulting from cash bail, this article advocates its eventual abolishment and replacement with alternative and less restrictive means to achieve the same overall policy rationale.

Recently, the United States has entered a new stage of bail reform to move away from a “tough on crime” stance towards a more defendant-oriented means of pretrial release. States have approached this goal by enacting legislation such as the reduction of cash bail, the use of pretrial risk assessments, and even a limitation as to the number of defendants who can be held in pretrial detention. In 2018, California passed Senate Bill 10, the California Money Bail Reform Act, which required judges to consider the defendant’s finances when instituting bail and entertain possible noneconomic means for pretrial release. The Act was met with opposition as prominent organizations such as the American Civil Liberties Union feared expansive judicial discretion that would further promulgate inequalities amongst minorities and the impoverished. Nevertheless, despite opposition, UCLA School of Law joined with other criminal justice advocacy groups to launch a pilot program with the goal of eliminating or reducing bail for felons who remain incarcerated merely because they cannot financially afford bail. This program has reported successes such as pretrial release or induction into drug rehabilitation facilities to await trial. This glimmer of hope, in conjunction with other reform efforts such as the establishment of Washington D.C.’s Pretrial Services Agency and New Jersey’s algorithmic pretrial assessment, demonstrate that bail reform efforts are having positive effects even if the measures up to this point remain imperfect.

Nevada, however, still suffers from high incarceration rates, incapacitating more people on average than other states, at a rate that is 15 percent higher than the national average. Such incarceration has incurred substantial costs. Since 2012, spending in relation to high incarceration has risen 20 percent each year. Nevada’s cash bail system is founded upon some of the most detailed and comprehensive statutes in the country. While the Nevada Constitution prohibits excessive bail, judicial discretion becomes the ultimate factor in determining if an arrestee will receive pretrial release and if so, upon what terms that release is

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conditioned. Many of Nevada counties employ standardized bail schedules, but they remain nonuniform in practice.

Despite high incarceration and bail inconsistencies in the state, Nevada has been slow to enact bail reform. For this purpose, this article makes several bail reform recommendations to defy the harms of the cash bail system, introducing the reforms as phases. In Phase One, bail schedules should be eliminated to promote dialogue regarding current bail procedure, endorse alternative bail practices, and instill principles of equality. Phase Two advocates the implementation of a more objective-based pretrial practice through the use of an evidence-based pretrial risk assessment within a pretrial options matrix. In doing so, the process will eradicate socioeconomic factors that rely upon race or class for bail determinations. As for Phase Three, in counties with a population of 100,000 people or more, cash bail will be completely abandoned and replaced by a pretrial agency dedicated to bail setting services like that of Washington D.C. Such an agency would provide invaluable help to defendants to obtain release and ultimately navigate all pretrial proceedings while also considering the safety concerns and flight risk of allowing the defendant back into the community. By following these Phases, the new bail process will protect Nevadans from the misgivings of the current cash bail system.