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# Bail Reform: New Directions for Pretrial Detention and Release

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BAIL REFORM:  
NEW DIRECTIONS FOR PRETRIAL DETENTION AND RELEASE

Megan Stevenson & Sandra G. Mayson  
March 13, 2017

ABSTRACT

*Our current pretrial system imposes high costs on both the people who are detained pretrial and the taxpayers who foot the bill. These costs have prompted a surge of bail reform around the country. Reformers seek to reduce pretrial detention rates, as well as racial and socioeconomic disparities in the pretrial system, while simultaneously improving appearance rates and reducing pretrial crime. The current state of pretrial practice suggests that there is ample room for improvement. Bail hearings are often cursory, with no defense counsel present. Money-bail practices lead to high rates of detention even among misdemeanor defendants and those who pose no serious risk of crime or flight. Infrequent evaluation means that the judges and magistrates who set bail have little information about how their bail-setting practices affect detention, appearance and crime rates. Practical and low-cost interventions, such as court reminder systems, are underutilized. To promote lasting reform, this chapter identifies pretrial strategies that are both within the state's authority and supported by empirical research. These interventions should be designed with input from stakeholders, and carefully evaluated to ensure that the desired improvements are achieved.*

## INTRODUCTION

The scope of pretrial detention in the United States is vast. Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last twenty years.<sup>1</sup> There are eleven million jail admissions annually; on any given day, local jails house almost half a million people who are awaiting trial.<sup>2</sup> The U.S. pretrial detention rate, compared to the total population, is higher than in any European or Asian country.<sup>3</sup>

Pretrial detention has profound costs. In fiscal terms, the total annual cost of pretrial jail beds is estimated to be \$14 billion, or 17% of total spending on corrections.<sup>4</sup> At the individual level, pretrial detention can result in the loss of employment, housing or child custody, in addition to the loss of freedom. Pretrial detention also affects case outcomes. No fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant's chance of conviction, as well as the likely sentence length.<sup>5</sup> The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself—especially if some of those convicted are innocent. Finally, two recent studies have found evidence that pretrial detention increases the likelihood that a person will commit future crime.<sup>6</sup> This may be because jail exposes defendants to negative peer influence,<sup>7</sup> or because it has a destabilizing effect on defendants' lives.

Given the costs of pretrial detention, one might expect that detention decisions would be made with care. This is not how the system currently operates. For the most part, whether a person is detained pretrial depends solely on whether he can afford the bail amount set in his case. Nationwide, nine out of ten of felony defendants who were detained pretrial in 2009 (the last year for which the data is published) had bail set, and would have been released if they had posted it.<sup>8</sup> Even at relatively low bail amounts, detention rates are high. In Philadelphia, between 2008 and 2013, 40% of defendants with bail set at \$500 remained jailed pretrial.<sup>9</sup> Over the same time period

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<sup>1</sup> Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, at 1 (2015).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> Roy Walmsey, *World Pre-trial/Remand Imprisonment List 2-6* (Int'l Centre for Prison Studies, 2013).

<sup>4</sup> Pretrial Justice: How Much does it cost?, 2 (Pretrial Justice Inst. 2017); Melissa S. Kearney *et al.*, *Ten Economic Facts about Crime and Incarceration in the United States*, THE HAMILTON PROJECT 13 (May 2014).

<sup>5</sup> Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), [www.nber.org/papers/w22511](http://www.nber.org/papers/w22511); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 22 (Columbia Law & Econ. Working Paper No. 531, 2016), <http://ssrn.com/abstract=2774453>; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (forthcoming 2017); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* 34-35 (Working Paper, July 20, 2016), [http://home.uchicago.edu/~npope/pretrial\\_paper.pdf](http://home.uchicago.edu/~npope/pretrial_paper.pdf); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (January 12, 2016) (working paper), <https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-December-2016.pdf>.

<sup>6</sup> Gupta *et al.*, *supra*; Heaton *et al.*, *supra*. Stevenson and Dobbie *et al.* tested for future-crime effects but found none.

<sup>7</sup> Patrick Bayer *et al.*, *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, QUARTERLY J. ECON. 105, 105 (2009); Megan Stevenson *Breaking Bad: Social Influence and the Path to Criminality in Juvenile Jails*, Unpublished Manuscript (2015) at 1.

<sup>8</sup> Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables 1*, 15 (2013).

<sup>9</sup> Stevenson, *supra* note 5, at 12.

in Houston, more than half of all misdemeanor defendants were detained pending trial; their average bail amount was \$2,786.<sup>10</sup> Some pretrial detainees are facing very serious charges, but most are not: At least as of 2002, 65% of pretrial detainees were held on non-violent charges only, and 20% were charged with minor public-order offenses.<sup>11</sup> The hearings at which bail is set—and which have such serious consequences—are typically rapid and informal.

In the last few years, the hefty costs of pretrial detention have generated growing interest in bail reform. Jurisdictions around the country are now rewriting their pretrial law and policy. They aspire to reduce pretrial detention rates, as well as socio-economic disparities in the pretrial system, without increasing rates of non-appearance or pretrial crime. The overarching reform vision is to shift from the “resource-based” system of money bail to a “risk-based” system, in which pretrial interventions are tied to risk rather than wealth.<sup>12</sup> To accomplish this, jurisdictions are implementing actuarial risk assessment and reducing the use of money bail as a mediator of release. The idea is that defendants who pose little statistical risk of failing to appear or committing pretrial crime can be released without bail or onerous conditions. Riskier defendants can be released under supervision, and detention can be reserved for those so likely to flee or commit serious harm that the risk cannot be managed in any less intrusive way.

This chapter offers a critical discussion of central pretrial reform initiatives, drawing on recent scholarship. We hope to provide readers with a deeper understanding of ongoing academic and policy debates around key reform goals: reducing the use of money bail, reducing racial disparities in pretrial detention, implementing actuarial risk assessment, rationalizing pretrial detention, and tailoring conditions of release. In each area we note the current direction of reform, survey relevant scholarship, and offer our own perspective on the best prospects for effective and lasting change. We evaluate pretrial reform initiatives on the basis of several criteria: efficacy in promoting public safety and court appearance, intrusiveness to individual liberty, cost, and distributive effects (effects on racial or socio-economic disparity).<sup>13</sup> Part I provides background. Part II is our substantive discussion. Part III identifies key reform priorities.

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<sup>10</sup> Heaton *et al.*, *supra* note 4, Tbl. 1.

<sup>11</sup> Doris S. James, Bureau of Justice Statistics, Profile of Jail Inmates, 2002 – B.J.S. Special Report, at 3 (July 2004).

<sup>12</sup> *See, e.g.*, Christopher Moraff, *U.S. Cities Are Looking for Alternatives to Cash Bail*, NEXT CITY (March 24, 2016); PRETRIAL JUSTICE INSTITUTE, RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS (2012).

<sup>13</sup> For further guidance on bail reform, see ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3d ed. 2007) [hereinafter ABA STANDARDS]; Moving Beyond Money: A Primer on Bail Reform (Harvard Law School, Criminal Justice Policy Program; Oct. 2016); *The Solution*, Pretrial Justice Institute, <http://www.pretrial.org/solutions>; and Timothy R. Schnacke, Nat'l Inst. Of Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 21-44 (2014). The general principles these sources articulate represent broadly held views among contemporary reformers, policymakers and academics.

## I. THE PRETRIAL SYSTEM

### A. Structure and History

The pretrial phase begins when a judicial officer or grand jury determines that there is probable cause to support a criminal charge, and it ends when the charge is adjudicated or dismissed. Once the state has charged someone, it has a strong interest in ensuring the integrity of the ensuing proceeding—including ensuring that the defendant appears in court and does not interfere with witnesses or evidence. The state also has an interest, as it always does, in preventing future crime, and some defendants may be particularly crime-prone. So the core goals of the pretrial system are to (1) ensure defendants’ appearance, (2) prevent obstruction of justice, and (3) prevent other pretrial crime, all while minimizing intrusions to defendants’ liberty.<sup>14</sup>

Since the Founding, the primary mechanism for ensuring defendants’ appearance has been money bail, or a “secured financial bond.”<sup>15</sup> A defendant deposits the specified bail amount with the court as security for his appearance at future proceedings. If he does appear, the deposit is returned at the conclusion of the case. This system has inspired three waves of reform. The first, in the 1960s, sought to reduce the pretrial detention of the poor by limiting the use of money bail in favor of unsecured release (“release on recognizance”).<sup>16</sup> But rising crime during the 1970s and 1980s prompted a second reform movement, this time directed at incapacitating dangerous defendants.<sup>17</sup> The Bail Reform Act of 1984 authorized federal courts to order pretrial detention without bail on the basis of a defendant’s dangerousness.<sup>18</sup> Many states followed suit. Every jurisdiction except New York also authorized courts to consider public safety in imposing bail or other conditions of release.<sup>19</sup> More recently, money bail has been on the rise and rates of release on recognizance have declined.<sup>20</sup> The current wave of reform seeks to reverse that trend.

### B. Current Practice

In practice, bail hearings are a messy affair. Every person who is arrested is entitled to a judicial determination, within forty-eight hours, that there is probable cause to believe she has committed a crime.<sup>21</sup> Many jurisdictions combine this with a bail hearing (or “pretrial release hearing”). It is common for such hearings to last only a few minutes. They are often held over

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<sup>14</sup> ABA STANDARDS, *supra*, § 10-1.1.

<sup>15</sup> See Schnacke, *supra* note 13, 21-40; *cf.* William Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 296 (1807) (explaining that an accused required to give bail must “put in securities for his appearance, to answer the charge against him”).

<sup>16</sup> See, *e.g.*, John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2 (1985).

<sup>17</sup> See generally Goldkamp, *supra*.

<sup>18</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-87 (codified at 18 U.S.C. §§ 3141-50, 3062).

<sup>19</sup> Goldkamp, *supra* note 16, at 56 & n.57.

<sup>20</sup> Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts 2* (2007) (from 1990-1994, 41% of pretrial releases were on recognizance and 24% were by cash bail; from 2002-2004, 23% of releases were on recognizance and 42% were by cash bail); Reaves, *supra* note 8, at 15 (“Between 1990 and 2009, the percentage of pretrial releases involving financial conditions rose from 37% to 61%.”).

<sup>21</sup> *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991).

videoconference, and often with no defense counsel present. The presiding official may be a magistrate rather than a judge, and may not even be a lawyer. Available evidence suggests that the bail judges do not often take the time to make a careful determination about what bail an arrestee can realistically afford. Some jurisdictions use bail schedules that prescribe a set bail amount for each offense.<sup>22</sup> In others, statutory law directs bail judges to consider various factors in imposing bail or alternative conditions of release.<sup>23</sup> These statutes provide little guidance about how to weigh the factors, or which conditions of release are appropriate to manage different pretrial risks.

In most cases a monetary bail amount is set, and in most cases the defendant need not pay it directly to be released. Three mechanisms have developed for subsidizing bail. The dominant one is the commercial bail bond industry.<sup>24</sup> Commercial bail bondsmen charge defendants a non-refundable fee—usually around ten percent of the total bail amount—for the service of posting the bond. Because of concern about the effect of this industry on defendants’ incentive to appear and on the fairness of the process, some jurisdictions have outlawed it. Others have developed their own partial-deposit systems, which allow defendants to obtain release by depositing only a percentage of the total bail amount with the court.<sup>25</sup> The third, less common, mechanism is the community bail fund: a non-profit organization that posts bail on defendants’ behalf.<sup>26</sup>

### C. Law and Policy

The Supreme Court has affirmed that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>27</sup> A panoply of federal constitutional provisions protect pretrial liberty. Most importantly, perhaps, the Equal Protection and Due Process Clauses prohibit the state from conditioning a person’s liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest.<sup>28</sup> Since 2015, a number of federal district courts have held that fixed money-bail schedules which

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<sup>22</sup> Pretrial Justice Institute, *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes* 7 (2010) (reporting that 64% of surveyed counties use a bail schedule).

<sup>23</sup> See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. Rev. 837, 866 (2016) (describing state statutes).

<sup>24</sup> Cohen & Reaves, *supra* note 20, at 4 (showing that 48% of all pretrial releases studied were based on financial conditions, most of which—33% of all releases—were on surety bond); *About Us*, AM. BAIL COALITION, [www.americanbailcoalition.org](http://www.americanbailcoalition.org) (last visited Jan. 31, 2017) (“The American Bail Coalition is a trade association made up of national bail insurance companies . . .”).

<sup>25</sup> E.g. Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping*, 47 J. L. & ECON. 93, 94 (2004).

<sup>26</sup> See Jocelyn Simonson, *Bail Nullification*, \_\_ MICH. L. REV. 101, 117 (forthcoming 2017) (noting that community bail funds have proliferated recently, motivated by “beliefs regarding the overuse of pretrial detention”).

<sup>27</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>28</sup> See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that to “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment”); see also Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015) (“Incarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment.” (citing *Tate*, 401 U.S. at 398; *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961))). But see Brief for Amici Curiae Am. Bail Coalition *et al.*, *Walker v. Calhoun*, 16-10521 (11th Cir. June 21, 2016) (arguing that this line of caselaw has no application in the pretrial context).

do not take ability to pay into account violate these provisions.<sup>29</sup> Relatedly, the Eighth Amendment prohibits “excessive” bail.<sup>30</sup> This requires an individualized bail determination: Bail must be “reasonably calculated” to ensure the appearance of a particular defendant.<sup>31</sup> The Bail Clause permits detention without bail, but may prohibit any burden on a defendant’s liberty that is excessive “in light of the perceived evil” it is designed to address.<sup>32</sup> The Due Process Clause prohibits pretrial punishment.<sup>33</sup> It also requires that any detention regime be carefully tailored to achieve the state’s interest and include robust procedural protections for the accused.<sup>34</sup> The Sixth Amendment, finally, requires that counsel be appointed for an indigent defendant at or soon after her initial appearance in court.<sup>35</sup> It remains an open question whether defendants have a Sixth Amendment right to representation at the bail hearing itself.<sup>36</sup>

Beyond the federal Constitution, federal statutory law and state law regulate pretrial practice. In the federal system, the Bail Reform Act lays out a comprehensive pretrial scheme.<sup>37</sup> At the state level, there is wide variation in pretrial legal frameworks. Approximately half of state constitutions include a right to release on bail in non-capital cases. The other half allow for detention without bail in much broader circumstances.<sup>38</sup> Most states also have statutes that structure pretrial decision-making.

In the policy realm, the American Bar Association has codified standards on pretrial release that represent the mainstream consensus among scholars about best practices in the pretrial arena.<sup>39</sup> Three core principles are worth highlighting. First, wealth cannot be the factor that determines whether a defendant is released or detained pretrial.<sup>40</sup> Secondly, money bail should be set only to mitigate flight risk (not threats to public safety) and as a last resort.<sup>41</sup> Finally, the state should always use the least restrictive means available to mitigate flight or crime risk.<sup>42</sup> Ultimately, though, it is local implementation that truly shapes pretrial practice. There is huge variance across counties with respect to the timing of bail hearings, the presence of counsel, the qualifications and

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<sup>29</sup> Order, *Pierce v. City of Velda City*, 4:15-cv-570-HEA (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, 2:15-cv-34-MHT (M.D. Al. Sept. 14, 2015); *Thompson v. Moss Point, Mississippi*, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015); *Walker v. City of Calhoun, Georgia*, No. 4:15-cv-170-HLM (N.D. Ga. Jan. 28, 2016). The Department of Justice took the same position under the Obama Administration. See Brief for the U.S. as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance of the Issue Addressed Herein at 3, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir. Aug. 18, 2016); Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 7 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

<sup>30</sup> U.S. Const. amend. VIII (“[e]xcessive bail shall not be required”).

<sup>31</sup> *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (emphasis added).

<sup>32</sup> *United States v. Salerno*, 481 U.S. 739, 754-55 (1987).

<sup>33</sup> *Id.* at 748-52.

<sup>34</sup> *Id.* at 747, 750-52. The Supreme Court upheld the federal pretrial detention regime against (inter alia) a procedural due process challenge on the ground that it provided for an adversarial hearing, guaranteed defense representation, requirements that the state prove “by clear and convincing evidence that an arrestee presents an identified and articulable threat” and that the court provide “written findings of fact” and “reasons for a decision to detain,” as well as immediate appellate review. *Id.* at 751-52.

<sup>35</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 199, 212 (2008).

<sup>36</sup> See *id.* at 212 n.15 (reserving judgment on that question).

<sup>37</sup> 18 U.S.C. §§ 3141-50, 3062.

<sup>38</sup> WAYNE R. LAFAVE *ET AL.*, 4 CRIM. PROC. § 12.3(b) (3d ed.).

<sup>39</sup> ABA STANDARDS, *supra* note 13.

<sup>40</sup> *Id.* §§ 10-1.4(c)-(e), 10-5.3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 10-5.2.

training of bail judges, the resources allocated for bail hearings, the prevalence of commercial bondsmen, the customary standards for bail-setting, and the availability of alternatives to detention or money bail.

## II. PRETRIAL REFORM INITIATIVES

### A. *Reducing the Use of Money Bail*

Reducing reliance on monetary bail is a central goal of many pretrial reform advocates. The use of monetary bail, by definition, disadvantages the poor; defendants who have resources or access to credit are more likely to secure release than those who do not. This fact is not only unjust. It also means that money-bail systems that do not meaningfully account for defendants' ability to pay are inefficient at managing flight and crime risk, and likely to be unconstitutional.<sup>43</sup> Although implementing procedures to assess defendants' ability to pay may help, it is difficult to assess accurately.

It is possible to operate an effective pretrial system with minimal reliance on money bail. The District of Columbia, for instance, has been running its pretrial system largely without it since the 1960s. Nearly all D.C. defendants are released on recognizance or with non-monetary conditions; a small percentage are ordered detained. For the last six years, appearance rates have remained at or above 87% and rearrest rates at or below 12%—far better than national averages.<sup>44</sup>

Replicating the D.C. model is no easy feat, however. The District benefits from an experienced and well-funded pretrial services agency. Without that infrastructure, limiting or eliminating money bail is likely to reduce appearance rates as well. The best empirical research on this topic found that money bail increased appearance rates by 3-7 percentage points over release on recognizance.<sup>45</sup> Increased rates of non-appearance can result in significant expense to the court system and the police. These costs may be outweighed by the benefits of reduced money bail (improved public safety, if release is based on crime risk; lower detention rates; and the elimination of an unjust mechanism of release), but they are still important considerations. Reformers who seek to limit money bail should pursue other methods to increase appearance rates, such as court reminders.

### B. *Reducing Racial Disparities in Detention Rates*

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<sup>43</sup> See supra notes 28-31 and accompanying text.

<sup>44</sup> See Pretrial Services Agency for the District of Columbia, Congressional Budget Justification and Performance Budget Request Fiscal Year 2017, 1, 23 (Feb. 2016). Nationally, 16% of released defendants were rearrested and 17% missed a court date in 2009, the last year for which data is published. Reaves, supra note 8, at 20-21.

<sup>45</sup> Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping*, 47 J. L. & ECON. 93, 108 (2004) (using propensity-score matching system to evaluate data from the 75 largest U.S. urban jurisdictions in the 1980s and 90s).



The most recent available data shows that, in 2002, black defendants made up 43% of the pretrial detainee population despite constituting only 13% of the total population.<sup>46</sup> A second core objective of pretrial reform is to reduce this racial disparity in pretrial detention. In order to pursue this goal effectively, it is important to understand how such disparities arise.

First, arrest itself, as well as criminal history information, may reflect racially disparate past practices. For example, residents of heavily policed minority neighborhoods are arrested for drug offenses at disproportionately high rates relative to the rate of offending.<sup>47</sup> Even superficially colorblind methods of making pretrial custody decisions will embed these disparities. This is not an easy problem to fix, as actual criminal behavior is unmeasurable and decision-making in criminal justice has long relied on the criminal record as its proxy. Nonetheless, educating judges about this type of disparity (or using sophisticated risk-assessment algorithms to adjust for it) may ameliorate the problem.

Secondly, bail judges may harbor explicit or implicit racial bias, which is to say that they may set higher bail or place more onerous conditions of release on minority defendants than otherwise similar white defendants. A typical approach to measuring this type of bias is to see whether minority defendants have higher bail than white defendants after controlling for variables like charge type, criminal history and age. Using this approach, many studies have found evidence of bias.<sup>48</sup> As the number and specificity of controls increase, however, this measure of bias tends to shrink or disappear. Baradaran and McIntyre find no evidence that judges set bail higher for black defendants than white defendants once predicted crime-risk (a function of a defendant's specific charge and criminal history) is accounted for.<sup>49</sup> Stevenson finds no evidence that bail is systematically set higher or lower for black defendants in Philadelphia, conditional on the charge and criminal record.<sup>50</sup> While racial bias certainly exists, differential treatment of similarly situated defendants on the basis of race does not appear to be a substantial contributor to racial disparities in pretrial detention.

Third, racial disparities may result from differing levels of wealth or access to credit across races. For example, Stevenson finds that, in Philadelphia, only 46% of black defendants with bail set at \$5000 (and who need only to pay a \$500 deposit on order to be released) post bail, compared to 56% of non-black defendants.<sup>51</sup> Stevenson estimates that 50% of the race gap in detention rates in Philadelphia is accounted for by differences in the likelihood of posting bail. The other 50% is due to the fact that black defendants in this dataset are, on average, facing more serious charges, have lengthier criminal records and accordingly have higher bail set.<sup>52</sup> Similarly, Demuth finds that black defendants do not have bail set at higher levels than white defendants, but finds that the

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<sup>46</sup> See Jail Inmates at Midyear, 2002, *supra* note 11, at 2.

<sup>47</sup> See, e.g., Shima Baradaran and Frank McIntyre, *Race, Prediction and Pretrial Detention*, 10 J. EMPIRICAL L. STUD. 741 (2013).

<sup>48</sup> See, e.g., Marvin D. Free, Jr., *Bail and Pretrial Release Decisions: An Assessment of the Racial Threat Perspective*, 2 J. OF ETHNICITY IN CRIM. JUST. 23, 31-33 (2004); Besiki Luka Kutateladze & Nancy R. Andiloro, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY – TECHNICAL REPORT ii–iii (2014), [www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf).

<sup>49</sup> Baradaran and McIntyre, *supra* note 47.

<sup>50</sup> Stevenson, *supra* note 5, at 23.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 25.

odds of detention for blacks are almost twice as large because they are less likely to post bail.<sup>53</sup> To the extent that racial disparities in pretrial detention rates are a direct function of socioeconomic disparity, reducing reliance on money bail should ameliorate them.

Finally, racial disparities in pretrial detention rates can arise from disparities in criminal prosecution (charged offenses and past records, which in turn affect bail and release decisions) that reflect actual differences in rates of criminal offending. It is extremely difficult to isolate this source of disparity. But to the extent that differential crime rates contribute to racial disparities in pretrial detention, the only long-term solution is to redress the underlying causes of the divergent rates.

### *C. Improving Pretrial Process*

Pretrial reform necessarily entails some changes to pretrial process. The following five approaches hold particular promise.

#### Release Before the Bail Hearing

Jurisdictions can reduce the number of people who require a bail hearing in the first place by increasing the use of citation rather than arrest, and by authorizing direct release from the police station (stationhouse release).<sup>54</sup> The process of arrest is obtrusive, time-consuming, expensive, and potentially damaging to community-police relations. Jurisdictions including Philadelphia, New York, New Orleans and Ferguson have recently begun substituting citations and summons for arrest for some categories of crime.<sup>55</sup> Even for crimes that require arrest, defendants who pose little risk of flight or future crime should be identified rapidly and released. Risk assessment tools may be helpful in identifying good candidates. Kentucky, for example, uses a risk assessment tool to identify defendants who are eligible for station-house arrest.<sup>56</sup>

#### Slowing Down the Bail Hearing

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<sup>53</sup> Stephen Demuth, *Racial and Ethnic Decisions in Pretrial Release and Outcomes*, 41 CRIMINOLOGY 874, 894 (2003) (Demuth finds that Hispanics have higher bail set than whites, although that could be due to citizenship status.)

<sup>54</sup> See ABA STANDARDS §§ 10-1.3 (“Use of citations and summonses”); 10-2.1–10.3.3 (encouraging jurisdictions to employ citations and summons broadly in lieu of arrest for minor offenses, and providing specific guidelines); Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. \_\_\_, 2 (2017).

<sup>55</sup> Chris Goldstein, *Marijuana Arrests Down 73 Percent*, PHILLY.COM (Aug. 7, 2015) (describing initiative encouraging citation rather than arrest for marijuana possession); Bruce Egger, *New Orleans City Council Reclassifies Pot Possession, Prostitution to Reduce Criminal Dockets*, NOLA.COM (Dec. 17, 2010); Mary T. Phillips, *Desk Appearance Tickets: Their Past, Present and Possible Future* (New York Crim. Just. Agency Research Brief No. 34, May 2014).

<sup>56</sup> Order 2015-22, (Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program, S. Ct. Ky., 2015)

Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.<sup>57</sup> It is hard to imagine that two minutes are sufficient to effectively evaluate the risk of failure to appear, risk of serious crime, whether detention or conditions of release are necessary, and, if money bail is used, ability to pay. Taking more care during the bail hearing is likely to improve the courts' ability to evaluate risk and determine appropriate pretrial conditions. While slowing down the bail hearing would, *ceteris paribus*, increase costs, a bail hearing should only be required for defendants at risk of losing liberty. If more people charged with low-level offenses were released before the bail hearing, the courts would have more time and resources to devote to evaluating whether detention or conditions of release are necessary for the remaining defendants.

### Providing Counsel

Decreasing the number of defendants who require a bail hearing would also lower the costs of supplying defense counsel to those at risk of losing their liberty. Currently, many jurisdictions do not provide counsel to indigent defendants at the bail hearing.<sup>58</sup> Sixth Amendment doctrine holds that defendants have the right to effective assistance of counsel at all “critical stages” of criminal proceedings.<sup>59</sup> 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”.<sup>60</sup> While providing counsel at the bail hearing would come at some expense, the presence of counsel is also useful to the system as a whole: lawyers can provide information that may help a judge determine which defendants can be safely released. Furthermore, initiating defense representation at the bail hearing would facilitate early and more effective investigation, plea negotiations, and case resolutions.

### Information and Feedback

The judges and magistrates who set bail may not be fully aware of how their decisions translate into detention rates. It may surprise some to learn how high detention rates can be even at relatively low amounts of bail. For example, 40% of Philadelphia defendants with bail set at

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<sup>57</sup> See, e.g., *Length of a Bail Hearing In North Dakota: 3 Minutes*, NAT'L CTR. FOR ACCESS TO JUST. (Jan. 25, 2013); Injustice Watch Staff, *Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICE WATCH (Oct. 14, 2016). In both Philadelphia and Harris County, bail hearings are only a few minutes long on average. Heaton *et al.*, *supra* note 5; Stevenson, *supra* note 5, at 5.

<sup>58</sup> Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices, and Outcomes (Pretrial Justice Institute, 2009), at 8; Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011).

<sup>59</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 199, 212 (2008).

<sup>60</sup> See sources cited in *supra* note 5. For additional arguments that defendants do or should have the right to representation at bail hearings, see, e.g., Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST., Spring 2016, at 23, 47; Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1763-83 (2002); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 335 (2011); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013); The Constitution Project Nat'l Right to Counsel Comm., *Don't I Need a Lawyer?: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing* (2015); Sixth Amendment Center & Pretrial Justice Institute, *Early Implementation of Counsel: The Law, Implementation, and Benefits* (2014).

\$500 – who need only pay a \$50 deposit to secure their release – remain detained pretrial.<sup>61</sup> While it is conceivable that these detention rates are the result of well-considered policies, it is possible that the magistrates are unaware of how difficult it can be for defendants to come up with even relatively small sums of money. Increasing the flow of information and feedback to judges, magistrates and policymakers may reduce the incidence of these seemingly irrational outcomes.

### Court Reminders

There are many reasons why a defendant may not appear in court beyond willful flight from justice. A defendant may not know when her court date is, have forgotten about it, or have failed to make adequate preparations (such as arranging time off from work). For these defendants, court reminders in the form of mail notifications, phone calls or automated text messages may greatly increase appearance rates. The available research shows that phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%.<sup>62,63</sup> Entrepreneurial technology firms now offer automated, individually customized text-message reminders.<sup>64</sup> While the efficacy of this type of reminder has not yet been evaluated, it holds considerable promise. Finally, improving court websites so that defendants can easily locate information relevant to their case should increase the likelihood of appearance. All of these methods come at relatively low cost and offer potentially significant savings.

#### *D. Implementing Actuarial Risk Assessment*

Actuarial risk assessment is central to contemporary bail reform.<sup>65</sup> Reformers aspire to improve the accuracy and consistency of pretrial decision-making by assessing each defendant's statistical risk of non-appearance and rearrest in the pretrial period, and providing this assessment to judges along with a recommendation for pretrial intervention. Pretrial risk assessment holds great promise, but also raises cause for concern.

### The Promise of Risk Assessment

There is reason to be optimistic about the actuarial turn in pretrial practice. Risk assessment tools should reduce the subjective, irrational bias that distorts judicial decision-making. They may

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<sup>61</sup> See *supra* note 9.

<sup>62</sup> Tim R. Schnacke, Michael R. Jones, and Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 COURT REVIEW 86, 89 (2012) (telephone live-caller experiment); Brian H. Bornstein *et al.*, *Reducing Courts' Failure to Appear Rate By Written Reminders*, 19 PSYCH., PUB. POLICY & L. 70 (2013).

<sup>63</sup> These numbers, however, are best thought of as upper bounds on the effect of court reminders. These studies were randomized control trials – the “gold standard” in research – but only the “treatment on the treated” results were reported, which makes causal interpretation difficult. See Schnacke and Bornstein, *supra*.

<sup>64</sup> See, e.g., *About Uptrust*, <http://www.uptrust.co/#about-uptrust-section>.

<sup>65</sup> For an overview of pretrial risk assessment tools and their expanding use, see Sandra G. Mayson, *Bail Reform and Restraint for Dangerousness: Are Defendants a Special Case?*, \_\_ YALE L. J. \_\_ (forthcoming 2017).

also mitigate judicial incentives to over-detain by absolving judges of personal responsibility for “mistaken” release decisions.<sup>66</sup> And recent studies argue that tying pretrial detention directly to statistical risk can minimize detention rates while maximizing appearance rates, public safety, or both. Analyzing a dataset from the seventy-five largest urban counties in the U.S., Baradaran and McIntyre find that the counties could have released 25% more felony defendants pretrial and reduced pretrial crime if detention decisions had been made on the basis of statistical risk.<sup>67</sup> In Philadelphia, Richard Berk and colleagues conclude that deferring to the detention recommendations of a machine-learned algorithm in domestic violence (DV) cases could cut the rearrest rate on serious DV charges (over two years) from 20% to 10%.<sup>68</sup> Jon Kleinberg and colleagues, working with New York City data, find that delegating detention decisions to a machine-learned algorithm could “reduce crime by up to 24.8% with no change in jailing, or reduce jail populations by 42.0% with no increase in crime,” while also reducing racial disparities in detention.<sup>69</sup>

The strength of this evidence should not be overstated, however. All empirical work comparing actuarial assessment to judicial pretrial decision-making has serious handicaps. One is that algorithmic pretrial tools are developed on the basis of pretrial outcomes (e.g. rearrest, non-appearance) for defendants who were released in the past. It may be that the defendants who were *not* released were categorically riskier. Without knowing how they would have behaved if released, it is impossible to fully compare the algorithm’s performance to the judge’s.<sup>70</sup> A second problem with the claim that actuarial risk assessment is better at predicting rearrest and non-appearance than judges is that judges’ predictions are not observed in the data; only detention status is observed. Detention status does not necessarily reflect a judicial prediction, because judges generally do not decide who to detain. They are charged instead with setting affordable bail that is a sufficient incentive to achieve a range of objectives. Their predictions may affect the amount of bail set, but whether a defendant winds up detained is also a function of his ability to pay (and how accurately the judge has assessed it), his willingness to pay, and whether other circumstances (like a detainer) prevent release. It is impossible to compare actuarial and judicial predictions when judicial predictions are not observed. A randomized control trial (RCT) would help to evaluate the utility of pretrial risk assessment, but has not yet been performed.

### Concerns over Accuracy, Racial Equality, and Contestability

Pretrial risk assessment has also sparked controversy in the popular press. In 2016, news outlet ProPublica published a study that claimed to have discovered that the COMPAS, a

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<sup>66</sup> See Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417 (2016).

<sup>67</sup> Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012).

<sup>68</sup> Richard Berk *et al.*, *Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions*, 13 J. EMPIRICAL LEGAL STUD. 94 (2016).

<sup>69</sup> Jon Kleinberg *et al.*, *Human Decisions and Machine Predictions* (working paper, Jan. 27, 2017).

<sup>70</sup> See Shawn Bushway & Jeffrey Smith, *Sentencing Using Statistical Treatment Rules: What We Don’t Know Can Hurt Us*, 23 J. QUANT. CRIMINOLOGY 377 (2007).

prominent risk assessment tool, was “biased against blacks.”<sup>71</sup> It also opined that the COMPAS was “remarkably unreliable in forecasting violent crime,” and only “somewhat more accurate than a coin flip” in predicting pretrial rearrest generally.<sup>72</sup> Finally, the article noted that statistical generalization may be at odds with individualized justice, and that proprietary risk assessment tools like the COMPAS pose transparency concerns. These critiques—regarding accuracy, racial equality, and contestability—represent core concerns with actuarial assessment.

Debate about accuracy would benefit from an acknowledgement that no method of prediction is one hundred percent accurate. It is particularly hard to predict low-frequency events like violent crime. The ProPublica article concluded that the COMPAS was “remarkably unreliable” on the basis that “[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so [in a two-year window].”<sup>73</sup> But that is much higher than the base rate.<sup>74</sup> An algorithm that can identify people with a 20% chance of rearrest for violent crime provides useful knowledge.<sup>75</sup> The policy-relevant question is not whether a tool is “accurate,” but rather *what* statistical information it provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pretrial decision-making.

The concern for racial equality is similarly complex. The most obvious source of racial bias in prediction would be if an algorithm treated race as an independently predictive factor, or over-weighted factors that correlate with race, like zip code, relative to their predictive power.<sup>76</sup> But none of the pretrial risk assessment tools in current use race as an input factor; the dominant tool, the Public Safety Assessment, relies exclusively on criminal history information.<sup>77</sup> Two people of different races with the same criminal history will thus receive the same risk score. Nonetheless, risk assessment can have disparate impact across racial groups. In fact, if the base rate of the predicted outcome (e.g. rearrest) differs across racial groups, statistical risk assessment necessarily *will* have disparate impact.<sup>78</sup> This was the source of the disparity that ProPublica documented: the black defendants in its dataset had higher arrest-risk profiles, on average, than

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<sup>71</sup> Julia Angwin *et al.*, *Machine Bias*, PROPUBLICA.COM (May 23, 2016).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> William Dieterich *et al.*, *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity* (Technical Report, Northpointe Inc., July 2016). *See also* Baradaran & McIntyre, *supra* note 47 (finding that, among all felony defendants in a national dataset, rate of pretrial rearrest for a violent felony was 1.9%).

<sup>75</sup> In fact, other pretrial risk assessment tools classify defendants as high-risk at substantially lower probabilities of rearrest. *See* Mayson, *supra* note 65.

<sup>76</sup> *See, e.g.*, Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

<sup>77</sup> Laura & John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* (2016), [www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf](http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf).

<sup>78</sup> Where base rates differ across two groups, it is impossible to ensure that predictions are equally accurate for each group and also ensure equal false positive and false negative rates unless prediction is perfect. *See* Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments* (working paper, Oct. 24, 2016); Jon Kleinberg, Sendhil Mullainathan, and Manish Raghavan, *Inherent Trade-Offs in the Fair Determination of Risk Scores*, PROCEEDINGS OF INNOVATIONS IN THEORETICAL COMPUTER SCIENCE (ITCS) (forthcoming 2017); Julia Angwin & Jeff Larsen, *Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say*, PROPUBLICA.COM (Dec. 30, 2016).

the white.<sup>79</sup> There is no easy way to prevent this result.<sup>80</sup> Nor is it good reason to reject actuarial risk assessment, because subjective risk assessment will have the same effect. It is possible to modify an algorithm to equalize outcomes across racial groups, but usually requires treating defendants with the same observable risk profiles differently on the basis of race.<sup>81</sup>

The third set of concerns with pretrial risk assessment are procedural. If people cannot meaningfully contest the basis of their risk score, actuarial risk assessment might violate due process by denying a meaningful opportunity to be heard.<sup>82</sup> This problem arises with proprietary algorithms like the COMPAS and with “black-box” machine-learned algorithms, although there are ways to make machine-learned algorithms more transparent.<sup>83</sup> A related concern is that no algorithm will take account of every relevant fact about a given individual. For this reason, most scholars believe that judges must retain discretion to vary from the recommendations of a risk assessment tool, and jurisdictions have universally followed this practice.<sup>84</sup>

### Best Practice in Risk Assessment

Given these concerns, and the limitations of existing research, jurisdictions implementing pretrial risk assessment should keep a number of best practices in mind.

First, risk assessment tools should be intelligible to the people whose lives they affect: To the greatest extent possible, the identity and weighting of risk factors should be public. Relatedly, tools that rely on objective data are preferable to tools that include subjective components.

Second, stakeholders should take care in determining what risks to assess. At present, many tools measure pretrial “failure,” a composite of flight- and crime-risk. But these two risks are different in kind and call for different responses.<sup>85</sup> As a number of studies have demonstrated, risk assessment can attain greater accuracy—and produce more useful information—if it measures them separately.<sup>86</sup> Within each category, moreover, further divisions are warranted. For instance, most tools currently define crime risk as the likelihood of arrest for anything at all, including minor offenses. If society’s core concern is violent crime, then assessing the risk of any arrest is counterproductive; people at highest risk for any arrest are *not* at highest risk of arrest for violent crime in particular, and vice versa.<sup>87</sup> Targeting those at highest risk for any arrest also introduces unnecessary racial disparity in prediction, because arrest rates for low-level and drug offenses are

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<sup>79</sup> See Dieterich *et al.*, *supra* note 74; Julia Angwin & Jeff Larsen, *ProPublica Responds to Company’s Critique of Machine Bias Story*, PROPUBLICA.COM (June 29, 2016).

<sup>80</sup> This kind of disparate impact is not a constitutional violation; equal protection prohibits only formal or intentional discrimination on the basis of race. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>81</sup> See, e.g., Richard Berk *et al.*, *Fairness in Criminal Justice Risk Assessments: The State of the Art* (Jan. 12, 2017) (working paper). This is one manifestation of the difficulty of avoiding both disparate impact and disparate treatment. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

<sup>82</sup> See, e.g., Hamilton, *supra* note 76.

<sup>83</sup> Joshua A. Kroll *et al.*, *Accountable Algorithms*, 165 U. PA. L. REV. \_\_\_ (forthcoming 2017).

<sup>84</sup> But see Wiseman, *Fixing Bail*, *supra* note 66 (arguing against such discretion).

<sup>85</sup> See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016).

<sup>86</sup> See, e.g., Baradaran & McIntyre, *Predicting Violence*, *supra* note 67; Kleinberg *et al.*, *Human Decisions and Machine Predictions*, *supra* note 69.

<sup>87</sup> Baradaran & McIntyre, *Predicting Violence*, *supra* note 67, at 528-29; see also Public Safety Assessment, *supra* note 77 (using mostly different factors to predict arrest versus arrest for violent crime).

skewed across racial groups vis-à-vis offending rates.<sup>88</sup> Focusing on the risk of rearrest for violent crime avoids these problems.

Third, criminal justice stakeholders should also take care to communicate accurately about risk assessment. If a risk assessment tool measures the likelihood of arrest, it is inaccurate to say that it measures the risk of “new criminal activity.” Risk assessment tools should be cautious in the communication of risk assessments as well. Terms like “high-risk” embed a normative evaluation.<sup>89</sup> To avoid unduly influencing courts’ or stakeholders’ judgment about the significance of a given statistical risk, an actuarial tool should report its assessment in numerical terms: “Statistical analysis suggests that this defendant has an X% chance of Y event within Z time period if released unconditionally.”<sup>90</sup>

Fourth, criminal justice stakeholders should confront the value judgments that a detention regime guided by risk assessment will entail.<sup>91</sup> Someone must decide what degree of statistical risk justifies detention. Either the developers of risk assessment tools will make that judgment implicitly, by choosing the “cut point” at which a risk is determined to be high and detention is recommended, or stakeholders can make it and direct the design of the tool accordingly. Similarly, any predictive system (including subjective risk assessment) will perpetuate underlying racial and socio-economic disparities in the world, and stakeholders should determine how best to respond to this reality.

Fifth, it is imperative that actuarial risk assessment tools are implemented carefully and monitored closely, with rigorous data collection and analysis.

### A. Rationalizing Pretrial Detention

A reform model in which defendants are detained based on risk rather than ability to post bail requires that courts have authority to order pretrial detention directly. In states that still have a broad constitutional right to pretrial release, bail reform may thus require amendment of the state constitution.<sup>92</sup> This poses significant logistical challenges and raises the difficult question of when detention is warranted. In the 1970s and 80s, when the first preventive detention regimes were implemented, critics argued that due process and the Excessive Bail Clause categorically prohibit detention without bail.<sup>93</sup> The Supreme Court rejected that position in *United States v. Salerno*.<sup>94</sup>

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<sup>88</sup> Baradaran & McIntyre, *Race, Prediction and Pretrial Detention*, supra note 49, at 21. Similarly, some people are at high risk for “flight” because they have powerful incentives to abscond; others are just likely to struggle with the logistics of attending court. See Lauryn P. Gouldin, *Defining “Flight Risk”* (working paper). As risk assessment technology improves, it should distinguish between these risks.

<sup>89</sup> See Jessica Eaglin, *Constructing Recidivism Risk for Sentencing* (working paper, Aug. 12, 2016); Moving Beyond Money, supra note 13, at 21.

<sup>90</sup> This is the “positive predictive value” of a risk classification. See, e.g., Chouldechova, supra note 78.

<sup>91</sup> See generally Eaglin, supra note 89; Mayson, supra note 65.

<sup>92</sup> New Jersey has recently completed this process. Its constitution now provides that “pretrial release may be denied” if a court finds that no condition of release would “reasonably” ensure appearance, protect the community, or prevent obstruction of justice. N.J. CONST. art. I, § 11 (effective Jan. 1, 2017). The state legislature has enacted statutory rules to guide these decisions. New Jersey P.L. 2014, c. 31, eff. Jan. 1, 2017 (codified at NJ ST 2A:162–15 et seq.).

<sup>93</sup> See, e.g., Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 401 (1970).

<sup>94</sup> 481 U.S. 739, 754-55 (1987).



But it did not specify what type or degree of risk is sufficient to justify detention, beyond the broad principles that pretrial detention must not constitute punishment or be excessive in relation to its goals. Even if the Constitution imposes little substantive constraint, the question of when pretrial detention is justified is also a moral one.<sup>95</sup>

It is clear that some defendants should *not* be detained. To begin with, detention is not justified if a less restrictive and cost-effective alternative would adequately mitigate whatever risk a defendant presents. Samuel Wiseman suggests, for instance, that detention should rarely be imposed as a response to flight risk, because electronic monitoring will nearly always reduce the risk to a reasonable level.<sup>96</sup> A related principle is that detention is unwarranted for defendants who pose little risk of flight or committing pretrial crime. The great promise of risk assessment is to identify this group and ensure their release. Finally, misdemeanor pretrial detention should be rare. Defendants charged with misdemeanors generally do not pose a grave crime risk, and incentives to abscond should be weakest in low-level cases. Some research suggests that misdemeanor pretrial detention has lasting criminogenic effects,<sup>97</sup> thus generating more crime than it prevents.<sup>98</sup> Pretrial detention in misdemeanor cases also appears particularly likely to skew the fairness of the adjudicative process,<sup>99</sup> because a guilty plea often means going home.<sup>100</sup> Scholars speculate that this dynamic may be a major cause of wrongful convictions.<sup>101</sup>

Beyond these classes of defendants, there is no easy answer to the question of when pretrial detention is warranted. Some scholars have suggested that it is justified when its benefits outweigh its costs.<sup>102</sup> Others have advocated for additional criteria,<sup>103</sup> or community involvement in

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<sup>95</sup> A few contemporary scholars have argued that pretrial detention based on general dangerousness categorically violates the presumption of innocence. *See, e.g.*, Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011); R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTIVE JUSTICE 128 (A.J. Ashworth et al., eds., 2013). This argument has no legal traction in the United States, because the Supreme Court has held that the presumption of innocence is merely “a doctrine that allocates the burden of proof in criminal trials.” *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). As Richard Lippke has noted, furthermore, it is difficult to specify what a presumption of innocence would require in the pretrial context. *See* Richard L. Lippke, *TAMING THE PRESUMPTION OF INNOCENCE* (2016).

<sup>96</sup> Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014). Wiseman focuses on money bail that results in detention, but the argument applies to direct detention as well.

<sup>97</sup> *See* Heaton *et al.*, *supra* note 5.

<sup>98</sup> Heaton *et al.* find that Harris County could have saved an estimated \$20 million and averted thousands of new arrests by releasing every misdemeanor defendant detained on a bail amount of \$500 or less between 2008 and 2013. *Id.* at 72.

<sup>99</sup> Misdemeanor defendants detained pretrial in Harris County, Texas (2008-2013) were 25% more likely to be convicted than statistically indistinguishable defendants who were not detained, due almost entirely to the increased likelihood of pleading guilty. These results indicate that approximately 28,300 defendants would not have been convicted but for their detention. *Id.*

<sup>100</sup> Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 308 (2011) (“In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation.”); *cf.* MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 9-10 (1979) (reporting that in sample of more than 1600 cases, “twice as many people were sent to jail prior to trial than after trial”).

<sup>101</sup> *See, e.g.*, Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930-31 (2008); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316, 1343-47 (2012).

<sup>102</sup> The most comprehensive cost-benefit analysis of pretrial detention concludes that we could achieve cost-benefit equilibrium, detain 28% fewer people and save \$78 million by adopting a statistical risk approach to detention decisions. Shima Baradaran Baughman, *Costs of Pretrial Detention*, \_\_ B.U. L. Rev. \_\_ (2017). *See also* David S. Abrams & Chris Rohlf, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 760-61 (2011); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 39 (2010).

<sup>103</sup> *See, e.g.*, Richard L. Lippke, *Pretrial Detention without Punishment*, 20 RES PUBLICA 111, 122 (2014) (arguing that detention on the basis of crime-risk is justified only if the defendant is likely to commit a serious crime in the pretrial phase, no

detention decisions.<sup>104</sup> This important debate should continue. As a baseline, jurisdictions seeking to craft new pretrial detention regimes should ensure that:

- a) Pretrial release is the default, and detention is a “carefully limited exception.”<sup>105</sup>
- b) Detention procedures include, at minimum, the protections noted by the Supreme Court in *United States v. Salerno* (including an adversary hearing and right to immediate appeal).<sup>106</sup>
- c) Detention requires clear and convincing evidence that (1) there is a substantial probability the defendant will commit serious crime in the pretrial phase or abscond from justice, and (2) no conditions of release can reduce the risk below that probability threshold. Jurisdictions should specify what numerical probability qualifies as substantial and what crime qualifies as serious for this purpose.

### *B. Implementing Non-Monetary Conditions of Release*

In order to limit the use of money bail and reduce detention rates, bail reformers advocate non-financial conditions of release as an alternative for defendants who pose some pretrial risk. This section surveys the literature evaluating three common conditions: required meetings with pretrial officers, drug testing, and electronic monitoring. The emphasis is on high-quality studies such as randomized control trials (RCTs); evidence from the probation or parole context is included if there is a lack of quality research in the pretrial context.

#### Meetings with a pretrial officer

The requirement of meeting periodically (in person or over the phone) with a pretrial officer is one of the most common conditions of release. Pretrial supervision is an expensive intervention, as it requires the time of a salaried employee of the state. It imposes time burdens on the defendant, and, in increasing the requirements of release, increases the likelihood that the defendant will fail to fulfill them.

There is no good evidence to support this practice. A small experiment conducted by John Goldkamp, in which defendants were randomly assigned to low-supervision or high-supervision conditions, finds no difference in appearance rates or rearrest across the two groups, either for low risk or moderate-high risk defendants.<sup>107</sup> An experiment in the 1980s randomly assigned

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less restrictive means can prevent it, and there is “substantial evidence” of the defendant’s guilt on a serious charge); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1953 (2005) (arguing that the state should compensate detained defendants for their lost liberty); see also Mayson, *supra* note 65 (noting that there is no clear justification for pretrial detention for dangerousness if the state could not detain an equally dangerous person not accused of any crime).

<sup>104</sup> Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & The Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012); Simonson, *supra* note 26.

<sup>105</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>106</sup> *Id.* at 751-52.

<sup>107</sup> John S. Goldkamp and Michael D. White, *Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 154 (2006). They also include a non-experimental analysis that compares outcomes for a baseline group in a prior period who were not under supervision against the experimental groups, who

defendants to either more intensive pretrial supervision or less intensive supervision plus access to services (vocational training or drug/alcohol counseling). It found no difference in appearance rate or rearrest across the groups.<sup>108</sup> Very little other research exists. A correlational study funded by the Laura and John Arnold Foundation showed that pretrial supervision is correlated with increased appearance rates but is not generally correlated with reductions in new criminal activity.<sup>109</sup> This study was conducted across multiple jurisdictions that varied in their use of, and definition of, pretrial supervision. Correlational studies are generally considered weak evidence, so it is hard to draw firm conclusions from these results.

There are several well-executed studies on required meetings with supervising officers in the probation and parole context. An RCT in Philadelphia that reduced the frequency of required meeting with probation officers found no effect on new charges or re-incarceration.<sup>110</sup> An RCT evaluating the benefits of intensive probation (which, among other things, involves extra meetings with probation officers) shows no evidence that these meetings decrease criminal behavior.<sup>111</sup> The intensive supervision does, however, increase the likelihood that a defendant will be re-incarcerated due to a technical violation, at considerable cost to the state. Another study evaluating the effects of abolishing post-release supervision showed similar results: a decreased likelihood of re-incarceration due to technical violations, but little effect on crime.<sup>112</sup>

More high-quality research on the efficacy of pretrial supervision is needed. At the moment, the practice is far from “evidence-based”, and the best available research shows no benefits. Indeed, the arguments for why it might be effective are fairly tenuous. Supervision implies a watchful eye and the guidance of a capable authority in troubling situations. Periodic meetings with a pretrial officer are unlikely to serve these functions. If a defendant is engaging in illicit behavior, she has every incentive to hide this from the pretrial officer, and the officer has no knowledge of such activities beyond what the defendant chooses to share. There are thus scant reasons to believe that meetings alone will have a deterrent effect or that the pretrial officer will have the information necessary to intervene if troubles arrive. Given its expense and intrusiveness, required check-ins with the pretrial officer should not be considered a core part of the portfolio of pretrial options unless better evidence emerges to support its use.

## Drug Testing

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had varying levels of supervision. This is a weak research design, since the baseline data related to circumstances and events from four years before the experimental data, and many things could have changed in between.

<sup>108</sup> James Austin, Barry Krisberg and Paul Litsky, *The Effectiveness of Supervised Pretrial Release*, 31 CRIME & DELINQUENCY 523, 523-535 (1985).

<sup>109</sup> Christopher T. Lowenkamp and Marie VanNostrand, Exploring the Impact of Pretrial Supervision on Pretrial Outcomes (Laura and John Arnold Foundation, Nov. 2013), at 15-16.

<sup>110</sup> Geoffrey C. Barnes, Charlotte Gill, and Ellen Kurtz, *Low-Intensity Community Supervision for Low-Risk Offenders*, 6 J. EXPERIMENTAL CRIMINOLOGY 159, 181-182 (2010).

<sup>111</sup> Susan Turner, Joan Petersilia and Elizabeth Piper Deschenes, *Evaluating Intensive Supervision Probation/Parole (ISP) For Drug Offenders*, 38 CRIME AND DELINQUENCY 539, 539 (1992).

<sup>112</sup> Ryan Sakoda, *Efficient Sentencing? The Effect of Post-Release Supervision on Low-Level Offenders* (working paper, Dec. 2016), at 4.

The use of drug testing during the pretrial period has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials. These studies mostly date from around the time when drug-testing was broadly implemented: in the late 1980s and 1990s. A large RCT in Washington DC showed that defendants who were assigned to drug testing were no less likely to have a pretrial arrest or non-appearance than those who were randomly assigned to drug treatment or release without conditions.<sup>113</sup> Another sizeable RCT in Wisconsin and Maryland also found that drug testing had no benefit relative to release without testing.<sup>114</sup> Several other randomized trials showed similar results.<sup>115</sup> Unfortunately, these results have been ignored, and drug testing continues to be a mainstay condition of pretrial release.

The last decade has seen a surge of optimism about the benefits of drug testing in the probation context. A famous study from Hawaii's HOPE project showed that drug testing paired with "swift, certain and fair" sanctions can effectively reduce drug use and re-incarceration for people on probation.<sup>116</sup> In this formulation, people receive immediate but light sanctions for each failed drug test. Unfortunately, the successes of the HOPE program have proven difficult to replicate. Multiple RCTs have found that drug-testing programs built on swift, certain and fair principles are no more effective than status quo procedures.<sup>117</sup>

While not as obtrusive as electronic monitoring, drug testing poses burdens on the defendant who must report for testing whenever notified. The state must pay the lab costs and the salaries of the monitoring officers. Researchers may yet find the key to the effective implementation of drug testing, but the best available evidence shows no indication that it is worth the costs or intrusions.

## Electronic Monitoring

There is limited high-quality research on the efficacy of electronic monitoring (EM) in the pretrial period. However, there is growing evidence that electronic monitoring reduces criminal activity for defendants in the probation or parole context. (The evidence is more mixed on EM's effect on technical violations or return to custody.) Electronic monitoring has been found to reduce crime relative to traditional parole for gang members and sex offenders in California<sup>118</sup>—although it increased the likelihood of returning to custody for gang members,

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<sup>113</sup> Mary A. Toborg et al., *Assessment of Pretrial Urine Testing in the District of Columbia*, (Nat'l Inst. Just., December 1989) at 13

<sup>114</sup> John S. Goldkamp and Peter R. Jones, *Pretrial Drug-Testing Experiments in Milwaukee and Prince George's County: The Context of Implementation*, 29 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 430, 430 (1992)

<sup>115</sup> For a review of the relevant literature, see Marie VanNostrand, Kenneth R. Rose and Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (Pretrial Justice Institute, 2011), at 20-24.

<sup>116</sup> Angela Hawken and Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (Nat'l Inst. Just., Dec. 2009), at 4.

<sup>117</sup> Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of Drug Testing and Graduated Sanctions Program for Probationers*, 15 CRIM. & PUB. POLICY 1073, 1086 (2016); Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 CRIM. & PUB. POLICY 1103, 1104 (2016).

<sup>118</sup> Steven v. Gies et al., *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program, Final Report*, April 2012 at vii; Steven v. Gies et al. *Monitoring High-Risk Gang Offenders with GPS Technology: An Evaluation of the California Supervision Program Final Report*, November 2013 at vii

due to an increased likelihood of technical violations.<sup>119</sup> A study in Florida found that EM reduced technical violation, reoffending and absconding relative to those placed on unmonitored home arrest; a subsequent Florida study found the EM reduced probation revocation and absconding relative to probation as usual.<sup>120</sup> A high-quality study in Argentina finds that electronic monitoring reduces recidivism relative to incarceration; other quasi-experimental studies in Europe find that electronic monitoring decreases recidivism and welfare dependency relative to incarceration.<sup>121</sup> Additional high-quality research is important to assess the efficacy of EM at preventing flight and pretrial crime in the U.S.

Whatever benefit EM provides comes at substantial cost. EM is a significant burden on a person's liberty. It places strain on family relationships, makes it difficult to find employment, and can lead to shame and stigma.<sup>122</sup> Surveys of people serving sentences find that EM is considered only slightly less onerous than incarceration.<sup>123</sup> EM is also costly to the state. Purchasing the equipment, monitoring individuals, and responding to violations entails considerable expense. Many jurisdictions charge fees for monitoring that burden the poor and often cannot be paid.<sup>124</sup> Once EM is available, finally, it may be overused. In one survey, supervising officers believed (on average) that a third of the people they supervised on EM did not need to be on EM because they posed no danger to society.<sup>125</sup> In conclusion: EM should be used selectively, and only as an alternative to detention.

### III. CONCLUSION

The pretrial system is ripe for reform. An optimal pretrial system will maximize appearance rates while minimizing both intrusions to defendants' liberty and pretrial crime. The central principle that unites best practices in the pretrial arena is that any pretrial restraint on liberty should be *tailored to the specific risk a defendant presents*, and should be the least *restrictive means available* to reasonably reduce the risk. Given our existing knowledge about the operation of the pretrial system and the efficacy of pretrial interventions, jurisdictions pursuing reform should prioritize the following strategies.

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<sup>119</sup> Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring* 5 CRIMINOLOGY & PUBLIC POLICY 61, 61 (2006); William Bales et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring*, May 2010, x (2010)

<sup>120</sup> The California and Florida studies used propensity score matching, which raises some concerns that those placed on EM differ in unobservable characteristics from the control group, leading to bias in the estimator. However, those on EM are generally higher risk than those on regular probation/parole suggesting that the bias would lead these papers to underestimate the effects if anything.

<sup>121</sup> Rafael Di Tella and Ernesto Scharfrodsky, *Criminal Recidivism after Prison and Electronic Monitoring*, 121 *Journal of Political Economy* 28, 28 (2013); Annais Henneguelle et al., *Better at Home Than in Prison? The Effects of Electronic Monitoring versus Incarceration on Recidivism in France*, Unpublished Manuscript, 3 (2015); Lars H. Andersen and Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUBLIC POLICY 349, 351 (2014)

<sup>122</sup> See Bales, *supra* note 119 at 89-95

<sup>123</sup> Brian K. Payne et al., *The 'Pains' of Electronic Monitoring: a Slap on the Wrist or Just as Bad as Prison?*, 27 CRIMINAL JUSTICE STUDIES 133, 140 (2014).

<sup>124</sup> See Bales, *supra* note 119 at 102-103.

<sup>125</sup> *Id.* at 104.

1. **Improve pretrial process** by granting immediate release for low-risk defendants and, for others, providing a thorough hearing with defense counsel present before imposing detention or conditions of release.
2. **Provide defendants notice of upcoming court dates** through phone calls or automated text-message reminders. Make court websites easy to navigate.
3. **Implement actuarial risk assessment** cautiously and transparently, with continuous evaluation by an independent third party. Assess and report flight risk and dangerousness separately, and assess dangerousness in terms of risk of arrest for violent crime rather than for any rearrest at all.
4. **Detain defendants only if there is a substantial probability** the defendant will commit serious crime in the pretrial phase or abscond from justice, and less intrusive methods such as electronic monitoring cannot adequately reduce that risk. Determine what level of risk warrants detention in a transparent process.
5. **Use conditions of release parsimoniously**, since few have been demonstrated to be effective and many involve non-trivial impositions on liberty.
6. **Limit money bail** as a condition of release to prevent detention on the basis of poverty.
7. **Pursue further research on the efficacy of pretrial interventions.** Pilot new pretrial initiatives through randomized controlled trials in collaboration with an academic partner, in order to rigorously measure their efficacy and identify necessary improvements.

These strategies will of course require investment, financial and political. But they have the potential to produce significant returns for defendants and taxpayers alike. If the momentum for pretrial reform translates into action, we can inaugurate a more effective and more humane system of pretrial justice.