Give Me Liberty or Give Me … Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration

Muhammad B. Sardar

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Give Me Liberty or Give Me . . . Alternatives?

ENDING CASH BAIL AND ITS IMPACT ON PRETRIAL INCARCERATION

“No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones.”¹

INTRODUCTION

When police officers arrested seventeen-year-old Kalief Browder for allegedly stealing a backpack, they said, “We’re just going to take you to the precinct. Most likely you will go home.”² But Kalief Browder never went home, and instead, spent the next three years of his life languishing in a Rikers Island prison cell.³ After police arrested Browder, a judge set his bail at $3,000, a fee that his family could not afford, and Browder spent years suffering in Rikers Island before the prosecution eventually dismissed his case.⁴ After three years of jail time and nearly two years of solitary confinement, Kalief Browder committed suicide at the age of twenty-two.⁵

Unfortunately Browder’s case is not an anomaly,⁶ but a tragic example of the norm that is due in part to a cash bail system.

⁴ See Peter Holley, Kalief Browder Hanged Himself After Jail Destroyed Him. Then ‘a Broken Heart’ Killed his Mother, WASH POST. (Oct.18, 2016); Wendy R. Calaway & Jennifer M. Kinsley, Rethinking Bail Reform, 52 U. RICH. L. REV. 795, 799 (2018).
⁵ See Holley, supra note 4; Schwirtz & Michael, supra note 3.
⁶ The havoc that cash bail has wreaked on defendant’s lives is harrowing: Bill Peyser, a seventy-three-year-old cab driver with no prior criminal record, was charged with attempted murder when confronting his noisy neighbors. Despite eventually being found not
that disproportionately impacts minorities and the indigent.\(^7\) The United States has a prison population of over two million; nearly five hundred thousand more than China, the next highest country.\(^8\) Of this two million plus, around 540,000 people are pretrial detainees, or better put, these individuals have been arrested, but have not yet been convicted of a crime and are presumed to be innocent.\(^9\) Even though the prison population has steadily increased in the last fifteen years, the conviction rate has remained stable, exhibiting that the “[d]etention of the legally innocent has been consistently driving jail growth.”\(^10\)

One of the main drivers of the growing rate of incarceration has been the cash bail system.\(^11\) Congress had envisioned the cash bail system for the primary purpose of reducing pretrial crime and


flight, but the majority of pretrial detainees are charged with nonviolent offenses, where these risks are exceedingly low. Instead, the cash bail system has created a two-tiered system of injustice, akin to a modern-day debtor’s prison, where the poor are imprisoned and the rich are released.

The resulting inequities stemming from money bail regimes have grave consequences for both the pretrial detainee and the public at large. Pretrial detainees have a tougher time mounting a defense and are much more likely to enter into guilty pleas and receive longer sentences than those who can afford bail. The detention itself places a long-term toll on the defendant’s mental health, current and future employment prospects, and family well-being. From a societal perspective, these bail policies continue to strengthen the firm grip of institutional racism in the U.S. criminal justice system, with money bail disproportionately affecting minorities. Furthermore, the financial cost of money bail places an enormous burden on American taxpayers and state budgets. In 2018, for example, the Hamilton Project estimated that pretrial detention “cost[] taxpayers roughly $11.71 billion each year.”

12 Originally, the sole reason for bail was to ensure a defendant reappeared in court. Following the Bail Reform Act of 1984, many jurisdictions now also factor in the defendant’s dangerousness to the community. See infra Section I.B.


15 See id.


17 See infra Part II.

States, in turn, have responded to these expenses by slashing funds to other programs, including higher education.\textsuperscript{20}

The inequities and costs of cash bail have not gone unnoticed, as states like New Jersey, Philadelphia, California, and New York have all taken steps to end or reform the cash bail system.\textsuperscript{21} As of 2018, California became the first state to statutorily eliminate money bail,\textsuperscript{22} but its risk assessment tool—a tool many jurisdictions use in lieu of cash bail—poses troubling consequences.\textsuperscript{23} Risk assessment tools are of questionable efficacy and their use can potentially perpetuate racial inequities. Other non-financial alternatives, like electronic monitoring, pose similar problems and ignore the fundamental presumption of innocence pretrial defendants should be afforded.\textsuperscript{24}

The inhumane system of cash bail should not be replaced with troubling alternatives. Although alternatives like California’s risk assessment tools and electronic monitoring are steps in the right direction, these alternatives still pose some of the same problems associated with cash bail. One example of an alternative procedure that has solved some of these problems is Washington, D.C.’s pretrial system, where cash bail has essentially been eliminated and replaced.\textsuperscript{25} D.C.’s success can be traced to its strong presumption


\textsuperscript{23} \textit{See Note, Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing}, 131 HARV. L. REV. 1125, 1132 (2018) [hereinafter \textit{Bail Reform}] (noting the substantial criticism leveled at risk assessment tools for their inaccuracy and dependence on racially biased data); infra Section III.A.

\textsuperscript{24} \textit{See infra} Part III for discussion on the drawbacks of relying on electronic monitoring and risk assessment tools.

\textsuperscript{25} \textit{See Marimow, supra} note 22.
towards release, procedural protections for pretrial defendants, and more humane pretrial services. This system, however successful, still imposes some onerous pretrial restrictions and employs a risk assessment tool that utilizes racially biased socioeconomic inputs.

State legislatures should take the successful framework of Washington, D.C.’s pretrial system one step further by releasing misdemeanor defendants on personal recognizance and providing greater procedural protections for felony defendants. The efforts of community bail funds across America have shown that a vast majority of defendants will return to court if adequately notified, exemplifying that pretrial restrictions are unnecessary punitive measures. By releasing all misdemeanor pretrial defendants and ensuring adequate procedural protections for felony defendants, states can restore some semblance of humanity to our criminal justice system.

This note proceeds in the following four parts. Part I presents a brief history of cash bail and an overview of current pretrial practices. Part II addresses the importance of eliminating cash bail by showing the disastrous effects that the system can have on individuals, indigent and minority defendants, and the U.S. economy. Part III discusses two of the more popular alternatives to cash bail—risk assessments and electronic monitoring—and illustrates that these two alternatives pose equally troubling consequences as that of cash bail. Part IV offers the solution to ending cash bail: state legislatures should adopt bail reform laws that release misdemeanor pretrial defendants and restore adequate procedural protections for felony defendants.

I. HISTORY OF CASH BAIL AND CURRENT PRACTICES

The present problem of cash bail can be traced back to the passage of the Bail Reform Act of 1984 and its reversal of decades of progressive bail reform. The Supreme Court’s decision in United States v. Salerno, upholding the constitutionality of the Act, further aided the proliferation of the current cash bail system in the United States and helped contribute to the incarceration of

27 See id.; infra Section III.A.
29 See infra Section I.B
millions of pretrial defendants. Before addressing the history of cash bail, this note provides a brief overview of the bail process.

A. Basics of Bail

Bail laws vary state to state, but at a basic level, a person who is arrested is entitled to pretrial release except in a few rare cases. A judge can release a pretrial defendant on personal recognizance (a promise to return to court), with conditions (i.e., electronic monitoring, drug testing, and/or pretrial service supervision), or on bail. If a pretrial defendant is not released on personal recognizance, the court generally must justify the outcome with “a finding of a significant risk that the defendant will not appear at future court appearances or will commit a serious crime in the community during the pretrial period.”

A pretrial defendant can be released on bail pursuant to a secured or unsecured bond. An unsecured bond does not require an upfront payment for release, but if a defendant misses subsequent court dates he or she will owe the court money. Secured bonds require the pretrial defendant to pay his or her bond amount first before securing release. The amount of money the court requires the defendant to pay “as a condition of his release is that person’s cash bail or money bail.” In some cases, a defendant can secure release by paying ten percent of the total bond amount directly to the court. In those cases, if the defendant makes their subsequent court appearances, the court will often return the ten percent amount. But in most instances, when a defendant cannot afford to pay the bond set by the court, he or she must turn to a bail bonds agent. The agent, or surety, will make the payment for the pretrial defendant through a “surety bond.”

If a defendant cannot afford the bail amount, “either personally or through a surety, they will remain incarcerated based on their inability to pay the money bail.”

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31 See Bail Reform, supra note 23, at 1126–27.
32 Id. at 1127.
33 CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 5 (2016) [hereinafter BAIL PRIMER].
34 Id. at 6.
35 Id.
36 Id.
37 Id.
38 Rabuy & Kopf, supra note 10, at 1 n.6.
39 BAIL PRIMER, supra note 33, at 6.
B. History of Cash Bail

The current cash bail system is deeply rooted in English law. When the United States declared its independence, English law on pretrial detention had three elements: (1) a determination if a defendant had the right to be released on bail; (2) a habeas corpus procedure; and (3) protection against excessive bail. Initially, the American colonies embraced nearly all of England’s bail practices, with some slight differences. But cultural and social differences in beliefs about criminal justice, crime rates, and colonial customs led to a more liberal criminal penalty law in the American colonies. For example, Pennsylvania, which served as “the model for almost every state constitution adopted after 1776,” provided that nearly all prisoners shall be bailable with certain exceptions for capital offenses.

Contributing to the progressive bail policies of the American colonies was the embrace of the English bail tradition of personal sureties. Sureties “were unpaid and unreimbursed,” and merely required a “promise[] to pay . . . in the event of default.” In fact, personal sureties and promises to pay were the foundation of the bail system adopted in the American colonies.

The theoretical underpinning of these protections was “grounded in the presumption of innocence, an ‘axiomatic and elementary’ right to protect defendants prior to any finding of guilt.” The United States Constitution eventually codified these pretrial detainee protections in both the Eighth Amendment.

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41 This was “answered by the Petition of Right,” which contained “a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king’s bench to bail any case not bailable by the lower judiciary.” TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 4 [hereinafter THE HISTORY OF BAIL] (Sept. 24, 2010), https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [https://perma.cc/MP7G-WMJF].

42 Id.

43 Id.

44 Id.; see also TIMOTHY R. SCHNACKE, CTR. LEGAL & EVIDENCE-BASED PRAC., ‘MODEL BAIL LAWS’: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 21 (Apr. 18, 2017) (noting America expanded the right to release to nearly all defendants and associated release “with liberty and freedom”).

45 THE HISTORY OF BAIL, supra note 41, at 4–5 (quoting June Carbone, Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 SYRACUSE L. REV. 517, 532 (1983) (internal quotation marks omitted)).


47 Id.

48 Id.

Amendment’s Excessive Bail Clause and the Judiciary Act of 1789. These doctrinal protections remained the norm for nearly the next two centuries.

In the 1800s, American bail practices started to change because personal sureties were no longer willing to take responsibility over defendants without payment. American judges “began placing secured money conditions on defendants hoping they could ‘self-pay.’” When defendants were unable to pay their bail amounts, they asserted that the amounts were excessive. But American courts began claiming “that an amount was not excessive simply because it was unattainable.” As other countries began to also grapple with the loss of personal sureties, “America acted alone . . . when, in roughly 1900, it began allowing commercial sureties by gradually discarding the longstanding rules against profit and indemnification at bail.” Around this time, most courts began requiring secured conditions, or full payment of bail rather than a promise to pay, as a condition of release. This increased use of commercial sureties became problematic as large inequities between those who could afford release and those who could not became apparent.

During the 1960s, it appeared that Americans were rethinking the cash bail system and charting a course towards a more just pretrial procedure. At that time, cash bail was thrust into the national spotlight as legislatures and the courts questioned the effectiveness of secured financial conditions. In

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50 See U.S. CONST. amend. VII (“Excessive bail shall not be required . . . .”), Stack v. Boyle, 342 U.S. 1, 4 (1951) (“From the passage of the Judiciary Act of 1789 . . . federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail.” (emphasis in original)).
51 Yang, supra note 49, at 1411.
52 Schnacke, supra note 46, at 6.
53 Id.
54 Id. (quoting TIMOTHY R. SCHNACKE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL, at n.73 & accompanying text (Nat’l Inst. of Corrections 2014) (internal quotation marks omitted)).
55 Id. at 7.
56 Id.
57 Allen, supra note 40.
58 Robert Kennedy, then acting U.S. Attorney General, exemplified this reform-minded era when he stated: “usually only one factor determines whether a defendant stays in jail before trial.’ That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor simply is money.” KENNEDY SCORES BAIL INJUSTICES; CHANGES IN SYSTEM URGED BY THE ATTORNEY GENERAL, N.Y. TIMES (May 30, 1964), https://www.nytimes.com/1964/05/30/archives/kennedy-scores-bail-injustices-changes-in-system-urged-by-the.html [https://perma.cc/XH93-TTEY].
59 See John S. Goldkamp, DANGER AND DETENTION: A SECOND GENERATION OF BAIL REFORM, 76 J. CRIM. L. & CRIMINOLOGY 1, 2, 2 n.7 (1985) (listing reform efforts by legislatures, non-profits, and the courts in the 1960s); see also Caleb Foote, COMPULSORY APPEARANCE IN COURT: ADMINISTRATION OF BAIL IN PHILADELPHIA, 102 U. Pa. L. REV. 1031, 1071 (1954) (“The only resolution of the clash between bail and defendants’ rights is to abandon the necessity of bail
response to the growing criticism directed at the efficacy of cash bail and the increasingly large bail amounts judges discretionally imposed, Congress passed the Bail Reform Act of 1966.\textsuperscript{60} The Act attempted to reform America’s criticized bail system by creating a presumption towards release for all non-capital defendants.\textsuperscript{61} Furthermore, if a judge believed that release on recognizance would be inadequate in assuring the pretrial detainee’s appearance at trial, the judge was to choose the least restrictive alternative condition.\textsuperscript{62} Only those charged with capital offenses were given a different standard of release, a standard that factored in a defendants potential danger to the community.\textsuperscript{63}

Many states began to emulate the Bail Reform Act’s provisions, some going as far as relying solely on personal promises rather than financial conditions.\textsuperscript{64} In the culmination of this reform-minded era, professional organizations issued standards in relation to bail issues at a national level.\textsuperscript{65} The American Bar Association (ABA), for example, attacked the bail system’s emphasis on financial constraints stating that the proposition “that risk of financial loss is necessary to prevent defendants from fleeing prosecution . . . is itself of doubtful validity.”\textsuperscript{66}

Despite impressive beginnings, these reforms began waning and many of the release on recognizance programs ceased operating or barely operated due to shaky financial and official support.\textsuperscript{67} Initially, the sole congressional standard for assessing bail was set forth for the purpose of deterring a defendant’s risk

\textsuperscript{60} Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214. The legislative history of the act explicitly stated the problems of the cash-centered bail system: “The present system of monetary bail would be adequate if all could afford it. The facts, however, are to the contrary. The rich man and the professional criminal readily raise bail regardless of the amount. But it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial.” H. REP. NO. 89-1541 (1966) reprinted in 1966 U.S.C.C.A.N. 2293, 2299.

\textsuperscript{61} See Bail Reform Act of 1966, 80 Stat. at 214; \textit{The History of Bail, supra} note 41, at 12.

\textsuperscript{62} Id.

\textsuperscript{63} \textit{The History of Bail, supra} note 41, at 12; see also Calaway & Kinsley, \textit{supra} note 4, at 800–01.

\textsuperscript{64} See \textit{The History of Bail, supra} note 41, at 12–13.

\textsuperscript{65} See PA. COMM. FOR CRIM. JUST. STANDARDS & GOALS, THE CRIMINAL JUSTICE STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION DIGESTED FROM A NATIONAL STRATEGY TO REDUCE CRIME 53 (1973) (“The Commission believes that a person's financial resources should not determine whether he is detained prior to trial.”); AM. B. ASS'N CRIM. JUST. STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE, PRETIAL RELEASE 31 (3d ed. 2007) (“[T]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view.”).

\textsuperscript{66} AM. B. ASS'N CRIM. JUST. STANDARDS COMM., \textit{supra} note 65, at 31.

\textsuperscript{67} \textit{The History of Bail, supra} note 41, at 16.
of flight.\textsuperscript{68} In fact, the 1966 Bail Reform Act “did not expressly permit a judge to consider the defendant’s future dangerousness or community safety during the release decision” for non-capital offenses.\textsuperscript{69} But, as with many rash restrictions on liberty, the death knell for bail reform was ushered in under the banner of law and order and racially-charged rhetoric.\textsuperscript{70}

The Nixon administration first attempted to strike against the Bail Reform Act of 1966 by unsuccessfully lobbying for an amendment to allow for preventative detention; in other words, allowing a judge to consider a defendant’s potential danger to the community in setting bail.\textsuperscript{71} Congressional compromise led to the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, which expressly allowed D.C. to put community safety on equal footing with risk of flight in setting a bail amount.\textsuperscript{72}

Due to highly publicized violent crimes committed by released pretrial defendants and growing public dissatisfaction with crime, Congress enacted the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984.\textsuperscript{73} The Act amended the Bail Reform Act of 1966 to include dangerousness to the community as a factor in assessing bail due to “the alarming problem of crimes committed by persons on release.”\textsuperscript{74} The 1984 Act contained numerous provisions that helped lead to the current system.\textsuperscript{75} First, the Act allowed a judge to exercise even more

\textsuperscript{68} Id. at 14. “It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.” H. REP. NO. 89-1541 (1966) reprinted in 1966 U.S.C.C.A.N. 2293, 2296.

\textsuperscript{69} THE HISTORY OF BAIL, supra note 41, at 14.


\textsuperscript{74} United States v. Salerno, 481 U.S. 739, 742 (1987) (quoting S. REP. NO. 98–225, at 3 (1983) (internal quotation marks omitted)).

\textsuperscript{75} For example, every defendant charged with a felony drug offense is subject to detention. See Thomas E. Scott, Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis, 27 AM. CRIM. L. REV. 1, 33 (1989). This is especially problematic considering that the “war on drugs” has had a disparate impact on African Americans, who as a group are targeted and arrested by police officers for non-violent drug offenses at a higher
discretion than the 1966 Act by expressly allowing consideration of community safety in deciding whether to detain a pretrial defendant. This increased discretion can be problematic when one considers a judiciary that is often out of step with the jurisdiction they preside over and the inherent racial biases, be it implicit or explicit, against minority defendants. Furthermore, the idea that “future dangerousness” can be accurately predicted is widely considered to be false in both the science and psychiatry community. Second, “the Act create[d] a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.” The list of drug offenses satisfying the “serious drug crime” category had the effect of disproportionately imprisoning minority defendants. Lastly, the Act provided defendants with minimal procedural protections from the prosecutors seeking to confine them:

The Act contains little to balance out the reliance on predicting dangerousness for the defense side. Evidence of other crimes may be
presented as hearsay, which is not subject to cross-examination. There is no notice to defendants that prosecutors may seek pretrial detention based on prior crimes or behavior. Additionally, the 1984 Act does not require that there be any confrontation between the defendant and the prosecutor who proffers the evidence.\textsuperscript{81}

The Act survived a constitutional challenge in \textit{United States v. Salerno}, where the Supreme Court held that the Act violated neither the Fifth Amendment’s Due Process Clause nor the Eighth Amendment’s Excessive Bail Clause.\textsuperscript{82} As to the respondent’s due process challenge, the Court held that Congress had a compelling and legitimate interest in preventing danger to the community.\textsuperscript{83} The Court grounded this ruling on the notion that the congressional purpose in passing the Act was not to \textit{punish} pretrial defendants but instead the Act was a form of regulation.\textsuperscript{84} The Court also minimized the respondent’s contention that predictions of future dangerousness are inaccurate, stating "there is nothing inherently unattainable about a prediction of future criminal conduct."\textsuperscript{85} In addressing the respondent’s Eighth Amendment contention, that the right to bail should be calculated solely based on consideration of flight and not future dangerousness, the Court held that nothing in the Eighth Amendment precludes a court from considering factors other than risk of flight.\textsuperscript{86}

With that ruling, the \textit{Salerno} Court solidified the constitutionality of detention based on pretrial dangerousness, a ruling that has since contributed to the imprisonment of innumerable pretrial detainees.\textsuperscript{87} Justice Marshall eloquently summed up the impact of the decision in his dissent:

\begin{quote}
\textsuperscript{81} Appleman, \textit{supra} note 78, at 1331 (footnotes omitted).
\textsuperscript{83} \textit{Id.} at 752.
\textsuperscript{84} \textit{Id.} at 747–48. Justice Marshall’s dissent highlighted this false dichotomy when he stated "[t]he majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement." \textit{Id.} at 759 (Marshall, J., dissenting).
\textsuperscript{86} \textit{Salerno}, 481 U.S. at 752–53.
\textsuperscript{87} The Salerno decision, by ratifying a state’s ability to detain individuals based on their potential dangerousness, led to an increase in the rate of pretrial incarceration. See Allen, \textit{supra} note 30, at 653 (noting that, after Salerno pretrial detention rates increased because states amended their bail statutes to allow for more arrestees to be detained based on future dangerousness). Furthermore, by rejecting the contention that predicting future dangerousness is inaccurate, the Salerno decision helped contribute to the pretrial detention of the innocent. See Michael J. Eason, \textit{Eight Amendment—Pretrial Detention: What Will Become of the Innocent?}, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1066 (1988) (Even those who favor some form of pretrial detention agree that “the risk of
Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be “dangerous.” Our Constitution . . . cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.\textsuperscript{88}

While States are free to fashion their own bail practices, these practices must still adhere to a constitutional floor.\textsuperscript{89} \textit{Salerno} allowed this constitutional floor to include fear-based detention.

\section*{C. Current Practices}

After the passage of the Bail Reform Act of 1984 and the \textit{Salerno} decision, states began to adopt the federal position’s emphasis on factoring in an individual’s dangerousness to the community,\textsuperscript{90} effectively reversing any momentum from the previous bail reform era.\textsuperscript{91} These state statutes reflected the influence of tough on crime rhetoric\textsuperscript{92} and effectively increased the use of pretrial incarceration.\textsuperscript{93} In essence, “nearly every state has incorporated . . . two purposes for bail”: community safety and erroneous detention under the Bail Reform Act [of 1984] is uncomfortably high.”; Craig Ethan Allen, Case Note, \textit{Pretrial Detention and the Loss of Innocence}, United States v. Salerno, 11 HAMLIN L. REV. 331, 344–45 (1988) (due to the inaccuracy of predicting future dangerousness, judges might err on the side of detention in close cases thereby “ensuring a ‘larger number of erroneous confinements—that is, confinements of persons predicted to engage in violent crime who would not, in fact, do so.’”) (quoting Alan M. Dershowitz, \textit{The Law of Dangerousness: Some Fictions About Predictions}, 23 J. LEGAL EDUC. 24, 32 (1970)).

\textsuperscript{88} \textit{Salerno}, 481 U.S. at 767 (Marshall, J., dissenting).


\textsuperscript{90} These bail provisions have come to be known as “preventative detention” statutes. Michael W. Youtt, Note, \textit{The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process}, 22 GA. L. REV. 805, 836 (1988).

\textsuperscript{91} \textit{The History of Bail, supra} note 41, at 18 (“By 1999, it was reported that at least [forty-four] states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision.” (citing EVIE LOTZE ET AL., PRETRIAL SERVS. RES. CTR., THE PRETRIAL SERVICES REFERENCE BOOK 12 (1999)).

\textsuperscript{92} See Calaway & Kinsley, \textit{supra} note 4, at 804 (“Judges do not want to appear soft on crime and are acutely aware that they may be held responsible if crimes are committed during the pretrial period.”); Stephen B. Bright, \textit{Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?}, 72 N.Y.U. L. REV. 308, 320 (1997) (noting New York politicians often dole out criticism for bail decisions adverse to the prosecution).

\textsuperscript{93} See SUBRAMANIAN ET AL., \textit{supra} note 13, at 7 (“By every measure, the scale at which jails operate has grown dramatically over the past three decades. The number of annual admissions nearly doubled, from six million in 1983 to 11.7 million in 2013.”).
flight risk.94 These standards typically make judges exercise individual determinations based on factors like: “the nature and circumstances of the offense charged, the weight of the evidence, family ties, employment, financial resources, and character and mental condition of the defendant.”95

Despite the Supreme Court’s emphasis on individual bail determinations,96 many states have also adopted the bail schedule, a procedural device that eradicates any sort of individualized inquiry into a defendant.97 Bail schedules are guidelines that provide judges with standardized bail amounts based solely on the offense charged, thereby ignoring the individual characteristics of a defendant.98 These systems, which can be mandatory or merely advisory, usually provide a minimum, maximum, “or a range of sums to be imposed for each crime.”99 In one survey, sixty-four percent of county respondents indicated that they utilized some form of a bail schedule.100 The problem with uniformly imposing such bail amounts is that these systems, in effect, operate to imprison pretrial detainees often charged with low-level crimes.101

Driven by the injustice of cash bail, a new bail reform wave is currently occurring, where many prosecutors, defense attorneys, and judges agree that the system is ineffective and needs to be replaced.102 Many alternatives to money bail have been both proposed, and in some cases, adopted by states and counties throughout the United States.103 In order to understand

95 Id. (citing MInN. R. CRIM. P. 9.02; N.J. COURT RULES, R. 3:26-1; MONT. CODE ANNO. § 46-9-109; WYO. R. CR. P. RULE 46.1 (2010)).
96 See Stack v. Boyle, 342 U.S. 1, 4 (1951) (holding that the calculation of bail “must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, are to be applied in each case to each defendant” (emphasis added) (footnote omitted)).
97 Allen, supra note 30, at 641, 653–55.
98 Carlson, supra note 94.
99 Id.
101 Jessica Brand & Jessica Pishko, Bail Reform: Explained, APPEAL (June 14, 2018), https://theappeal.org/bail-reform-explained-4abb73dd2e8a/ [https://perma.cc/5F4K-W56H] (“Often, those being held on bail have simply been accused of low-level offenses. Seventy-five percent of pretrial detainees have been charged with only drug or property crimes.”).
102 See BAIL PRIMER, supra note 33, at 4.
how these alternatives fall short of the mark, it is necessary to first dive deeper into the effect the inability to afford bail can have on a pretrial detainee’s life and on society as a whole.

II. THE EFFECTS OF CASH BAIL

Pretrial detention, as a consequence of the inability to afford bail, can have disastrous effects on an individual. Even an imprisonment of “a few days . . . can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who enter.”\textsuperscript{104} The community-level consequences to minority and indigent defendants are even more abhorrent to any idea of justice, with an exceedingly disproportionate incarceration rate of African Americans, Hispanics, and poor defendants.\textsuperscript{105} Taken as a whole, these policies of money bail have wreaked havoc on society from both a micro and macro level, destroying the lives of individuals, overcrowding jails, and seeking punishment over understanding.\textsuperscript{106} If a nation is to be judged on how it treats its lowest citizens,\textsuperscript{107} then America has hopelessly failed.

A. Individual Costs: The Effect of Pretrial Detention on Detainees

When a defendant is unable to post bail, often in relation to a relatively minor crime,\textsuperscript{108} the adjudication of their criminal case is drastically affected.\textsuperscript{109} For example, in a recent comprehensive study of 153,407 defendants booked into a Kentucky jail, researchers found that those defendants who are detained “for the entire pretrial period are much more likely to be sentenced to jail and prison.”\textsuperscript{110}

\begin{itemize}
  \item \textsuperscript{104} SUBRAMANIAN ET AL., supra note 13, at 5.
  \item \textsuperscript{105} Demetria D. Frank, Prisoner to Public Communication, 84 BROOK. L. REV. 115, 116 n.6 (2018) (discussing the severe social consequences in the poor and minority communities that suffer “disproportionately high incarceration rates”).
  \item \textsuperscript{106} See infra Sections I.A., II.B.
  \item \textsuperscript{107} See supra note 1.
  \item \textsuperscript{108} See Brand & Pishko, supra note 101.
  \item \textsuperscript{110} Lowenkamp et al., supra note 109.
\end{itemize}
The study found that “[l]ow-risk defendants\textsuperscript{111} who were detained for the entire pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison,” in comparison to those who were “released at some point before trial.”\textsuperscript{112} This disparity continued in terms of sentencing, as the study found that defendants detained for the entire pretrial period were also found to receive 2.78 times longer sentences than those defendants released at some point during the pretrial period.\textsuperscript{113} These findings are not individual to the Kentucky system, as many other studies have similarly shown increased rates of conviction and sentence times for defendants detained prior to trial.\textsuperscript{114} Furthermore, “[t]hese effects of pretrial detention appear the same even after controlling for factors such as the seriousness of the charges, prior convictions, and evidence against the defendant.”\textsuperscript{115}

Pretrial detention accounts for these disparate figures for a myriad of reasons. First, pretrial detention hampers the defendant’s ability to adequately formulate a defense.\textsuperscript{116} A defendant imprisoned prior to trial has a reduced ability to effectively interact with their defense attorney.\textsuperscript{117} This is because the defendants are often imprisoned a great distance from the court in which they are tried, which thereby reduces their ability

\textsuperscript{111} The study used “a research based and validated assessment tool” called the Kentucky Pretrial Risk Assessment (KPRA). The KPRA used 12 risk factors (offense class, criminal history, failure to appear, etc.) to categorize the sample size into three tiers: low risk, moderate risk, and high risk. \textit{Id.} at 8.

\textsuperscript{112} \textit{Id.} at 4.

\textsuperscript{113} \textit{Id.} at 14.

\textsuperscript{114} See Arpit Gupta et al., \textit{The Heavy Costs of High Bail: Evidence from Judge Randomization}, 45 J. LEGAL STUD. 471, 498 (2016) (“Defendants assessed money bail have a 6-percentage-point (12 percent) higher chance of conviction and a 0.7-percentage-point higher yearly probability of being charged with further crimes (or a 6–9 percent increase) [in Philadelphia jails.]”); Megan T. Stevenson, \textit{Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes}, 34 J.L. ECON. & Org. 511, 532 (2018) (finding a 6.2% increase in likelihood of conviction for pretrial detainees); Miller, \textit{supra} note 16.

\textsuperscript{115} Jeffrey Manns, \textit{Liberty Takings: A Framework for Compensating Pretrial Detainees}, 26 CARDOZO L. REV. 1947, 1972–73 (2005); cf STEVENS H. CLARKE ET AL., THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL 36 (1976) (study that notes that it would not be desirable to remove the financial incentives of cash bail if the amount is set in relation to the seriousness of the crime charged).

\textsuperscript{116} See Samuel R. Wiseman, \textit{Pretrial Detention and the Right to Be Monitored}, 123 YALE L.J. 1344, 1355–56 (2014) (“The defendant must recruit friends or family members to collect evidence and witnesses and will often have difficulty communicating with his attorney due to limited visiting hours.”); Will Dobbie et al., \textit{The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges}, 108 AM. ECON. REV. 201, 234 (2018) (“[I]t is also possible that pretrial release affects a defendant’s ability to prepare an adequate defense or negotiate a settlement with prosecutors. For example, a defendant may have a harder time gathering exculpatory evidence if he is detained.”).

\textsuperscript{117} Wiseman, \textit{supra} note 116, at 1355.
to communicate with counsel. Additionally, pretrial detention can interfere with the ability to even gain effective counsel in the first place; incarceration can result in financial hardship, leading to a “[lower] likelihood of obtaining private counsel.”

Another factor contributing to the disproportionate sentencing rate for pretrial detainees is the pretrial detainee’s guilty plea, culminating from a desire to secure a quicker release. Pretrial detainees are frequently imprisoned in substandard local and municipal jails, where conditions are often harsher than the prisons housing those actually convicted of a crime. These facilities are typically “locally operated jails where resources are scarce[,]” the staff is ‘less professionalized,’ classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions.” Faced with the prospect of continuing to be jailed in often subhuman conditions, losing their employment, and risking being labeled a convict in the eyes of a jury, defendants who cannot afford bail will often be compelled to plead guilty to avoid additional jail time.

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120 See Dobbie et al., supra note 116, at 234 (“[I]t is possible that pretrial release decreases a defendant’s incentive to plead guilty to obtain a faster release from jail.”); Covert, supra note 103 (“Those who are detained before trial are far more likely to plead guilty—a desperate attempt to regain their freedom, even if temporarily.”).
121 See Benjamin v. Fraser, 343 F.3d 35, 52–56 (2d Cir. 2003) (noting inadequate ventilation, lighting, heating, and food contaminated with vermin and fecal matter in New York jails); Owens v. Scott Cty. Jail, 328 F.3d 1026, 1026 (8th Cir. 2003) (defendant, who shared a one-man cell with another inmate, had urine splashed on him and his blankets when cellmate used bathroom); see also Appleman, supra note 78, at 1312; David C. Gorlin, Note, Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees’ Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis, 108 MICH. L. REV. 417, 418–19 (2009) (“One court has colorfully invoked the biblical notion of ‘purgatory’ to describe the condition of those persons held by the government prior to a formal adjudication of guilt.” (citing Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004))).
122 Gorlin, supra note 121, at 419.
123 Jail buildings can contain “mold, poor ventilation, lead pipes, and asbestos,” “a vector of contagious diseases,” and some jails even house “low-level detainees with dangerous convicted felons.” Appleman, supra note 78, at 1318, 1321.
125 See Brett Snider, Can an Orange Jumpsuit Prejudice a Jury, FINDLAW BLOTTER (May 7, 2014), https://blogs.findlaw.com/blotter/2014/05/can-an-orange-jail-jumpsuit-punish-a-jury.html [https://perma.cc/GKT2-JBZB] (“It may not surprise you, but how a criminal defendant appears before a jury is incredibly important in trial.”); Yang, supra note 49, at 1419 (“[I]f detained defendants appear at arraignment and at trial in shackles, prosecutors and jurors may be biased in favor of finding the defendant guilty and sentencing a defendant to prison time.”).
126 See Yang, supra note 49, at 1419.
Pretrial detention has an even more significant impact on minorities. It is well established that the criminal justice system has disparately impacted racial minorities in the United States.\footnote{See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 2 (rev. ed., 2012); Andrew Kahn & Chris Kirk, There’s Blatant Inequality at Nearly Every Phase of the Criminal Justice System, BUS. INSIDER (Aug. 9, 2015), https://www.businessinsider.com/theres-blatant-inequality-at-nearly-every-phase-of-the-criminal-justice-system-2015-8 [https://perma.cc/C4K7-D78S]; SUBRAMANIAN ET AL., supra note 13, at 11.} Consequences of incarceration are felt the most strongly in African American and Latino communities, whose members are disproportionately jailed in comparison to the rest of the population.\footnote{African American and Latino defendants are less likely to afford bail and more likely to be incarcerated than white defendants. BAIL PRIMER, supra note 33, at 7.} Despite African Americans and Latinos only making up thirty percent of the general population, they constitute fifty-one percent of the population in American jails.\footnote{SUBRAMANIAN ET AL., supra note 13, at 15.} Local differences in the rate of detention can be even starker; in New York City alone “blacks are jailed at nearly [twelve] times the rate of whites and Latinos more than five times the rate of whites.”\footnote{Id. at 11.} A plethora of factors accounts for these inequitable figures including police practices in low-income minority communities, disadvantages minorities face in the court system, and disproportionate pretrial detention figures.\footnote{See id. at 15; JENNIFER FRATELLO ET AL., VER A INST. JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 3 (Sept. 2013), https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications [https://perma.cc/7HJF-F3KS] (highlighting the disproportionate impact of stop and frisk policies on minorities, especially on young black males).}

Cash bail perpetuates these disparities because a minority defendant is less likely to be able to afford bail than a white defendant, due in part, to the well-established linkages between wealth and race.\footnote{The racial disparities in pre-incarceration wealth for those who cannot make bail is telling. The Prison Policy Initiative found that African American males who are unable to afford bail have a pre-incarceration income of $11,275, while white males have a pre-incarceration income of $18,283. Among non-incarcerated people the difference is still sharp. Black males have an income of $31,284, while their white counterparts have an income of $43,560. RABUY & KOPF, supra note 10, at 2.} Even though bail amounts are similar for both defendants, minority defendants are locked in a cyclical system of disadvantage.\footnote{See Jean Bonhomme, African-American Males in the United States Prison System: Impact on Family and Community, 3 J. MEN’S HEALTH & GENDER 223, 225 (2006) (noting factors like racism, lack of job opportunities, and class discrimination “create a vicious cycle that frequently relegates serial offenders to a permanently marginalized status”).} Higher rates of incarceration amongst minority defendants leads to higher rates of unemployment.\footnote{See Roberts, supra note 18, at 1293 (“[I]ncarceration depletes black communities of their workforce and income, thereby impairing their economic stability.”).}


\footnote{African American and Latino defendants are less likely to afford bail and more likely to be incarcerated than white defendants. BAIL PRIMER, supra note 33, at 7.}

\footnote{SUBRAMANIAN ET AL., supra note 13, at 15.}

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\footnote{See Roberts, supra note 18, at 1293 (“[I]ncarceration depletes black communities of their workforce and income, thereby impairing their economic stability.”).}
are often rearrested and, due to their inability to afford bail, incarcerated.\footnote{For example, despite asserting they would not arrest individuals for low-level marijuana possession, in the first three months of 2018 the NYPD made 4,081 arrests for criminal possession of marijuana. Ninety-three percent of those arrested were people of color. Innocence Staff, Racial Disparities Evident in New York City Arrest Data for Marijuana Possession, INNOCENCE PROJECT (May 14, 2018), https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/ [https://perma.cc/CDC6-PHTE]; \textit{see also} Roberts, supra note 18, at 1276 ("[A]nalysis shows not only that incarceration is persistently concentrated in New York City’s poorest neighborhoods, but also that these neighborhoods received more intensive and punitive police enforcement and parole surveillance throughout a period of general decline in crime.").} Furthermore, much of the growth in jails has been attributed to an increased emphasis on drug enforcement.\footnote{“From 1981 until 2006, when they peaked, total drug arrests more than tripled, from 560,000 to 1.9 million, and the drug arrest rate (per 100,000) grew 160 percent. The share of people in jail accused or convicted of a drug crime increased sharply in the 1980s . . . .” SUBRAMANIAN ET AL., supra note 13, at 9.} Black men are arrested at disproportionate rates for drug possession, despite similar rates of drug usage to white, and therefore are even more likely to land in jail.\footnote{“Although whites have a higher rate of illegal drug use, [sixty percent] of offenders imprisoned for drug charges in 1998 were black.” Roberts, supra note 18, at 1275.}

Finally, a system that predicates freedom on wealth is bound to destroy the lives of many indigent defendants, even when discounting the impact of race. Though figures vary, the Bureau of Justice Statistics places the median bail amount for a felony offense to be around $10,000.\footnote{This $10,000 figure is based on national data from 2009. RABUY & KOPF, supra note 10, at 1 n.9.} Defendants unable to meet bail have overall income levels drastically lower than non-incarcerated people.\footnote{\textit{Id.} at 2 (noting that defendants incarcerated due to their inability to make bail have a median annual income of $15,109 prior to incarceration, which is forty-eight percent lower than that of non-incarcerated individuals).} Sixty percent of individuals who are unable to afford bail fall into the poorest third of society, while eighty percent fall into the bottom half of society.\footnote{See \textit{id}.} Thus, in operating a system where wealth buys freedom and poverty equals imprisonment, we have condemned and forgotten a troubling number of individuals. A true lost generation.

\section*{B. Social Costs}

As if money bail’s effect on individuals, families, and communities is not distressing enough, the system also places a burdensome toll on society as a whole.\footnote{For example, the New York City Comptroller released a report stating that the marginal cost to detain individuals before trial cost the city around $100 million annually. SCOTT M. STRINGER, N.Y.C. DEPT. COMPTROLLER, THE PUBLIC COST OF PRIVATE BAIL: A PROPOSAL TO BAN BAIL BONDS IN NYC 5 (Jan. 17, 2018), https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/ [https://perma.cc/3Y32-NRAL].} The increased rate of
incarceration due to the inability to pay bail results in giant costs to city or state budgets.\textsuperscript{142} For example, the ABA observed that the cost to New York City, and consequently its taxpayers, was $45,000 annually for housing a single pretrial detainee.\textsuperscript{143} Nationally, the United States Department of Justice had stated that housing pretrial detainees costs taxpayers around $9 billion dollars annually.\textsuperscript{144}

The cost to society would be mitigated if the cash bail system actually contributed to greater community safety, but the benefits of the system are questionable at best.\textsuperscript{145} While it is certainly true that jails hold some dangerous individuals accused of committing violent crimes, “nearly [seventy-five] percent of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses.”\textsuperscript{146} In New York City, for example, in roughly fifty percent of cases where a defendant was imprisoned, the crime charged was a misdemeanor or less.\textsuperscript{147} Despite the level of a violation, nearly every study conducted on money bail has shown that its efficacy in keeping defendants from fleeing is arguably non-existent. For instance, “[i]n the seventy-five largest counties in the country, twenty-one to twenty-four percent of state court felony defendants who were released on bail or personal recognizance between 1990 and 2004 failed to appear at trial.”\textsuperscript{148}

The sad irony of these detention consequences is that those who should have been granted the presumption of innocence are instead deemed guilty of the crime of being impoverished. Some are forced to plead guilty to crimes they did not commit, while others are punished too harshly for, what in many cases, amounts to a lapse of judgment.\textsuperscript{149} The system itself is ineffective and costly, and

\textsuperscript{142} See Wiseman, supra note 116, at 1357 (“During the recent economic downturn, the cost of money bail to society has been raised as a more practical rallying flag for reform.”).

\textsuperscript{143} Criminal Justice Section, State Policy Implementation Project, AM. B. ASS’N, https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf [https://perma.cc/V433-NFCH].


\textsuperscript{145} For example, two years after New Jersey essentially ceased the use of cash bail violent crime numbers had dropped by nearly thirty percent. Scott Shackford, Garden City Crime is Down Since New Jersey Ditched Cash Bail, REASON (Dec. 6, 2018), https://reason.com/blog/2018/12/06/crime-continues-to-decline-in-new-jersey [https://perma.cc/S7V7-VXHK]; see also Baradaran & McIntyre, supra note 119, at 502 (finding that if we released twenty-five percent of felony defendants pretrial there would be no increases in pretrial crime).

\textsuperscript{146} SUBRAMANIAN ET AL., supra note 13, at 5.

\textsuperscript{147} Id. In Los Angeles Jails, similarly, the biggest group of pretrial detainees were those charged with minor crimes like traffic or vehicle related offenses. Id.

\textsuperscript{148} Wiseman, supra note 116, at 1361.

\textsuperscript{149} See Paul Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 STAN. L. REV. 711, 714 (2017) (due to the negative consequences of pretrial detention “a detained person may plead guilty—even if innocent—simply to get out
without question, is of little use in a society that prides itself on justice. As Professor Laura Appleman of Willamette University stated, “here, in the rotting jail cells of impoverished defendants—still innocent before proven guilty—are the Shadowlands of Justice: the murky corners of the criminal justice system, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law.”

III. ALTERNATIVES ARE MORE OF THE SAME

There has been a growing movement to end the system of cash bail at both a federal and state level. These reform methods, though commendable in their recognition of the inefficacious nature of cash bail, suffer from some of the same serious deficiencies as cash bail. In crafting bail reform laws, state legislatures should take care to avoid two of the more popular methods of reform: (1) risk assessment tools; and (2) electronic monitoring. Risk assessment tools are of questionable efficacy and utilize racially biased data to predict risk, while electronic monitoring is an onerous and unnecessary punitive measure.

A. Risk Assessment Tools

In the summer of 2018, California became the first state to fully eliminate cash bail. What drew much coverage was not the obvious negative reaction of the bail bond industry, but the outcry from the same activists who had originally advocated for the elimination of the cash bail system. The anger stemmed from...
California’s replacement of cash bail with risk assessment tools, a substitution that anti-bail advocates correctly felt perpetuates the same racial disparities as the original system.154

Prettrial risk assessment tools utilize algorithms, eschewing monetary standards, to predict a defendant’s risk of flight and dangerousness to the community.155 These tools typically rely on actuarial data and a checklist of risk factors “that statistically correlate with nonappearance in court or commission of a crime pretrial,” in order to “predict how likely it is that someone will miss an upcoming court date or commit a crime before trial.”156

The most popular risk assessment tool, a result of collaboration between the State of New Jersey and the Arnold Foundation, is the Public Safety Assessment (PSA).157 The PSA uses nine different risk factors: “age at current arrest, current violent offense, pending charges, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in past two years, prior failure to appear older than two years, and prior sentence to incarceration.”158 Based on these factors, a prettrial defendant receives three scores on the following: failure to appear, likelihood of new criminal activity, and likelihood of new violent criminal activity.159 The scores have different banded categories, representing the percentage chance that someone would flee, commit a crime, or commit a violent crime.160 The scores themselves do not warrant detention, but the judge and policymakers, in analyzing the defendant’s scores, must decide whether the threshold of risk warrants pretrial detention.161


156 Bail Reform, supra note 23, at 1131.

157 LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016).

158 Bail Reform, supra note 23, at 1131 (citing LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016)).

159 Id.


161 Bail Reform, supra note 23, at 1132.
The jurisdictional implementation of risk assessment tools has not been wholly without success. New Jersey, for example, saw its pretrial detention rate decline by nearly a third since it adopted the PSA in 2017. Nonetheless, New Jersey’s success is tempered by the shortcomings of the PSA in other jurisdictions. In Lucas County, Ohio, for instance, the implementation of the PSA actually led to an increase in pretrial detention rates. Kentucky, hailed as the “shining example” of risk assessment success, has only seen “a small increase in the use of non-financial bonds, and essentially no effect on releases, FTAs, pretrial crime, or racial disparities in detention.”

The mixed results of risk assessment tools are likely the result of a series of factors. For one, determining what threshold of risk warrants pretrial detention is a subjective determination that varies amongst the risk assessment jurisdictions. Within the PSA, New Jersey recommends pretrial detention only for arrestees with the highest risk scores, which amounts to around five percent of defendants. In contrast, Mecklenburg County, another PSA user, recommends pretrial detention for all defendants except those who are labeled “low or below-average.” If a jurisdiction fails to calibrate the risk threshold for release to an equitable level, then the change in pretrial detention rates could be negligible.

But even when risk rates are calibrated to promote pretrial release, it is unclear whether the risk assessment system itself is responsible for the pretrial release success. In New Jersey and Kentucky, for instance, the risk assessment tool was just one small part of their pretrial reform efforts. Both states expanded pretrial services for defendants, increased the rate of cite and release, and implemented other, educational, reforms. When jurisdictions
adopted risk assessment tools as their only source of reform, in many cases situations actually worsened: Harris County, Ohio, adopted the PSA in place of cash bail, and “has seen increased rates of pretrial detention and increased rates of early guilty pleas.” Apart from the efficacy of risk assessment tools, the underlying risk score calculation also proves problematic.

Risk assessment algorithms can serve as poor indicators of future risk, and a jurisdiction utilizing such algorithms can potentially perpetuate the same disparate treatment of minorities that cash bail presently does. In 2016, Pro Publica conducted a comprehensive study on risk assessment tools, obtaining the risk scores assigned to over seven thousand defendants arrested in Broward County, Florida. The study found that the scores had little correlation with actually predicting the risks of letting a pretrial defendant free. For example, only twenty percent of defendants whose risk scores predicted they would commit violent crimes actually committed such crimes. Even when taking into account other crimes, including misdemeanors, “the algorithm was somewhat more accurate than a coin flip,” only accurately predicting future crime in sixty-one percent of the cases. A recent study went as far as saying that risk assessment algorithms are “no more accurate or fair than predictions made by people with little or no criminal justice expertise.”

Beyond the accuracy of the tools, many members of the legal community have argued that by relying on these algorithms, and reducing an individual’s life into neat categories, the detention process fails to account for structural racism and biases present in the U.S. criminal justice system. These claims have

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171 Id. Similarly, when Maryland “replaced money bail with risk assessment, the number of defendants allowed to return home to await trial increased, but a significant number committed crimes and missed court dates.” Smith, supra note 168, at 469.


174 Id.

175 Id.

176 Former Attorney General Eric Holder, for example, was opposed to the use of risk assessment tools due to the risk of disparate treatment of racial minorities. Massimo Calabresi, Exclusive: Attorney General Eric Holder to Oppose Data-Driven Sentencing, TIME (July 31, 2014, 1:35 PM), http://time.com/3061893/holder-to-oppose-data-driven-sentencing/ [https://perma.cc/6QR3-YD5J]. Similarly, in July of 2018, a coalition of over 100 organizations released a joint statement expressing their concerns that risk assessment tools will worsen incarceration rates and racial disparities. Shin Inouye, More Than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment, LEADERSHIP CONFERENCE ON CIV. & HUMAN RTS. (July 30,
not been unfounded, as the Pro Publica study also found that the tools created racial disparities in risk scores between black and white defendants.\(^\text{177}\) There, “[t]he formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.”\(^\text{178}\) Other studies of risk assessment tools have also found the tools to be ineffective and discriminatory.\(^\text{179}\)

The disparate impact on minority defendants can be traced to the inputs used in the algorithms. Inputs like “prior convictions, prior incarceration sentences, education, [and] employment . . . are themselves the result of racially disparate practices.”\(^\text{180}\) To illustrate this folly, African American and Hispanic defendants are incarcerated at higher rates than white defendants.\(^\text{181}\) These arrest rates are partly driven by the divergent treatment of minorities in the criminal justice system. Minorities are targeted more frequently by law enforcement officials,\(^\text{182}\) arrested at higher rates for drug offenses\(^\text{183}\) and prosecuted more severely than their white counterparts.\(^\text{184}\) In 2018, https://civilrights.org/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/ [https://perma.cc/Q9VJ-86QU]; cf Adam Neufeld, In Defense of Risk-Assessment Tools, MARSHALL PROJ. (Oct. 22, 2017), https://www.themarshallproject.org/2017/10/22/in-defense-of-risk-assessment-tools?ref=ollections [https://perma.cc/STW8-3DQL] (“Used appropriately, algorithms could help in many more areas, from predicting who needs confinement in a maximum security prison to who needs support resources after release from prison.”).\(^\text{177}\) Even when isolating a defendant’s past crimes or type of crime from race, black defendants were 77% more likely to be labeled as high risks for committing future violent crime. Angwin et al., supra note 173.\(^\text{178}\) Id. Furthermore, “[w]hite defendants were labeled as low risk more often than black defendants.” Id.\(^\text{179}\) See DANIELLE KELH ET AL., BERKMAN KLEIN CTR. INTERNET & SOC’y, HARV. L. SCH., ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING 29 (2017), https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf [https://perma.cc/EX3N-YTTM] (discussing studies that show risk scores heavily weigh certain types of crime that are disproportionately policed in predominantly poor and minority neighborhoods); George Joseph, Justice by Algorithm, CITYLAB (Dec. 8, 2016), https://www.citylab.com/equity/2016/12/justice-by-algorithm/505514/ [https://perma.cc/5PKE-72N5] (noting that black residents in Baltimore are more likely to receive high risk scores); Wendy Sawyer, Breaking Open the “Black Box”: How Risk Assessments Undermine Judges’ Perceptions of Young People, PRISON POL’y INIT. (Aug. 22, 2018), https://www.prisonpolicy.org/blog/2018/08/22/blackbox/ [https://perma.cc/R3EQ-86H3] (one of the leading risk assessment tools disproportionately factors in age, with “roughly 60% of the risk score it produces is attributable to age”).\(^\text{180}\) Stevenson, supra note 164, at 328.\(^\text{181}\) See id. at 328 n.158. \(^\text{182}\) See Jesse Wegman, The Injustice of Marijuana Arrests, N.Y. TIMES (July 28, 2014), https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?partner=rss&emc=rss&smid=tw-nytopinion&r=0 [https://perma.cc/VSJ2-WTCP]. \(^\text{183}\) See ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013). \(^\text{184}\) See, e.g., BESIKI KUTATELADZE ET AL., VERA INST. OF JUST., RACE AND PROSECUTION IN MANHATTAN 3 (2014), https://storage.googleapis.com/vera-web-assets/
essence then, “risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race.”185 Thus, these tools pose the potential “to significantly aggravate the unacceptable racial disparities in our criminal justice system.”186

If predicting crime was as easy as plugging digits into a computer, a kind of Minority Report type world, then we would have no need for a criminal justice system.187 But the fact of the matter is that these risk assessment tools are plagued by their reliance on biased data that is “hard to correct for, and [therefore] few even try.”188 Furthermore, “the empirical research evaluating whether outcomes are improved by incorporating algorithmic risk assessment into the decision-making framework is beyond thin; it is close to non-existent.”189 Though eliminating financial constraints is appealing, substituting a system that can be ineffective and racially biased is not an adequate alternative.

B. Electronic Monitoring

Electronic monitoring, as opposed to detention, of pretrial defendants has been on the rise in many jurisdictions.190 “Most [electronic monitoring] systems consist of an ankle bracelet,” linked to a Global Positioning System receiver, which pretrial defendants must wear twenty-four hours a day.191 For most pretrial defendants, these monitoring devices essentially operate as a form of house arrest.192 Although there is no centralized database documenting the prevalence of electronic monitoring, it is estimated that in 2014 around one hundred sixty thousand of these devices were employed
in the criminal justice system. Proponents of these tools argue that the cost of the devices are cheaper than incarceration and, unlike pretrial detention, defendants have the freedom to return to their communities and workplaces.

But these devices are often ineffective in ensuring a defendant reappears to court. A 2011 study by the Pretrial Justice Institute found that “utilizing [electronic monitoring] as a condition of pretrial release does not reduce failure to appear or rearrest [rates].” Furthermore, these devices are often more restrictive than they may seem at first glance. A defendant is often subject to a plethora of limitations, including needing permission from their supervisor to leave home, even in light of an emergency.

These devices affect more than just a defendant’s movements, and can have drastic effects on families, housing, and medical care. For example, in Cook County one nineteen-year-old defendant could not return to his own home because Cook County did not allow electronically monitored defendants to live in Section 8 housing. This forced the young man to separate from his family and sleep on the floor of his mother’s friend’s apartment. Compounding the problem with electronic monitoring is that these devices also pose the same racially discriminatory problems present in risk assessment tools. For example, the Chicago Community Bail Fund found that African Americans in Cook County made up around seventy percent of those placed on electronic monitoring, despite being only twenty-five percent of the overall population in Cook County.

The main problem with monitoring devices lies in the reasoning that because these devices are a better alternative than incarceration, they should be used with more frequency. If a

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193 Id. at 8.
194 See Wiseman, supra note 116, at 1349.
195 See Electronic Monitoring, supra note 190.
197 See KILGORE, supra note 191, at 12.
198 In Cook County, for example, a household must have no residents on parole or on an electronic monitor in order to be approved as a host site. This can have the effect of splitting up families and forcing pretrial defendants to live with family members who do not want them or in areas where accessing employment is burdensome. See CHI. CMTY. BAIL FUND, PUNISHMENT IS NOT A “SERVICE”: THE INJUSTICE OF PRETRIAL CONDITIONS IN COOK COUNTY 7 (Oct. 24, 2017), https://chicagobond.org/wp-content/uploads/2018/10/pretrialreport.pdf [https://perma.cc/6G75-V7GV]. In Michigan, similarly, a long list of restrictive practices were found including “not being allowed to go to a hospital in an emergency without first obtaining permission from the parole officer, regardless of the time of day or the seriousness of the situation.” KILGORE, supra note 191, at 12.
199 See CHI. CMTY. BAIL FUND, supra note 198, at 7–8.
200 See supra Section III.A.
201 CHI. CMTY. BAIL FUND, supra note 198, at 13.
defendant is deemed safe enough to be sent outside the confines of jail, it is unclear why he or she must also be penalized with an electronic monitor. This reasoning further ignores the loss of the presumption of innocence. Pretrial defendants have not been convicted of crimes and, even if guilty, they are predominantly accused of misdemeanors and small violations. The U.S. system needs to be predicated on a presumption of liberty, not punishment, and these electronic devices do little to further this ideal.

IV. THE LEGISLATIVE SOLUTION: RESTORE AND RELEASE

The proposed solution to the cash bail problem does not lie in an alternative, like risk assessments or an onerous system of pretrial monitoring, but instead lies in a logical proposition: restore the presumption of innocence and release the majority of pretrial defendants. A system that has thrived on the backs of indigent and minority defendants will not be dismantled by increasing the state supervision of these populations. Instead, this note proposes that a true fix lies in state bail reform legislation that provides for the release of all pretrial defendants charged with misdemeanors and ensures adequate procedural safeguards and a presumption of release for those charged with felony crimes. Using the success of the Washington, D.C. bail system as a baseline, and ameliorating its shortcomings through what studies and the laudable work of community bail funds have taught, states can ensure a just and efficient pretrial system that does not need punitive measures to function.

202 See Natapoff, supra note 149, at 1320 (noting misdemeanors make up the majority of crimes in state courts).

203 Misdemeanors make up a substantial majority of crime in our state courts. For example, in 2012 misdemeanors accounted for “approximately [eighty] percent of sampled state dockets.” Id.


205 Community bail funds will post the bail for a defendant and, in many cases, provide pre-trial appearance resources, like counseling and text reminders. The bail funds have been a resounding success in most jurisdictions. See Arvind Dilawar, Fighting Mass Incarceration with a DIY Bail Fund, MASK MAG (Mar. 2018), http://www.maskmagazine.com/the-art-world-issue/struggle/fighting-mass-incarceration-with-a-diy-bail-fund [https://perma.cc/WBZ5-2N5M]. The Brooklyn Community Bail Fund, for example, had ninety-five percent of the defendants they bailed out make all their scheduled court appearances. Furthermore, those who have been released through the actions of the bail fund were three times as likely to have favorable case outcomes. Our Results, BROOKLYN CMTY. BAIL FUND (2018), https://brooklynbailfund.org/our-results-1/ [https://perma.cc/DFJ5-JJSF].
A. Washington, D.C. Pretrial System: A Building Block

Ironically, the District of Columbia, the jurisdiction that embodied the punitive turn in America’s criminal justice system in the 1970s by becoming the first jurisdiction to authorize preventative detention,\(^\text{206}\) has become the gold standard of pretrial detention reform.\(^\text{207}\) In 1992, the D.C. Council passed the Bail Reform Act that essentially ended the practice of cash bail in the district.\(^\text{208}\) Thus, a defendants’ financial means plays no part in pretrial incarcerations.\(^\text{209}\)

D.C.’s success is the result of several important implementations. First, the 1992 Bail Reform Act created “a presumption of unconditional pretrial release.”\(^\text{210}\) Additionally, the Act required a judge to determine if more restrictive conditions are needed, and if so, to impose the “least restrictive...condition or combination of conditions that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.”\(^\text{211}\) The Act also prohibits a judge from imposing financial conditions that results in pretrial detention for the purpose of protecting public safety.\(^\text{212}\)

The Act further provides procedural safeguards to ensure both the timeliness of release and adequate justification for detention. The Pretrial Services Agency\(^\text{213}\) must interview the defendants within twenty-four hours of arrest, and bring them to court within forty-eight hours of arrest.\(^\text{214}\) If the judge believes that preventative detention is necessary, a hearing is held and “[t]he government has the burden to prove by clear and convincing evidence that no conditions of release will reasonably assure appearance at trial and safety of the community.”\(^\text{215}\)

\(^{206}\) President Nixon ushered in this punitive system through his District of Columbia Court Reorganization Act of 1970. The act went beyond just preventative detention and also contained provisions for “mandatory minimum sentences for repeat offenders and ‘no-knock’ raids.” See Miller, supra note 16.

\(^{207}\) See Marimow, supra note 22; Ben-Achour, supra note 152.


\(^{209}\) See CHRISTINE BLUMAUER ET AL., PRINCETON U., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 33 (Feb. 27, 2018), http://wws.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf [https://perma.cc/B3AE-VMJ8].

\(^{210}\) DOYLE ET AL., supra note 26, at 36; see also D.C. CODE § 23-1321(b) (2019).


\(^{212}\) D.C. CODE § 23-1321(c)(3) (2019).

\(^{213}\) The Pretrial Services Agency is “responsible for gathering information about newly arrested defendants and preparing the recommendations considered by the [c]ourt.” What PSA Does, PRETRIAL SERVICES AGENCY D.C., https://www.ssa.gov/ [https://perma.cc/6SSW-SXZX].

\(^{214}\) Court Support, PRETRIAL SERVICES AGENCY D.C., https://www.ssa.gov/?q=programs/court_support [https://perma.cc/7QQT-K8PT].

\(^{215}\) DOYLE ET AL., supra note 26, at 37; (citing D.C. CODE § 23-1322(b)(2)(2019)).
The system has been a great success with pretrial defendants released ninety-four percent of the time. Of those released pretrial, around ninety percent showed up to their subsequent court appearance and only about ten percent were rearrested. “Between 2007 and 2012 . . . ninety-nine percent of released defendants were not rearrested on a violent crime while in the community.” D.C. has also employed many non-punitive measures, like drug treatment and job counseling, to avoid recidivism and focus on rehabilitating the pretrial defendant. While these pretrial services and counseling are expensive, they are more affordable due to the reduction in jail population. D.C. is estimated to have saved $398 million dollars annually because of its comprehensive bail reform scheme.

Although D.C.’s pretrial system should be heralded as a success, it still suffers from a few important shortcomings that this note addresses. For example, despite releasing over ninety percent of pretrial defendants, D.C. still employs restrictive, probation-like conditions, such as electronic monitoring, curfews, and supervisory reporting requirements. Conditions like electronic monitoring are invasive, affect the pretrial detainee’s individual and family life, and are often employed in a racially discriminatory manner. Furthermore, a court imposing conditional release ignores the fact that the individuals subjected to the restrictions are presumed innocent, and instead treats them as criminals.

D.C. has also pioneered the use of drug testing as a condition of pretrial release, which is equally problematic. The
use of drug testing is a burdensome restriction that ignores addiction and disproportionately jails those arrested for drug crimes (i.e., minorities and the poor). Additionally, studies have shown that the use of drug testing as a pretrial condition “has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials.”

Finally, D.C.’s Pretrial Services Agency, which works in tandem with judicial officers in deciding whether to detain a defendant, employs risk assessment tools. As discussed previously, these tools are of questionable efficacy and can help perpetuate racially disparate detention outcomes. The D.C. risk assessment tool utilizes socioeconomic inputs—including items to measure “criminal history, demographics, current criminal charges, and drug involvement”—which have been shown to contribute to racial disparities in sentencing. D.C.’s success in reforming cash bail is more likely attributable to its comprehensive reform package than risk assessment tools. Beyond the aforementioned reforms, the D.C. bail system also benefits from several unique characteristics: “all of its judges operate in a single courthouse, which may reinforce a culture of pretrial release; it has an extremely high-functioning public defender system, which helps ensure proper representation at pretrial detention hearings; and its pretrial services agency receives funding from the federal government.”

In essence, the D.C. system has had much success in eliminating the use of cash bail. Nonetheless, in formulating a solution to cash bail, state legislatures should avoid emulating the use of onerous pretrial restrictions and risk assessment tools. Instead, state legislation should focus on D.C.’s elimination of cash bail and its presumption towards release. It should also build upon D.C.’s procedural protections to ensure that felony defendants are afforded their presumption of innocence.

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226 See VanNostrand et al., supra note 196, at 20–24.
228 See supra Section III.A.
229 See Matthew DeMichele et al., The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky, at 8–9 (Apr. 25, 2018); supra Section III.A.
230 See Raphling, supra note 168 (arguing that risk assessment tools are not successful absent other pretrial reform measures).
231 Bail Primer, supra note 33, at 15.
B. The True “Alternative”

In order to combat the inequities of cash bail and restore the presumption of innocence, state legislatures should formulate legislation that releases all misdemeanor defendants and provides adequate procedural safeguards to the felony defendant population. Releasing misdemeanor defendants will not only mitigate the problem of mass incarceration but will also be a positive step towards ending the racial discrimination prevalent in the U.S. criminal justice system. Furthermore, by providing felony defendants with adequate procedural safeguards, through longer bail hearings and the right to counsel, we would ensure that the presumption of innocence is more than a platitude, but essential to the United States’ constitutional fabric.

1. Release Pretrial Defendants Charged with Misdemeanors

Advocating for the release of the vast majority of pretrial defendants would undoubtedly ring the alarm bell of pretrial dangerousness to the community and the risk of nonappearance. Community bail funds, however, have shown that this risk is not pervasive and more based in fear. Community bail funds are organizations that post the monetary bail on a pretrial defendant’s behalf and often supervise and aid the defendant in reappearing to court. The funds do not impose restrictive conditions, but instead, often utilize simple check-in requirements if the specific fund so requires. These check-in requirements can consist of simple, non-invasive tools, like phone or text notifications to ensure that a

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232 Natapoff, supra note 149, at 1320 (noting that misdemeanor crimes make up the majority of a state’s docket).


234 Calaway & Kinsley, supra note 4, at 826–27.

defendant is adequately informed of his or her future court case. Any other services, like a drug or alcohol treatment, are voluntary on the part of the pretrial defendant. These funds have been extremely successful and have shown the senselessness of money bail and probation-like restrictions for pretrial defendants. For example, in New York, bail fund clients reappear for their court cases ninety-five percent of the time, and more importantly, are twice more likely to win their cases than incarcerated individuals.

The community bail funds have illustrated that there is no need for cash bail, or other restrictive conditions, when it comes to misdemeanor defendants. Instead, in releasing these pretrial defendants, states should focus on what the community bail funds have done correctly: providing adequate notification to the defendant. Upon release of pretrial misdemeanor defendants, state legislatures should provide a framework for an adequate notification scheme to ensure reappearance. Studies have shown that notification techniques can drastically increase the reappearance rate of pretrial defendants. For example, “[t]he available research shows that phone-call reminders can increase appearance rates by as much as [forty-two percent], and mail reminders can increase appearance rates by as much as [thirty-three percent].” Even something as simple as improving a court’s website can provide a low-cost method of improving reappearance rates.

Practical utilization of non-invasive notification methods has also shown success. In Coconino County, Arizona, for example, the county tested different notification systems and found that the

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236 See Jocelyn Simonson, Bail Nullification, 115 Mich. L. Rev. 585, 603 (2017) (“[T]he involvement of bail funds can vary from frequent and substantive contact, including counseling and legal support, to minimal assistance with rides to court and reminder phone calls.”).

237 Appleman, supra note 235, at 1535 (2016).

238 See id. at 1535–37.


240 See, e.g., Jancy Hoeffel, Tulane Professor: New Orleans Bail Rules Are Bad Law and Bad Policy, ADVOCATE (Dec. 27, 2018, 6:00 PM), https://www.theadvocate.com/baton_rouge/opinion/article_ed3a432a-0304-11e9-b7e8-c392b5182d82.html [https://perma.cc/F6WA-S2D3] (“[S]cholars studying court systems in Colorado and Washington found that failure-to-appear rates were no better for people released on bail bonds than for people released without having to pay.”).


242 In Jefferson County, Colorado, for example, court appearance rates rose from seventy-nine percent to eighty-eight percent when a defendant was reminded of their court date a week in advance. Timothy R. Schnacke et al., Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 Ct. Rev. 86, 89 (2012).

243 Stevenson & Mayson, supra note 227, at 11.

244 Id. (“[I]mproving court websites so that defendants can easily locate information relevant to their case should increase the likelihood of appearance.”).
failure to appear rate was reduced from twenty-five percent in a control group to six percent in the notification group when a caller directly reminded a defendant of their court appearance date. In utilizing these notification techniques, a jurisdiction can reach the results of a successful pretrial system, like D.C., while not intruding on the individual defendant’s liberty.

Although critics may be concerned with the dangerousness of releasing such a large number of pretrial defendants, these arguments are misguided, even when putting aside their disregard for the presumption of innocence. In D.C., for example, of the ninety percent of defendants released pretrial, ninety-nine percent of them were not rearrested for a violent crime pretrial. One might contribute these figures to D.C.’s pretrial supervision and restrictions on released defendants, but as discussed, the efficacy of these restrictions has been shown to be wanting. Furthermore, other jurisdictions who have released large amounts of pretrial defendants have seen reductions in violent crime. In New Jersey, for instance, violent crime has decreased by thirty percent since it eliminated cash bail in 2017.

In the long run, pretrial detention of misdemeanor defendants may ultimately compromise public safety. A 2017 Stanford Law Review study conducted an empirical study of a representative group of ten thousand misdemeanor offenders in Harris County, Texas. The study suggested that if the 10,000 defendants were released pretrial, in a period of eighteen months, there would be 2800 new misdemeanor charges and around 1300 new felony charges. In contrast, “if the same group were instead detained, they would accumulate 3400 new misdemeanors and 1700 felonies over the same time period—an increase of 600 misdemeanors and 400 felonies.” Other studies have similarly shown that the “short-run gains [of incarceration] are more than offset by long-term increases in post-release criminal behavior.”

Even if there is a small risk of recommission of crime, we cannot give up liberty for a false sense of safety. Justice Jackson’s statement in Stack v. Boyle addressing risk of flight rings equally

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245 Subramanian et al., supra note 13, at 33–34.
246 See Bail Primer, supra note 33, at 15.
247 See supra Section IV.A.
249 Heaton et al., supra note 149, at 768.
250 Id.
true for the risk of dangerousness: “Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.”

2. Ensure Adequate Procedural Safeguards for Felony Defendants

Felony defendants, though charged with crimes of greater magnitude, should be presumed just as innocent as any other defendant. Thus, regardless of the crime committed, states should ensure that legislation includes a rebuttable presumption of release for felony defendants, with the burden shifted to the prosecution to show why a defendant should be detained. Furthermore, state legislatures should include two additional procedural safeguards to ensure that a felony defendant’s liberty is not taken away without due consideration: (1) longer bail hearings; and (2) representation of counsel at bail hearings.

Bail hearings in most jurisdictions are extremely short, and in some cases, these can be as short as a couple of minutes per defendant. For instance, in 2016, Texas Organizing Project obtained a video of bail hearings in Harris County, Texas where, in nearly every case, the judge took a few minutes, and in some cases even seconds, in rendering a bail amount. In one case, the hearing officer set a $5,000 bond for a defendant, ignoring and failing to even discuss the defendant’s history of homelessness and dementia.

The length of time for a hearing for a felony defendant needs to be increased substantially because of the loss of liberty that is at stake. Pretrial detention can drastically affect the adjudication of a defendant’s case, hence the length of time for a hearing needs to be adequate for a judicial officer to conduct an individualized inquiry into the defendant’s case. That way, a court can sufficiently consider and evaluate a defendant’s risk level prior to making a determination on incarceration.

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252 Stack v. Boyle, 342 U.S. 1, 8 (1951).
253 See Change Difficult as Bail System’s Powerful Hold Continues Punishing the Poor, INJUSTICEWATCH (Oct. 14, 2016), https://www.injusticewatch.org/projects/2016/change-difficult-as-bail-systems-powerful-hold-continues-punishing-the-poor/ [https://perma.cc/N7KC-46KM] (noting some bail hearings lasted no longer than one minute); Stevenson & Mayson, supra note 227, at 4 (“It is common for such [bail] hearings to last only a few minutes.”).
255 Id.
256 See supra Section II.A.
Critics may argue that costs would increase with lengthier bail hearings, but the loss would be offset by the release of misdemeanor defendants, thereby freeing up both money and the court’s time. D.C., for example, saved around $398 million a year by releasing the majority of pretrial defendants. A recent article found that Cuyahoga County, Ohio would save $45 million by switching to the D.C. bail model. Thus, other jurisdictions can use similar savings to fund costs associated with longer hearing times.

Felony defendants should also be provided the right to counsel at bail hearings, a necessary procedural safeguard when their freedom is at stake. In Rothgery v. Gillespie County, the Supreme Court held that when defendants hear the charge against them and their liberty is subject to a potential restriction, the adversarial process begins and the Sixth Amendment right to counsel is implicated. The Court stated that once the right to counsel is “attached,” the Sixth Amendment requires representation by counsel “at any critical stage of trial.” But because the defendant in the case did not challenge the denial of reasonable bail, the Court left open the question of whether a bail hearing constitutes a “critical stage.”

Despite the Court’s lack of guidance on this issue, it is clear that a bail hearing is a “critical stage” because it can greatly imperil a defendant’s liberty interest by potentially increasing a defendant’s conviction and sentencing rates. The bail stage, and in many cases, most stages of adjudication, are unfamiliar to a defendant who is not well-versed in the legal process or aware of his or her legal rights. With an attorney’s assistance, a defendant has a fair shot at explaining his or her


258 Id.


260 Id. at 212.

261 Id.; Alexander Bunin, The Constitutional Right to Counsel at Bail Hearings, 31 CRIM. JUST. 23, 24 (2016). Three states have interpreted Rothgery to mandate counsel during a bail decision. See Gonzalez v. Comm’r of Corr., 68 A.3d 624, 641 (Conn. 2013) (holding that arraignment is a “critical stage” and defendant has right to effective assistance of counsel); DeWolfe v. Richmond, 76 A.3d 1019, 1030 (Md. 2013) (holding that the Due Process Clause of Maryland State Constitution entitles indigent defendant to state-furnished counsel at initial bail hearing); Hurrell-Harring v. New York, 15 N.Y.3d 8, 20–21 (2010) (holding that defendant must be provided counsel at bail hearings because of the liberty interest inherent in these proceedings).

262 See Stevenson & Mayson, supra note 227, at 10 (“The recent studies showing that pretrial detention substantially increases a defendant’s likelihood of conviction and length of sentence support an argument that the bail hearing is a ‘critical stage.’”).
individual situation and mitigating the risk of a judicial officer conducting a cursory bail hearing.\footnote{Bunin, \emph{supra} note 261, at 26 (advocating for defense counsel at bail hearings and highlighting that "[i]f individual attributes of defendants were actually reviewed, and indigence was considered, the constitutional violations would be resolved").}

Some might argue that providing attorneys at these critical stages would result in higher costs. But it is likely quite the opposite. Studies have shown that legal representation of pretrial defendants at the bail stage “can make a significant difference in . . . jail costs.”\footnote{Bryan L. Sykes, \emph{Cost Savings to Cook County When Arrested Persons Access Their Right to Legal Defense Within 24 Hours}, FIRST DEF. LEGAL AID (May 2014), https://www.first-defense.org/wp-content/uploads/2015/03/Cost-savings-report4.pdf [https://perma.cc/G3TH-QHFA].} A 2012, New York City study found that those who were incarcerated prior to trial had a worse case outcome, “leading to more costs for incarceration.”\footnote{Bunin, \emph{supra} note 261, at 25.} Jerry Cox, the president of the National Association of Criminal Defense Lawyers, has also stated that representation at bail hearings “leads to greater efficiency and more accurate results.”\footnote{Id.}

Representation of felony pretrial defendants at bail hearings would likely not require greater expenditures for public defenders’ offices. Public defenders have advocated for such representation, and some have said the implementation would bear them “little additional cost . . . [m]aybe one or two more attorneys.”\footnote{Mihir Zaveri, \emph{Harris County to Place Public Defenders at Bail Hearings}, HOUS. CHRON. (Mar. 14, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-to-place-public-defenders-at-bail-11002089.php [https://perma.cc/23BS-D2YE].} The proposal would also not be new, as Harris County, Texas implemented a pilot program in 2017 that provided for two public defenders to “be present at bail hearings for those accused of misdemeanors and felonies.”\footnote{United States v. Salerno, 481 U.S. 739, 755 (1987).} In essence, by increasing the length of bail hearings and attaching the right to counsel at the bail stage for felony defendants, states can ensure a more just pretrial system for those defendants who are at the greatest risk of losing their freedom.

\section*{Conclusion}

In \emph{Salerno}, Justice Rehnquist stated that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”\footnote{United States v. Salerno, 481 U.S. 739, 755 (1987).} Cash bail has distorted any
sense of liberty and detention prior to trial has become more than just a limited exception. Pretrial detention has wreaked havoc on the lives of countless pretrial defendants, taking special aim at indigent and minority defendants. But this does not have to be the case. States have recognized that cash bail cannot be the foundation of a just criminal justice system. But states will have a long way to go if they continue to rely on alternatives that perpetuate the same sins of the cash bail system they seek to replace. Instead, state legislatures should pass bail reform laws that release misdemeanor defendants and ensure adequate procedural protection for felony defendants. The presumption of innocence should not be disregarded as a worthless platitude, but instead should be intrinsic to the idea of ordered liberty. By releasing misdemeanor defendants and providing adequate procedural safeguards for felony defendants, we can ensure that there is liberty, untouched by fear.

Muhammad B. Sardar†

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